INTRODUCTION

The question discussed in the articles published in this issue of the *Israel Law Review* is not really new. In 1978, I published an article in this review dealing with the issue.[1] At that time, it looked much more like an academic question with very few potential practical consequences. The reason for this is clear. It was like the discussions that took place in European countries a century ago regarding judicial review (of legislation). Even those who favored it were not able to consider any form of implementation. In the absence of an established principle of judicial review, the problem looked purely theoretical. Later, after World War II, judicial review of legislation became very fashionable and conquered almost all modern occidental democracies.[2] The question arising now is whether we can expect a similar development as regards the validity and efficacy of eternity clauses. On the one hand, there is a growing number of eternity clauses; on the other hand, we have witnessed an extraordinary development in the field of judicial review, which is the result of the general growth of judicial activism in all countries. In other words, two parallel trends are coming increasingly close to one another and will certainly give rise to a new chapter in constitutional theory and practice.

In April 2010, the International Association of Constitutional Law (IACL) held one of its two annual round tables in Jerusalem. Entitled "Unconstitutional Constitutional Amendments," it was devoted to the issue of constitutional review. In this issue of the *Israel Law Review*, we present some of the papers presented at the round table by experts from various countries.

As is well-known, the very idea of "entrenched constitutions" stems from the necessity to protect the "supreme law of the land" against the intrusion of ordinary legislation. This finally led to the admission of judicial review (either in the form of indirect review or in the form of direct review by special constitutional courts). Later, it was felt that this protection would not be sufficient. What if the "amending power" would try to bypass the constitution by amending it in order to allow the adoption of problematic laws, such as those that had already been declared unconsti-

[1] Claude Klein, *Is There a Need for an Amending Power Theory?*, 13 ISR. L. REV. 203 (1978). More recently, see Claude Klein, *The Eternal Constitution—Contrasting Hans Kelsen and Carl Schmitt*, *in* HANS KELSEN AND CARL SCHMITT: A JUXTAPOSITION 61 (Dan Diner & Michel Stolleis eds., 1999).

[2] Very few exceptions, including Holland or Switzerland (at least for federal legislation), still exist. The United Kingdom is a completely different case.

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tutional? There thus appeared to be a need for "super-protection" or "super-entrenchment."

As Professor Eivind Smith notes in his article, it is generally accepted that this issue first arose in Norway in the early 19th century. The Constitution of Norway of 1814 (which is still in force) states in article 112 that amendments to the constitution: "must never, however, contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution." Later, at a joint meeting of both its houses for the purpose of amending constitutional law in 1884, the National Assembly of the French Third Republic adopted the following provision: "A proposal concerning the republican form of government is not admissible." In his article, Professor Baranger analyzes these issues in relation to France. The above example represents the first real positive attempt to introduce an eternal clause in a constitutional document. Other countries such as Brazil and Italy also introduced a provision preventing the restoration of monarchy. In retrospect, these provisions seem quite harmless, since such a step was never seriously considered in any of these countries.

After World War II the situation changed rapidly. The most important development was realized in Germany, where article 79 § 3 of the Basic Law (1949) states: "Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Article 1 and 20 shall be inadmissible." The idea behind this article was very clear. After the terrible experience of Germany during the Nazi period, it seemed appropriate to prevent—as firmly as possible—the democratic system from going astray as it did after 1933. Hence the introduction of this form of super-protection. In his article, Ulrich Preuss examines the implications of eternity clauses in Germany.

When Portugal adopted a democratic constitution in 1976 following the end of the Salazar dictatorship, it listed no less than 14 issues that were to be considered "off-limits" by the amending power. This development crossed the line into judicial activism and was repeated in various other countries. In 1967, for example, the Indian Supreme Court established that there are certain matters that cannot been amended through the amending power.[3]

Today, the main issue is as follows: if there are non-amendable articles in a constitution, a constitutional amendment can be declared non-constitutional. This is a new chapter in the history of judicial review. Moreover, the power to declare an amendment non-constitutional also depends on the interpretation of the scope of the protection granted to the constitution and its non-amendable articles. The following is an example taken from the French situation.

[3] *See* Golaknath v. State of Punjab, A.I.R. 1967 S.C. 1643; Indira Gandhi v. Raj Narain, A.I.R. 1975 S.C. 2299.

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As already mentioned, the first non-amendable article in France, adopted in 1884, concerned the protection of the republican form of government. At that time, the "original intent" was clear. The article would prevent—for ever—the possibility of restoring the monarchy in France. Later, in various decisions, the courts appeared to hold that there were certain "republican principles" that had a constitutional value (such as those appearing in the preamble). Hypothetically, if one were to extend the expression "republican form of government" to these republican principles (including certain liberties, the separation of church and state, and so forth), it would become relatively easy to imagine a situation in which the possibility of declaring constitutional articles non-amendable would be much broader than originally intended.

These constitutional developments in the field of comparative law have turned the question of "unconstitutional constitutional amendments" into a modern question. It now seems very likely that we will witness more and more of this form of judicial review in the future. This issue of the *Israel Law Review* can therefore be regarded as an introduction to this new reality.

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