

Unconstitutional Constitutional Amendment and Re-enactment: Rules, Choices and Consequences

Emenda Constitucional Inconstitucional e Reedição: Regras, Escolhas e Consequências

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Abstract

In contemporary comparative constitutional studies, one of the most intriguing questions is: Is it possible to declare a constitutional amendment to be unconstitutional? If so, by whom and by what standards? This research delves into unconstitutional constitutional amendments and re-enactments, the choices, the rules, and the consequences that follow. A doctrinal research method is used through secondary legal data in both descriptive and prescriptive approaches. In this research, I take a holistic study of three constitutional changes – both successful and unsuccessful changes in The Gambia, Kenya and Israel – as fresh issues and use them to draw a conclusion. Formal constitutional amendment rules are the decisive mechanisms to constitutional precinct, but constitutional re-enactments tend to digress from its presuppositions and is not aligned with its basic structure, thereby destroying the continuity of the legal order. A constitution ought to be a speaking one that arises to the constant change of society because there has been a discernible change in the global constitutional debate away from the normative or institutionalist perspective and toward a more analytical and comparative approach when assessing the setting of constitutional making processes. Therefore, to change a significant provision of a constitution that has direct effect on the status of a state by taking the people away from the basket of progressive realization of a state is a non sequitur to constitutional amendment rules.

Keywords: Amendment rules; Basic structure doctrine; Constituent power; Constitutional dismemberment; Constitutional entrenchment.

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Resumo

Nos estudos constitucionais comparativos contemporâneos, uma das questões mais intrigantes é: é possível declarar uma emenda constitucional inconstitucional? Em caso afirmativo, por quem e por quais padrões? Esta pesquisa investiga emendas e reconstituições constitucionais inconstitucionais, as escolhas, as regras e as consequências que se seguem. Um método de pesquisa doutrinária é usado por meio de dados jurídicos secundários em abordagens descritivas e prescritivas. Nesta pesquisa, faço um estudo holístico de três mudanças constitucionais - mudanças bem-sucedidas e malsucedidas na Gâmbia, Quênia e Israel - como novas questões e as uso para tirar uma conclusão. As regras formais de emenda constitucional são os mecanismos decisivos para o recinto constitucional, mas as repromulgações constitucionais tendem a se desviar de seus pressupostos e não estão alinhadas com sua estrutura básica, destruindo assim a continuidade da ordem jurídica. Uma constituição deve ser uma constituição que surge para a constante mudança da sociedade, porque houve uma mudança perceptível no debate constitucional global, afastando-se da perspectiva normativa ou institucionalista e em direção a uma abordagem mais analítica e comparativa ao avaliar a configuração dos processos constitucionais. Portanto, mudar uma disposição significativa de uma constituição que tem efeito direto sobre o status de um estado, tirando o povo da cesta de realização progressiva de um estado, é um *non sequitur* às regras de emenda constitucional.

Palavras-chave: Regras de alteração; Doutrina da estrutura básica; Poder constituinte; Desmembramento constitucional; Entrincheiramento constitucional.

Introduction

The drafting of new constitutions and the revising of old constitutions by most African countries in the 1990s was a clear recognition of the need for radical changes to the status quo ante. In some cases, it meant a total break with a dreadful past – such as apartheid in Southern Africa – but in most cases it meant recognizing that a constitutional framework built around the one-party system that had bred authoritarian and dictatorial rule was a recipe for political instability and economic decline. In many countries, the problems were not caused by the absence of constitutions. Rather, it was the ease with which African leaders had rendered constitutions dysfunctional by regularly ignoring their provisions or arbitrarily amending them when it suited their convenience. (Fombad, 2011)

The third wave of democratization coincided with a fresh wave of constitution-making, and more specifically with the collapse of the Berlin Wall. This resulted in the setting up of many constitutional courts for judicial review (Ginsburg, 2008). Currently, a highly intriguing set of issues in contemporary comparative constitutional law concerns if, how, and by whom a constitutional amendment can be ruled unconstitutional. In certain jurisdictions, Supreme or

Constitutional Courts have established the “basic structure” doctrine to invalidate, on substantive bases, a constitutional amendment that has fulfilled all of the procedurally entrenched textual requirements for formal constitutional change (Albert, 2017). The rules governing constitutional change are issues that preoccupy the mind of constitutional scholars and the political class. Unlike constitution-making, constitutional amendment procedures are given less attention.

Constitutional amendment is a correction of a constitution to make it better. It may require adding or removing certain provisions. National constitutions today almost always have formal provisions for amending them (Dixon, 2011). Nonetheless, there is still a great deal of disagreement over the purpose of the formal procedures for amending the constitution as well as the basic ingredients that determine how difficult the processes are in comparison.

Can a constitutional amendment or re-enactment, however, be declared unconstitutional? *Prima facie*, this seems an antinomy. In recent years, there has been a growing emphasis on this daunting issue and the extent to what this can be permitted. Limits on constitutional amendments are an issue of interest to more than just academics, but defining the nature of constitutional amendment authority is one of the most abstract issues in constitutional theory (Roznai, 2013a). Amendment rules more deeply define the “rules for changing the rules,” in contrast to constitutional rules which typically outline the “rules of the game in a society” (Albert, 2015a). Amendment rules are crucial because they specify the circumstances under which any other constitutional requirement may be legitimately and legally replaced.

A constitution may be amended through a formal amendment, judicial interpretation, and legislative changes. Constitutional design assumes that institutions have predictable consequences, but contemporary constitutional studies and political science have not vigorously pursued the empirical verification of these predicted consequences (Lutz, 1994). While constitution-making and constitutional amendment are juxtaposed to certain extent, the former involves the exercise of the constituent power while the latter covers a broad range of interventions on the fundamental law, from minor tweaks to radical changes (Scotti, 2020).

Formal constitutional amendment rules are the decisive mechanisms to the constitutional precinct. They outline the methods for altering the written constitution, identify what is bound to or exempted from formal change, foster discourse about constitutional meaning, distinguish the constitutional text from regular law, and may also be aimed to communicate constitutional principles. In particular, formal amendment procedures help to verify unofficial constitutional revisions and direct public will into institutional discourse (Richard Albert 2014). There are a lot of constitutional amendments in the world – both successful and failed ones – that are done through different procedures and mechanisms, and these often drive scholars to question their constitutionality.

This study is very singular and important in both constitution building and consolidation because the resultant nature of some constitutional amendments are constitutional dismemberments. These constitutional changes have significant ramifications for the entirety of law and society. They are deliberate attempts to reject the fundamental elements of the constitution and to demolish its foundations. They destroy the fundamental framework of the

constitution while simultaneously building a new foundation based on antithetical principles (Albert, 2018). So, can a constitutional amendment be unconstitutional? Unequivocally, yes.

Elsewhere, (for example, in France) because of the prevalent culture of exercising popular sovereignty, all formal constitutional amendments are recognized and the idea of a court ruling a constitutional amendment unlawful is not recognized. Decision No. 92-312 DC, 2 September 1992 of the French *Council Constitutionnel* hold this.

Constitutional amendment in its entirety includes creating a new constitution to replace a new one. It is widely known that presidents, courts and parliaments frequently tamper with and alter constitutions without following constitutional precepts (Richard Albert 2014). The overall aim here is to give a descriptive and prescriptive nature of unconstitutional amendments and provide suggestions that will ensure that the will of the people, as provided in the constitutions, is not strategically subverted by the self-aggrandized political leaders who are determined to consolidate executive power.

Constitution Amendment Rules

Although all formal procedures for amending a constitution have been followed, several countries' supreme or constitutional courts have established a core theory that allows them to nullify a constitutional amendment on substantive grounds.² Some countries have favoured having sole authority over the formal components of enacting constitutional amendments, while other countries have preferred to have jurisdiction over both the substantive and formal aspects as expressed in Article 147/1 of the Turkish Constitution.

In a constitutional democracy, formal procedures for amending a constitution serve several vital purposes: in the event of a significant constitutional change, they guarantee that the change is implemented through legal channels rather than extralegal ones; in other situations, they give legislatures the ability to change or “renew” particular constitutional rules or to hold “dialogue” with courts regarding the interpretation of more ambiguous provisions (Dixon & Holden, 2011). In African constitutions, different terminologies like “amendment”³, “alteration”⁴ and “revision”⁵ are used and this identical with their linguistic affiliations.

The majority of Anglophone African countries' independence constitutions were drafted by British draftsmen in Whitehall in the nineteenth century, and they were not familiar with specially established constitutional procedures to restrict or control the ability to change constitutions. However, the constitutions of Francophone Africa, which attempted to include

² See decisions of Supreme Court of India: *Minerva Mills Ltd. v. Union of India*, 1980 AIR 1789, 1981 SCR (1) 206, SCC (2) 591; *Sripadagalvaru v. Kerala*, 1973 SCC (4) 225; *Golaknath v. State of Punjab*, 1967 AIR 1643, 1967 SCR (2) 762.

³ See, e.g., Art. 105 of the Constitution of Ethiopia of 1994; S. 195–197 of the Constitution of Malawi of 1994; Art. 296 of the Constitution of Mozambique of 2004; Arts. 131–132 of the Constitution of Namibia of 1990; S. 226 of the Constitution of the Republic of The Gambia, 1997; Art. 59 of the Constitution of Eritrea of 1997; S. 74 of the Constitution of South Africa of 1996; S. 255 – 257 of Constitution of Kenya, 2010; and S. 328 of the Constitution of Zimbabwe of 2013.

⁴ See, e.g., S. 47 of the Constitution of Mauritius of 1968; S. 98–99 of the Constitution of Tanzania of 1977; and S. 89 of the Botswana Constitution of 1966.

⁵ This is the case in the constitutions of almost all Francophone African countries. For example, Arts. 218–220 of the Constitution of the Democratic Republic of Congo of 2005; Arts. 116–118 of the Gabonese Constitution of 2011; Arts. 226–228 of the Chad Constitution of 2018; Art. 99–101 of the Mauritanian Constitution of 1991; and Art. 103 of the Constitution of the Republic of Senegal of 2001.

similar clauses, did not fare any better. Even while a culture of constitutionalism or the stability of the constitution are not guaranteed by constitutional provisions governing the authority to amend the document alone, these provisions are nevertheless essential to any real effort to achieve these objectives (Fombad, 2013). These laws were drafted with no intention to provide rules for amendments and thus, the consequences – although this will be further discussed later – are that states helplessly succumb to constitutional changes with explicit and implicit intent to secure constitutionalism and sometimes failed governance.

For Emmett Macfarlane, explicit procedural or substantive restrictions placed on the amending power, such as the designation of unamendable clauses, principles, or basic structure of a constitution, may lead to unconstitutional constitutional amendments (Macfarlane, 2022). In his classical and ground-breaking book, *Constitutional Amendments: Making, Breaking, and Changing Constitutions*, Richard Albert spends quite some intellectual energy to explicate what makes an amendment unconstitutional (Albert, 2019). Limitations on amending authority are sometimes invoked to draw a contrast between regular amendments and the re-enacting of a new constitution. According to Richard, a constitutional change that falls between an amendment and a complete re-enactment of a constitution must also be acknowledged. Although the degree or scope of the alteration is undoubtedly a factor, it is evident from defining the concept of dismemberment that the distinction goes beyond just illustrating a gradient from “minor” to “major” modifications to the constitution.

For Richard, a correctly interpreted constitutional amendment “maintains the amended constitution coherent with its pre-change identity, rights, and structure.” He posits, further, that dismemberments have both the purpose and effect of unmaking a constitution. Constitutional dismemberment, he submits, are “transformative changes with consequences far greater than amendments. They do violence to the existing constitution, whether by remaking the constitution’s identity, repealing or reworking a fundamental right, or destroying and rebuilding a central structural pillar of the constitution. A constitutional dismemberment can both enhance and weaken democracy, depending on what in the existing constitution is dismembered.” But can an entrenched clause be changed during constitutional re-enactment?

The Indian Constitution’s amendment procedure (two-thirds majority in both houses of Parliament, with an additional federal requirement in certain cases) feels almost antiquated in 2023, despite the fact that the basic structure doctrine has been the subject of debate for the past fifty years. This is a result of the development and increased sophistication of amendment procedures.

Current constitutions acknowledge the necessity of strengthening the flimsy parliamentary supermajority barrier against the wave of unwarranted constitutional amendments. A well-liked remedy is the two-tiered amendment procedure. (Dixon & Landau, 2018). Parliamentary supermajorities are still sufficient under the two-tiered amendment process to amend the majority of Constitutional provisions. However, for some deeply ingrained – basic – features, the process becomes significantly more complex, involving actors outside of parliament/congress and frequently necessitating a ‘ratificatory’ referendum. Essentially, the two-tiered amendment process lays out a constitutional “basic structure” and, in theory, a procedure for amending it. An example of a “tiered constitutional design,” where levels of

entrenchment differ with the prominence of the provision, is the coupling of “unamendable” provisions with relatively simple “normal” norms of amendment (Ginsburg et al., 2022). This procedure is intended to operate as the precise kind of safety valve that the basic structure doctrine has up until now.

Four Unconstitutional Constitutional Changes

(a) Attempted Constitutional Re-enactment in The Gambia

First, let me start with The Gambia. This is the smallest mainland country in Africa tucked almost in the ‘heart’ of Senegal and ‘mouth’ of the South Atlantic Ocean. The constitutional history of this country is one that is less studied by scholars. There are many amendments that happened to the 1997 Constitution of The Gambia but the most outstanding constitutional re-enactment – which also failed the executive procedure for adoption as a new constitution – is the attempt to introduce a new constitution in 2020.

A judicial inventiveness known as the basic structure doctrine, often known as the “unconstitutional constitutional amendments” theory, has given courts all over the world the authority to declare constitutional amendments that have been properly approved unlawful. But can a clause found in a country’s original constitution be declared unconstitutional using this theory? In *Bangladesh v. Asaduzzaman Siddiqui* (2017), the Bangladesh Supreme Court Appellate Division (AD) made history in 2014 when it declared unconstitutional a clause that had been part of the original 1972 Constitution, deleted in 1979, and then resurrected by the Sixteenth Amendment (Yap & Abeyratne, 2021). In a popular sovereign state where sovereignty resides in the people as it is in The Gambia, some constitutional amendments are so fundamental that they effectively rewrite the entire constitution, and only the people, in the exercise of their sovereign power to establish and unmake their Constitution, have the authority to make such changes.

In The Gambia as it is in many jurisdictions, the Constitution comprises two clauses: general and entrenched clauses, and their amendment procedures differ. Section 226 of the Constitution of The Gambia, 1997 sets a detailed explication of constitutional amendment and re-enactment, rules and the outcomes. These obstacles are increased by entrenchment clauses. They alter certain sections of a constitution or adjust in situations where they are either more challenging than “normal” amendments or completely unfeasible (Hein, 2019). One of the disconcerted constitutional changes in the attempted constitutional re-enactment in 2020 regarding Section 1 of the Constitution on the sovereignty of The Gambia. This created a line of ‘division’ in the country as one sect advocated the removal of the word ‘secular’ while another maintained that the provision should not be altered. This came into being after the drafters of the new constitution changed the provision, “The Gambia is a Sovereign Secular Republic” to “The Gambia is a Sovereign Republic”.

A constitutional re-enactment digresses from its presuppositions and is not aligned with its basic structure, thereby destroying the continuity of the legal order (R. Albert 2015). While

entrenched clauses are protected from amendments they are not, ex cathedra, protected from re-enactment safe that the spirit of the constitution needs preservation. For example, the entrenched provisions in the 1997 Constitutions of The Gambia form the implicit basic structure, requires a longer process than other general provisions, and requires legitimacy. Authority is created when the public accepts a particular process as legitimate. In other words, legitimacy creates authority, which enables a community to accept a constitutional process, and its resulting content and operation, as legitimate (Farinacci-Fernós, 2020). Legitimacy is a normative concept that arises from the people's approval of a particular process. As a constitutional scholar, my unsettled concern is on the alteration of the basic structure – explicit or implicit – thereby resulting in constitutional dismemberment.

In conclusion, I submit that changing a significant provision of a constitution that has direct effect on the status of a state by taking the people away from progressive realization of a “sovereign secular state” to only “sovereign state” is a non sequitur to constitutional amendment rules.

(b) Constitution of Kenya Amendment Bill 2020

In 2021, significant rulings in the case of *David Ndi and Others v. The Attorney General and Others (2021)* were rendered by Kenya's High Court, Court of Appeals and the Supreme Court. The Constitution Amendment Bill of 2020, which sought to implement the Building Bridges Initiatives (BBI), was declared unconstitutional and null by the High Court for, among other reasons, breaching the basic structure of the constitution. This decision was upheld by the Court of Appeal. Politically, this was a setback for the BBI idea, which was important to both Raila Odinga, an opposition leader, and the former president Uhuru Kenyatta. Aside from “reconciliation”, it is believed that the initiative's true aim was to give the president more authority by enabling both leaders to create a coalition in order to win the general elections in 2022 (Roznai & Okubasu, 2023). For the first time since the 2010 Constitution was adopted, Kenyan courts had to decide whether the amendment authority is subject to any substantive restrictions that could be enforced by the courts. However, other courts like in Tanzania have declined to apply the doctrine of unconstitutional constitutional amendment, restricting judicial review to procedural compliance, which in certain situations includes adhering to constitutional mandates for public participation and enlightenment as in the case of *The Honorable Attorney General v Reverend Christopher Mtikila, Civil Appeal No 45 of 2009, Court of Appeal of Tanzania (17 June 2010)*.

Despite its well-known contributions to the building of constitutions, political settlement carries the risk of exposing constitutional identity and institutions to the perils of quick or convenient alterations (Roznai, 2021). It implicitly disorganizes and to a certain extent, violates the doctrine of basic structure in constitutional amendment and making. According to this doctrine, a constitution expressly prohibits changing some institutions, laws, and tenets since they are crucial to the essence of the constitution. The two aforementioned courts held that Basic Structure Doctrine (unconstitutional constitutional amendment) applies in Kenya. The

Supreme Court upheld the rulings of these lower courts but declined that the Doctrine of Basic Structure applies in Kenya and that, the proposed amendment was unconstitutional for reasons based on procedures (Roznai, 2023). If the basic structure is applicable, it means even the people are limited by this ‘structure’.

The basic structure doctrine, to put it briefly, argues that even in the lack of any restrictions on the constitutional amendment power (“eternity clauses”) (Suteu, 2021), the ability to amend the constitution is subject to implicit constitutional limits, which state that amendments cannot alter the fundamental characteristics and framework of the constitution. This doctrine is passed from Germany to India (Polzin, 2021), where it was adopted by the Supreme Court of India in a constitutional landmark case,⁶ and from there diffused to other countries (Roznai, 2013b), irrespective of the name used.

(c) Constitutional Amendment in Israel

The written comprehensive constitution – which is typically referred to as “formal” – is not the only format in which one might adopt. Some countries, like Israel and the UK, have unwritten constitutions that incorporate Supreme Court rulings and statutes outlining fundamental values. Human rights guarantees are incorporated into the constitutional framework of the Israeli legal system, which lacks both a written constitution and an established bill of rights. Instead, the Israeli Declaration of Independence, which states that the nation will be founded “on the foundation of freedom,” serves as the basis for a presumption that the Supreme Court developed (Zamir, 2023).

On December 29, 2022, Israel swore in a new government. Israel has experienced the worst constitutional crisis in its history. A judicial makeover that would give the executive nearly total power and curtail the jurisdiction of the court has been started by the recently elected right-wing government (Roznai & Cohen, 2023). Israel is a deeply divided country where several groups – often referred to as “tribes” – face intense conflict with one another. Every liberal democracy has guiding principles that must be upheld by the courts in order for the legislature to be held accountable. Contrary to popular belief, courts are partners in the actual creation of the Constitution, and they have engaged in its building in other legal systems as well. This is valid for nations having written constitutions, like the US, as well as those without, like the UK and other common law jurisdictions (Harel, 2023). Contrary to the Kenyan narrative, the court in Israel failed in this regard.

The judicial change should be seen as a component of a larger shift in Israel’s constitutional identity, with the goal of undermining the court and freeing the government from its structural checks. Fundamentally, this shift is about challenging Israel’s adherence to the basic idea of equal citizenship, primarily with regard to the legitimacy of giving preference to Jewish interests over those of non-Jews, rather than about “empowering the people”. Recognizing the judicial reform as a component of this greater shift in the state’s identity – from democratic to

⁶ See Judgment in *Kesavananda Bharati v. State of Kerala* (1973) where the majority on the bench held that the power to amend the Constitution does not mean that the basic structure of the Constitution can also be amended. It was held that the basic framework of the Constitution must not be affected while amending any part of the Constitution.

more Jewish – has normative ramifications for the legality of the reform (Medina & Bloch, 2023). The 1992 so-called ‘constitutional revolution’ comprises two vital elements:

(i) A fundamental change in how Israel’s constitutional identity is defined, meaning moving from a framework that allowed the government to treat Jews and Arabs differently to one that forbids discrimination of any kind; and

(ii) giving the Court the authority to use judicial review in order to uphold this updated constitutional identity. The attempt by the Israeli government to reverse this development is predicated on two main points of contention: first, it calls into question the validity of the 1992 shift; second, it implies that even if it were valid, a counter-revolution would now be equally acceptable, conforming to the present will of the people as expressed in the makeup of the coalition.

The judiciary could become politicized as a result of the government’s effort to “reform” it. In this context, the Knesset adopted an amendment to the Basic Law on July 24, 2023, through an expedited procedure, disregarding the constitutionality of the provisions being adopted. The amendment prohibits the judiciary from investigating and adjudicating complaints against governmental and other administrative decisions, including appointments, on the basis of the judicial standard of reasonableness, which is also sometimes referred to as rationality. Shortly after this amendment was passed, the Supreme Court received multiple complaints alleging that this change was unconstitutional because it was at odds with both the fundamental political principles derived from the Declaration of Independence and the constitutional act known as the Basic Law: Human Dignity and Freedom, which defined Israel as an equally democratic and Jewish state.

According to the complainants, even in its constitutional form, the Knesset lacked the authority to approve an unlawful constitutional amendment because this concept was essentially unalterable. In response, the Supreme Court ruled that the complaints were valid, rescheduling the initial hearing for September 2023, and – perhaps most significantly – issuing the so-called injunction, which permanently halts the adoption of the modified version. In the meantime, Prime Minister Netanyahu said that this was “a foretaste of further ‘democratic’ changes in the judiciary and the only minor correction of the justice system” (Sadowski, 2023). On the other hand, many who opposed the government’s proposal claimed it was the initial move toward eradicating democracy in Israel and instituting a government based on that of Hungary and Poland. As a result, protests and other types of opposition to these political shifts are intensifying, and police brutality is increasing.

(d) Applying Brakes on Constitutions

Constitutional making, amendment and even re-enactment cannot be extricated from the political underpinning of any society, notwithstanding the legal terms and jargons that cloud the process. Constitutional governments are designed to security the rights of the people deriving their authority from the consent of the people. In as much as constitutions are

appreciated universally as sine qua of good governance, the antithesis is also valid when constitutions are left without brakes in the hands of the political class.

Where are brakes ought to apply in a constitution? A substantive constitutional validation of the sovereignty of the citizens – and not state institutions – ought to be architect of the constitutional affairs of a state (Albert, 2010). In Indonesia, prior to the three constitutional amendments in the aftermath of the reformation era that ended the dictatorial rule of Surharto, a significant change has been made to the 1945 Constitution of Indonesia in order to apply a brake on state institutions.

Before the amendment process, the Constitution provided that, “Sovereignty is in the hands of the people and is fully exercised by the People’s Consultative Assembly” which depicts parliamentary sovereignty. It is amended to “Sovereignty is in the hands of the people and is exercised according to the Constitution”⁷ depicting constitutional sovereignty. In parliamentary sovereignty, the consequences are that the parliament can change or modify any law; there is no distinction between constitutional law and ordinary law; and there is no superior authority which can declare the law passed by the parliament illegal or unconstitutional.

In constitutional supremacy to which the amendment has ushered the country, there is a distinction between constitutional law and ordinary law; the parliament itself is created and it functions in line with to the constitution; there must be some constitutional body to look after the legality or illegality of the act of the parliament. This can be affirmed by the functions of the Constitutional Court and Supreme Court of Indonesia. The Constitutional Court has the jurisdiction to make determination if a Law conflicts with a provision of the Constitution of Indonesia 1945. The Supreme Court has the jurisdiction to make determination on two laws that conflict. So, the amendment process that brought in “Sovereignty is in the hands of the people and is exercised according to the Constitution” helps in controlling the law-making power of the People’s Consultative Assembly.

So, the constitution ought to be a speaking one that arises to the constant ‘metamorphoses of society. As I indicated elsewhere, there has been a discernible change in the global debate away from the normative or institutionalist perspective and toward a more analytical and comparative approach when assessing the setting of the constitutional making process (Mendy, 2024). Therefore, in this era of global challenges when international law is used to address issues, and national laws are left out of the limelight, I argue that a national constitution can regain constitutional order and be free from shackle that distorts its purposive meaning. This can only be done where a constitution has brakes to check constitutional power of state institutions.

Purposive constitutional interpretation can be applied as a brake to address issues that arise from a speaking constitution that ‘evolves’ with time. In applying this theory, the consent of the people during constitutional making process as regards each provision of the constitution must not be subjected to constitutional coup d’etat during amendments.

⁷ Amendment of Article 1(2) of 1945 Constitution of the Republic of Indonesia from parliamentary sovereignty to constitutional sovereignty.

In an interesting interview for the position of a Chief Justice of the Republic of Kenya at the Judicial Service Commission of Kenya on 14 September 2016, the subject of interpretation of Articles 11, 27 and 45 were raised. These provisions speak to the issues of culture, national values, equal treatment and non-discrimination, and marriage. The interviewee (name withheld), in response to the question on LGBTQ and same sex marriage, argued that the Constitution of Kenya, 2010 is a speaking constitution and it must be interpreted in the context of a dynamic document. Countering the submission of the interviewee, one of the interviewers pointed out that the issue of LGBTQ is one of the three questions that were beyond dispute during the constitution making process. He went further to submit that these provisions were not accidentally captured in Constitution of Kenya, 2010 but instead, it is captured because the public refused to have them removed from the Constitution.

Thus, restricting the ability to amend constitutions can clearly help democracy and informed will of the people. A legally enforceable concept of “unconstitutional constitutional amendment” is one approach to achieve this. Such a theory can provide another obstacle to change, even though it might not be a perfect answer to anti-democratic uses of constitutional amendment powers. However, from a democratic point of view, such a concept must be treated cautiously since it can also seriously obstruct the legal use of amendment procedures to overturn court rulings that the majority of people find to be irrational or objectionable. Any theory of invalid constitutional amendment must have a narrow focus in order to support democracy rather than work against it.

Consequences

According to the basic structure concept, unelected judiciaries have the capacity to override even supermajorities and decide whether to modify the constitution. The limits of this power are also not preset but rather are decided on a case-by-case basis. It is impossible to ground the basic structure theory in the text of the constitution (in fact, doing so would lead to an infinite regress issue). The basic structural concept is simply a replication of the old judicial review dilemma, although one that is more acute. Owing to these considerations, consequentialism may provide the most compelling argument of the basic structure doctrine. Its origins are in the bitter historical experience of parliamentary supermajorities abusing their temporary political authority to essentially rewrite the Constitution, usually (though not always) in an attempt to support authoritarianism and establish their own political supremacy. The argument goes that in order to prevent a nation from imminent tragedy and prevent the Constitution from turning into a “suicide pact,” someone needs to be present.

In many places of the world, there is a strong conflict between constitutional amendment procedures and democratic commitments. Unconstitutional constitutional amendments that adhere to formal democratic procedures are routinely passed in order to achieve anti-democratic or “abusive” constitutional goals, such as assisting powerful presidents in prolonging their terms in office, eliminating parliamentary or federalism-based checks on executive power, and reducing or suspending fundamental human rights protections (Dixon &

Landau, 2015). Recently, several countries have attempted to amend their constitutions in order to do away with or significantly reduce term restrictions for presidents. These attempts to prolong terms have occasionally been a component of larger initiatives to strengthen the grip on power, undermine other institutions of the state, and sway elections in favor of incumbents. These cases are noteworthy from a legal standpoint because they demonstrate the limitations of instruments that restrict constitutional change, such as the unconstitutional constitutional amendment doctrine and eternity clauses, to prevent potentially anti-democratic or anti-liberal forms of constitutional change (Landau, 2018). While most of these cases involved constitutional texts that gave courts plenty of leverage to reject term limit attempts or at the very least steer those changes in more difficult directions, most of these efforts were not thwarted, and in some cases, the courts even used the doctrines to eliminate term limits rather than uphold them.

Whether stated explicitly or implicitly, dominant political actors can always try to get around restrictions of this type through a process of actual constitutional re-enactment. Unless there are extraordinary situations, courts will typically have limited authority to monitor processes of re-enactment of this kind (Dixon & Uhlmann, 2018). More often than not, such amendments, whether constitutionally or unconstitutionally, are confronted with the question of legitimacy of the process. In politics of democracy, legitimacy is not only juridical but also a byproduct of the consent of the ruled.

Conclusion

Unconstitutional constitutional amendments, the rules, and the consequence of the deliberation is *sine qua non* of constitutional governments and the proclivity of states to adhere to the rules of constitutional amendments is a herculean task that must be confronted with utmost sobriety by states and non-state institutions.

Limit to constitutional amendments is key to constitutional development and therefore, in this era of global challenges when international law is used to address issues, and national laws are left out of the limelight national constitutions can regain constitutional order and be free from the morass that distorts its purposive meaning. This can only be done where a constitution has brakes to check constitutional power of state institutions. Without prejudice to the role of parliament, this institution ought not have unlimited power on constitutional amendment as doing that violates the direct will of the people. While it is arguable that representative democracy depicts the aspirations of the people as their 'mouthpiece' the conundrum of the government to subvert the constitution jointly with these parliamentarians to suit their personal benefits is not out of the wool in many jurisdictions.

Unlimited constitutional amendments expose constitutions to unconstitutional constitutional amendments since a constitution may be amended through a formal amendment, judicial interpretation, and legislative changes. Consequently, constitutional design assumes that institutions have predictable consequences to their acts, but contemporary constitutional studies and political science have not vigorously pursued the empirical verification of these

predicted consequences, and this has left the world of governance is a shambolic state of unconstitutional constitutional amendments and re-enactments with rules, and consequences that continue to bedevil us.

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