

## UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS AND THE STRATIFICATION OF POWERS

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**Abstract.** The subject of the article is the idea of unconstitutional constitutional amendments. The essay does not concern any specific legal order but takes the perspective of a general theory/philosophy of law. The study is divided into two parts. The first part briefly describes the theory and practice of applying the idea of unconstitutional constitutional amendments. The second part reveals and analyzes the basic assumptions of the theory of unconstitutional constitutional amendments: “the assumption of the stratification of powers” and “the essentialist assumption.” As a result of the analysis, it is concluded that on the grounds of democracy and constitutionalism the inadmissibility of amendments to the constitution should be linked not to the difference between the establishment of the constitution and its amendment, but to the difference between the degree of democratic legitimacy of the indicated law-making activities. Therefore, the article also formulates a postulate that the admissibility of declaring the unconstitutionality of constitutional amendments should be limited to cases where the amendments were adopted in a procedure with an evidently lower degree of democratic legitimacy.

**Keywords:** unconstitutional constitutional amendments, constitutionalism, constituent power, theory of law, normative democratic theory

### INTRODUCTION

The issue of unconstitutional constitutional amendments in recent years has attracted more and more attention. This is for both practical and theoretical reasons. The constitutional practice of many countries shows the need and usefulness of the idea of restrictions on the possibility of amending the constitution. In particular, it is necessary to mention India and Turkey, whose constitutional courts have loudly implemented this idea. On the other hand, the idea of unconstitutional constitutional amendments seems to be some kind of conceptual contradiction. According to the common meaning of the term “unconstitutionality” is that an ordinary law, inferior to and bound by the constitution, violates it [Dicey 1982, 371–72]. Therefore, someone may insist that unconstitutionality can’t refer to an act carrying the same normative status as the constitution itself. It seems that the discussion on the mere admissibility and

scope of constitutional changes has been going on since the time of the first modern constitutions, i.e. since the 18th century. There are significant efforts in constitutional theory to solve mentioned puzzle – to resolve the apparent contradiction between idea of an unconstitutional constitutional amendment and the unconstrained nature of constituent power. One can say that as a result of these efforts, we are now dealing with a sort of theory of unconstitutional constitutional amendments.

The essay is divided into two parts. The first part briefly describes the basic issues of the theory of unconstitutional amendments to the constitution. The second part is devoted to a critical discussion of its basic assumptions (“the assumption of the stratification of powers” and “the essentialist assumption”) and drawing certain normative conclusions from it. This study can be understood as a contribution to the universal theory of unconstitutional constitutional amendments and, at the same time, to a normative theory/philosophy of law and democracy.

In the first place, let’s try to briefly describe the theory and practice of applying the idea of unconstitutional constitutional amendments.

## 1. EXPLICIT AND IMPLICIT UNAMENDABILITY

One can say that the important feature of constitutionalism is that the norms of the constitution must be in some way, and to some degree, be entrenched. The most far-reaching expression of this idea is the phenomenon of the unamendable provisions of the constitution: their amendment would be prohibited [Bezemek 2011, 528–41]. They reflect the idea that certain constitutional regulations ought to be protected from alteration. This kind of extreme entrenchment is (and has been) used in the constitutions of many states,<sup>1</sup> but at the same time many countries do not use such a solution. For example, the Polish constitution of 1997 does not contain unamendable provisions. In turn, under the French constitution of 1958, the republican form of government shall not be subject to amendment, and the amendments to the German Basic Law of 1949 affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 (human dignity, human rights) and 20 (principle of democratic and social federal state) shall be inadmissible.

Initially, unchangeable provisions were designed mainly for protection the state’s form of government; over time, however, they were extended to protect

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<sup>1</sup> According to Roznai “out of the constitutions which were enacted between 1989 and 2013 already more than half (53%) included unamendable provisions (76 out of 143)” [Roznai 2017, 28]. His research shows that we are dealing here with an upward trend in relation to previous historical periods.

many features of a democratic system, including fundamental rights and freedoms [Mohallem 2011, 767]. As the Venice Commission stated, unamendability is a complex and potentially controversial constitutional instrument, which should be applied with care, and reserved only for the basic principles of the democratic order. It is worth adding here that the Commission indicated that explicit limits on constitutional amendments are not a necessary element of constitutionalism.<sup>2</sup>

The existence of provisions of the constitution, which the constitution itself proclaims unamendable, explicitly restricts the possibility of changing the constitution. It seems, however, that the “core” of the theory of unconstitutional constitutional amendments is the recognition of the implicit limitations of constitutional changes. Recognition of implicit limitations means that even when the constitution is silent on the subject, we should recognize that some of its amendments are unacceptable.

In my opinion, the theory of unconstitutional constitutional amendments makes sense only if it recognizes the existence of implicit limitations. A simple example proves this. Let us assume that the constitution contains a provision which, by another provision of it, will be declared unamendable. If we allow the existence of only explicit limits, then the act of first repealing the second provision and then changing the first one will be entirely lawful. This, in turn, seems to contradict the basic intuitions related to the idea of unconstitutional constitutional amendments. Therefore, in the following I will refer to the “full-blooded” theory of unconstitutional constitutional amendments, which primarily recognizes implicit restrictions on constitutional amendments and treats explicit restrictions as their “positivized form.”

The idea of implicit constraints on making constitutional amendments has been present in modern constitutional thought since the creation of the U. S. Constitution and the first American Congress. Then it appeared in different countries and was conceptualized in different ways. The works of French and German scholars significantly developed this idea (in particular, the findings of Maurice Hauriou and Carl Schmitt should be mentioned). Despite this, until the 1960s, the idea in question was mainly a theoretical construct. At that time, however, in India, the German doctrine was referred to and the so-called “basic structure doctrine” was developed, which the Indian Supreme Court applied in practice canceling the constitutional amendments several times.<sup>3</sup> According to Indian “basic structure doctrine” the amendment power is not unlimited – it does not include the power to abrogate or change the identity of the Constitution or its basic features. The Indian basic structure doctrine

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<sup>2</sup> *Report on Constitutional Amendment*. Strasbourg: Council of Europe (2010), [https://www.venice.coe.int/WEBFORMS/DOCUMENTS/CDL-AD\(2010\)001.ASPX](https://www.venice.coe.int/WEBFORMS/DOCUMENTS/CDL-AD(2010)001.ASPX) [accessed: 15.09.2021], p. 43.

<sup>3</sup> See for example Krishnaswamy 2010, 70–130; Randhawa 2011, 4–35; Mate 2010, 179–208.

was widely echoed in other countries [Ragone 2019, 327–40]. It is widely discussed, and in some countries has significantly influenced the constitutional jurisprudence (e.g. Bangladesh, Pakistan, Kenya, South-Africa). Some have even said that the international trend is moving towards accepting the basic structure doctrine [Dlamini 2009, 10]. However, from the point of view of this study, the most important thing is that this doctrine inspires the development of a universal theory of unconstitutional constitutional amendments,<sup>4</sup> which is the subject of this study.

## 2. UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS AND CONSTITUENT POWER

It can be said that the only way to logically coherently introduce the concept of unconstitutional constitutional amendments is to distinguish between the power to adopt a constitution and the power to amend it. To consistently “reconcile” the concept of unconstitutional constitutional amendments with the basic assumptions of the legal system, it is necessary to assume that the latter authority is somehow weaker than the first. This type of stratification of powers to give specific content to constitutional provisions justifies the restriction of the possibility of introducing changes to the constitution.

In modern constitutional thought, there is a long tradition of distinguishing constituent power from constituted power (for example Seyes and Schmitt). In short: constituent power is the power to establish the constitutional order of a nation and constituted power is the power created and limited by the constitution. Constituent power belongs to the sovereign. Of course, when adopting democratic legitimacy of power, the people are the sovereign. Constituent power is legally unlimited and has an extra-legal nature. On the one hand, it constitutes all legal power, and on the other it is itself the supreme legal power. In turn, constituted power is a competence granted by positive law. Constituted powers are legal powers somehow derived from the constitution and are limited by it. They owe their existence and validity to the constituent power and depend on it. Constituent power is superior to them.

There are many levels of constituted power. Constituent power, however, is also sometimes stratified. According to a well-known distinction, primary (or original) constituent power and secondary (or derived) constituent power can be distinguished (this distinction originates from the 18th century French doctrine, during the French National Assembly on the 1791 Constitution). In short: primary constituent power is the power to create a constitution and establish a new legal order. Strictly speaking, only this power is legally unlimited, superior and belongs to the people. The secondary constituent power is

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<sup>4</sup> See such a highly developed theory in Roznai 2017.

the power exercised under legal circumstances according to rules established by the constitution, but it operates at the constitutional level and is in some sense a reflection of the primary power. The secondary constituent power acts within the constitutional framework and is therefore limited, nevertheless, it operates at a higher level than ordinary legislation. In the light of the above, the obvious question arises: how should the power to amend the constitution be characterized in the light of the above distinctions?

It should be noted that many authors emphasize the difficulties with the unequivocal characteristics of the power to amend the constitution [Preuss 1994, 158; Webber 2009, 49; Roznai 2017, 110–12]. It is indicated that this power has the characteristics of both constituent and constituted power. On the one hand, the amendment power function is very similar to the constituent power function. On the other hand, this power is conferred by the constitution and regulated by it. Obviously, proponents of restrictions on constitutional amendments cannot treat it as pure constituent power because constituent power is legally unlimited. As a result, amendment power is treated as “secondary” constituent power – *sui generis* power sitting between constituent power on the one hand and constituted power on the other [Roznai 2017, 112]. The power to amend the constitution is delegated by those who exercise primary constituent power and the exercise of the amendment power is limited.

### 3. STRATIFICATION OF POWERS AND DEMOCRATIC LEGITIMACY

At this point I would like to point out that the theory of unconstitutional constitutional amendments implicitly adopts a certain basic assumption which I shall call here “the assumption of the stratification of legal powers” (in short: stratification of powers). Although it has not been clearly formulated, its acceptance seems to be a necessary condition for the acceptance of the aforementioned theory (especially for the idea of unamendability). The basic content of the assumption on the stratification of legal powers can be, in short, expressed as follows: “we can differentiate legal powers at some level of the legal system (also at the highest, constitutional level), even if there are no explicit regulations providing for such differentiation.” In such a case, the appropriate differentiation of legal powers must therefore be justified by other arguments. It is not unusual that even in legal cultures with a strong positivist attitude, certain norms are sometimes recognized as valid, although it is difficult to provide a clear basis for them in statutory law (this is often the case, for example, with legal principles). Therefore, there are no fundamental philosophical or theoretical reasons to exclude the possibility of recognizing the validity of the rules introducing stratification of legal powers (stratification without clear grounds in the provisions of positive law). In order to assess whether in a given case the stratification of legal powers is well justified (not

arbitrary), it is necessary to analyze the nature of the arguments presented to justify the stratification.

Let us examine how the stratification of powers is justified in the theory of unconstitutional constitutional amendments. It seems that the main theoretical/philosophical argument is that it is one thing to establish a legal act (in this case – the constitution) and another to change (amend) it. As they are two different legal actions, the legal powers needed to establish them also differ somewhat, with the former being stronger than the latter [Roznai 2017, 105–34]. The power needed to establish a constitution is stronger than the power to change (amend) it – only the first one is primary constituent power. This argument is based on an assumption which I will later refer to as the “essentialist assumption.” According to the essentialist assumption, establishing a legal act and changing it are two essentially different activities. The enactment of a legal act gives it a unique legal identity – its essence. By establishing an act, it becomes this and not another legal act, and its legal identity creates a set of the most important norms/regulations contained in it (as well as their mutual relationship). On the other hand, a change (amendment) is an activity whose essence is different. It alters the content of the act, but does not create a new act (i.e. a new legal identity/essence). What leads to the creation of a new act is the repeal of the existing act and the establishment of another one in its place.

At this point, it should be noted that it is obvious that establishing a legal act is something other than amending (change) it. It does not follow from this, however, that in this case we are dealing with the performance of two different powers (and also that the second is weaker than the first). It also does not follow that the second power is delegated power. We can only obtain such conclusions by significantly enriching the premises. These premises must somehow refer to the difference between actors performing two different acts and the legitimacy of these actors to perform them.

The case of unconstitutional constitutional amendments is, of course, a special case. In this case, we are talking about the very top of the legal system and the exercise of the highest legal power. This highest legal power comes from the sovereign and in modern democracies it is “the people.” The stratification of the highest power must therefore somehow be based on the difference in legitimacy to express the “authentic will of the people.” However, the concept of “people’s will,” and thus the notion of the exercise of constituent power, is, of course, somewhat elusive. Therefore, answering the question which act better represents the will of the people is sometimes not easy and depends on many additional assumptions. If the concept of “authentic people’s will” and the concept of exercising constituent power are to have some normative or practical dimension, they must be related to specific features or circumstances of specific actions. Otherwise, they will remain abstract formal concepts or assumptions needed only to make sense of the constitutional order (some kind of “constitutional myth”).

In modern democracies it is quite commonly accepted that “the people” are the subject and the holder of the constituent power and the nation’s constitution receives its normative status from the political will of “the people.” Any stratification of powers at the highest, constitutional level must therefore refer to the difference in legitimization to express the genuine will of the people. However, there are many philosophical/theoretical and practical doubts associated with the concept of the will of the people (which is why some authors call it a “modern myth” [Weale 2018, 1–29]. Many of these doubts relate to doubts about the very principles of democratic decision-making (in particular, problems related to participation and representation, deliberative decision making, difficulties in social choice theory – difficulties with the aggregation of preferences). It should also be added that the concept of constituent power also has its critics for whom the idea of a founding moment at which the constituent power is exercised holds little descriptive or normative appeal [Dyzenhaus 2008, 129–46].

Regardless of the doubts indicated above, it can generally be said that any justified stratification of powers at the highest level of the legal system must refer to the difference in legitimacy derived from the sovereign. Therefore, in the realities of modern democracies any justified stratification of powers at the highest level must refer to the difference in the degree of “democratic legitimacy,” and this democratic legitimacy must take into account the extent to which the decision-making procedures contains inclusive and deliberative mechanisms (which bring us closer to gaining “the authentic will of the people”). The above-mentioned doubts related to the will of the people and democratic decision-making show that in some cases it will be difficult to establish the difference in democratic legitimacy, however, in my opinion, it does not rule out the very idea of such legitimacy. The applicability of this idea can be seen in cases of an evident difference, e.g. when we compare the legitimacy of a constitution imposed by a foreign state with the legitimacy of a fundamental change to this constitution adopted in a popular referendum or when we compare the legitimacy of a constitution established by the assembly which was elected in the exclusion of a significant group of citizens with the legitimacy of essential amendments adopted by the body elected in the elections with the participation of that group (in these cases the question of what will be the execution of primary constituent power seems rhetorical). It seems that on the basis of the assumptions of modern constitutional democracies any stratification of legal powers must be related to the degree of democratic legitimacy (and not to the essentialist assumption). This, in turn, shows that constitutional amendments may, in certain circumstances, have greater legal force than the enactment of the constitution.

As mentioned above, the use of “the democratic legitimacy” indicator may in some cases not provide clear answers (its use is hardly conclusive).

Although in obvious cases we can intuitively indicate the difference in the degree of democratic legitimacy, nevertheless a more detailed definition of this indicator seems to be quite a complex issue in the field of normative democracy theory (therefore it is difficult to discuss it in greater detail in this study). In short, the difficulties with strict determination of the degree of democratic legitimacy of decisions result in particular from the fact that this indicator itself includes at least three others: “degree of deliberativeness,” “degree of inclusiveness (participation),” “degree of adequacy of the representation system.” Each of them is difficult to define precisely, and moreover, their mutual relationship is not clear (e.g. can we compensate for a lower degree of deliberativeness with a greater degree of inclusiveness? etc.). Hence, in hard cases, identifying a difference in the degree of democratic legitimacy may be highly debatable or even arbitrary (it requires settling controversial problems in the field of normative theory of democracy, and this can always be treated as debatable).

It can be said, however, that from the point of view of this essay, the indicated problems are not of major importance. If we agree that the stratification of powers is the exception rather than the principle, then justifiable stratification can be limited to cases where there is a clear difference in democratic legitimacy. In the case of constitutional amendments, such a solution is additionally justified by the assumption that the act complies with the constitution (used quite often in modern constitutional states). If we apply this assumption to statutes, we should apply it all the more to amendments (changes) to the constitution. In other words, the possibility of recognizing the unconstitutionality of amendments to the constitution should be limited to cases where there is no doubt that the degree of democratic legitimacy of the amendment is lower than the degree of democratic legitimacy of the constitution itself. In case of doubts, the decision should be made in favor of the inadmissibility of limiting the amendments. When assessing the difference in the degree of democratic legitimacy, it will of course be crucial to assess the legislative procedure and participation as well as the representativeness of the relevant legislative body (if they are different in the case of enacting amendments to the constitution and the constitution itself).

Taking into account the above considerations, it can be said that in relation to the enactment of the constitution itself, amendments (changes) to it may have a greater degree of democratic legitimacy, the same (at least approximately) degree, or a lower degree. In the legal cultures of modern constitutional democracies, the possibility of recognizing the unconstitutionality of amendments (changes) to the constitution should be limited to the last case. In difficult cases, when it is difficult to unequivocally decide whether the amendments actually have less democratic legitimacy, the decision should be “in favor of the admissibility of the amendments.”

## CONCLUSION

Summing up this essay, it should first be noted that the idea of unconstitutionality of amendments to the constitution becomes a very interesting element of contemporary constitutionalism. In some countries, the constitutional courts applied in practice the idea of unconstitutionality of amendments to the constitution, while the theory/philosophy of law developed a conceptual apparatus allowing for the rejection of the thesis about the internal contradiction of this idea. Although this has not been clearly formulated, such a rejection is possible only with the acceptance of the assumption which in this study was called “the assumption of the stratification of legal powers.” However, the stratification of legal powers requires appropriate justification. A justification based solely on an essentialist assumption (that an amendment to an act is something essentially different and weaker than the enactment of a new act) seems, at least in contemporary constitutional democracies, insufficient. The essentialist assumption seems controversial from a philosophical point of view, and an effective justification should somehow appeal to the sovereign. In the constitutional orders of modern democracies, this translates into a justification referring to the difference in the degree of democratic legitimacy of law-making decisions at the constitutional level. In other words, the inadmissibility of amending the constitution should be linked not to the difference between the enactment and amendment, but to the difference between the degree of democratic legitimacy of law-making activities.

The degree of democratic legitimacy may be considered a vague concept and the strict determination of the difference in legitimacy may in some cases be questionable. However, in the case of the issue of unamendability of the constitution, this does not cause any major difficulties. Due to the generally recognized presumption of constitutionality of an act, it seems that the inadmissibility of amending the constitution should be limited to cases of an evident difference in the degree of democratic legitimacy between the adoption of the constitution and the adoption of its amendment. In other words, the condition for the admissibility of recognizing an amendment to the constitution as unconstitutional should be the fact that the adoption of the amendment was made in a procedure with a lower degree of democratic legitimacy than the adoption of the constitution. The adoption of the idea of unconstitutional changes to the constitution in a specific legal system depends on many particular factors (e.g. the history of a given legal system, legal culture, arguments of a political and social nature) and does not seem to be a simple consequence of accepting the universal idea of constitutionalism. If, however, we accept the concept of unconstitutionality of the amendments to the constitution, the acceptance of the above-mentioned condition seems necessary in the light of the normative theory of democracy and constitutionalism.

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