UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS

*Aharon Barak**

This paper deals with the question of an amendment to the constitution that has been made pursuant to the formal requirements of the constitution but deviates from its basic structure. The paper explores different views regarding this question in comparative law. It also examines the applicability of the doctrine of unconstitutional constitutional amendments in Israel.

I. PRESENTATION OF THE PROBLEM

There is disagreement in comparative constitutional law, primarily in the United States, regarding the justification for judicial review of the constitutionality of a statute.[1] For the purpose of this paper, I assume that, in a given legal system, the constitution (expressly[2] or impliedly[3]) recognizes judicial review of statutes that violate the provisions of the constitution. The question I wish to deal with is whether that judicial review also covers an amendment to the constitution that has been made pursuant to the provisions of the constitution regarding amendment of the constitution.[4] It seems that

* President (ret.) of the Supreme Court of Israel; Radzyner School of Law, Interdisciplinary Center (IDC), Herzliya. I wish to thank Professor Ariel Bendor, Professor Alon Harel, Judge Geula Levin, Justice Hanan Melcer, Judge Dr. Yigal Mersel, and Professor Suzie Navot for their helpful comments.

[1] *See* Daniel Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941 (1999); Christopher F. Zurn, *Deliberative Democracy and Constitutional Review*, 21 LAW & PHIL. 467 (2002); Luc B. Tremblay, *General Legitimacy of Judicial Review and the Fundamental Basis of Constitutional Law*, 23 OXFORD J. LEGAL STUD. 525 (2003); Leighton McDonald, *Rights, "Dialogue" and Democratic Objections to Judicial Review*, 32 FED. L. REV. 1 (2004); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006); Larry Alexander, *Constitutions, Judicial Review, Moral Rights, and Democracy: Disentangling the Issues*, *in* EXPOUNDING THE CONSTITUTION: ESSAYS IN CONSTITUTIONAL THEORY 119 (Grant Huscroft ed., 2008); Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693 (2008); David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723 (2009); Alon Harel & Tsvi Kahana, *The Easy Core Case for Judicial Review*, 2 J. LEGAL ANALYSIS 227 (2009).

[2] Such as article 93 of the German Constitution. *See* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 93.

[3] *See* Marbury v. Madison, 5 U.S. 137 (1803); CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Cooperative Village 49(4) PD 221 [1995] (Isr.).

[4] In principle, one can recognize judicial review of the constitutionality of a constitutional amendment without recognizing judicial review of the constitutionality of a statute. In practice, all legal systems that recognize the former also recognize the latter.

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there is no need for great persuasion in order to show that even those who support judicial review of the constitutionality of a ("regular") statute do not necessarily have to recognize the existence of judicial review of the constitutionality of a constitutional amendment.[5] The latter issue—judicial review of the constitutionality of an amendment to the constitution—lies at the foundation of this paper.[6] This problem arises both in legal systems whose constitutions include provisions that have been expressly determined to be unamendable ("eternal clauses") and in legal systems in which there are no express "eternal clauses."

II. COMPARATIVE LAW

A. UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS IN TURKEY

Turkey's Constitution recognizes judicial review of the constitutionality of statutes.[7] It also includes a number of provisions that cannot be amended ("eternal clauses").[8] These provisions determine that Turkey is a republic,[9] a democracy, and a secular and socialist state, governed by the rule of law.[10] The Constitution contains a general provision dealing with the amendment of the Constitution. Until 1971, the Turkish Constitution did not contain an express provision regarding the judicial review of constitutional amendments. The Turkish Constitutional Court interpreted the silence of the Constitution on this issue to mean that it authorized the Court to perform judicial review of the constitutionality of an amendment to the Constitution.[11]

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[5] *See United Democratic Movement v. President of the Republic of South Africa* 2003 (1) SA 495 (CC) (S. Afr.).

[6] I assume that the constitution itself is constitutional. When the argument is that the constitution itself is unconstitutional, additional problems arise that stray beyond the scope of this argument. A good question arose before the Constitutional Court of Peru, where it was argued that the country's Constitution was unconstitutional. The argument was rejected. The Constitutional Court discussed the question of its authority, granted to it by the Constitution, which according to the argument was unconstitutional. *See* judgment 14-2003 A1/TC of Dec. 17, 2003. I examine the constitutionality of an amendment to a constitution according to the state's internal law and not in light of international conventions that bind it. *See* Stephen J. Schnably, *Emerging International Law Constraints on Constitutional Structure and Revision: A Preliminary Appraisal*, 62 U. MIAMI L. REV. 417 (2007-2008).

[7] TURKISH CONST., 1982, art. 148.

[8] TURKISH CONST., 1982, art. 4: "The provision of Article 1 of the Constitution establishing the form of the state as a Republic, the provisions in Article 2 on the characteristics of the Republic, and the provision of Article 3 shall not be amended, nor shall their amendment be proposed."

[9] TURKISH CONST., 1982, art. 1: "The Turkish state is a Republic."

[10] TURKISH CONST., 1982, art. 2: "The Republic of Turkey is a democratic, secular and social state governed by the rule of law...."

[11] *See* KEMAL GÖZLER, JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS: A COMPARATIVE STUDY 23-24 (2008).

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In a judgment of June 16, 1970,[12] the following question was discussed. The Turkish Constitution of 1961 included a provision according to which a person who had been convicted of certain offenses could not be elected to the legislature, unless he had been pardoned. A 1969 amendment to the Constitution annulled the provision regarding the pardon. The Constitutional Court determined that this amendment was not constitutional, as it had not been enacted by the legislature (the body authorized to alter the constitution) by the required majority. The Court added that even if the amendment had been enacted by the required majority, it would not have been constitutional due to its content. Another case of April 3, 1971[13] dealt with an amendment to the Constitution that had no formal fault. Despite this, it was held that the amendment was not constitutional and therefore null and void, as it contradicted the fundamental principles of the Constitution.[14]

In 1971, the Turkish Constitution was amended. In the amendment, it was determined that the Constitutional Court of Turkey can examine whether an amendment fulfills the formal requirements of a constitutional amendment.[15] In the first case adjudicated after this amendment, the Constitutional Court examined the amendment of the Constitution (of 1973), according to which a majority of members of the military courts must be qualified to be judges. The amendment further determined that this condition did not need to be met in time of war. In its judgment of April 15, 1975,[16] the Constitutional Court determined that this amendment was not constitutional, on the grounds that it contradicted the republican character of the state. The Court concluded that the amendment harmed judicial independence (enshrined in article 7 of the Constitution), which constitutes a component of the principle of the rule of law (enshrined in article 2 of the Constitution), which in turn constitutes an integral component of the state's status as a republic (enshrined in article 1 of the Constitution). According to article 9 of the Constitution, articles 1 and 2 of the Constitution are unamendable.

In 1971, the Constitution was amended regarding an additional matter. It was determined that compensation for expropriation of land should not exceed the land's value as declared by the owner to the tax authorities. In its decision of October 12, 1976,[17] the Constitutional Court determined that the amendment was not constitutional,

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[12] Decision of June 16, 1970, No. 1970/31, 8 AMKD 313 (1970), referred to by GÖZLER, *supra* note 11, at 40.

[13] Decision of Apr. 3, 1971, No. 1971/37, 9 AMKD 416 (1971). GÖZLER, *supra* note 11, at 97 quotes the judgment (at 428-29), according to which the constitutional amendment must fulfill the "requirements of contemporary civilization" and must not violate "the coherence and system of the constitution."

[14] *See* GÖZLER, *supra* note 11, at 96.

[15] TURKISH CONST., 1961, as amended in 1971, art. 147.

[16] Decision of Apr. 15, 1975, No. 1975/87, 13 AMKD 403 (1975), referred to in GÖZLER, *supra* note 11, at 42.

[17] Decision of Oct. 12, 1976, No. 1976/46, 14 AMKD 134-36 (1976), referred to in GÖZLER, *supra* note 11, at 43.

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as it impinged upon the nucleus of the property right. The amendment also derogated from the republican form of government, which constitutes a component of the republican character of the state, which cannot be changed in the Constitution.

In 1971, a further amendment to the Constitution determined that there should be no appeal of decisions of the Council of Judges to a judicial instance. In a judgment of January 28, 1977,[18] it was determined that the amendment was not constitutional, since it derogated from the rule of law (safeguarded in article 2 of the Constitution), which constitutes a component of the republican nature of the state, which cannot be amended in the Constitution (as determined in article 9 of the Constitution). An additional amendment determined that there should be no judicial review of the decisions of the Prosecution Council. Similar to the judgment that dealt with the Council of Judges, the Court determined that the amendment was unconstitutional in its decision of September 27, 1977.

In 1982, a new Constitution was enacted in Turkey. Article 148(1) of the Constitution authorized the Constitutional Court to examine the constitutionality of an amendment to the Constitution. It was determined that such an examination should be limited to questions of form. Article 148(2) of the Constitution states as follows: "The verification of constitutional amendments shall be restricted to consideration of whether the requisite majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates under urgent procedure was complied with."

The new Constitution further determines that Turkey is a republic (art. 1) and that the Turkish Republic is a democratic, secular, and socialist state governed by the rule of law (art. 2). These provisions cannot be amended (art. 4).

The new constitutional provision regarding the amendment of the Constitution has been examined several times by the Constitutional Court.[19] The first time was in 1987. In its judgment of June 8, 1987,[20] the Constitutional Court determined that it was not authorized to decide on the unconstitutionality of an amendment, as this is not among the issues that are judicially reviewable pursuant to article 148(2) of the Constitution. The second time it considered this constitutional provision, the Court discussed a 2008 constitutional amendment amending, inter alia, article 42 of the Constitution, which deals with rights and duties regarding education. The amendment added a provision to the Constitution, according to which: "No one can be deprived of the right to higher education due to any reason not explicitly written in the law. Limitations on the exercise of this right shall be determined by the law."

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[18] Decision of Jan. 28, 1977, No. 1977/4, 15 AMKD 106-31 (1977), referred to in GÖZLER, *supra* note 11, at 44.

[19] Ergun Ozbudun, *Judicial Review of Constitutional Amendments in Turkey*, 15 EUR. PUB. L. 533 (2009).

[20] Decision of June 8, 1987, No. 1987/15, 23 AMKD 282 (1987).

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The background to the amendment was as follows. Female students encountered prohibitions against entering institutions of higher education in traditional dress. The law was changed in order to allow them to do so. The Constitutional Court then determined that the law was unconstitutional. As a result, the above-mentioned constitutional amendment was enacted in 2008. In its judgment of June 5, 2008,[21] the Constitutional Court determined that the amendment to the Constitution was unconstitutional. The reason for this was the amendment's derogation from the secular character of the state (enshrined in article 2 of the Constitution)—a derogation that detracts from Turkey's character as a republic (as enshrined in article 1 of the Constitution). This character cannot be amended in the Constitution.

B. UNCONSTITUTIONAL AMENDMENTS TO THE CONSTITUTION IN INDIA

The Constitution of India recognizes express judicial review of the constitutionality of statutes. It has no express "eternal clauses." The Supreme Court of India recognized its power to determine that an amendment to the Constitution is unconstitutional.[22] Much literature, both in India[23] and abroad,[24] deals with the approach of India's Supreme Court. The discussion of this case law might begin with *Golaknath v. State of Punjab* (1967).[25] In this case, it was argued that the 17th amendment to the Constitution (of 1964) was unconstitutional, as it impinged upon property rights. The Supreme Court accepted the argument, striking down a number of judgments that had been handed

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[21] Decision of June 5, 2008, No. 2008/116.

[22] This ruling was probably influenced by the German approach, and mainly by Dietrich Conrad, *Limitation of Amendment Procedures and Constituent Power*, 15-16 INDIAN Y.B. INT'L AFF. 347, 394 (1966-1967).

[23] The central book that guides the case law and literature in India on the subject of unconstitutional constitutional amendments is SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE (2009). *See also* R.D. Garg, *Phantom of Basic Structure of the Constitution: A Critical Appraisal of the Kesavananda Case*, 16 J. INDIAN L. INST. 243 (1974); Upendra Baxi, *The Constitutional Quicksands of Kesavananda Bharati and the Twenty-Fifth Amendment*, 1 SUP. CT. CASES. J. 45 (1974); N.A. Palkhivala, *Fundamental Rights Case: Comment*, 4 SUP. CT. CASES. J. 57 (1973); P.P. Rao, *Basic Features of the Constitution*, 2 SUP. CT. CASES. J. 1 (2002); P.A. Sathe, *Amendability of Fundamental Rights: Golaknath and the Proposed Constitutional Amendment*, SUP. CT. CASES. J. 33 (1969); P.K. Tripathi, *Kesavananda Bharati v. State of Kerala: Who Wins*? 1 SUP. CT. CASES. J. 3 (1974); A. Desai, *Constitutional Amendments and the "Basic Structure" Doctrine*, *in* DEMOCRACY, HUMAN RIGHTS AND THE RULE OF LAW 90 (Venkat Lyer ed., 2000).

[24] *See* Gary J. Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective*, 4 INT'L J. CONST. L. 460 (2006); David G. Morgan, *The Indian "Essential Features" Case*, 30 INT'L & COMP. L.Q. 307 (1981); Mathew Abraham, *Judicial Role in Constitutional Amendments in India: The Basic Structure Doctrine*, *in* THE CREATION AND AMENDMENT OF CONSTITUTIONAL NORMS 195 (Mads Andenas ed., 2000); Rory O'Connell, *Guardian of the Constitution: Unconstitutional Constitutional Norms*, 4 J. CIV. LIB. 48 (1999).

[25] Golaknath v. State of Punjab, A.I.R. 1967 S.C. 1643 (India).

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down previously.[26] Relying on article 13 of the Constitution, the Court determined that an amendment to the Constitution that violates a constitutional right is unconstitutional. Article 13 states: "The state shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

It was determined in the judgment that an amendment to the Constitution is a "law" and that it therefore cannot impinge upon rights included in the third part of the Constitution. Due to the deviation from previous case law, it was decided that the change in the law should be prospective.

The *Golaknath* ruling was overturned in *Kesavananda Bharati v. State of Kerala* (1973).[27] In this case, the constitutionality of the 24th, 25th, and 29th amendments to the Constitution was examined. These amendments determined that, despite anything appearing in any provision of the Constitution, parliament could alter it by way of addition, alteration, or annulment. The Supreme Court determined that the judgment in *Golaknath* was wrong, since an amendment to the Constitution is not a "law" for the purpose of article 13 of the Constitution. However, it was determined that the 24th, 25th, and 29th amendments to the Constitution were unconstitutional, because they violated "the basic structure of the Constitution." Amendments that violate the basic structure of the Constitution are unconstitutional despite the fact that the formal conditions for amendment of the Constitution (laid down in article 368 of the Constitution) had in fact been fulfilled. The justices had different opinions regarding the reason behind the ruling. Some based their positions on the interpretation of the word "amend" in article 368. In their opinion, the authority to amend the Constitution does not include the authority to replace the Constitution with a new constitution. Other justices based their position on the interpretation of the Constitution as an entirety. According to their approach, in addition to the express provisions there are also implicit provisions, according to which the authority to amend the Constitution does not include the authority to change the basic structure of the Constitution.

Later case law went down the path of *Kesavananda*. In *Indira Ghandi v. Raj Narain* (1975),[28] it was decided that the 39th amendment to the Constitution (1973) was unconstitutional, as it contradicted the basic structure of the Constitution. The response by parliament did not take long. The 42nd amendment to the Constitution (1976) added clauses (4) and (5) to article 368:

> (4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article ... shall be called in question in any court on any ground.

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[26] *See* Sankari Prasad v. Union of India, A.I.R. 1951 S.C. 458 (India); Sajjan Singh v. State of Rajasthan, A.I.R. 1965 S.C. 845 (India).

[27] Kesavananda Bharti v. State of Kerala, (1973) 4 S.C.C. 225 (India).

[28] Indira Gandhi v. Raj Narain, A.I.R. 1975 S.C. 229 (India).

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> (5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

Were these amendments to the Constitution constitutional? This question arose in *Minerva Mills Ltd. v. Union of India* (1980).[29] It was determined that the 42nd amendment was unconstitutional, since the approach according to which the authority to amend is restricted is a basic component of the Indian Constitution, which cannot be amended.[30]

C. UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS IN AUSTRIA

The Austrian Constitution recognizes judicial review of the constitutionality of laws.[31] A special article in the Constitution (art. 44) is dedicated to amendment of the Constitution. According to this provision, partial amendment of the Constitution is performed by the legislature with half of its members present and by a majority of two-thirds of the votes. A full amendment of the Constitution (*Gesemtänderung*) requires a referendum. The Constitutional Court has determined, in its case law, that it is not authorized to determine the constitutionality of an amendment to the Constitution from a substantive point of view. However, the Court is authorized to determine the constitutionality of an amendment to the Constitution from a procedural point of view, that is, whether the mechanism by which the amendment was enacted (parliament or referendum) was authorized to do so—in other words, whether it was a partial or full amendment. In its judgment in the *State Citizenship* case,[32] the Constitutional Court determined that a full amendment of the Constitution does not require the alteration of all the articles of the Constitution. An amendment of the Constitution is a full amendment even if it affects only one of the fundamental guiding principles (*leitender Grundsatz*) of the Constitution,[33] including the principles of democracy, the rule of law, and federation. Specifically, the Court held that the amendment to the Constitution that was discussed in that case, which concerned the rules of citizenship in the states (*Länder*) of the Federal Republic of Austria, did not derogate from one of the fundamental principles of the Constitution. The Court has applied these standards to

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[29] Minerva Mills v. Union of India, A.I.R. 1980 S.C. 1789 (India).

[30] Sambamurthy v. Andhra Pradesh, A.I.R. 1987 S.C. 1125 (India); Chandrakumae v. Union of India, A.I.R. 1997 S.C 1125 (India).

[31] BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION] BGBl. No. 1/1930, as last amended by Bundesverfassungsgesetz [BVG] BGBl I No. 2/2008, art. 140(1) (Austria).

[32] Verfassungsgerichthof [VfGH] [Constitutional Court], Dec. 12, 1952, ERKENNTNISSE UND BESCHLÜSSE DES VERFASSUNGSGERICHTHOFES [VFSLG] No. 2455/1952 (Austria).

[33] *See* Otto Pfersmann, *La révision constitutionnelle en Autriche et en Allemagne fédérale: théorie, pratique, limites*, *in* LA RÉVISION DE LA CONSTITUTION 7, 40 (1993).

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other amendments to the Constitution, at times determining that the amendment was partial, and therefore legally enacted by parliament, and at times determining that the amendment was full, and that since it was not enacted by a referendum it is not constitutional.[34]

D. UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS IN GERMANY

The question of the constitutionality of amendments to a constitution that is unconstitutional was discussed in the German legal literature during the Weimar Republic.[35] The approach of Carl Schmitt, who noted that an amendment to the Constitution assumes the continued existence of the Constitution, is well known.[36] The authority to amend the Constitution is not the authority to establish a new constitution. Without judicial review of the constitutionality of laws during the Weimar period, judicial review of the constitutionality of amendments to the Constitution was also non-existent.

At the end of the Second World War, and before the Constitutional Court began to function, the Constitutional Courts in a number of states (*Länder*) and the Federal Constitutional Court recognized the unconstitutionality of constitutional provisions.[37] They were influenced in this matter by trends in natural law that prevailed in Germany at the time. The judgment of the Constitutional Court of the State of Bavaria, which is well known in this context,[38] states:[39]

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[34] *See* VICTOR FERRERES COMELLA, CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES: A EUROPEAN PERSPECTIVE 106 (2009).

[35] *See* DAVID DYZENHAUS, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR (1999); Claude Klein, *The Eternal Constitution—Contrasting Hans Kelsen and Carl Schmitt*, *in* HANS KELSEN AND CARL SCHMITT: A JUXTAPOSITION (Dan Diner & Michael Stolleis ed., 1999).

[36] CARL SCHMITT, CONSTITUTIONAL THEORY 150 (Jeffrey Seitzer trans., Duke University Press, 2008) (1928):

> The boundaries of the authority for constitutional amendments result from the properly understood concept of constitutional change. The authority to "amend the constitution," granted by constitutional legislation, means that other constitutional provisions can substitute for individual or multiple ones. They may do so, however, only under the presupposition that the identity and continuity of the constitution as an entirety is preserved. This means the authority for constitutional amendment contains only the grant of authority to undertake changes, additions, extensions, deletions, etc., in constitutional provisions that preserve the constitution itself. It is not the authority to establish a new constitution, nor is it the authority to change the particular basis of this jurisdiction for constitutional revisions.

[37] *See* Gottfreid Dietze, *Unconstitutional Constitutional Norms? Constitutional Development in Postwar Germany*, 42 VA. L. REV. 1 (1956).

[38] Judgment of April 4, 1950, *published in* 2 VERWALTUNGSRECHTSPRECHUNG No. 65 (1950). In this case, a provision of the Constitution of Bavaria was examined (art. 184), according to which the provisions of the Constitution could not derogate from the effect of legislation from the Nazi period. The Constitutional Court of Bavaria annulled that provision, ruling that it was unconstitutional.

[39] *Id.* Justice Sussman translated the German into Hebrew, quoting this passage in EA 1/65 Yeredor v. The Central Elections Committee for the Sixth Knesset 19(2) PD 365, 390 [1965] (Isr.).

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> The nullity of a provision in the Constitution should not be negated just because the provision itself is part of the Constitution. There are constitutional rules which are so fundamental, and are a manifestation of supraconstitutional law, to the extent that they bind the drafter of the Constitution himself; other constitutional provisions, which are not of such high status, and conflict with these rules, can be annulled.

The Federal Constitutional Court began to function in 1951. In its judgment of October 23, 1951, it favorably quoted the judgment of the Constitutional Court of Bavaria. The judgment itself examined the constitutionality of a regular statute and not the constitutionality of an amendment to the Constitution. In an additional judgment of December 18, 1953, the Constitutional Court again determined that a provision in the Constitution was likely to be unconstitutional.[40]

Germany's Constitution contains a number of "eternity clauses,"[41] that is, constitutional provisions that are unamendable. Central among these are the provisions regarding the division of the federation into states, the principles determined in article 1 of the Constitution, dealing with human dignity (*Menschenwürde*), and article 20 of the Constitution, which states that the Federal Republic is a federal, democratic and socialist state (*democratisher und sozialer Bundesstaat*). In a number of judgments, the Constitutional Court has examined whether or not amendments to the Constitution violate those eternity clauses.[42] Although the express authority of the Constitutional Court is to examine the legality of laws that violate the Constitution, it also views itself as authorized to examine whether an amendment to the Constitution violates the unamendable provisions. In all the cases that it has examined, the Court has determined that the constitutional amendments in question did not violate the eternity clauses of the Constitution.[43]

E. UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS IN THE U.S.

The U.S. Constitution does not include an express provision regarding judicial review of the constitutionality of laws. In *Marbury v. Madison* (1803),[44] the Supreme Court

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[40] *See* JURISTENZEITUNG 35 (1954). For translations of parts of some of the judgments, see Dietze, *supra* note 37, at 18. *See also* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 48 (2d ed. 1997); 30 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] [DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT] 1 (1970) (*Klass* case).

[41] The source of these provisions is in article 79(3) of the Constitution, which 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 Articles 1 and 20 shall be inadmissible."

[42] For analysis of this case, see GÖZLER, *supra* note 11, at 56.

[43] On certain occasions, dissenting opinions have denounced the constitutionality of the amendment. *See* O'Connell, *supra* note 24; Donald P. Kommers, *German Constitutionalism—A Prolegomenon*, 40 EMORY L.J. 837 (1991).

[44] Marbury v. Madison, 5 U.S. 137 (1803).

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determined that such review is appropriate in light of the supremacy of the Constitution. Should judicial review of the constitutionality of an amendment to the Constitution be recognized? It appears that the answer is yes, if the argument is that the amendment to the Constitution is intended to amend the eternity clause according to which the makeup of the Senate—in which each state has two senators regardless of the number of voters in that state[45]—is not subject to the amendment in article 5 of the Constitution.[46] But what about amendments to the Constitution enacted according to article 5 of the Constitution that do not affect the eternity clause? A number of judgments have recognized the Supreme Court's authority to examine whether the formal conditions, determined in the constitutional provision regarding amendments, have been fulfilled.[47]

Thus, for example, a number of judgments of the Supreme Court have dealt with the constitutionality of the 18th amendment to the Constitution regarding the prohibition of the manufacture, sale, or transport of illegal alcohol. The examination dealt with the question whether the amendment had been enacted by the required majority, and whether it had been approved according to the requirements of the constitutional amendment regarding amendment of the Constitution.[48]

A change in the Court's approach took place in *Coleman v. Miller* (1939).[49] In this case, Congress proposed an amendment to the Constitution. The legislature of Kansas decided that Kansas would oppose the amendment, and notice was legally given. Twelve years later, the legislature of Kansas changed its mind and ratified the decision. The validity of the ratification was under judicial review. The Supreme Court of Kansas decided the case on the merits and decided that the ratification was valid. That decision was attacked in the United States Supreme Court. It was argued that the Kansas legislature could not change its position and that, with the passage of time, the amendment had expired. The Supreme Court refrained from deciding these issues. It determined that the control over the process of amending the Constitution is exclusively in the hands of Congress and that there is no judicial review of Congress's decision. Justice Black noted that a constitutional amendment is a "political question" that is not subject to judicial review. Justice Black wrote:[50]

> Article V ... grants power over the amending of the Constitution to Congress alone.... The process itself is political in its entirety, from

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[45] U.S. CONST., art. I, § 3.

[46] *See* U.S. CONST., art. V: "... no Amendment which may be made prior to the Year One thousand eight hundred and eight shall be in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article...."

[47] *See* GÖZLER, *supra* note 11, at 28.

[48] *See* State of Rhode Island v. Palmer, 253 U.S. 350 (1920); Dillon v. Gloss, 256 U.S. 368 (1921); United States v. Sprague, 282 U.S. 716 (1931); Leser v. Garnett, 258 U.S. 130 (1922).

[49] *See* Coleman v. Miller, 307 U.S. 433 (1939).

[50] *Id.* at 459.

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> submission until an amendment becomes part of the Constitution, and it is not subject to judicial guidance, control or interference at any point.

The scope of this ruling is a matter of controversy.[51]

F. UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS IN IRELAND

Ireland's Constitution recognizes judicial review of the constitutionality of statutes. It has no eternal clauses. It contains a provision regarding the amendment of the Constitution.[52] Does it recognize judicial review of an amendment to the Constitution that is unconstitutional? The answer of the Irish Supreme Court is that such review is possible regarding the fulfillment of the formal conditions determined in the Constitution for enacting an amendment to the Constitution. Judicial review does not extend to the content of the amendment to the Constitution or its relation to the rest of the Constitution.[53]

G. UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS IN BRAZIL

The Constitution of Brazil (1988) recognizes judicial review of the constitutionality of laws. It contains a provision regarding eternal clauses, which states: "No resolution is discussed concerning an amendment proposal which tends to abolish: I. the federative form of the state; II. the direct, secret, universal, and periodic vote; III. the separation of the Government Branches; IV. individual rights and guarantees." The Supreme Court views itself as authorized to annul an amendment to the Constitution that violates eternal clauses,[54] and it has done so on a number of occasions.[55]

H. EXPRESS CONSTITUTIONAL PROVISIONS REGARDING JUDICIAL REVIEW OF THE CONSTITUTIONALITY OF A CONSTITUTIONAL AMENDMENT

We have seen that Turkey's Constitution includes express provisions that authorize the Constitutional Court to examine whether the formal requirements for constitutional amendments, as laid down in the Constitution, have been fulfilled.[56] In Chile's Constitu-

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[51] *See* George D. Skinner, *Intrinsic Limitations on the Power of Constitutional Amendment*, 18 MICH. L. REV. 213 (1920); William L. Marbury, *The Limitations Upon the Amending Power*, 33 HARV. L. REV. 223 (1919-1920); Laurence H. Tribe, *The Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433 (1983-1984); Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386 (1983); Jeff Rosen, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073 (1990-1991); Raymond Ku, *Consensus of the Governed: The Legitimacy of Constitutional Change*, 64 FORDHAM L. REV. 535 (1995-1996); Jason Mazzone, *Unamendments*, 90 IOWA L. REV. 1747 (2004-2005).

[52] *See* IR. CONST., 1997, art. 46.

[53] *See* O'Connell, *supra* note 24, at 61.

[54] Luciano Maia, *The Creation and Amendment Process in the Brazilian Constitution*, *in* THE CREATION AND AMENDMENT OF CONSTITUTIONAL NORMS 54, 9 (Mads Andenas ed., 2000).

[55] *Id.*

[56] *See* GÖZLER, *supra* note 11, at 47.

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tion (of 1980), the Constitutional Court was authorized to examine the questions likely to arise during the process of amending the Constitution.[57] Romania's constitution (of 1991) authorizes the Constitutional Court to examine the constitutionality of a bill to amend the Constitution. This is judicial review (preview) prior to the enactment of the amendment. The Constitutional Court of Romania has ruled on this issue on a number of occasions.[58] The Constitution of South Africa authorizes the Constitutional Court to decide the constitutionality of every amendment to the Constitution.[59]

In the same manner in which a constitution may authorize the court to review the constitutionality of a constitutional amendment, the constitution may also revoke such authority from the court. To the extent that the provision that revokes judicial review was inserted into the constitution by way of a constitutional amendment, it may encounter the claim—as was in fact set forth in India—that this constitutional amendment is itself unconstitutional.

III. LESSONS FROM COMPARATIVE LAW

Every constitution has its own problems, and every court has its own powers. However, an examination of comparative law regarding the constitutionality of amendments to constitutions raises four key issues. First, one must differentiate well between the question whether the court has the authority to perform judicial review of the constitutionality of an amendment to the constitution, on the one hand, and the question what the standards for such review are, on the other. Courts have not, for the most part, interpreted the silence of the constitution regarding the issue of the court's authority to perform judicial review of the constitutionality of a constitutional amendment as a negation of that authority. The opposite is true: courts have usually determined that, if there is an argument against the constitutionality of an amendment to the constitution, it should be examined on its merits. Thus, for example, we have seen that the silence of the Constitutions of Germany, Austria, and Turkey (until 1971) regarding the court's authority to examine the constitutionality of an amendment to the constitution did not lead the Constitutional Courts of those countries to conclude that they do not have such authority. They assumed as obvious that they have such authority. This usually is the situation, but not always.[60] As we have seen, the U.S. Supreme Court denied itself this authority, defining it as a political question.[61]

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[57] *See* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [CONSTITUTION], 1980, art. 82(2) (Chile).

[58] *See* GÖZLER, *supra* note 11, at 5.

[59] S. AFR. CONST., art. 167(4)(d). *See also* Albie Sachs, *South Africa's Unconstitutional Constitution: The Transition From Power to Lawful Power*, 41 ST. LOUIS U. L.J. 1249 (1996-1997).

[60] *See* State v. Lennon, [1935] 1 I.R. 170, 198 (Ir.); Abortion Information, [1995] 2 I.L.R.M. 81 (Ir.); Riordan v. An Taoiseach, [1999] I.E.S.C. 1 (Ir.).

[61] *See* Coleman v. Miller, 307 U.S. 433, 459 (1939).

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The differentiation between the question of authority and the question of standards raises difficulties where the amendment to the constitution denies the court's authority to examine the constitutionality of the amendment. Is such an amendment constitutional? In order to answer this question, must the court examine whether there are restrictions on the authority to amend the constitution? The question of authority is thus a derivative of the question of standards. This issue arose in India.[62] As a result of the Supreme Court's determination that it is authorized to examine the constitutionality of an amendment to the Constitution, the Constitution was amended (the 42nd amendment of 1976) in such a way that it was determined that amendments are not subject to judicial review.[63] In *Minerva Mills*,[64] the Supreme Court of India ruled that this amendment was unconstitutional, as it violated the fundamental structure of the Constitution. Such an amendment cannot be made as an amendment to the Constitution. This judicial approach cannot base itself on the court's authority or on the article regarding amendment of the Constitution. It must base itself on substantive standards. These are entrenched in the doctrine of the basic structure of the Constitution, which, despite the fact that it is not determined expressly in the Constitution, arises from it implicitly.

The second key issue concerns the standard according to which it will be determined whether or not an amendment to the constitution is constitutional. Comparative law indicates that a proper cause for review in this context is that the amendment to the constitution is unconstitutional because it violates express eternity clauses in the constitution.[65] The eternity clause is intended to fortify the constitution against improper amendments. Judicial review is a natural mechanism for protecting eternity clauses in the constitution. Judicial review provides (legal) "teeth" to the eternity clause. In this respect, there is no substantive difference between a regular statute that violates the constitution and an amendment to the constitution that violates the eternity clause. Just as judicial review is recognized in the first case (a regular statute that violates the constitution) it should also be recognized in the second case (a constitutional amendment that violates the "eternity clause").

Against this backdrop, the German Constitutional Court's case law is understandable.[66] It has not only recognized its own authority to examine the constitutionality of constitutional amendments but has also determined that the standard

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[62] *See supra* section II.B.

[63] *See supra* section II.B.

[64] *See* Minerva Mills v. Union of India, A.I.R. 1980 S.C. 1789 (India).

[65] On the "eternity clause," see Sharon Wintel, "Eternal Clauses" in the Constitution: The Strict Normative Standard in Operating the "Constituent Power" (5766-2005) (unpublished LL.D. thesis, Hebrew University of Jerusalem). On constitutional amendments that violate Italy's eternity clause on the republican character of the government (in art. 139), see Corte Constituzionale, No. 1046/1988, Dec. 15-29, 1988. On a similar approach in Portugal, whose constitution includes a long list of eternity clauses (in art. 288), see COMELLA, *supra* note 34, at 107.

[66] *See supra* section II.D.

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for that examination is found in the eternity clauses in the constitution. The same is true of the Turkish Constitutional Court. The eternity clauses in the Turkish constitution form the basis for its case law regarding the unconstitutionality of constitutional amendments.[67] In this light, it is also possible to understand the broad interpretation of the constitutional amendment that determined that the Constitutional Court is authorized to examine whether the formal requirements regarding constitutional amendments have been properly fulfilled. According to this interpretation, a derogation from the secular character of the Constitution is a derogation from the republican character of the state, and such a derogation is at odds with the formal requirements in the provision regarding amendments to the Constitution. If a narrower interpretation were given to that provision, a conflict would be created between the provision denying the Constitutional Court the authority regarding amendments to the Constitution and the "eternity clause." That conflict would be resolved in favor of the "eternity clause." The broad interpretation prevented this conflict.

The third issue is that a natural standard for examining the constitutionality of a constitutional amendment is to examine the requirements in the constitution regarding constitutional amendments. Indeed, an amendment to the constitution can only have effect if it has been enacted in accordance with the requirements in the provision dealing with constitutional amendments. It is thus natural that a court that has the authority to perform judicial review will examine whether these requirements have been fulfilled. These requirements are usually of a formal character, such as the identity of the body that enacts the amendment (the people, the federal legislature, or the state legislature) and the majority required to do so. The key question that arises in this context is whether it is possible to derive "substantive" standards from the provisions regarding the amendment of the constitution. This question arises primarily in the case of constitutions that are easy to amend. If a temporary majority can change a constitution, and thus undermine the foundations upon which it rests, the question arises whether there are constitutional restrictions upon the power of the majority. This question is not as pressing in legal systems in which amending the constitution is difficult, like in the United States.

Without special substantive provisions, and without eternity clauses, the question arises whether the very use of the term "amendments" to the constitution radiates substantive meaning. Can it not be said that the term "amendments" indicates that the amended document is left standing? According to this approach, the amendments clause in the constitution cannot serve as a source for the establishment of a new constitution.

This view can be seen in the judgment of some of the Indian Supreme Court justices in *Kesavananda*.[68] According to their approach, an amendment to the constitution does

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[67] *See supra* section II.A.

[68] *See* Kesavananda Bharti v. State of Kerala, (1973) 4 S.C.C. 225 (India).

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not permit its replacement with another constitution. Thus, there is a substantive requirement that the basic structure of the constitution should not be changed via such an amendment. This approach sees the term "amend" as the "hook" upon which the substantive test is hung. In light of this, the question arises—as it did in India[69]—what happens when an amendment to the constitution is enacted that removes this "hook." This can be achieved by amending the constitutional provisions on the amendment of the constitution in such a way that there are no longer any restrictions on parliament's power to amend the constitution. As a result, the ability to amend the constitution includes the ability to replace the entire constitution. Is this type of amendment to the constitution constitutional? If the sole source of the substantive requirement regarding the basic structure of the constitution is the clause on the amendment of the constitution, then amending this provision would pull the rug out from under this requirement. However, if the substantial requirement regarding the basic structure of the constitution is entrenched not only in the provision on the amendment of the constitution but in the entire constitution, then the amendment of the amendments provision is insufficient, as the amendment itself would be unconstitutional. If the requirement regarding the basic structure indeed arises from the language of the entire constitution, then a new constitution is necessary in order to remove the requirement regarding the basic structure. In fact, this is how the Supreme Court of India ruled in *Minerva Mills*.[70] The Constitutional Court of Italy has also ruled similarly.[71]

The final issue that often arises in situations involving unconstitutional amendments to the constitution concerns the status and role of the courts in a given society. Is it proper for judges who are not elected directly by the public to annul the decisions of its elected representatives regarding the amendment of the constitution? This question obviously arises regarding the judicial review of the constitutionality of a "regular" statute; it arises in full force regarding the judicial review of the constitutionality of an amendment to the constitution.

On the one hand, it is argued that the boundary of judicial legitimacy should be drawn at the judicial review of the constitutionality of a regular statute. Beyond this boundary, it is not legitimate, barring an express provision in the constitution, for a court to annul an amendment to the constitution on the grounds that it is unconstitutional. The court itself acts by virtue of and in accordance with the constitution. It should not prevent amendments to the constitution. The court does not have the authority to create judicial eternity clauses. It must make do—and even this is controversial—with an examination whether the formal conditions for amending the constitution have been met. Beyond that, the issue is essentially political. It concerns the most sensitive aspects of democracy. If judicial review of the content of a consti-

[69] *See supra* section II.B.

[70] Minerva Mills v. Union of India, A.I.R. 1980 S.C. 1789 (India).

[71] *See* COMELLA, *supra* note 34, at 107.

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tutional amendment is recognized, such recognition should be laid down in an express provision of the constitution. It should not be introduced impliedly.

On the other hand, it is claimed that there is no real difference between judicial review of the constitutionality of a regular statute and judicial review of an amendment to the constitution. In both cases, the judicial review is intended to safeguard the constitution and its (express or implied) content. The court thus fulfills its classic role. The authority to amend the constitution does not include the authority to enact a new constitution.[72] And when the court defends the constitution and prevents the use of the amendment process to establish a new constitution, it safeguards the sovereignty of the people. This is true in general; it is especially true in cases where the constitution is easily amended. The natural role of the court in a modern democracy is to protect the constitution and to prevent bodies that were created by the constitution from exceeding their authority. The political character of judicial activity resulting in the annulment of an amendment to the constitution should not tie the hands of the court. The court is not protecting itself: it is protecting democracy.

Of these two approaches, the second one appeals to me most. In a democratic society, the role of the court is to protect the constitution and democracy.[73] Protecting the constitution does not only involve protection against statutes that violate the constitution but also against amendments to the constitution that violate its foundations. Statutes that violate the constitution and amendments that violate the constitution's foundations are both at odds with the idea of the constitution and the authority to change it. Those who wish to change the basic foundations of the constitution must do so not by changing the constitution but rather by establishing a new constitution. The authority to establish a constitution must be exercised in accordance with the fundamental principles and the fundamental structure of the existing constitution. When an amendment changes the fundamental principles and the fundamental structure, it removes the constitutional basis upon which the entire edifice rests. The role of the court is to protect the basic structure and fundamental values of the constitution. There is thus a strong justification for recognizing the court's authority to examine whether an amendment to the constitution is constitutional.

IV. SUBSTANTIVE STANDARDS FOR AMENDING THE CONSTITUTION

As we have seen, the Supreme Court of India has determined that the constitutional provision regarding the authority to amend the constitution is not an authorization to enact an amendment that derogates from the basic structure of the constitution.[74] The Court thus

[72] It is my opinion that this is also the case if the constitutional amendment (as opposed to the creation of a new constitution) is brought forth by means of a referendum.

[73] *See* AHARON BARAK, THE JUDGE IN A DEMOCRACY 20 (2006).

[74] *See supra* section II.B.

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recognized, de facto, the existence of an implied eternity clause that protects the basic structure of the Constitution. It seems to me that, according to the aforementioned second approach, every constitution has an implied eternity clause according to which its basic structure cannot be changed other than by the establishment of a new constitution. The provisions on the amendment of the constitution cannot authorize a change in the basic structure of the constitution, which is like establishing a new constitution. The existence of an express eternity clause on certain matters should not be interpreted as a negation of the existence of an implied eternity clause on other matters.

This view is based on the interpretation of the constitution as an entirety. This interpretive approach is an accepted approach in constitutional law.[75] An additional approach, which stems from the view of the constitution as an entirety and is also accepted in constitutional law, is that the language of the constitution does not only include its express language but also its implicit language.[76] It could be said that the implicit language is written in invisible ink. It is written "between the lines."[77] Take, for example, a constitution that determines the powers of the various branches of government and enshrines basic human rights in its various clauses. It can be argued that such a constitution implicitly determines the principle of separation of powers, the independence of the judicial branch, and the rule of law.[78] This approach can also be applied in the issue

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[75] *See* AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 373, 390 (2005). *See also* CHARLES L. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 39 (1969); LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION (2008).

[76] *See* AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 53 (2012); *see also* Jeremy Kirk, *Constitutional Implications (I): Nature, Legitimacy, Classification, Examples*, 24 MELB. U.L. REV. 645 (2000); Jeremy Kirk, *Constitutional Implications (II): Doctrines of Equality and Democracy*, 25 MELB. U.L. REV. 24 (2001); Walter Sinnott-Armstrong, *Two Ways to Derive Implied Constitutional Rights*, *in* LEGAL INTERPRETATION IN DEMOCRATIC STATES (T.D. Campbell & J. Denys-Goldsworthy eds., 2002); BARAK, *supra* note 75, at 373.

[77] *See* HCJ 2257/04 Chadash-Ta'al Party v. Chairman of the Knesset Election Committee 58(6) PD 685 [2004] (Isr.); KRISHNASWAMY, *supra* note 23, at 131.

[78] *See* Paul R. Verkuil, *The American Constitutional Tradition of Shared and Separated Powers: Separation of Powers, The Rule of Law, and the Idea of Independence*, 30 WM. & MARY L. REV. 301 (1989); Volkmar Götz, *Legislative and Executive Power Under the Constitutional Requirements Entailed in the Principle of the Rule of Law*, *in* NEW CHALLENGES TO THE GERMAN BASIC LAW 141 (C. Starck ed., 1991); Mark D. Walters, *The Common Law Constitution in Canada: Return of Lex Non Scripta as Fundamental Law*, 51 U. TORONTO L.J. 91 (2001); Jean Leclair, *Canada's Unfathomable Unwritten Constitutional Principles*, 27 QUEEN'S L.J. 389 (2002); David Mullan, *The Role for Underlying Constitutional Principles in a Bill of Rights World*, 2004 N.Z. L. REV. 9; Sebastian Seedorf & Sanele Sibanda, *Separation of Powers*, *in* CONSTITUTIONAL LAW OF SOUTH AFRICA 12-36 (Stuart Woolman, Theunis Roux & Michael Bishop eds., 2008); Mark D. Walters, *Written Constitutions and Unwritten Constitutionalism*, *in* EXPOUNDING THE CONSTITUTION: ESSAYS IN CONSTITUTIONAL THEORY 245 (Grant Huscroft ed., 2008); Peter A. Gerangelos, *The Separation of Powers and Legislative Interference*, *in* JUDICIAL PROCESS: CONSTITUTIONAL PRINCIPLES AND LIMITATIONS (Peter A. Gerangelos ed., 2009); JEFFERY GOLDSWORTHY, PARLIAMENTARY SOVEREIGNTY: CONTEMPORARY DEBATES 61 (2010); *Re* Manitoba Language Rights, [1985] 1 S.C.R. 721, 752 (Can.); Sambamurthy v. State of Andhra Pradesh, A.I.R. 1987 S.C. 66 (India); *Ex parte Chairperson of the Constitutional*

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under discussion. It leads to the interpretative conclusion that the constitution impliedly determines the continued existence of a number of fundamental principles that cannot be changed even by constitutional amendment. The interpreter learns the fundamental principles of the constitution, from which he learns the basic structure of the constitution. He learns these things from the interpretation of the constitution in light of its history, its values, and the supra-constitutional principles that surround it, as well as from the fundamental societal values that characterize any society.

At the basis of this view lies the differentiation between the amendment of an existing constitution and the establishment of a new constitution. The view regarding the fundamental structure of the constitution means that a new constitution cannot be established via an amendment to the existing constitution. This view negates the possibility of changing the basic structure of the constitution. Such a change is not attained by amending the existing constitution in accordance with the provisions regarding the amendment of the constitution; it is attained by the establishment of a new constitution. This differentiation between the amendment of an existing constitution and the establishment of a new constitution safeguards the path of democracy. It does not block off the people's ability to change the basic structure of the constitution. However, in order to achieve this, one cannot take the path of amending the constitution. A completely different route must be chosen: the route of establishing a new constitution. Examining that route is beyond the scope of this article.

Recognition of an implied eternity clause regarding the fundamental structure of the constitution requires a determination of its boundaries.[79] Clearly, not every amendment of the constitution falls within this definition. The changes we are dealing with are fundamental constitutional changes that alter the identity of the constitution and the democratic character of the regime, including profound changes to the republican character of the government and serious infringements of the separation of powers, the rule of law, judicial independence, and the most fundamental human rights. Every constitution has its own fundamental principles that characterize its fundamental structure.

V. UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS IN ISRAEL

The project to enact basic laws in Israel is based on the Knesset's power as a constitutional assembly.[80] This project has yet to be completed. Once it has been completed

Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 74 (CC) (S. Afr.); Reference re Remuneration of Judges of the Provincial Court (P.E.I.), [1997] 3 S.C.R. 3 (Can.); *South African Association of Personal Injury Lawyers v. Heath* 2001 (1) SA 883 (CC) (S. Afr.); *Doctors of Life International v. Speaker of the National Assembly* 2006 (6) SA 416 (CC) (S. Afr.).

[79] *See* HCJ 2257/04 Chadash-Ta'al Party v. Chairman of the Knesset Election Committee 58(6) PD 685 [2004] (Isr.); KRISHNASWAMY, *supra* note 23, at 131.

[80] *See* CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Cooperative Village 49(4) PD 221 [1995] (Isr.); SUZIE NAVOT, THE CONSTITUTIONAL LAW OF ISRAEL 115 (2007).

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and ratified by the people, it will be time to make a decision regarding unconstitutional amendments. The constitution may include eternity clauses that will assist in solving this question. Alternatively, the constitutional text may be silent on this issue, and the Supreme Court will have to decide whether to adopt the doctrine of the basic structure of the constitution, or a similar doctrine, or to reject such doctrines altogether. Finally, the amendment process may be so difficult and complicated that in practice the question never arises.

Does this mean that, at the present stage of constitutional development in Israel, the question of unconstitutional constitutional amendments should not be considered? Under the comprehensive and full meaning of this doctrine as it is accepted in comparative law, this question indeed has no place in Israel. The reason for this is that the concept of an "amendment" to the constitution is itself problematic in Israel. The constitutional project in Israel is a work in progress. The mission has not yet been completed. The "whole" has not yet been completed, and in any case the arrangements for amending it have not yet been developed. In Israel, we have a process of enacting basic laws. From time to time, a new basic law is enacted in an area in which there was no previous basic law. From time to time, an amendment to an existing basic law is performed by enacting an amending basic law. In light of this situation, it is appropriate to raise the following question in Israel: are there any limitations on the power of the Knesset, as a constitutional assembly, to formulate the substantive content of the basic laws, such that it is possible to speak of an unconstitutional basic law? Is there a difference, in this context, between an area that has already been covered by a basic law and in which a change is being made and an area in which a basic law has not yet been enacted?

The answers to these questions are controversial.[81] In my opinion, the Knesset is not omnipotent as regards the establishment of a new basic law or the amendment of an existing basic law. In both cases, the Knesset, as the constitutional assembly, must act within the framework of fundamental principles and fundamental values of the constitutional structure.[82] It must act within the framework of the principle-based

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[81] *See* 1 AMNON RUBINSTEIN & BARAK MEDINA, CONSTITUTIONAL LAW IN THE STATE OF ISRAEL 74 (6th ed. 2005) (in Hebrew); Claude Klein, *The Constitutional Convention in the State of Israel*, 2 MISHPATIM 51 (1970) (in Hebrew); Claude Klein, *After the Mizrahi Bank Case—The Constitutional Power in the Mirror of the Supreme Court*, 28 MISHPATIM 341 (1997) (in Hebrew); Yoav Dotan, *A Constitution for Israel? The Constitutional Dialogue after "the Constitutional Revolution,"* 27 MISHPATIM (1996) 149 (in Hebrew); Ariel Bendor, *The Legal Status of the Basic Laws*, *in* SEFER BERENSON 119 (Aharon Barak & Hayim Berenson eds., 2000) (in Hebrew).

[82] *See* HCJ 4676/94 Meatrael Ltd. v. The Knesset 50(5) PD 15, 28 [1996] (Isr.). In the *United Mizrahi Bank* case, *supra* note 80, I left open for review the question regarding the Israeli Knesset's "abuse" of its constituent authority. Constitutional amendments are not subject to the limitations clause. *See* HCJ 1368/94 Porat v. The Government of Israel 57(5) PD 913, 914 [1994] (Isr.). The limitations clause is intended to restrict the "regular lawmaker." It is not intended to limit the Knesset as a constitutional council.

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standards upon which Israel's Declaration of Independence and the entire constitutional project are based. According to this view, a new basic law or an amendment to a basic law

> which negates the character of Israel as a Jewish or democratic state is unconstitutional. The people, the sovereign, did not empower our Knesset to do that. The Knesset was authorized to act within the framework of the fundamental principles of the regime, as they are manifested in the Declaration of Independence. It has not been authorized to annul them.[83]

The Knesset was not authorized to violate fundamental principles and objectives "upon which all of our constitutional structure, including the basic laws themselves, are based, and the violation of which is substantial and severe."[84] The Knesset was not authorized to violate "the heart of democracy, or the minimum required for a state's character as a democratic one."[85] Similarly, it was not authorized to violate the heart of Israel's existence as a Jewish state or the minimum requirements for that character.

My approach to the question of unconstitutional constitutional amendments differs from the comparative law approach, which assumes the existence of an entire constitution. However, in Israel we are in the middle of a constitutional process, based on basic laws, which has not yet been completed. Even if one accepts the basic approach that there are restrictions on the establishment of a constitution in Israel or on the power to amend it, my opinion is that, as long as the project of enacting basic laws has not yet been completed, these restrictions operate in a narrower framework than is customary in comparative law. Thus, for example, a constitutional amendment that limits the scope of the right to human dignity might violate the doctrine of the basic structure of the constitution; however, it might not violate the heart of democracy and should therefore not be annulled.[86] Similarly, the annulment of the existing judicial review of the constitutionality of a law and its replacement with a "lighter" judicial review might be considered a violation of the basic structure of an existing constitution. In my opinion, it should not be seen as a violation of the heart of democracy. Thus, if the Knesset sees fit to adopt provisions on this issue, it is authorized to do so, as long as the project of enacting basic laws has not yet been completed. The difference between my stance and that of those courts that recognized the possibility of an unconstitutional amendment to the constitution is not a difference in principle or a qualitative difference:

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[83] *See* HCJ 6427/02 The Movement for Quality Government in Israel v. The Knesset (May 11, 2006), Nevo Legal Database (by subscription) para. 74 (Barak, P.) (Isr.).

[84] *See* HCJ 4676/94 Meatrael Ltd. v. The Knesset 50(5) PD 15, 28 [1996] (Isr.).

[85] *Id.*

[86] *See The Movement for Quality Government in Israel* case, *supra* note 83, *but see also* the dissenting opinion of Vice President Cheshin. Equality will remain part of Israel's common law.

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it is a difference in implementation or a quantitative difference. I recognize the doctrine of unconstitutional constitutional amendments as a legitimate and worthy doctrine. I am of the opinion that, in the present constitutional situation in Israel and as long as the project of enacting basic laws has not been completed, this doctrine acts within narrower boundaries.

This position raises the question when the project of enacting basic laws will reach its conclusion. It will certainly end when the Knesset declares that it has ended. In my opinion, it will be possible to regard the project of enacting basic laws as completed even without a formal declaration. A slow demise also leads to death. I am afraid that we are not far from that day. It has been years since a new basic law has been enacted. The attempts in the Knesset to establish a comprehensive constitution are not succeeding. Has the time not arrived for the Knesset to determine that the project of enacting basic laws has reached its conclusion? Is the court authorized to make such a determination if the Knesset does not do so? It appears that the answers to these questions are difficult—even more difficult than the question of unconstitutional constitutional amendments.

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