

Constitutional Amendments, Transformation and Dialogue:  
A Canadian and Israeli Perspectives  
Amnon Reichman

Constitutional amendments raise a known dilemma. According to Chief Justice Marshall, in *Marbury vs. Madison*, the power to amend the fundamental principles of the constitution should be used only on rare occasion. In his words:

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

On the other hand, Jefferson, who did not accept the ruling in *Marbury*, thought that not only is it problematic that unelected judges will have the ultimate power to declare a congressional statute void, as this would lead to despotism, but also, in our context, stated:

"[T]he earth belongs in usufruct to the living, the dead have neither powers nor rights over it." Therefore, from him – and for that matter, for the United Kingdom to this day, restricting the power to amend constitutional texts raises the dead hands problem, as one generation is restricted by values and decisions of a previous generation to fully govern itself.

One way to ease this tension is to distinguish between different forms for amending the constitution. One form is to follow the amendment procedures laid down in the constitution. These usually entail some input from the legislative bodies (usually requiring some special majority) and perhaps some input from the public itself, via referenda. Another form of amending the constitution is via interpretation –either by the apex court with constitutional jurisdiction, or by the legislature and the executive, by way of their practices (which may be confirmed by the court or not litigated and therefore allowed to stand). The interpretative amendment may (although not necessarily) be less rigid as courts with constitutional powers are often less bound by their own precedents, precisely in order to allow for “adaptation”, namely the process by which the supreme

law of the land is interpreted so as to respond to societal changes, as the Europeans often put it. Another way to ease this tension is to distinguish between two types of amendments: those that transform the fundamental principles themselves, and those that change the manifestation of the principles regarding concrete areas. Amending the constitution so elections are held not every 4 years but every 4 years and one month is the latter. Amending the constitution so that elections are held whenever the legislature desires is the former. Amending the constitution so that flag burning is excluded from protected speech is an ordinary amendment. Amending the constitution by deleting the protection of free speech altogether is restricting the fundamental principles of the constitution themselves.

This distinction finds support in several jurisdictions. In Germany, for example, some provisions of the constitution cannot be amended at all. Changing them would require a revolution, or the adoption of a new constitution altogether. In India, the Court has held that the constitution's "basic structure" cannot be amended via a adopting a constitutional amendment, and it was therefore the duty of the court to declare such an amendment as lacking legal force. Analytically, this distinction rests on the distinction between *pouvoir constituant original* – the original power to constitute a jurisdiction, which entail the fundamental principles upon which the jurisdiction is set – and *pouvoir constituant dérivé*, or secondary constituent power, which is the power to amend, but not fully replace, the constitution, following the procedures set out in the constitution. Recall that Chief Justice Marshall himself was careful to state that it is the fundamental principles that are "permanent" as expressed by the "original" right exercised at "very great exertion".

If we buy this distinction – which I am not sure we should – the question that immediately arises is where lies the line between "amendment" and "replacement", (or "ordinary amendment" and "transformative amendment") and derivatively, which institution gets to decide where this line lies. Clearly apex courts have a role, but if legal realism teaches us anything, it is that such power must, to some extent, be respected and accepted by the judiciary as a whole, and at least by segments of the legislature and the executive (let alone "the public"). The Taiwanese case is on point – there the court ordered that not only a statute was unconstitutional but a constitutional amendment was insufficient, prompting the revision of the constitution as such. Nevertheless, such awesome power may lead to clashes, as the current situation in India reveals.

Canada offers an interesting example on point. The British North America Act of 1867 was facing a grand amendment – one that qualifies not only as a mere amendment but as a fundamental amendment: the introduction of charter of rights and freedoms, which would change the structure of the constitutional regime. Technically, the Canadian Constitution is a British Act of Parliament (like other UK constitutional statutes). Some provinces were against the decision of Trudeau to go ahead with the request to the British Parliament based solely on passage of the Charter in the Canadian Parliament. The Court, in a famous reference stated that legally speaking Trudeau and the Parliament were not restricted to proceed. But there was a constitutional convention to consult with the provinces, although violating this convention did not, necessarily, detract from the legal force of any subsequent British legislation. Jean Chrétien, Trudeau’s justice minister, was happy that the project was given a legal green light. Trudeau, however, saw the importance of maintaining constitutional conventions and went back to consult with the provinces. Pursuant to the consultation and negotiation process the majority of the provinces agreed (Quebec not being one of them), provided the charter included an override clause, which allowed the provinces to enact a statute notwithstanding a disproportionate infringement of some rights. Not all – language rights, for example, were excluded (and so were structural elements, such as Federalism). The federal government was also granted this power. Under this design, a law enacted using this clause will be in force notwithstanding the infringement, for a period of 5 years (the election cycle in Canada), and can be renewed after each period. The Charter was so enacted.

Resorting to s. 33 is therefore not a constitutional amendment, but rather something less than that, while still on the constitutional plane. So we have a “replacement”, an “amendment” (following the constitutional procedures or evolving as a matter of judicial interpretation or legislative or executive practices), and, as of 1982, a formal constitutional permission to act notwithstanding the constitution for a limited period, which is a type of derogation.

Interestingly, Quebec, that wanted the charter to include a specific protection and recognition of its distinct culture, and therefore opposed the project, responded by re-enacting all its statutes using the notwithstanding clause. The Court affirmed, stating that it was not required to enact a statute following a judicial invalidation, nor was it required to enact each statute separately using the clause.

So the court was “active” in declaring that there is a convention but restrained when faced with Quebec’s reaction. The political culture in Canada now views the exercise of s. 33 as something that should be resorted to only in the most extreme circumstances, if at all. One could say that a convention has developed regarding the non-application of s. 33.

Israel also offers a unique example, as it was directly influenced by Canada. Israel has a peculiar form of constitutional law – it is still in the making, one basic law at a time.

In way, Israel is in a continuous process of constitutional building “on the fly”, so to speak, which means that constitutional amendments are built into the process, and therefore the need to distinguish between the use of “original” constituent power and derivative power, is ever greater. Procedurally, enacting a new basic law requires a simple majority, and amending a basic law requires following the majority requirements set out in that law – either no requirements, or a requirement that the majority of Knesset members actually vote in three readings in favor of the amendment. In some rare cases, a majority of two thirds is required, but these sections were never amended so this requirement was never tested in court.

Three important points here: While Israel was initially of the British position according to which there is a binding constitutional convention according to which parliament is supreme and therefore no constitutional judicial review of primary statutes is entertained (to the extent such review entails the power to find primary legislation invalid), this is no longer the case. Judicial interpretation of basic laws governing elections (enacted in 1958 and judicially interpreted in the famous *Bergman* case in 1969), and later judicial interpretation of basic laws governing human rights (enacted in 1992 and interpreted in 1995) have transformed this convention. The Israeli judiciary now has the power to exercise constitutional judicial review over a Knesset’s statute infringing a protected right, or infringing basic democratic characteristics of elections.

As part to the enactment of the basic laws dealing with human rights, when the legislature realized that the judicial interpretation of these basic laws results in the power to exercise constitutional judicial review, the legislature reacted by amending one basic law (Basic-Law: Freedom of Vocation) – but not the other (Basic-Law: Human Dignity and Liberty), by inserting the override clause. Yet in Israel this clause requires, for its application, a special majority (namely the actual vote of 61 out of the Knesset’s 120 members in favor of the statute in three readings). Moreover, it is unclear whether this power is available prior to judicial finding of constitutional invalidity,

and where it can be exercised *en mass*, as was done in Quebec. In Israel it has been exercised once, with respect to laws banning the importation of non kosher meat – laws which infringe the basic right to freedom of vocation, protected by the basic law that includes the notwithstanding clause. Debates currently rage in Israel with respect to whether to include an override clause in the other basic law, Basic-Law Human Dignity and Liberty, which protects the more fundamental rights. Recall that in Germany, for example, the right to human dignity is so central that it is “eternal” in the sense that it cannot be amended at all. But, in Germany the scope of this right is more limited than the scope of the right in Israel. The fear, in Israel, is that the very robust and active political scene will not generate a convention for a restrained or rare recourse to the override clause, as in Canada, but rather the opposite, leading to the dilution of the protection of human rights. Party-political interests may thus trump a more deliberative, long term approach committed to the protection of human rights, usually associated with judicial review. So we have an override clause with respect to one right – freedom of vocation, but not with respect to others, and we have the relatively accessible option of amending that.

Which brings me to the issue of constitutional amendments. The Israeli court in recent years has considered the possibility of adopting the doctrine of non-constitutional constitutional amendment. It has stated that in principle the Knesset, in using its constituent power, is nonetheless subject to the fundamental principles of the system as a democracy. Most importantly, the court was willing to review whether the Knesset can adopt a temporary amendment to a basic law – an amendment that will expire after two years. This was done with respect to the budgetary process, governed by Basic-Law: The State Economy (and Basic-Law: Knesset) which require that each year the Knesset will enact a budget law, and should it fail to do so by a certain date the Knesset is dissolved and elections are held. The temporary amendment instituted a bi-yearly budget, allowing the Knesset to enact a budget for a two years period, and therefore be exempt from the requirement to hold a yearly legislative debate (and consequently also exempt from the threat of dissolution should this debate fail to achieve a majority in the Knesset in favor of a proposed yearly budget). This temporary amendment to the Basic Law was challenged in court, as it is in stark contradiction to the approach of Chief Justice Marshall with respect to the constitution. The court, in a sense, said that it is possible to enact such a temporary amendment, but only as a pilot. After the Knesset “tries” a certain constitutional arrangement, it has to either let it expire, or legislate it in an ordinary basic law. And

if it insists on extending the period via another temporary amendment, the court will declare such a constitutional amendment void.

Lastly, there is indication that the Israeli system has developed a convention with respect to the entry into force of amendments dealing with the election process. As part of the same move that led to the enactment of the basic laws dealing with human rights, an amendment to the basic laws dealing with election was enacted, according to which elections for the office of the Prime Minister will be split from the elections to the Knesset (although held in the same time). The idea to split the ballot was to give the Prime Minister a direct mandate to establish a coalition. What is interesting is that the change was to take place one election after the election immediately following the enactment of the amendment. This was in order to ensure that the system isn't gamed (or otherwise captured). As it turned out, the idea of direct election for the Prime Minister's office was a bad idea, because it only increased the power of the potential coalition members (and specifically the tiebreaker small parties). But the lesson remains: some constitutional amendments, especially those dealing with elections, should have a delayed date of entry into force.

To conclude, the Israeli and Canadian examples show that that there is a spectrum with respect to constitutional amendments – not all amendments are alike. They also show that we should be sensitive to time (with respect to the override clause – a statute has to be reenacted each election cycle, with respect to amendments governing elections, they should be staggered). And lastly, political and legal culture matter, and therefore in comparing constitutional arrangements we would be remiss if we simply borrow one component or another from this or that system, without looking at the overall picture governing rights and separation of powers, including the legal and political culture and the potential threats to the capture of key democratic process by factions and/or by Capital.