Hague Journal on the Rule of Law
https://doi.org/10.1007/s40803-024-00233-4

ARTICLE

Friends or Foes: Is Unamendability the Answer to Democratic Backsliding?

Silvia Suteu[1]

Accepted: 13 May 2024
© The Author(s) 2024

Abstract
Unamendability is often viewed as a 'lock on the door' that can keep enemies of constitutional democracy out, at least for a time. Unsurprisingly, it has also been invoked as a potential bulwark democratic backsliding. While it may not entirely thwart authoritarian populist takeovers, unamendability – including in the form of basic structure doctrines or constitutional identity review – is said to at least delay them, buy some time for defenders of constitutional democracy to resist, and clearly signal to the outside world (including supranational institutions such as the European Union) that foul play is afoot. This article questions such easy assumptions about the nature and operation of unamendability, both in general and in an authoritarian populist context in particular. It argues, based on the examples of India and Hungary, that unamendability is a tool either too ineffective to be deployed against authoritarian populists in power, even while courts may not have been fully captured, or one they are just as comfortable wielding as their opponents. For example, the Indian Supreme Court's hitherto celebrated basic structure doctrine has been useless in the face of the court's refusal to hear or decide key challenges against the government. Additionally, drawing on the Hungarian case, the article shows the dark side of constitutional identity review includes captured courts defending majoritarianism and exclusion in the name of a national identity perceived as under attack. In other words, doctrines of unamendability may quickly and subversively turn into instruments of entrenching the very authoritarian populist projects proponents of such doctrines abhor.

Keywords Unamendability · Democratic Backsliding · Basic Structure Doctrine · Constitutional Identity · India · Hungary

✉ Silvia Suteu
s.suteu@ucl.ac.uk

[1] University College London Faculty of Laws, Bentham House, 4-8 Endsleigh Gardens, London WC1h 0EG, UK

Published online: 12 June 2024

The now vast literature on populism and constitutionalism sets out to diagnose, classify, and offer solutions to the ills the former purports to address and the weaknesses the latter has displayed.[1] In a span of a few years, populists have reached power in countries as far apart as Hungary (since 2010),[2] India (since 2014),[3] Poland (2015–2023),[4] and the United States (2016–2020),[5] to name but a few. This has prompted an urgency among legal scholars to deepen of our understanding of what populists aspire to, say, and do when moving from the political fringes to the mainstream: the legal institutions they create, manipulate, or hollow out; the legislative and constitutional routes they adopt to entrench their hold on power; and the accountability mechanisms they often eschew.

With a few exceptions,[6] the tone of this literature is critical of populists, viewing them as anti-constitutionalists or even anti-democratic.[7] The scholarly disagreement is irreconcilable insofar as it departs from disagreement on the very definition of populism – as an ideology, a discourse, or a political strategy – and different understandings of constitutionalism itself – how thin or how thick and whether inherently liberal or not. Thus, what to some is a diverse cast of actors and ideological pursuits, at times offering a valid democratic critique,[8] to others is an intrinsically anti-constitutionalist phenomenon masquerading as law-abiding.[9] There is some convergence in the literature, however, that one sub-type, right-wing authoritarian populists, increasingly learn from each other and use the same playbook when it comes to undermining rule of law institutions and cementing their position: concentration of executive power, instrumental use of the law, and attacks on media and civil society.[10] There is also widespread agreement that the sophisticated and abusive use of legal and constitutional means – variously termed ‘autocratic legalism’,[11] ‘abusive constitutionalism’,[12] or ‘abusive legalism’[13] – requires a rethinking of legal and constitutional defences.

[1] This literature has exploded in recent years and is too vast to cite in its entirety. Notable contributions include: Graber et al. (2018); Ginsburg and Huq (2018); Letnar Cetnar and Avbelj (2019); Blokker et al. (2019a, b); EuConst (2019); ICON (2019); Gardos-Orosz and Szente (2021); Tushnet and Bugaric (2021); Krygier et al. (2022).

[2] Uitz (2015, 279).

[3] Khaitan (2020, 49).

[4] Sadurski (2019).

[5] Graber (2021, 253).

[6] Howse (2019, 641); Tushnet and Bugaric (2021).

[7] Kumm et al. (2017, 1) and Baer (2018, 335). See also differing views of contributors in Krygier et al. (2022) and discussion in Martinico (2021), chapter 1.

[8] Bugaric (2019, 390) and Bugaric (2022).

[9] Halmai (2019a, 296) and Halmai (2022).

[10] de la Torre (2019, 1).

[11] Scheppele (2018, 545).

[12] Landau (2013, 189).

[13] Cheung (2018).

This article cannot, nor does it set out to, do justice to all these debates. It does not seek to take a position in the debate between the splitters and the lumpers, as Martin Krygier has put in, in other words, between those that seek to distinguish between varieties of populism and those that find there to be a connecting thread among them despite contextual differences.[14] I have argued elsewhere that, however critical we may be of populism in its various guises, the challenge to constitutional democracy that it presents needs a powerful and concerted constitutional democratic response.[15] This article focuses on the authoritarian strand of populism, without thereby assuming that all forms of populism are necessarily authoritarian. It also takes its cue from Krygier et al. (2022) in taking their anti-constitutional stance as the starting point for study. This means engaging with the constitutional means they use, most often maliciously, unapologetically, and subversively, aiming to transform constitutional institutions, practices, and principles.[16]

More specifically, this article seeks to engage with only one strand of the many thorny problems raised by populism understood in its right wing, autocratic garb in the constitutional arena, namely the question of effective constitutional responses. What internal defences can constitutional systems reliably levy against a populist takeover and are there any unforeseen pitfalls in doing so? The answer to these questions remains relevant insofar as populism – especially when understood as likely to morph into outright authoritarianism where the context allows it – remains on the political agenda the world over. The article zeroes in on the unconstitutional constitutional amendment doctrine and related constitutional identity review as potential efficacious responses to authoritarian populist constitutional attacks. In so doing, the article seeks to closely examine the proposition that – at least during the window of opportunity when constitutional courts retain independence and room for manoeuvre – such doctrines can serve as bulwarks against abusive constitutional change.

The article proceeds as follows. It first lays out more fully the case for unamendability and constitutional identity review as defences in the face of democratic backsliding through constitutional means. Second, the article provides an in depth discussion of two case studies that can test the potential of doctrines of implied constitutional limits as defences against authoritarian populism. India's basic structure doctrine, long established and accepted as the preeminent example of a doctrine of implied substantive limits on constitutional amendments, is tested against the Modi government's sustained attacks on religious minorities. Hungary offers an illustration of the propensity for the argument from constitutional identity to be turned on its head and become a tool in the hands of the authoritarian populists it was meant to reign in.

Finally, the article revisits the potential for unamendability to be useful in contexts of democratic backsliding. It argues that it is unlikely to serve its protective function not just because authoritarian populists are likely to capture the courts tasked

[14] Krygier (2022, 12).

[15] Suteu (2019, 488).

[16] Krygier et al. (2022, 6).

with deploying such doctrines. This is certainly true and especially pernicious when captured courts then proceed to deploy unamendability doctrines and constitutional identity review abusively. However, court capture is too often presented as an either/or reality and the sole threat under an authoritarian populist government. In fact, we are just as if not more likely to find courts on a continuum between independence and capture. The attacks on courts may be overt, such as through disciplinary proceedings, early retirement, or transfers of inconvenient judges. But often we also see courts that formally retain room to manoeuvre nevertheless employing avoidance tactics in an effort to prevent clashes with the political branches and backlash. This reality has not been wholly appreciated by proponents of unamendability as part of the answer to authoritarian populists in power.

1 Unamendability, Constitutional Identity, and Democratic Backsliding

There are many responses to authoritarian populism discussed in the literature, including but not limited to: strengthening rule of law institutions, including at the supranational level such as the European Union, the European Court of Human Rights, and more generally international human rights bodies; reinforcing international law commitments, including before domestic courts; and restructuring public law institutions to render them more, rather than less, participatory and deliberative so as to respond to the crisis of democratic representation the populists have exploited.[17] Unsurprisingly, legal scholars have focused on the need to rethink and possibly redesign legal institutions so as to make them more resilient,[18] whereas political scientists have offered ways out of the polarisation, mutual distrust, and antagonism that authoritarian populists rely on and foster.[19]

This article closely investigates only one proposed solution in the constitutional sphere: unamendability. This is a seemingly narrow response, but one with potentially vast consequences for the constitutional system. It has been argued that unamendability, both in the form of textual eternity clauses in the constitution and of judicially-created doctrines such as unconstitutional constitutional amendment doctrines, functions as a "lock on the door" to protect constitutional democracy from its enemies.[20] Given that authoritarian populists have often sought to entrench their hold on power through overtly or more subtly abusive constitutional means, the argument goes, we should be supportive of courts intervening to sanction such abuse via doctrines of unamendability. This use of unamendability reveals it as a tool in the militant democratic arsenal in that democracies act in self-defence by outright prohibiting certain substantive constitutional change.

[17] See, *inter alia*, Kochenov and Bard (2019, 243); Zysset (2022, 976); Neuman (2020); Brandes (2019, 576); Anterio (2019, 270) and Suteu (2019). This is by no means an exhaustive list.

[18] Ginsburg and Huq (2018).

[19] Levitsky and Ziblatt (2018).

[20] Roznai (2017). In the populist context, see Roznai and Brandes (2020, 19).

Such hopes draw on examples in the more distant or recent past. One such example is the Indian Supreme Court's basic structure doctrine developed in the famous *Kesavananda* case and deployed in response to emergency era abuses.[21] Another is the Colombian Constitutional Court's constitutional replacement doctrine being the anchor for blocking President Uribe's seeking of a third term in office explicitly banned by the constitution.[22] Both examples are frequently cited in the literature on unamendability as instances in which courts have stopped constitutional abuse by relying on implied substantive constitutional limits.[23] This despite shortcomings, such as the fact that Colombia "appears to be an unusual case in regional terms", with more Latin American countries relying on unconstitutional constitutional amendment doctrines to remove rather than enforce executive term limits.[24]

An even more recent example is that of the Building Bridges Initiative (BBI) case in Kenya,[25] which offers a mixed picture of the role unamendability can play in thwarting executive aggrandisement through cumulative amendments. When President Kenyatta's Building Bridges Initiative sought to modify at least 74 constitutional provisions that expanded executive power and altered the electoral map, this initially seemed to provide a prime example of such a doctrine meeting this promise. Both the Kenyan High Court and Court of Appeal had struck down the package as contravening Kenya's basic structure doctrine, reasoning that only a renewed constituent process could alter the 2010 Constitution to the degree sought. The Kenyan Supreme Court disagreed on the necessity of importing unamendability into Kenyan law in order to invalidate the President's initiative. Thus, while it nevertheless struck down the amendment package, it found sufficient resources within the constitutional system short of unamendability in order to sanction the President's far-reaching cluster of amendments.

Despite this mixed comparative track record, unamendability's appeal in cases of democratic backsliding is obvious: to the extent that democratic erosion is pursued via constitutional amendment, sometimes cloaked as legislative or even tacit change, the threat of a finding of unconstitutionality may deter or at least stall constitutional abuse.[26] When explicit, as embodied in an eternity clause, unamendability is deemed worthy of protection as it protects the original constitutional dispensation, whose contours define the polity. When implicit, such as in basic structure doctrines, unamendability is taken to protect the building blocks of constitutional democracies, including the rule of law, fundamental rights, and the principle of democracy itself.

Where basic structure doctrines are especially appealing is in their scope: by casting the net of unconstitutionality broadly, they aim to 'catch' constitutional mischief that may be incremental, cumulative, and structural – what has alternatively been

[21] *Kesavananda & Ors v State of Kerala* (1973) 4 SCC 225.

[22] Sentencia C-141/10, 26 February 2010.

[23] For a recent example, see Dixon (2021, 165–167).

[24] Landau (2018, 225–244).

[25] *David Ndii & others v Attorney General & Others*, Petition no. E282 of 2020.

[26] For a fuller account of this line of argumentation, see Suteu (2021, 158–156).

termed "constitutional dismemberment".[27] In other words, precisely the type of constitutional change contemporary populists in power have been astute to pursue to avoid early detection or straightforward sanction. Populists' propensity to instrumentalise and abuse the law requires a response that can target the abuse itself and not become bogged down in populists' formalist but misleading attachment to legal form. For some commentators, unconstitutional constitutional amendment doctrines should be construed minimally, given the potential for their anti-democratic deployment, to protect a democratic minimum core without which it no longer makes sense to speak of constitutional democracy.[28] Others have argued that it is precisely during periods of populist threat and while courts still retain independence that they should deploy unconstitutional constitutional amendment doctrines robustly.[29] If an adaptation of such doctrines were needed, it would be in rendering them more rather than less strict, such as in cases involving possible threats to judicial independence.[30] For others still, especially those writing in the midst of an ongoing slide towards autocracy such as in Hungary, unamendability's appeal was more urgent. They viewed it as a potential last stand of liberal constitutionalism and the rule of law against the total capture of state institutions.[31] For as the case of Poland has shown, it is not just through overt court capture that populists know to pursue their constitutional and legal agenda, but also through "legislative bombardment" and measures whose destabilising, rule of law undermining effect reveals itself only cumulatively.[32]

A closely related but distinct concept is that of constitutional identity. The early scholarship on constitutional identity approached the concept as helpful in setting out what is important, distinctive, and enduring about a constitutional system. It has been viewed as tied to an exercise of self-definition by the constitutional subject – constitutional identity "as belonging to an imagined community that must carve out a distinct self-image."[33] Alternatively, constitutional identity has been seen as not so much to do with an essence but resulting from a dialogic and expressive process of constitutional development over time, not free from contestation but binding it via the inherent limits of constitutionalism; the result of such contestation is constitutional disharmony or dissonance, but not incoherence.[34]

The link with unamendability is unavoidable. Eternity clauses – and amendment rules more generally – have been read as repositories of constitutional identity.[35] Insofar as the constitution renders some provisions more or less open to change,

[27] Albert (2019, 78).
[28] Dixon and Landau (2015, 606).
[29] Roznai and Brandes (2020).
[30] *Ibid.*, 46.
[31] Halmai (2012, 182); Halmai (2015, 951); Gardos-Orosz (2018, 231). Halmai has since recanted his optimism that unamendability could have helped stop Hungary's descent into authoritarianism. See Halmai (2019b, 259–277).
[32] Sadurski (2019, 70).
[33] Rosenfeld (2012, 759). See generally, Rosenfeld (2009).
[34] Jacobsohn (2010, 15).
[35] Roznai (2017, 148–150), and Albert (2019, 85–86).

including by foreclosing the possibility entirely through unamendability, amendment clauses are taken to seek to protect precisely the contours of constitutional identity. They may be viewed as tethering the evolution of constitutional meaning to the text, "so as to accommodate the dialogical interactions between codified foundational aspirations and the evolving mores" of a people.[36]

However, constitutional identity does not rely solely or even necessarily on textual unamendability. In democracies, the constitutive elements of a given constitutional identity may be universal, such as commitment to the rule of law and human rights, or polity-specific, such as an official language or religion, the form of government, or territorial makeup.[37] The two need not be viewed as mutually exclusive but rather coexisting as facets of a multicentric legal environment.[38] Unamendability, then, is necessary to protect this identity for both universal and particularistic reasons. Echoing the logic of interpretive originalism, this has been referred to as "preservative unamendability" and has been described as "anchored in a rigid philosophy of constitutional interpretation requiring constitutional meaning to be construed through the eyes of the founding understanding."[39] No one should be able to modify this identity, the argument goes, short of constitutional revolution.[40]

Two case studies will be explored in what follows. Each illustrates different potential pitfalls of expecting unamendability to perform the defensive function expected. They show, in distinct ways, why its militant promise is precisely least likely to be met in the circumstances where it is most needed. A note is necessary on the choice of such seemingly disparate examples. It is not just that both India and Hungary have experienced authoritarian populists in power for more than a decade, though this thus allow us to eschew short-term, untested propositions. Nor would it be sufficient to note that the two countries' highest constitutional courts have been seen, at various points, as among the most powerful in the world.[41] While India has had decades of experience with its Supreme Court relying on the basic structure doctrine to assess the constitutionality of legislative and executive action, Hungarian courts have never embraced such a doctrine. Nevertheless, what the Hungarian Constitutional Court prior to its capture had developed was a doctrine of the invisible constitution which did show its willingness to depart from interpretive textualism and to

[36] Jacobsohn (2010, 14). Jacobsohn illustrates this point with reference to the Turkish unamendable commitment to secularism, whose precise meaning may still evolve over time.

[37] On the distinction between a general and a particular form of constitutional identity, see Tripkovic (2018, 31). For a critique of Visegrad countries' constitutional courts enforcing particular, ethnonationalist forms of constitutional identity to the exclusion of universal ones, see Kovacs (2017, 703) and the contributions in Kovacs (2023).

[38] Śledzińska-Simon (2015, 124–128).

[39] Albert (2019, 145).

[40] Jacobsohn and Roznai (2020).

[41] On India, see Sathe (2001, 29–43). Sathe made this observation about the Indian Supreme Court precisely in relation to its basic structure doctrine, though noting that embracing the doctrine also made the court distinctly more political. On Hungary, see Scheppele (1999, 81), referring to the Hungarian Constitutional Court under its first president "perhaps the most powerful court of its kind in the world.".

embrace a normative reading of the country's transitional constitution.[42] Grounded in the concept of an inalienable human dignity, this allowed the court to check the constitutionality of legislation against what it saw as a stable standard of constitutionality that went beyond the formal constitutional text. One can understand then why advocates of unamendability in the early days of the Orban government would have thought that developing a doctrine of implied limits on amendments would not have been such a stretch for the Hungarian Constitutional Court. Finally, by looking at the two cases together, we see two facets of the shortcomings of the unamendability answer to authoritarian populism: judicial avoidance and submissiveness both short of and after political capture.

2 Basic Structure Doctrines as a Response to Authoritarian Populism

As discussed above, the conceptual openness and structural nature of basic structure doctrines make it a prime candidate for deployment against populist subterfuge. Nowhere should this promise be more readily verifiable than in India: the birthplace of the basic structure doctrine itself. However, I will show that the doctrine failed to fire in the hands of a court that has become increasingly submissive to the government, even while not being politically captured outright. Instead, India's case illustrates "the role of omission or nonperformance" by courts, especially via refusals to hear or decide major constitutional cases challenging the government.[43]

The country has been said to have extensive experience not just with a variety of forms of populism, usually authoritarian and personalised, but also with years of its grip on power.[44] Once he swept into power in 2014, Narendra Modi's version of populism has brought to the fore Hindu nationalism, with both economic and religious facets, and the side-lining of institutions in favour of direct appeals to the people.[45] His playbook – involving economic development and communal polarisation – is by now a tried and tested one among populists, who exploit it for electoral gain.[46] As will be discussed shortly, what distinguishes Modi's agenda is the particular ways in which he has used the law as an instrument to redefine the contours of the Indian state and its political community. In the words of two observers,

> Modi's populist infusion of patriotism and nationalism with religion offers supporters both a national meta-morality and an exclusionary source of identity for the "people", from which political opponents are distinguished either because they are or allegedly support Muslims….The resultant redefinition and amplification of nationalism around an exclusive ethnoreligious identity marks a departure from prior, more pluralistic conceptions of the Indian state

[42] Halmai (2018a, b, 969); Toth (2018, 541–562); Sajo (1995).

[43] Sundar (2023, 106–115).

[44] Jaffrelot and Tillin (2017, 179).

[45] *Ibid.*, 180 and Vajpeyi (2020, 17).

[46] *Ibid.,* 20 and Rogenhofer and Panievsky (2020, 1394).

and threatens the accommodation between casts, ethnicities and religious groups at the heart of India's democratic constitutional arrangement.[47]

Same as authoritarian populists elsewhere, the Modi government strategically targeted the courts and other independent institutions that could have blocked his agenda or held him to account. On the judicial front, we have seen the politicisation of judicial appointments, including via refusals to appoint judges recommended by India's collegium system, as well as judicial transfers of inconvenient judges, the fast-tracked appointments of loyalist judges, and failure to staff a range of independent tribunals.[48] It has not gone unnoticed that the curtailment of rights and freedoms, weakening of democratic accountability, and concentration of executive power in the Prime Minister share important similarities to, and in distinct ways may be even more dangerous than, those during India's 1975–1977 Emergency era. Some have even called the current period in India's history one of 'undeclared emergency' as a result.[49]

Illustrative for our purposes here is the Citizenship (Amendment) Act 2019 (CAA). It was adopted with the stated aim of providing a path to citizenship to Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh or Pakistan. The bill immediately triggered protests, with opponents viewing it as discriminatory on the ground of religion. By not basing the grant of citizenship to illegal migrants on the basis of an actual experience of persecution in these countries but of their religion, as well as by excluding certain countries of origin from the list (notably Sri Lanka) and certain religions (Islam and Judaism), the act has been viewed as breaching the rights to equality and dignity guaranteed by the Indian Constitution (Articles 14 and 21). Insofar as the act also breaches the constitutional commitment to secularism, the prospect was raised that it also violates the basic structure doctrine. The United Nations High Commissioner for Human Rights expressed the fear that the act was "fundamentally discriminatory in nature" and that its enforcement would place India in breach of its international human rights obligations.[50] Thus, critics of the act viewed it as both unconstitutional and in breach of international law. The act requires notification of its rules in order to be implemented, a step that was placed on hold with the advent of the COVID-19 pandemic.

The full scope of the CAA must be understood in tandem with the Indian Government's planned roll out of the National Register of Citizens (NRC).[51] The NRC would document all Indian citizens and enable the detention and deportation of those who cannot prove their citizenship status, so-called "doubtful citizens". The focus on presumed illegal immigrants must itself be contextualised and read in light of

[47] Rogenhofer and Panievsky (2020, 1402).

[48] Sundar (2023, 117–118).

[49] Narrain (2022).

[50] United Nations Office of the High Commissioner for Human Rights (2019).

[51] One could also cast the net wider and view the CAA as part of a larger legislative agenda pursued by Modi and the Bharatiya Janata Party (BJP) in order to abandon secularism and implement their political "Hindutva" ambitions. See Chandrachud (2020, 138–139).

India's tumultuous recent past involving partition, cross-border conflict, and population displacement. Proof of citizenship, therefore, is not straightforward, especially in border areas. In the border state of Assam, where the NRC was updated beginning with 2013, the revised version published in 2019 left out 1.9 million applicants, of which half are Muslim. This left them at risk of being rendered stateless. The passage of the CAA at the same time as preparations to launch the NRC nationally therefore intensified fears that they were part of a concerted effort, with the CAA "a protective fallback option to be availed by persons who are *not* Muslim but find themselves excluded from citizenship through the" NRC (a connection drawn publicly by the government itself).[52]

The CAA is not a constitutional amendment, as it changes the citizenship law (specifically, the Citizenship Act 1955) but does not alter the constitutional text. Nevertheless, by discriminating on the basis of religion, it has been viewed as infringing the constitutional commitment to secularism, long recognised as part of the basic structure.[53] While the Indian Supreme Court has always avoided providing an exhaustive list of unamendable constitutional principles, it has explicitly and repeatedly recognised secularism as one of them, linking it both to the state's survival and to realising the socio-economic goals of the Indian Constitution:

> The Constitution has chosen secularism as its vehicle to establish an egalitarian social order…Secularism, therefore, is part of the fundamental law and basic structure of the Indian political system to secure to all its people socio-economic needs essential for man's excellence and of his moral wellbeing, fulfilment of material and prosperity and political justice.[54]

There were 144 petitions lodged with the Supreme Court challenging the constitutionality of the CAA. There were also calls for the court to stay the CAA, which the court refused to do. Despite the heightened political reaction to the CAA, intense protests resulting in several deaths, and the numerous petitions challenging it, the Indian Supreme Court has yet to rule on the act's constitutionality as of the time of writing. The government continues to defend the CAA as a narrow and compassionate piece of legislation. For example, in its 2020–21 report, the Ministry of Home Affairs stated:

> The CAA is a limited and narrowly tailored legislation which seeks to provide a relaxation to aforesaid specific communities from the specified countries with a clear cut-off date. It is a compassionate and ameliorative legislation.[55]

[52] Khan (2021, 176–178).

[53] *S. R. Bommai v. Union of India*, AIR 1975 1994 SC 1918. For a more detailed discussion, see Jacobsohn (2003, 125–138).

[54] *Bommai v. Union of India*, para. 186.

[55] Indian Express (2022).

Moreover, given that it only created a pathway to citizenship for non-citizens, the Ministry argued, it in no way discriminated against or abridged the rights of any Indian citizen.

What to make of the Indian Supreme Court's silence in this case? Is its failure to intervene this long with a clear ruling on the CAA's constitutional compliance, including with the unamendable commitment to secularism, an instance of careful judicial statecraft,[56] designed to insulate it from potentially far-reaching backlash, or instead one of abdication of the court's duty? Did it have the doctrinal and institutional means to step into the political fray? The ambit of the basic structure doctrine and the court's own precedent in cases involving breaches of the constitutional commitment to secularism suggest it did.

The *Bommai* case in which the Supreme Court so clearly articulated the fact that secularism was integral to the Indian state's self-definition and to the basic structure doctrine underpinning the constitution is instructive. That case had involved the dismissal by the federal executive of three state governors (all members of the BJP) in the aftermath of the Babri Masjid mosque demolition. The rationale given had been that, by failing to ensure constitutional order, they had proven themselves unable to govern. The court not only intervened but also sanctioned the state governors' behaviour – the sympathies they expressed and the support they provided to perpetrators of violence – as a breach of constitutional secularism. At the same time, the court set out limits and clarified the reviewability of the federal executive's powers under Article 356 to dismiss state governors. In the words of SP Sathe, the court warned the Hindu right that "entertaining the idea of a majoritarian Hindu state that any move in that direction towards constitutional amendment would be considered a violation of the basic structure of the Constitution."[57]

We do not yet know what the Supreme Court will decide with respect to the CAA. So far, its silence in the case is itself proof that invoking the basic structure doctrine is no quick fix of authoritarian populist action. The court has not shown signs of hurry in answering the numerous petitions in the case, with the pandemic providing cover for throwing hearings and a resolution even more into the long grass. Recourse to arguments grounded in the constitutional basic structure in a case of such far-reaching discriminatory consequences was not enough to merit swift court action. Quite on the contrary, the CAA case is one more in a line of cases that shows how the Indian Supreme Court seek to avoid confrontation and appease the government through inaction:

> Perhaps the biggest favor by the Supreme Court, however, is in not hearing challenges to laws that rewrite fundamental principles of the constitution [reference omitted]. In refusing to hear such cases, not only is the court enabling the changes to become accepted social fact, but it is also signaling that their unconstitutionality or constitutionality will be tested against election results,

[56] Dixon (2020, 298).
[57] Sathe (2002, 98).

> coproducing with the RSS [Rashtriya Swayamsevak Sangh] a de facto rewriting of the constitution.[58]

We may not yet have a verdict in the case of the CAA, but we do in others similarly seeking to challenge governmental action running counter to basic features of Indian constitutionalism. In the equally infamous case of the Jammu and Kashmir Reorganisation Act 2019, the Modi government struck down Article 370 of the constitution which had previously guaranteed the state's autonomy and had underpinned its accession to the Union of India in 1947. The Supreme Court had refused to even hear the case until 2023, then issuing its judgment in December 2023.[59] The Court accepted the reading of Article 370 as a no longer necessary transitional measure and legitimised the government's unilateral change of the status of Jammu and Kashmir – India's only Muslim-majority state – to that of union territories. It completely ignored the arguments raised before it that to do so amounted to an impermissible breach of the constitution's basic structure, specifically the long-recognised principles of federalism and representative government.[60]

Scholars have reconstructed a long line of other cases in which the Supreme Court has either ignored or ruled in favour of the government and, even when deciding against it, reinforced majoritarian values and the dominant anti-minority narrative.[61] There are also important ideological similarities between the CAA and laws othering Muslims and positioning them as threats to the Hindu nation.[62] In this context, the Supreme Court reveals itself to be more quiescent than daring, with its track record suggesting less and less willingness to challenge the government. Arguments before it that the basic structure of the constitution was under attack seem to have made no difference.

3 Constitutional Identity Review as a Response to Populism

Hungary is by now a familiar case study in analyses of authoritarian populism in power. Its departure from what we recognise as a liberal constitutional democracy with working mechanisms of accountability and subject to the rule of law has been gradual but effective. The country now finds itself – fourteen years into Viktor Orban's hold on power as of the time of writing – with constitutional constraints on the exercise of political power having evaporated.[63] Not only has Orban claimed to be building an illiberal form of constitutional democracy, he has consistently

58 Sundar (2023, 133).

59 *In re: Article 370 of the Constitution* [2023] 16 S.C.R. 1.

60 Written Submissions of Mr Chander Uday Singh, Senior Counsel on Behalf of the Petitioners.

61 Narrain (2022) and Sundar (2023).

62 An example are state-level bans on interreligious marriages or so-called “anti-love jihad laws”. See Narain (2023, 167).

63 Uitz (2015).

claimed that his extreme majoritarianism is *more* democratic and conducive to better protection for the rule of law.

As already mentioned in the introduction to this article, at one point unamendability doctrines seemed to hold the key to resisting the authoritarian decline in Hungary. Scholars had hoped that a Constitutional Court yet to be captured and which had in the past developed sophisticated, non-textualist interpretive tools to decide on the constitutionality of legislation could be open to developing its own version of an unamendability doctrine.[64] However, the space for manoeuvre quickly closed. The court went from a certain ambivalence on the matter, evident in its 2011 decision refusing to strike down a constitutional amendment on retroactive tax legislation despite finding it both procedurally and substantively flawed,[65] to an explicit refusal to endorse the substantive review of amendments in its 2013 decision reviewing the Fourth Amendment to the Fundamental Law.[66] The Fundamental Law now expressly stipulates that constitutional amendments may only be reviewed for their procedural conformity (Article 24(5)).

One might have thought that that would be the end of the story of unamendability and Hungarian authoritarian populism. However, there is a second act in the story that I believe is instructive. As we saw in Sect. 1 above, there is a close link between unamendability as tied to a minimum/essential core or basic structure of the constitution and constitutional identity, itself also purported to be expressive of and grounded in this core.[67] Those arguing for the usefulness of unconstitutional constitutional amendment doctrines against authoritarian populists do so on account of the latter's propensity to subvert the constitution at a fundamental level – in other words, to subvert constitutional identity.[68] What the Hungarian case also illustrates, however, is how appealing the argument from constitutional identity has been to the authoritarian populist and how malleable in the hands of compliant judges.

Both in the European law context, aided by its explicit protection via Article 4(2) of the Treaty on European Union (TEU), and in contexts where unamendability doctrines have been built on the premise of protecting constitutional identity, we are now faced with multiple jurisdictions having embraced constitutional identity review as a distinctive form of judicial review.[69] We have also witnessed, however, captured courts embracing the concept and building intricate doctrines around exclusionary – some have called them "abusive"[70] – notions of constitutional identity. The threat, then, is that a concept initially thought part of the anti-populist arsenal has been deployed just as, if not more, effectively by the populists themselves.

---

[64] Halmai (2012, 2015) and Gardos-Orosz (2018).

[65] Decision 61/2011. (VII. 13).

[66] Decision 12/2013. (V. 24).

[67] For an elaboration of the interplay between unamendability and constitutional identity, see Suteu (2021), chapter 3. For a discussion of the twin developments of these concepts in German constitutionalism, see Polzin (2016, 411).

[68] See, e.g., Roznai and Brandes (2020, 29).

[69] On the European context, see, *inter alia*, Arnaiz and Llivina (2013) and Calliess and van der Schyff (2019).

[70] Halmai (2018b, 23).

In 2016, Orban initiated a referendum on the question of migration, seeking to gain a popular stamp of approval to his rejection of the European Union (EU)-imposed migrant quota. His position was that the quota would result in a redrawing of ethnic, cultural, and religious boundaries within Hungary that the EU had no right to impose. Challenges to the referendum initiative were rejected by both the Supreme Court and the Constitutional Court and the referendum went ahead in October 2016. It failed to garner a sufficient turnout for the results, otherwise overwhelmingly opposing the quota, to be validated. The government, humiliated, attempted in the aftermath of the referendum to pass the Seventh Amendment to defend Hungarian constitutional identity.[71] The amendment failed by only two votes to reach the required two-thirds majority to pass. If adopted, it would have created a state duty to defend constitutional self-identity, rooted in the 'historical constitution', to the National Avowal; would have added explicit limits to the Europe clause; and would have altered the prohibition against expulsion of foreign citizens.[72]

Enter the Constitutional Court decision in the matter, which for the first time introduced constitutional identity review into Hungarian law.[73] It should be noted that the court was by then packed and a whole host of constitutional amendments had eroded the rule of law in Hungary, even while on its face, the bill of rights, judiciary, and parliamentary democracy appeared to remain operational.[74] The Constitutional Court was tasked with reviewing whether the European Council's temporary relocation mechanism for asylum seekers was compatible with the 2011 Fundamental Law. The court was to clarify whether state authorities were required to implement European law when in conflict with fundamental rights under the Fundamental Law; whether they had to implement European law when this was *ultra vires*; and whether the relocation of foreign citizens (in this case, from one European Member State to another), argued by the government to contravene the constitutional prohibition of collective expulsion, was permissible under the Hungarian constitution.[75]

In embracing constitutional identity review, the Hungarian Constitutional Court cited the German Federal Constitutional Court's *Lisbon* decision.[76] In it, its German counterpart had sought to establish limits on the supremacy of European law, including on the basis of the German Basic Law's *Ewigkeitsklausel* (Article 79(3)). The German Federal Constitutional Court had not only declared itself the guardian of an "inalienable constitutional identity",[77] but had also introduced constitutional identity review as a new form of judicial review to check European law's compatibility with the inalienable values in Article 79(3).[78]

[71] Uitz (2016).
[72] For an overview, see Halmai (2018b).
[73] Decision 22/2016. (XII. 5.) AB.
[74] Uitz (2015, 291).
[75] Halmai (2018b, 30).
[76] 2 BvE 2/08, 30 June 2009.
[77] *Lisbon* decision, para. 219.
[78] *Ibid*., para. 240.

The Hungarian court also found that it had the competence to determine limits to the primacy of European law. It would be bound to examine whether the application of European law "results in a violation of human dignity, the essential content of any other fundamental right or the sovereignty (including the extent of the competences transferred by the State) and the constitutional self-identity of Hungary."[79] The Hungarian court invoked the principle that public power derives from the people and found that "the maintenance of Hungary's sovereignty should be presumed when reviewing the joint exercise of competences" that have already been conferred on the European Union (also relying on Article B) (1) of the Fundamental Law).[80]

It was not only the Hungarian Fundamental Law that the court interpreted as empowering its novel identity review, but European law itself, specifically Article 4(2) TEU. In this way, it operated an inversion that is by now familiar to students of populism: claiming the same values, principles, and legal techniques of their opponents as their own, even while simultaneously hollowing them out. More on this in the next section. At the same time, the court was careful to stipulate that it was not engaging in a review of the decision of the European Council itself, as this would have opened it up to accusations of acting *ultra vires*.[81] Thus, the court attempted to walk the tightrope between an openly hostile position vis-à-vis European institutions – cast in the role of bogeyman – and maintaining a semblance of acting within the boundaries of its competence.[82] As we will see, this would not be the last time the court attempts this balancing act.

In terms of the content of the constitutional identity it purported to defend, the Hungarian Constitutional Court tethered it on the entire Fundamental Law, the National Avowal, as well as Hungary's 'historical constitution', but refused to provide a closed list of values. The Fundamental Law was said to have merely recognised this millenary constitutional identity in 2011, not to have itself created it, which meant it could not be waived via an international treaty.[83] Only the court itself could therefore perform the task of ultimate guardian of both sovereignty and constitutional identity. The link to the substantive question before the court – whether asylum-seeker relocation quotas were lawful – remained tenuous, subsumed as it was to the identitarian question the court was preoccupied with answering.[84] It has been noted that, ironically, this elusive thousand-year constitutional identity would include a longer tradition of authoritarian rule than of democracy.[85]

Constitutional identity as constitutional self-defence was later formally entrenched in the Fundamental Law via a 2018 constitutional amendment introducing constitutional self-defence into the Fundamental Law.[86] However, the

[79] Decision 22/2016. (XII. 5.) AB, para. 46.

[80] *Ibid.*, paras. 59–60.

[81] Halmai (2018a, b, 39).

[82] On the Hungarian Constitutional Court casting European institutions in the role of 'Other', against which it defined Hungarian constitutional identity, see Koertvelyesi and Majtenyi (2017, 1721).

[83] Decision 22/2016, para. 67.

[84] *Ibid*.

[85] Halmai (2018b, 40-41) and Sonnevend et al. (2015, 33–36).

[86] Bill number T/332, Seventh amendment of the Basic Law of Hungary.

Constitutional Court has continued to pay lip service to compliance with EU law in its judgments, even when adopting interpretations directly in contradiction to it. For example, in a 2019 the Constitutional Court reiterated its claim to be the final guarantor of the Fundamental Law and defender of constitutional identity while dismissing foreign interpretations' authority.[87] The European Court of Justice found Hungary in breach of the European *acquis* on asylum in 2020.[88]

Then in December 2021, the Minister of Justice again sought an abstract review by the Constitutional Court, this time in order to declare the ECJ's finding contrary to Hungary's constitutional identity. Her argument was that, by seeking to impose the entry of third-country nationals into Hungarian territory indefinitely, Hungary loses control over its population and its constitutional identity is thus violated. This time, the court avoided a direct conflict and instead adopted an avoidance strategy.[89] It reiterated the joint competences of European and Hungarian authorities on the matter, as well as Hungary's presumption of reserved sovereignty and power of constitutional self-defence. At the same time, however, the court avoided providing a concrete answer to the asylum issue before it, deeming it a matter for the legislature. It has not gone unnoticed that the judgment was issued at a delicate time, when the EU post-pandemic recovery plan had not yet been approved for Hungary, with 7 billion Euro hanging in the balance.[90] In short, an inauspicious time to engage in a direct clash with European institutions.

The saga of constitutional identity review in Hungary is therefore a story of full embrace and, some have argued, abuse of the identitarian argument. This remains true even while the Hungarian Constitutional Court has not deployed the full force of this form of review, not going so far (yet?) as to set in motion a direct collision with European law. However, the earlier hopes that unamendability and constitutional identity arguments with it could at least forestall the country's decent into autocracy have been dashed. As will be discussed in the next section, however, we must seriously ask whether this was solely to do with captured guardian institutions – in this case, the Constitutional Court – or whether reliance on constitutional identity itself was misplaced from the start.

4 Questioning Unamendability as a Response to Authoritarian Populism

The case studies above illustrate the shortcomings and even dangers of relying on unamendability doctrines in response to authoritarian populism. Whether in the form of basic structure doctrines or constitutional identity reviews, both the constitutional theorist and the constitutional practitioner must grapple with the reality that unamendability's promise as a tool of militant democracy may be more limited than

[87] Decision 2/2019 (III. 5.).

[88] *C-808/18—Commission v Hungary*, Judgment of the Court (Grand Chamber) of 17 December 2020.

[89] Chronowski and Vincze (2021).

[90] *Ibid.*

hoped. Given that contexts of democratic backsliding, whether overt and quick or insidious and incremental, would be precisely where unamendability as democratic self-defence is most needed, this finding is significant.

In practice, we have seen the institutional preconditions for unamendability doctrines to be deployed as intended be eroded by far-reaching court packing and attacks on judicial independence. It would be nonsensical to insist on a captured court to rely on unamendability as democratic defence against the architects of its capture. This is also why the debate on a possible implicit unamendability being recognised in Hungary was short-lived: once the Constitutional Court was packed with government loyalists and its powers of review severely restricted, expectations for it to rule against that same government – not least to the extent of invalidating constitutional amendments – would have been illusory. Thus, while it is important to recognise how skilful and quick populists in power have come to be in neutralising courts, this is merely an empirical observation.

In what follows, I propose instead a partial explanation to the misplaced optimism about unamendability's capacity to protect constitutional democracy against populism besides court capture. A first mistaken assumption can be dispensed with more quickly. Early understandings of populism and populists were based on erroneous assumptions about their democratic rhetoric and their goals and actions once in power. Specifically, the assumption was that populists playing the electoral game would either die out, as anti-democrats at the fringes of electability, or else naturally moderate over time, as they would need to appeal to moderates in order to gain power or else engage in compromise with coalition partners to retain it. In either scenario, accountability institutions such as courts would remain in place ready to intervene, including if needed by defending the unamendable constitutional core.

The longevity of Orban's hold on power in Hungary (since 2010) and Modi's on India (since 2014) has been coupled with the deepening of the exclusionary nature of their agenda, not its moderation. In fact, they have both invoked an extreme form of majoritarianism – legitimised by repeat electoral victories – to defend measures that have restricted electoral competition and minority rights. They have also both promoted a personalised form of politics that has enabled them to speak directly to the people and to claim to do so as their sole voice. Together, these moves have hollowed out their respective democracies, even while on paper the two systems may not appear fundamentally flawed. As one commentator has put it: "Technically, the much-maligned representative democracy remains in place, serving as the façade of plebiscitarian acclamation."[91]

A second assumption is less straightforward to address. Populists were and sometimes still are thought to be anti-institutionalists by definition, meaning that they set out to destroy and disable institutions when given the opportunity. Certainly in the past, they were regarded as anti-constitutionalists and anti-legalists, seeking to operate extra-legally in order to pursue their aims. While it is true that they have targeted institutions that could hold them accountable, it is more subtly and perversely true

[91] Sajo (2021, 171).

for other institutions. Instead, what the new populists in power have displayed is a "legalist anti-constitutionalism" that allows them to de-institutionalise independent institutions while at the same time institutionalising anti-rule of law values.[92] This assumption also tends to underpin the recourse to unamendability as a potential response to authoritarian populism. Insofar as they could be straightforwardly branded as anti-constitutionalists, populists engaging in abusive constitutional change would be the obvious (and easy) targets of unamendability doctrines. Experience has since shown otherwise, however.

What we have, then, are shrewd authoritarian populists who know how to pretend to play the democratic game and, at least formally, also the constitutionalist/legalist one. Their ability to leave in place enough of the previously existing institutions and practices to make it seem as though we are still dealing with business as usual makes them particularly difficult to combat. After all, courts continue to operate and may even occasionally issue judgments against the government (though, crucially, on more minor issues) and elections continue to take place periodically (though with an ever-diminishing electoral space for the opposition and for civil society).[93] India's case above is the perfect illustration of this mixed picture: we have a Supreme Court that, while undermined, still stands, just enough to be able to occasionally rule against the government. More often that not, though, and certainly in high profile cases that would challenge the government's Hindu nationalist and anti-minority agenda, the Supreme Court has failed to act. This has been the case in the CAA case, despite its silence allowing the ongoing repression of peaceful protesters. It was also the case in Article 370 case, in which when it finally ruled, the court remained mum on the attacks on federalism and representative government – both recognised elements of the constitutional basic structure – at the heart of the case.

Doctrines of unamendability would require not just a strong, assertive court willing to address the subterfuge afoot; they would also require such a court to have the foresight and ability to piece together the multiprong attack on the rule of law and democracy, deployed across institutions and time, in part at the constitutional level and at the legislative and even regulatory level. Whether called upon to engage in abstract or concrete review of constitutionality, courts tend to render their judgments on single pieces of legislation or cases. Rarely do they have before them a full package of amendments as the Kenyan courts did in the BBI saga, giving them the opportunity to assess them holistically and based on their cumulative effects on executive aggrandisement and democratic accountability. Thus, while the populist playbook may increasingly involve the "death by a thousand cuts"[94] of constitutional democracy, courts have shown themselves slow, or unwilling, to adapt. Whether earnestly or maliciously, they have instead stumbled upon interpretivist limits, positivist approaches to law, and legal formalism. The consequence has been

92 Krygier (2019, 544).

93 Uitz (2015) and Sajo (2021).

94 Khaitan (2020).

that "[l]egal and constitutional positivism, reinforced by traditional techniques of legal interpretation, turn judges into instruments of oppressive and/or arbitrary law."[95] Even formalism may operate in this way, such as by allowing the dismissal of sensitive applications or the delaying of politically inconvenient judgments to avoid embarrassing the government,[96] as has happened in the case of India discussed above.

It is not just the institutional and doctrinal shortcomings of courts that pose an obstacle to effective responses to populism, up to and including unamendability. It is also the identitarian bent that right-wing populists in power have adopted and entrenched. One commentator writing on their rise in Europe explained that they "favor the constitutionalization of traditional identity markers (recently conveniently transformed into "constitutional identity"), as they provide ample opportunity for nativist mobilization for the constitution."[97] As we have seen above, this is not solely a European phenomenon, even while the language of constitutional identity may not have acquired the same currency elsewhere. The threat of this ethnonational, nativist turn – resulting in the demonisation of useful 'Others', be they ethnic and racial minorities, sexual minorities, immigrants and asylum seekers etc. – is amplified when it is placed on constitutional footing.

As we saw in the case of Hungary, the argument from constitutional identity was adopted by the populist leader quite effectively, except turned on its head: rather than underpinning a return to the bounds of liberal constitutionalism, it was relied on to further entrench a conservative, traditionalist, and exclusionary notion of identity. The danger had always been there, however, given the radically indeterminate nature of the concept of constitutional identity[98] and its insufficient differentiation from notions of national and cultural identity.[99] Despite its proponents' view of the concept as anchored in the universal values of liberal constitutionalism, constitutional identity as embraced by certain courts – and juridified as a novel form of judicial review – retained its extra-legal roots. In cases such as Hungary's, this resulted in an exclusionary, anti-pluralist notion of constitutional identity being enshrined in law.[100]

Insofar as unamendability is meant to protect constitutional identity, especially understood as an essence or core of the constitutional order, it is not well-suited to weed out such potentially exclusionary outcomes. It presupposes a consensual precommitment to certain values and principles and ignores their potential contestation. Indeed, the literature on unamendability has only recently been enriched with studies showing how otherwise liberal democratic constitutional orders retain formal or

[95] Sajo (2021, 186).

[96] *Ibid.*, 184.

[97] Sajo (2021, 41). On nativism as a key feature of populism in a constitutional key, see Walker (2019, 515).

[98] Faraguna (2019, 329) and Fabbrini and Sajo (2019, 457).

[99] I elaborate this argument more thoroughly in Suteu (2021), chapter 3.

[100] See also discussion in Kelemen and Pech (2019, 59), who draw a link between the evolution of constitutional identity review and the unresolved tensions within understandings of constitutional pluralism.

implicit unamendable commitments to exclusionary definitions of the state.[101] Such studies complicate the idea of a pacified constitutional identity, ripe to be protected by courts. Populist appropriation of the notion, moreover, is no accident: constitutional identity has allowed them to transfer their game of identity politics – involving tribalism and a view of politics as a zero-sum game – onto the constitutional front.[102]

In the European context, defenders of constitutional identity have warned against drawing the wrong conclusion from instances of its abuse such as Hungary's and Poland's, arguing instead that the concept is an inherent element of the dialogic frame of EU law and that authoritarian populists would be just as likely to abuse other concepts in its stead.[103] This may be true. However, returning to constitutional identity's link to unamendability, even defenders of the concept's usefulness in the European context admit it plays a distinct function domestically versus transnationally:

> Whereas domestically, unamendability serves to secure constitutional precommitment against rash democratic decisions, the transnational argument from constitutional identity seems to aim rather at securing the domestic democratic space.[104]

What we should not fail to acknowledge, however, is that opposition to the transnational has become part of the populist playbook, not just in Europe but elsewhere as well.[105] This retreat from cosmopolitanism plays out in different ways depending on the domestic context, but has been deployed quite effectively as a rallying cry to defend the nation – in terms of its ethnic/racial composition, territorial integrity, financial sovereignty etc. Where accompanied by an eternity clause or doctrine of implied unamendability, these have bolstered rather than tempered the breadth of the authoritarian populist argument. Opposition to the transnational, including its accountability tools as contained in EU or international human rights law, could thus be recast as defence of constitutional essence.

5 Conclusion

This article has sought to take seriously and test out the suggestion that unamendability, such as in the form of basic structure doctrines or constitutional identity review, could be usefully deployed as a response to authoritarian populism. Insofar as the latter seeks to undermine rule of law institutions and hollow out the very edifice of constitutionalism, unamendability's appeal would appear obvious: its structural reach, non-textual and thus broad foundations, and ability to attach the stigma of unconstitutionality all attractive to defenders of constitutional democracy.

[101] Masri (2018, 169) and Suteu (2017, 413).
[102] Sajo (2021, 160–170).
[103] Scholtes (2021, 534) and Scholtes (2023).
[104] Scholtes (2021, 542).
[105] Krieger (2019, 971).

In looking closely at the two case studies of India and Hungary, however, the article has questioned this optimistic take on unamendability's potential in the face of populist subterfuge.

Not long ago, in the run-up to the 2022 Hungarian parliamentary elections and back when the prospect of a FIDESZ loss seemed at least conceivable, two constitutional scholars launched an appeal for ideas on how to restore constitutionalism in the country.[106] Their quest was motivated by the difficult question of how to deal with "authoritarian enclaves", understood as "binding institutional solutions that make it practically impossible to restore a rule of law based democracy", entrenched by populists while in power. The problem entails being unable to overcome authoritarian entrenchment by playing by the rules of the game left in place, while at the same time wishing to abide by the rule of law. I would add to their conundrum that where authoritarian commandeering extended to unamendability doctrines, the dilemma worsens.

The argument proposed here is different from merely observing the propensity of authoritarian populists to immediately capture courts and/or render them ineffective as accountability institutions. This matters too, of course, and should be addressed carefully as part of an anti-populist playbook of measures.[107] Instead, authoritarian populists are also astute, if perverse, institutionalists and know well to co-opt and then deploy institutions – including unamendability doctrines and constitutional identity review – to serve their goals. Sometimes this deployment will take the form of abusive use, as in the case of Hungary's constitutional identity review. Other times, the channelling of disputes to constitutional courts that retain a modicum of societal legitimacy but are pliant and avoidant serves the authoritarian populists' agenda, as was shown in the case of India. We cannot turn away from the fact that, when it would be most needed as constitutional defence, unamendability may well become not just ineffective but counterproductive. And in the worst case scenarios, unamendability will help define the friend/enemy line rather than signal, nevermind stop, the slide into authoritarianism.

Declarations

Conflict of Interest No financial or non-financial interests that are directly or indirectly related to the work submitted for publication to declare.

Open Access This article is licensed under a Creative Commons Attribution 4.0 International License, which permits use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons licence, and indicate if changes were made. The images or other third party material in this article are included in the article's Creative Commons licence, unless indicated otherwise in a credit line to the material. If material is not included in the article's Creative Commons licence and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder. To view a copy of this licence, visit http://creativecommons.org/licenses/by/4.0/.

[106] Arato and Sajo (2021).
[107] Gardbaum (2020, 1).

References

Albert R (2019) Constitutional amendments: making, breaking, and changing constitutions. Oxford University Press, p 78
Anterio AM (2019) Reactive vs structural approach: a public law response to populism. Glob Con 8(2):270
Arato A, Sajo A (2021) "Restoring Constitutionalism: An open letter", Verfassungsblog, 17 November 2021, https://verfassungsblog.de/restoring-constitutionalism/. Accessed 13 May 2024
Arnaiz AS, Llivina CA (eds) (2013) National constitutional identity and European integration. Intersentia
Baer S (2018) The rule of—and not by any—law. On constitutionalism. Curr Leg Probl 71(1):335
Blokker P, Bugaric B, Halmai G (2019a) Public law and populism. German Law J 20:2
Blokker P, Bugaric B, Halmai G (2019b) Populist constitutionalism: varieties, complexities and contradictions. German Law J 20:3
Brandes TH (2019) International law in domestic courts in an era of populism. Int J Const Law 17(2):576
Bugaric B (2019) The two faces of populism: between authoritarian and democratic populism. German Law J 20(3):390
Bugaric B (2022) Populist constitutionalism–Between democracy and authoritarianism. In: Krygier M, Czarnota A, Sadurski W (eds) Anti constitutional populism. Cambridge University Press, p 27
Calliess C, van der Schyff G (eds) (2019) Constitutional identity in a Europe of multilevel constitutionalism. Cambridge University Press
Chandrachud A (2020) Secularism and the citizenship amendment act. Indian Law Rev 4(2):138–139
Cheung AYH (2018) "Abusive legalism", Law archive (22 February 2018). https://osf.io/preprints/lawarchive/w9a6r. Accessed 13 May 2024
Chronowski N, Vincze A (2021) "Full steam back: The Hungarian constitutional court avoids further conflict with the ECJ", Verfassungsblog, 15 December 2021, https://verfassungsblog.de/full-steam-back/. Accessed 13 May 2024
de la Torre C (2019) "Global populism: Histories, trajectories, problems, and challenges" in Carlos de la Torre, Routledge Handbook of Global Populism. Routledge, pp 1
Dixon R (2020) Strong courts: judicial statecraft in aid of constitutional change. C J Transl Law 59:298
Dixon R (2021) Responsive judicial review: democracy and dysfunction in the modern age. Oxford University Press, pp 165–167
Dixon R, Landau D (2015) Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment. Int J Const Law 13(3):606
EuConst (2019) Populism and constitutionalism. Eur Const Law Rev 15:3
Fabbrini F, Sajo A (2019) The dangers of constitutional identity. Eur Law J 25(4):457
Faraguna P (2019) Unamendability and constitutional identity in the Italian constitutional experience. Eur J Law Reform 21:329
Gardbaum S (2020) The counter-playbook: resisting the populist assault on separation of powers. C J Transl Law 59(1):1
Gardos-Orosz F (2018) Unamendability as a judicial discovery? Inductive learning lessons from Hungary. In: Albert R, Oder BE (eds) An unamendable constitution? Unamendability in constitutional democracies. Springer, p 231
Gardos-Orosz F, Szente Z (eds) (2021) Populist challenges to constitutional interpretation in Europe and Beyond. Routledge
Ginsburg T, Huq A (2018) How to save a constitutional democracy. Princeton University Press
Graber MA, Levinson S, Tushnet M (eds) (2018) Constitutional democracy in crisis? Oxford University Press
Graber M (2021) Born populist: the Trump administration, the ocurts and the constitution of the United States. In: Gardos-Orosz, F, Szente, Z (eds) Populist challenges to constitutional interpretation in Europe and beyond. Routledge, p 253
Halmai G (2012) Unconstitutional constitutional amendments: constitutional courts as guardians of the constitution? Constellations 19(2):182
Halmai G (2015) Judicial review of constitutional amendments and new constitutions in comparative perspective. Wake Forest L Rev 50:951
Halmai G (2018a) Silence of transitional constitutions: the "invisible constitution" concept of the Hungarian constitutional Court. Int J Const Law 16(3):969

Halmai G (2018b) Abuse of constitutional identity. The Hungarian constitutional court on interpretation of article E) (2) of the fundamental law. Rev Central East Eur Law 43:23
Halmai G (2019a) Populism, authoritarianism and constitutionalism. German Law J 20(3):296
Halmai G (2019b) Transitional constitutional unamendability. Eur J Law Reform 21(3):259–277
Halmai G (2022) Populism or authoritarianism? A plaidoyer against illiberal or authoritarian constitutionalism. In: Krygier M, Czarnota A, Sadurski W (eds) (2022) Anti-constitutional populism. Cambridge University Press, p 366
Howse R (2019) Epilogue: In defense of disruptive democracy—a critique of anti-populism. Int J Const Law 17(2):641
ICON (2019) Public law and the new populism. Int J Const Law 17:2
Indian Express (2022) CAA 'compassionate and ameliorative' legislation, says MHA annual report. The Indian Express. https://indianexpress.com/article/india/caa-limited-narrowly-tailored-law-mha-7888413/
Jacobsohn GJ (2003) The wheel of law: India's secularism in comparative constitutional context. Princeton University Press, pp 125–138
Jacobsohn GJ (2010) Constitutional identity. Harvard University Press, p 15
Jacobsohn GJ, Roznai Y (2020) Constitutional revolution. Yale University Press
Jaffrelot C, Tillin L (2017) Populism in India. In: Kaltwasser CR et al (eds) The oxford handbook on populism. Oxford University Press, p 179
Kelemen RD, Pech L (2019) The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland. Camb Yearb Eur Legal Stud 21:59
Khaitan T (2020) Killing a constitution with a thousand cuts: executive aggrandizement and party-state fusion in India. Law Ethics Human Rights 14(1):49
Khan AH (2021) India and statelessness: an introduction. Statelessness Citizenship Rev 3(1):176–178
Kochenov D, Bard P (2019) "The last soldier standing? Courts versus politicians and the rule of law crisis in the new member states of the EU". Eur Yearbook Const Law 243
Koertvelyesi Z, Majtenyi B (2017) Game of values: the threat of exclusive constitutional identity, the EU and Hungary. German Law J 18(7):1721
Kovacs K (2017) The rise of an ethnocultural constitutional identity in the jurisprudence of the East Central European courts. German Law J 18(7):703
Kovacs (ed) (2023) The jurisprudence of particularism: national identity claims in central and Eastern Europe. Hart
Krieger H (2019) Populist governments and international law. Eur J Int Law 30(3):971
Krygier M (2019) The challenge of institutionalisation: post-communist 'transitions', populism, and the rule of law. Eur Const Law Rev 15(3):544
Krygier M, Czarnota A, Sadurski W (eds) (2022) Anti-constitutional populism. Cambridge University Press
Krygier M (2022) Introduction: anti-constitutional populism. In: Krygier, M, Czarnota, A, Sadurski W (eds) Anti-constitutional populism. Cambridge University Press, p 1
Kumm M et al (2017) Editorial: The end of 'the West' and the future of global constitutionalism. Glob Con 6(1):1
Landau D (2013) Abusive constitutionalism. UC Davis Law Rev 47(1):189
Landau D (2018) Presidential term limits in Latin America: a critical analysis of the migration of the unconstitutional constitutional amendment doctrine. Law Ethics Human Rights 12(2):225–244
Letnar Cernic J, Avbelj M (2019) Crisis of constitutional democracy in central and Eastern Europe. Hague J Rule Law 10:1
Levitsky S, Ziblatt D (2018) How democracies die: what history reveals about our future. Penguin
Masri M (2018) Unamendability in Israel: a critical perspective. In: Albert R, Oder BE (eds) An unamendable constitution? Unamendability in constitutional democracies. Springer, p 169
Martinico G (2021) Filtering populist claims to fight populism: the Italian case in a comparative perspective. Cambridge University Press
Narain V (2023) What's love got to do with It? Anti-love Jihad Laws and the othering of Muslims in India. UCLA J Gender Law 30(1):167
Narrain A (2022) India's undeclared emergency: constitutionalism and the politics of resistance. Context, Westland Publications
Neuman GL (ed) (2020) Human rights in a time of populism: challenges and responses. Cambridge University Press

Polzin M (2016) Constitutional identity, unconstitutional amendments and the idea of constituent power: the development of the doctrine of constitutional identity in German constitutional law. Int J Const Law 14(2):411
Rogenhofer JM, Panievsky A (2020) Antidemocratic populism in power: comparing Erdogan's Turkey with Modi's India and Netanyahu's Israel. Democratization 27(8):1394
Rosenfeld M (2009) The identity of the constitutional subject: selfhood, citizenship, culture, and community. Routledge
Rosenfeld M (2012) Constitutional identity. In: Rosenfeld M, Sajo A (eds) The oxford handbook of comparative constitutional law. Oxford University Press, p 759
Roznai Y (2017) Unconstitutional constitutional amendments: the limits of amendment powers. Oxford University Press
Roznai Y, HostovskyBrandes TH (2020) Democratic erosion, populist constitutionalism, and the unconstitutional constitutional amendments doctrine. Law Ethics Human Rights 14(1):19
Sadurski W (2019) Poland's constitutional breakdown. Oxford University Press
Sajo A (1995) Reading the invisible constitution: judicial review in Hungary. Oxf J Leg Stud 15:253
Sajo A (2021) Ruling by cheating: governance in illiberal democracy. Cambridge University Press, p 171
Sathe SP (2001) Judicial activism: the Indian experience. J Law Policy 6:29–43
Sathe SP (2002) Judicial activism in India. Oxford University Press, p 98
Scheppele KL (1999) The new hungarian constitutional court. East Eur Const Rev 8(4):81
Scheppele KL (2018) Autocratic legalism. Univ Chicago Law Rev 85(2):545
Scholtes J (2021) Abusing constitutional identity. German Law J 22:534
Scholtes J (2023) The abuse of constitutional identity in the European union. Oxford University Press
Śledzińska-Simon A (2015) A model of individual, relational, and collective self and its application in Poland. Int J Const Law 13(1):124–128
Sonnevend P, Jakab A, Csink L (2015) The constitution as an instrument of everyday party politics: the basic law of Hungary. In: von Bogdandy A, Sonnevend P (eds) Constitutional crisis in the european constitutional area: theory, law and politics in Hungary and Romania. Hart, pp 33–36
Sundar N (2023) The supreme court in Modi's India. J Right-Wing Stud 1(1):106–115
Suteu S (2017) The multinational state that wasn't: the constitutional definition of Romania as a national state. Vienna J Int Const Law 11(3):413
Suteu S (2019) 'The populist turn in central and eastern Europe: is deliberative democracy part of the solution? Eur Const Law Rev 15(3):488
Suteu S (2021) Eternity clauses in democratic constitutionalism. Oxford University Press, pp 158–165
Toth GA (2018) Lost in transition: invisible constitutionalism in Hungary. In: Dixon R, Stone A (eds) The invisible constitution in comparative perspective. Cambridge University Press, pp 541–562
Tripkovic B (2018) The metaethics of constitutional adjudication. Oxford University Press, p 31
Tushnet M, Bugaric B (2021) Power to the people: constitutionalism in the age of populism. Oxford University Press
Uitz R (2015) Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary. Int J Const Law 13(1):279
Uitz R (2016) "National constitutional identity in the European constitutional project: a recipe for exposing cover ups and masquerades", Verfassungsblog, 11 November 2016, https://verfassungsblog.de/national-constitutional-identity-in-the-european-constitutional-project-a-recipe-for-exposing-cover-ups-and-masquerades/. Accessed 13 May 2024
United Nations Office of the High Commissioner for Human Rights (2019) "Press briefing on India", 13 December 2019, https://www.ohchr.org/en/press-briefing-notes/2019/12/press-briefing-india. Accessed 13 May 2024
Vajpeyi A (2020) Minorities and populism in Modi's India: the mirror effect. In: Kaul V, Vajpeyi A (eds) Minorities and populism – critical perspectives from South Asia and Europe. Springer, p 17
Walker N (2019) Populism and constitutional tension. Int J Const Law 17(2):515
Zysset A (2022) Calibrating the response to populism at the European court of human rights. Int J Const Law 20(3):976

Publisher's Note Springer Nature remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.