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The Authority of the Constitutional Judiciary in Reviewing Constitutional Amendments: (A Comparative Analytical Study)

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Abstract

Constitutional documents include limitations on their amendment, established by the original constituent authority. These limitations are divided into procedural limitations, substantive limitations, and temporal limitations. Accordingly, this research raises an important question: what if the authority empowered to amend the constitution violates the limitations imposed upon its power in the constitutional document? In such a case, may constitutional amendments be subject to judicial review? This study seeks to answer this question by setting out the positions of comparative constitutional courts in a number of states regarding the review of constitutional amendments. It also examines constitutions that contain explicit provisions stipulating that constitutional amendments are subject to judicial review. This subject has been addressed through three principal axes: first, the legal basis of judicial review of constitutional amendments; secondly, the justifications supporting judicial review of constitutional amendments; and thirdly, the approaches of comparative constitutional courts regarding the review of constitutional amendments. This is undertaken within an integrated framework combining the analytical, inductive, descriptive, and comparative research methodologies. The study concludes that, in light of the limited number of constitutions that adopt the principle of judicial review of the constitutionality of constitutional amendments, the principal recommendation lies in the necessity of constitutional entrenchment of this principle, particularly in view of the inclusion within constitutional documents of constraints upon the amending power. Violation of these constraints constitutes a deviation of power that necessitates the imposition of a sanction.

Keywords: Constitutional Amendments; Judicial Review; Constitutional Judiciary

Introduction

Although the concept of constitutional rigidity is founded upon the desire to achieve stability and permanence for constitutional rules, the constitutional system of any state cannot remain absolutely fixed; such a state of affairs is impossible. The constitutional document reflects the conditions of society and its political, social, and economic circumstances, and these conditions are in continuous change and development. It is therefore necessary to permit the amendment of that document so that it may keep pace with emerging circumstances and accommodate the changes that occur within society.

Through this research, we discuss the issue of judicial review of constitutional amendments. This issue places us before three hypotheses:

The First Hypothesis: the existence of an explicit provision in the constitution granting the constitutional judiciary jurisdiction to review constitutional amendments. In this case, no difficulty arises, as the constitutional judiciary will exercise its jurisdiction of review; there is no scope for interpretation where a clear text exists.

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The Second Hypothesis: the existence of an explicit provision prohibiting the constitutional judiciary from extending its jurisdiction to the review of constitutional amendments. In this case as well, no difficulty arises, as the jurisdiction of the constitutional judiciary to review constitutional amendments is excluded pursuant to this prohibitive provision.

The Third Hypothesis: arises where there is no provision permitting or prohibiting such review. This is the prevailing hypothesis in most constitutions. Here, controversy arises and debate branches out concerning the existence or non-existence of such review.

Research Problem:

The research problem of this study is summarised in answering a principal question: to what extent is it possible to recognise constitutional judicial review of constitutional amendments? The move towards recognising this type of judicial review is not an easy matter, in light of the supremacy enjoyed by the constituent authority, whether the authority to enact the constitution or the authority to amend it, over other authorities within the state.

Several subsidiary questions arise from this principal question:

1. In the event that judicial review of constitutional amendments is recognised, what is the legal basis for such review?
2. What is the position of legal scholarship and comparative jurisprudence regarding this issue?
3. What legal justifications support this type of judicial review?
4. May courts exercise such review where the constitution remains silent as to its regulation?

Methodology:

This research relies upon two methodologies: the analytical inductive method and the comparative method.

From the perspective of the analytical inductive method, the study provides an analysis of all issues related to the subject through the examination of various legal texts and the analysis of judicial decisions rendered in this regard. It also surveys the position of comparative constitutional courts and comparative constitutions, drawing the necessary inferences and conclusions.

From a second perspective, the study undertakes a comparison between constitutional courts that support review of constitutional amendments, such as the Constitutional Court in Italy and Germany and the Supreme Court in India, and those that reject adopting such review in the absence of a constitutional provision permitting it, such as the French Constitutional Council and the Supreme Constitutional Court of Egypt. The study further highlights, through comparison, the constitutions of certain states that provide for such review, including the constitutions of Romania, South Africa, Turkey, Morocco, and Tunisia.

1. The Legal Basis of Judicial Review of Constitutional Amendments:

In reality, the basis of such review derives from the limitations imposed by the constitution upon the amending power, whether these limitations are procedural, substantive, or temporal. However, prior to this, the question arises as to whether supra-constitutional principles may constitute a valid legal basis for the review of constitutional amendments.

This would mean that such principles would govern both the constitution itself and the authority empowered to amend it. This matter has given rise to a sharp division of opinion, ultimately leading to its rejection by a significant segment of legal scholarship.

1.1. The Extent to Which Supra-Constitutional Principles Bind the Authority to Amend the Constitution:

A segment of legal scholarship maintains that there exist “higher principles” that transcend the constitution. Since these principles are regarded as superior to the constitution, it is argued that they are binding upon the authority empowered to amend the constitution, and indeed also upon the authority entrusted with enacting it.

In Egypt, for example, following the fall of the 1971 Constitution, a trend emerged advocating the establishment of a set of fundamental constitutional principles to which the new constitution would be bound, so that no single political faction could unilaterally draft it in accordance solely with its own orientations (Al-Silmi, 2012).

In South Africa also, the issue of supra-constitutional rules arose during the drafting of the constitution in accordance with the thirty-four constitutional principles contained in the multi-party agreements concluded at the end of the policy of apartheid. After the adoption of the final Constitution in 1996, it was subjected to review by the Constitutional Court to verify its conformity with those constitutional principles. The Court ruled that certain of its provisions did not conform to them, which led to the amendment of the Constitution (Sorour, 2006).

The notion of higher principles is not a recent development; rather, it is an established idea embraced by certain jurists, including the French jurist (*Duguit*), who maintained that there exists a higher law that predates the State itself, and that all state legislation-including constitutional legislation- must conform to this higher law, which is a creation of the social order rather than a product of legislative will (Salman, 2011; Ahmed, 2019).

However, jurists who advocate the existence of supra-constitutional rules have not agreed upon a clear definition of these principles clarifying their nature and substantive limits. Some attribute the source of these rules to domestic law, while others trace them to international law.

1. Some maintain that higher principles derive from principles of natural law, those principles established in the conscience of the community, dictated by ideal justice, and deduced by reason without the need for a text to proclaim them.
2. Others contend that there exist general principles of law that possess greater legal force than the provisions contained in the constitutional document, such as the principle of popular sovereignty and the principle of separation of powers.
3. Whereas the preceding two approaches refer to supra-constitutional rules derived from outside the constitutional document, another opinion maintains that there exist supra-constitutional rules derived from within the constitutional document itself. According to this view, there exists a hierarchy within the provisions of the constitutional document; for example, provisions imposing prohibitions or restricting the authority to amend the constitution are regarded as constituting supra-constitutional rules.
4. Others argue that there exists a hierarchy in legal value among the documents forming the constitutional bloc within the State, such that some of these documents enjoy superiority over others (Nouiji, 2007) ⁽³⁾.

³. For example, in France there is a diversity of constitutional sources, including the current 1958 Constitution, the Preamble to the 1946 Constitution, and the Declaration of the Rights of Man and of the Citizen of 1789. Consequently, controversy arose as to whether all these sources possess the same constitutional value or whether a hierarchy exists among them.

Similarly, in Egypt, debate arose concerning the legal value of the National Charter issued in 1962, and whether it possessed a status superior to that of the provisions of the constitutional document. In any event, the constitutional judiciary in both France and Egypt rejected the establishment of any hierarchy among the provisions forming the constitutional bloc.

5. A further trend maintains that the rules of international law are superior to the rules of domestic law, including the constitution. Accordingly, the authority to amend the constitution may not adopt an amendment that contradicts rules of international law. Indeed, rules of international law are regarded as constraints upon the original constituent authority itself, pursuant to the principle of continuity of the State, which prevents the original constituent authority from acting in a manner that would incur the international responsibility of the State (Tajen, 2006; Al-Shimi, 2006).

In reality, it is not possible to accept the foregoing views regarding the existence of supra-constitutional rules. This represents the position of the majority of legal scholarship, which we support. These principles still lack clearly defined substantive boundaries. Moreover, it cannot be accepted that a legal rule exists prior to its formulation by the legislator. Such a position purifies legal science from many problems extraneous to its proper domain (Abu Al-Majd, 1960). From another perspective, is the sole source of principles such as justice and equality natural law, or are these principles expressly enshrined within the constitutional document itself? The answer is that no constitutional document is devoid of reference, whether in its preamble or in one or more of its provisions to such principles. Consequently, when the authority responsible for enacting the constitution contravenes principles of justice, it contradicts itself and, in the first instance, violates the provisions of the document it has adopted before violating principles of natural law.

The same applies to the amending authority: should it act in such a manner, it would be violating the provisions of the constitution itself rather than the principles of natural law.

It may therefore be stated that the principles of natural law have, in their entirety, become enshrined within constitutional documents. Accordingly, their violation results in a contradiction between constitutional provision, an anomaly and defect within the document. The rules of natural law have thus become a term designating rules that are, in fact, written, rather than merely unwritten rules deduced by reason and imposed by the human conscience.

As for the assertion that there exist general principles of law possessing greater legal force than the provisions contained in the constitutional document, such as the principle of popular sovereignty and the principle of separation of powers. it may be replied that although it is correct that these are indeed general principles of law, they are likewise expressly enshrined within the constitutional document. Therefore, no provision within the constitutional document may contradict such principles, lest a contradiction arise between its provisions, not because one provision enjoys superiority over another.

The provisions of the constitutional document form an interconnected whole, each complementing the other. General principles derive their importance and strength from their specific and subsidiary applications. For example, the principle of judicial independence, although derived from the principle of separation of powers, is no less significant than it; both are affirmations of a further principle, namely the realisation of justice.

In reality, what legal scholarship describes as higher constitutional principles or general legal rules encompasses an unlimited number of rules or principles, some of which closely approximate written legal provisions or are derived from one or more of them, such as the principle of separation of powers, which is ordinarily inferred from the totality of constitutional provisions that assign the three principal public functions to three independent public bodies (Abu Al-Majd, 1960).

Furthermore, the authority to amend the constitution -like the authority to enact it- finds it difficult to contravene rules of international law, both politically and legally. A breach of international law by the amending authority may provoke the disapproval of the international community, thereby causing moral embarrassment to the State at the international level, as for contravention of international agreements to which the State is a party, this would engage the international responsibility of the State, all such consequences create instability within the State and undermine its political order.

1.2. Constitutional Amendment Constraints as a Legal Basis for the Review of Constitutional Amendments:

The constitutional document incorporates within its constraints upon its own amendment. These constraints are divided into procedural constraints, substantive constraints, and temporal constraints. Procedural constraints refer to a set of procedures through which the amendment process must pass. These procedures consist of proposing the amendment, then debating it, and finally its definitive approval. Substantive constraints, by contrast, remove certain specified matters from the scope of constitutional amendment⁽⁴⁾. Temporal constraints prohibit amendment of the constitution except after the lapse of a specified period of time⁽⁵⁾.

With regard to procedural constraints, jurists are unanimous as to the necessity of the amending authority's compliance with them, the subordination of the authority to amend the constitution to the original constituent authority in formal terms cannot be questioned, the authority to amend the constitution cannot amend it without adhering to the procedural controls and conditions set out in the constitutional document.

To argue otherwise would mean that the authority to amend the constitution could amend it according to the same procedures applicable to the enactment and amendment of ordinary legislation, that is; the amending authority could transform a rigid constitution into a flexible one. Such a conception cannot be accepted under any circumstances.

Accordingly, formal review is conceivable. For example, where the constitution requires that a constitutional amendment be approved by two-thirds of the members of Parliament, the amendment cannot validly be issued without satisfying that condition. Likewise, where the constitution requires the approval of both chambers of Parliament, the amendment cannot be adopted with the approval of only one chamber. In such cases, the procedural requirements must be fulfilled, whether or not the constitution expressly provides for review of constitutional amendments (Al-Shimi, 2006).

As for substantive and temporal constraints, jurists had differed as to their legitimacy and the extent to which the amending authority is bound by them. The prevailing view has ultimately

⁴. An example of a substantive prohibition is found in the final paragraph of Article (226) of the Egyptian Constitution, which provides that: "*The provisions relating to the re-election of the President of the Republic, or to the principles of freedom or equality, may not be amended unless the amendment relates to the provision of further guarantees*". Likewise, Article (89) of the French Constitution prohibits any amendment affecting the republican form of the State.

⁵. An example of a temporal prohibition is found in the final paragraph of Article (174) of the Kuwaiti Constitution, which provides that: "*No proposal for the amendment of this Constitution may be made before the lapse of five years from the date of its entry into force.*"

recognised the legal value of these constraints; accordingly, the authority to amend the constitution is required to comply with them.

However, if these constraints possess legal value, what is the fate of a constitutional amendment that contradicts them?

In answering this question, it cannot be said that there exists a genuine legal sanction for breach by the amending authority of amendment constraints unless the constitutional legislator recognises judicial review of constitutional amendments.

This gives rise to a further question: to what extent are constitutional amendment constraints suitable as a reference point for judicial review of constitutional amendments?

In reality, regarding amendment constraints as a legal basis for the exercise of judicial review of constitutional amendments rests upon two considerations.

First: The Superiority of the Original Constituent Authority over the Authority to Amend the Constitution:

The original constituent authority is superior to the authority to amend the constitution. The latter is closer in nature to the traditional authorities (legislative, judicial, and executive). These three authorities, together with the authority to amend the constitution, derive their competences from the constitution, that is; from the original constitutional legislator. Nevertheless, it cannot be said that the authority to amend the constitution stands on an equal footing with the three traditional authorities, since the amending authority performs a function of a constitutional nature; it possesses the power to determine the competences of the three traditional authorities.

More precisely, if the authority to amend the constitution may not depart from what has been established by the original constituent authority, the traditional authorities may not depart from what has been established by the authority to amend the constitution (Al-Shimi, 2006).

The superiority of the original constituent authority over the authority to amend the constitution is attributable to two factors:

1. The timing of their respective intervention: The original constituent authority exercises its function at a time when no constitution exists, that is; at the time characterised by a legal vacuum. It does not derive its existence from any constitutional provision. By contrast, the authority to amend the constitution exercises its function at a time when an existing constitution is in force and derives its existence from its provisions.
2. The controls governing the exercise of their respective competences: The original constituent authority, exercising its function in the absence of a constitution, is not subject to restriction or condition. The authority to amend the constitution, however, is a limited and conditional authority. It exercises its competence within the framework of the existing constitution and derives its powers from its provisions.

Accordingly, the authority to amend the constitution is a delegated authority and is therefore constrained. It cannot evade the provisions that define its competence. Since the original constituent authority has restricted the competence of the amending authority, the latter does not possess the power to interfere with such provisions (Fikri, 2002).

Second: The Binding Nature of Constitutional Provisions:

The basis for binding the authority to amend the constitution to the constraints imposed upon it in the constitutional document lies in the binding character of all constitutional provisions. The original constituent authority does not include a provision within the constitutional document without intending its application. All constitutional provisions are equal in this respect. Accordingly, a constitutional provision that establishes a constraint upon the amending authority

must be complied with by that authority; otherwise, it would have disregarded the application of that provision, which cannot be accepted.

Constitutional provisions cannot be regarded as merely directive rules stripped by the constituent authority of their binding force and reduced to provisions devoid of value, producing no effects within the legal order (Al-Murr, 2003).

It should be noted that the obligation of the authority to amend the constitution to comply with amendment constraints is not due to the existence of a hierarchy among constitutional provisions. Rather, it is attributable to the binding nature of all constitutional provisions, whether they contain constraints or not, and whether they were enacted by the original constituent authority or by the amending authority. All constitutional provisions possess the same value and rank.

The authority to amend the constitution performs an act of a constitutional nature, not a legislative act. Accordingly, the act issued by the authority to amend the constitution is of the same nature as the act issued by the original constituent authority; both are constitutional acts (Al-Shimi, 2006).

Most constitutions, in order to facilitate amendment of their provisions and to ensure their rapid adaptation to political and social developments within the State, do not apply strict parallelism of forms and instead adopt procedures that are easier and less complex. They therefore do not require that amendment be carried out by the same authority that enacted the constitution (Badawi, 1969).

In reality, no positive constitution establishes a hierarchy between a constitutional provision issued by the authority to amend the constitution and a constitutional provision issued by the original constituent authority.

For this reason, it is not possible to endorse the view that designates the constitutional foundations established by the original constituent authority with the aim of restricting the authority to amend the constitution as supra-constitutional rules or governing principles of the constitution (Sorour, 2006).

The constraints imposed upon the authority to amend the constitution are nothing more than substantive constraints established by the original constituent authority upon the amending authority. The latter must comply with them and refrain from departing from them when undertaking amendment. However, they do not stand above the constitution itself or above its other provisions (Salman, 2011).

From all of the foregoing, it may be concluded that constitutional amendment constraints constitute a legal basis for judicial review of constitutional amendments. The reason for this is not the superiority of the constraining provisions over other provisions, but rather the existence of a form of hierarchy between the original constituent authority and the amending authority, pursuant to which the former is superior to the latter.

3. Justifications Supporting Judicial Review of Constitutional Amendments:

At the outset, it must be stated that what is issued by the authority to amend the constitution constitutes a purely constitutional act. The act issued by Parliament in its capacity as an authority competent to amend the constitution differs from that which it issues in its capacity as a legislative authority. Accordingly, constitutional amendments cannot be subsumed within the broad meaning of the term “laws” that are subject to review by the constitutional judiciary.

If we do not accept reliance upon an expansive interpretation of the term “laws” as a justification for judicial review of constitutional amendments, there nevertheless exist other justifications that strongly support such review. The most significant of these may be summarised as follows:

3.1. The Concept of the Rule of Law State Supports Review of Constitutional Amendments:

By a rule of law state is meant a state in which all its bodies and authorities are subject to the law, that is to say, the law governs their administrative, legislative, and judicial activities ⁽⁶⁾. One of the most important pillars of the rule of law state is the existence of judicial oversight over all acts of the public authorities within it, so as to ensure their compliance with the law.

The rule of law state is founded upon subjection to the law with the objective of protecting individuals and their freedoms. These freedoms constitute a constraint upon the public authorities within the State. In order to ensure the continued balance between public authorities and individual rights, a form of review must exist to rectify matters whenever an authority deviates and departs from the law. Review, in and of itself, constitutes an element of the rule of law state, whether it be political, administrative, or judicial review. Judicial review, however, remains the most effective form of oversight (Fouda, 2011).

Since the constitution constitutes the primary reference within every State, by guidance of which it may be determined whether the other elements of the rule of law state are present or absent, and since the constitution establishes all the authorities within the State, founds their legal existence, and defines their competences, all authorities are under an obligation to refrain from undertaking any act that would contravene the provisions of the constitution. The constitution thus constitutes a constraint upon all authorities established within the State (Al-Gamal, 2010). Given that the authority to amend the constitution is an authority created by the constitution, whose competences are defined and whose powers are constrained by it, that authority must comply with these constraints and adhere to the limits drawn for it. Should it depart from them, such departure constitutes a deviation, and the most effective means of correcting such deviation is judicial review.

To contend otherwise, that is to deny the subjection of constitutional amendments to judicial review, would result in disregarding the will of the original constitutional legislator when it made the authority to amend the constitution a limited and conditional authority. It would also enable the amending authority to circumvent the constitution under the pretext that it exercises an unrestricted competence; consequently, it could introduce into the constitution, under the guise of amendment, any provision it wishes and in whatever manner it chooses (Al-Shimi, 2006).

On this basis, we do not accept the view that where the constitution does not regulate review of the legality of constitutional amendments to ensure their conformity with the controls governing the exercise of the amending power, the basis for the validity of such amendments -even where they violate the prescribed controls- is to be found in the constitution itself, which has not made the entry into force of the amendment dependent upon any supervisory intervention by any authority (Tajen, 2006).

Although this view possesses a degree of plausibility, it is difficult to accept, as it combines two contradictory wills of the same authority. How can the original constituent authority intend both the application of the constraint it has established and its non-application at the same time? The original constituent authority cannot enact a provision without intending its application. The matter does not go beyond one of two hypotheses:

First hypothesis: that the original constituent authority enacts a provision containing a constraint

⁶. For a State to qualify as a rule of law state, several elements must be present, foremost among them: the principle of separation of powers; the principle of the supremacy of the law; the existence of a constitution; the hierarchy of legal norms; judicial review; and the recognition of individual rights.

upon the amending authority. In this case, it cannot be said that it did not intend the application of that provision.

Second hypothesis: that the original constituent authority does not impose constraints upon the amending authority. In this case, it will must be understood as having been directed towards not binding the amending authority by any constraints.

The view under consideration, however, assumes a third hypothesis: that the original constituent authority establishes a constraint while simultaneously permitting its breach by the amending authority. This cannot be accepted.

The assertion of this view that the absence of a constitutional provision providing for review signifies that the original constituent authority intended constitutional amendments to take effect even where the amending authority violates constitutional constraints; results in stripping amendment constraints of all legal value.

In light of this situation, it becomes necessary for the constitution expressly to provide for judicial review of constitutional amendments. Just as the constraint has been established, so too must the sanction resulting from its breach be established.

3.2. Constitutions That Recognise Judicial Review of Constitutional Amendments:

Among the justifications supporting the concept of judicial review of constitutional amendments are those states whose constitutions expressly provide for such review. These include the constitutions of Turkey, Romania, South Africa, Morocco, and Tunisia.

1. The Constitution of Turkey (1982)

The Turkish Constitution is among those whose judiciary reviews constitutional amendments. However, this review is limited to formal compliance only.

Article (148) provides that: “...*The Court shall review constitutional amendments and verify their validity in form only... The review of the validity of constitutional amendments is limited to verifying whether the required majority for the proposed amendment and for its ratification in the referendum has been achieved, and compliance with prohibitions imposed on discussions conducted under urgent procedures...*”⁽⁷⁾

Article (149) further stipulates that: “...*Decisions on the annulment of constitutional amendments, the dissolution of political parties, and the deprivation of their state aid shall be taken by a two-thirds majority of the total number of members...*”

2. The Constitution of Romania (1991)

The Constitution of Romania also recognises the principle of review of constitutional amendments. (Article 146) stipulates the jurisdiction of the Constitutional Court to examine proposed amendments. Before Parliament may adopt a constitutional amendment, it must submit the proposed amendment to the Constitutional Court, which is required to decide on its constitutionality within ten days from the date of referral.

3. The Constitution of South Africa (1996)

The Constitution of South Africa provides for judicial review of constitutional amendments. Article (144) outlines the procedure for ratification of provincial constitutions, stating:

⁷. It is noteworthy that Article (175) of this Constitution specifies the majority required for proposing a constitutional amendment and for its ratification in a referendum as follows: “*A constitutional amendment shall be proposed in writing by no fewer than one-third of the total members of the Grand National Assembly of Turkey. Draft constitutional amendment bills shall be debated twice in the plenary session of the Assembly, and the adoption of any draft constitutional amendment bill requires the approval of three-fifths of the total number of members of the Assembly by secret ballot...*”

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1. If a legislative body enacts or amends any constitution, the head of that legislative body must submit the text of the constitution or constitutional amendment to the Constitutional Court for ratification.
2. No provision of any provincial constitution or constitutional amendment shall become law unless the Constitutional Court certifies that:
 - (a) the provision was enacted in accordance with Section 142; and
 - (b) the provision as a whole complies with Section 143. ⁽⁸⁾

Accordingly, the Constitutional Court is constitutionally entrusted with certifying provincial constitutions and any amendments thereto; a constitution or its amendments do not become effective without such certification. Prior to certification, the Court verifies whether the provincial constituent authority or amending authority has complied with Sections 142 and 143. Whereas Section (142) provides that: *“A provincial legislature may enact this province’s constitution or amendment thereof if at least two-thirds of its members vote in favour of the proposed law”*. while Section (143) stipulates that: *“No provincial constitution or constitutional amendment may be inconsistent with this Constitution.”*

Article (167) further provides that the Constitutional Court has exclusive competence to: “...rule on the constitutionality or unconstitutionality of any constitutional amendment...”

4. The Constitution of Morocco (2011)

The Moroccan Constitution also provides for Constitutional Court oversight of constitutional review procedures. Title XIII, which addresses constitutional revision, spans Articles 172 to 175. Article (172) defines the authorities competent to propose constitutional amendments: the King, the Prime Minister, the House of Representatives, and the House of Councillors.

Articles 173 and 174 set out the procedures for constitutional revision. (Article 173) requires that for a proposed constitutional amendment submitted by one or more members of either House of Parliament to be validly adopted, it must receive the approval of a two-thirds majority of the members of each House.

Article (174) establishes two conditions for ratification of proposed constitutional amendments: the first requires approval by a two-thirds majority of the members of each House; the second requires submission of the proposal to the people for a referendum. Amendments do not become final until ratified by referendum.

Then, the final paragraph of Article (174) provides: “The Constitutional Court shall monitor the validity of these review procedures and announce the results.”

5. The Constitution of Tunisia (2022)

The Tunisian Constitution entrusts the Constitutional Court with monitoring proposals for

⁸. Article (145) also clarified the procedure for signing and promulgating provincial constitutions, providing as follows:

1. *The Prime Minister of any province shall approve and sign the text of any provincial constitution or constitutional amendment that has been certified by the Constitutional Court.*
2. *The text approved and signed by the provincial Prime Minister shall be published in the Official Gazette and shall enter into force upon publication or on a later date specified in accordance with that constitution or amendment.*
3. *The text signed for any provincial constitution or constitutional amendment shall constitute conclusive evidence of the provisions of that constitution and, after publication, shall be deposited with the Constitutional Court for safekeeping.*

constitutional amendment and verifying their conformity with the constraints on the amending authority set out in the Constitution. If a proposal affects a provision that may not be amended under the Constitution, it cannot be discussed.

Article (136) of Title IX, on constitutional amendment, provides: *“Every initiative to revise the Constitution shall be obligatorily submitted by the entity that proposed the draft revision to the Constitutional Court to decide on matters that may not be amended as provided in this Constitution.”*

It should be noted that the 2014 Tunisian Constitution provided for a similar arrangement. Article 144 of Title VIII provides: *“Every initiative to amend the Constitution shall be submitted by the Speaker of the Assembly of the Representatives of the People to the Constitutional Court for an opinion as to whether it affects any unamendable provision under this Constitution.”*

However, there are two differences between the current and previous texts:

1. In the current Constitution, submission of proposals to the Constitutional Court is obligatory.
2. In the current Constitution, the entity that submitted the proposal is responsible for submitting it, whereas under the previous Constitution, the Speaker of the Assembly of the Representatives of the People was responsible.

3.3. Closing the door on circumventing the constitutional prohibitions established by the rulings of the constitutional judiciary:

The application of the concept of a rule of law state necessitates that all state institutions be subject to the law. This, in turn, requires that the legislative authority be subject to the constitution, such that any laws issued by that authority must not conflict with the constitution, in observance of the principle of the hierarchy of legal norms.

If the legislative authority enacts a law that contradicts a constitutional provision, the constitutional judge will not hesitate to rule it unconstitutional, and such a ruling will have binding force against the legislative authority, constituting a constitutional barrier that prevents it from attempting to re-enact the defective law unless its defects have been remedied.

A pertinent question arises in this context: does the binding effect of a constitutional court ruling extend to the authority to amend the constitution, such that that authority refrains from enacting a constitutional amendment that conflicts with the ruling?

In principle, a ruling by the constitutional judge constitutes a barrier to the amending authority from enacting a constitutional amendment that contradicts the ruling. However, it may occur that the amending authority circumvents the rulings of the constitutional judiciary by re-enacting unconstitutional provisions in the form of a constitutional text. In such a case, the constitution itself becomes a source of encroachment upon sound constitutional principles established by constitutional court rulings. Consequently, judicial review of constitutional amendments would provide a vital safeguard for the protection of citizens' rights and fundamental freedoms against any such constitutional circumvention (Al-Shimi, 2006).

The concern regarding the potential circumvention of constitutional court rulings by the constituent authority is not merely theoretical; it has historical precedent. It occurred in Egypt under the original constituent authority when the 2012 Constitution was adopted. It is therefore conceivable that the same could occur under the amending authority.

On 23 April 2012, Official Gazette Law No. 17 of 2012 was published, amending certain provisions of Law No. 73 of 1956 on the Organisation of the Exercise of Political Rights. The amendment added a fourth paragraph to Article 3, which imposed a ten-year suspension of political rights on anyone who, during the ten years preceding 11 February 2011, had served as

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President of the Republic, Vice-President, Prime Minister, head of the dissolved National Democratic Party, its Secretary-General, or a member of its Political Bureau or General Secretariat.

On 25 April 2012, the Presidential Election Commission referred the text of the aforementioned paragraph (4) to the Supreme Constitutional Court to determine its constitutionality. The Court ruled that the paragraph was unconstitutional, on the grounds that it imposed a penalty without judicial judgment, violated the principle of equality before the law a fundamental pillar of rights and freedoms, established arbitrary differentiation between citizens without objective basis, and lacked generality and abstraction (Supreme Constitutional Court of Egypt, 2012).

Nevertheless, the constituent authority that enacted the 2012 Constitution circumvented the substance of this ruling by adopting the previously struck-down legislative text. Article (232) of the Constitution stipulated that the leaders of the dissolved National Democratic Party were prohibited from engaging in political activity for presidential and legislative elections for a period of ten years from the date of entry into force of the Constitution! (⁹).

The Comparative Constitutional Judiciary's Position on the Review of Constitutional Amendments:

This section examines the stance of constitutional courts regarding the judicial review of constitutional amendments. The focus here is specifically on situations where no constitutional provision explicitly empowers the court to exercise such review; where such a provision exists, no issue arises.

Given that most constitutions do not explicitly authorise such review, the approaches of constitutional courts differ across states. One judicial trend assumes the authority to exercise this review, whereas another trend rejects granting itself a competence not provided by constitutional text.

Comparative constitutional jurisprudence on this matter can be categorised into three approaches:

4.1. First Approach: Judicial Review of Constitutional Amendments:

In many countries, constitutional courts have undertaken to review the constitutionality of constitutional amendments that violate amendment constraints, whether formal or substantive, as seen in Italy, Germany, Austria, India, and South Africa (Srouf, 2006).

In Italy, the Constitutional Court, in Case No. 1146 of 29 December 1988, ruled that the Italian Constitution contains supreme principles that cannot be altered or amended in their essential content, whether by constitutional amendment or any other constitutional law. The Italian Constitutional Court has repeatedly affirmed that it may exercise review over the constitutionality of constitutional texts (¹⁰).

⁹. Article (232) of the 2012 Constitution provided as follows: *“The leaders of the dissolved National Democratic Party are prohibited from engaging in political activity or standing for presidential and legislative elections for a period of ten years from the date of entry into force of the Constitution. By ‘leaders’ is meant anyone who, on 25 January 2011, was a member of the party’s General Secretariat, Policy Committee, or Political Bureau, or was a member of the People’s Assembly or Shura Council in the two legislative terms preceding the Revolution.”*

¹⁰. For example: Decision No. 38 of 9 March 1957, Decision No. 46 of 2 January 1946, Decision No. 30 of 1 March 1971, Decision No. 12 of 2 February 1972, Decision No. 170 of 8 June 1984, Decision No. 26 of 30 January 1985, and Decision No. 366 of 1991.

In Germany, on 15 December 1970, the Constitutional Court held that the authority to amend the constitution is a derivative authority of the original constituent power; it is bound by the substantive procedural provisions set out in the Constitution and is responsible for ensuring compliance with these provisions. The Court confirmed that it may intervene to declare certain constitutional amendments invalid.

Specifically, pursuant to Article (79/3) of the German Constitution ⁽¹¹⁾, the authority to amend the Constitution may not contravene the restrictions set forth therein. The Court emphasised that the supreme constitutional norms govern the entire constitutional order, and the amending authority may not impose new restrictions in a manner that alters the scope of its constitutionally delegated powers. The Court also highlighted the internal unity of the Constitution, noting that the meaning of any part is interconnected with other provisions. In addition to substantive limitations imposed by supreme constitutional norms, these norms may also prescribe procedural rules that must be observed.

In India, until 1967, the Supreme Court refrained from imposing any constraints on the authority to amend the Constitution. However, in 1967, by a ten-to-two majority in (*Golak Nath v. State of Punjab*), the Court held that Parliament could not infringe the fundamental rights guaranteed under Part III of the Constitution, even through constitutional amendment. This ruling relied on Article (13/2), which provides that the State may not enact any law that contravenes the rights enshrined in Part III, and that any law enacted in violation of this provision is void.

The Supreme Court reaffirmed this principle in 1973 in (*Kesavanda Bharati v. State of Kerala*), holding that constitutional amendments could not impinge upon the fundamental rights, including the right to property, as a component of the Constitution's basic structure.

In 1975, the Indian Supreme Court in (*Indira Gandhi v. Rajnarain*) invalidated a constitutional amendment passed by Parliament to validate disputed election results, ruling that the amendment constituted a manifest abuse of the amending power.

It should be noted that the Indian Constitution, from 1949 until 1976, contained no provision barring the Supreme Court from reviewing constitutional amendments. However, following the aforementioned rulings, the Constitution was amended in 1976 to prohibit judicial review of constitutional amendments. Article (368/4) now provides: "No amendment of this Constitution shall be called into question in any court on any ground whatsoever, including under the provisions of Part III."

Further, Article (368/5) expressly states: *"For the avoidance of doubt, it is hereby declared that*

¹¹. Article 79(3) of the German Constitution provides: *"No amendment to this Basic Law shall affect the division of the Federation into Länder, the principle of participation in the legislative process, or the principles set forth in Articles 1 and 20."*

Article 1 of the Constitution concerns the protection of citizens' personal freedom and prohibits any infringement on human dignity by the state authorities. Article 20 comprises four paragraphs: the first establishes the federal, democratic, and social nature of the state; the second provides that all state authority derives from the people; the third stipulates that the legislative authority is bound by the constitutional law, and that the executive and judicial authorities are bound by the Constitution and the law; and the fourth guarantees all citizens the right to critique and resist tyranny, provided no other means of redress are available.

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there shall be no limitations of any kind on the constituent power of Parliament to amend this Constitution by adding, varying, or repealing any provision thereof under this Article.”

Thus, it is clear from clauses (4) and (5) of Article 368 that the Indian Constitution prohibits judicial review of constitutional amendments: clause (4) bars judicial challenge to any amendment, and clause (5) confirms that Parliament faces no restrictions in amending the Constitution (Shenawi, 2016).

Despite this prohibition, the Indian Supreme Court subjected constitutional amendments to judicial scrutiny. In 1980, in (*Minerva Mills v. Union of India*), the Court affirmed that Parliament cannot arrogate to itself the right to contravene the Constitution or destroy its essential components, nor can it divest the courts of their power to review the constitutionality of amendments. Judicial review of amendments constitutes a fundamental element of the constitutional framework. Without it, fundamental rights would be at risk, and the Constitution would be reduced to a mere declaration of intent.

The Supreme Court observed that constitutional amendments intended to prevent judicial review sought to undermine the constitutional balance between fundamental rights and the guiding principles of the State, a balance that forms an essential element of India’s constitutional structure. Such amendments aimed to replace the democratic order with authoritarian rule (Srouf, 2006; Wahba, 2015).

Some scholars argue that the Indian Constitution does not provide the clearest example of an explicit bar on judicial review. The bar applied to the amending authority, not the original constituent power. A clearer example is the 1973 Constitution of Pakistan, where the prohibition emanated from the authority that enacted the Constitution itself (Al-Ubaidy, 2021).

Article (239/5) of the **Pakistani Constitution** provides: *“No constitutional amendment shall be challenged in any court for any reason whatsoever”*. Paragraph (6) further clarifies: *“For the avoidance of doubt, it is hereby declared that there shall be no limitations of any kind on the competence of the Majlis-e-Shura to amend any provision of this Constitution.”*

4.2. Second Approach: Rejection of Judicial Review of Constitutional Amendments:

Contrary to the first approach, which endorses judicial review of constitutional amendments, the constitutional courts in France and Egypt have refrained from exercising such review.

In France, the Constitutional Council refused to conduct any constitutional review of the power to amend the Constitution outside the procedures set forth in Article 89, which governs the amendment process. French constitutional practice provides us with two decisions directly related to the review of constitutional laws, one from 2003 and another from 2005. For illustration, we focus on the first: **Decision No. 469–2003**, issued on 26 March 2003.

This decision concerned a challenge submitted by members of Parliament to the Constitutional Council regarding a constitutional law related to the decentralized organization of the Republic, in order to assess its constitutionality on the basis that it violated Article (89/5) of the Constitution, which prohibits amendments affecting the republican form of government.

The government submitted a memorandum to the Council asserting its lack of jurisdiction over constitutional laws. It argued that the Council’s competence under Article (61) and other constitutional provisions does not extend to reviewing constitutional amendments. The government also rejected the idea that the Council could rely on “higher principles” of the Constitution to justify reviewing amendments, arguing that such abstract principles are not recognised under French law. The memorandum concluded that no constitutional rule empowers the Council to review constitutional laws amended under the Constitution (Rousseau & Viala, 2004).

The Constitutional Council subsequently ruled that it lacked jurisdiction to review the constitutionality of constitutional amendments, affirming that the Constitution does not grant it such authority. This ruling was accurate, as Article 61 only empowers the Council to review organic laws and ordinary laws passed by Parliament. Furthermore, the term “law” does not encompass constitutional law, since the Constitution explicitly distinguishes between “constitutional amendment” and ordinary law, particularly in Article 89. Thus, it was natural for the Council to declare its lack of jurisdiction over parliamentary constitutional amendments and those approved by referendum (Tagen, 2006).

Some commentators have described this decision as “disappointing” (Al-Shimi, 2006), suggesting that it unjustly denied oversight of constitutional amendments passed by Parliament. However, this assessment overlooks the precision and sensitivity of constitutional matters, which cannot be decided solely on judicial interpretation. Accepting the competence of the Council to review constitutional amendments would effectively allow it to amend the Constitution without following the formal amendment procedures, a power the Council does not possess.

Similarly, **in Egypt**, the issue of judicial review of constitutional amendments before the **Supreme Constitutional Court** arose only in 2006 in Case No. 188/27 Judicial Constitutional, in connection with the 2005 amendment of Article 76 of the 1971 Constitution. In its ruling, the Court held that it lacked jurisdiction to review constitutional amendments, reasoning that the Constitution does not grant such competence and that exercising it without a clear constitutional basis would exceed its authority. The Court stated:

"Whereas the request to annul Article 76 of the Constitution, as submitted by the people, is misplaced, it is established in the Court's jurisprudence that the Supreme Constitutional Court may not abandon or assume a competence not conferred upon it by the Constitution and the law, as either action would be constitutionally impermissible." (Supreme Constitutional Court of Egypt, 2006)

We support the Court's position rejecting judicial review of constitutional amendments. Some jurists have criticized this stance, arguing that it elevates the amendment authority to the level of the original constituent power, which is incorrect (Al-Shimi, 2006). This criticism is unfounded for several reasons:

1. The Court's refusal to review amendments does not equate to equating the amendment authority with the original constituent power. The refusal arises from distinct grounds: absolute authority in the case of the original constituent power, and absence of explicit constitutional authorization in the case of the amendment authority.
2. Judicial competence cannot be assumed without explicit authorization, particularly in sensitive areas such as oversight of constituent authority. Reviewing constitutional amendments requires a clear constitutional provision granting such power, as adopted in many constitutions.
3. If the Court were to review amendments autonomously without explicit constitutional authorization, it would constitute amending the Constitution without following proper procedures, even if the intent were to protect constitutional limitations and the will of the original constituent power (Tagen, 2006).

4.3. Third Approach: Review of Constitutional Amendments from a Procedural Perspective:

In some countries, courts limit their review of constitutional amendments to formal or procedural compliance.

In the **United States**, the Supreme Court reviews constitutional amendments, even though the

Constitution does not expressly grant it this authority. However, the review is procedural, focusing solely on whether the amendment complies with the formal requirements under Article V, without extending to the substance of the amendment.

In **Libya**, the Supreme Court extended its jurisdiction to review constitutional amendments formally, despite the absence of an explicit constitutional provision. The issue first arose in 2013 before the Constitutional Chamber of the Libyan Supreme Court, which ruled the **2012 Amendment No. 3** to Article (2/6/30) of the Constitutional Declaration unconstitutional.

The Court stated: "*While constitutional review under Article 23 of Law No. 6 of 1982, regarding the reorganization of the Supreme Court, is limited to monitoring whether the law under challenge complies with the provisions of the Constitution, it does not extend to reviewing the constitutional provisions themselves. However, when the Constitution prescribes specific procedures for amending its provisions, the legislative authority must adhere to them. If the amendment is challenged for violating these procedures, it falls within the jurisdiction of the Constitutional Chamber to review compliance with the constraints imposed by the Constitution, in accordance with the fundamental principle that the judiciary has general authority to adjudicate disputes, except where otherwise provided.*" (Constitutional Chamber of the Libyan Supreme Court, 2013)

Thus, the Libyan constitutional judiciary adopted formal procedural review of amendments, limiting its oversight to ensure compliance with procedural rules and safeguards, thereby protecting the Constitution while not overstepping its authority (Diab, 2014).

Conclusion:

5.1. Findings

1. The authority to amend the Constitution exercises its powers based on the provisions of the existing Constitution. Therefore, it cannot act contrary to the general principles of the Constitution or violate the procedural, substantive, or temporal constraints imposed on its authority. These constraints constitute a legal basis that enables the constitutional court to exercise judicial review.
2. The hierarchical relationship between the original constituent authority and the amendment authority, with the former being superior to the latter, supports the concept of judicial review of constitutional amendments. The amendment authority is a delegated power, similar in status to the three traditional branches of government. While judicial oversight over the original constituent authority is legally excluded due to its absolute nature, the amendment authority can be subject to review based on a clear legal foundation.
3. Judicial review of constitutional amendments reinforces the principle of the rule of law, upholds democratic governance, and prevents circumvention of constitutional court rulings. This is particularly relevant when the amendment authority attempts to incorporate legislation previously deemed unconstitutional into the Constitution itself.
4. Constitutional courts may refuse to review amendments in the absence of explicit constitutional authorization, as seen in France and Egypt. Judicial competence cannot be presumed and requires clear constitutional provision.
5. Constitutions vary internationally regarding review of amendments. Some, such as those of Turkey, Tunisia, and Morocco, explicitly permit such review, while others, such as India and Pakistan, expressly prohibit it. The majority of constitutions contain no express provision either permitting or prohibiting judicial review.

6. Some countries limit their review to the procedural aspects of amendments even in the absence of explicit authorization. For example, the US Supreme Court exercises procedural oversight under Article V without extending review to the content of amendments. Similarly, the Libyan Supreme Court has monitored amendments solely for procedural compliance.
7. In India, the Supreme Court annulled amendments that violated the basic structure of the Constitution. These rulings prompted the 1976 constitutional amendment, which explicitly removed the Court's power to review constitutional amendments.

5.2. Recommendations

1. We recommend expanding the jurisdiction of constitutional courts to include review of constitutional amendments in both procedural and substantive dimensions. Procedural review should ensure compliance with the formal requirements for amendment, while substantive review should safeguard the unalterable principles of the Constitution.
2. Judicial review of amendments should be prior and mandatory, requiring the competent authority to submit any proposed amendments to the constitutional court before approval.
3. Constitutional judges should refrain from reviewing amendments in the absence of explicit constitutional authorization, as exercising review without such a mandate would constitute unauthorised constitutional modification. Furthermore, constitutional amendments cannot be treated as ordinary laws for judicial review purposes, as they are acts of purely constitutional nature.

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