The Possibility of Unconstitutional Constitution: Bangladesh, Bolivia, and Honduras cases in context

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Abstract

Based on three cases of Bangladesh, Bolivia, and Honduras, this thesis primarily aims to answer whether courts can review and invalidate constitutional provisions. The respective courts have, disregarding the subordination of the *constituted power* to the *constituent power*, reviewed and invalidated the work of the *constituent power* (i.e., provisions of the Constitution). In answering the question, the thesis at first determines whether, as opposed to conventional understanding, there are limits to *constituent power*. Maintaining that there are context-specific limits to *constituent power*, the thesis addresses an anticipated query regarding the possibility of surpassing such limits: by proposing two models on the exercise of *constituent power*: *Revolutionary Model* and *Conformist Model*. It argues that while *constituent power* within the *Revolutionary Model*, is unbounded, within the *Conformist Model*, is limited. Thereafter, it places the existing Constitutions of the three countries within the two models and finds that in case of 1972 Bangladesh Constitution, that emerged from within *Revolutionary Model* and as such was not subject to any limits, the question of review by court does not even arise. However, the 1982 and 2009 Constitutions of Honduras and Bolivia respectively, emerged from within *Conformist Models* and could be subject to limits. Thereafter, the thesis, using the Bolivian and Honduras cases, determines whether the court, in *Conformist* cases, can review and invalidate the works of the *constituent power* based on the said limits? The thesis answers the question in the negative providing threefold reasoning: the subordination dilemma that exists even within the *Conformist Model*, contested conception of principles that are considered to bind the constituent power, and pragmatism.

Introduction

1.1 Background

On 3 July 2017, the Appellate Division of the Supreme Court of Bangladesh[1] upheld a judgment of the High Court Division that had declared the 16th constitutional amendment unconstitutional. The scrapped amendment had sought to substitute an amended provision of the Constitution providing for removal of the Supreme Court Judges by the President on the recommendation of the Supreme Judicial Council (SJC) with an original provision of the Constitution, mandating removal of the Judges by the parliament. Thus, the Court subverted an attempt of the parliament to restore an original provision in the Constitution. The judgment has been subjected to immense scholarly criticism on the ground of its failure to address the question as to whether the court could review and invalidate a provision of the Constitution.[2]

Along quite similar timeline, on 28 November of 2017, the Bolivian Constitutional Court,[3] and on 22 April 2015, the Constitutional Chamber of the Honduran Supreme Court,[4] invalided the constitutional provisions relating to presidential term-limit as provided in their respective Constitutions. These cases too raised the question as to whether it is normatively permissible for a court to declare a constitution or its provision unconstitutional. The three peculiar cases do not fit within the conventional theoretical framework of constituent power which perceives the court as *constituted power*, protecting and abiding by the dictates of the Constitution (i.e., the work of *constituent power*).[5] In this light, doubts have arisen about the normative relevance of the theory and its pragmatic significance. The three courts also question the conventional understanding that the *constituent power* is omnipotent, illimitable, and unrestrained— as the respective courts reviewed provisions of the Constitutions, indicating that there are *limits* to the exercise of *constituent power* and its work can be reviewed against such *limits*.

Against this backdrop, the present thesis seeks to address the following primary research question—

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[1] Bangladesh v Advocate Asaduzzaman Siddiqui (2019) 71 DLR (AD) 52.
[2] Ridwanul Hoque, 'Judicial Review of Original Provisions of a Constitution: Attempting the Impossible?' (2016) Available at SSRN: <https://ssrn.com/abstract=3144185>accessed January 11, 2023.
[3] TCP, Plurinational Constitutional Judgment 0084 (2017).
[4] Supreme Court of Justice, Constitutional Chamber, Judgment no. RI-1343-14 (2015).
[5] Joel I. Colón-Ríos, Eva Marlene Hausteiner, Hjalte Lokdam, Pasquale Pasquino, Lucia Rubinelli and William Selinger, 'Constituent power and its institutions' (2021) 20(4) Contemporary Political Theory.

Whether the court can review and invalidate constitutional provisions?

This question relates to a further question: *whether there exist any limits to the exercise of constituent power?* Because only if there exist any limits, can there be questions of reviewing the works of *constituent power*. Besides these, the thesis addresses an array of follow-up questions, arguments, and counterarguments relating to the primary research question.

Thus, the paper aims to determine whether the court can review and invalidate constitutional provisions. As a precursor, it aims to underscore the limits, if any, to the exercise of *constituent power*. In doing so, it has the objective of mediating between the conventional understanding of illimitable nature of *constituent power* and the abundant literature suggesting otherwise. Such mediation, besides paving the way for answering the thesis question(s), also redeems relevance of the theory of *constituent power*.

1.2 Methodology and theoretical framework

The thesis is comparative in nature as it, besides canvassing other jurisdictions, primarily compares the judgments, brief constitutional history, and political contexts of three countries, Bangladesh, Honduras and Bolivia, whose courts have produced the peculiar judgments on invalidating the constitutional provisions. The case selection is justified on the ground of being the "most different cases." Under the "most different cases" principle, cases, that are similar for variables central to the study but different for most variables that are not central, are chosen as comparators.[6] Similarly, in my thesis, all three selected jurisdictions vary significantly from one another. For instance, their colonial pasts, systems of government, structures of courts are different. Also, there are differences among the political contexts of the selected jurisdictions. However, all these areas of differences are not central to the present thesis. The thesis concerns with the court's power to review and invalidate constitutional provisions— uniquely related to the selected jurisdictions.

The paper uses the theory of *constituent power* to address the thesis questions. Since the peculiarity of the three cases of the comparators lies in the fact that court, as *constituted power*, reviewed the constitutional provisions (i.e., works of the constituent power), the paper extensively engages with the theory of constituent power in the first and third chapters. The

[6] Ran Hirschl, 'Case Selection and Research Design in Comparative Constitutional Studies', in *Comparative Matters: The Renaissance of Comparative Constitutional Law* (OUP 2014) 253.

paper looks back to the origin and evolution of the theory and the conception of hierarchization between *constituent power* and *constituted power* that paved way for the creation of tools like Unconstitutional Constitutional Amendment doctrine and eternity clauses. The two chapters thus delineates the ascendancy of the *constituent power*, which sets the premise for answering the thesis question. In this regard, this paper adopts *historical approach.*

The paper also provides an overview of utility of the theory of *constituent power* in protecting the work of the *constituent power*. In addition to the comparators, the paper also discusses how the theory has functioned in other countries in restraining the *constituted powers* from overstepping the mandates of the *constituent power*. As such, in this regard, the paper takes *functionalist approach.*

Furthermore, in answering the central question, the paper conceptualizes two models of the exercise of constituent power as a framework for addressing atypical constitutional questions, pertaining to the theory of *constituent power*, like the one that the paper seeks to answer. Drawing on the two models, the paper sets out certain standardized reasonings for substantiating its findings. In this context, the paper takes a *normative approach.*

Thus, the paper primarily encompasses an overlapping of three— *historical*, *functionalist*, and *normative*— methodological approaches. However, the *normative* approach, among them, for fundamentally addressing the thesis questions, is the dominant one.

The research of the paper is based on qualitive method. It is multi-disciplinary since besides the constitution, case laws, necessary theories and doctrines, the paper also highlights how political and historical contingencies shape the constitutional order.

1.3 Meaning of words, expressions, and limitations

In this thesis, the word *constituent power* shall primarily mean the power of the people to formulate a legal-political order through the process of constitution making,[7] through 'extra-ordinary institutions' such as constituent assembly.[8] *Constituted power* shall mean the legal and political institutions, such as court and parliament, established through the exercise of the *constituent power*.[9] The words *work of the constituent power* denote *the Constitution*. The word

[7] Colón-Ríos *et al* (n 5).
[8] Richard Albert, 'Constitutional Amendment and Dismemberment' (2018) 43(1) The Yale Journal of International Law 21.
[9] Colón-Ríos *et al* (n 5).

review shall mean *assessment of constitutionality*. The word *limit* to the exercise of constituent power implies substantive, and not procedural, limit. Furthermore, the *Unconstitutional Constitutional Amendment (UCA)* doctrine is understood as the power of the court to review amendments to the Constitution.[10]

The prime limitation of the thesis has been time constraint, given the expansive and contested nature of the topic. Furthermore, the instances of the court reviewing constitutional provisions are rare. This rarity has been a limiting factor in terms of substantiating arguments through instances. Moreover, while surfing through literature, language (e.g., Spanish) has also been a limiting factor.

With regard to the temporal dimension, the thesis takes a relative approach due to the differences in the historical evolution of the comparators' constitutional order. In terms of Bangladesh, it took into consideration the period from 1972 to 2017, since the 16th Amendment Judgment (2017) is deeply intertwined with the post-independence political history (since 1971) of the country. In terms of Bolivia, the focus has been on the drafting process of the 2009 Constitution and the subsequent events leading to the case of 2017 in question. However, reference has also been made to 1952 revolution of Bolivia and ensuing events to substantiate the two models proposed in the thesis. As regards Honduras, the events leading to the removal of Zelaya in 2009 and the following development that led to removal of the term-limit by the Honduran court in 2015 has been of primary focus. However, references to previous Constitution of Honduras have also been made to add substance to the proposed models on the exercise of *constituent power*.

1.4 Structure of the thesis

The first chapter provides an overview of the historical origin and evolution of the theory of *constituent power*. It underscores how the origin and the development of the theory have been shaped by the conception of hierarchization of *constituent power* and *constituted power*— the latter being sub-ordinate to the former. This hierarchization has engendered the understanding that protecting the work of the constituent *power* (the Constitution or its core) and to operate within its dictates is the primary function of *constituted power* (parliament, courts etc.). It canvasses that this theoretical basis for restraining the *constituted powers* from

[10] David Landau, Rosalind Dixon and Yaniv Roznai, 'From an Unconstitutional Constitutional Amendment to an Unconstitutional Constitution? Lessons from Honduras' (2019) 8(1) Global Constitutionalism 40, 45.

going beyond the dictates of the Constitution (work of the *constituent power*) and thereby protecting the sanctity of the *constituent power* also got translated into constitutional tools, such as the *UCA doctrine* and the eternity clauses, which migrated across different jurisdictions.[11] The chapter concludes by setting the premise for the next chapter— mentioning the three unique cases where the courts from the three comparators deviated from the standard function, based on the theory of *constituent power*, of protecting the work of *constituent power*.

The second chapter provides a brief account of the immediate constitutional history and role of the courts of the comparators, in maintaining the sanctity of the *constituent power*, before analysing the three cases. It then moves through the three judgments where the respective courts, disregarding the subordination of the *constituted power* to the *constituent power*, reviewed and invalidated the provisions of the Constitution. The chapter also critically visits the grounds and standards purported to be set by the courts in reviewing the said provisions and thereby lays the foundation for positing the thesis question— *Whether the court can review and invalidate constitutional provisions?*

The third chapter begins by suggesting that the power of review is premised on the existence of any limiting factor to the exercise of *constituent power* because only if there exist any limits, can the court opt for using such limits as standards to review the work of *constituent power*. Thus, the chapter deals with the follow up question— whether there exist any limits to the exercise of the *constituent power*? The chapter in the first segment immerses in the relevant literature and provides an overview of the scholarly takes on the existence of limits to the exercise of constituent power. Based on the analysis of the literature, it argues that there is no uniform set of limits to the exercise of *constituent power* rather the limits are context specific. The next segment of the chapter justifies the existence of limits by advancing two models of the exercise of *constituent power*: *Conformist Model* and *Revolutionary Model*. It argues while the constituent power within the *Revolutionary Model* is omnipotent and illimitable akin to the conventional understanding of the *constituent power*, within *the Conformist Model*, such power is *in fact* limited.

The fourth chapter in its first segment provides for instances of limiting the *constituent power* within *the Conformist Model*. The second segment situates the existing Constitutions of the comparators within the two models. It argues that the Bangladesh Constitution of 1972 emerged within *Revolutionary Model* of the exercise of constituent power and cannot be subject

[11] Ibid 41.

to any limit. Based on such finding, it argues that 16th Amendment judgment of Bangladesh (one of the three peculiar judgments) cannot be justified within the theoretical contours of the limits of *constituent power*. On the contrary, the chapter finds the existing Constitutions of the Honduras and Bolivia, as they emerged within *Conformist Model*, to have limits. The chapter concludes, using Honduras and Bolivia cases, with this question— if the *constituent power* within *Conformist Model* has limits, whether the court, as *constituted power*, can review the works of the *constituent power* based against such limits?

The final chapter argues that despite the *constituent power* within the *Conformist Model* having limits, it is not the Court that can impose such limits to review its works. It provides a threefold reasoning to substantiate the claim: *the subordination dilemma* that exists even within the *Conformist Model*, *contested conception of principles* that are considered to bind the *constituent power*, and *pragmatism.* It reflects on the three reasonings using the Bolivian and Honduran cases. The thesis concludes with the finding that the court cannot review the work of the constituent power (neither in *Conformist model* nor in the *Revolutionary model*).

Chapter 1

The Theory of Constituent Power and Its Upshots

This chapter, adopting historiographical lenses, provides a brief account of the history of the theory of constituent power at the beginning. Reflecting on the history of the theory and its evolution, it underscores the theoretical premise of the subordination of the constituted power to the constituent power. It then sheds light on the translation of this theoretical premise into practical constitutional tools.

1.1 A brief history of the theory of constituent power

By and large, different shades of revolutionary Constitutions have shaped the genre of modern constitution and constitutionalism.[12] These Constitutions were made defying the existing order of constitution-making, and often without any pre-existing authorization.[13] However, to be legitimate any Constitution needs prior authorization.[14] It is in this context, *Abbé de Sieyès'* pamphlet— *What is The Third Estate* becomes relevant. For *Sieyès* 'the nation' was prior to everything and was the source of everything since its will was superior to and independent of any existing order or dictated procedure.[15] Thus, the nation, as the constituent power, bears the political authority of creating new constitutional order[16] from which any Constitution including the revolutionary ones derive legitimacy.

This idea was introduced in the late eighteenth century for addressing the issue of French Constituent Assembly's proposed breakaway from the authority under which it had been convened.[17] *Sieyès* described the assembly not as a body exercising under the authority delegated by the King rather as an entity exercising the *constituent power* on behalf of the people of the whole nation.[18] This *constituent power* shapes the contours of a constitutional

[12] András Sajó, Renáta Uitz, 'Conditions for a Constitution' in *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (OUP 2017) 57.
[13] Ibid.
[14] Stephen Gardbaum, 'Revolutionary constitutionalism' (2017) 15(1) International Journal of Constitutional Law 174.
[15] Joel Colón-Ríos, 'The legitimacy of the juridical: Constituent power, democracy, and the limits of constitutional reform' (2010) 48 Osgoode Hall Law Journal 205, 206.
[16] Ibid 206.
[17] Mark Tushnet, 'Peasants with pitchforks, and toilers with Twitter: Constitutional revolutions and the constituent power' (2015) 13 (3) International Journal of Constitutional Law 645.
[18] Ibid 645.

order within which public power is to be exercised, laws are to be enacted, and disputes are to be settled. Thus, the theory of constituent power, as postulated by *Sieyès*, is conventionally understood to make a distinction between two powers: the *constituent power*— the will of the people that is omnipotent, unrestrained and predates the existing constitution or the State, and the *constituted power*— the legal and political institutions, established by the exercise of the constituent power, and limited by the constitutional form to which they owe their existence.[19] The *constituted powers*, as creations of the *constituent power*, cannot take part in the act of constitution-making.[20]

Following *Sieyès*, *Carl Schmitt* too made a distinction between the *constituent power*, as the "pre-existing political will of the people to create new constitutional order," and the *constituted powers*—legislature, executive and judiciary— that ought to function within the limits of the emergent constitutional order.[21] Similarly, *per Schmitt*, the *constituent power* could not be restrained in any legal form, not even by the Constitution, since no law could confer the original constitution-making power and prescribe the procedure for its making.[22] It is pertinent to mention here that *Schmitt* understood 'nation' as a homogenous entity.[23]

Another theory developed during the debates at the French National Assembly on the drafting of the 1791 Constitution, complemented the distinction drawn between the *constituent* and *constituted powers*. According to this theory, there remains a distinction between the *original constituent power* and *amendment power* (derived constituent power).[24] While the *amendment power* is exercised conforming to the set of rules prescribed in the Constitution, the *constituent power* emerges, without being subjected to any norms or rules, during extra-ordinary moments.[25] This leads to the creation of 'double identity' of the people.[26]The explicit limitation placed on the exercise of the *amendment power* depicts that such power can be exercised upon being granted to that effect by the Constitution, and it must be exercised

[19] Colón-Ríos, The legitimacy of the juridical (n 15) 207.
[20] Ibid.
[21] Richard Stacey, 'Constituent power and Carl Schmitt's theory of constitution in Kenya's constitution-making process' (2011)9 (3) International Journal of Constitutional Law 602.
[22] Ibid 602.
[23] Carl Schmitt, 'Verfassungslehre' cited in Duncan Kelly, 'Carl Schmitt's Political Theory of Representation' (2004) 65(1) The Migration.
[24] Yaniv Roznai, 'Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea' (2013) 61 (3) American Journal of Comparative Law 664.
[25] Ibid.
[26] Markus Böckenförde, 'Letting the constituent power decide? in Tania Abbiate, Markus Böckenförde, Veronica Federico (eds) *Public participation in African Constitutionalism* (Routledge 2017) 28.

following the rules and prohibitions enshrined in the Constitution.[27] Such prohibitions could be both substantive and procedural.[28] Although this theory considers constitution making power as *constituent power* and the amendment power as *constituted power*, there is another way such distinction can be drawn at the institutional level. For instance, the constitution-making body is often regarded as the *constituent power* or an institution representing the constituent power of the people while other institutions like the judiciary, parliaments, executive created by the constitution are regarded as the *constituted powers*.[29]

Thus, the classical formulation of *constituent power* finds a considerable degree of convergence of 'omnipotence' and 'sanctity'. This notion of the theory of constituent power has traversed continents and entered the constitutional discourse across the world.

1.2 Translation of the theory into practical tools: Emergence of the UCA doctrine and eternity clauses

The sacred and omnipotent nature of the constituent power, as envisioned in the classical formulation of *constituent power*, derives from the fact that such power is not regularly exercised.[30] It may be exercised outside the legal framework established by the existing Constitution in revolutionary circumstances[31] or within the legal framework during the extra-ordinary moments.[32] In order to exercise such power, the people, as a whole, are brought into political consciousness.[33] This collective political consciousness creates a new Constitution that needs to be protected until there appears another constitutional moment[34] undergirded by similar consciousness. As such, any amendment to the Constitution must abide by the rules and procedures set out in the Constitution because the sovereignty of the *constituent power* entails the subordination of the *amending power* to the *constituent power*.[35]

[27] Roznai (n 24) 665.
[28] Ibid.
[29] Colón-Ríos *et al* (n 5).
[30] Roznai (n 24) 665.
[31] Ibid.
[32] Albert (n 8) 21.
[33] Stacey (n 21) 593.
[34] The moment of genuine political consciousness as postulated in Bruce Ackerman, 'Constitutional Politics/Constitutional Law' (1989) 99 (3) Yale Law Journal 489.
[35] Thomas Wischmeyer, 'Unconstitutional Constitutional Amendments' (2017) 15(4) International Journal of Constitutional Law 1243.

This classical notion of protecting the identity of the Constitution, as the work of the *constituent power*, led to the creation of two prominent constitutional tools: eternity clause[36] and UCA doctrine.[37] These tools have migrated across the world. They serve as the most effective mechanism of restraining the *amending power* and protecting the pre-existing political consciousness of 'we, the people' as reflected in the Constitution. Thus, the theoretical basis for curbing the *amending power* or restraining the *constituted powers* from going beyond the dictates of the Constitution and thereby protecting the sanctity of the *constituent power* also got translated into practical tools. Courts in several jurisdictions, used these tools to strike down amendments with the reasoning of protecting the mandate of the *constituent power*.[38]

However, the Courts in the comparators of this paper, in three recent cases, disregarding this hierarchy of the *constituent power* and the *constituted power* and their normative function (as *constituted powers*) of protecting the dictates of the *constituent power*, struck the works of *constituent power* down. The next chapter will analyse these three peculiar cases and underscore the grounds used by the Courts to justify their stances of deviating from their normative function of protecting the works of the constituent power.

[36] Ulrich K. Preuss, 'The Implications of "Eternity Clauses": The German Experience' (2011) 44(3) Israel Law Review 429, 441.
[37] Landau, Dixon, and Rozai (n 10).
[38] For instance, in India, Bangladesh, Nepal, Pakistan, Brazil, Colombia etc.

Chapter 2

Setting Extra-Constitutional Standards: The Adventurous Courts of Bangladesh, Honduras, and Bolivia

This chapter first provides a brief account of the three jurisdictions to depict that the Courts of these jurisdictions had initially conformed to the logic of upholding the sanctity of the *constituent power* by protecting the Constitution until deciding on the three peculiar cases. Next, this chapter through the three judgments, delineates the standards set by the Courts to review the provisions of the Constitutions.

2.1 Bangladesh

The Bangladesh Supreme Court (SC) has in several cases applied the UCA doctrine to invalidate constitutional amendments with the reasoning of protecting the work of *constituent power*. It was first applied in 1989 in the case of *Anwar Hussain Chowdhury v Bangladesh*, popularly known as the eighth amendment case, where the Court struck down an amendment, that sought to set up six divisional benches of the High Court Division outside the permanent bench of the Supreme Court at the capital, on the ground that it was inconsistent with the 'basic feature' (the unitary nature of the Supreme Court) of the Constitution. The Court explicitly referred to the seminal Indian decision, *Kesavananda Bharati v. State of Kerala* in its decision. While in India, the Basic Structure Doctrine evolved gradually through trials and errors before crawling into the constitutional fabric,[39] the Bangladesh Court plucked the Doctrine from the Indian context and readily deployed it. Thus, the SC of Bangladesh held the eighth amendment to the Constitution unconstitutional borrowing the Basic Structure Doctrine from India.

Interestingly, the Constitution of India does not explicitly refer to such doctrine. However, the SC of India had gradually developed the doctrine through a number of decisions over a span of a decade.[40] According to the doctrine, the Constitution harbours certain basic norms that cannot be abrogated by the exercise of the amendment power— in other words, constitutional amendment cannot amount to replacement.[41] The doctrine therefore, is

[39] Rokeya Chowdhury, 'The Doctrine of Basic Structure in Bangladesh: From 'Calfpath' to Matryoshka Dolls' (2014) 14 (1) Bangladesh Journal of Law 21.
[40] Christopher J. Beshara, 'Basic Structure Doctrines and the Problem of Democratic Subversion: Notes from India' (2015) 48 (2) Nomos Verlagsgesellschaft mbH 99.
[41] Ibid.

considered to be a tool used by the Court to protect the dictates of the *constituent power*. The reasoning of the Court is generally premised on the importance given to a particular provision or norm during the Constituent Assembly debate.[42] Thus, the Court deploys the doctrine maintaining the hierarchy between the *constituent power* and the *constituted power*. However, there are criticisms as to whether in doing so the Court posits itself above other constituted powers (e.g., the legislature).[43] However, as the Constitution of Bangladesh categorically enshrines the principle of constitutional supremacy and says that the Supreme Court is the guardian of the Constitution, the task of protecting the work of the *constituent power* can be gleaned from the Constitution itself. For this paper, it is pertinent to understand that the Bangladesh Court had routinely sought to maintain the so-called sanctity of the *constituent power* while applying the doctrine.

Following the eighth amendment case, the Bangladesh Court had held several other constitutional amendments unconstitutional.[44] The Court had done so with the similar justification of preserving the *constituent power* and by recognizing the relationship of subordination of the *constituted power* to *constituent power*. However, the latest 16th judgment has been the rare exception where this hierarchization had been blatantly disregarded as the Court went on to review the work of the *constituent power*.

2.1.1 The 16th Amendment Judgment: Testing the constitutionality of the Constitution?

For understanding the 16th Amendment Judgment of Bangladesh, one needs to be aware of the brief history of the country since the judgment cannot be seen in isolation from the dramatic politico-constitutional history of the country.

The Constitution of Bangladesh (1972) originally provided for parliamentary process for removal of judges. In 1975, the Father of the Nation Bangabandhu Sheikh Mujibur Rahman was murdered, the Constitution was thwarted, and state powers were usurped by the military. The military regime, through 5th constitutional Amendment, introduced several changes to the Constitution, including taking away the parliamentary power of removal of judges and vesting

[42] Sudhir Krishnaswamy, *Democracy and constitutionalism in India: A study of the basic structure doctrine* (OUP, 2010) xi–xxxiii.
[43] Ibid 168.
[44] Bangladesh Italian Marble Works Ltd v Bangladesh [2006] BLT 1; Khondhker Delwar Hossain v Bangladesh Italian Marble Works Ltd and Others (2010) 62 DLR 298; Siddique Ahmed v Bangladesh (2011) 33 BLD 84; Anwar Hossain Chowdhury v Bangladesh (1989) BLD 1; Saleem Ullah v Bangladesh (2005) 57 DLR 171; Abdul Mannan Khan v Bangladesh (2012) 64 DLR 1.

the same upon "Supreme Judicial Council (SJC)", a body composed of senior most judges of the Supreme Court (SC). The military regime, through 6th and 7th amendments, also made fundamental changes to the Constitution. Primary among such changes was replacing secularism with Islam as 'State religion'.

After transitioning to democracy in 1991, the 5th Amendment was challenged before the SC. The SC invalidated most of the changes brought about by the amendment but "condoned" (in the Court's words) and approved the validity of the provision relating to the SJC.[45] However, the SC did not provide sufficient reason for retaining a provision that had been brought about by the military regime.

In 2008, Bangladesh Awami League (BAL), the secular-leaning political party and the party that led the liberation war of independence and the drafting of 1972 Constitution, came to power securing more than 2/3rd of the total number of seats in the parliament with the electoral manifesto of going back to the original Constitution of 1972. The newly formed government introduced fifty constitutional changes through 15th amendment with the mandate of reinstating the 1972 Constitution. However, the provision relating to the removal of judges by the SJC was kept intact. Following the election of 2014, tension erupted between the Chief Justice and the 'BAL-led parliament' on various issues.[46] The tension led to fiery debates in the parliament— with most parliamentarians advocating for reinstating the original provision of removal of judges by the parliament *per* their commitment to going back to the 1972 Constitution. As a result, the 16th constitutional Amendment was introduced replacing the concept of SJC with the parliamentary scheme of judicial removal.

Consequently, the High Court Division of the SC in *Asaduzzaman Siddiqui case* held the 16th constitutional amendment unconstitutional. The Appellate Division of the SC upheld the judgment of the High Court Division. The scrapped amendment, as mentioned, had sought to substitute an amended provision of the Constitution providing for removal of the Supreme Court Judges by the President on the recommendation of the Supreme Judicial Council (SJC)[2] with an original provision of the Constitution, mandating removal of the Judges by the parliament.[3] Thus, the Court subverted an attempt of the parliament to restore an original provision in the Constitution.

[45] Hoque (n 2).
[46] Ashif Islam Shaon, 'SC issues contempt rule on two ministers' *Dhaka Tribune* (Dhaka, 8 March 2016), <https://archive.dhakatribune.com/uncategorized/2016/03/08/sc-issues-contempt-rule-on-two-ministers> accessed 12 February 2023.

The SC held the 16th constitutional amendment unconstitutional by predominantly questioning the morals of the parliamentarians, *inter alia*, accusing most of them as "corrupt businessmen" and of having "criminal records".[47] As such, the Court apprehended that the amendment may entail abuse of power on part of the parliamentarians in terms of removing the Judges from their offices,[48] and thereby violate the principles of *separation of powers* and *independence of judiciary*, that form part of the basic structure of the Constitution.

The SC, thus, by deploying the UCA doctrine, instead of offering protection to the mandate of the *constituent power*, invalidated an original provision of the Constitution. It utilized constitutional principle to set aside a provision of the Constitution. The court failed to address the issue that the Constitution makers in the exercise of their *constituent power* had included the parliamentary scheme of judicial removal. As such, there appeared to be no concrete reasoning to strike down the provision on the ground of its inconsistency with principles such as *separation of powers* and *independence of judiciary*.

The court referred to Article 7B of the Constitution, that entrenched various provisions of the Constitution as the basic structure including the provision concerning the principle of separation of powers and independence of judiciary, to substantiate its argument.[49] However, it failed to explain how article 7B, being inserted through the 15th amendment, could be used to invalidate an original provision of the Constitution. Thus, throughout its decision, the Court navigated normative inconsistencies. By and large, it left the significant question unanswered- "can the Court (a *constituted power*), invalidate the text of the original Constitution (work of the *constituent power*)?"[50]

In a similar vein, the Constitutional Chamber of the Honduran Supreme Court had also in a 2015 decision reviewed the provisions of the Constitution relating to term limit and struck them down, *albeit*, with different reasoning than the ones advanced by Bangladesh Court.

2.2. Honduras

In Honduras, the Court, immediately before the controversial 2015 decision, with the logic of preserving the Constitution, had removed the then President Zelaya from the post. His

[47] Asaduzzaman (n 1) 52.
[48] Hoque (n 2).
[49] Asaduzzaman (n 1) 52.
[50] Hoque (n 2).

removal was largely impliedly justified as the pre-emptive measure of protecting the Constitution as Zelaya had sought to amend the term limit which was protected as the eternity clause.[51]

President Zelaya had expressed his willingness to hold a referendum for seeking public opinion as to whether the Constitution needed to be rewritten.[52] He had tried to move forward unilaterally since he did not have the congressional support.[53] The Attorney General had warned that such a move would be unconstitutional.[54] The Civil, Administrative, and Electoral Courts also at different times, opined the same.[55] The critics, beyond the Courts and legal offices, were of view that although Zelaya was not making it explicit, he was actually trying to hold onto power by changing the one-time presidential term-limit which could have not been amended by ordinary means (as an eternal provision), and any steps towards repudiating the provision, regardless of the route taken, would *in fact* be unconstitutional.[56]

In a similar voice, the Constitutional Chamber of the Supreme court held that Zelaya could not go ahead with the proposed referendum as it would be in breach of the entrenched provision on the presidential term-limit.[57] Thus, the reasoning provided by different bodies including the Constitutional Chamber relied heavily on protecting the term-limit on the basis of explicit constitutional provisions that protected essential parts of the Constitution and thereby ensured that no changes to the Constitution could exceed the scope of delegation delineated by the *constituent power*. Despite the formidable resistance from different quarters, Zelaya issued an executive decree commanding the National Statistical Institute to hold a nonbinding referendum.[58] Shortly after, the Supreme Court, citing the illegal measures taken by Zelaya, ordered the military to place him under arrest.[59] The military, instead of bringing the arrested president before the Court, defying the judicial instruction, had flown him out of

[51] Forrest D. Colburn and Alberto Trejos, 'Democracy Undermined: Constitutional Subterfuge in Latin America' (2010) 57(3) University of Pennsylvania Press 11.
[52] Frank M Walsh, 'The Honduran Constitution is not a suicide pact: The legality of Honduran President Manuel Zelaya's removal' (2010) 38 Georgia Journal of International and Comparative Law 341.
[53] David Landau, 'Democratic Erosion and Constitution Making Moments: The Role of International Law' (2017) 2 UC Irvine Journal of International, Transnational, and Comparative Law 101.
[54] Walsh (n 52) 341.
[55] Landau (n 53) 101.
[56] Ibid 102.
[57] Silvia Suteu, 'Eternity in Post-conflict Constitutions: Unamendability as a Facilitator of Political Settlements', in Silvia Suteu (ed) *Eternity Clauses in Democratic Constitutionalism* (OUP 2021) 75.
[58] J. Mark Ruhl, 'Trouble in Central America: Honduras Unravels' (2010) 21(2) Johns Hopkins University Press 93, 100
[59] Ibid 101.

the country.[60] While some commentators found the entrenchment of the term-limit as the reason behind the constitutional crisis, many considered such ironclad around the term-limit, in the wider political climate of Latin America, reasonable and labelled Zelaya's attempt as 'constitutional subterfuge' or *Constitutional coup d'Etat* : of attempting to break the constitutional barrier, of defying the limits of delegation— all to his advantage under the garb of legality.[61]

However, very few could have anticipated that the Honduran Court, within a short span of time, would take a U-turn in respect of the same issue.[62] In 2015, the Constitutional Chamber of Honduras annulled the constitutional provision that prohibited presidential re-election.

2.2.1 Testing the Constitution against the judge-made 'hierarchy of constitutional norms': The case of Honduras

The same political force that played pivotal role in Zelaya's removal for his attempted constitution-making effort to reform the eternal provision relating to term-limit, consolidated enormous power, and subsequently sought to scrap the same provision in order to perpetuate its rule.[63]

The Constitutional Court, which was allegedly packed by post-Zelaya regime, in the 2015 case (Judgment no. RI-1343-14)[64] invalidated Articles 239, 42 and 374 of the Honduras Constitution.[65] While Article 239 created the term-limit, Article 42 made *the attempt to change the term-limit provision* a punishable act and Article 374 made the term-limit provision unamendable.[66] While invalidating the provisions, the Court reasoned that they conflicted with the right to freedom expression recognized by the Constitution and found in the international and regional human rights instruments.[67] The Court also took resort to Article 15 of the Constitution which states that— "Honduras supports the principles and practices of international law, that promote the solidarity and self-determination of peoples, non-intervention and the strengthening of universal peace and democracy."

[60] Ibid 102.
[61] Suteu (n 57) 77.
[62] Ibid.
[63] Landau, Dixon and Roznai (n 10) 53.
[64] Supreme Court of Justice (n 4).
[65] Landau, Dixon and Roznai (n 10) 54.
[66] Ibid.
[67] Ibid 53.

According to the Court, this provision and other provisions in the Constitution crafted a 'constitutional block' through which certain provisions of the international law became part of the domestic law.[68] It has been observed by *Landau, Dixon and Roznai* that the Court's suggestions hinted towards creating a sort of hierarchy of constitutional norms where it placed the rights-related provisions of the Constitution found in the international Human Rights instruments, principles of self-determination and democracy at the top of the order.[69] Thus, the Court sought to create a standard for itself which other provisions of the Constitution and any amendment to the Constitution must be consistent with, in order to escape being invalidated on ground of unconstitutionality.

However, in doing so, the Court paid no attention to the hierarchy between the *constituent power* and the *constituted power*. It failed to address the issue that the *constituent power* in 1982, in exercise of its Constitution making power, had included the rights provisions, including the principles of self-determination and democracy, alongside the presidential term limit in the Constitution. The Court, as a *constituted power* was obliged to protect the work of the *constituent power* and use the same as the standard to strike down any amendment (if, at all). However, the Court, almost positing itself as the *constituent power*, ventured on the business of creating a constitutional standard for itself and invalidated the very (eternal) provisions of the Constitution which it was meant to protect.

The very provision that had been, through a preemptible move, protected by the Court as the work of *constituent power*, and had led to ouster of Zelaya (for attempting to repeal it), was thus found unconstitutional by the Court in a few years.[70] Thus, in a rather perfidious manner, the Honduran Court, defying the relationship of subordination between *constituted power* to *constituent power*, reviewed the provisions of the Constitution and held them unconstitutional. The Bolivian Court, with reasoning quite similar to that of Honduran Court, but following different turn of events, reviewed and invalidated the term limit provision of the Constitution.

[68] Ibid.
[69] Ibid.
[70] David Landau and Brian Sheppard, 'The Honduran Constitutional Chamber's Decision Erasing Presidential Term Limits: Abusive Constitutionalism by Judiciary?' (*Blog of the International Journal of Constitutional Law,* 6 May 2015) <http://www.iconnectblog.com/2015/05/the-honduran-constitutional-chambers-decision-erasing-presidential-term-limits-abusive-constitutionalism-by-judiciary> accessed 18 January 2023.

2.3 Bolivia

The Bolivian Constitution of 2009 was adopted following the chaotic turns of events and subsequent settlement between the President Morales led coalition, MAS (Movimiento al Socialismo) and the oppositions.[71] The Constitution included presidential term-limit. It also incorporated the idea that the Court had the power to invalidate any amendments that bring such fundamental changes that amount to creation of a new Constitution.[72]

Article 411(I) of the Bolivian Constitution of 2009 states that—

> "The total reform of the Constitution, or that which affects its fundamental premises, affects rights, duties and guarantees, or the supremacy and reform of the Constitution, shall take place through an original plenipotentiary Constituent Assembly, put into motion by popular will through referendum."

This provision is considered to have institutionalized the application of UCA doctrine,[73] since it harbours the idea that the judiciary would strike down any amendment that brings fundamental changes to the Constitution which are meant to be brought about only through the exercise of the *constituent power*. Thus, it appears to be quite 'abstract form of eternity clause,' similar to that found in the 1814 Constitution of Norway. As such, the provision makes a distinction between the *constituent power* and *constituted power*.

However, despite such a provision, the Constitutional Court in the 2017 case (TCP Sentencia Constitucional Plurinacional N° 0084/2017) had helped President Morales to extend his term-limit by going beyond the dictates of the Constitution of 2009. The Court, as *constituted power*, reviewed the provision of the term-limit inserted in the Constitution and held the same unconstitutional.

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[71] Sergio Verdugo, 'The fall of the Constitution's political insurance: How the Morales regime eliminated the insurance of the 2009 Bolivian Constitution' (2019) 17(4) International Journal of Constitutional Law 1098, 1111.
[72] Joel Colón-Ríos, Deliberative democracy and the doctrine of Unconstitutional Constitutional Amendment in Ron Levy, Hoi Kong, Graeme Orr and Jeff King (eds) The Cambridge Handbook of Deliberative Constitutionalism (Cambridge University Press) 271.
[73] Ibid 277.

2.3.1 Reviewing the Constitution against Supra-constitutional rights: The Bolivian story

As discussed, the Bolivian Constitution of 2009 was promulgated following a lengthy and bumpy bargaining process that took place between the President Morales led coalition, MAS and the oppositions. The primary, among many settlements that the MAS and the oppositions reached at, was of barring Morales' from running for presidential re-election more than once (Article 168).[74] However, despite such a barrier introduced in the Constitution, Morales was allowed to run for second re-election on the ground that in computing the terms, his presidency before the promulgation of the 2009 Constitution would not be counted.[75] As a result, Morales was re-elected in 2014. Despite enjoying such leeway, he started finding ways to extend his tenure further.[76] A process to hold referendum on reforming Article 168 had been initiated by the Morales regime.[77] The initiative to hold the referendum had been adopted following a thorny debate in "the MAS-controlled" parliament.[78] Quite unexpectedly, the people voted against MAS; 51.3 per cent of voters voted against the proposal to reform Article 168.[79] Ignoring the mandate of the referendum, Morales regime went on to challenge various provisions of the Constitution including the provision relating to term-limit before the Constitutional Court.[80]

The Court in a bizarre ruling, relying on the American Convention on Human Rights (ACHR) among others, held the term-limit provision unconstitutional on the ground that it interfered with the constitutional political rights of those seeking re-election.[81] It made specific reference to Article 23 of the ACHR and asserted that "the political rights require the possibility of re-election."[82] The Court further asserted that since there is tension between the political rights and the impugned provision, the approach of the Court should be rights-oriented.[83] The Court was somewhat suggesting about the existence of supra-constitutional political rights. Thus, the Court reviewed and invalidated a constitutional provision relying on the ACHR provision considering the same to stand above the Constitution. It is pertinent to mention here

[74] Verdugo (n 71) 1110.
[75] Ibid.
[76] Ibid.
[77] David Doyle, Presidential Term Limits in Bolivia in Alexander Baturo and Robert Elgie, (eds) *The Politics of Presidential Term Limits* (OUP 2019) 544.
[78] Ibid.
[79] Ibid.
[80] Verdugo (n 71) 1119.
[81] Ibid.
[82] Ibid 1120.
[83] Ibid.

that the Inter-American court (IACtHR) has recently observed through its advisory opinion that term limit provisions do not amount to violation of human rights.[84]

As such, the Court, defying the work of the *constituent power* and the fresh mandate of the people went on to determine the constitutionality of a provision. The Court, perhaps in an attempt to water down the theoretical aberration, used the argument put forward by MAS delegates in the Constituent Assembly Debate of 2006 for justifying unlimited presidential term-limit in the early constitutional draft.[85] However, the Court gave no substantial reason as to why it found the content of the final Constitution and the result of the latest referendum irrelevant.[86]

As discussed, the Bolivian Court reviewed the Constitution, (wrongly) interpreting rights derived from ACHR. With this, arose few difficult questions. Could the Court, applying correct interpretation, review the Constitution against the rights-based standard set by an international convention? Can there be a standard for testing unconstitutionality of the Constitution?

Thus, the Courts in the three jurisdictions provided different grounds for reviewing the provisions of the Constitution. The SC of Bangladesh appears to suggest that there is normative hierarchy within the Constitution and certain principles (forming part of the basic structure) tops the hierarchy. Furthermore, any provisions of the Constitution can be tested for constitutionality against these principles with change in the socio-political landscape. The Constitutional Court of both Honduras and Bolivia, on the other hand, though with certain differences, used regional and international human rights instruments, among others, to review the provisions of the Constitution. The Honduran Court in this regard emphasized on the existence of a 'constitutional block' (where certain international law norms creep into the constitutional domain) and of a normative standard with rights provisions that are present in the constitution and international human rights instrument and principles of self-determination and democracy at the top of the hierarchy. On the other hand, the Bolivian Court resorted to the rights-based provision of the regional Convention to invalidate a constitutional provision.

[84] Christina Binder and Mariela Morales Antoniazzi, 'Towards Institutional Guarantees for Democratic Rotation: The Inter-American Court's Advisory Opinion OC-28/21 on Presidential Re-election'*(VerfBlog*, 6 October, 2021) <https://verfassungsblog.de/towards-institutional-guarantees-for-democratic-rotation/,> accessed 15 April, 2023
[85] Verdugo (n 71) 1120.
[86] Ibid.

Thus, like Bangladesh and Honduras decisions discussed above, the Bolivian decision suffers from sub-ordination difficulty since the Court, as *constituted power*, reviewed the provision of the Constitution, a work of the *constituent power*. These adventurous routes taken by the Courts lead us to the question of the thesis— whether the Court, as *constituted power*, can review the works of *constituent power*? A straightforward answer to the question posed would be a 'no' due to the classical or conventional understanding of *constituent power*.

The conventional understanding of *constituent power*, as discussed in the first chapter, is that it is an unbounded and omnipotent power. Basically, this conventional understanding of unboundedness and omnipotence of the constituent power serves as the basis for the conception of sub-ordination of the *constituted power* to the *constituent power*. However, the courts of comparators reviewed the work of *constituent power* and thereby indicated that just like *constituted power*, the *constituent power* too has limits which empowers the court to review its work. This leads the next chapter to reflect upon the question whether, as opposed to the conventional understanding, there exists any limit to the constituent power.

Chapter 3

The Limits of the Constituent Power

The conventional understanding of constituent power as discussed in the first chapter, is an unbounded, unrestrained and omnipotent power. However, the courts of comparators, disregarding such conception, reviewed the works of the constituent power.

The research question of the paper, helpful to remember, is whether the court, as constituted power, can review the works of constituent power. This question is linked with a further question: whether there exist any limits on the works of constituent power. Because only if there exist any limits, can there be questions of reviewing the works of constituent power.

The present chapter is divided into two sections. While the first section provides an overview of the scholarly takes on the limits of constituent power, the second section justifies the existence of the said limits by proposing two models of the exercise of constituent power, namely *Conformist Model* and *Revolutionary Model*. This chapter maintains that while constituent power in *Conformist Model* is limited, constituent power in the *Revolutionary Model* is not.

3.1. Delineating the limits of constituent power

For the paper, the limit of constituent power is understood as the limit that exists on the constituent power in framing a legitimate Constitution. It does not imply limit on future amendments to the Constitution. Thus, the limit that this paper is concerned with, is regarding Constitution making and not amending.

As discussed in the first chapter, the constituent power, resting with 'the people', is generally considered as unlimited power.[87] Scholars attribute this idea of unboundedness to *Sieyes*' assertion that "a nation alone has the right to make a Constitution" and the task of making the Constitution is done through "extra-ordinary representative of the people" who are free from any prior restraints, and who decide on issues as "individuals would decide in the

[87] Joel I. Colón-Ríos, 'Rousseau, Theorist of Constituent Power' (2016) 36 (4) Oxford Journal of Legal Studies 885.

state of nature."[88] However, *Roznai* argues that the constituent power has limits, and existence of such limits can be discerned from *Sieyes*' work itself.[89] He substantiates by referring to the passage of *What is the third State* where Sieyes states "[t]he nation exists prior to everything; prior to the nation and above the nation, there is only natural law."[90] Thus, *per Sieyes*, the constituent power could be limited by natural law. *Roznai* further asserts that in today's world, supra-constitutional limits can be imposed on the constituent power based on the norms of international law.[91]

On the other hand, *Carlos Bernal* endorses the thick normative conception of Constitution noting that a Constitution can only be regarded as 'Constitution', if it, besides being 'authoritatively enacted and socially recognized', harbours the elements of rule of law, separation of power, protection of individual rights and democracy.[92] Thus, for *Bernal*, the fundamental elements of constitutionalism operates as limits on constituent power.[93]

Landau and *Dixon*, in this regard, imply that in the backdrop of democratic backsliding and abusive constitutionalism', 'transnational constitutional norms' could act as limits.[94] In a similar vein, *Colón-Ríos* argues that the democratic nature of the theory of constituent power entails that the Constituent power be bound by the principles of democracy and values of democratic openness.[95] For *Richard Stacey*, "the very nature of popular sovereignty imposes restraints on those who claim its authority in enacting a new Constitution."[96] *Stacey* further asserts that constituent power should be bound by liberal rule of law principles.[97]

In broad stroke, predominantly the Constitution making power is expected to respect the principles of freedom, liberty, and democracy. Be that as it may, essentializing the liberal-

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[88] Lucien Jaume, 'Constituent Power in France: The Revolution and its Consequences', in Martin Loughlin, and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2009) <https://doi.org/10.1093/acprof:oso/9780199552207.003.0005> accessed 30 March 2023.
[89] Yaniv Roznai, 'The Theory and Practice of 'Supra-constitutional' limits on Constitutional Amendments' (2013) 62(3) Cambridge University Press 562.
[90] Ibid.
[91] Ibid 571.
[92] Carlos Bernal, 'Constitution-Making (without Constituent) Power: On the Conceptual Limits of the Power to Replace or Revise the Constitution' in Richard Albert, Carlos Bernal and Juliano Zaiden Benvindo (eds.) *Constitutional change and transformation in Latin America* (Hart Publishing 2019) 34.
[93] Ibid.
[94] Rosalind Dixon and David Landau, 'Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment' (2015)13(3) International Journal of Constitutional Law 606-638.
[95] Sergio Verdugo, 'Is it time to abandon the theory of constituent power?' (2023) 21(1) I*nternational Journal of Constitutional Law* 14, 51.
[96] Richard Stacey, 'Popular Sovereignty and Revolutionary Constitution-Making', in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (OUP 2016) 162.
[97] Verdugo, 'Is it time to abandon' (n 95) 52.

democratic principles as limits of constituent power gives rise to a question: whether a good number of Constitutions around the world which have not adopted the liberal-democratic principles (An array of Asian Constitutions including the Arabs, Africa, Latin America etc), can be regarded as 'Constitutions'?

This chapter argues that the limit on the constituent power is context specific. Apart from the claim of the liberal-democratic principles and principles of constitutionalism acting as limits, there are a whole range of limits that potentially bind the constitution making power across different contexts.

Richard Kay affirms that for a constitution to live through, it must inhere *something* that would persuade "its subjects to submit to it", this *something*, Kay argues, is the source of validity of the exercise of constituent power.[98] As such, the constitution making power must not muddle through anything that would potentially go against the citizens, so as to be outrightly rejected. *Lumbreras* contends that in order to enjoy stability, Constitution must be consistent with the "eternal principles of society"[99] The work of *Luigi Taparelli d'Azeglio* maintains that the primary goal of the exercise of constituent power is to promote common good and if such power is exercised by disregarding the principles of natural law, the consequent design would be 'dangerously incomplete.'[100]

Gaspar Melchor de Jovellanos held the view that constitution making was always limited by historical contingencies.[101] *Jovellanos* asserted that any Constitution was the product of "long historical processes" and hence it must respect the essential historical contingencies in order to create a "stable legal system."[102] For him, the historical contingencies could flow from "fundamental laws that determined the right of the sovereign and its subjects" that could be found in the "old codes in ancient chronicles, in depreciated manuscripts and dusty archives".[103] On the other hand, the *'doctrinaires'* believed that the legitimacy of any power,

[98] David Dyzenhaus, 'Constitutionalism in an old key: Legality and constituent power' (2012) 1(2) Global Constitutionalism 240.
[99] Joel Colón-Ríos, 'The Identity and Limits of the Constituent Subject', *Constituent Power and the Law* (OUP 2020).
[100] Ibid.
[101] John H. R. Polt, 'Jovellanos and His English Sources: Economic, Philosophical, and Political Writings' (1964) 54(7) American Philosophical Society 60.
[102] Colón-Ríos, The Identity and Limits (n 99).
[103] Ibid.

including the power of bringing about a Constitution depended on the condition of such power being guided by 'sovereignty of reason'.[104]

Scholars like *Hauriou* also gave the impression that the constituent power could be limited by political liberty and principles pertaining to structure of the State.[105] Such principles are considered to form part of constitutional super-legality that exists above and beyond the constitution.[106] According to *Heller*, the exercise of constituent power must be guided by "the general will" and must be consistent with the juridical principles pertaining "to the organisation of the family and to the property regime".[107] He considered such principles to be grounded in culture whose transgression could justify popular resistance for bringing about new constitutional order.[108] For *Mortati*, principles connected to ideology of "dominant political force", representing the core set of values of a determined social class, act as the limit of constituent power.[109]

Thus, beyond the liberal democratic principles, there are so called "eternal principles of society", principles of common good, historical contingencies, principles shaped by religious texts and scriptures, ideology of dominant political party representing the core set of values of the society which can operate as limiting factor for the respective constituent powers.

Thus, jurisdictions whose Constitutions historically recognize as source of law old codes or religious texts, may consider such religious or traditional laws as limiting factors when framing a new Constitution. Similarly, a state that entrenches leadership of a political party whose ideology is claimed to align with the core societal value may perceive such ideology as limit on the future constituent power. As such, considering that limits on the constituent power can be context-specific, helps one to find limits for Constitutions of different regions irrespective of the ideologies they rest upon.

Now the question is if the constituent power, beyond the conventional understanding, is *supposed* to be limited by liberal-democratic principles, core ideologies of dominant political party, core set of societal values, religious or traditional norms, or historical contingencies, is there no way to frame a new constitutional order by completely breaking away with the existing

[104] Aurelian Craiutu, 'Tocqueville and the political thought of the French doctrinaires (Guizot, Royer-Collard, Rémusat)' (1999) 20(3) History of Political Thought 456, 485.
[105] Colón-Ríos, The Identity and Limits (n 99).
[106] Ibid.
[107] Ibid.
[108] David Dyzenhaus, 'The Legitimacy of Legal Order: Heller's Legal Theory', in *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (OUP 1999) 178.
[109] Colón-Ríos (n 99).

principles, ideology, or values? The next section answers this question by articulating two models of constituent power.

3.2. Locating the "limit" within the spectrum of the two models of constituent power

If we concede that there is array of context-specific limits to the exercise of constituent power, as discussed, complete severance from the past may seem improbable. It is in this context relying on the formulation of constituent power, this paper argues that there are two modes of the exercise of constituent power. One is *Conformist Model of constituent power* that aims to bring massive changes to the Constitution/remake the Constitution without completely severing from the previous constitutional order. Theories such as 'constitutional dismemberment' (pertaining to changing basic feature of Constitution without breaking the legal order)[110] come within the larger domain of such exercise of constituent power. The other one is *Revolutionary Model of constituent power* that pertains to the exercise of constituent power with revolutionary zeal that completely breaks away from the past and brings about an entirely new constitutional order.

I draw a distinction between the two by adding to the concept of basic rules as propounded by Richard Albert for identifying the exercise of constituent power. *Per* Albert, constituent power can be identified, among others, through the functioning of the *rule of extraordinariness* and the *rule of consent*. The *rule of extraordinariness* implies that changes in the constitutional order must occur through extra-ordinary institutions or forums like constituent assembly or convention etc. and *the rule of consent* implies that the changes must be affirmed by popular support, manifested either directly or indirectly.[111] These two rules are present in both the models I conceptualize. I argue that the only difference is made by existence of an additional element in the *Revolutionary Model of constituent power*: the conscious unmaking of the existing order by completely severing from the past. Pertinent to note that in most cases, exercise of constituent power manifests the *Conformist Model*. *Revolutionary Models* are a rarity. For instance, during the French revolution, as claimed by *Rubinelli* the idea of constituent power was promoted with the call for abolishment of 'Ancien Régime' and founding of a completely new political order.[112] The transformation of the third Estate to

[110] Albert (n 8) 3.
[111] Ibid 21.
[112] Lucia Rubinelli, 'Sieyès and the French Revolution' Constituent Power: A History (Cambridge University Press 2020) 33.

national assembly by claiming that "political authority did not lie in the hands of the monarch but in the will of the people" epitomised a radical severance from the previous order.[113]

However, other constitutions such as the making of the Indian Constitution, provides a picture of continuity rather than severance. As *Uday Mehta* observes, the Constitution making of India was not marked so much by "metaphors of revolutionary ruptures" rather by those of "continuity and transfer".[114] India became independent in 1947 with Nehru as the head of the then existing interim government and with King George VI remaining sovereign until 1949.[115] *Mehta* calls the episode as simple transfer of power or succession of personnel.[116] The constitution making did not take place in clean slate. Indeed, "75 percent of the new Constitution was the reproduction of the Government of India Act of 1935"[117] as enacted by the previous British regime.[118] Also, as *Ebrahim and Miller* argues, the interim constitution of South Africa operated as a bridge of legitimacy of the apartheid regime and the legitimacy of the final constitution thereby suggesting transition rather than complete severance.[119] These processes depict that the exercise of the constituent power in these jurisdictions took place within the schema of legal/political/constitutional continuity instead of complete dismantlement of the previous order.

While the exercise of constituent power within the *Conformist Model* can be limited, as it tends to give more importance to 'formal trappings of law', existing principles and values (since there is no complete severance from the existing/previous order),[120] the constituent power within the *Revolutionary Model* appears to be illimitable as it perceives the exercise of the power through the total abolishment of the existing order.[121] Also, as *the Revolutionary Model* usually appears in the backdrop of tyranny, the exercise of constituent power within this model surfaces with unrestrained powers underpinned by the spontaneous rise of the people to totally break free from the existing order of things.[122] However, at times, complete break from the existing order through the *Revolutionary Model* may also not be possible because of the

[113] Ibid 34.
[114] Uday Mehta, 'Constitutionalism' in Pratap Bhanu Mehta (ed), The Oxford Companion to Politics in India (Oxford University Publication 2010) 15, 19.
[115] Ibid.
[116] Ibid.
[117] Ibid.
[118] Ibid.
[119] Hassen Ebrahim and Laurel E Miller, 'Creating the birth certificate of a new South Africa' in Laurel E Miller and Louis Aucoin (eds) *Framing the state in times of transition: Case studies in constitution making* (US Institute of Peace Press 2010) 121.
[120] Albert (n 8) 20.
[121] Ibid.
[122] Verdugo (n 95) 'Is it time to abandon' 33.

order's systematic and well-entrenched clutch on power base— in such circumstances, people are compelled to opt for the *Conformist Model* (as in the case of South Africa).

Thus, this chapter maintains that limits to constituent power exist within the scheme of *Conformist Model* but not that of *Revolutionary Model*. The conventional understanding of the illimitable nature of the constituent power is associated with the *Revolutionary Model*. The following chapter places the comparators of the paper within the two proposed models.

Chapter 4

Locating the Comparators within the Two Models

The first section of this chapter provides certain instances where the constituent power within the *Conformist Model* were limited by the principles of the existing order. The second section of the chapter locates the constituent power of the comparators of the paper (Bangladesh, Honduras, and Bolivia) within the two models of constituent power.

4.1. Instances of limiting the Constituent power within the conformist model

In the context of South Africa, neither the interim Constitution of 1993 nor the final Constitution of 1996 completely broke away with the previous order rather got incrementally developed within the schema of legal continuity. This is apparent from the fact that the actors from the previous regime were allowed to maintain a power base, as *Christina Murray* observes, through the mandate of power division between the national and provincial government as provided by the thirty four agreed upon principles.[123] As such, since there was no revolutionary break from the previous order, these principles acted as limits for the constituent assembly drafting the final constitution. Furthermore, the Constitutional Court was empowered to review the final Constitution for determining its consistency with the said agreed upon principles. Similarly, *Sam Brooke*, in his work, canvasses the application of certain principles in making of the Constitutions of Namibia, Burundi, Cambodia, and Eritrea where constitution making took place within the schema of legal continuity.[124]

The second *re-election case* of 2010 of Colombia is another example in point. The Colombian Court in that case struck down a referendum that would have allowed the Colombian President (Alvaro Uribe) to seek a third consecutive term in office.[125] The Court had done so primarily on the procedural ground as articulated in the Constitution, but it also set forth the substantive grounds that it considered could limit the exercise of the constituent power. It is pertinent to mention here that although referendum can be understood as a part of constituted order, in exceptions times, as Colón-Ríos perceptively observes, when referendum

[123] Christina Murray, 'A Constitutional Beginning: Making South Africa's Final Constitution' (2001) 23(3) University of Arkansas at Little Rock Law Review 809, 815.
[124] Sam Brooke, Constitution-Making and Immutable Principles 3, 10 (2005) (unpublished M.A. thesis, The Fletcher School, Tufts University).
[125] Landau, Dixon and Roznai (n 10) 47.

is used to modify Constitution, like the Colombian example, it can be understood to channel 'the will of constituent power.'[126]

As regards the substantive restrictions, the Colombian court reasoned that the third presidential term of Uribe would lead to concentration of power, compromise the necessary checks and balances that had existed between different institutions, and thereby affect the principle of separation of power as envisaged in the 1991 Constitution.[127] The substantive restrictions were discussed by the Court was in *obiter dictum*. However, the fact that the attempt of writing the constitutional provision of term limit took place following the procedure stipulated in the existing Constitution (continuity of the order) gave the impression that the exercise of constituent power was indeed deemed limited by the principles, as discussed by the court, of the 1991 Constitution.

Furthermore, the constitutional dismantlement process of Indonesia in 1999 is also relevant in this context. Indonesia witnessed the exercise of constituent power, within the scheme of 'constitutional dismemberment' since the polity wanted to dismantle the principle of *integralism* as entrenched in the 1945 Constitution.[128] It invoked the *Majelis Permusyawaratan Rakyat (MPR)*, which as the highest institution of the State and as 'the manifestation of all the people of Indonesia' consisting of elected representative and regional representative,[129] went on to dismantle the integralist model of the 1945 Constitution. Nonetheless, the rupture took place within the framework of the existing constitutional order. As a result, principles such as *panchasila* coming from the 1945 Constitution operated as a limiting factor for the actors who were steering the constitutional dismantlement in 1999.[130] Even the 1978 Constitution-making process of Sri Lanka through constituent assembly appears to have been bound and deeply influenced by the principles of the 1972 Constitution, which did not drift far away from the previous *Soulbury* Constitution.[131]

Thus, the countries experiencing the *Conformist Model* observe the dual rule of deploying extra-ordinary body of constitution making and attaining consent of the people

[126] Colón-Ríos et al (n 5).
[127] Landau, Dixon and Roznai (n 10) 47.
[128] Simon Butt and Tim Lindsey, *The Constitution of Indonesia: Contextual Analysis* (Hart Publishing 2012) 19.
[129] Andrew Ellis, 'Constitutional Reform in Indonesia: A Retrospective' (International Institute for Democracy and Electoral Assistance 2005) <https://constitutionnet.org/sites/default/files/AEpaperCBPIndonesia.pdf> accessed 16 March 2023.
[130] Butt and Lindsey (n 128).
[131] Mario Gomez, 'The failure of transformative constitution making in Sri Lanka' in Ngoc Son Bui and Mara Malagodi (eds) *Asian Comparative Constitutional Law Volume 1: Constitution Making* (Hart Publishing 2023).

through direct or indirect means. However, since they lack the element of completely breaking away or severing with the previous order, as opposed to that in the *Revolutionary Model*, they are often limited by the principles, ideas or values of the previous order in their constitution making. In some cases, the limits are expressly provided as in the case of South Africa and in other cases such limits can be discerned from the constituent assembly debate as well as the politics of Constitution-making of the respective country.

Now the constitutions of the comparators need to be assessed to ascertain whether such Constitutions came about through the process of continuity suggesting that their makings were subject to limit or whether they came into existence by completely severing from the past suggesting that the emerging order could not be limited by past order rather would operate as limiting factor upon the future constitution makings.

4.2. Placing the Comparators within the two models

A. Bangladesh: Revolutionary model

The case of Bangladesh is one of *revolutionary model*. The constitution making was preceded by liberation war and declaration of independence akin to the American declaration. Bangladesh came into existence by exercising people's right to self-determination in the year 1971 by seceding from Pakistan. The exercise of this right manifested itself through a liberation war.[132] The beginning of the end of West Pakistan's domination started in the year 1952 with the language movement which was followed by many significant social and political movements that laid the foundation of the Constitution of independent Bangladesh.

The 'unholy alliance of civil-military bureaucracy and unrepresentative elites' (the formal 'State apparatus') that basically ruled Pakistan (including erstwhile East Pakistan) became the most formidable tyrant.[133] The alliance devised a constitutional mechanism that was capable of denying popular sovereignty and subordination of the government to the rule of law.[134] The unfathomable narratives of social, political and economic injustice engineered by the State mechanism made the people strive for parliamentary democracy with president as

[132] Muhammad Ekramul Haque, 'The Bangladesh constitutional framework and human rights' (2011) 22(1) The Dhaka University Studies Part-F 55, 56.
[133] Gowhor Rizvi, 'Democracy & Constitutionalism in South Asia: The Bangladesh Experience' (2005) Ash Institute for Democratic Governance & Innovation Kennedy School of Government Harvard University 28.
[134] Ibid 13.

the nominal head.[135] The constituent assembly, consisting of the elected representatives, formed immediately after independence worked to reflect the will and aspiration of the revolutionary mass to formulate an entirely new order marking absolute severance from the past. The Assembly introduced democracy, socialism, secularism, and Bengali nationalism, collectively known as 'Mujibism', as the founding principles which marked the radical break from the past. Bangladesh emerged as the first country in South Asia to incorporate secularism as a state principle, making a radical transition from Islam as state religion. Thus, the constitution making of Bangladesh included all three elements of a *Revolutionary Model*: rule of extra-ordinariness, rule of consent and the conscious severance from the previous order.

B. Honduras: Conformist Model

On the contrary, the Honduras Constitution of 1982 appears to be the product of *Conformist Model* of the exercise of constituent power. The constitutional history of Honduras provides an account of the demise and enactment of several Constitutions. The 1982 Constitution is the twelfth Constitution since 1839.[136] Indeed, in terms of number of Constitutions, Honduras ranks second in Latin America, Bolivia being the first.[137] A wide number of Constitutions reduces the chance of any revolutionary break rather produces a pattern of commonality with slight modifications introduced to suit the changes sought. This commonality engenders principles and ideas that tend to transcend and bind subsequent Constitutions.

For instance, the 1839 Constitution provided the framework of protection of rights, 1865 Constitution introduced *habeaus corpus*, 1880 Constitution introduced many principles like the principle of municipal autonomy, 1924 Constitution is known for its social and labour scheme, and many more.[138] All these principles and ideals operated as limiting factors for subsequent Constitutions since there was no conscious effort to completely sever from the continuing order. As such, the 1982 democratic Constitution, enacted through invocation of constituent assembly of elected representative, were bound by such ideals and principles that could be found in the Constitution. Many institutions, processes, and principles of the 1982

[135] Abul Fazl Huq, 'Constitution-Making in Bangladesh' (1973) 46(1) Pacific Affairs 59.
[136] Dario A. Euraque, 'Honduras' in Robert H. Holden (ed) Oxford Handbook of Central American History (OUP) 531.
[137] Ibid 528.
[138] The Constitution (US Library of Congress) < https://countrystudies.us/honduras/84.htm> accessed 1 May 2023.

Constitution was thus reminiscent of the previous Constitutions.[139] Thus, although the Constitution was adopted following decades of military rule, the transformation was marked by rupture and continuity rather than revolutionary severance and novelty. As such, the Constitution making process was limited by over-arching principles developed over this long constitutional journey of the country.

C. Bolivia: Conformist Model

In case of Bolivia, the frequency of demise and enactment of Constitutions is much higher than those of Honduras. Nonetheless, a pattern of consistency, if not commonality, exists among the Constitutions that came into effect after the revolution of 1952. The revolution paved way for a massive break from the past constitutional history by mobilising the demand of 'voting rights of indigenous' people along with many radical transformation.[140] The revolution, as *Laura Gotkowitz* perceptively observes, was deeply influenced by the indigenous struggles for land and justice that swept through Bolivia.[141] A great majority of Bolivia's population was excluded from political participation prior to the revolution.[142] The 1961 Constitution reflected, to a significant extent, the aspiration of the revolution.[143] Thereafter the democratic history of Bolivia was entrenched in the 1967 Constitution.[144] This was followed by *Kataristas'* political and cultural claim in 1970 and the multicultural and plurilingual demands advanced in the 1980s and 1990s.[145]

All these culminated in the adoption of the present Constitution of 2009 which Morales regime labelled as an attempt to 'refound' the country.[146] It cannot be denied that the 2009 Constitution made significant advancement as regards multi-culturalism and protection of

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[139] Constitutional History of Honduras <https://constitutionnet.org/country/honduras#:~:text=Honduras%20was%20under%20Spanish%20colonial,style%20presidential%20system%20of%20government> accessed 1 May 2023.
[140] Laura Gotkowitz, *A Revolution for Our Rights: Indigenous Struggles for Land and Justice in Bolivia 1882-1952* (Duke University Press 2008) 43.
[141] Ibid 43.
[142] Almut Schilling-Vacaflor, 'Bolivia's New Constitution: Towards Participatory Democracy and Political Pluralism?' (2011) 90 European Review of Latin American and Caribbean Studies 5.
[143] Constitutional History of Bolivia <https://constitutionnet.org/country/constitutional-history-bolivia> accessed 11 May 2023.
[144] Miguel Centellas, 'Bolivia's new multicultural constitution: The 2009 constitution in historical and comparative perspective', in Todd A. Eisenstadt and others (eds), *Latin America's Multicultural Movements: The Struggle Between Communitarianism, Autonomy, and Human Rights* (OUP 2013).
[145] Schilling-Vacaflor (n 142) 6.
[146] Centellas (n 144).

rights of indigenous people.[147] However, this did not mark a revolutionary break from the previous order as it was bound by the revolutionary aspiration of 1952 and its aftermath as apparent from the claim of *Miller* that the Constitution making was but a completion of the residual task left by the 1952 revolution.[148] The 1952 revolution set the ground for various constitutional reforms, and the new Constitution-making process was bound by those reforms, ideas and principles of the revolution which led *Centellas* to conclude that the new constitution was in no way a 'radical departure from previous political tradition.'[149]

Thus, the Bolivian Constitution of 2009 did not signify a complete break from the past. Though the rupture was stronger than the 1982 Constitution of Honduras, it was not a revolutionary severance like the Bangladesh Constitution of 1972.

The previous chapter captured the differences between the *Revolutionary* and *Conformist models of constituent power* and argued that while the former could not be limited, the latter could be. This chapter viewed the comparators of the paper within the framework of the two models and concluded that while the 1972 Constitution of Bangladesh was a product of Revolutionary *Model* of the exercise of constituent power, the 1982 Honduran Constitution and 2009 Bolivian Constitution were products of the *Conformist Model*. As such, while the constituent power of Bangladesh was not constrained by any limitation, the constituent powers in the contexts of Honduras and Bolivia were.

Now there is this final question- can the court, in *Conformist* cases, as a constituted power, review the works of the constituent power? The next chapter answers this question using the Bolivian and Honduran case. Bangladesh case is not analysed in answering the question because as a case of revolutionary model, the constituent power was unrestrained as such the question of whether the court could impose limit is redundant. Thus, the 16th Amendment judgment of Bangladesh cannot be justified within the theoretical contours of the limits of constituent power.

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[147] Ibid.
[148] Michael Miller, 'The Rise of Evo Morales' (Brown University Library 2019) <https://library.brown.edu/create/modernlatinamerica/chapters/chapter-6-the-andes/moments-in-andean-history/the-rise-of-evo-morales/> accessed 24 March, 2023.
[149] Centellas (n 144).

Chapter 5

Whether the court can review the work of constituent power of the *Conformist Model*

This chapter argues that the court, as constituted power, cannot review the work of constituent power even when it is the product of *Conformist Model.* The chapter provides a threefold reasoning to substantiate the claim: the subordination dilemma that exists within the theory of constituent power, contested conception of the principles that are considered to bind the constituent power, and pragmatism. It elaborates the three reasonings using the Bolivian and Honduran cases and concludes that despite the constituent power in the *Conformist model* having limits, it is not the court which can impose such limit to review the work of the constituent power. Thereafter, it answers the question— if not courts, who is to place in the limits?

5.1 Threefold Reasoning

A. The existence of Subordination dilemma in the Conformist Model

The theory of constituent power is underpinned by the hierarchisation of the *constituent power* and the *constituted power*. Even the limits of *constituent power* that seemingly exist within the *Conformist Model* does not dislodge this hierarchy. Because the *constituted powers* as the creation of the Constitution are limited by the Constitution, whereas the *constituent power* within the *Conformist Model* is limited by principles, ideals, and concepts that predate and shape the Constitution. The limits do not empower the Courts, which are but *constituted powers*, to review the work of *constituent power* since the limits that exist, predate their birth, and bind the *constituent power*. Thus, *constituted power* as creation of the *constituent power*, even in *the Conformist Model*, works towards protecting the work of the constituent power. To cope with the evolving society, the constituted powers (parliament and constitutional court) bring changes to the constitution through formal amendment, interpretation, or necessary construction. However, such amendment and construction cannot compromise the Constitution rather must occur within the framework of the Constitution.

For instance, Brazilian Supreme Court in May 2011 by a unanimous vote, recognized that "same-sex couples should share the same rights as hetero-sexual couples in civil unions" despite the Constitution explicitly mentioning that "for the purposes of protection by the state,

the stable union between a man and a woman is recognized as a family entity [..]"[150] The Court's ruling appears to have gone against an explicit clause of the Constitution.[151] However, it is to be mentioned here that the Brazilian Court had used the Constitution to allow same-sex couples to legally form civil unions by stating that the Constitution also prohibits any discrimination on the basis of sex or sexuality.[152] It further stated that a clause designed (constitutional clause regarding union) to entrench rights cannot be read to exclude a specific category.[153] As such the Court did not question or review the work of constituent power rather it recognized the Constitution's supremacy and used the same to justify its stance of interpreting the Constitution in a way that it remains consistent with the societal demands. Whereas the Bolivian and Honduran Courts went beyond the purview of the Constitution in order to review the provisions of the Constitution and struck them down by disregarding the hierarchy of the constituent power and constituted power which cannot be justified.

B. Contesting nature of the limits

As regards the second reasoning, it has been argued that in the *Conformist Model*, the constituent power remains bound by the principles and values of the continuing order. However, such principles or values are often contested and may have different meanings for different regions. It is the people that define the forms and content of those principles and concepts through debate and deliberation of their representatives. The courts of Bolivia and Honduras, as discussed, primarily considered human right (the right to seek re-election and freedom of expression), democracy, principles of self-determination and international law as the limiting ideas or concepts and used them to review the work of constituent power. These concepts also have contested and varied understandings for different jurisdictions.

For instance, democracy, as *W.B. Gallie* observes— is an "essentially contested concept".[154] There are primarily two conceptions: 'thin' democracy and 'thick' democracy.[155] While the former entails a conception of democracy that is procedural and puts off the moral evaluation

[150] Vilhena Oscar Vilhena Vieira, 'Ambitious constitutions: prominent courts' in Rosalind Dixon and Tom Ginsburg (eds), *Comparative Constitutional Law in Latin America* (Edwaed Elgar 2017) 270.
[151] Ibid 271.
[152] Ibid.
[153] Ibid.
[154] Gallie, W.B., 'Essentially Contested Concepts' (1965) 56 Proceedings of the Aristotelian Society 167.
[155] James Allan, 'Thin Beats Fat Yet Again: Conceptions of Democracy' (2006) 25 (5) Law and Philosophy 533—559.

for another time, the latter defends a democracy that is substantive.[156] The thin conception encompasses ideas such as 'Majority rules' or 'letting the numbers count' or 'rule by the people' whereas the thick conception disapproves 'unalloyed majoritarianism.'[157] Thus, while the thin conception focuses explicitly on election and numbers, the thick conception remains wary about the 'tyranny of majority' or emergence of populism.[158] In order to avoid the emergence of tyranny and populism, the thick conception is often overlain by concepts such as presidential term-limits. Both Bolivian and the Honduran Courts, adopting a thin conception of democracy, decided in favour of letting the incumbents run for presidential election for unlimited time focusing on the idea— *Majority rules*.

As regards human rights, there are no uniform understanding as to its content. Rights are generally articulated keeping in mind certain specific violations.[159] There is no uniform standards of anticipated violation for all societies; nonetheless, certain values are considered as basic and fundamental in each society.[160] For instance, the German Basic Law gives primacy to human dignity, drawing upon the concept of rational idealism, and the desire for securing personal space and autonomy following the anarchy of Weimar republic and the dehumanizing experience of Nazi regime.[161] Thus, it is the communities or the polities that decide the kinds or contents of human rights that they would want to uphold and bind their state with. The international standard of human rights in this regard defers to communal autonomy and self-determination.[162] However, the communitarian understanding too is arguably limited: as the universality of rights is tempered with 'limited cultural variation.'[163]

The answer to the question as to what leads a polity to adopt a particular form of democracy and human rights can be found in historical contingencies, as *Bell* rightly asserts.[164] For instance, the historical instances of Latin American leaders' holding on to power and doing away with checks and balances led to the inclusion of presidential term-limits in various

[156] Ibid 533.
[157] Ibid 535.
[158] Ibid.
[159] Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1994) 6(4) The Johns Hopkins University Press 417.
[160] Ibid.
[161] Edward J. Eberle, 'Observations on the Development of Human Dignity and Personality in German Constitutional Law: An Overview' (2012) 33(3) Liverpool Law Review 201, 211.
[162] Donnelly (n 158) 400.
[163] Ibid 419.
[164] Mark Tushnet 'What is Comparative Constitutional Law' in Vicki Jackson and Mark Tushnet (eds), Comparative Constitutional Law (Foundation Press 2006) 143.

Constitutions.[165] Bolivia and Honduras ones are instances of such Constitutions. It was a deliberate decision made through the representatives by the people of these countries who had had similar historical experiences and decided to go for a 'thick version of democracy.' Similarly, with almost similar cognitive framing of being suspicious of President's holding onto power, the people, through their representatives, gave primacy to constitutionalism and rights of the people over whims of the political elites seeking re-election. The people tailored the framework of their Constitution in a way that there remains no space or scope for the so called 'political right' to seek re-election or to stretch freedom of expression to a point that it includes the right to contest in election for unlimited times.

Thus, while concepts such as democracy and human rights come in deeply contested shapes and forms, it is the people who by way of deliberations through their representatives and taking lessons from the common historical experiences, adopt these concepts in such forms that they deem suitable. The Courts, as a handful of unelected members, cannot indulge in the venture of writing the Constitution on a clean slate which appears to be inconsistent with cognitive mapping of the people of a polity wired by their shared historical contingencies.

Furthermore, both courts appear to have relied on international law, jurisprudence of ACHR and supra-constitutional norm to review the provision of the Constitution. It is to be mentioned in this regard that the authority to use extra-constitutional sources is attained by the bottom-up approach of the Constitution providing such scope and not through the top-down approach of those sources empowering the constituted bodies to use them.[166] The scope provided by the Constitution cannot be used to disregard its own mandate. The limits of the *constituent power* within the *Conformist model* exist along the horizontal axis— as manifested through principles, ideals, or concepts flowing within the constitutional order in continuity. The limits do not as such exist along the vertical axis (regional conventions, principles, and practices of international law). However, the limits along the horizontal and vertical axes may align when previous Constitutions within the existing order provide scope for such alignment.

[165] Charlotte Heyl and Mariana Llanos, 'Contested, violated but persistent: presidential term limits in Latin America and sub-Saharan Africa' (2022) 29(1) Democratization 5.
[166] Anne Peters, 'Supremacy Lost: International Law Meets Domestic Constitutional Law' (2009) 3(3) International Constitutional Law Journal 170, 171.

C. Pragmatism

Constitution making, within the theory of constituent power even in the conformist model, is a daunting task since the people as a whole are considered to be brought into singular political consciousness for the task. It entails invoking extra-ordinary institutions and acquiring consent of the people. Such stringent procedure makes it difficult to make a new Constitution. The difficulties associated with the process prevent any regime from making a new Constitution with the ulterior motive of holding onto power.

Use of the Constitution, mainly through amendment procedure, to benefit the ruling regime in many countries has led many scholars to suggest incorporation of tiered threshold for amendment with the aim of preserving important provisions of the Constitution.[167] *Graber* has provided an overview of the populists, around the world, misappropriating the amendment procedure to hold onto power.[168] Under such circumstances if the court is viewed as an institution that can review the provision of the existing Constitution and rewrite them, it will emerge as a single point of capture for the populists. The difficult task of 'breaking and making' of Constitution would become extremely easy as a body of few unelected members can be used to pull off this challenging task. For instance, Morales fulfilled his goal through the court which he could not achieve through referendum. Similarly, in Honduras the same court that used the Constitutional term limit to dethrone Zelaya, held the limit unconstitutional during the reign of post-Zelaya regime.

Taking this into consideration, it would not be pragmatic to consider the court as an institution that could limit the constituent power and based on such limit to review the provision of the Constitution. As Waldron says there is no special reason to have unconditional faith in the courts.[169]

Thus, based on aforementioned three reasonings, the Court, as a constituted power, cannot review the work of the constituent power. In this context one might argue how could the courts in South Africa and Colombia review the work or dictate the terms of the constituent power. It is to be mentioned that the constituent assembly of South Africa *empowered* the court

[167] David Landau and Rosalind Dixon, 'Tiered Constitutional Design' (2018) 86 The George Washington Law Review 439—511.
[168] Mark Graber, 'What's in Crisis? The Postwar Constitutional Paradigm, Transformative Constitutionalism, and the Fate of Constitutional Democracy' in Mark A. Graber, Sanford Levinson, and Mark Tushnet (eds) Constitutional Democracy in Crisis? (OUP 2019) 665-690.
[169] Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115(6) The Yale Law Journal 1346, 1357.

to review its work whereas the Colombian court invalidated the process of referendum mainly on procedural ground (following the dictates of the Constitution) and the substantive ground was mentioned as *obiter* that is in a way reminding the stakeholders that the constituent power has limits (in the *conformist model*).

5.2 Who can put in place the limits?

As such, though the exercise of constituent power within *Conformist Model has* limits (as concluded in the previous segment), it is never the constituted powers like the Courts that can put in place such limits or review the works of constituent power. Now a residual question is, then who can put in place the limits? It is the constituent power that can limit itself. One may say, this generates the paradox of omnipotence— inasmuch as an answer to 'can an omnipotent entity limit itself' (be it yes or no) questions the omnipotence of the entity. However tautological or paradoxical it may sound, it is not unpragmatic. For instance, the constituent assembly of the South Africa bound itself with the thirty-four principles. The first draft of the Constitution was disapproved by the court, if the constituent power were unbounded in the real sense, the great many supporters who supported the draft would have broken the rules and bypass the court.[170]

Similarly, the Indonesian *MPR* bound itself with the *panschila principles* of 1945 during the constitutional dismemberment that occurred during 1999. Even the Uribe regime of Colombia did not move forward with its referendum respecting the existing term limit. One of the reasons for restraining or binding itself with limitations for *Conformist constituent powers* is the apprehension that going beyond limit can create legal vacuum where only the *Revolutionary Models* can be born. As *Verdugo* explains if the constitution making takes place in the legal vacuum the entire process can be regarded as illegal.[171]This is often an undesired state of affairs since there is always tendency of regimes to align with the continuing order with adoption of necessary changes.[172]

[170]Verdugo, 'Is it time to abandon' (n 95) 37.
[171] Ibid 27.
[172] Ibid 21.

Conclusion

In the light of the three peculiar cases coming from Bangladesh, Bolivia, and Honduras, where their highest courts have reviewed and invalidated constitutional provisions, the thesis using them as comparators strive to answer the question- *Whether the court can review and invalidate constitutional provisions?*

The thesis, in the beginning, provides an overview of the conventional understanding of *constituent power*, as an unbounded and omnipotent power. It underpins that this conventional understanding of unboundedness and omnipotence of the constituent power serves as the basis for the conception of sub-ordination of the *constituted power* to the *constituent power*. It then canvasses through the three judgments where the respective courts, disregarding the subordination of the constituted power to the constituent power, reviewed and invalidated the provision of the Constitution. It also delineates the grounds and standard set by the courts to review constitutional provisions indicating that just like *constituted power*, the *constituent power* too has limits which empowers the court to review its work. This leads the thesis to reflect upon the question whether, as opposed to the conventional understanding, there exists any limit to the constituent power.

For answering the question, the thesis delves into relevant literature and works of pertinent scholars with diverse orientation and concludes that the constituent power has context specific limits. Apart from the claim of the liberal-democratic principles and principles of constitutionalism acting as limits, there are a whole range of limits that potentially bind the constituent power across different contexts. The finding of limits is expected to face a counterargument as to- if the constituent power, beyond the conventional understanding, is bound by limits, is there no way to frame a new constitutional order by completely breaking away with the limits? The thesis addresses the apprehended question by articulating two models of constituent power: *Revolutionary model* and *Conformist model.*

The thesis argues that while both models observe the dual rule of deploying extra-ordinary body of constitution making and attaining consent of the people through direct or indirect means while exercising constituent power, the *Conformist Model* lack the element of completely breaking away or severing with the previous order, as opposed to that in the *Revolutionary Model.* As such, while the constituent power in the revolutionary is unbounded, in the conformist model it is limitable. Thereafter, in order to answer the primary thesis question, the paper situates the existing constitutions of the comparators within the two models

and finds that while the 1972 Constitution of Bangladesh is the product of *Revolutionary model* and not subject to any limit, the 1982 and 2009 Constitutions of Honduras and Bolivia respectively are the products of *Conformist model* and are subject to limit. As such, it concludes that the Bangladesh case cannot be justified within the theoretical contours of the limits of constituent power since the work of constituent power could not be subject to any limit.

Following such findings, the thesis, using the Honduran and Bolivian case answers the question- can the court, in *Conformist* cases review the works of the constituent power based on the limit? The thesis answers the question in negative providing a threefold reasoning: the subordination dilemma that exists within the theory of constituent power, contested conception of the principles that are considered to bind the constituent power, and pragmatism.

To sum up, it is the finding of the thesis that the constituent power of the *Conformist model* has limits, and the court cannot review the work of the constituent power (neither in *Conformist model* nor in the *Revolutionary model* as there exists no limit for the constituent power in the revolutionary model) based on such limits.

The thesis concludes by creating the scope for further research in the topic. It states that it is the constituent power in the *Conformist model* that limit itself with the objective of not drifting to a domain of legal vacuum. This wary of legal vacuum, underpinned by conventional understanding of illimitable constituent power, generates the claim of avoiding the idea of constituent power as there exists ambivalence whether in the idea "the authority exists within or without the legal order."[173] Further research on the two models postulated in the thesis can operate to address this ambivalence and underpin the compatibility between law and the idea of constituent power.

[173] Dyzenhaus (n 98) 229.

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