

EDITORIAL

Introduction: Constitutional Unamendability in Europe

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The question of ‘unconstitutional constitutional amendments’ has become one of the most burning questions in comparative constitutional law, constitutional theory, constitutional design and constitutional adjudication. There is an increasing tendency in global constitutionalism to substantively limit formal changes to constitutions. One type of limitation is explicit constitutional limits on the amendment powers, usually termed ‘eternity clauses’ in the literature. Perhaps the most famous example is Article 79(3) of the 1949 German Basic Law, which was written against the background of the experience of the Weimar Constitution, and 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. Studies demonstrate how the inclusion of eternity clauses in constitutions has become a central feature of modern global constitutional design. Moreover, even in states where the constitution does not include any eternity clause, courts around the world (such as in India, Bangladesh, Belize, Colombia and Peru) have recognized a core of basic principles that is implicitly protected from amendments.¹

The challenges of limits to constitutional amendments to constitutional theory become even more complex when constitutional courts enforce such limitations through substantive judicial review of amendments, sometimes resulting in the declaration that these constitutional amendments are ‘unconstitutional’.

One such declaration occurred recently, on 30 January 2019, when the Constitutional Court of Slovakia delivered a judgment in which it declared, for the first time in its history, a constitutional amendment as ‘unconstitutional’ and void.² The unconstitutional amendment concerned security clearance by the national security authority of judges and judicial candidates. In a judgment that exceeded 100 pages, the Constitutional Court held that “the Constitution contains an implicit substantive core, which consists of the principles of democracy and rule of law, including the principle of separation of powers and the related

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1 Y. Roznai, *Unconstitutional Constitutional Amendments – The Limits of Amendment Powers*, Oxford, Oxford University Press, 2017.

2 Judgment (Nalez) no. PL. ÚS 21/2014-96, see the text (in the Slovak language), available at: https://www.ustavnysud.sk/documents/10182/0/PL_+US+21_2014.pdf/233a617c-4dfd-4151-8a6b-16d180b27111 (last accessed on 6 April 2019).

independence of judiciary.” Moreover, “not even constitutional laws may violate this implicit substantive core of the Constitution”. Also,

the Constitutional Court has the power to examine constitutional laws for possible violations of the implicit substantive core of the Constitution and if it finds a violation, it has the power to declare unconstitutionality of the respective constitutional law with the implicit core of the Constitution.³

This judgment is remarkable, not only because the Constitution of Slovakia – in contrast, for example, to the Czech Constitution – does not contain an explicit eternity provision,⁴ but also because this is the first time that a European jurisdiction has not only formally adopted the idea of implicit limits on the constitutional amendment power but also applied it in practice. Thus far the courts in Europe that have exercised substantive judicial review of constitutional amendments, such as in Germany,⁵ Turkey⁶ and the Czech Republic,⁷ have done so on the basis of explicit constitutional provisions protecting certain principles from amendments or have based their decisions on a clear constitutional provision distinguishing between various constitutional procedures and ensuring that the proper process has been undertaken, as in Austria.⁸

The concept of an ‘unamendable core (identity) of the Constitution’ has been present, at least since the mid-war period, in the doctrine of several European countries. The ‘identity’ is understood as an objective fact that exists also where constitutions do not contain any explicit ‘eternity clauses’. Even some constitutional courts (like the Italian one) seemed ready to recognize the existence of unamendable constitutional principles. Such signals, however, have never gone beyond different obiter dicta, falling very far from any practical application. What saved the attractiveness of the concept of ‘constitutional identity’ was its extension to the case-law concerning the European integration. Several constitutional

3 An English translation of press release no. 7/2019 of 30 January 2019, by the Constitutional Court of the Slovak Republic. We thank Schnutz Rudolf Dürr for providing us with the translation of the press release.

4 See O. Preuss, ‘The Eternity Clause – Lessons from the Czech Example’, this volume.

5 U.K. Preuss, ‘The Implications of “Eternity Clauses”: The German Experience’, *Israel Law Review*, Vol. 44, No. 3, 2011, p. 429.

6 E. Özbudun, ‘Judicial Review of Constitutional Amendments in Turkey’, *European Public Law*, Vol. 15, 2009, p. 533; Y. Roznai & S. Yolcu, ‘An Unconstitutional Constitutional Amendment – The Turkish Perspective: A Comment on the Turkish Constitutional Court’s Headscarf Decision’, *International Journal of Constitutional Law*, Vol. 10, No. 1, 2012, p. 175.

7 See, e.g., K. Williams, ‘When a Constitutional Amendment Violates the Substantive Core: The Czech Constitutional Court’s September 2009 Early Elections Decision’, *Review of Central and East European Law*, Vol. 36, 2011, p. 33; J. Kudrna, ‘Cancellation of Early Elections by the Constitutional Court of the Czech Republic: Beginning of a New Concept of “Protection of Constitutionality”’, *Jurisprudencija*, Vol. 4, 2010, p. 43; Y. Roznai, ‘Legisprudence Limitations on Constitutional Amendments? Reflections on the Czech Constitutional Court’s Declaration of Unconstitutional Constitutional Act’, *Vienna Journal of International Constitutional Law*, Vol. 8, No. 1, 2014, p. 29.

8 See, e.g., O. Pfersmann, ‘Unconstitutional Constitutional Amendments: A Normativist Approach’, *ZÖR*, Vol. 67, 2012, p. 81.

courts (those in countries like Germany, Italy, Spain, the Czech Republic, Poland Bundesverfassungsgericht being the best known but not the only examples) developed an elaborate case-law on the matter.⁹

The 'EU-case-law', although interesting, is based on the premise that the Treaties (and their modifications) do not have a constitutional rank. This leaves more room for judicial review (at least in the national perspective) but is less relevant for the debate on the constitutionality of constitutional amendments. In effect, until the Slovak decision, the only courts that have declared that there is an implicit unamendable constitutional core based on which formal duly enacted constitutional amendments may be invalidated, were outside of Europe, namely in Asia¹⁰ and Latin America,¹¹ most notably in India, with the famous 'basic structure doctrine', and in Colombia, with the 'constitutional replacement doctrine'.¹²

In the past, the very idea of an 'unconstitutional constitutional amendment' was regarded as a conundrum, a legal paradox that is found only in academic debates and constitutional law classrooms. How can a constitutional amendment, enacted according to amendment procedure, be considered 'unconstitutional'? After all, once it becomes part of the constitution it carries an equal normative value as the constitution itself. However, the debate on the constitutionality of constitutional amendments has, in many countries, moved from the purely academic dimension towards judicial practice. The problem has been addressed by several important constitutional jurisdictions and, although there is still no uniform position on this matter, some courts appear quite convinced of their power to review constitutional amendments as part of their role as 'guardians of the constitution'.¹³ The Slovak Constitutional Court, for instance, held in its decision that

it has decided to recognize that the substantive core of the Constitution enjoys the highest form of protection. By so doing the judges fulfill their oath

- 9 See, e.g., P. Faraguna, 'Taking Constitutional Identities Away from the Courts', *Brooklyn Journal of International Law*, Vol. 41, 2016, p. 491; P. Faraguna, 'Constitutional Identity in the EU – A Shield or a Sword?', *German Law Journal*, Vol. 18, Issue 7, p. 1617.
- 10 See, e.g., A.I. Siddiquee, 'Unconstitutional Constitutional Amendments in South Asia: A Study of Constitutional Limits on Parliaments' Amending Power', *Journal of Law, Policy and Globalization*, Vol. 33, 2015, p. 64; Y. Roznai, 'Constitutional Amendability and Unamendability in Southeast Asia', *The Journal of Comparative Law* (forthcoming 2019).
- 11 Y. Roznai, 'Constitutional Unamendability in Latin America Gone Wrong?', in R. Albert, C. Bernal & J. Zaiden Benvindo (Eds.), *Constitutional Change and Transformation in Latin America*, Hart Publishing, forthcoming 2019, p. 93.
- 12 S. Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine*, Oxford, Oxford University Press, 2010; M.J. Cepeda & D. Landau, *Colombian Constitutional Law: Leading Cases*, Oxford, Oxford University Press, 2017.
- 13 Roznai, 2017, *supra* note 1; See also R.O'Connell, 'Guardians of the Constitution: Unconstitutional Constitutional Norms', *Journal of Civil Liberties*, Vol. 4, 1999, p. 48; G.J. Jacobsohn, 'An Unconstitutional Constitution? A Comparative Perspective', *International Journal of Constitutional Law*, Vol. 4, No. 3, 2006, p. 460; A. Barak, 'Unconstitutional Constitutional Amendments', *Israel Law Review*, Vol. 44, No. 3, 2011, p. 321; G. Halmi, 'Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?', *Constellations*, Vol. 19, No. 2, 2012, p. 182.

under Article 134 par. 4 of the Constitution, which requires the constitutional judges to protect the inviolability of natural human and civil rights and the principles of the rule of law.... The Court did so with full respect towards the sole authority [LG-YR – of the Parliament] in the Slovak Republic charged with adopting and amending the constitution, but also in an effort to make the latter respect the fundamental law of the Slovak Republic equally.¹⁴

The underlying dilemma is that of the legitimacy of a judicial intervention into the amendment-making power. As is well-known, the traditional debate on judicial review of (ordinary) laws is often concluded with the position that the ‘last word’ belongs, ultimately, to the legislature as it also has a power to amend the constitution (or – at least – to put in motion the amendment process).¹⁵ Now – with the possibility to review constitutional amendments – this argument is losing its validity, and it may be necessary to look for another way to justify the judicial review of constitutional amendments.

The problem of legitimacy appears less complicated in regard to formal or procedural review of constitutional amendments; it may be maintained that a procedurally defective amendment cannot be regarded as an ultimate expression of the ‘will of the people’. So this volume is focused on the ‘substantive review’ of constitutional amendments, *i.e.* on its forms, legal basis, doctrinal justifications and, last but certainly not least, on the readiness of courts and judges to exercise such review. The legal basis aspect seems to be of crucial importance. Whenever an internal hierarchy of constitutional norms has been expressly established in the text, as in the form of ‘eternity clauses’, it may be maintained that judicial review of the amendments remains compatible with the ‘original intent’ (or, at least, the ‘original logic’) of the constitution. The problem then shifts rather towards the level of judicial deference in addressing constitutional amendments. On the other hand, the ‘counter-majoritarian difficulty’ arises in the most extreme form when, in the absence of any textual basis, the courts ground their review powers in general concepts like ‘the basic structure’ of the constitution.

Finally, in the European context, there is an additional limitation on constitutional amendments, namely the requirements established in EU law as well as in the Council of Europe instruments. It opens another dimension of review that has already been (indirectly) exercised by both European Courts. The question is whether a national supreme and/or constitutional court also may intervene in such matters.¹⁶

These questions become even more acute in current trends of populist constitutionalism.¹⁷ Since constitutional amendments may be used in order to erode the democratic order, it is precisely in these contexts that constitutional

14 An English translation of press release no. 7/2019, *supra* note 3.

15 See, *e.g.*, M. Troper, ‘The Logic of Justification of Judicial Review’, *International Journal of Constitutional Law*, Vol. 1, No. 1, 2003, pp. 99, 113-114.

16 See, in general, L. Garlicki & Z. A. Garlicka, ‘External Review of Constitutional Amendments? International Law as a Norm of Reference’, *Israel Law Review*, Vol. 44, No. 3, 2011, p. 343.

17 See, *e.g.*, P. Blokker, ‘Populism as a Constitutional Project’, *International Journal of Constitutional Law*, forthcoming.

unamendability can serve as a protective mechanism of a ‘minimum core’ set of institutions undergirding constitutional liberal democracy.¹⁸ Of course, as Ash Bâli recently commented,

in the end, mechanisms of constitutional entrenchment and unamendability cannot in themselves guard against populist constitutional transformation. Constitutional permanence will inevitably be bounded under any theory of democratic sovereignty. ... The conditions under which the primary constituent power is invoked should be the determinant of legitimacy or its absence.¹⁹

Moreover, it is questionable whether the doctrine of unconstitutional amendments may be useful in the context of court-capturing and court-packing, and against democratic erosion achieved through gradual, incremental and subtle constitutional changes that on their own do not necessarily amount to a serious violation of essential democratic values but when examined in aggregation substantially erode the democratic order.²⁰ Finally, once the populist movement is strong enough to adopt a new constitution and to insert some ‘eternity clauses’, it may significantly complicate the future process of restoration of a ‘regular’ constitutional order.

It seems that there are more questions than answers (and perhaps one day we may also move ‘one step higher’ and consider the constitutionality of an entirely new constitution²¹). This collection of articles should assist further debates that, inevitably, will be arising with a growing intensity.

This special volume includes contributions from leading European scholars who discuss the question of constitutional unamendability from various theoretical, disciplinary and doctrinal viewpoints and bring the experience of a host of European jurisdictions.

The opening article, by Michael Hein, traces the origins of these clauses during the American Revolution (1776-1777), their migration to the ‘Old World’ and their diffusion and variation in the continent of Europe from 1776 until the end

18 See, e.g., R. Dixon, ‘Populist Constitutionalism and the Democratic Minimum Core’, *VerfBlog*, 26 April 2017, available at: <http://verfassungsblog.de/populist-constitutionalism-and-the-democratic-minimum-core/>; R. Dixon & D. Landau, ‘Democracy and the Constitutional Minimum Core’, in T. Ginsburg & A. Huq (Eds.), *Assessing Constitutional Performance*, New York, Cambridge University Press, 2016, p. 268.

19 A. Bâli, ‘Constitutional Amendments in an Age of Populism’, *International Journal of Constitutional Law Blog*, 5 July 2017, available at: www.iconnectblog.com/2017/06/constitutional-amendments-in-an-age-of-populism-i-connect-column/.

20 Y. Roznai & T. Hostovsky Brandes, *Democratic Erosion, Populist Constitutionalism and the Unconstitutional Constitutional Amendments Doctrine*, 2019 (copy with the authors).

21 See R. Albert, ‘Four Unconstitutional Constitutions and Their Democratic Foundations’, *Cornell International Law Journal*, Vol. 50, 2017, p. 169; D. Landau, R. Dixon & Y. Roznai, ‘From an Unconstitutional Constitutional Amendment to an Unconstitutional Constitution? Lessons from Honduras’, *Global Constitutionalism*, Vol. 8, No. 1, 2019, p. 40.

of 2015.²² By using the *Constitutional Entrenchment Clauses Dataset* (CECD),²³ Hein shows that unamendable provisions (or ‘eternity clauses’) are now a typical element of the majority of European constitutions, aimed, from their very first use, at protecting the essentials of modern constitutionalism.

While the main function of constitutional unamendability is to protect the constitutional core, can it truly impact the resilience of a constitution, allowing it to maintain its core constitutional values throughout crises? This is the main question that Xenophon Contiades and Alkmene Fotiadou explore in their article.²⁴ While *prima facie*, unamendability seems to create permanence, it may serve change and adaptability through stability and may thereby work as a tool for attaining constitutional resilience.

In his article, Gábor Halmai investigates a somewhat different question: can unamendability protect the integrity and identity of constitutions drafted after a democratic transition?²⁵ While eternity clauses carry great promise in transitional settings,²⁶ examining the experiences of backsliding constitutional democracies in Eastern Europe, Halmai claims that

even if there had been explicit or implicit unamendability rules, nothing would have prevented a new government from entrenching abusive illiberal rules either as a ... totally new constitution as it happened in Hungary ... or through unconstitutional legislation with the help of the silent Constitutional Tribunal in Poland.²⁷

An example of a limited use of the doctrine in the context of a ‘packed’ or ‘captured’ judiciary, may come from Turkey. As Ergun Özbudun claims in his article,²⁸ although the Turkish Constitutional Court has in the past taken an activist approach concerning limits that are imposed on the amending power, and even invalidated several constitutional amendments that violated the unamendable provisions, in recent years, the Constitutional Court has shifted its approach towards self-restraint concerning judicial review of amendments (even highly controversial ones). This may be explained, Özbudun argues, “as part of the political regime’s drift towards competitive authoritarianism and the governing party’s... capturing almost total control over the entire judiciary.”²⁹

22 M. Hein, ‘Constitutional Norms for All Time? General Entrenchment Clauses in the History of European Constitutionalism’, this volume

23 M. Hein, *The Constitutional Entrenchment Clauses Dataset*, Göttingen, University of Göttingen, 2018, available at: <http://data.michaelhein.de>.

24 X. Contiades & A. Fotiadou, ‘Constitutional Resilience and Unamendability: Amendment Powers as Mechanisms of Constitutional Resilience’, this volume.

25 G. Halmai, ‘Transitional Constitutional Unamendability?’, in this volume.

26 See, e.g., S. Suteu, ‘Eternity Clauses in Post-conflict and Post-authoritarian Constitution-Making: Promise and Limits’, *Global Constitutionalism*, Vol. 6, No. 1, March 2017, p. 63.

27 Halmai, *supra* note 25.

28 E. Özbudun, ‘Judicial Review of Constitutional Amendments in Turkey: The Question of Unamendability’, this volume.

29 *Ibid.*

Also taking Turkey as his backdrop, Ali Acar, uses comparative constitutional law to shed light on the Turkish case.³⁰ Acar notes that a correlation exists between the practice of democracy and judicial review of constitutional amendments. Where there are “no serious or grave problems in terms of substantive as well as procedural (institutional design) understanding of democracy”, courts have refused to review amendments on substantive grounds or – even if reviewing amendments – have never invalidated amendments. In contrast, where “the practice of democracy seems to have some problems, either in terms of procedural or substantial understanding of democracy”, courts have shown more willingness to review and even invalidate formal constitutional amendments. Acar further claims that when there is a grave structural problem in the political system, if there are no well-functioning democratic institutions and rights are not taken seriously, the courts bear the imperative task of standing for the democratic functioning of the system, even by reviewing formal constitutional amendments.³¹

Indeed, courts may rely on unamendability to guard the functioning of democratic institutions and the rule of law. Whereas Polish and Hungarian Constitutional Courts are no longer considered strong defenders of liberal democracy, Ondřej Preuss demonstrates how the Czech Constitutional Court was still prepared to defend the values of liberal democracy by relying on the eternity clause, which prohibits constitutional amendments of “an essential requirement of a democratic state governed by the rule of law”, as a practical instrument that may help to protect certain principles.³²

Constitutional unamendability, as Pietro Faraguna demonstrates in his article,³³ may not only set limits to domestic amending powers attempting to change the constitutional core, but also protect constitutional identity against external norms such as supranational and international law. Exploring the experience of Italy concerning unamendability, Faraguna further illustrates how “the existence of explicit unamendability clauses in the text of a constitutional charter does not exclude the possibility of the development of implicit unamendability theories within the same framework”.³⁴

Indeed, as Catarina Santos Botelho argues in her thorough study of Portugal and Spain, although the Spanish Constitution – in contrast with the Portuguese one – does not include an unamendable provision, in the scholarly literature it was suggested that it nonetheless includes implicit material limits to the amending power. But even explicit constitutional unamendability, Santos Botelho demonstrates, is not a complete bar against changes to constitutional identity.³⁵ Not-

30 A. Acar, ‘A View on the Future of Judicial Review of Constitutional Amendments in Turkey: An Invitation to Judicial Dialogue’, this volume.

31 *Ibid.*

32 Preuss, *supra* note 4.

33 P. Faraguna, ‘Unamendability and Constitutional Identity in the Italian Constitutional Experience’, this volume.

34 *Ibid.*

35 C. Santos Botelho, ‘Constitutional Narcissism on the Couch of Psychoanalysis: Constitutional Unamendability in Portugal and Spain’, this volume.

withstanding the unamendability in the Constitution of Portugal, she claims, “the Portuguese constitutional identity did change and for the better.”³⁶ In fact, and fascinatingly, the Portuguese case exemplifies that an unamendable clause can itself be amended. Moreover, as the Spanish case demonstrates, the preservation of certain aspects of the constitutional-democratic system can take place even without an unamendable provision but instead through qualified rigidity procedures that allow for even a total amendment of the Spanish Constitution.

As in Spain, the Austrian Constitution includes a special higher procedural threshold for a ‘total revision’, which was interpreted to mean formal constitutional changes that affect the principles of the constitution. Manfred Stelzer demonstrates how this ‘tiered procedural design’³⁷ allows for the creation of a ‘hierarchy of norms’ and, moreover, allows the Constitutional Court to review constitutional amendments in order to “scrutinize lower ranking constitutional law against constitutional principles”, and verifying that the proper process for amendment or revision is chosen.³⁸ Thus, in the context of judicial review of amendments, form and substance are interrelated.³⁹

But even an explicit limit on formal amendments may not give rise to judicial scrutiny of constitutional amendments. In Norway, for example, while the Constitution of 1814 protects the ‘spirit’ and ‘principles’ of the Constitution from amendments, the legislature is considered to have the last word on the meaning of these protected principles.⁴⁰ Focusing on the Nordic countries,⁴¹ Tuomas Ojanen shows how even this unamendability is exceptional among the Nordic Constitutions, which generally lack any limits to amendments and *a fortiori* any discussion on judicial review of amendments. Ojanen explains how in the Nordic countries

courts still play a secondary role on the Nordic scene of constitutionalism. Given also the strong tradition of judicial self-restraint in the Nordic countries, it is quite excluded that any Nordic court would start enforcing substantial limits to amendment powers.⁴²

The lack of unamendability may perhaps be explained by the fact that the Nordic countries “are still relatively homogenous in terms of culture, religion and community values. ... Furthermore, ‘consensual pathos’ has traditionally characterized Nordic political and constitutional cultures.” Yet, as Ojanen notes,

36 *Ibid.*

37 See R. Dixon & D. Landau, ‘Tiered Constitutional Design’, *George Washington Law Review*, Vol. 86, 2018, p. 438.

38 M. Stelzer, ‘Limited Constitutional Amendment Powers in Austria?’, this volume.

39 J. Colón- Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power*, London, Routledge, 2012, p. 134.

40 E. Smith, ‘Old and Protected? On the “Supra-Constitutional” Clause in the Constitution of Norway’, *Israel Law Review*, Vol. 44, No. 3, 2011, p. 369.

41 T. Ojanen, ‘Constitutional Unamendability in the Nordic Countries’, this volume.

42 *Ibid.*

it remains to be seen whether the Nordic tradition of consensual decision-making will continue as the Nordic countries are rapidly becoming more diverse in terms of culture, politics and religion. In addition, such issues as immigration and European integration have leapt to politics in Denmark, Finland and Sweden in a manner that is increasingly causing friction between political parties and different sections of society.⁴³

Another country without an explicit unamendable provision, in fact without even a complete formal constitutional document, is Israel. Yet in Israel too, the question was raised whether the Knesset's power to enact and amend Basic Laws – legislation of constitutional normative status – is limited in any way, and whether the Israeli Supreme Court has the authority to review such basic laws. The question has recently been at the centre of public debates on Basic Law: Israel – the Nation State of the Jewish People. In their article on Israel,⁴⁴ Suzie Navot and Yaniv Roznai review the jurisprudence of the Israeli Supreme Court on the question of limits to the Knesset's constituent authority and argue that in light of Israel's overly flexible constituent process, which is controlled by the government, it is imperative that the court possess the authority to review basic laws, as it is the primary authority counterbalancing the power of the majority.

We hope that this special volume will advance the theoretical and comparative knowledge in the field on one of the most burning questions in constitutionalism, a topic with much relevance in times when liberal democracies around the world are in crisis.⁴⁵

43 *Ibid.*

44 S. Navot & Y. Roznai, 'From Supra-Constitutional Principles to the Misuse of Constituent Power in Israel', this volume.

45 See, e.g., M.A. Graber, S. Levinson & M. Tushnet (Eds.), *Constitutional Democracy in Crisis?* Oxford, Oxford University Press, 2018.