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BOOK REVIEW: *UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS – THE LIMITS OF AMENDMENT POWERS*

Alec Duncan*

Book review of Yaniv Roznai Unconstitutional Constitutional Amendments: The Limits of Amendment Powers *(Oxford University Press, Oxford, 2017).*

The theory of constituent power posits that "the people" is the only legitimate author of a constitutional order and the constitution reflects their will as to the "type and form [of the nation's] political existence".[1] This is considered "the generative principle of modern constitutional arrangements".[2] "The people", through the constitution, institutes governmental authorities (the "*constituted* powers") and grants, defines and regulates the powers of the institutions it creates.[3] The constituted powers, being a creation of the constitution, are, therefore, subservient to the constitution, and must exercise power within the bounds of the constitutional grant of powers. Accordingly, the constituted power cannot alter or abrogate the basis for its existence.[4]

Most prior attempts at domesticating the constituent power to guard against popular revolt have reflected this binary division between the people as constitution-makers and the government as law-makers, and have accordingly sought to disempower the people. Yaniv Roznai's book, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*, takes a different and somewhat novel approach to protecting constitutional orders against fundamental change. He is

* LLB(Hons), BA Victoria University of Wellington. I would like to thank Associate Professor Joel Colón-Ríos for introducing me to the book and for commenting on the draft of this review.

1 Carl Schmitt *Verfassungslehre* (Duncker and Humblot, Munich, 1928) (translated ed: Jeffrey Seitzer (translator) Carl Schmitt *Constitutional Theory* (Duke University Press, Durham (NC), 2008)) at 125, 130–131 and 132.

2 Martin Loughlin *The Idea of Public Law* (Oxford University Press, Oxford, 2004) at 100.

3 Emmanuel Joseph Sieyès "Qu'est-ce qu'est le tiers état?" (1789) (translated ed: Michael Sonenscher (translator) "What is the third estate?" in *Sieyès: Political Writings* (Hackett, Indianapolis, 2003) 92 at 135 and 136.

4 At 127 and 134–136.

not afraid of the people; rather, he seeks to protect constitutional orders from the avarices of their leaders.

The book comes at a time of increasing anxiety, both in the wider world and for constitutional scholars in particular. Brexit, the rise of Donald Trump and of reactionary populism more broadly has led scholars to examine how constitutions and legal systems respond to threats to their fundaments; more specifically, how safe they might be from significant revision or total abrogation by populist governments. Against this backdrop, one disturbing trend has emerged: the increasing number of instances in which governments use constitutional amendment procedures to alter fundamental aspects of their countries' constitutions, usually involving the use of referendums.[5]

However, one important point must be borne in mind: the constitutional amendments propagated in Hungary, Poland and Turkey (to name but a few examples) are not, technically, exercises of the constituent power. The "true" constituent power is an extraordinary and extra-legal power that emerges only in revolutionary situations – the re-emergence of "the people's" will. Such revolutionary instances of constitution-making tend to result in the destruction of the old constitutional order and its replacement with an entirely different one. The power to amend a constitution, by contrast, is a power to progressively develop, correct and refine the constitution, provided for and regulated by the constitution itself.[6]

Unconstitutional Constitutional Amendments proceeds from the assumption that this amendment power, as often exercised by governments (whether acting through the people or not), is capable of regulation by the judiciary. In the book, Roznai attempts to answer the question of how amendments to a constitution, which carry the same normative value as the constitution itself, can nonetheless be regulated. The paradox that an amendment to a constitution might, in some cases, be itself unconstitutional and *ultra vires* will be especially stark to New Zealand readers, raised as we are on

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5 For commentary on this trend, see for example Yaniv Roznai "We the Limited People" (discussion paper for NYU Global Fellows Forum, 10 March 2015); Andreas Kalyvas "Popular Sovereignty, Democracy, and the Constituent Power" (2005) 12 Constellations 223; Mark Tushnet "Peasants with pitchforks, and toilers with Twitter" (2015) 13 ICON 639; and Richard Albert "Constitutional Amendment and Dismemberment" (2018) 43 Yale J Int'l L 1. For illustrations of this practice, see the examples provided in Rosalind Dixon and David Landau "Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment" (2015) 13 ICON 606, regarding the constitutional reforms undertaken by the Fidesz Party in Hungary to weaken the checks on their power and on the efforts of the Justice and Development Party in Turkey to transform the country into a presidential republic. Other recent examples include the ongoing constitutional crisis in Venezuela and the Polish Law and Justice Government's support for the Fidesz Party's policies along with judicial reforms.

6 Hannah Arendt *On Revolution* (rev ed, Penguin Books, London, 2006) at 136; Carl J Friedrich *Constitutional Government and Democracy* (4th ed, Blaisdell, Waltham (MA), 1968) at 134; Kalyvas, above n 5, at 225 and 226; Schmitt, above n 1, at 125–126, 127 and 132; Roznai, above n 5, at 4; and Albert, above n 5, at 4.

a diet of Diceyan parliamentary sovereignty in which Parliament is competent to legislate on any subject it sees fit.

However, Roznai's solution to this quandary is elegant in its simplicity: he denies the assumption that an amendment carries the same normative value as the constitution it purports to amend. This argument and its implications are clearly and logically set forth in a three-part comparative and theoretical exposition of the constituent power.

In Part 1, Roznai commences the book with a comparative analysis of the ways in which amendment powers are considered limited. He begins by exploring the rationales and purposes for the inclusion of such limitations.[7] These limiting provisions "create a space in which [the constitutional amendment] power is not permitted to enter" and aim to protect aspects of the polity that the framers fear might be eroded or attacked.[8] Roznai distinguishes between provisions that are *explicitly* unamendable and those that are *implicitly* unamendable, noting the former are relatively uncontroversial because the framers' intentions are clear and judges conducting judicial review of purported amendments' substance thus enjoy greater democratic legitimacy.[9]

Implicitly unamendable provisions are more legally complex, and it is this concept of unamendable provisions that occupies the rest of the book. Proponents of the idea that such provisions exist and are legally effective argue that there is a constitutional identity that impliedly limits the substance of amendment: an amendment cannot substitute one constitutional identity for another within a continuous legal order – to do so is to reconstitute, rather than amend, the constitution.[10] This idea, drawn from the United States Constitution, is then supplemented with an analysis of the "Basic Structure Doctrine", developed by the Indian Supreme Court as a constitutional bulwark against the Indian Parliament's assertion that parliamentary sovereignty could be applied to the constitutional amendment power such that Parliament could amend the Indian Constitution to any effect it desired.[11]

Having rejected in Chapter 3 the idea that there are substantive supra-constitutional limits to the amendment power,[12] Part II of the book moves on to consider the origins of the theory of

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7 Yaniv Roznai *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press, Oxford, 2017) at 17–18.

8 At 22.

9 At 39.

10 At 41–42.

11 At 42–46.

12 See at 71–104. At 77–78, for example, Roznai provides an analysis of *State (Ryan) v Lennon* [1935] 1 LR 170, in which a minority of the Irish Supreme Court held that, since the Constitution states that the government derives its lawful power from God via the people, it was unlawful for the government to amend the Constitution contrary to natural law (in this case, an amendment suspending *habeas corpus*, which was

constituent power itself, as envisaged by Emmanuel Sieyès, linking Sieyès's theory of constituent power and Jean Bodin's and Johannes Althusius's division between the power to govern and the power to alter the form of government.[13] To this mixture, Roznai adds Lawson, Locke and Defoe's "right of rebellion", observing that Sieyès borrowed from it to give the theory of constituent power its revolutionary bite, whilst modifying it to allow the power to be activated at any time and for any reason.[14]

Roznai revives the distinction that was developed by French constitutional theorists who analysed the debates of the French National Assembly in 1791: the distinction between the original constituent power and the derived constituent power. The original constituent power is the extra-legal constitution-making power that is exercised in a legal vacuum. The derived constituent power, meanwhile, draws its power from the constitution (and hence from the exercise of the original constituent power).[15] Accordingly, whilst the derived constituent power can affect the constitution, it is limited in what it can accomplish.

The book, therefore, addresses itself towards implicitly unamendable provisions that are sought to be amended using mechanisms contained within the constitution.

Roznai's main contribution to the debate is to argue that the amendment power is *sui generis* – it is not the original constituent power itself. Instead, Roznai conceptualises the delegated power as a grant of limited amendment power that the original constituent power provides to the government, subject to the conditions contained in the constitution.[16] When exercising that power, the amending body acts as the people's agent, using the power on the people's behalf and in their interests. Because the exercise of constituent power evinces the people's intention and because the constituted powers are required to conform with the people's will, the amending body, therefore, cannot act so as to destroy the core of the constitution or its basic principles. Roznai, in conformance with the law on agency, describes the amending body as owing a fiduciary duty to the people.[17] In constitutional terms, it would be inconceivable for a legislature to hold limited legislative power, yet also hold unlimited constitution-making power.

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said to radically alter the Constitution's basic principles). At 84–100, he rejects Dixon and Landau's argument, above n 5, that international law poses a supra-constitutional limit on the amending power, noting that international actors cannot force countries to change their constitutions by mere operation of international law, but instead must use the law to create political change.

13 At 107.

14 At 107.

15 At 113–115.

16 At 118.

17 At 119.

This leads Roznai to reject Bruce Ackerman's two-track law-making system (dividing law-making between the legislative and constitutional functions) as inadequate.[18] Instead, Roznai proposes a three-track lawmaking system: the legislative track, the secondary constitutional amendment track (that is, the exercise of delegated constituent power) and the original constituent power track (that is, the exercise of original constituent power).[19]

Part III concludes the book. In this part, Roznai sketches out the rationale for, and approach to, judicial review of constitutional amendments.[20] He proposes that courts need first to identify whether the unamendability is explicit or implicit. If it is the former, the analysis should end there. If it is the latter, the court should identify the fundamental principle contained in the provision. Further, the court needs to analyse both the fundamental principle and the purported amendment. If the amendment renders the constitution fundamentally unrecognisable or strikes at its most basic principles, it will be *ultra vires* the amending power.[21] However, if it merely carves out an exception or alters the principle, the court should hold the amendment to be constitutional (flag-burning, for example, is an exception to freedom of expression, but does not otherwise completely destroy the right).[22]

Finally, Roznai deals with the concern that courts might use judicial review to subvert the democratic will of the people. Roznai addresses these concerns using the spectrum detailed at the end of Part II. There, he establishes the core concept that guides the analysis in Part III: the spectrum of "originalness" in exercises of the constituent power. He distinguishes his approach from the approach taken in the Irish and Swiss Constitutions, which represents a binary in which the amendment power is either unlimited when the people exercise their secondary amendment powers or is only unlimited when exercised in a legal and constitutional vacuum. Instead, what Roznai proposes is a spectrum.[23] In his view, popular, inclusive and deliberative mechanisms that imitate the re-emergence of the constituent power enjoy greater democratic legitimacy and are less amenable to judicial review than an amendment whose enactment process appears to be more similar to the exercise of ordinary legislative power.[24]

Unconstitutional Constitutional Amendments proceeds from the assumption that courts are, or can be conceived of as being, competent to review constitutional amendments and the circumstances

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18 See Bruce Ackerman *We the People: Foundations* (Harvard University Press, Cambridge (MA), 1991).

19 At 127.

20 At 180–186.

21 At 212–218.

22 At 218–219.

23 At 160–161.

24 At 219–224.

in which they arise. However, a discussion of the legal aspects of the power is insufficient to capture the scope of the underlying political situation. Ultimately, though it is not the book's purpose, I think that its failure to address the political aspects of the constituent power's exercise renders the book somewhat less useful than it could otherwise have been.

It is all well and good to argue that courts *should* be able to review constitutional amendments and deem them unconstitutional. However, it does not follow that courts *can*. There are two reasons for this: the first is that judges have no mechanism through which to enforce their judgment except through the other branches of government; and the second is that the current political climates in countries like Venezuela, Turkey, Hungary, Poland and (to a certain extent) the United States have demonstrated that constitution's fundaments can be undermined without any amendment and that constitutional mechanisms put in place to protect the constitution have been ineffective in the face of political antipathy towards liberal constitutional democracy.

In respect of the first point, if the branches of government find themselves in a stand-off (which can often happen if the courts render decisions unfavourable to strong-man leaders), it will be nearly impossible for a court decision to gain any traction with the people and the government. This will be particularly true if the population is polarised or has a highly unfavourable view of the courts vis-à-vis the leader. Indeed, Roznai understands this, if in a different sense. When referring early in the book to international law as a potential supra-constitutional limit, he observes that international legal decisions cannot alter constitutions because international law operates in a different realm. Instead, he notes that any supra-constitutional limits on the amendment power are usually exercised through soft power mechanisms: by companies and by other countries who exert pressure on governments to conform.[25] Judicial review, in the context of highly charged political environment, faces the same difficulty as international law would face in the domestic sphere.

In respect of the second point, it can be noted that, for example, the Venezuelan constitutional crisis was precipitated by attempts by Nicolás Maduro's government to usurp legislative power and maintain executive power in the face of economic collapse and growing unpopularity.[26] The process in Venezuela has proceeded along the lines of the exercise of a "constitutionalised constituent power", and whilst Roznai observes that such instances may establish an orderly and participatory process,[27] it is apparent in Venezuela's case that this has not occurred: the process has been rigged by Maduro to freeze out the political opposition – which boasts similar popularity to his party – and the use of the delegated constituent power to maintain political power came only after Maduro had

25 At 90–91 and 100.

26 Julian Borger "Venezuela's worsening economic crisis – the Guardian briefing" *The Guardian* (online ed, London, 22 June 2016); Editorial "How Chávez and Maduro have impoverished Venezuela" *The Economist* (online ed, London, 6 April 2017); and Mircely Guanipa and Eyanir Chinea "Venezuela exchange rate fluctuation sparks price surge" (10 August 2017) Reuters <www.reuters.com>.

27 Roznai, above n 7, at 166–167.

used political and state coercive tools to undermine the opposition.[28] Far from being a participatory process that guarantees the legitimacy of the resulting constitutional order, the Venezuelan constituent assembly contains no opposition supporters and it looks certain that any resultant constitution will be held illegitimate in the eyes of Maduro's opposition.

Furthermore, no discussion of this nature would be complete without mention of Donald Trump. It is trite that he has, successfully one might say, undermined the United States Constitution without ever having laid a finger on it. President Trump has achieved this dubious feat because he breaks the assumptions and norms that underlie constitutional politics – what we might call "conventions" in the sense that Sir Ivor Jennings understood them.[29] It follows from this that constitutions can, without any extra-legal action, be undermined to the point at which unamendable provisions become irrelevant. At this point, a constitutional revolution may be said to have taken place by stealth and the constitution remains only as an artifice.[30] In other words, constitutions stand and fall on the willingness of individuals, in particular political actors, to adhere to constitutional conventions, not on judicial preservation. Indeed, recent events have shown that, by the point at which courts need to pronounce on such matters, the situation will likely have developed to a point of no return, rendering a judicial opinion an exercise in mere formalism.

My concerns notwithstanding, *Unconstitutional Constitutional Amendments* is a well written book and it is clear that much research has gone into Roznai's work, particularly in the wide lens he takes to global constitutionalism. While the book is entirely theoretical and speculative in approach, Roznai draws extensively from existing literature and constitutional material and the book is replete with examples that assist the reader to build a clear picture of the constitutional mechanisms that Roznai is trying to construct. The book is, therefore, an asset to students and researchers who want to use it as a primer on constitutional theory, or a springboard from which to research further constitutional issues.

Though a reader need not be well-versed in constitutional theory to understand it, the book would have benefited from introducing the theory of constituent power at an earlier stage. Thus, whilst Roznai clearly and carefully problematises the issue of unconstitutional constitutional

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28 Jonathan Watts and Alicia Hernàndez "Venezuela opposition allege coup as supreme court seizes power" *The Guardian* (online ed, London, 30 March 2017); Christopher Sabatini "Maduro has stopped torturing democracy in Venezuela – by killing it" *The Guardian* (online ed, London, 3 August 2017); Mery Mogollon and Chris Kraul "Venezuela's political crisis deepens as its legislature is essentially dissolved" *Los Angeles Times* (online ed, Los Angeles, 18 August 2017); Jorge Rueda and Joshua Goodman "New Venezuela assembly ousts government critic Luisa Ortega as she denounces 'siege' by troops" *The Independent* (online ed, London, 5 August 2017); and Joshua Goodman and Fabiola Sanchez "New Venezuela Assembly Declares Itself Superior to All Other Branches of Government" *Time* (online ed, New York, 9 August 2017).

29 W Ivor Jennings *The Law and the Constitution* (5th ed, University of London Press, London 1959) at 135–136.

30 A view similar to this can be found in Tushnet, above n 5.

amendments in Part I, it is not until Part II that we are given the theoretical basis to understand why this is important. The discussion of constituent power that forms the first section in Part II (in particular the history of the development of the constituent power) is a very valuable discussion that would have been better placed, for the benefit of those unfamiliar with the subject, closer to the front of the book, perhaps explored as an explanation to Roznai's stated problem.

It must be noted that, for those readers looking for analysis on how common law constitutions work, the book will be a disappointment. New Zealand, unsurprisingly, is never once mentioned, nor is Australia or the United Kingdom. Canada merits a single mention, but no more. Accordingly, Commonwealth constitutional lawyers and academics will find little of legal value in the book. Readers hoping for analysis of constitutional parliamentary sovereignty along the lines of Martin Loughlin and Bruce Ackerman will be sorely disappointed.[31]

All this said, however, Roznai's book is not entirely without merit for a New Zealand audience. The book invites curious readers to look behind the explicit lack of analysis of cognate legal systems and to interrogate the constitutional possibilities. It is distinctly possible that New Zealand will, one day, have a written constitution. Take for instance the constitution proposed by Sir Geoffrey Palmer and Dr Andrew Butler, in which the Treaty of Waitangi was included as an unamendable provision.[32] Though, it is speculative to argue as to how the courts might approach a constitutional amendment to this provision, the book provides some guidance as to how the courts could approach the exercise.

Roznai's discussion of the Indian Basic Structure Doctrine appears to have some value for the New Zealand courts.[33] Although this has been applied only in a small number of other countries and never in Canada or Australia, there is a chance, however small, that New Zealand judges could be convinced to deploy it. That doctrine was created in response to the Indian Parliament's assertion that it could utilise parliamentary sovereignty to pass amendments contrary to the fundamental identity of the Constitution. The doctrine was the Indian Supreme Court's mechanism to push back against a body it felt was using these common law notions to fundamentally undermine the will of the people.

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31 For examples of those authors' works on the topic, see Bruce Ackerman, above n 18; Bruce Ackerman "Constitutional Politics/Constitutional Law" (1989) 99 Yale LJ 453; Martin Loughlin and Neil Walker (eds) *The Paradox of Constitutionalism* (Oxford University Press, Oxford, 2007); Martin Loughlin "The concept of constituent power" (2014) 13 European Journal of Political Theory 218; and Martin Loughlin *Foundations of Public Law* (Oxford University Press, Oxford, 2012). See also Richard Tuck *The Sleeping Sovereign: The Invention of Modern Democracy* (Oxford University Press, 2015).

32 Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016) at 75 (art 116(2) of the authors' proposed constitution).

33 See Roznai, above n 7, at 42–70.

Though it would perhaps be unlikely that a New Zealand court would rely on Indian, rather than Canadian, English or Australian precedents, it is not impossible that a judge faced with this sort of novel challenge to a fundamental aspect of New Zealand's written constitution would seek to find guidance from wherever in the common law world he or she could find it.