Transitional Constitutional Unamendability?

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Abstract

This article discusses the pros and cons for a suggestion to use unamendable provisions in transitional constitutions to protect the integrity and identity of constitutions drafted after a democratic transition. The presumption for such a suggestion could be that most democratic constitution-making processes are elite-driven exercises in countries with no or very little constitutional culture. The article tries to answer the question, whether in such situations unamendable constitutional provisions can help to entrench basic principles and values of constitutionalism with the help of constitutional courts reviewing amendments aimed at violating the core of constitutionalism. The article investigates the experiences of some backsliding constitutional democracies, especially Hungary, and raises the question, whether unamendable constitutional provision could have prevented the decline of constitutionalism.

In order to discuss the issue of transitional unamendability, the article engages in the scholarly discussion on transitional constitutionalism in general, and deals with the relationship of constitutional law and constitutional culture. Another side topic of the article is whether such transitional unamendability provisions should also contain international or transnational values and principles, and what happens if those are not in conformity with the unamendable provisions that serve to build up a national constitutional identity. Again, the example of Hungary can be important here, how national constitutional identity protected by the Constitutional Court can serve to abandon the European constitutional whole.

Keywords: transitional constitutionalism, constitutional unamendability, decline of constitutional democracy, constitution-making in Hungary, the Hungarian Constitutional Court.

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A Transitional Constitutionalism

Transitional constitutionalism usually challenges the constitutional canon[1] and can essentially change basic constitutional principles.[2] Hence, it is essential that the main elements of the canon and the basic traditional constitutional principles are known to both the state actors and the addressees of their actions. One possible argument about constitutional transitions to successfully result in consolidated constitutional systems is that some degree of normative commitment to constitutionalism in general and to the specific rules and procedures of the country's constitutional system in particular, on a behavioural and attitudinal level is required.[3] These elements reveal the extended nature of the constitutional consolidation process: it is related not only to the development, strengthening and good functioning of constitutional institutions, but also to the entrenchment and deepening of certain attitudes, both by the elites and by the masses.[4] Consolidation of constitutional democracy thus implies, and indeed requires, the emergence of a certain political and constitutional culture, which is a central factor in the consolidation of democracy.[5] Political culture – both among the masses and especially among the elites – is a crucial issue in post-communist East Central Europe. These countries, for instance at the point of their accession to the European Union seemed to be consolidated on the structural, institutional, procedural level, but full consolidation on the substantive level has yet to be achieved mainly because the political and constitutional culture has not been strong enough. In the beginning of the democratic transition of these new democracies, preference

1 R. Teitel, 'The Constitutional Canon: The Challenge Posed by A Transitional Constitutionalism', *Constitutional Commentary*, Vol. 17, 2000, p. 237. About challenging *Marbury v. Madison*, probably the most important American constitutional canon, *see* S. Levinson, 'Why I Do Not Teach Marbury (Except to Eastern Europeans) and Why You Shouldn't Either', *Wake Forest Law Review,* Vol. 38, 2003, p. 553. Levinson argues that Marbury can only present a desirable model for judicial behaviour taking into account the transitional period of 1800 to 1804 in the American constitutional history. This is the reason he only teaches it to Eastern European students, who are much more immediately familiar with the problems that face 'transitional' polities.

2 *See* H. Eberhard, K. Lachmayer & G. Thallinger, 'Approaching Transitional Constitutionalism', *in* H. Eberhard, K. Lachmayer & G. Thallinger (Eds.), *Transitional Constitutionalism*, 2007, 9, p. 23.

3 In the political science literature on consolidated democracies, Larry Diamond construes consolidation as "the process of achieving broad and deep legitimation, such that all significant political actors, at both the elite and mass levels, believe that the democratic regime is the most right and appropriate for their society, better than any other realistic alternative they can imagine". L. Diamond, *Developing Democracy: Toward Consolidation*, Baltimore, Johns Hopkins University Press, 1999. Linz and Stepan explicitly mention the commitment to the constitution as a special dimension of consolidation. *See* J.J. Linz & A. Stepan, 'Toward Consolidated Democracies', *Journal of Democracy,* Vol. 7, 1996, pp. 14-16.

4 Some political scientists are even inclined to believe that constitutions themselves and their institutional structures are much less important in the distortion of liberal constitutionalism than political culture. Such is the argument that says that the reasons for the ungovernability of the United States lie deeper than the institutional structure of the country. *See* T.L. Friedman & M. Mendelbaum, *That Used to Be Us: How America Fell Behind in the World It Invented and How We Can Come Back*, Hachette UK, 2011, p. 33.

5 L. Diamond, 'Introduction: Political Culture and Democracy', *in* L. Diamond (Ed.), *Political Culture and Democracy in Developing Countries*, Boulder, Lynne Rienner, 1994.

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was given to general economic effectiveness over mass civic and political engagement.[6] The satisfaction of the basic economic needs of the populace was so important for both the ordinary people and the new political elites that not even constitutions really did make a difference.[7] Between 1989 and 2004, all political forces accepted a certain minimalistic version of a 'liberal consensus' understood as a set of rules and laws rather than values, according to which NATO and EU accession was the main political goal. But, as soon as the main political goals were achieved, the liberal consensus has died,[8] and the full democratic consolidation is still better viewed as having always been somewhat illusory.[9]

The behavioural element of consolidation is adherence to constitutional patriotism.[10] Jürgen Habermas, who argues for an ideal of 'constitutional patriotism,' adds here that constitutional values inevitably differ from state to state, depending on the historical traditions of the country in question: the expression 'constitutional patriotism' (*Verfassungspatriotismus*) refers to the notion that citizens share not only the abstract understanding of constitutional principles, but also make its prevailing specific meaning – which emerges from the context of their own national history – their own.[11] In several of his writings, Shlomo Avineri also emphasizes the key significance of national history in the context of the Central and Eastern European transformation. He emphasizes the importance of pre-1939 authoritarian Polish and Hungarian politics, but also refers to the more democratic Czech traditions before 1948.[12]

For instance, in Hungary there was no real parliamentary democracy until 1990. Only elements of a representative system existed before World War II during Governor Horthy's regime, with strong nationalism and anti-Semitism, and without any kind of human rights culture. According to the political theorist, István Bibó, who also served as the Minister of State in the government of Imre Nagy during the Hungarian revolution of 1956, pre-World War II Hungary was a prime example of a 'deformed political culture', where

6 Dorothee Bohle and Béla Greskovits state that East Central European democracies had a 'hollow core' at their inception. *See* D. Bohle & B. Greskovits, *Capitalist Diversity on Europe's Periphery*, Ithaca, Cornell University Press, 2012.

7 *See* U.K. Preuss, *Constitutional Revolution: The Link Between Constitutionalism and Progress*, Atlantic Highlands, Humanities Press, 1995, p. 3.

8 *See* I. Krastev, 'Is East–Central Europe Backsliding? The Strange Death of the Liberal Consensus', *Journal of Democracy,* Vol. 18, 2007, pp. 56-63.

9 J. Dawson & S. Hanley, 'What's Wrong with East–Central Europe? The Fading Mirage of the Liberal Consensus', *Journal of Democracy*, Vol. 27, 2016, pp. 20-34.

10 After Dolf Sternberger's and Jürgen Habermas's conceptions of constitutional patriotism by the end of 1970s and 1980s respectively, both of which have been answers to particular German challenges, Jan-Werner Müller developed a new theory of the term, concentrating on universal norms and constitutional culture. *See* J.-W. Müller, *Constitutional Patriotism*, Princeton University Press, 2007.

11 *See* J. Habermas, & J. Ratzinger, *The Dialectic of Secularism*, San Francisco, Ignatius Press, 2005.

12 *See* S. Avineri, 'Two Decades After the Fall: Between Utopian Hopes and the Burdens of History', *Dissent*, 29 September 2009, available at: www.dissentmagazine.org/online_articles/two-decades-after-the-fall-between-utopian-hopes-and-the-burdens-of-history (last accessed on 19 March 2019).

> nationhood had to be made, re-fashioned, fought for and constantly protected not only from the predations of imperial powers but also from the indifference and fluctuating sense of national identity as a part of the people themselves.[13]

This constitutional awareness means that citizens have to endorse what John Rawls once called 'constitutional essentials'; they have to be attached to the idea of a constitution, and from the debates about it, a 'constitutional identity' or 'constitutional culture' can emerge. According to Rawls, the core of this kind of constitutional patriotism is a constitutional culture centred on universalist liberal-democratic norms and values, refracted and interpreted through particular historical experiences. It is of course possible to find oneself confronted with unconstitutional patriotism. For instance, one can observe the kind of nationalism that violates constitutional essentials in the name of 'national interest' or 'national constitutional identity' in the cases of the recent Hungarian and Polish constitutional 'counter-revolutions.'[14] In such situations, as Jan-Werner Müller argues, the normatively substantive theory of constitutional patriotism would counsel dissent or even civil disobedience, all in the name of the very constitutional essentials that are being violated and the constitutional culture that is being damaged.[15]

So, there is a dialectic relationship between constitutional law and constitutional culture: the first is based on the latter, and also influences it.[16] This means that it is very hard to make legitimate constitutional law accepted by the people without a pre-existing constitutional culture.[17] In such situations, the constitutional law must necessarily be an elitist project with the hope that it contributes to the development of constitutional culture. Exactly this happened in East-Central Europe during the democratic transition in 1989–90. In the 'notable absence

13 *See* I. Bibó, Kelet-Európai Kis-Népek Nyomorúsága [The Misery of the Small States of Eastern Europe] 1946.

14 In 2016, the Hungarian government argued with Hungary's 'national constitutional identity' to defy the resolution of European Council to relocate asylum seekers within the Member States of the EU, and the packed Constitutional Court in its decision 22/2016 AB on the interpretation of Article E) (2) of the Fundamental Law of Hungary rubberstamped the government's constitutional identity defence. *See* G. Halmai, 'From a Pariah to a Model? Hungary's Rise to an Illiberal Member State of the EU', *European Yearbook of Human Rights*, 2017, pp. 35-45.

15 *See* Müller, 2007, at 142.

16 *See* R.C. Post, 'The Supreme Court 2002 Term: Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law', *Harvard Law Review,* Vol. 117, 2003, pp. 4, 7. Here Post uses the term 'constitutional culture' referring to the beliefs and values of non-judicial actors, most of all the people, while the term 'constitutional law' according to Post refers to constitutional law as it is made from the perspective of the judiciary.

17 Ulrich Preuss, explaining the difficulties to import constitutions after the political transition into this region, argues that constitutionalism was a minor element of the political culture at best. *See* U.K. Preuss, 'Perspectives on Post-Conflict Constitutionalism: Reflections on Regime Change Through External Constitutionalization', *New York Law School Law Review,* Vol. 51, 2006, p. 467.

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of constitutional constituent assemblies',[18] the constituent power was effectuated by the 'active revolutionary minority'.[19]

This approach has been harshly criticized with the argument that the potential of democracy following the transition in Hungary and also in the other new democracies of Central and Eastern Europe was diminished by technocratic, judicial control of politics, and the treasure of civic constitutionalism, civil society and participatory democratic government as a necessary counterpoint to the technocratic machinery of legal constitutionalism was lost.[20] This concept argues that the legalistic form of constitutionalism (or legal constitutionalism), while consistent with the purpose of constitutionalism of creating the structure of the state and setting boundaries between the state and citizens, risks the possibility of creating participatory democracy.[21] In other words, these authors think that legal constitutionalism falls short, reducing the constitution to an elite instrument, especially in countries with weak civil societies and weak party political systems, which undermine a robust constitutional democracy based on the idea of civic self-government.[22]

The concept of civic or participatory constitutionalism is based on 'democratic constitutionalism',[23] emphasizing that structural problems in new democracies include the relative absence of institutions of popular participation, which is also related to 'counterdemocracy',[24] as well as robust institutional linkages of civic associations and citizens with formal politics. I think that this approach does

18 R. Teitel, 'Post-Communist Constitutionalism: A Transnational Perspective', *Columbia Human Rights Law Review,* Vol. 26, 1994, p. 167, p. 172.

19 *See* U.K. Preuss, 'The Exercise of Constituent Power in Central and Eastern Europe', *in* M. Loughlin & N. Walker (Eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, Oxford, Oxford University Press, 2007, p. 216. Preuss argues that the limited role played by the idea of constituent power in the region is explained by the significant emphasis on national liberation instead of constitutions of liberty.

20 *See* this argument in P. Blokker, *New Democracies in Crisis? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania, and Slovakia*, 2013. Also, Wojciech Sadurski argued that legal constitutionalism might have a 'negative effect' in new democracies and might lead to the perpetuation of the problem of both weak political parties and civil society. *See* W. Sadurski, 'Transitional Constitutionalism: Simplistic and Fancy Theories', *in* A. Czarnota, M. Krygier & W. Sadurski (Eds.), *Rethinking the Rule of Law after Communism,* Budapest, Central European University Press, 2005, pp. 9-24.

21 *See* R. Albert, 'Counterconstitutionalism', *Dalhousie Law Journal,* Vol. 31, No. 1, 2008, p. 4.

22 *Cf.* Sadurski, 2005, at 23.

23 J. Tully, *Public Philosophy in a New Key, Volume I: Democracy and Civic Freedom*, Cambridge, Cambridge University Press, 2008, p. 4.

24 P. Rosenvallon, *Counter-Democracy: Politics in the Age of Distrust*, Cambridge, Cambridge University Press, 2008.

not sufficiently take into account the lack of civic interest in constitutional matters, based on the poor constitutional culture.[25]

The question is whether constitutional unamendability is a suitable tool to develop constitutional culture, and thus contribute to consolidate constitutional democracy in transitional societies.

B Constitutional Unamendability

Since John Locke's idea that a constitution should be "the sacred and unalterable form and rule of government…forever" did not find any serious followers in the modern world, constitutions usually do contain rules about constitutional amendments. But there are no general patterns as to the application of amendments. Some countries are more inclined to modify the text of their constitutions. For instance, the German Basic Law of 1949 was modified on more than 50 occasions; the 1958 Constitution of the Fifth French Republic on 25 occasions; the 1937 Constitution of Ireland on 29 occasions, and the 1978 Constitution of Spain only twice.[26] Other countries have separate 'constitutional laws' that also enjoy super legislative authority. In Austria, since 1945, there have been more than 800 modifications to the 1920 Constitution, mostly in the form of a constitutional law or as special constitutional provisions inserted into ordinary laws, while in Italy, besides 14 amendments introduced into the text of the 1947 Constitution, 20 separate 'constitutional laws' have been adopted.[27] In other countries, formal constitutional amendments remain exceptional. In the United States, the Constitution has only been changed 27 times on the federal level since 1787, and the last changes were adopted in 1964, 1967, 1971 and 1992. This does not mean that the meaning of the federal constitution has not been changed by way of interpretation. The state rate of amendment is almost ten times the federal rate.[28]

The authority to amend the constitution does not include the authority to enact a new one. To limit the amendments to the constitution, the proponents of unamendability argue, safeguards the sovereignty of the people, especially in cases where the constitution is easily amended. One of the crucial questions concerning the limits of constitution-making sovereignty is whether there are any

25 Other critics also mention the rise of populism, the elite disdain for participatory institutions and the increasing irrelevance of domestic constitutionalism due to the tendencies of Europeanization and globalization. *See* the reviews on Blokker's book by Jiri Priban and Bogusia Puchalska in ICONnect. P. Blokker, J. Priban & B. Puchalska, 'Book Review/Response: Paul Blokker, Jiri Priban and Bogusia Puchalska on Civic Constitutionalism', *International Journal of Constitutional Law Blog* (10 September 2013), available at: www.iconnectblog.com/2013/09/book-reviewresponse-paul-blokker-jiri-priban-and-bogusia-puchalska-on-civic-constitutionalism/ (last accessed on 19 March 2019).

26 *See* L. Garlicki and Z.A. Garlicka, 'Review of Constitutionality of Unconstitutional Amendments (An Imperfect Response to Imperfection?)', *Anayasa Hukuku Degrisi: Journal of Constitutional Law*, Vol. 1, 2012, p. 185.

27 *Ibid.*

28 *Ibid.*

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limits to constitutional change. In other words, are there certain principles, institutions, rights and liberties, or as John Rawls calls them, "constitutional essentials", which must be and remain to be part of the constitution, and may not be removed by means of the amending power?[29] Rawls discussing Article V of the US Constitution[30] and the role of the Supreme Court argues that there are limits to what can be a valid constitutional amendment.[31] Rawls cites with approval[32] the work of Stephen Macedo, who argues that parts of the constitution are more fundamental than other provisions, and an amendment that repealed fundamental constitutional freedoms would be "unintelligible and revolting from the perspective of the Constitution as a whole."[33] Therefore according to Macedo,

> the first freedoms of speech and the press, the requirement of warrants for police searches, the right to confront witnesses, and to a trial by jury, even the elaborate procedures required to amend the Constitution, all these provisions and more represent basic structural commitments to institutionalizing a process of free and reasonable self-government.[34]

Thus, he concludes that

> an amendment which sought to expunge that basic commitment and to wipe out basic political and personal freedoms intrinsic to reasonable self-government suggests a desire to revolutionize rather than correct and amend [...] and so it would properly be held by the Supreme Court to be a nullity.[35]

Also, Walter F. Murphy has argued for a position that is similar to Rawls's and Macedo's on textual, semantic and normative basis. His textual argument is based for instance on the wording of the First Amendment, which prohibits its own repeal by an Act of Congress:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of

29 *See* this question posed concerning Rawls's idea of 'constitutional essentials' by C.A. Kelbey, 'Are There Limits to Constitutional Change? Rawls on Comprehensive Doctrines, Unconstitutional Amendments, and the Basis of Equality', *Fordham Law Review,* Vol. 72, 2004, pp. 1487-1536.

30 Article V originally forbade the abolition of the African slave trade until 1808, and without time limits, prohibits the deprivation of a state of equal representation in the Senate without its content. The idea of explicitly limiting the amendment power also appeared in the state constitutions between 1776 and 1783. For instance, the Delaware Constitution (1776) prohibited amendments to the Declaration of Rights, the articles establishing the state's name, the bicameral legislature, the legislature's power over its own officers and members, the ban on slave importation and the establishment of any one religious sect.

31 *See* J. Rawls, *Political Liberalism,* 2nd ed, New York, Columbia University Press, 1996, p. 231.

32 *Ibid*., p. 238.

33 S. Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism*, Oxford, Clarendon Press, 1990, note 116 at 183.

34 *Ibid.*

35 *Ibid.*

> the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[36]

The semantic meaning of the word 'amend' means correcting or improving, not deconstructing, reconstructing or replacing and abandoning the fundamental principles of the Constitution. Murphy notes that also normative constraints impose prohibition on the amending power:

> Any change that would transform the polity into a political system that was totalitarian, or even so authoritarian as not to allow a wide space for human freedom, would be illegitimate, no matter how pure the procedures and widespread the public support.[37]

Murphy uses the hypothetical case – which very much reminds me the constitutional counter-revolution in Hungary from 2010 onwards – that the people decide to abolish constitutional democracy in return for a charismatic leader's promise of prosperity in a time of severe economic downturn. Although the people can agree to such a transformation, Murphy asks:

> May a people who accepted constitutional democracy democratically or constitutionally authorize such a political transmutation? May the new system validly claim to draw its authority from the consent of the governed?[38]

Murphy thinks not.

Also, Ronald Dworkin insisting the tension between constitutionalism and democracy defends a difficult amendment procedure of the constitution, which contains certain rights, that sets limits to popular decision making:

> We may better protect equal concern by embedding certain individual rights in a constitution that is to be interpreted by judges rather than by elected representatives, and then providing that the constitution can be amended only by supermajorities.[39]

According to him, majorities should not be allowed "whenever they wish, to change the basic constitutional structure that seems best calculated to ensure equal concern."[40]

Yaniv Roznai, in his recent seminal monograph on unconstitutional constitutional amendments, builds up his theory on constitutional unamendability on the

36 *See* W.F. Murphy, 'Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity', *in* S. Levinson (Ed.), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*, Princeton, Princeton University Press, 1995, p. 179.

37 *Ibid.*

38 *Ibid.*, 175.

39 R. Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate*, Princeton, Princeton University Press, 2006, p. 144.

40 *Ibid.*

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distinction between primary and secondary constituent power.[41] He argues that the secondary constituent power, which is the authority to amend the constitution, is a delegated power derived by the primary constituent power, which established the constitution. Consequently, Roznai claims that the secondary constituent power cannot perform acts that would amount to destroying the constitution created by the primary constituent power. Supporting his mostly descriptive and not normative theory, Roznai also introduces the concept of 'foundational structuralism', according to which there are basic features of every constitution that make up a specific constitutional identity and a hierarchy of constitutional values, manifested in the unamendable core of the constitution, not reachable by the secondary constituent power. This means for Roznai that constitutions "reflect certain basic political-philosophical principles, which form the constitution's foundational substance, its essence or spirit."[42]

Similar to Roznai, Michel Rosenfeld also argues that constitutional identity refers to the specific characteristics of a constitution, which is based on certain principles that the given polity gave itself in its constitution.[43] Even though Gary Jacobsohn understands constitutional identity emerging dialogically and representing a mix of political aspirations and commitments manifested in the unamendable core of the constitution that are expressive of the 'origins', 'concepts' and 'aspirations' of a nation's past, which is changeable, but resistant to its own destruction.[44] In other words, according to Jacobsohn, the unamendability guarantees for the current identity of a constitution against an undesirable future one.

The democratic objection against constitutional unamendability argues that democratic openness is incompatible with untouchable abstract principles, and insists on permanently open constitutions.[45] Jed Rubenfeld for instance argues – very much in line with Hungarian Prime Minister Viktor Orbán – that "constitutionalism always permits the possibility of legitimate rupture, of a revolutionary process of popular rewriting that takes place, in part or in whole, outside every existing political institution".[46] Also Christopher L. Eisgruber shares this opinion referring to Article V of the US Constitution that

> a constitutional procedure that enables people to entrench good rules and institutions will also enable them to entrench bad rules and institutions. A

41 Y. Roznai, *Unconstitutional Constitutional Amendments. The Limits of Amendment Power*, Oxford, Oxford University Press, 2017, pp. 113-128.

42 *Ibid*., 143.

43 *See* M. Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture and Community*, London, Routledge, 2010, pp. 10-11.

44 G.J. Jacobsohn, *Constitutional Identity*, Cambridge, Cambridge University Press, 2010, p. 91.

45 *See* for instance J. Colon-Rios, 'The End of the Constitutionalism-Democracy Debate', *Windsor Review of Legal and Social Issues*, Vol. 28, 2010, p. 25.

46 J. Rubensfeld, *Freedom and Time: A Theory of Constitutional Self-Government*, New Haven, Yale University Press, 2001, p. 174.

> people must have the freedom to make controversial political choices, and that freedom will necessarily entail the freedom to choose badly.[47]

Similarly, Walter Dellinger claims "the formal amendment process set forth in Article V represents a domestication of the right to revolution".[48] Based on this procedural argument, Dellinger also rejects the Supreme Court's power to exercise judicial review of the substance of constitutional amendments: "Judicial review of the merits of proposed amendments is illegitimate for the simple reason that the Constitution places virtually no limits on the content of amendments".[49]

Opposing this view on possible judicial review, Rawls also considering a hypothetical amendment, questions

> whether an amendment to repeal the First Amendment, say, and to make a particular religion the state religion with all the consequences of that, or to repeal the Fourteenth Amendment with its equal protection of laws, must be accepted by the Court as a valid amendment.[50]

For Rawls, the First Amendment is

> entrenched in the sense of being validated by long historical practice. They may be amended but not simply repealed and reversed [...] The successful practice of its ideas and principles over two centuries places restrictions on what can now count as an amendment, whether was true at the beginning.[51]

Rawls argues that to be valid, a constitutional amendment that goes beyond either (a) adjusting basic constitutional values to changing political and social circumstances or incorporating a broader understanding of those values, or (b) removing weaknesses that come to light in subsequent constitutional practice, should be declared invalid by the courts.

47 C.L. Eisgruber, *Constitutional Self-Government*, Cambridge, Harvard University Press, 2001, p. 120.

48 W. Dellinger, 'The Legitimacy of Constitutional Change: Rethinking the Amendment Process', *Harvard Law Review,* Vol. 97, 1983, p. 431.

49 W. Dellinger, 'Constitutional Politics: A Rejoinder', *Harvard Law Review,* Vol. 97, 1983, pp. 447-448.

50 *See* Rawls, 1996, p. 238. Rawls here refers to Bruce Ackerman, who suggests that the Supreme Court must look upon the amendment under discussion as valid. B. Ackerman, *We the People: Foundations*, Cambridge, MA and London, The Belknap Press of Harvard University Press, 1992, pp. 319-322.

51 *Ibid*., pp. 238-239.

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C Can Unamendability Prevent the Decline of Constitutional Democracy? The Case of Hungary

I The Transitional Constitution Making in 1989

During the democratic transition in Hungary, formally the normal, but illegitimate legislature enacted the comprehensive modifications of the 1949 Stalinist constitution, but after the peaceful negotiations between the representatives of the authoritarian regime and their democratic opposition. Similar 'post-sovereign'[52] or 'pacted constitution-making'[53] process happened in Spain in the end of the 1970s and in South Africa from the beginning through the middle of the 1990s. The 1989 constitutional amendment inserted new content into the 1949 framework, which can be considered as a rule of law document, even if the Rákosist-Kádárist skeleton lolls out sometimes, especially concerning the unchanged structure of the chapters, starting with the state organization, followed by the fundamental rights parts. But, this liberal democratic content of the document was not entrenched by explicit unamendability provisions. Apparently, the negotiations-based drafting explains that the old-new constitution principally follows the model of a consensual democracy widely accepted in the continental European systems. The system of government, which assumes the presence of more than two parties in the Parliament and a coalition-governance, at the same time meant that the parties knowingly rejected both the semi- or full-presidential regime that was preferred by the former communist party, MSZMP and is applied in many post-communist countries even today, and also the English Westminster-type of two-party parliamentarism. When compared to the Western European solutions, the decision-making process set up in 1989–90 has another distinctive characteristic that obviously could be explained by the legacy of the forty-year long totalitarian regime: it is not only based on the consensus among the coalition parties, but in some cases it also requires the involvement of the opposition, and it significantly strengthens the checks on the governmental powers.

As regards the acts requiring two-thirds majority, hence the support of the opposition, in their original forms as "acts with the force of the Constitution" practically called for a two-thirds quorum in all questions concerning the structure of the government and fundamental rights. Even if this special institution did not reach the level of unamendability, it certainly made change of the constitution's core institutions more difficult. Even though the 'pact' in 1990 between the biggest governing and opposition party radically reduced the number of the qualified acts, they remained part of the constitutional system.

The Constitutional Court, which began its work on 1 January 1990, had the opportunity to assert the rules and principles enshrined in the 1989 Constitution even before the democratic elections. This was fortuitous precisely because it did so against an illegitimate parliament and government. The Court interpreting

52 *See* A. Arato, 'Post-Sovereign Constitution-Making in Hungary: After Success, Partial Failure, and Now What?', *South African Journal of Human Rights*, Vol. 26, 2010.

53 The term is used by M. Rosenfeld, *The Identity of the Constitutional Subject*, Uitgever, Taylor & Francis, 2009.

legal certainty as part of the principle of rule of law, for instance, interdicted the implementation of the first democratically elected government's first plans for retroactive justice concerning the previous regime, arguing that "legal security based on objective and formal principles enjoys primacy over a sense of substantive justice that is always partial and subjective".[54] In this decision, the Court also expressed its vision about constitutionalism:

> It is not only legal statutes and the operations of state organs that need to be in strict compliance with the Constitution, but the Constitution's conceptual culture and values need to fully suffuse society.[55]

Indeed, the first Constitutional Court led by La'szlo' So'lyom expressly followed an activist approach in the interpretation of the Constitution, which was laid down in the concept of the 'invisible constitution' elaborated in his concurring opinion to the decision on the death penalty:

> The Constitutional Court must continue its effort to explain the theoretical bases of the Constitution and of the rights included in it and to form a coherent system with its decisions, which as an 'invisible Constitution' provides for a reliable standard of constitutionality beyond the Constitution, which nowadays is often amended out of current political interest; therefore this coherent system will probably not conflict with the new Constitution to be adopted or with future Constitutions.[56]

But the activist concept of the 'invisible constitution' did not mean that the Constitutional Court imposed implicit unamendable provisions on the constitutional system.

II The Constitutional Counter-Revolution of 2010–2011

The centre-right government of FIDESZ, the Alliance of Young Democrats, with its tiny Christian democratic coalition partner received more than 50% of the actual votes, and, due to the disproportional election system, with this two-thirds of the seats in the 2010 Parliamentary elections. With this overwhelming majority, they were able to enact a new Constitution without the votes of the weak

54 Constitutional Court decision No. 11/1992. (III. 5.)
55 *Ibid*., p. 80.
56 Constitutional Court decision 23/1990. (XII. 31.) AB

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opposition parties. But this constitutionalist exercise aimed at an illiberal constitutional sort.[57]

This new constitution, entitled the Fundamental Law of Hungary, was passed by the Parliament on 18 April 2011.[58] The Fundamental Law, which entered into force on 1 January 2012, supersedes the previous constitution (hereinafter: 1989 constitution), which, in keeping with the requirements of democratic constitutionalism during the 1989–90 regime change, comprehensively amended the first written Constitution of Hungary (Act XX of 1949). The drafting of the Fundamental Law took place without following any of the elementary political, professional, scientific and social debates. These requirements stem from the applicable constitutional norms and those rules of the House of Parliament that one would expect to be met in a debate concerning a document that will define the life of the country over the long term. The debate – effectively – took place with the sole and exclusive participation of representatives of the governing political parties.

Before 1 January 2012, when the new constitution became law, the Hungarian Parliament had been preparing a blizzard of so-called cardinal – or supermajority – laws, changing the shape of virtually every political institution in Hungary and making the guarantee of constitutional rights less secure. These laws, which can only be changed by a two-thirds majority, affect the laws on freedom of information, prosecutions, nationalities, family protections, the independence of the judiciary, the status of churches, functioning of the Constitutional Court and elections to Parliament. In the last days of 2011, the Parliament also enacted the so-called Transitory Provision to the Fundamental Law, which claimed constitutional status and partly supplemented the new Constitution even before it went into effect. These new laws have been uniformly bad for the political independence of state institutions, for the transparency of law making and for the future of human rights in Hungary. The independence of the judiciary was dealt with in the constitutional amendment, in which have changed the appointment and reassignment process for judges. The Transitory Provisions to the Fundamental Law

57 In an interview on Hungarian public radio on 5 July 2013, Prime Minister Viktor Orbán responded to European Parliament critics regarding the new constitutional order by admitting that his party did not aim to produce a liberal constitution. He said, "In Europe the trend is for every constitution to be liberal, this is not one. Liberal constitutions are based on the freedom of the individual and subdue welfare and the interest of the community to this goal. When we created the constitution, we posed questions to the people. The first question was the following: what would you like; should the constitution regulate the rights of the individual and create other rules in accordance with this principle or should it create a balance between the rights and duties of the individual. According to my recollection more than 80% of the people responded by saying that they wanted to live in a world, where freedom existed, but where welfare and the interest of the community could not be neglected and that these need to be balanced in the constitution. I received an order and mandate for this. For this reason the Hungarian constitution is a constitution of balance, and not a side-leaning constitution, which is the fashion in Europe, as there are plenty of problems there". *See* A Tavares jelentés egy baloldali akció (The Tavares report is a leftist action), Interview with PM Viktor Orbán, 5 July 2013. Kossuth Rádió.

58 For the 'official' English translation of the Fundamental Law, available at: www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf (last accessed on 19 March 2019).

reduced the retirement age for judges in ordinary courts from 70 to 62, starting on the day the new constitution went into effect. This change forced somewhere between 274 judges into early retirement. Those judges included 6 of the 20 court presidents at the county level, 4 of the 5 appeals court presidents and 20 of the 80 Supreme Court judges. According to the cardinal law on the status of the churches, the power to designate legally recognized churches is vested in the Parliament itself. The law has listed fourteen legally recognized churches and required all other previously registered churches (some 330 religious organizations in total) to either re-register under considerably more demanding new criteria, or continue to operate as religious associations without the legal benefits offered to the recognized churches (like tax exemptions and the ability to operate state-subsidized religious schools). As a result, the vast majority of previously registered churches have been deprived of their status as legal entities.

On 11 March 2013, the Hungarian Parliament added the Fourth Amendment to the country's 2011 constitution, re-enacting a number of controversial provisions that had been annulled by the Constitutional Court. The most alarming change concerning the Constitutional Court annulled all Court decisions prior to when the Fundamental Law entered into force. At one level, this makes sense: old constitution = old decisions, new constitution = new decisions. But the Constitutional Court had already worked out a sensible new rule for the constitutional transition by deciding that in those cases where the language of the old and new constitutions were substantially the same, the opinions of the prior Court would still be valid and could still be applied. In cases in which the new constitution was substantially different from the old one, the previous decisions would no longer be used. Constitutional rights are key provisions that are the same in the old and new constitutions, which means that, practically speaking, the Fourth Amendment annuls primarily the cases that defined and protected constitutional rights and harmonized domestic rights protection to comply with European human rights law. This made it possible for Prime Minister Orbán to raise the possibility of the reintroduction of the death penalty, declared unconstitutional by the Constitutional Court in 1990, or threaten retroactive political justice despite a 1992 ban by the Court. With the removal of these fundamental Constitutional Court decisions, the government has undermined legal security with respect to the protection of constitutional rights in Hungary.

One part of the long fourth amendment just elevates the annulled non-transitory provisions of the Transitional Act into the main text of the Fundamental Law, in some cases with somewhat modified formulation, while in others unchanged. The following provisions were lifted to the constitutional rank without any alteration: the rules on nationalities, the authorization of mayors with administrative competences, the authorization of both the Chief State Prosecutor and the President of the Judicial Council to select another court if they think that the competent one is overloaded with cases, as well as the extension of the restriction of the review power of the Constitutional Court in financial matters even after the state debt does not exceed half of the entire domestic product, for laws, which were enacted in the period when the debt did exceed the limit.

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Among the amendments, there are ones that were not part of the Transitional Provisions, but are also consequences of a previous annulment by the Constitutional Court. One of them is the authorization of the legislature to set conditions for state support in higher education, for instance to prescribe graduates of state universities to remain in the country for certain periods of time after graduation. (Without prior Constitutional Court decision, the amendment also limits the autonomy of universities by allowing the government to supervise their financial management.) Another revenge for a declaration of unconstitutionality is the authorization of both the legislature and self-governments to criminalize homelessness. In another decision, the Court also declared the ban of political advertisements in the electoral campaign. The reaction to this is the possibility according to the amended text of the Fundamental Law to limit political ads in a cardinal law. By the end of 2012, the Court annulled the very definition of the family in the law on the protection of families as to exclusive. Now the Fundamental Law defines marriage and the parents–children relationship as the basis of family relationships, not mentioning extramarital relations and parenting. Also, the Constitutional Court expressed constitutional concerns towards private law limitations of hate speech, which violates the dignity of groups. The new amendment allows such limitations, not only to protect racial and other minorities, but also to protect the dignity of the members of the Hungarian nation, who build the overwhelming majority of the population.

Finally, there is a set of amendments related to the power of the Constitutional Court itself, as a direct reaction to recent unwelcome decisions of the judges. As an indirect reaction to the readiness of the Court to review the substance of constitutional amendments expressed in the decision on the unconstitutionality of the non-transitory elements of the Transitional Provisions, the new text of the Fundamental Law, while allowing the review of procedural aspects of an amendment, specifically excludes any substantive review.

All these moves, without introducing unamendable provision in the constitution, entrenched the features of 'illiberal constitutionalism' beyond the text of the Fundamental Law, even if Fidesz would lose its parliamentary majority, unless the very unlikely situation in which opposition parties manage to reach a two-thirds majority.

III The Constitutional Court on the Unconstitutional Constitutional Amendments

In July 2010, the new Hungarian government elected in April adopted a law[59] that imposed a so-called special-tax on severance, bonuses and other rewards for state employees who left public service and received such financial benefits in excess of 2 million forints (~$9,000). The tax rate was set at 98% and was to be retroactively applied to all money paid out over the preceding year. The government argued that its predecessor had used severance payments as an instrument for rewarding political loyalists in the public service. At the same time, the punitive tax rate applied not only to the presumed target group of high-level former

59 Act XC on the creation or amendment of certain economic and financial laws (2010. XC. tv. Egyes gazdasági és pénzügyi tárgyú törvények megalkotásáról, illetve módosításáról).

civil servants, but also to teachers, doctors and other professional groups who had received such benefits after decades of service.

In October, the not yet packed Constitutional Court struck down the special tax in a unanimous decision.[60] Noting that justice demands the measure, the government on the very day of the decision introduced amendments to the Constitution allowing retroactive legislation in certain cases, and removing the Constitutional Court's jurisdiction to review laws pertaining – among other things – to budgetary and tax policy, According to the latter amendment, the constitutional court judges can only review these financial laws from the perspective of those rights (the right to life and human dignity, protection of personal data, freedom of thought, conscience and religion, or the right to Hungarian citizenship) that they typically cannot breach. This withdrawal of the right to review financial laws created a solution found nowhere else in the world, since there is no other institution functioning as a constitutional court whose right of review has been restricted based on the object of the legal norms to be reviewed. Therefore, in the case of laws that are not reviewable by the court, the requirement that the constitution be a fundamental law, and that it be binding on everyone, is not fulfilled.

Together with the constitutional amendment, the government also reintroduced the nullified law with unchanged provisions, even expanding its retroactive application to the preceding five years. Ultimately, the Court found a 'loophole' in the constitutional amendment limiting its jurisdiction and nullified the act again in May 2011, citing a violation of human dignity.[61] At the same time, in the context of many other laws its diminished jurisdiction did stop the Court from intervening. In response to various petitions seeking to invalidate both of the government's constitutional amendments, the Court soon confronted the question of whether these measures were unconstitutional and if it had the authority to review it. It issued a decision in July 2011, a year after the retroactive special tax was first adopted.[62] The majority opinion, while rejecting the substantive review of the challenged constitutional amendments, states that

> it is not possible to rule out the Constitutional Court's jurisdiction with regard to the review of the procedural invalidity of constitutional provisions, since unlawfully or even unconstitutionally adopted legal provisions that suffer from constitutional invalidity are considered automatically void, as if they had never been created in the first place.[63]

Regarding the mentioned Act on the Transitional Provisions to the Fundamental Law, the Constitutional Court ruled that the parts of the Transitional Provisions of the Fundamental Law that are not transitory in nature cannot be deemed as

60 Constitutional Court decision 184/2010. (X. 28.)
61 Constitutional Court decision 37/2011. (V. 10.)
62 Constitutional Court decision 61/2011. (VII. 13.)
63 *See* a detailed analysis of the decision in G. Halmai, 'Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?', *Constellations*, Vol. 2, 2012.

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part of the constitution, and are therefore invalid.[64] Although this decision did not go into the substance of the constitutionality of the Transitional Provisions, since the petition of the ombudsman asked exclusively a formal review, the majority of the judges this time emphasized in the reasoning that in order to keep the unity of the constitution they may consider looking at the substance of a constitutional amendment.

On 21 May 2013, the Constitutional Court ruled on the constitutionality of the Fourth Amendment.[65] In its petition, the ombudsman argued that, on the one hand, by failing to discuss parts of the suggested modification to the amendment at the plenary session, the Parliament has violated the formal requirements of the amendment procedure and, on the other hand, some provisions of the amendment, which are in contradiction with provisions of the Fundamental Law, endanger the unity of the constitution, which is in his view also a formal requirement of the amendment procedure. The majority of the judges did not find any formal mistake in the amendment procedure, therefore rejected the first part of the petition, and arguing with the lack of their competence have not reviewed the contradictions among constitutional provisions on the basis of the ombudsman's unity of the constitution argument. The majority of the judges argued that there is no substantial limit to the amendment power, and consequently the Constitutional Court has no jurisdiction for such a review.

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As discussed above, the comprehensive transitional constitutional amendment of 1989 did not use any explicit unamendability provision, and the jurisprudence of the Constitutional Court also did not develop implicit limits to further constitutional amendments. Instead, the 1989 constitution introduced the institution of the two-thirds majority laws to make it harder for governments with simple parliamentary majority to change the basic institutional structure of the constitution as well as the content of fundamental rights. This higher amendability threshold was able to guarantee the most important achievements of liberal constitutionalism established by the transitional constitution of 1989 until a governing coalition reached the two-thirds majority, and was able not only to change the cardinal laws, but also the constitution itself, without any contribution of opposition parties.

Due also to the disproportional election system, first a Socialist-Liberal coalition got two-thirds of the seats with slightly more than absolute majority of the votes in 1994. With its constitution-making majority, the MSZP-SZDSZ government attempted to write a new constitution, trying also to involve at least parts of the opposition parties, but failed. When Fidesz, with its tiny coalition partner, the Christian Democratic Party again with 53% of the votes, received more than two-thirds of the seats during the 2010 parliamentary elections, it immediately star-

64 Constitutional Court decision 45/2012. (XII. 29.)
65 Constitutional Court decision 12/2013. (V. 24.)

ted to enact a new constitution, and change all the crucial two-thirds majority laws, without any contribution of opposition parties. This entrenchment of 'illiberal constitutional values', even without unamendability provision in the constitution, turned out to be effective not only because Fidesz repeated its two-thirds majority victory in the 2014 election, and will most probably do so in 2018 as well, but also because the opposition parties proved to be incapable of receiving a similar two-thirds majority to be able to change the entrenched constitutional structure. Even between 2015 and 2018, when Fidesz did not have the two-thirds majority, no change could have occurred in the system.

Ninety days before the 2018 election, Fidesz, thanks to a contra legem interpretation of the packed National Election Commission, was even able to make a collaboration of smaller opposition parties against Fidesz's candidates impossible. Since the amendment of the Law on Electoral Procedure requires two-thirds majority Fidesz did not have, the National Election Commission, loyal to the governing party, came to rescue with its guidance to change the previous interpretation of the provision on the requirement of national list of the parties. The original wording of the rule prohibits any political party that does not put forward at least 27 candidates for individual constituencies from running a party list at the same time.[66] According to the uncontested application of the provision during the 2014 election, removals of candidates due to step-back on behalf of other parties' candidates after the registration of the party list did not affect the validity of the list, while the new guidance makes it mandatory to remove the party list.[67] This practice is very similar to that of the Polish government's since 2015, which without having a constitution-making majority, violates the valid liberal democratic constitution through legislative changes, and the packed Constitutional Tribunal does not invalidate the clearly unconstitutional laws.

D Conclusion

If we try to answer the initial question of this article whether unamendable constitutional provision can prevent the decline of constitutionalism, the case of Hungary, or that of Poland for that matter, does not provide any indication for an affirmative answer. This response can only be hypothetical, as the transitional liberal democratic constitutions neither in Hungary nor in Poland contained unamendable clauses, and even though the constitutional courts consequently protected the main values of a substantive rule of law, such as separation of powers and guarantees of fundamental rights, it did not elaborate implicit eternity clauses, similar to the Indian Supreme Court's basic structure doctrine. But even

66 Ever since 1989, Hungary has a German-type mixed election system in which all voters have two votes: (1) one for a candidate in an individual constituency in a first-past-the-post election (106 seats) and (2) one for a party list that allocates seats to parties based on their share of the party votes (93 seats).

67 Available at: https://budapestbeacon.com/national-election-committee-changes-rules-general-elections/ (last accessed on 19 March 2019).

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if there had been explicit or implicit unamendability rules, nothing would have prevented a new government from entrenching abusive illiberal rules either as a form of constitutional amendment or a totally new constitution as it happened in Hungary, in 2010 and 2011 respectively, or through unconstitutional legislation with the help of the silent Constitutional Tribunal in Poland.

Transitional unamendability, as any other constitutional unamendability, can only work if the actors accept the rules and procedures of the constitutional game, including the authority of a peak court to review the constitutionality of constitutional amendments, as has happened in Germany since the adoption of the Grundgesetz in 1949. In this respect, I have to correct my previous optimism that constitutional unamendability may "serve to prevent the abuses of majority rule".[68] But, even Hungary and Poland without such unamendability rules prevented backsliding of constitutionalism for twenty-plus years after the democratic transition with a consensus among the political players on basic principles of constitutionalism. In recent Hungary and Poland, this does not seem to work anymore. In the case of a new constitution-making process, it is even more required, namely to bound the new constituent power to the 'constitutional essentials' laid down by the previous constituent power, which already stretches the very concept of unamendability altogether.

68 *See* G. Halmai, 'Judicial Review of Constitutional Amendments and New Constitutions in Comparative Perspective', *Wake Forest Law Review,* Vol. 50, 2015, p. 983.