# ON GARY JACOBSOHN AND YANIV ROZNAI, *CONSTITUTIONAL REVOLUTION*

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## ABSTRACT

In constitutional democracies substantive constitutional change must be adopted through the proper procedures. The substance cannot be changed outside the constitutional procedure and must align with the constitutional rules. Substantive change and pre-set competence and procedure cannot be separated in this regard. The claim that Gary Jacobsohn and Yaniv Roznai make in their book *Constitutional Revolution* challenges this basic concept on empirical and normative grounds. I argue in this commentary that although this attempt to revise the classic standpoints is extremely inspiring, to contrast the normative requirements on constitutional change in a constitutional democracy with actual constitutional practice might serve as a good analytical framework to understand and evaluate constitutional revolution on a case by case basis.

KEYWORDS: *constitutional revolution, constitutional change, constitutional amendment*

## I. INTRODUCTION

The claim that Gary Jacobsohn and Yaniv Roznai (2020) make in their book *Constitutional Revolution* is interesting, convincing, and troubling at the same time.

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They argue for a new theory of constitutional change, a theory that takes into consideration the constitutional reality. Descriptive conceptualization should, they believe, form the basis of normative claims—that is, theory building. After the first chapter, on theorizing constitutional revolution, their book provides a detailed analysis of the constitutional revolutions that took place in Hungary, Germany, India, and Israel. Beyond these examples, the authors provide us with an even more complex comparison of constitutional change in the world. After all this comes the basic theoretical question of how the constituent power is understood within the theoretical framework of the constitutional revolution.

In my contribution I explain why I find this approach debatable in the field of normative legal theory.[2] I see no need to explain why this work is interesting, rich, convincing, and challenging. Scholars will use it on a daily basis; indeed, constitutional revolutions in the world will be categorized in its light from now on. The phenomenon of the constitutional revolution is superbly described in the book.

*Constitutional Revolution*, however, makes a further claim in that it introduces a new theoretical approach to such major substantive constitutional change that its authors call THt change constitutional revolution. After summarizing my understanding of the normative concept, I submit it to the test of both theory and practice. The argument of Jacobsohn and Roznai's book follows a deductive logic. The authors observe the nature of constitutional change around the world and especially in certain countries, and they conclude that a new theoretical approach to constituent power and to constitutional amendment has become necessary. Complex, paradigmatic constitutional change that leads to a new constitutional identity (Jacobson 2010) requires a change in the theory of constitutional revolution.

This groundbreaking book contributes to the core discussion about legality and legitimacy, which is one of the most difficult topics in constitutional theory. *Constitutional Revolution* is an attempt to deny the rupture between procedure and substance and incorporate the procedure into the substantive assessment as one element of it. The new conceptualization and categorization are clear. Concerns, however, can be raised when the authors claim that this concept should redesign our normative understanding of substantive legal constitutional change with respect to the present, primarily procedural, institutional, and competence settlements in constitutional democracy. The authors' claim is, to put it simply, that we urgently need a new normative approach that acknowledges the legal nature of those substantive and paradigmatical constitutional changes that do not happen according to

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the established constitutional settings. We should regard substance primarily and assess the measure of the change accordingly. The authors aim at narrowing the gap between the empirical facts of the world's constitutionalism and the normative, aspirational imagination. The authors' observations on constitutional practice worldwide are extremely valuable, and this goal is fully legitimate, but the question is whether it is better to bring the theory closer to the constitutional practice or to advocate and enforce that the constitutional practice follow the aspirational requirements of rule-of-law constitutionalism.

## II. PRELIMINARY REMARKS

The starting point is that although there is an continuing theoretical debate about constituent power, the constitution, and constitutional amendments, a certain practical consensus about these fundamentals characterizes the contemporary constitutional orders, mostly because of globalization, the migration of constitutional ideas, constitutional transplants, and constitutional bargaining and tailoring. Some debates in political philosophy and contemporarily constitutional theory are channeled this or that way into positive law and legal requirements. That is especially true concerning constitutional amendments and the adoption of a new constitution in case it is based on the provisions of a former constitution. Constitution-making usually happens legally in contemporary Europe (Szente 2020). But when we analyze and evaluate legal change, we make a clear distinction between Western constitutional democracies, such as those of Germany, France, or Spain, and young transitory democracies, hybrid regimes, illiberal democracies, or populist countries (Gárdos-Szente and Gárdos-Orosz 2018). In Spain, for example, the decision of the Spanish Constitutional Court on the Catalan succession implies that the constitution can be changed only by official procedure. The revolution occurs within the constitutional procedure.[3] But when two-thirds of the governing majority has exclusive influence on constitution-making and the constitution-amending process, while following completely the procedural rule set down in the country's constitution, as in Hungary, it is quite fair that the Constitutional Court rules in contradiction to the text of the Fundamental Law, doing so after its substantive review of the unconstitutional amendments with doctrinal reference to the constitution's coherence.[4] While it can be a legitimate claim to involve the judicial branch in

3. https://www.tribunalconstitucional.es/ResolucionesTraducidas/Ley%20transitoriedad%20ENGLISH.pdf.

4. Decision 45/2012 on Transitory Provisions of the Fundamental Law.

constitutional change in case the constitution-making and amending process is captured as it has been in Hungary (Gárdos-Orosz 2020), this claim may not apply to well-established constitutional regimes but rather to their opposite.

If the claim cannot be generalized, it cannot form a part of a general legal theory. In hybrid or authoritarian regimes, as the authors well recognize and describe, legal procedures are reinterpreted, and therefore the relation between the procedure and the substance becomes very different from that found in full-fledged democracies (Szente 2021). Given that the authors' idea heavily relies on the distinction between procedure and substance, I am not sure that we can define common elements of the notion of constitutional revolution for all states. It is difficult to understand how the notion of a constitutional revolution helps us in qualifying substantive major constitutional change as revolutionary in a legal sense if the elements of this legal inquiry cannot be generally identified as applicable to all constitutional regimes.

If we go one by one through the examples and group them as the book proposes, it is possible to detect the paradigmatical constitutional change that is happening without the observation of the applicable constitutional rules, many times by judicial constitutional interpretation. It is also possible to describe how in some cases even a new constitution is born without a change that would affect constitutional identity. Applying the classic theories of constitutional democracy, we usually regard these phenomena as misuses, abuses, functional problems or politically legitimate but nonlegal actions, observation of the law in action.

In constitutional democracies substantive constitutional change must be adopted through the proper procedures. The substance cannot be changed outside the constitutional procedure and must align with the constitutional rules. Substance and procedure cannot be separated.

It is very important to notice that in many cases a constitutional revolution happens as a result of the jurisprudence of a high court or political powers that do not change the constitution but do change the laws and disarm the high court, as happened in Poland in the case of the Constitutional Tribunal. It is also very important to notice when the constitutional amendment procedure is substantively misused, because if a constitution is flexible, parliaments like to change the constitution frequently without making any real attempt at a significant substantive constitutional change. The opposite might also occur, when a substantively new constitution is born through constitutional amendments.

The concept of constitutional revolution recognizes these phenomena and addresses them, but the question is whether we should, rather, choose to observe these changes but preserve the integrity of the constitutional idea by saying that

they remain illegal? My concern is that if we accept such informalities in the operations of constitutional states, even theoretically, we open a door that leads to another world of normativity where without clear standards we might easily get lost.

Nonconstitutional and hybrid regimes can be well described by the new concept of constitutional revolution, but for these regimes it is impossible to give a general normative legal framework for assessing paradigmatic constitutional change. Assessment works only case by case. However, while the concept can be well used to assess and categorize constitutional change in traditional constitutional democracies as well, the normative attempt to characterize substantive change that does not follow the proper procedure as revolutionary—a term that the authors intended to be neutral but one that remains nonneutral because legal recognition must be inherently positive in nature—might be a slippery slope, even if sympathetic and legitimate in some cases.

The legal system's democratic responsiveness is important and best supported by the involvement of all state institutions in the constitutional revolution process. So, why was political philosophy and constitutional theory originally so restrictive in its definition of constituent power and constitutional amendments?

## III. A TRADITIONAL APPROACH TO CONSTITUTIONAL STABILITY: CONSTITUENT POWER, AMENDMENTS, AND INTERPRETATION

We should consider not only how far the definition of the constitution-making and -amending power can be broadened but also whether constitutional adjudication can be opened up the way suggested by Jacobsohn and Roznai's theory of constitutional revolution.

Constituent power as such is not a central element in positivist normative legal theories. An autonomous legal order with the constitution as the touchstone does not have to understand the notion of constituent power; this is left to decisionist legal theories or to political science. Consider the following:

> All constitutions—or at least some provisions of constitutions—contain values of choice. Parts of these are fundamental values define the identity of the constitution. Parts of these values are unamendable even if this prohibition is not incorporated explicitly in the text. These are unamendable because the source of the amending power is in the constitution, it is derived from it, therefore it is not empowered to eliminate essential parts of it. (Bragyova 2003, 65)

For ruining the constitution a revolution is needed when the old constitution dies. (Servai 1996 260ff.) The idea of inherent unamendability is mentioned not

only in often-cited case law but also in mainstream, well-known constitutional doctrine, even in Schmitt's writings: "Amending the constitution must stay within the constitutional framework, this competence is based on the constitution and it cannot override it. This competence cannot involve the adoption of a new constitution" (Schmitt 1928, 16).

In modern constitutions, stability is often guaranteed by eternity[5] or other entrenchment clauses. These provisions provide some sort of an obstacle to fundamental amendments to constitutions by stating, in their strictest form, that one or more provisions are unamendable. If the prohibition is final, we talk about eternity clauses (*Ewigkeitsklausel*)—and many jurisdictions show examples of eternity clauses.[6] In Europe, the constitutions of Germany, Italy, and France are typical models for other European constitutions, which explicitly limit or exclude amendments of certain provisions. The said states experienced the harm totalitarian regimes cause to the individual, society, and the state. The preventive function of such unamendability in these states and others copying them leaves no room for doubt.[7] Unamendable provisions in the republican form of government, in the protection of fundamental rights, or in territorial integrity give the impression of legal certainty and the inviolability of the basis of the constitutional order.[8] The Indian Supreme Court was the first to discover implicit unamendability rooted in the basic structure of the constitution. The doctrine of unconstitutional constitutional amendments has spread the world over and attracted promoters among constitutional judges of the world.[9]

The duration of a constitution—the death of the old one and the birth of the new one—cannot be explained without taking a stand on how the constitution is to be understood. I suggest understanding the constitution as the supreme law that defines the validity of all the norms of the legal system, the constitution itself included (Kelsen 1967, 35–50). Although adopting a constitution (the constitutional

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5. See all eternity clauses of the world in the appendix of Roznai (2016).

6. The most famous among them is Article 79 (3) of the German Basic Law.

7. This is also elaborated by the German Federal Constitutional Court in its Decision BVerfGE 30, 1. For the function of unamendable clauses within the broader context of constitutional change, see Albert (2010) or Roznai (2013).

8. Romania's constitution offers examples of all kinds of explicit unamendability. See a complex exemplification in Jacobsohn (2006).

9. Colombia and the Czech Republic, among others, are often points of reference in this discussion. See Roznai (2014) and Halmai (2015, 951). On the Colombian constitutional replacement doctrine, see Halmai (2015, 960–62); on his arguing with Roznai with regard to the Czech case, see p. 964. see also Albert (2009)

moment) is undoubtedly a political act (Lánczi 2012, 30–32), constitutional democracy is based on the concept of legal constitutionalism, and as I have argued, it results from a legal act in most cases, at least in Europe.[10] The Austrian-German heritage of public law had had a very strong effect on many central European countries as well (Halmai 2015). Amendments to a constitution are also part of this socially constructed normative order that carries out substantive change following preset procedures (von Wright 1963, 116ff., 189ff.).

A constitution as a special norm, therefore, contains provisions on the possibility and the limits of its own amendment and any other constitutional change.[11] These provisions are very special, and the creator of these rules, the constituent power, ceases to exist at the very moment of the adoption of a constitution. Agreeing with Alf Ross (1929, 309), one can suppose that from its birth the final source of law is the constitutional system itself.[12] Similarly, the source of the legitimacy of a constitutional state is neither with the people nor with the constituted state but rather in a balanced relation between the normative order, as the ideal of constitutionalism, and governmental action (Loughlin 2014, 222).

Modern constitutions usually entitle the people or the nation to be the source of power.[13] But whichever it is, it is the constitution that normatively makes it so. Without a normative constitution, we cannot identify the source of state power and the limits of government, and we are also not capable of describing the limits of constitutional stability or change. The normative nature of the constitution implies that the rules on amending the constitution and the limits thereof are open to interpretation. This work is done by all state institutions, but with final force by the separate and independent courts. Interpretation, however, has its limits also within the constitution, as has the amending power, the legislative power, or the nonoriginal constitution-making power. The identity of the constitution cannot be changed without proper authorization from the people specifically for this constitutional revolution. The explicit authorization can be legal or nonlegal, but it is inevitable in a constitutional democracy—otherwise, we talk about a state capture.

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10. On the basic differences between the concept of legal and political constitution and constitutionalism, see Bellamy (2007).

11. This opinion is affirmed by the Constitutional Court in its decision on a referendum on Constitutional Amendment 25/1999. (Decision VII. 7. CC, ABH, 1999, 251, 261).

12. "Das System ist die letzte Rechtsquelle" (Ross 1929).

13. This double formula is found in both the French and the Spanish constitutions (Art. 3. ill. 1. (2).).

## IV. WHAT IS THE ROLE OF CONSTITUTIONAL ADJUDICATION IN CONSTITUTIONAL CHANGE?

The 2014 decision of the Czech Constitutional Court to strike down the constitutional amendment on the election of the new House of Representatives was heavily criticized because the content of unamendability it referred to was undefined and open to interpretation, thus allowing judicial interpretation to define constitutional violations case by case (Roznai 2014; Preuss 2016). Is that necessarily a problem, or does this case show us, rather, how constitutional courts are able to meet the challenges of the day by their interpretation of the constitutional text adopted earlier?

The Hungarian Constitutional Court, when dealing with the adjudication of constitutional amendments, developed the coherent interpretation doctrine, similar to the Indian basic structure doctrine or the constitutional identity argument, with its Decision 22/2016 (XII. 5.). Constitutions cannot tell precisely in advance and *in abstracto* what will amount to a constitutional revolution if an eternity clause does not exist; but if we accept that all constitutions have core constitutional identities, the constitutional courts have the competence to defend the constitution. As it is, the constitution cannot be understood in all cases as a source of a paradigmatical constitutional change and the constitutional court as an acting player in the constitutional revolution. Otherwise, the constitutional court is sometimes not a defendant of the constitution and the interpreted constitutional order but an actor outside the existing constitutional order.

Within the concept of legal constitutionalism, when the constitution is part of the normative order, constitutional adjudication is perceived as a special pillar of the constitutional construction. Without judicial review, the constitution can be amended unlawfully without consequences, causing the entire normative construction to collapse. Without interpretation, it is not possible to define what the law is, but the interpretation cannot change the law.[14]

Similarly, as formal and informal constitutional amendments, interpretation remains within the existing constitutional framework and does not step outside it.[15] Constitutional revolution, though, if it happens, does not remain within the presettled constitutional framework (Ackerman 1998).

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14. Here I do not consider whether it is better to leave to parliaments the power to make a final interpretation by, for example, overruling the opinion born in a weak judicial review. For weak judicial review, see Gyorfi (2016).

15. Even Richard Albert (2015, 146–50) acknowledges this observation.

## V. THE CONCEPTUAL RECONSIDERATION OF CONSTITUTIONAL REVOLUTION

The new theory of constitutional revolution offered in Jacobsohn and Roznai's book denies the preeminent role of the procedure in the assessment of constitutional change. The authors measure constitutional change that is so substantive and paradigmatical that it amounts to a change in the constitutional identity of the state (Jacobson). By rejecting the exclusively procedural approach, the authors claim, constitutional revolution is possible without a constitutional moment of the constituent power. Constituent power is no longer considered an exclusively original power, as it was conceptualized by Montesquieu or Carl Schmitt, but rather a derived power.

In constitutional theory, as Yaniv Roznai (2016) describes in detail in his book on constitutional amendments, the amendment power was thought of as a derived power in order to better understand its nature. This was a great step in theory toward understanding the nature of the change. In this respect, Jacobsohn and Roznai's book takes a step further: not only is the amendment power proved to be a derived power but likewise the constituent power loses its originalism. The book argues that if we accept that democracy is based on representation and that the state is the public's form of organization, it is difficult and perhaps useless to uphold a theoretical view that the constitutional revolution is based on an original, extralegal moment of the constituent power of the people, a power that ends something and creates something new by intended action. The authors argue that if the notion of the constituent power has anything to do with the people as imagined since the French Revolution and the establishment of the United States Constitution, the theory of constitutional change in democracy should recognize that the relation of the people and their constitution may have changed. To regard constitutional amendment as an original, unbounded step of the constituent looses popularity in contemporary thinking, although it is still present in mainstream constitutional tehory. Saying that amending power is derived from the constitution itself is rather popular in certain scholarly circles because the argument is based on comparative constitutional experience and an equally strong and convincing doctrinal argumentation, rather than the debating doctrinal claims on the unity and homogenous nature of constituent power. Constitutional revolution is an excellent expression that we like to use for fast and fundamental changes, but very often all state institutions are involved in this constitutional change, especially the constitutional courts or other high courts.

In *Constitutional Revolution*, Jacobsohn and Roznai, when analyzing constitutional experience, recognize that constituent power and constitutional change are

so diverse in the world that it is misleading to characterize constitutional revolution as it is preset in our minds and in literature. It is misleading to conclude, based on existing theoretical concepts, that no constitutional revolutions took place in Hungary, India, and Israel, among other countries. No doubt the world has had a rich experience of constitutional revolutions without constitutional moments and original constituent powers, where the people of a nation were clearly involved mostly through assisting and accepting these changes carried out by revolutionary institutions. The authors claim that we should adopt an all-encompassing concept of constitutional revolution that is able to endorse all these paradigmatical changes if institutional no matter how exactly they happened, because constitutional revolution might be made by a derived power that could also be an institutional balance, with the agreement of the people as the source of the constituent power. The authoritative consent should be designed alternatively to traditional theoretical claims.

The underlying question is, How far can the new theory be adapted, generally, to the constitutional experience? Can we conceptualize constituent power, as the authors suggest, as a derived, institutional power that may appear in the action of any constitutional cooperation and institutional interpretations and actions? That suggestion is appealing to me because it lies in the denial of absolute power. It is problematic, however, from the point of view of pure theory, as in the case of the creation of the separate and derived amending power. To understand that we can qualify a constitutional change as a constitutional revolution without a timely restricted constitutional moment, without the act of the constituent power, and without intended procedure might be a slippery slope on which we arrive at questioning a fundamental attribute of constitutional democracy. Construction, however, often follows destruction, and in their book the authors undoubtedly take steps toward a new construction.

## VI. HUNGARY AND THE NEW ANALYTICAL FRAMEWORK

No doubt, the Hungarian example proves the validity of the thesis of Jacobsohn and Roznai's book. This approach really suits the two Hungarian constitutional revolutions and creates a good analytical framework to understand the revolutionary nature of the evolution of Hungarian constitutionalism.

Two of my earlier research projects will complete the analyses made by the authors in their book. Both projects form significant parts of the argumentation of the constitutional revolution in a descriptive sense. One is about the Constitutional Court's role when initiating informal constitutional amendments (Drinóczi et al.

2019), and the other is about its role in creating, by interpretation, new substantive concepts—such as the constitutional identity—that can finally, in their sum, form the bases of paradigmatic change (Gárdos-Orosz 2021).

In the case of Hungary—without aiming to repeat the excellent analysis of the book—one can say that both constitutional transformations of the past thirty years can be qualified as revolutionary (Tóth 2015). I fully agree with the Jacobsohn and Roznai's assessment that no part of either transformation was carried out according to the requirements. The 1989 democratic transition was made by a constitutional revision, and Act XX of 1949 remained in force in its amended version, certainly with a fully changed content. Everyone felt the necessity of adopting a new constitution, as in Germany after unification, but the constitution-making process failed. The amendment process became a procedural vehicle later to tailor the constitution when necessary. I believe that this flexible approach to constitutional change was inherited by the leaders of the new illiberal regime established in 2010. It might be a sociological observation to say—but it has relevance for my argument—that something became habitual in the operation of constitutionalism; and without regarding the substance of the two constitutions and the dozens of amendments, we can recognize that the preset substantive rules and procedures rarely stopped the ruling political elites in their planned, transformative constitutional change.

Hungary is a good example to legitimize Jacobsohn and Roznai's conceptual purposes. The tension between substance and procedure can be perfectly drawn. It is true that the major problem of Hungarian constitutional scholarship at the moment is that procedurally perfect legal changes, in the form of constitutional amendments, have changed the Hungarian constitutional identity smoothly in the past ten years. One question the book leaves open is methodological. We can describe step by step how the change that amounts to a constitutional revolution happened in Hungary. We can prove the revolutionary nature of the 1989 amendment of the Stalinist constitution. Is there, however, anything that can serve as a specific element of a new normative theory? Can general normative requirements be based on particular eventualities?

## VII. CONCLUSION: THE NECESSITY OF A NEW THEORY OF CONSTITUTIONAL CHANGE

Although it is essential to think about analytical tools and normative theories, they should mirror reality or in some sense approach reality; in case a theory is so far from the reality that it is unable to catch it, it might be best to revisit the theoretical

concept in order to build one that might serve as a standard to measure and evaluate constitutional change. This is the goal aimed at and ultimately achieved by the authors. Given the reconceptualization of the constitutional revolution, their new model surely suits Hungary—and much better than the old one. The question is whether it fits everyone, and whether it is safe for the normative use in full-fledged constitutional regimes. I am very grateful to the authors for raising these fundamental questions in their rich book of scholarly excellence and fundamental importance.

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