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# **UNAMENDABLE ELEMENTS GUARD** **CONSTITUTIONAL IDENTITY**

AUTHORED BY - KRATI SACHDEV

## **ABSTRACT**

Constitutions are more than legal or written texts; they formulate a country's essential values, past struggles, and identity. The unamendable parts of the Constitution are the parts in such frameworks that are considered so critical that they cannot be altered under ordinary conditions<sup>1</sup>. These provisions, usually called "eternity clauses" or "constitutional identity," are theoretical and legal protections that guarantee essential democratic values, human rights, or federal institutions are not undermined even when political majorities change.

The aim of unamendable constitutional provisions, their role in maintaining a nation's essential nature, and the challenges they present to democratic rule are all discussed in this essay. We discuss different legal systems' ways of balancing rigidity and flexibility by studying comparative examples like India's "basic structure doctrine"<sup>2</sup>, Germany's respect for human dignity, Article 79(3) of the Basic Law, and the U.S. constitutional safeguards of state sovereignty.

Additionally, this essay looks into the conflicts that come with being unamendable: How can a constitution be both unchanging and adaptable to the changing needs of society? If these unchangeable principles are defined by judicial authorities instead of democratic processes, what would happen? Can these restrictions stop authoritarian reversals, or do they run the risk of judicial overreach?

## **INTRODUCTION**

Constitutions provide the ultimate legal and political foundation of contemporary states, defining the fundamental principles upon which nations are established. However, not all constitutional provisions can be amended by ordinary methods. Some central principles form legal constraints against eroding the constitutional nature of a country. Whether they are

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<sup>1</sup> A.V. Dicey, Introduction to the Study of the Law of the Constitution

<sup>2</sup> Kesavananda Bharati Vs. state of Kerala (1973) 4 SCC 225.

specifically shielded from alteration or viewed as fundamentally unchangeable, some core principles serve as legal safeguards against the erosion of a nation's constitutional character. These unchanging components raise grave concerns about democracy, sovereignty, and the limits of legal reform: How can a constitution guarantee its survival against ephemeral political majorities while permitting essential growth? Why should some principles not be subject to democratic amendment? Furthermore, who is ultimately responsible for creating and maintaining these immutable boundaries<sup>3</sup>?

The idea of unamendability is not uniform or unquestioned. Protected concepts (including human dignity, federalism, and the democratic order) are listed expressly in several constitutions, such as Germany's Basic Law and India's, and use judicial interpretation to identify an unchangeable "basic structure" that is implied. Meanwhile, due to almost impossible procedural challenges, some structural elements of the US (such as equal state representation in the Senate) remain essentially unchangeable. These unlike viewpoints are a reflection of broader philosophical and historical conflicts, such as America's federalist concessions, India's opposition to constitutional overreach during the Emergency, and post-war Germany's determination to avoid authoritarian relapse.

## **THE CONCEPT OF UNAMENDABILITY: ORIGINS AND RATIONALE**

The "unamendability" theory describes constitutional provisions as either legally entrenched or subject to more onerous procedural hurdles than those employed in routine revision processes. Two explanations are given for why such restrictions come to be imposed:

### **EXPRESS OR IMPLIED UNAMENDABILITY**

Express Unamendability:- Some Constitutional provisions specifically mention that certain principles cannot be altered. For example:-

Article 79(3) of Germany's Basic Law protects human dignity, federalism, and the democratic order from change, as well as Article 4 of the Turkish Constitution declares the republican system of government to be irreversible. The Brazilian Constitution's Article 60(4) prohibits amendments that would do away with federalism or individual rights.

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<sup>3</sup> Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (OUP 2017) 53-78; David Lamdau, "Abusive Constitutionalism" (2013) 47 UC Davis Law Review 189.

Implied Unamendability:- Even where there is no explicit prohibition in the text, courts read unamendability from the form or history of the constitution. Examples are:

The Indian Supreme Court established the "basic structure doctrine" Kesavananda Bharati, 1973, the Parliament is not allowed to alter the basic structure of the Constitution e.g., judicial review, secularism Even with procedural compliance, the U.S. Supreme Court suggested in Obiter Dicta that some amendments e.g., those restricting free expression might be substantively illegal.

### **ROLE OF UNAMENDABILITY:-**

There are three main key roles of Unamendable Provision:-

#### **A. Protected Democracy**

- Asserts “Constitutional coups” by which elected majorities employ the amendment process to take power (e.g, Hungary’s 2012 Constitutional amendments undermine checks and balances).
- Guards minority rights against “tyranny of the majority” (e.g, the South African Constitution’s unamendable equality provision)<sup>4</sup>

#### **B. Maintain Federalism & Separation of Power**

- Ensures structural balance, e.g, inviolable state sovereignty guarantees in federal constitutions such as the United States or Germany.
- Prevents Adjustments that would consolidate power ( such as eliminating an independent judiciary)

#### **C. Strengthening Post-Conflict or Radical Improvement**

- To avoid reversal, post-authoritarian constitutions (like Portugal’s 1976 Constitution) usually incorporate transitional justice principles.
- South Africa’s unamendable equality clause ( Section 1)

## **CRITICISM AND CHALLENGES**

The concept of unamendable constitutional provisions is strongly contested from a democratic, institutional, and suspicious perspective, even though it is meant to safeguard fundamental values. These criticisms cast doubt on the validity and effectiveness of enshrining specific regulations beyond modifiable bounds.

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<sup>4</sup> David Landau, ‘Abusive Constitutionalism’ (2013) 47 UC Davis Law Review 189, 214-221; Constitution of the Republic of South Africa, ss1(a) and 74(1)

Democratic Legitimacy Concerns- Unamendability fundamentally challenges popular sovereignty. If constitutions are based on popular authority, then permanent restrictions on the power to amend them may be incompatible with the concept of self-government. Critics argue that forcing past decisions on future generations undermines democratic responsiveness. Turkey's long-standing secularism laws, for example, have been criticised for being undemocratic constraints on contemporary political will. Additionally, empirical studies show that unchangeable provisions often fail to prevent democratic regression, as was the case in Venezuela, where constitutional protections against authoritarian decline proved ineffective<sup>5</sup>.

Judicial Overreach and Arbitrary Enforcement- When courts uphold implied unamendability like India's "basic structure"<sup>6</sup> doctrine, which essentially establishes which concepts are unchangeable, they run the risk of creating quasi-constituent power. This raises doubts about the judiciary's control over democratic processes. Moreover, the lack of clear guidelines for defining "constitutional identity" leads to inconsistent rulings; for instance, depending on the political climate, Pakistan's Supreme Court has alternately applied and disregarded the basic structure doctrine. Such capricious conduct undermines the rule of law<sup>7</sup>.

Functional limitations and Circumvention - Changing the constitution, as in Hungary's 2011 Fundamental Law or the interpretation (s in Russia's eroding of federalism are two ways to circumvent unamendability<sup>8</sup>. Rigidity can also fuel divisiveness, as was shown in Bolivia, where unalterable plurinational clauses intensified regional disputes. Instead of stabilizing constitutions, over-entrenchment can drive political disputes to other arenas, such as judicial appointments or emergency powers<sup>9</sup>.

Theoretical Paradoxes- The basic concept of unamendability contains contradictions. If the amendment power is derived from the constitution, is it reasonable to use it to weaken its foundation? Furthermore, unanimity favors majority control over minority protection, which could result in legitimacy deficits, making it challenging for democratic theory to find a balance between the two. Furthermore, its effectiveness varies by legal culture, performing better in systems with greater judicial independence than in others, such as Germany's robust

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<sup>5</sup> Criticism of Turkey's Secularism laws and their perceived undemocratic nature.

<sup>6</sup> Idib (n 2)

<sup>7</sup> Nawaz Sharif Case (2017) 2017 PLD SC 265;

<sup>8</sup> Hungary's 2011 Fundamental Law (officially known as the Basic Law of Hungary).

<sup>9</sup> The political Economy of Bolivia's New Constitution (2009) 18 Latin American Politics and Society, 75-78

constitutional order.

Although unamendability seeks to preserve fundamental aspects of the constitution, its criticisms highlight profound conflicts between democracy and stability, popular sovereignty and judicial guardianship, and textual entrenchment and practical enforcement. Clearer standards for determining core values, sunset clauses for out-of-date legislation, and supplementary protections like civic education might all be included in a well-rounded strategy. Without these improvements, unamendability runs the risk of becoming an undemocratic restraint on constitutional development or an ineffectual formality.

### **COMPARATIVE CONSTITUTIONAL ANALYSIS OF UNAMENDABILITY:**

Constitutional unamendability is one of the most fascinating and complex features of modern constitutional architecture. In many jurisdictions, the concept takes many different forms, each of which reflects unique historical experiences, legal traditions, and political realities. This study looks at how various constitutional systems respond to the main question: which values are so essential to a society's identity that they must be given more weight than ordinary amendment procedures

The **German Basic Law** is arguably the best illustration of stated unamendability. The "eternity clause" established by Article 79(3) forbids the alteration of fundamental values, including human dignity (Article 1), the federal structure of the state, and the fundamental democratic and social nature of the republic (3)<sup>10</sup>. This framework, which is a conscious attempt to offer legally unassailable democratic protections, was inspired by Germany's terrible experience under the Nazi dictatorship. The Federal Constitutional Court has accumulated a significant body of law that offers a wide interpretation of the eternal clause as a result of its rigorous enforcement of these clauses. In the 1973 Basic Treaty ruling, for instance, the Court emphasized that even international agreements cannot circumvent these fundamental safeguards. A solid Judicial Review and clear language entrenchment can effectively prevent constitutional backsliding, as demonstrated by the German model.

In contrast, **India's** unamendable system was created by judicial interpretation rather than explicit textual requirements. Despite having extensive amendment power, Parliament cannot

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<sup>10</sup> Federal Republic of Germany (grundgesetz), 23 May 1949, Article 1(1) and Article 79(3)

alter the fundamental framework of the Constitution, according to the "basic structure doctrine"<sup>11</sup>, which was established by the landmark 1973 Kesavananda Bharati case. This ideology emerged as a result of Prime Minister Indira Gandhi's attempt to use constitutional amendments to solidify his hold on power during a constitutional crisis. The Supreme Court's involvement supported principles like federalism, secularism, and judicial independence by placing substantial limitations on parliamentary power. Subsequent examples have elaborated and extended this theory, such as *Minerva Mills* (1980)<sup>12</sup> and the *NJAC* judgment (2015)<sup>13</sup>. Although it also deals with the issue of judicial encroachment into politics, the Indian experience shows how unamendability caused by the judiciary can dynamically shift to address new challenges to constitutional democracy<sup>14</sup>.

The **United States** has a different approach, where procedural rather than substantive constraints are the central way unamendability operates. Some provisions are de facto unamendable due to the amendment process outlined by Article V of the United States Constitution, which demands supermajorities on both the federal and state sides<sup>15</sup>. Perhaps most significantly, this feature of the federal structure is effectively unalterable due to the provision for protection against withholding from any state equal suffrage in the Senate without its consent. American courts, unlike German or Indian courts, have typically been unwilling to impose substantive restrictions on the amendment power and have instead preferred to leave amendment questions within the political process. This is a feature of the United States' political constitutionalism tradition and having been founded as a charter of specified powers.

Another noteworthy comparative instance is in the 1988 **Brazilian** Constitution, which has "cláusulas pétreas" (stone clauses) that explicitly forbid changing particular concepts. They provide safeguards for individual rights, the federal system, voting rights, and the separation of powers. The Brazilian experience was a move to solidify democratic advances and was in reaction to the nation's movement away from military dictatorship. These clauses have been actively enforced by the Supreme Federal Court, particularly in cases of attempts to erode judicial independence or water down anti-corruption measures<sup>16</sup>. Brazil's experience does

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<sup>11</sup> Idib (n 2)

<sup>12</sup> *Minerva Mills Ltd Vs. Union of India* AIR 1980 SC 1789;

<sup>13</sup> *Supreme Court Advocate-on-Record Association Vs. Union of India* (2016) 5 SCC 1

<sup>14</sup> Constitution of India, 1950.

<sup>15</sup> Article V of the US Constitution

<sup>16</sup> Federative Republic of Brazil, 1988, Article 60(4)

help, however, to show the difficulties of enforcing unchanging clauses in a strongly polarized political system, where opposing interpretations of central constitutional concepts tend to create institutional tensions.

Unamendability clauses can be used as both political control and democratic preservation instruments, as demonstrated by the Turkish constitutional framework. Article 4 of the **Turkish Constitution** states that the republican system of government, secularism, and territorial integrity cannot be altered. These provisions, which were initially meant to protect Atatürk's reforms, have since been used as a tool of restraint by several political players. As evidenced by the Constitutional Court's 1998 dissolution of the Welfare Party and more recent concerns about presidential powers, unamendability can become entangled in more significant political disputes. The Turkish case highlights the importance of judicial independence and political culture in determining whether unamendability is a political tool or a democratic safeguard<sup>17</sup>.

The main innovative interpretation of unamendability can be found in the **South African Constitution** following the end of apartheid. A 75% legislative majority is required to amend Section 1, which protects fundamental values like equality, human dignity, and multiparty democracy. These provisions have been interpreted broadly by the Constitutional Court, which has ruled that the measures that restrict judicial review or undermine anti-corruption organisations are unconstitutional. South Africa's approach combines explicit textual protection with progressive judicial interpretation to produce what some scholars call "transformative unamendability" provisions meant to both support ongoing constitutional reform and preserve existing arrangements<sup>18</sup>.

The comparative analysis reveals several significant conclusions about constitutional unamendability. First, the most effective systems usually incorporate clear fundamental concepts with strong enforcement mechanisms. Germany and South Africa are two instances of how, when backed by impartial judicial evaluation, unambiguous language regulations can result in substantial protections. Second, historical context is important; post-authoritarian constitutions tend to have more robust unamendability processes than stable democracies.

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<sup>17</sup> Constitution of the Republic of Turkey 1982, Article 2 and Article 4.

<sup>18</sup> "Legal Culture and Transformative Constitutionalism (1998) 14 South African Journal on Human Rights 146, 150-155.

Third, the relationship between unamendability and democracy remains complex and situational. Although unamendability can be used to support democratic ideals, it can also be used to bolster particular ideologies or limit popular sovereignty.

There are various lessons to be learned from these comparative experiences while designing constitutions. Hybrid models that combine clear safeguards with adaptable enforcement techniques may be taken into consideration by new constitutions. While retaining some flexibility for constitutional change, established systems may benefit from a clearer articulation of basic ideas. In all systems, upholding the legitimacy of unamendability necessitates constant public involvement with constitutional principles and close consideration of the harmony between change and stability. The comparative study of unamendability provides important insights into how to preserve constitutional fundamentals while being adaptable to changing circumstances, which is crucial as constitutional democracies confront new problems in the twenty-first century.

### **CONCLUSION**

Constitutional unamendability, or the democratic imposition of undemocratic limits, is one of the most important paradoxes in legal theory. This complex legal system is a prime example of what scholars call "the constitutional dilemma": how to protect a polity's fundamental values from ephemeral majorities while maintaining the live nature of the constitution. Across similar jurisdictions, we observe this delicate balance manifested in various but convergent ways.

The Ewigkeitsklausel (Article 79(3)) of the German Basic Law, which declares human dignity, federalism, and democratic values to be legally untouchable, is arguably the purest example of substantive entrenchment. This concept, not abstract theory, was developed in response to the catastrophic collapse of the Weimar Republic, a legal lesson that certain democratic safeguards must exist outside the scope of majoritarianism. Similarly, India's fundamental structural theory, which was judicially articulated in *Kesavananda Bharati*, demonstrates how implicit limitations could emerge to protect constitutional identity without resorting to exact wording.

These systems demonstrate three fundamental jurisprudential truths: First, effective unamendability requires institutional guardianship. Independent judicial review, whether by the Federal Constitutional Court of Germany or the Supreme Court of India, transforms textual

provisions into operational bounds<sup>19</sup>. Second, Rawls referred to the substantive and procedural prerequisites for legitimate government as "constitutional essentials," which are always at the center of the protected information. Third, the most resilient systems achieve a balance between entrenchment and controlled adaptation, as evidenced by South Africa's Section 1 provisions, which support transformation rather than stagnation<sup>20</sup>.

These agreements are founded on a legal theory that combines positivism from Dworkinian and Hartian perspectives. The constitutional language (Hart's "primary rules") establishes the formal framework, but its interpretation and application (Dworkin's "integrity") give its normative commitments life. Ackerman called this combination "higher lawmaking" because it keeps everyday politics apart from fundamental constitutional ideas.

Contemporary challenges test this architecture. While social and technical changes require constitutional flexibility, populist movements are increasingly framing unamendability as an elitist barrier. Instead of eliminating entrenchment, the solution is to refine its design by combining clear substantive boundaries with democratic amendment procedures for non-core provisions.

The social compact that protects democracy from its flaws and symbolizes society's covenant with its future self is ultimately expressed legally by constitutional unamendability. It's painstaking drafting represents the ultimate in constitutional craftsmanship: creating durable protections without undermining governance<sup>21</sup>. These legal protections act as a reminder that, despite the remarkable difficulties that face democracies around the world, certain standards must be upheld not to curtail democracy, but to preserve its very potential.

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