

Constitutional Resilience and Unamendability

Amendment Powers as Mechanisms of Constitutional Resilience

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Abstract

This article aims to explore the relationship between unamendability and constitutional resilience. Inspired by Roznai's theory on the limits of amendment powers, this article seeks to examine how such limits may function as a mechanism of constitutional resilience exploring how unamendability may impact the resilience of a constitution, allowing it to withstand crises while retaining its core functions. The key question is whether entrenchment enhances resilience through its protective shield or, by contrast, fetters resilience by foreclosing adaptability – what does not bend often breaks. The complex relationship between unamendability and constitutional resilience unfolds in the context of different amendment patterns.

Keywords: constitutional change, constitutional resilience, unamendability, constitutional identity.

A Introduction

This article aims to explore the relationship between unamendability and constitutional resilience. Inspired by Roznai's theory on the limits of amendment powers, this contribution seeks to examine how such limits may function as a mechanism of constitutional resilience. According to Roznai's analysis, "constitutional unamendability emphasizes the thin line between constitutional success and constitutional failure".¹ Unamendability could impact the resilience of a constitution, allowing it to withstand crises and retaining its core functions. Unamendability as a rule aims to protect the core of a constitution.

The question is whether entrenchment enhances resilience through its protective shield or, by contrast, fetters resilience by foreclosing adaptability – what doesn't bend often breaks. To do so, it shall first explore the notion of the core of the constitution, which plays a central role in both unamendability theory and constitutional resilience theory, caught in between the need for fixidity and the need for adaptation. Then it shall place unamendability in the context of the

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1 Y. Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*, Oxford, Oxford University Press, 2017, p. 229.

mechanisms of constitutional change that operate different in constitutional orders, approaching it as a form of constitutional rigidity. Lastly, it shall probe the complex relationship between unamendability and constitutional resilience by placing it in the context of different amendment patterns.

B The Core of a Constitution: Between Fixidity and Adaptability

A resilient constitution can respond to severe crises without losing its normativity, enabling also democracy and the rule of law to demonstrate resilience.² This two-pronged definition entails, on the one hand, the ability of a constitution to withstand shocks and, on the other, its capacity to enable the legal order, whose ground rules it sets out, to seek recovery within the constraints of these ground rules. Formal amendment rules are multifunctional and determine the relationship between constitutions and time, which appears to accelerate in times of crisis. Adaptability within constraints and maintenance of core constitutional functions are crucial for constitutional resilience against shocks.³

Constitutional resilience means that core constitutional values persist throughout a crisis. Resilience-building at the constitutional level aims at ensuring that the core purposes of the constitution are accomplishable under any conditions. This suggests that the core functions of the constitution must be pinned down in order to assess how they are expected to be performed in unforeseen adverse circumstances. The ability to continue setting the basic rules of the game is important. Of equal importance is preserving constitutional identity.

Unamendability refers to the limitation on amending constitutional subjects, that is “provisions, principles, rules symbols or institutions”.⁴ It creates constitutional content made not merely to last but to outlast constitutional change. The core of a constitution is important in Roznai’s understanding of unamendability. It is the core of a constitution that makes up its identity. And it is also the core of the resilient constitution that is expected to persevere through crises. As Michel Rosenfeld writes, “constitutional identity is elaborated through a complex dynamic process aimed at integrating successive instances of negation and identification into coherent and mutually consistent narratives of sameness and selfhood”.⁵ To be the same despite changes is what identity is about. To be the same after a major crisis is the stake of resilience.

2 X. Contiades & A. Fotiadou, ‘On Resilience of Constitutions. What Makes Constitutions Resistant to External Shocks?’, *International Constitutional Law Journal*, Vol. 3, 2015, pp. 3-26.

3 X. Contiades & A. Fotiadou, ‘The Resilient Constitution: Lessons from the Financial Crisis’, in A. Herwig & M. Simoncini (Eds.), *Law and the Management of Disasters. The Challenge of Resilience*, Routledge, 2016, p. 1189.

4 Y. Roznai, ‘Necrocracy or Democracy? Assessing Objections to Constitutional Unamendability’, in R. Albert & B. Oder (Eds.), *An Unamendable Constitution? Ius Gentium: Comparative Perspectives on Law and Justice*, Springer, Vol. 68, 2018, p. 29.

5 M. Rosenfeld, *The Identity of the Constitutional Subject Selfhood, Citizenship, Culture, and Community*, Routledge, 2009, p. 29. See also M. Rosenfeld, ‘Constitutional Identity’, in M. Rosenfeld & A. Sajó (Eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2012.

The identity of a constitution, if able to persist throughout a crisis, signals constitutional resilience. Resilience-building at the constitutional level aims at finding ways to render the core purposes of the constitution accomplishable under the stress of a severe crisis. The fundamental rules of democracy and the rule of law must be able to withstand the shock of crises. In liberal democracies, the rule-of-law guarantees are inevitably part of the core of the constitution.⁶

Recent phenomena of constitutional backslide, where the pre-existing constitutional framework was successfully attacked and captured by populist leaders,⁷ shows that constitutions can be vulnerable. According to Rosenfeld, “constitutional identity is not national identity and would cease having an identity of its own if it could simply be folded into the latter”.⁸ This distinction seems to gain particular importance for the constitution to resist the dismantling of the rule-of-law guarantees. According to Kim Lane Scheppele’s analysis, “a momentous political shift is occurring, in which the left/right political spectrum is being replaced by a global/local political spectrum”, while “the local side of the spectrum emphasizes the exclusiveness of community, importance of loyalty and distinctive values”.⁹ Placing constitutional identity in that context suggests that in case constitutional identity is viewed as the same thing as national identity, the constitution becomes vulnerable to ethnocentric populism.

Still, the identity of a constitution is more than the guarantees for democracy and the rule of law. Identity is a work in progress, emerging through a dialogical process. As Gary Jakobson observes, constitutional culture is not a “heavily encrusted essence embedded in a society’s culture”.¹⁰ A constitutional culture bridges the past and the future of a constitution. Much as the essence of resilience, constitutional culture reflects stability through change, sameness despite adaptation.

Constitutional cultures reflect common understandings and attitudes towards the constitution.¹¹ Constitutions emerge and are enacted within a specific legal culture and also operate, are enforced, interpreted, and developed within and through that legal culture.¹² Emphasis put in constitutional identity as an evolving project allows room for adaptation: sameness is maintained

6 On a further elaboration of the concept of constitutional resilience and its connection to democracy, see R. Albert & M. Pal, ‘The Democratic Resilience of the Canadian Constitution’, in M. Graber, S. Levinson & M. Tushnet (Eds.), *Constitutional Democracy in Crisis?*, Oxford, Oxford University Press, 2018.

7 See K.L. Scheppele & L. Pech, ‘What Is the Rule of Law Backsliding?’ (2018), available at: <https://verfassungsblog.de/what-is-rule-of-law-backsliding/>.

8 Rosenfeld, 2009, p. 29.

9 See K.L. Scheppele, ‘Autocratic Legalism’ (2017), available at: <https://blogs.eui.eu/constitutionalism-politics-working-group/populist-constitutionalism-6-kim-lane-scheppele-autocratic-legalism/>.

10 G. Jakobson, ‘Constitutional Identity’, *The Review of Politics*, Vol. 68, No. 3, 2006, pp. 361-397. See also G. Jakobson, *Constitutional Identity*, Princeton, Princeton University Press, 2010.

11 J. Mazzone, ‘The Creation of a Constitutional Culture’, *Tulsa Law Review*, Vol. 40, No. 4, 2004, pp. 671-698.

12 See H. Vorländer, ‘What Is “Constitutional Culture”’, in S. Hensel, et al. (Eds.), *Constitutional Cultures*, Cambridge, Cambridge Scholars Publishing, 2012, p. 21.

through evolution. Unamendability can fit this scheme only if it somehow succeeds to encourage adaptation not despite preserving, but, adversely, because it preserves the core of the otherwise-evolving constitutional identity.

Adrienne Stone writes that there are two notions of the core of a constitution: a core that every constitution contains and a core that distinguishes this constitution from other constitutions. Under this rationale, a constitution that does not provide for the rule of law does not even qualify as a constitution.¹³ This is important for the definition of resilience: a resilient constitution does not merely withstand a severe crisis itself but it also makes it possible for the rule-of-law guarantees to be operational in crisis conditions. Still, the rule of law itself appears to have become a more flexible notion. It is possible that it is the very type of rule of law guaranteed by a constitution that gives a constitution its identity. As for the particular features that make each constitution unique, it would be worth asking, if they are indeed so embedded in a constitutional culture, then why should they require special entrenchment? The constitutional and political culture are sources of factual rigidity that blocks constitutional change even when it is procedurally available.

When what is considered part of the constitutional identity is proven vulnerable, resilience may face extra obstacles. During the shock of the financial crisis, the Greek and the Portuguese Constitutions were both severely tested, partly because of the important place the protection of social rights had in terms of constitutional culture.¹⁴ Unavailability of resources did not suffice to convince that constitutional normativity did not give way. The strong presence of social rights within both constitutions maximized, thus the impact of the crisis on the constitution rather than protect their carriers.¹⁵ Nonetheless, to abolish such rights, especially under the pressure of an acute crisis, regardless of the fact that they are not protected by eternity clauses, would have an immense symbolic impact and possibly little practical result. The synthesis of the rule-of-law principle with the welfare state protections obscured what the true nature of rule-of-law backslide is, at least during the first phase of the financial crisis, putting at risk constitutional faith.

The core of a constitution during a crisis cannot but encompass the rule of law: it is the rule of law plus. Michel Hein supports that eternity clauses, which he

- 13 A. Stone, *Unconstitutional Constitutional Amendments: Between Contradiction and Necessity* (University of Melbourne Legal Studies, Research Paper No. 786, available at: <https://ssrn.com/abstract=3216896>); R. Dixon & A. Stone, 'Constitutional Amendment: A Comparative and Philosophical Reflection', in D. Dyzenhaus & M. Thorburn (Eds.), *Philosophical Foundations of Constitutionalism*, Oxford, Oxford University Press, 2016.
- 14 See X. Contiades & I.A. Tassopoulos, 'The Impact of the Financial Crisis on the Greek Constitution', in X. Contiades (Ed.), *Constitutions in the Global Financial Crisis: A Comparative Analysis*, Routledge, 2013; J.E.M. Machado, 'The Sovereign Debt Crisis and the Constitution's Negative Outlook: A Portuguese Preliminary Assessment', in X. Contiades (Ed.), *Constitutions in the Global Financial Crisis: A Comparative Analysis*, London, Routledge, 2013.
- 15 See X. Contiades & A. Fotiadou, 'How Constitutions Reacted to the Financial Crisis', in X. Contiades (Ed.), *Constitutions in the Global Financial Crisis: A Comparative Analysis*, London, Routledge, 2013a; M. Tushnet, 'The United States Constitution and the Great Recession', in X. Contiades (Ed.), *Constitutions in the Global Financial Crisis: A Comparative Analysis*, London, Routledge, 2013.

views as the most absolute form of entrenchment, fulfil their functions in case they “contribute to the protection for democratic constitutionalism”.¹⁶ What is open is the way they contribute towards this end. Is it merely through their content, or are there other ways in which they do so?

To answer this question, the complex relationship of constitutions with time has to be addressed. This relationship becomes more complex in conditions of crisis, as constitutional time appears denser. Sometimes during shock, it is hard to observe whether what is unfolding is a crisis or a transition. Eternity clauses create a thread, which surpasses time, determining subtle balances.

Which is the function of eternity clauses?

Eternity clauses are something more than mere relics of the mystical constitution. They determine the balance between constitutionalism and democracy, shifting the weight towards constitutionalism. Creating an off-limits area, they narrow the scope of democratic deliberation. Material limits aspire to freeze time, yet often by including abstract core concepts of the constitution such as the form of government, the character of the polity, and fundamental rights, they inescapably abandon self-referential introvert inertia, craving dynamic understandings of concepts. At the same time, they open the door to judicial review with regard to the substance of constitutional amendments. Judicial competence to delineate the substantial limits of the amending power renders judges guardians of the ‘eternal’ with authority to decide what is permanent, and further enhances their role, allowing them entrance into a space where the stakes of democracy versus constitutionalism are very high. The extent to which judges may meddle with constitutional amendment is dependent on the type of the eternity clause, that is, its content and the function it is expected to perform. Eternity clauses, for example, may entail the polity or the spirit of the constitution, the core protection of fundamental rights, or they may aim to preserve forever or to transform constitutional reality towards a specific direction. For example, Germany, Greece, France, and Portugal all have eternity clauses aspiring to entrench what matters most, ranging from the protection of the republican form of government or the inviolability of human dignity to the inclusion of more detailed directive principles and fundamental rights. Such choices stem from history and constitutional culture, yet a common thread that marks the reality of constitutional change in these countries is that it is political elite-driven, be it through conflict or through consensus. The absence of eternity clauses in Switzerland, Ireland, and Denmark, where the constitution vests in the people the final say on constitutional revision, suggests that this connection is not merely coincidental.¹⁷

- 16 M. Hein, ‘Do Constitutional Entrenchment Clauses Matter? Constitutional Review of Constitutional Amendments in Europe’, *International Journal of Constitutional Law*, Vol. 17, 2019 (forthcoming).
- 17 X. Contiades & A. Fotiadou, ‘Models of Constitutional Change’, in X. Contiades (Ed.), *Engineering Constitutional Change. A Comparative Perspective on Europe, Canada and the USA*, Abingdon, Routledge, 2013b, pp. 417-468.

This weight shift is important when a polity is faced with unexpected shocks. The “language of eternity”¹⁸ betrays different attitudes towards constitutional change.¹⁹ The subtle balance between the two components of democratic constitutionalism determines the different routes that constitutional change may follow, as well as the safeguards against the paths that lead to backslide.

C Unamendability: An Institutional Rigidity and a Resilience Mechanism

To assess whether unamendability can operate as a resilience mechanism, it must be understood as part of the amendment formula and the particular mechanisms of constitutional change in place, which must, in turn, be viewed as part of a system of rigidities, that is, institutional and factual hindrances to constitutional change that interact in the context of specific amendment models.²⁰ If understood as an absolute form of constitutional fixidity, unamendability appears as a fetter to the adaptability of a constitution. Yet, the true function of unamendability surfaces only in light of its rapport with its constitutional environment.

Institutional rigidities are institutionally embedded ways of increasing the difficulty level of constitutional change. The most obvious such rigidity is the amending formula. Factual rigidities are sources of impediments to constitutional change situated in the practices, attitudes, and behaviour patterns of different actors, which emerge through the application of institutional requirements, or address areas that fall outside the scope of institutional regulation, or stem directly from the political, legal, or social culture and constitutional ethos.

Rigidities cut through the formal/informal dipole, connecting the dots between the variables that determine constitutional change. Institutional and factual rigidities are communicating vessels, and the interaction between them is unavoidable.²¹ The “hydraulics” of constitutional change²² operate in a way that channels change through the available byways. No hindrance to constitutional change operates independently: constitutional rigidities impact one another. This has particular importance from the aspect of constitutional design. Changes at the institutional level influence factual rigidities and vice versa. The interdependence between different rigidities determines the dynamics of constitutional change. Incompatibility between institutional arrangements and political or legal culture often results in dysfunctionalities.

When the concept behind the design of the amendment formula is to render the exercise of the amending power a simulation of the exercise of constituent

18 D. Baranger, ‘The Language of Eternity: Constitutional Review of the Amending Power in France (or the Absence Thereof)’, *Jus Politicum*, No. 5, 2010. Available at: SSRN: <https://ssrn.com/abstract=2039346>.

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

20 Contiades & Fotiadou, 2013b, p. 417.

21 On the definition of constitutional rigidities and the way they function, see X. Contiades & A. Fotiadou, 2013b, p. 417.

22 See H. Gerken, ‘The Hydraulics of Constitutional Reform: A Skeptical Response to Our Undemocratic Constitution’, *Drake Law Review*, 2007.

power, an inbuilt permanent dissonance is created between the rules and the environment within which they shall operate. According to Roznai's spectrum theory,

the more the democratic characteristics of the amendment power resemble those of the primary amendment power the less the amendment power should be bound by limitations, the more it resembles ordinary power the more it must be bound by limitations.²³

This conception of the constituent power refers to a rather idyllic romanticized process: inclusive, deliberative, and democratic.²⁴ To replicate that ideal image, time-consuming procedures are designed, which include supermajorities and referendums. Those are clear signs of the attempt to copy the constituent power. By contrast, relaxed procedures seem to distance amendment power from constituent power and thus to warrant, or at least allow, more unamendabilities. Even then, unamendability, for Roznai, does not block all 'democratic avenues' for constitutional change but renders one such avenue unavailable.

The attempted simulation of the primary amendment power often ends up in extreme difficulty of change. Amending formulas may have unintended consequences, especially when formal amendment rules fail to match the political and constitutional environment in which they shall operate. Although it is easy to model the prerequisites for change imitating the constituent moment, the conditions in which the primary constituent power is exercised and those of the secondary delegated power are most likely dissimilar – and it is most probably a good thing too. Not only is the constituent moment often idealized but it is a sign of a constitutional democracy maturing to distant itself from the conditions that gave birth to a constitution. The inherent disharmony between amendment rules and environment is the cost of romanticizing the constituent power.

As David Law writes,

a romantic constitution is the product of a kind of immaculate conception. It is born free of imposition or coercion, in a magical land beyond the realm of power politics and foreign influence, in which free and equal members of an inclusive yet distinctive community engage in constitution-making that somehow manages to address the nation's unique needs and express the nation's unique identity while also respecting a generic checklist of global norms—electoral democracy, fundamental human rights, the rule of law, and so forth.²⁵

23 Y. Roznai, 'Amendment Power, Constituent Power, and Popular Sovereignty: Linking Unamendability and Amendment Procedures', in R. Albert, X. Contiades & A. Fotiadou (Eds.), *The Foundations and Traditions of Comparative Constitutional Amendment*, Hart Publishing, 2017, pp. 23-69.

24 See D.S. Law, 'Imposed Constitutions and Romantic Constitutions', in R. Albert, X. Contiades & A. Fotiadou (Eds.), *The Law and Legitimacy of Imposed Constitutions*, Routledge, 2018, p. 34.

25 *Ibid.*

In other words, the constituent power narrative is one of the basic tools for constitutional marketing, which is the process of promoting and ‘selling’ a constitution to an audience. The saga of constituent power renders constitutions attractive to their target audience. This is a noble function, aimed at refurbishing the constitutions with legitimacy but often comes at a price: it sets dysfunctional standards to the (perceived as) more mundane but equally important amending power.

It is true that the enactment of a constitution constructs a memory.²⁶ This memory is important for the constitutional identity of a nation. The democratic pedigree of a constitution is established at that moment. The memory of this moment is intertwined with the symbolic power of the constitution and lingers on throughout the multiple changes and transformations a constitution undergoes. The constitutional document inescapably reflects the memory of the constituent moment. This memory, however, is not static but in itself subject to perpetual revision. “Memory is a mental representation of the past but it has only a partial rapport with the past.”²⁷ The memory of the constituent moment cannot escape distortions effected by the passage of time and constitutional narratives.

Unlike the more mundane constituted power, constituent power tends to retain its mythical dimension. Demystifying the memory of the constituent moment may have negative impact on the symbolic power of the constitution and on constitutional faith. Using this romanticized version, however, to design the rules that monitor future constitutional change is something different. The memory of the honeymoon era and a romanticized remembrance of the wedding ceremony stripped from any unpleasantness has a positive function for a marriage. In case, however, it would dictate the expectations from marital life, it is far from certain that it would be beneficial for the resilience of the marriage.

Contemporary tendencies show that alternative forms of rigidity emerge, giving a different conceptual lens through which to examine unamendability. For example, resemblance to ordinary law may suggest a novel trend of entrenchment. As Vestee and Zackin explain,²⁸ detail is an alternative source of constitutional rigidity, constraining courts, legislators, and the executive to act in accordance to specific constitutional rules. Such new forms of constitutional rigidity challenge more ‘traditional’ forms of rigidity, such as eternity clauses, especially with regard to their ability to guarantee respect for the constituent democratic will of the people. Whether detail is an institutional rigidity stemming from the

26 C. Dupre & J. Yeh, ‘Constitutions and Legitimacy over Time’, in C. Saunders, T. Fleiner & M. Tushnet (Eds.), *Routledge Handbook of Constitutional Law*, Routledge, 2013, pp. 45-56.

27 H. Rousso, *The Haunting Past: History, Memory, and Justice in Contemporary France*, University of Pennsylvania Press, 2002, p. 4; R. Uitz, *Constitutions, Courts, and History: Historical Narratives in Constitutional Adjudication*, Central European University Press, 2005, p. 241.

28 M. Versteeg & E. Zackin, ‘Constitutions Unentrenched: Toward an Alternative Theory of Constitutional Design’, *American Political Science Association*, Vol. 110, No. 4, 2016, pp. 657-674.

constitutional text and not from the formal amendment rules depends on the constitutional context and the true conditions in which it operates.²⁹

The observation of the way mechanisms of constitutional change function when producing change allows placing unamendability within the overall context. Constitutional change patterns are based on correlations between amending formula, political system, constitutional ethos, judicial system, legal culture, and other factors that explicitly or implicitly impact constitutional change.³⁰

For instance, detecting how constitutional adaptability works and how it relates to the amending formula, in a consensus-dominated culture as opposed to a distrust-dominated culture, may provide insight into how constitutional design can render constitutions resilient, enhancing their resistance to external pressures. Formal rules including material limits are but part of a mechanism, and similar rules may operate differently in an environment where a consensus to effectuate change exists, as opposed to an environment in which such consensus is lacking. Intentional efforts to control the mode of constitutional change by drafting or changing amendment rules must, therefore, be culture-conscious. Culture-consciousness is even more crucial for understanding how constitutional change mechanisms can interfere with formal amendment rules within an environment characterized by distrust. Political conflicts, distrust, polarisation, and veto strategies create the context within which the legal stringency of amendment rules may be heightened. Especially when, in such an environment, amendment rules require augmented consensus, multiple unintended consequences may ensue.

This must be taken into consideration when using Roznai's spectrum theory for designing amendment rules. Correlating unamendability exclusively with mechanisms of formal change runs the risk of overlooking the overall rigidity level. The difference this makes is potentially overwhelming. Creating a protective shield over the core of a constitution may facilitate stability through change by providing a safety valve, which allows adaptability and thus constitutes a resiliency mechanism. By contrast, in case unamendability complements ostensibly relaxed amendment rules, which, however, operate in an environment where factual rigidities block constitutional change, or in case amendment rules, by attempting to render the amending power a simulation of the constituent power, multiply rigidities, unamendability becomes an extra hurdle which solidifies difficulty of change. In such cases difficulty of constitutional change may become itself part of the constitutional identity, distancing the constitution from the people. Constitutional resilience is achieved through different paths in different environments, so placing unamendability within amendment models reveals weather and to which extent it can operate as a constitutional resilience mechanism.

29 On the functions of formal amendment rules, see R. Albert, 'Formal Amendment Rules: Functions and Design', in X. Contiades & A. Fotiadou (Eds.), *Routledge Handbook of Comparative Constitutional Change*, Routledge (forthcoming, 2019); R. Albert, 'The Expressive Function of Constitutional Amendment Rules', *McGill Law Journal*, Vol. 59, No. 2, 2013, p. 225.

30 Contiades & Fotiadou, 2013b, p. 434.

D Resilience and Unamendability within Different Amendment Models

Resilience is defined as

the ability of a system and its component parts to anticipate, absorb, accommodate, or recover from the effects of a potentially hazardous event in a timely and efficient manner, including through ensuring the preservation, restoration, or improvement of its essential basic structures and functions.³¹

At the heart of this reasoning lies the “adapting capacity, the ability to adapt to changing circumstances while fulfilling one’s core purpose”.³² The adapting capacity of a constitution depends on the model of constitutional change in which it operates. Constitutional resilience is correlated with amendment models.

Constitutional change can be classified into distinct amendment models: the elastic model, the evolutionary model, the pragmatic model, the distrust model, and the direct democratic model.³³ A constitutional amendment model comprises the set of operative mechanisms within a legal order amounts, corresponding to distinct profiles of constitutional change.

Constitutional change is accomplished through the operation of mechanisms involving actors, amending formulas, and other constitutional arrangements that interact in various combinations and work together to channel change. The actors involved and the means employed to effect change connect to form a mechanism. Mechanisms may be simple or elaborate, and they may operate simultaneously, alternatively, or complementarily.

Whether the formula is an attempted simulation of the constituent moment endeavouring to imitate the exercise of constituent power or whether it includes eternity clauses is a classification criterion and interacts with other criteria which include: if and in what form popular participation is part of the amending process; whether the amendment process can be concluded within one parliamentary term; whether amendment rules provide for supermajorities or enhanced majorities, who are the designated players in constitutional amendment – *i.e.*, if besides the parliament, the head of state or the cabinet also have a role; whether, in addition to organs of the central state, organs of constituent or peripheral states participate; and whether amendment rules regulate time, imposing a mandatory lapse of time between the conclusion of an amending process and the initiation of a new one. Infinite combinations of such arrangements may be found within constitutions.

Eternity clauses are interrelated to the type of constitutional review and the role of the judiciary in constitutional change. Would judges be willing to rule that a constitutional amendment is unconstitutional? If the judicial culture does not allow this kind of intervention, eternity clauses are rendered a standard

31 C. Field *et al.* (Eds.), *Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation*, New York, Cambridge University Press, 2012, p. 33.

32 A. Zolli & A.M. Healy, *Resilience: Why Things Bounce Back*, Free Press, 2012.

33 Contiades & Fotiadou, 2013b, p. 417.

addressed primarily to the political actors who effect constitutional change. This changes the place of unamendability within the system of rigidities and its rapport with other institutional and factual impediments to constitutional change.³⁴

1. Mechanisms of constitutional change operating under an unentrenched constitution comprise the elastic model. No procedural limits and no eternity clauses exist. The routes of change in the absence of an amending formula when no explicit limits would be totally open, nonetheless, are often blocked by factual rigidities.

The elastic model encompasses mechanisms operating under an unentrenched constitution, which may be altered through the normal law-making process, having no procedural limits and no eternity clauses. The way an uncodified constitution lacking an amending formula undergoes formal and informal change challenges preconceived notions of rigidity, amendment rates, formal/informal change correlations, constitutional continuity, and self-restraint. The legislator appears to be omnipotent. No obstacles to revision exist other than self-restraint flowing from legal culture, tradition, and political accountability. Such obstacles are not neglectable. They may amount to a severe form of constitutional rigidity, binding actors. Judicial self-restraint emanating from respect for parliamentary supremacy is a safety valve against judicial activism. The judiciary do not wish to claim the lead in constitutional change despite the fact that they do effect such change, especially since common-law judges feel at home with implicit law-making. Normal law-making procedures are, therefore, used as mechanisms of constitutional change. In the absence of formal amendment rules, detecting constitutional change is subject-dependent.

Adaptability, the fundamental prerequisite for achieving resilience, is readily available. There is no procedural obstacle to adaptation – rigidities stem from the constitutional culture. The stakes are finding stability through change. Implicit unamendabilities must play the role of the stable axis, which shall fetter the abuse of adaptability at the face of shock. The challenge of resilience in the elastic model is maintaining the core of the constitution intact: the risk factor is the very availability of unblocked channels of change that allow overreacting to a crisis. Controlling adaptability under stress conditions is important for resilience.

2. The evolutionary model describes the dynamic evolution of a formal change-resistant constitution through informal change. It results from the combination of stringent amendment rules with a very strong judiciary willing to engage in dynamic constitutional interpretation. The basic feature of the evolutionary model is judge-made change, effectuated by the judge who has both the will and the legitimacy to alter the constitution. Textual changes are rare and may result from a dialogue between constitutional lawmaker and judge, as a reaction to judge-initiated changes that push the lawmaker to act in order to either adopt or overturn them.

34 See R. Albert, 'Constitutional Handcuffs', *Arizona State Law Journal*, Vol. 42, 2010, pp. 664-715. For Albert, eternity clauses can potentially lock again the constitutional handcuffs that citizens can unlock by the key of amendatory power.

Informal constitutional change results from dynamic interpretation. What characterizes it is that it is meticulously construed through legal reasoning as befits judicial justification. Judge-made change is not, however, attributed exclusively to the judge; political elites or the people might be the driving force behind judicial constitutional evolution.³⁵ The distinct feature of the evolutionary model is that constitutional change is filtered through judicial channels. The judge is the key player in this model, and constitutional review operates as a mechanism of constitutional change. A wide array of alterations that range from being perceived as constitutional revolutions to incremental maintenance fall within the scope of informal change. Constitutional moments mark major changes occurring outside the formal amendment process. By blocking the formal routes of change, the amending formula regulates constitutional change in this model, mainly by causing outsourcing amendment to the judiciary.

Through constant judicial elaboration, the constitution remains alive and relevant, and it is attributed the characteristics of a living organism with the ability to adapt to changing times and demands.³⁶ Constitutional resilience is thus dependant to a great extent on judicial attitude. How will the judiciary respond to a crisis? Will there be a sudden change in precedent? Will dynamic interpretation change long-standing constitutional principles? The control the judicial branch exercises over the other branches that make and implement laws to respond to crises is the determinant of constitutional resilience.

3. The pragmatic model allows constitutional change to take place smoothly. Efficiency of formal change is the most characteristic feature of the way this model works. The basis of pragmatism is either the amending formula or a consensual political culture, or both. Constitutional arrangements may *per se* point in the direction of easily achieved constitutional maintenance. Alternatively, practicality may be fostered by compromise and cooperation between political parties, which provides a consensual background for the operation of constitutional change mechanisms. Slow, gradual change and updating are characteristic of the pragmatic model. When the amending formula allows constitutional revisions to become daily routine in political life, constitutional adaptability is promoted. It is possible, however, that deeper political cleavages lurk beneath the surface of agreement on constitutional updates, and those may block dramatic changes to the constitution. When agreement on constitutional issues is encouraged by the amending formula, this leaves a clearly discernible imprint on the political system.

Many variations of the way consent or compromise work to bring forth change exist. The amending formula may be demanding, designed to secure constitutional stability; nevertheless, constant change is feasible due to a consensual constitutional ethos. It is possible that the formula is bypassed, stretched to its

35 B. Ackerman, *We the People*, Reprint edition, Belknap Press, 1993 and D. Law, 'Constitutions', in P. Cane & H. Kritzer (Eds.), *The Oxford Handbook of Empirical Legal Research*, Oxford, Oxford University Press, 2010.

36 Z. Elkins, T. Ginsburg & J. Melton, *The Endurance of National Constitutions*, Cambridge, Cambridge University Press, 2012.

limits, and eroded to serve the needs of constitutional maintenance. Political elites may tamper with the amending formula to produce the practical results that best serve constitutional adaptability. In this line of changes, the amending formula is not violated but twisted to fit the requirements of the cooperating political class, while constant change is allowed without normally amounting to major shifts or reforms. Amending formulas may thus lead to unintended, yet widely accepted consequences.

A strong judiciary is a feature of this model; nevertheless, there is no need for constitutional review to operate as a substitute for formal amendment. Either the formula itself permits constant change or political compromises allow meeting the requirements set by the formula, so change is not sidetracked and channelled through judicial interpretation. Change can be effected through formal channels, although in some cases, differently from the way formal amendment rules were originally designed to function. Judicial interpretation plays a complementary role and is not the primary vehicle of change. The role played by the people is secondary as well, since it is the consenting political elites that pull the strings of constitutional change.

In a context where adaptability is the basic feature, constitutional resilience is enhanced. In case adaptability is allowed by the formula, the formula itself is an adaptability mechanism. When the adaptability is culture-driven, constitutional resilience is culture dependent. Shock resistance is facilitated when consensus on how to respond to a crisis exists. The only danger is that crises may undermine the very consensus that is the basis of adaptation, in which case, the impact of a crisis may be enhanced. Still, adaptability through consensus remains an optimal resilience mechanism.

4. In the direct-democratic model, the people have the final say on constitutional change, and they can also initiate change. The citizens are the drivers of constitutional change. Constitutional referendums are mandatory and an integral part of the system. Eternity clauses setting substantive obstacles to revision do not exist. The political party system is characterized by fragmentation and diversity. Constitutional decision making is citizen-led: the citizens are the designated amenders of the constitution.³⁷ Popular decision making lies at the heart of this model, which is built around the concept of substantiating popular sovereignty in constitutional change. In a culture where the people get to take the decisions on constitutional reforms, experts can only play a supportive technical role. The design and qualities of referendums are of great importance, while the role of political elites and courts is influenced by the fact that the ultimate amending power lies with the people. A test area for different facets of constitutionalism and civic participation emerges, as the side effects of the people retaining the final word on constitutional revision are revealed.

What is at stake in this model is finding ways to delimit the power of the people with regard to the protection of human rights and minorities, that are partic-

37 See X. Contiades & A. Fotiadou (Eds.), *Participatory Constitutional Change. The People as Amenders of the Constitution*, Routledge, 2016.

ularly vulnerable at the face of crisis. The constitution can adapt in crisis as it is entrusted in the hands of the people, who may also initiate change. Constitutional culture and familiarity with direct-democratic tools are expected to be a shield against the dangers of populism that go hand in hand with crises.³⁸

5. The distrust model is characterized by political polarization extending to issues of constitutional politics. Disputed constitutional issues decided by the judiciary are often issues that cause major political disagreement, so judicial resolution towards one or the other direction covers areas where political consent is unfeasible. Judicial filtering provides a distinct type of informal constitutional change, marked by the distinct style of judicial reasoning. Eternity clauses may exist, complementing a unique interplay with notions of the eternal, due to the stringency of the amending formula. This shows the intention of remarkable constitutional time endurance. Rigidity is often perceived as an asset. The amending formula usually requires that consensus conditions similar to those of the original constitutive moment exist. This gives formal constitutional change extra symbolic weight but can also amplify difficulty of formal change.

Theories of judicial interpretation acquire specific significance in this context, where the boundaries between interpretation and amendment are obscure, and the way the task is described and perceived by actors is equally important with what it is in reality. Achieving constitutional resilience at the face of crisis is not an easy task in conditions of distrust. Unamendability in environments characterized by distrust between players can work in different directions. Blocking formal change at the face of crisis may work as a resiliency mechanism, providing stability, but it may also lead to diminishing the symbolic value of the constitution. The distrust model provides the ideal environment for testing Roznai's spectrum approach to the link between procedural rules and unamendability with regard to constitutional resilience. Polarization and political distrust impact the way amendment rules work in practice. The quest of reviving the consensus of the constituent moment every time the constitution is amended may lead to unexpected rigidities.

E Conclusion

Roznai's work has brought a fresh vibe into the concept of unconstitutional constitutional amendment. Unamendability refers to the limitation on amending constitutional subjects, such as provisions, principles, rules symbols, or institutions.³⁹ As such, it dives into theories on the constituent/constituted power divide with a new twist: the spectrum theory which connects the two into a permanent interactive symbiotic relationship. The success of further developing this theory relies on two factors:

38 See P. Blokker, 'Constitutional Reform in Europe and Recourse to the People', in X. Contiades & A. Fotiadou (Eds.), *Participatory Constitutional Change. The People as Amenders of the Constitution*, London, Routledge, 2016, p. 31.

39 Roznai, 2018, p. 29.

- a the ability to view the two powers through the same conceptual lens, that is, avoid a romanticized approach of the constituent power exclusively in combination with a pragmatic approach of the amending power and
- b the ability to place both in the context of an overall system of constitutional rigidities that determine how constitutions change in distinct political and constitutional cultures. Unamendability operates within a matrix of interacting rigidities and acquires its true identity in connection to amendment models.

Constitutions are mystified subjects. They are made to last; they refer to eternity and inspire faith and worship. The resilient subject is inherently vulnerable, yet viewing constitutions as vulnerable does not correspond to the way constitutions are usually conceptualized. Unamendability at first sight appears to be a mechanism aimed at permanence, armouring the constitution at the cost of adaptability. Unamendability, however, is a mechanism that operates in conjunction with the other constitutional mechanisms that monitor change. It is part of a unique combination of institutional and factual constitutional rigidities in the context of specific amendment models.

Demystifying the constitution through emphasis on practicability allows taking a clearer look at amendment mechanisms and the way they function. The parameter of constitutional resilience does not compromise constitutional functions in a world of risk and vulnerability. Adversely, it seeks to investigate how those functions are maintained and constitutional normativity does not fade when encountered with crises.

Excursus: A short anecdotal story on unamendability

A historical anecdote from the Greek political history reveals that the limits to amendment power can be clearly understood by the people and that a dialogue about unamendability is not necessarily a technical constitutional issue but can be a matter of public confrontation. Eleftherios Venizelos, a prominent liberal politician of the early 20th century elected several times as prime minister of Greece, had the following public confrontation with the people attending his first public speech, which he delivered in Athens on 5 September 1910:

Venizelos: Elections have been called for a Constitutional Revision Assembly

The crowd: We want a Constituent Assembly

Venizelos: I repeat Revision Assembly

The crowd: Constituent

Venizelos: I said Revision

It is recorded that silence fell, and from that moment on, Venizelos had imposed his will upon the people through persuasion with regard to the amendment of the Constitution of 1864, which was in force at the time. What is important in this dialogue is that Venizelos and the people alike understood what the stakes were: a constituent assembly would inevitably address the issue of changing the form of government, and more precisely abolishing the monarchy, which was beyond the capacity of the delegated amendment power. Venizelos thought that the time was

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not ripe for this to happen and would trigger multiple problems that would fetter the reforms he wanted to effectuate towards the modernization of the Greek state.

In order for change to happen, some things had to remain unchanged for a while. Reforms at the time would be best achieved without a violent break from the past, in the context of a turbulent constitutional history. Unamendability served change through stability rather than vice versa, made reforms possible through adaptation, and thus worked as a tool for achieving constitutional resilience.