

Constitutional Amendability and Unamendability in South-East Asia

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In this short commentary, the four themes discussed are central to constitutional change: first-order unamendability, that refers to the constitutional prohibitions, whether explicit or implicit, on amending certain constitutional principles; second-order unamendability that refers to tiered-design of formal constitutional changes; the distinction between constitutional amendment and replacement, and the concept of constituent power. These themes that are central to global constitutionalism, constitutional design and constitutional theory, as I will show, also find their manifestations in South-East Asia.

First-Order Unamendability

A central theme within global constitutionalism is what is termed “first-order unamendability” – the stipulation that certain constitutional rules, principles or institutions are beyond the power of formal amendment process.¹ There is an increasing trend in the world to include within national constitutions explicit provisions that limit the amendment power from amending certain constitutional subject that are considered so fundamental to the constitutional order and its identity that they should even be beyond the amending power. This is explicit unamendability.² This trend did not skip South-east Asia, and some countries include explicit prohibitions against amendments.

In Cambodia, the 1993 Constitution includes two types of limits; the first is circumstantial. It prohibits amending or revising the constitution during states of emergencies (Article 154 new (two), former Article 152 new).³ The second is substantive; it states that “The revision or the amendment of the Constitution cannot be done, if affecting the liberal multi-party democracy system and the constitutional monarchy regime” (Article 155 new (two), former Article 153 new).⁴ Anirudh Bhati terms this provision the constitution’s “immortal clause”.⁵ Taing Ratana suggests that

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¹ See, for example, Richard Albert and Bertil Emrah Oder (eds.), *An Unconstitutional Constitution? Unamendability in Constitutional Democracies* (2018); Yaniv Roznai, “The Uses and Misuses of Constitutional Unamendability”, in Xenophon Contiades and Alkmene Fotiadou (eds.), *The Routledge Handbook of Comparative Constitutional Change* (2019); Roznai, *Unconstitutional Constitutional Amendments – The Limits of Amendment Powers* (2017); Oran Doyle, “Constraints on Constitutional Amendment Powers”, in Richard Albert, Xenophon Contiades, and Alkmini Fotiadou (eds.), *The Foundations and Traditions of Constitutional Amendment* (2017), p. 73.

² See, among others, Richard Albert, “Constitutional Handcuffs”, *Arizona State Law Journal*, XLII (2010), p. 663; Yaniv Roznai, “Unamendability and The Genetic Code of The Constitution”, *European Review of Public Law*, XXVII (2015), p. 775.

³ On this type of unamendability, see Yaniv Roznai and Richard Albert, “Limitations on Constitutional Amendments in Emergency” (2018, unpublished) (copy with authors).

⁴ This is not the first time a Cambodian Constitution has included an unamendability provision; the 1947 Constitution already stated that “the provisions relating to the monarchical form of the State, the representative character of the regime, and the principle of liberty and equality guaranteed by this Constitution may not be the subject of any proposed amendment” (Article 115); and that “no amendment may have the effect of restricting the rights reserved to Royalty by this Constitution” (Article 116).

⁵ Anirudh Bhati, “The Immortal Clauses: Safeguards For A Liberal Democratic Order In Cambodia?” (*Lex Kambujadesa BLAWG*, 10 February 2019) (online), accessed 2 March 2019.

“the entrenchment of these features may be an attempt to insure against repeated political regime changes, which Cambodia had experienced since the first constitution was enacted in 1947”.⁶ Although unamendability has a stabilizing effect, it is not a complete bar against extra-constitutional powers, and thus is a limited mechanism for providing a complete bar against revolutionary changes of the constitutional order.⁷ Article 17 includes another unamendable provision: “The provision, in which the King shall reign but not govern, as stipulated in Article 7 paragraph 1 of this Constitution, cannot in any case be modified”. Thus, Bhati argues that

in contrast to Article 155, which offers protection to a broad swathe of constitutional provisions, the legal directive contained in Article 17 (another eternity clause) is absolute in its specificity and demands strict compliance thereof. By way of this provision, the Constitution rejects the possibility of a shift in the locus of sovereignty from ‘We, the Khmer People’ to ‘We, the King’, preventing a backslide into absolute monarchy, because that would be an anathema to the rule of law.⁸

Similar to the unamendability provision in the Cambodian 1947 Constitution, the Constitution of Lao of the same year included an explicit unamendability clause, according to which “the provisions relating to the monarchic, unitary and indivisible form of the state, the representative character of the regime, and the principles of liberty and equality guaranteed by the present constitution may not be the subject of any amendment” (Article 33), but – against the global trend – the 1991 Constitution of Lao People’s Democratic Republic does not include any unamendable provisions.

In Thailand, whereas earlier constitutions did not include any formal unamendability, the 1997 (Article 313(1)) and 2007 (Article 291(1)) Constitutions stated that “a motion for amendment which has the effect of changing the democratic regime of government with the King as Head of State or changing the form of the State shall be prohibited”. Likewise, the 2017 Constitution states that “[a]n amendment to the Constitution which amounts to changing the democratic regime of government with the King as Head of State or changing the form of the State shall be prohibited” (Article 255). Even without this unamendability, the amendment process in Thailand is considered a rigid one,⁹ arguably due to the will of the junta to maintain its political power and prevent their opponents from returning to power again.¹⁰

In Indonesia, Article 37(5) of the Constitution of 1945 states that “[p]rovisions relating to the form of the unitary state of the Republic of Indonesia may not be amended”. This refers to Article 1(1) of the Constitution, according to which: “The state of Indonesia is a Unitary state which has the form of a Republic”. This unamendability provision thus protects both the “unitary” form of State and the

⁶ Taing Ratana, “Constitutional Change and Amendment in Cambodia”, herein, pp. --.

⁷ See, for example, Yaniv Roznai and Silvia Suteu, “The Eternal Territory? The Crimean Crisis and Ukraine’s Territorial Integrity as an Unamendable Constitutional Principle”, *German Law Journal*, XVI (2015), p. 542.

⁸ Bhati, note 5 above.

⁹ See generally, Khemthong Tonsakulrungruang, “Constitutional Amendment in Thailand: Amending in the Spectre of Parliamentary Dictatorship”, herein, pp. --.

¹⁰ Natdanai Nachan, “The Issue of Constitutional Instability Caused by the Limitation of Constitution Amendment Procedure Under Article 256 of The Constitution of The Kingdom of Thailand B.E. 2560”, *Songklanakarinn Law Journal*, I (2018), p. 1.

“Republic” as the form of government.¹¹ This was important from an historical perspective, as after Indonesia’s independence in 1945, Indonesian State administration was a federal system because Indonesia was divided into states until the 1950 declaration of the Establishment of the Unitary State.¹² Arguably, as this unamendability provision is not in itself unamendable (that is, there is no double-entrenchment), the ability to overcome the unamendability would be through a two-stage amendment. As Luthfi Widagdo Eddyono states:

When People’s Consultative Assembly want to modify the shape of the country, they only need to change Article 37 paragraph (5) of the 1945 Constitution first. Thus, it is appropriate to say that the provision of Article 37 paragraph (5) of the 1945 Constitution is only a moral message.¹³

Nonetheless, there is an additional argument that supports the amendability even of the unamendable provisions protected by Article 37(5). This provision did not exist in the original 1945 Constitution. It was inserted at a later stage through the Fourth Amendment in 2002 as part of the major constitutional reforms that took place between 1999 (the First Amendment) and 2002 (the Fourth Amendment).¹⁴ The reforms strengthened the principles of constitutional democracy, peoples’ representation, separation of powers, basic rights and rule of law.¹⁵ Before the Fourth Amendment, no unamendable provision appeared in the Constitution and this has changed in 2002 with the stipulation that the “form of the unitary” State is unamendable (that is, a constitutional amendment that establishes unamendability – an “unamendable amendment”). Therefore, it is a case of a constitutional amendment power aimed at blocking future exercises of similar powers of amendment. Conceptually, this is untenable because there is an implicit understanding according to which “an amendment cannot establish its own unamendability”.¹⁶ As the present writer has written elsewhere,

limitations upon the delegated secondary constituent power can solely be imposed by the higher authority from which it is derived, namely the primary constituent power. Unamendable amendments may lose their validity when they face a conflicting valid norm that was *formulated by the same authority*. ... Accordingly, provisions created by the amendment power could subsequently be amended by the amendment power itself. Because both amendments are issued by a similar hierarchical authority, their conflict is governed by the principle of *lex posterior derogat priori*.¹⁷

In contrast with these examples, some constitutions do not include explicit unamendability provisions. The Philippine Constitution is one example. Although the

¹¹ See Luthfi Widagdo Eddyono, “The Unamendable Articles of the 1945 Constitution”, *Constitutional Review*, II (2016), p. 264.

¹² *Ibid.*, pp. 264-265.

¹³ *Ibid.*, p. 267.

¹⁴ The Second Amendment was passed in 2000 and the Third Amendment in 2001.

¹⁵ On these reforms see Dian A. H. Shah, “Post-Soeharto Constitutional Amendment in Indonesia: Promises and Pitfalls”, herein above; Denny Indrayana, *Indonesian Constitutional Reform, 1999-2002: An Evaluation of Constitution-making in Transition* (2008).

¹⁶ Kent Greenawalt, “The Rule of Recognition and the Constitution”, *Michigan Law Review*, LXXXV (1987), p. 633.

¹⁷ Roznai, note 1 above, p. 139.

1987 Constitution has never been amended,¹⁸ there is no explicit prohibition against an amending thereof. Does the exclusion of explicit unamendability mean that everything goes? Does the amendment power have *carte blanche* to do as it desires? Not necessarily. For example, even in the Philippines, in the *Planas v. Comelec* (1973), the Supreme Court stated that the sovereign people might amend the Constitution in any way it chooses, so long as the change is not inconsistent with *jus cogens* norms of international law.¹⁹

The second global trend concerning first-order unamendability is implicit unamendability. Courts around the world, in countries such as India,²⁰ Bangladesh,²¹ Pakistan,²² Taiwan,²³ and recently Uganda²⁴ and Slovakia,²⁵ have held that their national constitutions include a material constitutional core – a set of basic constitutional principles – that is implicitly protected against formal amendments. As the Indian Supreme Court held in the famous *Kesavananda Bharati v. State of Kerala* case of 1973, which is considered to be a precedent for this notion, the power of parliament to amend the constitution does not include the power to alter the basic structure, or framework of the constitution so as to change its identity.²⁶ This “basic structure doctrine” has migrated to other countries.²⁷

The basic structure doctrine has also migrated to South-east Asia. For example, the ‘basic structure doctrine’ was mentioned in Malaysia in several judicial cases. In its earlier jurisprudence, the Malaysian Federal Court was inclined to adopt the basic structure doctrine, holding that parliament possesses an unlimited constitutional amendment power, which brought Andrew Harding to declare the “death of the doctrine”.²⁸ In the *Loh Kooi Choon* case, the court held that in contrast with the Indian

¹⁸ See Dante Gatmaytan, “Constitutional Change as Suspect Projects”, herein, pp. --.

¹⁹ *Planas v. COMELEC*, G.R. No. L-35925; 3 49 S.C.R.A. 105, 126 (1973); see Yaniv Roznai, “The Theory and Practice of ‘Supra-Constitutional’ Limits on Constitutional Amendments”, *International and Comparative Law Quarterly*, LXII (2013), p. 590.

²⁰ See, for example, Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (2010).

²¹ See Ridwanul Hoque, “See Eternal Provisions in the Constitution of Bangladesh: A Constitution Once and for All?”, in *An Unamendable Constitution?*, note 1 above, p. 195; Rokeya Chowdhury, “The Doctrine of Basic Structure in Bangladesh: From ‘Calpath’ to Matryoshka Dolls”, *Bangladesh Journal of Law*, XIV (2014), p. 43.

²² Zeeshaan Zafar Hashmi, “Unconstitutional Constitutional Amendments or Amending the Unamendable: A Critique of District Bar Association Rawalpindi v. Federation of Pakistan”, *Pakistan Law Review*, IX (2018), p. 1.

²³ Council of Grand Justices, Interpretation No. 499 (delivered on 24 March 2000); an English translation is available in Ming-Sung Kuo and Hui-Wen Chen, “J.Y. Interpretation No. 499 (24 March 2000) - Unconstitutional Constitutional Amendments Case”, in id. (eds.), *Leading Cases of the Taiwan Constitutional Court* (2018), p. 15 (online), accessed 2 March 2019.

²⁴ Constitutional Petition No. 49/2017 (delivered on 26 July 2018) (online), accessed 3 March 2019.

²⁵ PL. ÚS 21/2014096, accessed 3 March 2019.

²⁶ *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461.

²⁷ See Yaniv Roznai, “The Migration of the Indian Basic Structure Doctrine”, in Malik Lokendra (ed.), *Judicial Activism in India—A Festschrift in Honour of Justice V. R. Krishna Iyer* (2012), p. 240; Aratrika Choudhuri and Shivani Kabra, “Determining the Constitutionality of Constitutional Amendments in India, Pakistan and Bangladesh: A Comparative Analysis”, *NUJS Law Review*, X (2017), p. 669.

²⁸ See Andrew J. Harding, “The Death of a Doctrine”, *Malaya Law Review*, XXI (1979), pp. 368– 369. See generally, Andrew Harding, “The Constitutional Amendment Process in Malaysia”, in Mads Andenas (ed.), *The Creation and Amendment of Constitutional Norms* (2000), pp. 255-257.

doctrine, any provisions of the Malaysian Constitution could be amended.²⁹ Justice Raja Azlan Shah held that parliament was the organ chosen for amending the constitution, and it was not for courts to question the policy amendments adopted by parliament; any other approach would overly empower the courts.³⁰ Likewise, in the *Phang Chin Hock* case,³¹ once more with direct reference to the Indian *Kesavananda* case, the Federal Court held that the basic structure doctrine does not apply in Malaysia: “Parliament may amend the Constitution in any way they think fit, provided they comply with all the conditions precedent and subsequent regarding manner and form prescribed by the Constitution itself ...” (Suffian LP).³² Thus the court accepted that it possessed the power to review constitutional amendment based on procedural grounds,³³ but rejected that the substance of constitutional amendment vis-à-vis the constitution’s basic structure can be reviewed.

This approach has recently been changed. In *obiter* in the *Sivarasa Rasiah v. Badan Peguam Malaysia* case,³⁴ the court stated that “Parliament cannot enact laws (including Acts amending the Constitution) that violate the basic structure”, and that “it is clear from the way in which the Federal Constitution is constructed there are certain features that constitute its basic fabric. Unless sanctioned by the Constitution itself, any statute (including one amending the Constitution) that offends the basic structure may be struck down as unconstitutional. Whether a particular feature is part of the basic structure must be worked out on a case by case basis”.³⁵ In the 2017 case of *Semenyih Jaya Sdn Bhd v PTD Hulu Langat*, the court formally adopted the basic structure doctrine, ruling that parliament does not have the authority, even when acting according to the constitutional amendment procedure, to amend the Constitution in any way which abrogated or undermined any element of the basic structure. Through this doctrine, the court held, the principle of “constitutional supremacy” may be defended.³⁶ It thus appears that by endorsing the basic structure doctrine, the Federal Court reversed its established approach from earlier cases, which is why this endorsement was considered both astonishing and dramatic: “The Federal Court’s acceptance of the ‘basic structure doctrine’ was the most surprising, and the most radical, aspect of the decision in *Semenyih*, because it departed from long-held Malaysian jurisprudence”.³⁷ The doctrine has been resurrected.

The clearer endorsement of the basic structure doctrine arrived in the judgment of *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak and Others*³⁸ in 2018, in which the Federal Court declared that “the power of judicial review is essential to the constitutional role of the courts, and inherent in the basic structure of the

²⁹ Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187.

³⁰ Ibid, pp. 188-190.

³¹ Phang Chin Hock v Public Prosecutor [1980] 1 MLJ 70.

³² Ibid, p. 75.

³³ See, for example, Robert Linggi v Government of Malaysia [2011] 2 MLJ 741.

³⁴ Sivarasa Rasiah v Badan Peguam Malaysia [2010] 2 MLJ 333.

³⁵ Ibid., pp. 341-342.

³⁶ *Semenyih Jaya Sdn Bhd v PTD Hulu Langat* [2017] 3 MLJ 561. See Wilson Tay Tze Vern, “Basic Structure Revisited: The Case of Semenyih Jaya and the Defence of Fundamental Constitutional Principles in Malaysia”, *Asian Journal of Comparative Law* (2019, forthcoming).

³⁷ H. P. Lee, Richard Foo, and Amber Tan, “Constitutional Change in Malaysia”, herein, pp. --.

³⁸ [2018] LNS 86 (Federal Court of Malaysia).

Constitution”, and that it “cannot be abrogated or altered by Parliament by way of a constitutional amendment”.³⁹ Malaysia has joined the members of the constitutional unamendability club.⁴⁰ And the Malaysia’s shift might also influence other countries in the region. Indeed, it appears that Singapore is already moving in that direction.

The story of Singapore resembles the Malaysian one. At first, the basic structure doctrine was presented and rejected. In the case of *Teo Soh Lung v Minister for Home Affairs* of 1989, the Supreme Court rejected an argument that parliament’s constitutional amending power was implicitly limited. A constitutional amendment, Justice Chua wrote for the majority, is part of the Constitution itself and could not be invalid if it was enacted according to the amendment procedure. Had the framers of the Constitution intended to impose limitations on the amendment power, they would have done so explicitly. Relying on Malaysian jurisprudence, the court rejected the application of the basic structure doctrine.⁴¹

However, just as in Malaysia, there is an inclination towards adopting a form of basic structure doctrine. This is reflected in scholarly writings emphasizing that

it is anathema for a constitution to bestow unlimited powers upon an institution or allow any institution to define their own powers. Therefore, it should be uncontroversial that the separation of powers and the Legality Principle are among the components of the basic structure.⁴²

In a lecture delivered by Chief Justice Chan Sek Keong in 2012 he stated that “[t]he judicial power is part of the basic structure of the Constitution and its exercise;”⁴³ and Kevin Tan claimed that “[s]o long as the courts continue to hold Singapore’s Constitution to be based on the Westminster model, the matrix holds true and limits Parliament’s amendment powers only in so far as it destroys the structure of the Constitution.”⁴⁴ In the case of *Yong Vui Kong v. Public Prosecutor* in 2015, the Court of Appeal endorsed the notion that some aspects of the Constitution are so “fundamental and essential to the political system that is established thereunder” that they are part of its basic structure. Notwithstanding this acknowledgment of the concept of basic structure, the Court stated that it would not make any decision on the implications of

³⁹ Ibid.; see Jaelyn L. Neo, “Beyond Mortals? Constitutional Identity, Judicial Power, and the Evolution of the Basic Structure Doctrine in Malaysia” in *Identity and Change – The Basic Structure in Asian Constitutional Orders* (2016) (online), accessed 3 March 2019.

⁴⁰ Andrew James Harding, Jaelyn L. Neo, Dian A. H. Shah, and Wilson Tay Tze Vern, “Malaysia: The State of Liberal Democracy”, *International Journal of Constitutional Law*, XVI (2018), p. 629: “The Federal Court’s explicit assertion that parliament does not have the power to amend the Federal Constitution to the effect of undermining the separation of powers and the independence of the judiciary enshrined therein is a landmark development that departs significantly from previous rulings on the issue and brings Malaysia in line with some other Commonwealth jurisdictions”.

⁴¹ [1989] 2 MLJ 449, pp. 456–7. See also *Vincen Cheng v Minister for Home Affairs* [1990] 1 MLJ 449.

⁴² Calvin Liang and Sarah Shi, “The Constitution of Our Constitution, a Vindication of the Basic Structure Doctrine” (*Singapore Law Gazette*, August 2014) (online), p. 12, paragraph 51.

⁴³ Chan Sek Keong, “The Courts and the ‘Rule of Law’ in Singapore”, *Singapore Journal of Legal Studies* (2012), p. 223.

⁴⁴ Kevin Y. L. Tan, “Into the Matrix: Interpreting the Westminster Model Constitution”, in Jaelyn L. Neo (ed.), *Constitutional Interpretation in Singapore: Theory and Practice* (2016), p. 70. For an argument that parliament may change even the basic structure of the constitution of Singapore, see Andrew J Harding, “Does the ‘Basic Structure Doctrine’ Apply in Singapore’s Constitution? An Inquiry into Some Fundamental Constitutional Premises” in Neo (ed.), *ibid*, p. 38.

declaring something to be part of the Constitution's basic structure; that is, it refused to take this further and declare a certain aspect as unamendable.⁴⁵

Chan Sek Keong was critical of Chua J's reasoning for not applying the basic structure doctrine and argued that in principle, the [basic structure] doctrine is applicable in Singapore...⁴⁶ Similar to the reasoning of the Supreme Court of Malaysia, Chan Sek Keong claims that only through the basic structure doctrine, can constitutional supremacy be maintained:

If the supremacy of the Singapore Constitution or its basic structure could be destroyed or eviscerated by a valid constitutional amendment of any of its provisions, then the notion of constitutional supremacy is meaningless, because Parliament is effectively supreme.⁴⁷

When considering first order unamendability, several issues are important. First, it is imperative to understand that constitutional unamendability and its judicial enforcement are not a necessary requirement of constitutionalism.⁴⁸ Indeed, in some countries, there is still resistance to unamendability and its judicial enforcement.⁴⁹ It is one thing to declare that certain parts of the constitution are implicitly unamendable; it is another to say that this unamendability will be subject to judicial review. One can imagine a constitution in which certain aspects are regarded as unamendable, yet the decision regarding unamendability is left to the political arena and is not justiciable. Such is, for example, the case of unamendability in Norway.⁵⁰ The difficulty with judicial enforcement of unamendability is that we then shift the locus of constitutional change from the political authorities entrusted with the authority to change the constitution to the judiciary, making the court the final arbitrator of society's values.

A second issue is that unamendability should not be examined in isolation from the entire amendment process; in other words, unamendability must be related to the amendment procedure. The more difficult the amendment procedure is, and the more it involves various actors, or the more deliberative, inclusive, and time-consuming, the greater scope and room should be granted to the amendment power, because in such a

⁴⁵ *Yong Vui Kong v. Public Prosecutor* [2015] 2 SLR 1158; see Swati Jhaveri, "Recent Judicial Comments on the Basic Structure of the Constitution" (*Singapore Public Law Blog*, 20 April 2016) (online), accessed 3 March 2019; Jaclyn L. Neo, "Towards a 'Thin' Basic Structure Doctrine in Singapore" (*International Journal of Constitutional Law Blog*, 17 January 2018) (online), accessed 3 March 2019.

⁴⁶ Chan Sek Keong, "Basic Structure and Supremacy of the Singapore Constitution", *Singapore Academy of Law Journal*, XXIX (2017), p. 622. Chan Sek Keong argues at p. 664 that "[a] provision of the constitution therefore may be amended in accordance with Art 5, but Art 4 says that no law enacted by the Legislature may be inconsistent with this Constitution. A constitutional amendment is a "law" under Art 4. Hence, by definition, a constitutional amendment which is inconsistent with this Constitution shall be void, to the extent of its inconsistency. Article 4 must accordingly imply that the Singapore Constitution has a basic or fundamental structure that cannot be amended by a constitutional amendment. Otherwise, no such amendment can be inconsistent with 'this Constitution'".

⁴⁷ *Ibid.*, p. 665.

⁴⁸ Adrienne Stone, "Unconstitutional Constitutional Amendments: Between Contradiction and Necessity", *Vienna Journal on International Constitutional Law*, XII (2018), p. 357.

⁴⁹ See Richard Albert, Malkhaz Nakashidze, and Tarik Olcay, "The Formalist Resistance to Unconstitutional Constitutional Amendments", *Hastings Law Journal*, LXX (2019) (online), accessed 3 March 2019.

⁵⁰ See, for example, Eivind Smith, "Old and Protected? On the 'Supra-Constitutional' Clause in the Constitution of Norway", *Israel Law Review*, XLIV (2011), p. 369.

process it enjoys high level of democratic legitimacy and because, in a way, through such mechanisms it imitates the original constitution-making process.⁵¹ In contrast, when the amendment procedure is centered with one-organ, controlled by one political agency, and excludes the people, or simply similar to ordinary lawmaking; then there is a greater risk of abuse of the amendment power – what David Landau termed “abusive constitutionalism”,⁵² and weaker democratic legitimacy. When the amendment power is in the hands of the ruling party which controls parliament and therefore has the required majority for amendments, it is where courts should possess the power to protect certain aspects of the constitution. Thus, in the case of Singapore, for example, where the amendment process of which can be regarded as combination of rigidity and flexibility,⁵³ a stronger case exists for the judicial enforcement of the constitution’s basic structure. Likewise with a dominant party controlling the amendment process. As Jaclyn Neo correctly states with regard to the Malaysian case:

The debate about whether Malaysia is a constitutional supremacy or a parliamentary supremacy ultimately rests upon what role the judiciary should have vis-à-vis the political branches. If Malaysia’s overarching constitutional identity is one of a constitutionalist state with limited government based on a supreme constitution, which one can distil into the doctrine of constitutional supremacy, then the judiciary will play some role in ensuring that the political branches, including Parliament, do not overreach. In the context of a dominant party state like Malaysia was until recently, this overreach may extend even to constitutional amendments that radically change the original constitutional consensus. Where one political party is able to control a supermajority of seats in Parliament for an extended period of time, procedural limits provide no bar to constitutional amendments. The constitution may be formally rigid but practically flexible. Under such conditions, invoking meta norms in the form of the basic structure doctrine or interpreting the scope of amendments narrowly by reference to those norms may well be necessary to preserve judicial power and independence.⁵⁴

While judicial review of constitutional amendments is an exceptional exercise that raises the ultimate counter-majoritarian difficulty, it is an existing practice in various countries,⁵⁵ and this unique judicial activity is also visible in South-east Asia. As Taing Ratana demonstrates with regard to Cambodia, “the constitution does

⁵¹ See Yaniv Roznai, “Constituent Powers, Amendment Powers and Popular Sovereignty: Linking Unamendability and Amendment Procedures”, in Richard Albert, Xenophon Contiades and Alkmene Fotiadi (eds.), *The Foundations and Traditions of Constitutional Amendment* (2017), p. 23.

⁵² David Landau, “Abusive Constitutionalism”, *U.C. Davis Law Review*, XLVII (2013), p. 289.

⁵³ Yaniv Roznai, “Constitutions, Rigid(Entrenched)/Flexible”, in Rüdiger Wolfrum, Frauke Lachenmann, and Rainer Grote (eds.), *Max Planck Encyclopedia of Comparative Constitutional Law* (2018).

⁵⁴ Neo, note 39 above, p. 27.

⁵⁵ See e.g. Rory O’Connell, “Guardians of the Constitution: Unconstitutional Constitutional Norms”, *Journal of Civil Liberties*, IV (1990), p. 48; Gary J. Jacobsohn, “An Unconstitutional Constitution? A Comparative Perspective”, *International Journal of Constitutional Law*, IV (2006), p. 460; Kemal Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study* (2008); Gábor Halmai, “Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?”, *Constellations*, XIX (2012), p. 182; Yaniv Roznai, “Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea”, *American Journal of Comparative Law*, LXI (2013), p. 657; Gábor Halmai, “Judicial Review of Constitutional Amendments and New Constitutions in Comparative Perspective”, *Wake Forest Law Review*, L (2015), p. 951.

explicitly identify certain substantive limits to the constitutional power of amendment”, and “a key aspect of the constitutional council’s role is to ensure that any proposals to revise or amend the constitution will not violate these substantive limitations”.⁵⁶ Cambodia presents an interesting mechanism of an *ex-ante* judicial scrutiny, which is a useful mechanism for ensuring that constitutional amendments are compatible with unamendable provisions, as long as the opinions of the Constitutional Council are taken seriously. An *a priori* judicial review of proposed constitutional amendments has the ability to avoid the alleged paradox of declaring constitutional norms “unconstitutional; for it allows courts to correct or block amendments that change the constitution’s unamendable principles before they become part of the constitution and thus exacerbate the paradox of unconstitutional constitutional amendments.⁵⁷ In Cambodia, this difficulty was visible in the Constitutional Council’s decision of September 2004, in which the council was asked to examine the constitutionality of the *Additional Constitutional Law Aimed at Regulating the Functioning of National Institutions*. In that case, the council declared that

whereas the Constitutional Council has examined the constitutionality of many laws, but has never examined the constitutionality of a law having the quality of a constitution such as this Additional Constitutional Law. Furthermore, the Additional Constitutional Law is a supreme law stipulating the objectives of the law containing separate articles, and having a hierarchy equal to that of the 1993 Constitution; therefore, this Additional Constitutional Law is the Constitution of which the constitutionality cannot be examined.⁵⁸

In other words, the Constitutional Council argued that after its adoption, the law had a constitutional rank and was not subject to its judicial control.

The question of judicial review of amendment is complicated even when the constitution provides an explicit authority of such an exercise; it is even more challenging when the court declares itself competent to review amendments even without such an explicit authority. Thailand may be a prime example.⁵⁹ As noted earlier, the 2007 Constitution⁶⁰ included explicit limits to formal amendments. *Prima facie*, an amendment that would undermine the democratic form of the government, constitutional monarchy, or the unity of the kingdom, would be deemed unconstitutional. However, the Constitution did not authorize the Constitutional Court to review the constitutionality of constitutional amendments; its authority was limited to organic laws and statutes.⁶¹ Nonetheless, notwithstanding the lack of clear authority, the Constitutional Court asserted its power to review constitutional amendments based

⁵⁶ Ratana, note 6 above.

⁵⁷ See Sabrina Ragone, *El control judicial de la reforma constitucional. Aspectos teóricos y comparativos* (2012), p. 216; Yaniv Roznai, “Constitutional Unamendability – Four Observations”, *Vienna Journal on International Constitutional Law*, XII (2018), p. 375.

⁵⁸ The Constitutional Council, Decision No. 060/002/2004 CC.D of 2 September 2004, ([online](#)), [accessed 3 March 2019](#); see also Jörg Menzel, “Cambodia From Civil War to A Constitution to Constitutionalism?”, in Hor Peng, Kong Phallack, and Jörg Menzel (eds.), *Cambodia Constitutional Law* (2016), pp. 7, 20.

⁵⁹ Tonsakulrungruang, note 9 above, p. 12.

⁶⁰ *Thai Constitution B.E. 2550* (2007).

⁶¹ See Khemthong Tonsakulrungruang, “The Constitutional Court of Thailand: From Activism to Arbitrariness”, in Albert H. Y. Chen and Andrew Harding (eds.), *Constitutional Courts in Asia: A Comparative Perspective* (2018), pp. 193-195.

on its duty to guard the constitution.⁶² And indeed, it reviewed and even invalidated certain constitutional amendments.⁶³ However, as Tonsakulrungruang demonstrates, notwithstanding the Constitutional Court's "aggressive judicial review" of the elected regime, it refused to review the constitutionality of the military coup.⁶⁴ In his words, "Thailand is therefore a unique system where elected politicians are subject to most aggressive review, whereas since they are not elected and no democracy is to be protected by them, the junta is virtually above the law".⁶⁵

This is similar to the Philippines. As in Thailand, the Supreme Court became a forum to challenge constitutional amendments.⁶⁶ But under President Ferdinand Marcos (1917-1989), in the early days of martial law, when the court was confronted with a challenge to the ratification of the 1973 Constitution in the case of *Javellana v. Executive Secretary*, it was restrained; whereas a majority of Justices took the view that the constitution was not validly ratified, the court eventually ascertained that the new charter was still in force.⁶⁷ Naturally, judicial activism vis-à-vis the political branches is more challenging in non-democratic settings, facing authoritarian rule.

Second-Order Unamendability

Thus far, first-order unamendability has been discussed. In comparative constitutional design we find another type of unamendability – a second-order unamendability. According to Richard Albert, second-order unamendability refers to the distinction between the procedures for constitutional amendment and for revision or for partial and total revision.⁶⁸ According to this second-order unamendability, the amendment of certain constitutional values, institutions, or rules is not completely prohibited, as in first order unamendability, but usually requires a different, heightened, or more onerous procedure, for example one that includes a constituent assembly or a constitutional convention with wider popular participation than amendment. When the constitution includes different amendment or revision procedures for different constitutional values or provisions, Rosalind Dixon and David Landau define it as a "tiered constitutional design".⁶⁹ A tiered constitutional design allows to update the constitution while

⁶² On the work of the constitutional court see generally, Björn Dressel and Khemthong Tonsakulrungruang, "Coloured Judgements? The Work of the Thai Constitutional Court, 1998–2016", *Journal of Contemporary Asia*, XLIX (2019), p. 1.

⁶³ See Constitutional Court Decision No. 15-18/2556 (2013); Constitutional Court Decision No. 1/2557 (2014); cited in Tonsakulrungruang, note 9 above.

⁶⁴ Khemthong Tonsakulrungruang, "Chaos, Kings, and Thailand's 20th Constitution", *International Journal of Constitutional Law Blog*, 11 April 2017) (online), accessed 14 October 2018.

⁶⁵ Tonsakulrungruang, note 9 above.

⁶⁶ Dante M. Gatmaytan, "The Judicial Review of Constitutional Amendments: The Insurance Theory in Post-Marcos Philippines", *Philippine Law and Society Review*, I (2011), p. 74.

⁶⁷ *Javellana v. Executive Secretary*, G.R. No. L-36142, 50 S.C.R.A. 30 (1973); see Gatmaytan, note 66 above, p. 78.

⁶⁸ Richard Albert, "Amendment and Revision in the Unmaking of Constitutions", in David Landau and Hanna Lerner (eds.), *Edward Elgar Research Handbook on Comparative Constitution-Making* (2019, forthcoming).

⁶⁹ Rosalind Dixon and David Landau, "Tiered Constitutional Design", *George Washington Law Review*, LXXXVI (2018), pp. 448–449.

preserving the core constitutional values by providing them a stronger protection through the more rigid process.⁷⁰

South-east Asian constitutions reveal not only first-order, but also second-order unamendability. A tiered design exists, for example, in Myanmar, where the constitution also provides escalating amendment rules in which some provisions – such as the general principles of the Constitution and the chapter on emergency powers – may only be amended with a special parliamentary majority and the consent of the electorate in a referendum and others may be amended by Parliament alone (Article 436). This heightened process applies to “the most basic and most important structural provisions of the Constitution”, which brings Harding to claim that by this tiered design the Constitution “has actually defined its own basic structure”.⁷¹ Accordingly, he continues, “given the express and very specifically delineated double-lock entrenchment, the doctrine of implied limitations on the power of constitutional amendment has, logically, no application”.⁷²

In the Philippines, for example, a distinction exists between amendment and revision. Constitutional amendments can take place through the congress, upon a vote of three-fourths of its members, a constitutional convention, or an initiative; while a revision may only be accomplished through the first two modes.⁷³ Although the constitution includes this dual process, it does not explain what an amendment is and what constitutes a revision. This provides a space for judicial creation. Indeed, in the *Lambino v. Commission on Elections* case,⁷⁴ the Court stated that an initiative to change the constitution violated the constitution because it constituted a *revision* and not a mere *amendment*. A people’s initiative may propose only amendments to the Constitution — but not revisions. Accordingly, the initiative to amend the Constitution was declared illegal.⁷⁵

In Cambodia, the Constitution uses both terms: revision and amendment, and both are made by the same procedure; one may wonder, then, why the different terminology? Ratana explains that amendment to the constitution is a change that creates, modifies, or extinguishes some provisions in an existing article of the constitution, whereas a revision is any change in the content of the constitution by adding new articles or chapters to a constitution or restructuring the constitution.⁷⁶

In Singapore, the Constitution originally adopted a flexible amendment that required a simple majority for constitutional amendments. In 1979, the amendment formula (Article 5(2)) changed to a two-thirds majority (as existed in Article 90 of the *State of Singapore Constitution* of 1963).⁷⁷ Whereas constitutional provisions can be

⁷⁰ Ibid, p. 476.

⁷¹ See Andrew Harding, “Constitutional Amendment and The Problems of Transition in Myanmar”, herein, pp. --.

⁷² Ibid.

⁷³ Gatmaytan, note 18 above.

⁷⁴ *Lambino v. COMELEC*, G.R. No. 174153; 505 S.C.R.A. 160 (2006); See Gatmaytan, note 66 above, p. 89.

⁷⁵ Ibid. See also Dante Gatmaytan-Magno, “Changing Constitutions: Judicial Review and Redemption in the Philippines”, *UCLA Pacific Basin Law Journal*, XXV (2007), pp. 15-16.

⁷⁶ Ratana, note 6 above.

⁷⁷ *Constitution of the State of Singapore Act 1963*.

amended through a two-thirds majority, some provisions require a higher threshold. In 1972, the Constitution was amended, and a provision was inserted requiring a national referendum, by no less than two-thirds of the total number of votes, in order to amend Part III of the Constitution, dealing with the surrender of State sovereignty and armed forces (Article 8(1)). In 1992 and 1996 respectively, Article 5(2A) and Article 5A were inserted into the Constitution and introduced a complex amendment procedures regarding core constitutional provisions, such as fundamental liberties and the office of the President and its discretions. However, both articles have never been brought into force.⁷⁸

Thus, in Singapore, the amendment procedure itself was amended. This raises an interesting – and thorny – question regarding the power to amend amendments formula. This has occurred not only in Singapore. In Indonesia, the 1945 amendment formula that stipulated a two-thirds vote requirement for amendments (Article 37) was itself amended in 2002 by the Fourth Amendment, relaxing the rule to a simple majority in order to amend the constitution.⁷⁹ And, a change to the amendment procedure can also be done informally, for instance by a court’s interpretation. Thus, the subjection by Constitutional Court of Thailand that a wholesale amendment should be approved in a referendum just as the original adoption of the 2007 Constitution⁸⁰ may be regarded as an informal amendment of the formal amendment provisions, reading in an implicit process for a total revision.

This issue raises challenging theoretical, conceptual, and practical issues. If we consider the amendment power as a legal power delegated by the primary constituent power to the secondary constituent power,⁸¹ this raises the question whether the amendment power can amend its own mandate and if so – by which procedure. *Prima facie*, as Emmanuel Joseph Sieyès (1748-1836) wrote, a delegated power cannot change its own terms of delegation.⁸² If that is so, how can the amendment power amend the amendment provision itself? Additionally, should the answer be a binary one, or should it depend on the amendment itself, i.e., whether it elevates the procedure, making it harder to amend the constitution or alternatively relaxing the procedure? These questions are beyond the scope of this article, but they deserve special consideration.

This idea of the distinction between revision and amendment is by no means new. During the French National Assembly on the 1791 Constitution, Nicolas Frochot (1761-1828) suggested that there is a distinction between partial and total change to the constitution, each involving a different power and each requiring a different procedure.⁸³ Although Frochot’s proposal was eventually rejected, this distinction between the two powers continues until today in many places, such as Austria,

⁷⁸ Jaclyn Ling-Chien Neo and Yvonne C. L. Lee, “Constitutional Supremacy—Still a Little Dicey?”, in Thio Li-ann and Kevin Y. L. Tan (eds.), *Evolution of a Revolution: Forty Years of the Singapore Constitution* (2014), pp. 162-163. See also Jaclyn L. Neo and Andrea Ong Hui Xian, “Making the Singapore Constitution: Amendments as Constitution-Making”, herein pp. --.

⁷⁹ Shah, note 15 above.

⁸⁰ Constitutional Court Decision 18-22/2555 (2012), p. 23.

⁸¹ See Mark Tushnet, “Amendment Theory and Constituent Power”, in Gary Jacobsohn and Miguel Schor (eds.), *Comparative Constitutional Theory* (2018), chapter 16.

⁸² Emmanuel Joseph Sieyès, ‘What Is the Third Estate?’ [1789] in *Political Writings* (2003), p. 136.

⁸³ See Roznai, “Unconstitutional Constitutional Amendments”, note 1 above, pp. 113-114.

Nicaragua, Switzerland, and others. For example, nearly half of American state constitutions formally entrench this distinction between constitutional amendment and revision.⁸⁴ Amendments authorize fractional changes, for instance to one provision or a set of related provisions, whereas revisions allow comprehensive modifications to more than one provision or subjects, or even the adoption of a whole new constitution and usually require a more burdensome process of a constituent assembly or a constitutional convention with wider popular participation than amendment.

It is not always conceptually clear how to distinguish between amendment and revision.⁸⁵ Generally put, though, an “amendment” is a constitutional change “within the lines of the original instrument”, whereas “a revision” is “a far reaching change in the nature and operation of our governmental structure”.⁸⁶ An amendment is consistent with the constitution while a revision is inconsistent with the fundamental presuppositions of the constitution. It substantively alters the basic constitutional framework. This is what Richard Albert terms ‘dismemberment’ – a fundamental modification of the constitution.⁸⁷ Second-order unamendability results in jurisprudence that ranks constitutional priorities by determining which provisions or principles affect the constitution’s core (thereby require revision for their change), and which are marginal (thereby modifiable through ordinary amendments).⁸⁸

When distinct procedures exist for amendment and revision, it is for the courts to determine what actually comprises an amendment or revision. At the review stage, courts then must examine the content of the constitutional amendment in question to determine whether it alters certain fundamental principles which require for their change a revision process.⁸⁹ Thus, as we have seen in the Philippines, this formal procedural distinction between amendment and revision provides a ground for judicial intervention which may be regarded as semi-procedural.⁹⁰

⁸⁴ See Richard Albert, “American Exceptionalism in Constitutional Amendment”, *Arkansas Law Review*, LXIX (2016), p. 231; Russell Patrick Plato, “Selective Entrenchment against State Constitutional Change: Subject Matter Restrictions and the Threat of Differential Amenability”, *NYU Law Review*, LXXXII (2007), p. 1470; Gerald Benjamin, “Constitutional Amendment and Revision”, in G Alan Tarr and Robert F Williams (eds.), *State Constitutions for the Twenty-First Century* (2006), III, p. 178.

⁸⁵ Donald S. Lutz, “Toward a Theory of Constitutional Amendment”, *American Political Science Review*, LXXXVIII (1994), p. 356.

⁸⁶ Albert, “Amendment and Revision in the Unmaking of Constitutions”, note 68 (citing the Supreme Court of California in *Livermore v. Waite*, 102 Cal 113 (Cal 1894) 118-119 and *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P2d 1281 (Cal 1978) at 1286).

⁸⁷ Richard Albert, “Constitutional Amendment and Dismemberment”, *Yale Journal of International Law*, XLIII (2018), p. 1. Albert suggests a similar approach to that taken by the Constitutional Court of Thailand in its decision of 2012; in the absence of any specific rule the presumption should be that dismemberment of the constitution would require a similar process to that of the original adoption.

⁸⁸ Jonathan L. Marshfield, “Amendment Creep”, *Michigan Law Review*, CXV (2016), p. 268.

⁸⁹ Compare with *Raven v. Deukmejian*, 801 P. 2d 1077 (1990), where the Supreme Court of California prohibited an amendment from appearing on the ballot for a referendum on the grounds that it was much more fundamentally transformative than an amendment, such that it amounted to a revision, which requires a different procedure. See also Peter J. Galie and Christopher Bopst, “Changing State Constitutions: Dual Constitutionalism and the Amending Process”, *Hofstra Law and Policy Symposium*, I (1996), p. 30.

⁹⁰ See David Landau, “Selective Entrenchment in State Constitutional Law: Lessons from Comparative Experience”, *Arkansas Law Review*, LXIX (2016), p. 442: “In form, this kind of review appears to be something of a hybrid between the policing of tiers of change and the unconstitutional constitutional

The Distinction between Replacement and Amendment

The distinction between amendment and revision may be supplemented by another deeper one between amendment and replacement. A replacement of the constitution would be a complete change of the constitution with a new one. Often this would take place through a new formal constitution-making process but often, a constitutional replacement, if examined substantively, may also be introduced by constitutional amendments.⁹¹ For example, a forthcoming book explores how revolutionary changes through amendment have taken place in Chile, Taiwan, South Korea, Japan, and Hungary.⁹² This also occurred in South-east Asia.

As Dian Shah demonstrates, amendments to the 1945 Indonesian Constitution have had dramatic transformative influence and were imperative in the country's transition to a democracy.⁹³ The decision to opt for formal amendments instead of a clean break with the previous authoritarian constitutional order is crucial. On one hand, as Shah points out, such an approach allowed the government to avoid the re-opening of specific contentious issues, in this case to avoid a re-contest of the debate about the secular or Islamic nature of the Indonesian constitutional State. The initiation of an entirely new constitution-making process might be risky, as it opens the entire constitution for re-negotiation, increases costs, and invites strategic behavior of greater magnitude and scale.⁹⁴

Indeed, such approach as its advantages. It allows political leaders to cloak their desired changes in legality and continuity, thus framing their actions in the norms of formal legitimacy. A strategy of transformation through amendment may allow political actors to avoid the heightened risk of failure associated with the making of an entire constitution. An incremental approach to constitutional replacement that relies on amendments is likely to entail lower political costs. But this approach has disadvantages.

Maintaining constitutional continuity with the previous regime may represent a missed opportunity to make a clean break with the past, a missed opportunity that can hinder democratization processes by saddling the new regime with undemocratic vestiges of the old regime. For example, in Chile, a 1989 constitutional reform that modified several Articles of the 1980 Constitution⁹⁵ transformed the authoritarian regime into a democratic one. This experience illustrates how an authoritarian constitution can change into a democratic one by using amendment procedures. Yet,

amendment doctrine. ... Moreover, the amendment/revision distinction is generally not clearly defined in the constitution, and thus requires the courts to develop a standard to enforce the distinction".

⁹¹ Claude Klein and Andras Sajo, "Constitution-Making: Process and Substance", in Michel Rosenfeld and Andras Sajo (eds.), *Oxford Handbook in Comparative Constitutional Law* (2012), p. 421: "while constitutions may formally remain the same, it is possible that through amendments the constitution becomes fundamentally different from the one which remains in the formal existence, raising the issue of fundamental change of the constitution without making a formally new constitution".

⁹² Gary J. Jacobsohn and Yaniv Roznai, *Constitutional Revolution* (Yale University Press, forthcoming), chapter 3.

⁹³ Shah, note 15 above.

⁹⁴ Stephen Michel and Ignacio N. Cofone, "Credible Commitment or Paternalism? The Case of Unamendability", in Richard Albert and Bertil Emrah Oder (eds.), *An Unconstitutional Constitution? Unamendability in Constitutional Democracies* (2018), p. 123.

⁹⁵ *Political Constitution of the Republic of Chile 1980*.

that transformation carries its costs. Amaya Alvez Marin, for example, describes how this “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”.⁹⁶ Therefore, Bruce Ackerman urged 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...”.⁹⁷

Furthermore, as amendment powers are often regarded as limited by the scope of their ability to influence the substance of the constitution (this is first-order unamendability), then when the constitution is transformed and fundamentally replaced with a new one, by using constitutional amendments, important questions of legitimacy may be raised.⁹⁸ To put it differently, when political actors completely transform the constitution while using the constitution’s own amendment rules, this may be regarded as what French theorist Georges Liet-Veaux termed as “fraude à la constitution” – a fraud upon the constitution, and the undermining of the constitution’s spirit or content by adhering to its textual rule.⁹⁹

Finally, there is a question of democratic legitimacy. Central to the continuity of the transformation process is the formal role of parliamentary institutions of the old regime. When amendment provisions are used for creating new constitutional regimes, and there are neither elections to a constituent assembly nor popular referendums, the process may be regarded as lacking popular democratic support. Accordingly, it may be argued that in order to acquire democratic legitimacy, fundamental constitutional transformations, episodic 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.¹⁰⁰ This brings us back to the concept of constituent power.

Constituent Power

Constitutional unamendability is based on the distinction between constituent power and amendment power. The former is the people’s original power to create and shape their constitutional order, while the latter is the more limited power of the people’s representatives, agents, to change constitutional norms. Certain changes, the theory claims, are for the people themselves to decide, not for those constitutional organs acting under the constitution. According to this understanding, when courts enforce

⁹⁶ Amaya Alvez Marin, “Forcing Consensus: Challenges for Rights-based Constitutionalism in Chile”, in Colin Harvey and Alex Schwartz (eds.), *Rights in Divided Societies* (2012), p. 253.

⁹⁷ Bruce Ackerman, *The Future of Liberal Revolution* (1992), p. 61.

⁹⁸ For a general discussion see Andrew Arato, *Post Sovereign Constitution Making – Learning and Legitimacy* (2016).

⁹⁹ Georges Liet-Veaux, “La ‘fraude à la constitution’: Essai d’une analyse juridique des révolutions communautaires récentes: Italie, Allemagne, France”, *Revue Du Droit et de Science Politique en France et A L’Etranger*, LIX (1943), p. 145 (describing as fraud the use of the Third Republic’s legal devices in order to form the Vichy regime).

¹⁰⁰ See Joel Colón-Ríos, “Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform”, *Osgoode Hall Law Journal*, LXVIII (2010), p. 199; Joel Colón-Ríos, “Notes on Democracy and Constitution-Making”, *New Zealand Journal of Public and International Law*, IX (2011), p. 17.

unamendability, they protect the vertical separation of powers between constitution-making and constitution-amending.¹⁰¹ But the idea of constituent power is a western concept developed, mainly, during the French Revolution.¹⁰² Is it applicable to South-east Asia? Can we even talk about *pouvoir constituant* in this context?

Surely, the less democratic the original constitution is, the less legitimate it may be regarded to block future constitutional changes by the constitutional amenders, especially when the proposed amendments aim to improve the democratic order. In other words, why should we accept limits to constitutional changes imposed by the military in a coup? This question becomes even more difficult when the amendment procedure is more democratic than the original constitution-making process.

Nonetheless, examination of the different case suggests that the concept of constituent power – people’s constitution-making power – is not completely useless or out of context in South-east Asia. Consider Myanmar, in which in 1988 a popular rebellion against the military government was brutally suppressed. Yet, if it had succeeded and a new constitutional order would have been created, this could have been regarded as a successful exercise of constituent power. And also, in Myanmar the 2008 constitution was adopted after an approval in a popular referendum.

The understanding of the need to involve the people in dramatic constitutional changes, invoking constituent power in a way, was manifested in Thailand. When the Constitutional Court of Thailand held that a wholesale constitutional amendment was tantamount to making a new constitution, which should be approved in a referendum, similarly to the adoption process, the court endorsed the distinction between amendment and replacement and sought to summon the people’s constituent power in order to create a new constitution. As Tonsakulrungruang notes, “[t]he decision made a reference to the idea of the *pouvoir constituant* that Parliament alone was unfit to amend the constitution which created it. Only the people, the sovereign, could do so”.¹⁰³ This judicial decision acknowledges that the people are the holders of constituent power and have to be involved in a constitutional replacement. It is not for parliament to replace the constitution with a new one. This is the main rationale behind constitutional unamendability.

Returning to Singapore and the basic structure doctrine, Chan Sek Keong, in explaining why the basic structure doctrine applies in Singapore, based his argument on the people’s sovereign power:

If the doctrine applies, Singapore will not have to live with British constitutionalism forever, but only with a constitution whose basic structure cannot be changed by constitutional amendment. A democratic constitution can always be changed by another legitimate democratic process. Here, we do not refer to undemocratic means to

¹⁰¹ See Po Jen Yap, “The Conundrum of Unconstitutional Constitutional Amendments”, *Global Constitutionalism*, IV (2015), p. 114; Yaniv Roznai, “Towards A Theory of Constitutional Unamendability: On the Nature and Scope of the Constitutional Amendment Powers”, *Jus Politicum*, XVIII (2017), p. 5.

¹⁰² On the concept of constituent power see generally, Martin Loughlin, “The Concept of Constituent Power”, *European Journal of Political Theory*, XIII (2014), p. 218; Joel Colón-Ríos, “Five Conceptions of Constituent Power”, *Law Quarterly Review*, CXXX (2014), p. 306.

¹⁰³ Tonsakulrungruang, note 9 above (referring to Constitutional Court Decision 18-22/2555 (2012)).

effect change, like a coup d'état. A referendum is such a means as, properly conducted, it expresses the will of the people and is the most democratic and peaceful way to effect political change. In a democratic state, the constitution, even if supreme, must give way to the higher supremacy of the people. The basic structure doctrine does not apply to constitutional changes effected via referendum.¹⁰⁴

This statement is correct. Unamendability is not eternity. Even unamendable principles can be changed. Unamendability should not be regarded as blocking all the democratic avenues, but rather merely proclaiming that one such avenue – the formal amendment process – is unavailable. In order to legitimately achieve the sought constitutional change, other procedures ought to be used; the original constituent power should be exercised.¹⁰⁵ And when the sovereign – the people have spoken, the argument for unamendability and its judicial enforcement is severely weakened.¹⁰⁶ Why is the present writer not in complete agreement with the statement? Simply because a referendum is not necessarily tantamount to legitimately exercising constituent power. It may be, but it does not have to.¹⁰⁷ Indeed, the process must be inclusive, but this is not sufficient to reflect the people's will. It must also be deliberative and time-consuming, making certain that the decision does not reflect a momentary caprice, but a rational decision. Unamendability thus aims to assure that certain changes take place via a proper participatory channel of higher-level democratic deliberations. Understood in this way, the doctrine of constitutional unamendability can be seen as a safeguard of the people's constituent power.

Conclusion

Constitutional changes in South-east Asia raise fascinating issues that have the ability to deepen our knowledge and broaden our understanding on constitutional change and constitutional politics. A limited set of themes have been addressed here: first-order unamendability; second-order unamendability; and the distinction between amendment and replacement and constituent power. Unamendability trends have not skipped South East Asia. This collection demonstrates the importance of looking beyond euro-centric or the “usual suspects” in comparative law.

¹⁰⁴ Sek Keong, note 46 above, p. 628.

¹⁰⁵ See, for example, Vicki Jackson, “Unconstitutional Constitutional Amendments: A Window into Constitutional Theory and Transnational Constitutionalism”, in Astrid Wallrabenstein, Philipp Dann and Michael Bäuerle (eds.), *Demokratie-Perspektiven Festschrift für Brun-Otto Bryde zum 70* (2013), p. 47; Yaniv Roznai, “Necrocracy or Democracy? Assessing Objections to Constitutional Unamendability”, in Richard Albert and Bertil Emrah Oder (eds.), *An Unconstitutional Constitution? Unamendability in Constitutional Democracies* (2018), p. 29.

¹⁰⁶ It is precisely the involvement of the people in approving constitutional amendments that is the reason why courts in Ireland and France have held that when the sovereign people themselves approve the constitutional change, the court cannot question their decision and invalidate constitutional amendments ratified by the people. See, generally, Aileen Kavanagh, “Unconstitutional Constitutional Amendments from Irish Free State to Irish Republic”, in Eoin Carolan (ed.), *The Constitution of Ireland: Perspectives and Prospects* (2012), p. 331; Denis Baranger, “The Language of Eternity: Constitutional Review of the Amending Power in France (Or the Absence Thereof)”, *Israel Law Review*, XLIV (2011), p. 389.

¹⁰⁷ On the complexities of constituent power and its exercise, see Yaniv Roznai, “‘We the People’, ‘Oui, the People’ and the Collective Body: Perceptions of Constituent Power”, in Gary Jacobsohn and Miguel Schor (eds.), *Comparative Constitutional Theory* (2018), p. 295.

