
7. Interpreting unconstitutional constitutional amendments

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1. INTRODUCTION

This chapter examines the practice of judicial interpretation around unconstitutional constitutional amendments (UCA). As the phenomenon of UCA, both in its explicit and implicit forms, has proliferated in recent years,² it has also appeared more frequently in the constitutional dockets of courts around the world. Judges today are called upon to adjudicate the scope of unamenable provisions (eternity clauses) within the constitutional text, to determine the appropriate procedures or thresholds required to enact constitutional amendments, and to exercise constitutional judicial review over duly enacted amendments that may violate a constitution's implicit basic structure or material core.

Drawing from a range of case studies, we aim to explain how courts have approached each of these interpretive exercises, to illuminate their reasoning, and to discuss the broader effects of these judgments on constitutionalism in their respective countries. Section 2 examines how constitutional courts have interpreted explicitly unamendable provisions in the constitutions of Germany, Brazil, and Romania. In the cases we discuss, courts have not invalidated any constitutional amendments; instead, they interpreted eternity clauses narrowly to avoid conflicts between those provisions and the impugned amendments or have read down amendments to avoid conflict with eternity clauses.

Section 3 explores the judicial treatment of unamendability in 'tiered' constitutions.³ These constitutions have escalating amendment procedures, with higher thresholds reserved for amendments to the most fundamental constitutional values or provisions. In some cases, such as Sri Lanka, the judiciary is called upon to determine which textually provided procedure should be adopted to enact a particular amendment. In other cases, such as in Thailand and Kenya, courts have determined that additional requirements must be met to pass especially significant amendments, even if such requirements are not provided for in the constitutional text.

Section 4 considers implicit unamendability – that is, how courts have read and enforced limitations on amendments into constitutions that contain no such textual limits. We divide our case studies here into two categories. First, we examine cases from India, Bangladesh, and Slovakia where courts have invalidated constitutional amendments that violate the basic

¹ We thank Jairo Néia Lima, Suzie Navot, Silvia Suteu, and Thomas Wischmeyer for valuable assistance.

² Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (OUP 2017) 20–21, 47–69.

³ Rosalind Dixon and David Landau, 'Tiered Constitutional Design' (2018) 86 GW Law Rev 438.

structure or material core of their respective constitutions. Second, we look at cases from Malaysia, Pakistan, and Israel, where courts have used the basic structure doctrine (BSD) or similar UCA doctrines as an interpretive tool to read down amendments but have hitherto declined to strike down any constitutional amendments.

The chapter concludes with some broader observations about the scope and effects of judicial interpretations in the UCA context.

2. EXPLICIT UNAMENDABILITY

In various countries, the constitution explicitly creates a hierarchy of constitutional norms. Some principles, rules, or institutions that are considered fundamental to the constitutional order and its identity are given a special status – they are protected from formal amendments to the constitution; they are deemed unamendable.⁴ Such unamendability imposes a substantive restriction on the power to amend the constitution.⁵

While the content of such restrictions varies from state to state, explicit unamendability often refers to constitutional features that are considered as the constitutional order's core values, institutions, or structures. Such features can include the rule of law,⁶ the state's religious or secular character,⁷ the state's territorial integrity,⁸ or presidential term limits.⁹ Probably the most famous example of explicit unamendability is the German 'eternity clause'. Article 79(3) of the 1949 Basic Law, enacted in response to past horrors, provides that constitutional amendments cannot affect human dignity, nor the democratic and federal features of the constitutional order.¹⁰

⁴ On unamendable clauses as embodying constitutional identity, see, for example, Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism* (OUP 2021) ch 3.

⁵ Oran Doyle, 'Constraints on Constitutional Amendment Powers' in Richard Albert, Xenophon Contiades, and Alkmene Fotiadou (eds), *The Foundations and Traditions of Constitutional Amendment* (Bloomsbury 2017) 73.

⁶ See Ondřej Preuss, 'The Eternity Clause as a Smart Instrument: Lessons from the Czech Case Law' (2016) 57(3) *Hungarian J L Sted* 289; Ondřej Preuss, 'The Eternity Clause: Lessons from the Czech Example' (2019) 21(3) *Eur J of Law Reform* 313.

⁷ See Richard Albert and Yaniv Roznai, 'Religion, Secularism and Limitations on Constitutional Amendment' in Rex Ahdar (ed), *Research Handbook on Law and Religion* (Edward Elgar 2018) 154; Yaniv Roznai, 'Negotiating the Eternal: The Paradox of Entrenching Secularism in Constitutions' (2017) *Michigan State Law Rev* 253.

⁸ Yaniv Roznai and Silvia Suteu, 'The Eternal Territory? The Crimean Crisis and Ukraine's Territorial Integrity as an Unamendable Constitutional Principle' (2015) 16(3) *German Law Journal* 542; Rivka Weill, 'Secession and the Prevalence of Both Militant Democracy and Eternity Clauses Worldwide' (2013) 40(2) *Cardozo Law Rev* 905, 947–966.

⁹ David Landau, Yaniv Roznai, and Rosalind Dixon, 'Term Limits and the Unconstitutional Constitutional Amendment Doctrine: Lessons from Latin America' in Alexander Baturo and Robert Elgie (eds), *Politics of Presidential Term Limits* (OUP 2019) 53.

¹⁰ See, for example, Helmut Goerlich, 'Concept of Special Protection for Certain Elements and Principles of the Constitution Against Amendments and Article 79(3), Basic Law of Germany' (2008) 1 *NUJS Law Rev* 397; Ulrich K Preuss, 'The Implications of "Eternity Clauses": The German Experience' (2011) 44(3) *Israel Law Rev* 429.

Such restrictions have become increasingly common in global constitutional design; whereas between 1789 and 1944, about 17% of the constitutions enacted in these years included 'unamendable provisions', the percentage increased to 27% in the years between 1945 and 1988, and to over 50% in the constitutions enacted after 2015.¹¹ Explicit unamendability has become not only a central issue in constitutional architecture but also for constitutional adjudication, as in various countries, it has become the grounds for substantive judicial review of constitutional amendments.¹²

Take Germany, for example.¹³ As mentioned, the German Basic Law contains an unamendable provision according to which amendments cannot affect the division of the Federation into Länder, human dignity, and or the country's identity as a democratic and social federal state. This provision creates a sort of hierarchy of constitutional ordering.¹⁴ This was recognised by the German Federal Constitutional Court early in the *Southwest* case (1951):

A constitution has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a unit, a constitution reflects certain overarching principles and fundamental decisions to which individual provisions of the Basic Law are subordinate.¹⁵

While the Federal Constitutional Court has reviewed constitutional amendments vis-à-vis the principles protected by the unamendable provision on a routine basis, it has, thus far, never annulled an amendment as unconstitutional. Yet, these principles play a role in constitutional interpretation. The *Klass* case of 1970 is telling.¹⁶ There, the Constitutional Court considered the constitutionality of an amendment that permitted violations of communication privacy for the purpose of protecting national security and substituted judicial review of any alleged violation of this right with a review by an agency appointed by Parliament. Although the Constitutional Court sustained the amendment's validity, three dissenting judges were persuaded that the amendment infringed on the principles of human dignity, separation of powers, and the rule of law and should, therefore, be annulled. What is crucial for our purposes is the emphasis on interpretation:

¹¹ Roznai (n 2) 20–21; On the origins, differentiation, and migration of unamendable provisions, see Michael Hein, 'Entrenchment Clauses in the History of Modern Constitutionalism' (2018) 86(3–4) *Legal History Rev* 434.

¹² For comparative studies, see Roznai (n 2) ch 7–8; Gábor Halmai, 'Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?' (2012) 19(2) *Constellations* 182; Aharon Barak, 'Unconstitutional Constitutional Amendments' (2011) 44(3) *Israel Law Rev* 321; Kemal Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study* (Ekin Press 2008).

¹³ Donald P Kommers and Russell A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edn, Duke University Press 2012) 58–59; Monika Polzin, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law' (2016) 14(2) *Int'l J Const'l L* 411.

¹⁴ Compare with Walter F Murphy, 'An Ordering of Constitutional Values' (1980) 53 *Southern California Law Rev* 703.

¹⁵ BVerfGE 1, 14 (1951), 32. See Donald P Kommers, 'German Constitutionalism: A Protegomenon' (1991) 40 *Emory Law Journal* 837, 852.

¹⁶ BVerfGE 30, 1 (1970), 19–20.

A constitutional provision must not be interpreted in isolation from its wording alone. Rather, all constitutional provisions must be interpreted in such a way that they are compatible with the elementary principles of the Basic Law and its system of values ... When interpreting Article 10.2 sentence 2 of the Basic Law, the context of the constitution, in particular fundamental decisions of the Basic Law and general constitutional principles, must be taken into account.¹⁷

When it comes to interpretation, a preliminary issue is how the unamendable principles ought to be interpreted and what the standard of their protection should be. On this point, the Court adopted a high standard for violating the unamendable provision – that of fundamental abandonment, notwithstanding its prohibition on even ‘affecting’ the protected principles:

Article 79.3 of the Basic Law as a barrier for the legislature amending the constitution has the purpose of preventing the existing constitutional order from being eliminated in its substance, in its foundations, on the formal-legalistic path of a constitution-amending law and to the subsequent legalization of a totalitarian regime can be abused. The provision therefore prohibits a fundamental abandonment of the principles mentioned there. Principles are not ‘affected’ ‘as principles’ from the outset if they are generally taken into account and they are only modified for a special situation according to their nature for evidently appropriate reasons.¹⁸

So, according to the majority, Article 79(3) should be narrowly and strictly interpreted. Of course, the circumstances under which human dignity can be violated are crucial for any determination of whether the unamendable principles have been affected.

In this controversial split decision, three minority judges declared the amendment unconstitutional for violating Article 79(3); however, the majority opinion upheld the amendment as constitutional, notwithstanding the claim that it violated Article 79(3), because it did not fundamentally abandon the unamendable principles of the Basic Law, such as human dignity, the separation of powers, and the rule of law. The narrow interpretation of the unamendable principles allowed the amendment to stand.

In the 2004 *Electronic Eavesdropping* case,¹⁹ the Federal Constitutional Court held that an amendment permitting eavesdropping in homes does not fundamentally abandon human dignity and, therefore, accords with Article 79(3). In this case, by a majority of six-to-two, the Constitutional Court upheld the challenged constitutional provision, Article 13(3), which was the constitutional basis for the eavesdropping laws. The main issue was whether the amendment of Article 13(3), restricting the inviolability of the home, comported with the standards of Article 79(3) of the Basic Law that protects the principle according to which ‘human dignity is inviolable’. As Nicolas Nohlen explains, the Court – perhaps surprisingly – did not prohibit electronic eavesdropping measures as such but, rather, read down the new article to allow legislators only to enact laws that are compatible with human dignity. Not every electronic eavesdropping operation inside people’s homes, it held, is automatically an interference with the core intimate area of privacy – which is closely connected to human dignity. Conversations regarding crimes that were committed or about to be committed, would not be

¹⁷ *ibid* para C-I, 1.b. Online version of the judgment is available at <<https://www.servat.unibe.ch/dfr/bv030001.html>> accessed 29 March 2023.

¹⁸ *ibid* para C-I, 2. a.

¹⁹ BVerfGE 109, 279 (2004).

included within the absolute protection of intimacy and, thus, recordings of such conversations would not violate human dignity.²⁰

Importantly, Nohlen remarks, to reach this conclusion, the Constitutional Court ‘interpreted the new provision “in a manner consistent with the Basic Law’s fundamental principles and its systems of values” (verfassungskonforme Auslegung).’²¹ As in the *Klass* case, the Court applied this interpretive approach based on fundamental principles and values of the Constitution not only to ordinary legislation but also to formal constitutional amendments. The approach accords with the notion of the constitution as a ‘structural unity’ in which all constitutional clauses are regarded as inter-related and not read in isolation.²² This is a holistic interpretation, and as we shall see, it is not unique to Germany.

Another notable case study is Brazil, where judicial review of constitutional amendments is an existing practice.²³ This judicial exercise is based on an unamendable provision – the *clausulas petreae*, defined in Article 60.4 of the Constitution as follows: ‘No proposal of amendment shall be considered which is aimed at abolishing the federative form of the State; the direct, secret, universal and periodic vote; the separation of the Government Powers; individual rights and guarantees’. When a constitutional amendment conflicts with the principles protected by the unamendable provision, the Federal Supreme Court – as ‘guardian of the constitution’ – can declare the amendment unconstitutional and invalidate it.²⁴

Notwithstanding the wide scope of the unamendable provision in the Brazilian Constitution, Jairo Lima has demonstrated how, in fact, the provision is not a strict limitation on the amending power because the Federal Supreme Court has taken a narrow interpretation of the protected principles and established that the provision does not prevent ‘any modification of the constitutional text but only those that imply effective violation of its essential core’.²⁵ Thus, notwithstanding its extraordinary power (and perhaps due to that power), the Court exerts a degree of self-restraint as it protects the enshrined principles only against the violation of their essential core. It thereby provides a relatively wide margin of discretion to the amending

²⁰ Nicolas Nohlen, ‘Germany: The Electronic Eavesdropping Case’ (2005) 3(4) Int’l J Const’l L 680, 682–683.

²¹ *ibid* 683.

²² *ibid* 684.

²³ See Conrado H Mendes, ‘Judicial Review of Constitutional Amendments in the Brazilian Supreme Court’ (2005) 17 Florida J Int’l L 449; Yaniv Roznai & Leticia R C Kreuz, ‘Conventionality Control and Amendment 95/2016 – A Brazilian Case of Unconstitutional Constitutional Amendment’ (2018) 5(2) Revista de Investigaciones Constitucionales 35; Valentina Rita Scotti, ‘Constitutional Amendments and Constitutional Core Values: the Brazilian Case in a Comparative Perspective’ (2018) 5(3) Revista de Investigações Constitucionais 59, 66–71. For a list of more than 70 cases of judicial review of constitutional amendments in Brazil from 1988 to 2018, see Pedro H A Riccetto, ‘Striking Down Constitutional Amendments: When Do Courts Enhance Democracy in Latin America’ (PhD thesis, University of Sao Paulo 2020) 159–160, <https://www.teses.usp.br/teses/disponiveis/2/2134/tde-22032021-173923/publico/9592918_Tese_Parcial.pdf> accessed 29 March 2023.

²⁴ *Supremo Tribunal Federal (STF) ADIMC 466/91 DF* (3 April 1991); *Supremo Tribunal Federal (STF) ADIN 939-7 DF* (15 December 1993).

²⁵ *Supremo Tribunal Federal (STF) ADI 2395* (9 May 2007) (Justice Gilmar Mendes); cited in Jairo Lima, ‘How Unamendable is the Brazilian Constitution? Lessons from the STF Judicial Review of Constitutional Amendments’ (unpublished, copy with authors).

authorities to change even the content of the principles protected by the unamendable provision, as long as their minimal essence is preserved.²⁶

Consider the following two cases. In 2005, the Federal Supreme Court considered the constitutionality of an amendment that created the National Council of Justice.²⁷ This amendment created an institution to govern and monitor the national judiciary, composed of members from various judicial institutions as well as ordinary citizens. The Court held that this amendment was not constitutionally suspect. It reasoned that the amendment did not violate the unamendable principle of separation of powers because the council has only administrative, financial, and disciplinary functions and does not have the power to interfere in judicial decisions.

In a 2020 case, the Federal Supreme Court faced a challenge to a constitutional amendment from 2003 that limited the salary of state judges to an amount lower than that of federal judges.²⁸ In its decision, the Court held that this amendment violated the unamendable fundamental right to equality when it created an unreasonable distinction between state and federal judges. However, instead of invalidating the amendment, the Court read down the amended constitutional provision as ‘conforming to the Constitution’ – that is, as if it were not discriminatory, in order to exclude the different salaries. In other words, although the judges accepted the claim of unconstitutionality, the constitutional amendment was actually upheld but was given different meaning through interpretation. The judges were able to do so because there were some sub-constitutional acts challenged in the same case. These acts were struck down and the amendment was interpreted according to the Constitution and its fundamental principles.

Finally, consider the experience of Romania. The Romanian Constitution defines the country, in Art. 1(1) as ‘a national state, sovereign and independent, unitary and indivisible’.²⁹ This definition is declared unamendable in Article 152, according to which:

- (1) The provisions of this Constitution with regard to the national, independent, unitary and indivisible character of the Romanian State, the republican form of government, territorial integrity, independence of justice, political pluralism and official language shall not be subject to revision.
- (2) Likewise, no revision shall be made if it results in the suppression of the citizens’ fundamental rights and freedoms, or of the safeguards thereof.

This unamendable provision is not merely declarative but legally enforceable as the Constitution empowers the Constitutional Court to adjudicate initiatives for revising the Constitution before an amendment’s adoption.³⁰ In 2014, for instance, the Constitutional Court struck down

²⁶ Lima (n 25).

²⁷ *Supremo Tribunal Federal (STF) ADI 3367* (13 April 2005).

²⁸ *Supremo Tribunal Federal (STF) ADI 3854* (22 February 2021).

²⁹ See Silvia Suteu, ‘The Multinational State That Wasn’t: The Constitutional Definition of Romania as a National State’ (2017) 11(3) *ICL Journal* 413, 415.

³⁰ Romania Constitution Nov 21 1991, art 146(a); Ion Deleanu & Emil Boc, ‘The Control of the Constitutionality of Laws in Romania’ (1995) 2 *J Const’l L Eastern & Central Europe* 119, 120, 124; Ion Deleanu, ‘Separation of Powers, Constitutional Regulation and Practice of the Constitutional Court’ (1996) 3 *J Const’l L in Eastern & Central Europe* 57, 63.

proposals to amend the Constitution in a manner that would provide administrative territorial reorganization for its purported effects on national unity.³¹

The unamendable provision, which protects the most important values defining the state, also plays a crucial role in interpreting constitutional amendments, even without invalidations. A good example is the decision on the popular initiative to amend the constitutional definition of family.³² In 2016, this initiative was brought for review before the Constitutional Court, as provided by the Constitution. The initiative aimed to amend Article 48(1) of the Romanian Constitution, according to which ‘The family is based on the freely consented marriage between spouses ...’, to replace the phrase ‘between spouses’ with the phrase ‘between a man and a woman’, so as to clarify that the right to marry excludes same-sex couples.³³ It was aimed to bar, at the constitutional level, the legal ability of persons of the same gender to get married. This blatantly suppressed the right to marry by violating Articles 26 and 48 of the Constitution, which enshrine fundamental rights to privacy and family, respectively. However, the Constitutional Court was able ‘to dodge the question’, ruling that the popular initiative infringed ‘neither the privacy nor the right to found a family’.³⁴ According to the Court, the initiative did not breach the unamendable provision, as it did not ‘eliminate’ the right to marry but ‘only’ specified its scope. The Court further held that the initiative was compatible with the understanding of ‘spouses’ when the Constitution was adopted in 1991.³⁵ The Court noted that the initiative refers only to ‘the legal institution of marriage’ (as stipulated in Article 48) and not the right to personal and family private life, which is protected by Article 26. Accordingly, the Court held that the initiative did not ‘suppress the right to marriage’, as it did not violate respect for private, intimate, and family life and, thus, was consistent with the unamendable provision.³⁶

³¹ Decizia nr 80/2014 (16 February 2014); cited in Suteu (n 4) 111.

³² Decizia nr 580/2016 (20 July 2016).

³³ Eliza Ene-Corbeanu, ‘Reflecting the Right to Privacy in the Decisions of the Constitutional Court of Romania’ (2019) 26 *Lex ET Scientia Int’l J* 124, 130.

³⁴ Simina Elena Tănăsescu & Bianca Selejan-Guțan, ‘Formal and Informal Constitutional Amendment Report on Romania’ (2018) 9 *Romanian J Comp L* 389, 428.

³⁵ Decizia nr 580/2016 (n 32) [40–43] (cited in Suteu (n 4) 111).

³⁶ Simina Elena Tănăsescu and Bianca Selejan-Guțan, ‘Developments in Romanian Constitutional Law: The Year 2016 in Review’ (ICONnect Blog, 2 December 2017) <<http://www.iconnectblog.com/developments-in-romanian-constitutional-law-the-year-2016-in-review>> accessed 29 March 2023; Ene-Corbeanu (n 33) 131–132. Compare with Marieta Safta, ‘Constitutional Court of Romania: The Constitutionality of the Citizens’ Initiative for the Revision of Article 48 (1) of the Constitution (“Family”)’ (2017) 11(2) *ICL Journal* 315 (arguing that the amendment ‘constitutes a mere indication as regards the exercise of the fundamental right to marriage, namely the specific determination of the fact that marriage is concluded between partners of different biological sex. The amendment proposed is not likely cause the disappearance, removal, deletion or cancellation of the concept of marriage. Furthermore, the safeguards of the right to marriage, as enshrined in the constitutional text of reference in its original form, remain unchanged. Therefore, the initiative for revision of the Constitution is constitutional in respect of the provisions of Article 152 of the Constitution, as it does not remove the right to marriage or the safeguards thereof and it does not bring into question any other limit on matters of revision’).

The Court, here, adopted a narrow and formalistic interpretation of the unamendable provision, as it could have provided a broader interpretation of ‘spouses’ and elaborated on the right to equality and non-discrimination, which were left out of the discussion. Hence, the initiative was deemed to be compatible with the unamendable provision. As Suteu correctly argues, this ‘highly formalistic (and partially originalist) approach to determining the scope of the eternity clause illustrates the limits of unamendability as a normative benchmark’.³⁷

In a second review by the Constitutional Court, in September 2018, the Court reiterated its earlier approach, holding that Article 48 ‘entrenches and protects the right to marriage and family relationships resulting from marriage, distinctly from the right to family life/respect and protection of family life, with a wider legal contents, provided by Article 26’. Accordingly, the new phrasing did not ‘supersede’ the fundamental right to marriage, which continues to exist, as the new phrasing conveys a ‘precision’ to its meaning, without harming the notion of family as protected in Article 26.³⁸

All told, judicial review of constitutional amendments is an increasingly common practice, though it is not a universal phenomenon.³⁹ These cases demonstrate how constitutions that include explicit unamendable provisions may impose limits on constitutional change. Yet courts often allow for the modification of protected principles by narrowly interpreting either the unamendable principles or the conflicting constitutional amendment.

But not all constitutions include an absolute ban on formal amendments. Some provide that certain principles, especially those regarded as vital for the constitution’s identity and structure, be given a special, heightened protection through a more cumbersome procedure for its amendment. We consider such constitutions in the following section.

3. TIERED UNAMENDABILITY

Rosalind Dixon and David Landau have described a constitutional structure wherein different constitutional values or provisions necessitate different procedures for change as a ‘tiered constitutional design’.⁴⁰ Such a design allows updates to the constitutional text while preserving the core – or more fundamental values – of the constitutional order by making its amendment more difficult. As Dixon and Landau put it:

The rigidity of these provisions may protect the stability of certain aspects of the constitutional order, thus preserving the value of the Constitution as a focal point and precommitment device and perhaps defending against forms of constitutional change that pose a threat to the democratic order.⁴¹

³⁷ Suteu (n 4) 111.

³⁸ Bianca Selejan-Guțan, ‘The People and the Constitution: Who Is Above: Direct Democracy Tools and Limits of Constitutional Amendment in Romania’ (2019) 10 *Romanian J Comp L* 134, 143.

³⁹ See, for example, Richard Albert, Malkhaz Nakashidze, and Tarik Olcay, ‘The Formalist Resistance to Unconstitutional Constitutional Amendments’ (2019) 70 *Hastings Law Journal* 639.

⁴⁰ Dixon and Landau (n 3) 448–449.

⁴¹ *ibid* 476.

A tiered constitutional design allows for a clever balance between constitutional rigidity and flexibility, allowing the constitution to be amended in line with changing economic, social, or political circumstances while preserving the core values of the constitutional order.⁴²

This tiered design has been, for example, repeatedly used in the constitutions of Costa Rica. The Constitution of 1847 stated in Article 187 that ‘the whole of the Charter cannot be repealed, except when the Republic is been reorganized, and it is found that the general laws of the nation require an absolute reform’, thereby making a distinction between a partial reform and a total replacement. Similarly, the Constitutions of 1859 (Article 141), 1869 (Article 148), 1871 (Article 135), and 1949 (Article 196) have made a similar distinction, stating that ‘The general reform of this Constitution can be affected only by a Constituent Assembly convoked for the purpose’.

In Bolivia, the Constitution of 2009 establishes in Article 411(1) that

The total reform of the Constitution, or that which affects its fundamental premises, or 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 a referendum.

In Guatemala, the Constitutions of 1945 (Article 206) and 1956 (Article 245) have both included a second order tier of entrenchment by providing different provisions for amending certain provisions.⁴³

Very often, national constitutions drift between first-order and second-order amendment tiers. Venezuela, for example, in its Constitution of 1961, distinguished in Articles 245 and 246 between amendments and reform. The Constitution of 1999 also includes a ‘three-track design’, which distinguishes among an amendment, a reform, and a complete transformation: ‘The purpose of an amendment is to add to or modify one or more Articles of the Constitution, without altering the fundamental structure of the same’ (Article 340); ‘The purpose of constitutional reform is to effect a partial revision of this Constitution and replacement of one or more of the provisions hereof, without modifying the fundamental principles and structure of the text of the Constitution’ (Article 342). In other words, whereas an amendment involves a minimal alteration, a constitutional reform is more comprehensive and may comprise the partial revision of the Constitution and the replacement of one or more of the provisions that do not alter the core structure and principles of the constitutional text.⁴⁴ Finally, ‘The original constituent power rests with the people of Venezuela. This power may be exercised by calling a National Constituent Assembly for the purpose of transforming the State, creating a new juridical order and drawing up a new Constitution’ (Article 347). The Constitution also includes an explicit unamendable provision: ‘The government of the Bolivarian Republic of

⁴² See Yaniv Roznai, ‘Constitutions, Rigid (Entrenched)/Flexible’, in Rainer Grote, Frauke Lachenmann, and Rüdiger Wolfrum (eds), *Max Planck Encyclopaedia of Comparative Constitutional Law* (OUP 2018).

⁴³ Other Latin American constitutions also contain separate procedures for constitutional reform and replacement. See, for example, Constitution of Nicaragua (1987) arts 191–195; Constitution of Paraguay (1992) arts 289–290. See also Roznai (n 2) ch 4 (theorizing the related distinction between primary and secondary constituent power).

⁴⁴ See Supreme Court of Justice of Venezuela (Constitutional Chamber) Opinion No 53 (3 February 2009).

Venezuela and of the political organs comprising the same is, and shall always be, democratic, participatory, elective, decentralised, alternative, responsible, and pluralist, with revocable mandates' (Article 6).

At the interpretive level, courts may be called upon to determine into which constitutional tier a proposed amendment should be placed. Consider, for instance, the proposed Nineteenth Amendment to the 1978 Sri Lankan Constitution.⁴⁵ The amendment, among other things, would have limited the President of Sri Lanka's power to dissolve Parliament.⁴⁶ Before the Sri Lankan Supreme Court, the challengers argued that this new scheme would violate Article 3 of the Constitution when read together with Article 4(b).⁴⁷ Article 3 places sovereignty in the Sri Lankan people and is a so-called 'entrenched clause'. These clauses, listed in Article 82 of the Constitution, can only be amended with the approval of a two-thirds majority in Parliament and a public referendum. Article 4, which lays out the separation of powers scheme in the Constitution, is not an entrenched clause. Article 4(b) provides, 'The executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People'.⁴⁸ The Court held that a transfer of the president's powers to Parliament – proposed by the Nineteenth Amendment – would be an 'alienation of sovereignty which is inconsistent with Article 3 read together with Article 4 of the Constitution'.⁴⁹ Thus, the Court concluded that the Nineteenth Amendment must be subject to a public referendum for approval as required by Article 83.⁵⁰

In 2016, the Sri Lankan Supreme Court once again considered the constitutionality of the Nineteenth Amendment and more explicitly conferred this higher status on Article 4. Petitioners argued that the proposed amendment altered the 'basic structure' of the Constitution by 'diminishing the final discretionary authority of the President' in violation of Articles 3 and 4.⁵¹ The Court conceded that the 'Sovereign people have not chosen to entrench Article 4 ... and not all violations of Article 4 will necessarily result in a violation of Article 3'.⁵² Nonetheless, the Court held that the Nineteenth Amendment altered the exercise of the president's executive power under Article 4 such that some of its provisions 'require the approval of the People at a Referendum in terms of ... Article 83 of the Constitution'.⁵³ All told, the Court effectively gave Article 4 entrenched status or, in other words, placed it in a higher constitutional tier.

Courts may also impose additional procedural requirements on proposed constitutional amendments even though the constitution has no explicit tiering. These judicially created amendment tiers usually require the general public to approve amendments through referenda or similar mechanisms. Courts may even make explicitly unamendable provisions amendable by placing them within the new, highest tier.

⁴⁵ For an analysis of this amendment within its political context, see Mario Gomez, 'Constitutional Struggle in Sri Lanka' (2022) 50 Federal LR 174.

⁴⁶ *In Re the Nineteenth Amendment* [2002] LKSC 20, [2002] 3 SLR 85 (1 January 2002).

⁴⁷ *ibid* 94.

⁴⁸ Constitution of Sri Lanka (1978), art 4(b).

⁴⁹ *In Re the Nineteenth Amendment* (n 46) 98.

⁵⁰ *ibid* 115.

⁵¹ *In Re the Nineteenth Amendment*, SD Nos 4-19/2015 (2 May 2016) 5.

⁵² *ibid* 6.

⁵³ *ibid* 17.

In Thailand, the Constitutional Court imposed a referendum requirement on a proposed amendment despite the lack of such a requirement in the constitutional text. For the past several decades, Thailand has oscillated between military and democratic rule.⁵⁴ The 1997 Constitution was its most democratic, but it had a short shelf life – a military coup toppled the populist but democratically elected Prime Minister Thaksin Shinawatra in 2006 and imposed a new constitution in 2007.⁵⁵ The 2007 Constitution, though imposed by the military, was cast in a veneer of popular legitimacy. Authored by a Constitutional Drafting Assembly under the supervision of military elites, the draft 2007 Constitution was circulated to 20 million households and subject to public hearings, none of which had the scope to alter the original text.⁵⁶ This Constitution was then approved by 57% of voters, though the turnout was low and the referendum was carried out under oppressive conditions.⁵⁷

When democratic elections were held again in 2011, Thaksin's sister, Yingluck Shinawatra became prime minister and attempted various constitutional reforms.⁵⁸ One such reform was the creation of a new constitutional drafting council to replace the existing provision in Section 291 of the 2007 Constitution. Section 291 placed the amendment power within various political institutions. The only limit imposed by this provision was that amendments having the 'effect of changing the democratic regime of government with the King as Head of the State or changing the form of the State shall be prohibited'.⁵⁹

Nonetheless, the Thai Constitutional Court ruled that the proposal to establish a drafting council would require a referendum; alternatively, the government could amend the Constitution in piecemeal fashion under the existing amendment procedure.⁶⁰ Significantly, the Court relied on the (problematic) premise that the 2007 Constitution obtained public approval. It held, therefore, that a similarly participatory process would be required to approve the proposed constitutional drafting council. Through this interpretation, the Court recognised implicitly that constitutional replacement should be placed in a higher tier than mere constitutional amendments.⁶¹

The Kenyan judiciary took an even bolder approach to the creation of new amendment tiers. In the *BBI Judgment* (2021), the High Court held that the Kenyan Constitution included a basic structure – essential features that could not be altered through ordinary amendment procedures.⁶² However, the Court ruled that these essential features could be amended if the

⁵⁴ Tom Ginsburg, 'Constitutional Afterlife: The Continuing Impact of Thailand's Postpolitical Constitution' (2009) 7 *Int'l J Const L* 83, 85–86.

⁵⁵ *ibid* 89–95.

⁵⁶ Björn Dressel, 'Thailand's Elusive Quest for a Workable Constitution, 1997-2007' (2009) 31 *Contemp Southeast Asia* 296, 30506.

⁵⁷ *ibid* 306–307.

⁵⁸ Björn Dressel and Khemthong Tonsakulrungruang, 'Coloured Judgments? The Work of the Thai Constitutional Court, 1998-2016' (2019) 49 *Journal of Contemporary Asia* 1, 6.

⁵⁹ Thailand Constitution of 2007, s 291.

⁶⁰ Constitutional Court Ruling No. 18-22/2555 (13 July 2012) 21–23 (Thailand).

⁶¹ Khemthong Tonsakulrungruang, 'Thailand's Unamendability: Politics of Two Democracies' in Rehan Abeyratne and Ngoc Son Bui (eds), *The Law and Politics of Unconstitutional Constitutional Amendments in Asia* (Routledge 2021).

⁶² *David Ndii v Attorney General (Petition No E282, 397, E400, E401, E416, and E426 of 2020 and 2 of 2021 (Consolidated))* [2021] KEHC 9746 (KLR) (High Court) (13 May 2021) [399].

‘primary constituent power’ (which created the Constitution) was exercised.⁶³ This would entail a four-step process – devised by the Court – involving robust public participation. This process would supersede the existing amendment procedures in Articles 256 and 257. The four steps are:

1. Civic education to provide the public with sufficient information regarding the possibility of participating in the process of establishing or amending the Constitution;
2. Public participation, in which the people share their positions on constitutional issues;
3. Deliberations in a Constituent Assembly for the formulation of constitutional ideas through representatives specially elected for establishing or amending the Constitution;
4. A referendum for the adoption or rejection of the Constitution or the amendments to the basic structure of the Constitution.⁶⁴

By detailing this process, the High Court did more than merely create an additional amendment tier for the Constitution’s basic structure. It enabled the people’s will to be expressed at every stage of the exercise of the primary constituent power rather than limiting public participation to a mere ‘yes’ or ‘no’ vote in a referendum. As one of us wrote elsewhere, ‘it is the manifestation of “we the people”, not simply “oui, the people.”’⁶⁵

This judgment was upheld by the Court of Appeal, but it was overturned by the Kenyan Supreme Court in 2022. A divided Supreme Court held that Kenya’s Constitution lacked a basic structure and, hence, the High Court’s heightened procedures to amend essential features were invalid.⁶⁶ The Court noted, *inter alia*, that the Kenyan Constitution sets forth amendment tiers and provides for public participation through Articles 255–257.⁶⁷ Thus, the Constitution did not require an additional, judicially created amendment tier; its design, according to the Supreme Court, already protected against abusive constitutional amendments and enabled sufficient popular involvement in the amendment process.⁶⁸

4. IMPLICIT UNAMENDABILITY

When a constitution provides for explicit unamendability, judicial review of constitutional amendments would seem a natural mechanism providing ‘legal teeth’ to the unamendable provisions.⁶⁹ But what if the constitution does not include explicit unamendable provisions? Does this mean that the constitutional amendment power is omnipotent? The fact that a constitution does not contain expressly unamendable parts does not necessarily mean that the constitutional amendment power is absolute and that all the parts of the constitution are

⁶³ *ibid* [474].

⁶⁴ *ibid* [469].

⁶⁵ Yaniv Roznai, ‘“We the People”, “Oui, the People” and the Collective Body: Perceptions of Constituent Power’ in Gary Jacobsohn and Miguel Schor (eds), *Comparative Constitutional Theory* (Edward Elgar 2018).

⁶⁶ *Attorney General v David Ndii (Petition Nos 11, 12 and 13 of 2021) (Consolidated)* [2022] KESC 8 (KLR) (Supreme Court) (31 March 2022) [360].

⁶⁷ *ibid* [192]–[200].

⁶⁸ *ibid* [202]–[203], [1803]–[1808].

⁶⁹ Barak (n 12) 333.

amendable. Constitutional courts around the world have declared that some basic features or principles of the constitution are so imperative to the constitutional order that they are beyond the amendment power even without any explicit limitations. When courts enforce explicit or implicit unamendability, they regard themselves as ‘guardians of the constitution’ and its core values.⁷⁰

Courts have referred to the unamendable parts of a constitution as the ‘basic structure’, ‘salient features’, or ‘material core’. These terms refer to essentially the same judicial doctrine. But an important distinction emerges in the judicial application of the doctrine. We distinguish between (1) courts that strike down duly enacted constitutional amendments for violating the unamendable core and (2) courts that have declared that certain constitutional features or principles are unamendable but have, thus far, refrained from striking down amendments. Courts in this latter group have used implicit unamendability to read down amendments to avoid conflicts with the unamendable features of their respective constitutions.⁷¹

(a) Implicit Unamendability as a Means to Strike Down Amendments

Judicial doctrines of implicit unamendability can be traced back to the landmark judgment *Kesavananda Bharati v State of Kerala* (1973). The Supreme Court of India held that the Indian Parliament’s power ‘to amend the constitution does not include the power to alter the basic structure, or framework of the constitution so as to change its identity’,⁷² as it is ‘a precious heritage’,⁷³ creating what has come to be known as the BSD.⁷⁴ Six years earlier, in *I.C. Golaknath v Punjab* (1967), the Supreme Court first declared that constitutional amendments could be held unconstitutional.⁷⁵ The Court, in that case, ruled that three amendments were unconstitutional for violating fundamental rights under Article 13 of the Constitution.

Parliament responded by enacting the Twenty-Fourth Amendment (1971), which effectively overruled *Golaknath* by asserting that Parliament had plenary power to amend the Constitution under Article 368 of the Constitution, including fundamental rights provisions. This case set the stage for *Kesavananda*, which, among other things, upheld the Twenty-Fourth Amendment in its entirety. Nevertheless, the Court issued two other rulings that were more significant.⁷⁶ First, it overruled *Golaknath*. Constitutional amendments, the Court ruled,

⁷⁰ Rory O’Connell, ‘Guardians of the Constitution: Unconstitutional Constitutional Norms’ (1999) 4 J Civil Liberties 48; Halmai (n 12).

⁷¹ We use a similar terminology but a different typology from Joel I Colón-Ríos, ‘A New Typology of Judicial Review of Legislation’ (2014) 3 Global Constitutionalism 143. For Colón-Ríos, strong basic structure review allows courts to invalidate constitutional amendments incompatible with the basic structure or features of the constitution, while weak basic structure review provides courts authority to invalidate constitutional amendments but provides ‘the people’, acting through a constituent assembly, the final word on the validity of any form of positive law.

⁷² *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

⁷³ *Minerva Mills v India* (1980) 3 SCC 625, 643 (opinion of Chandrachud J).

⁷⁴ Much has been written about this doctrine. See, for example, Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (OUP 2011).

⁷⁵ *I.C. Golaknath v State of Punjab* AIR 1967 SC 1643.

⁷⁶ Krishnaswamy (n 74) 26–27.

could not violate fundamental rights because Article 13 of the Constitution provided only that ordinary, legislative acts were subject to fundamental rights review. Second, the Court held that constitutional amendments could still be ultra vires if they violated the Constitution's 'basic structure'. Justice Khanna's majority opinion focused on the phrases 'this Constitution' and 'the Constitution shall stand amended' in Article 368.⁷⁷ These terms suggested the existence of a core constitutional identity that Parliament could not alter. Because sovereignty was located in the Indian people, Parliament could not destroy or replace the essence of the Constitution through amendments.⁷⁸ As Justice Khanna put it, '[A]mendment of the Constitution necessarily contemplates that the Constitution has not to be abrogated ... it is not permissible to touch the foundation or to alter the basic institutional pattern'.⁷⁹

But which foundational principles are contained within the basic structure? Chief Justice Sikri's separate opinion identified five aspects of the Constitution that were unamendable – secularism, democracy, rule of law, federalism, and the independence of the judiciary. This is a non-exhaustive list, and the Supreme Court has expanded the scope of basic structure review in 'common law' fashion on a case-by-case basis.⁸⁰

From its judicial origins in India, the BSD has migrated to several other countries.⁸¹ Bangladesh, India's neighbor to the East, was one of the early adopters. The Bangladesh Supreme Court Appellate Division⁸² first recognised the BSD in *Anwar Hossain Chowdhury v Bangladesh* (1989).⁸³ The case concerned the Eighth Amendment to the Constitution, which sought to formalise a proclamation from the previous martial law period (1982–1986). The Eighth Amendment established six additional permanent benches of the Supreme Court's High Court Division, each with exclusive jurisdiction over a designated area. This structural change had the effect of weakening the High Court Division, which was previously a unitary court based in Dhaka.⁸⁴

In *Anwar Hossain*, the Appellate Division limited the amendment power within the 1972 Bangladesh Constitution in much the same vein as *Kesavananda*. Justice Chowdhury, who wrote the main opinion, held that constitutional amendments could not be used to destroy the Constitution itself or any of its core elements. He said, '[T]he structural pillars of Parliament and Judiciary are basic and fundamental. It is inconceivable that by its amending power the Parliament can deprive itself wholly or partly of the plenary legislative power over the entire Republic'.⁸⁵ Similarly, the creation of new High Court division benches 'destroyed'

⁷⁷ *Kesavananda* (n 72) [1426].

⁷⁸ *ibid* [1433]–[1434].

⁷⁹ *ibid* [1426]; Madhav Khosla, 'Constitutional Amendment' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds) *Oxford Handbook of the Indian Constitution* (OUP 2016) 240.

⁸⁰ Roznai (n 2) 44.

⁸¹ Yaniv Roznai, 'The Migration of the Indian Basic Structure Doctrine' in Lokendra Malik (ed), *Judicial Activism in India: A Festschrift in Honour of Justice V. R. Krishna Iyer* (Universal Law Publishing 2013) 240.

⁸² The Bangladesh Supreme Court is divided between the High Court Division and Appellate Division; the latter has the power of final adjudication.

⁸³ *Anwar Hossain Chowdhury v Bangladesh* (1989) 41 DLR (AD) (special) 1.

⁸⁴ Po Jen Yap, *Courts and Democracies in Asia* (CUP 2017) 160.

⁸⁵ *Anwar Hossain* (n 83) [293].

the ‘basic structural pillar, that is [the] judiciary’.⁸⁶ The chief justice further noted that it was the province of the judiciary to hold amendments unconstitutional if they violated the basic structure. He stated, ‘Now if any law is inconsistent with the Constitution ... it is obviously only the judiciary which can make such declaration. Hence the Constitutional Scheme if followed carefully reveals that these *basic features are unamendable and unalterable*’.⁸⁷ In a concurring opinion, Justice Ahmed similarly concluded that the additional judicial benches had ‘broken the “oneness” of the High Court Division and thereby damaged [the] basic structure ... as such, it is void’.⁸⁸ Justice Ahmed expressly referred to Indian materials in his analysis, including the *Golak Nath* and *Kesavananda* judgments.⁸⁹

More recently, on the other side of the world, a version of strong-form basic structure review was adopted in Slovakia. In 2019, the Slovak Constitutional Court declared that the Slovak Constitution has an implicit material core and struck down a constitutional amendment that violated judicial independence.⁹⁰ The case concerned a 2014 constitutional amendment that required all judges and candidates for judicial office to be vetted by the National Security Authority (NSA) along with various other police and security agencies. The information gathered on judges and candidates would be submitted to the Judicial Council, which is an independent body within the judiciary. The council would then decide whether these individuals qualified for judicial service. Sitting judges would be removed from office and candidates would be disqualified if, *inter alia*, they had a history of addiction to alcohol or illicit substances, received improper gifts or payments, or were in a financial position that left them vulnerable to coercion.⁹¹ The president of the Judicial Council challenged this amendment before the Constitutional Court.

The Court held that the Slovak Constitution has a material core comprising several principles including (but not limited to) democracy, rule of law, separation of powers, and judicial independence.⁹² The Court further held that it possessed the authority to strike down unconstitutional amendments. It inferred this power from Article 124 of the Constitution, which provides, ‘The Constitutional Court is an independent judicial authority vested with the mandate to protect constitutionality’. Finally, the Court struck down the 2014 amendment on several grounds, including that (1) it would impinge on the independence of sitting judges, (2) it may permit the NSA to unduly influence judicial outcomes, and (3) by placing no limits on the vetting process, the amendment would violate the privacy of judges, judicial candidates, and their families.⁹³ Following this decision, the Parliament amended the Constitution to exclude substantive judicial review of amendments. This amendment was itself challenged, and the case is currently pending before the Constitutional Court.⁹⁴

⁸⁶ *ibid* [295].

⁸⁷ *ibid* [294] (emphasis added).

⁸⁸ *ibid* [419].

⁸⁹ *ibid* [350–368].

⁹⁰ PL ÚS 21/2014 (30 January 2019).

⁹¹ Tomáš Lalík, ‘The Slovak Constitutional Court on Unconstitutional Constitutional Amendment (PL. ÚS 21/2014)’ (2020) 16 *Eur Const L Rev* 328, 329–30.

⁹² *ibid* 333.

⁹³ *ibid* 333–334.

⁹⁴ Šimon Drugda, ‘On Collision Course with the Material Core of the Slovak Constitution: Disabling Judicial Review of Constitutional Amendment’ (Verfassungsblog, 3 December 2020)

(b) Implicit Unamendability as a Means to Read Down Amendments

In other countries, courts have invoked implicit unamendability as an interpretive tool to read down amendments but have, thus far, refrained from invalidating constitutional amendments. Consider, for instance, the experience of Pakistan.⁹⁵ In *Mahmood Khan Achakzai v Federation of Pakistan* (1997), the Supreme Court of Pakistan noted that all of Pakistan's post-independence constitutions shared the same Preamble, which was based on the Objectives Resolution adopted by the Constituent Assembly of Pakistan on 12 March 1949.⁹⁶ Therefore, the Court ruled that Parliament was limited in its amendment power and could not alter the 'salient features and basic characteristics of the Objectives Resolution'.⁹⁷ The unamendable salient features included 'federalism, parliamentary democracy and Islamic provisions including independence of judiciary'.⁹⁸

Following the imposition of military rule in 1999, General Pervez Musharraf's regime sought to enact the Seventeenth Amendment, which granted indemnity to the military for the actions they had taken since the 1999 coup, validated the laws and orders issued during the prior state of emergency, and authorized Musharraf to remain president until 2007. The amendment was challenged before the Supreme Court in *Pakistan Lawyers Forum v Federation of Pakistan* (2005).⁹⁹ In this undemocratic and coercive environment, the Court upheld the Seventeenth Amendment and abandoned the salient features doctrine. It ruled that 'no constitutional amendment could be struck down by the superior judiciary as being violative of those [salient] features'¹⁰⁰ in the Constitution and, further, that any 'remedy lay in the political and not the judicial process'.¹⁰¹

Upon the resumption of civilian democratic rule, the Court resurrected the salient features doctrine in *Munir Hussain Bhatti v Federation of Pakistan* (2011).¹⁰² The case concerned the constitutionality of the Nineteenth Amendment, which required a Parliamentary Committee to provide 'reasons to be recorded' when rejecting judicial nominees put forward by the Judicial Commission, headed by the chief justice and comprised mostly of judges. The Supreme Court did not strike down the Nineteenth Amendment but read it down by ruling that the Parliamentary Committee had no discretion to reject the appointment of judicial nominees put forward by the Judicial Commission, as that would violate judicial independence.¹⁰³ A few years later, the Supreme Court in *District Bar Association v Federation of Pakistan* affirmed

<<https://verfassungsblog.de/on-collision-course-with-the-material-core-of-the-slovak-constitution/>> (accessed 29 March 2023).

⁹⁵ See Po Jen Yap and Rehan Abeyratne, 'Judicial Self-Dealing and Unconstitutional Constitutional Amendments in South Asia' (2021) 19 Int'l J Const L 127, 143–146; Matthew J Nelson, 'Indian Basic Structure Jurisprudence in the Islamic Republic of Pakistan: Reconfiguring the Constitutional Politics of Religion' (2018) 13 Asian J Comp L 333.

⁹⁶ *Mahmood Khan Achakzai v Federation of Pakistan*, PLD 1997 SC 426.

⁹⁷ *ibid* [56] (opinion of Sajjad Ali Shah CJ).

⁹⁸ *ibid*.

⁹⁹ *Pakistan Lawyers Forum v Federation of Pakistan* PLD 2005 SC 719.

¹⁰⁰ *ibid* [57].

¹⁰¹ *ibid*.

¹⁰² *Munir Hussain Bhatti v Federation of Pakistan* PLD 2011 SC 407.

¹⁰³ Yap and Abeyratne (n 95) 143–144.

that ‘the independence of the judiciary [is] a salient feature of the Constitution’, though it, once again, upheld the amendment at issue – here the Eighteenth Amendment, which created the Parliamentary Committee and Judicial Commission.¹⁰⁴ However, the Court elaborated on what judicial independence required in the appointments process, holding that

the litmus test for the independence of Judiciary qua the appointment of the Judges appears to be that the power to initiate and the primacy or decisiveness with regard to the final outcome of the process must vest in the Chief Justices and the Members of the Judiciary.¹⁰⁵

A similar scenario has played out in Malaysia. The Federal Court – the country’s highest judicial body – had been a formalist, deferential institution from its inception in 1957 into the twenty-first century.¹⁰⁶ On several occasions, it rejected the BSD and declined to rule that the Federal Constitution of Malaysia (1957) contained any implied limitations on the amendment power.¹⁰⁷

The Federal Court began to change tack in *Semenyih Jaya v Pentadbir Tanah Daerah Hulu Langat* (2017).¹⁰⁸ The case concerned Article 121(1) of the Constitution, which had been amended in 1988. Article 121(1) originally provided, ‘The judicial power of the Federation shall be vested in a Supreme Court and such inferior courts as may be provided by federal law’.¹⁰⁹ The 1988 amendment weakened judicial independence by removing the phrase ‘The judicial power of the Federation shall be vested’ and replacing it with ‘the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law’.¹¹⁰

In *Semenyih Jaya*, the Federal Court had to determine the constitutionality of the Land Acquisition Act of 1960, which provided that two lay assessors – and not judges – would determine the amount of compensation for compulsory land acquisitions. The Federal Court held that the act was unconstitutional for requiring judges to follow the lay assessors’ determination.¹¹¹ The Court read down the 1988 amendment, stating that it had ‘the effect of undermining the judicial power of the Judiciary’ and impinged on ‘the following features of the Federal Constitution: (i) the doctrine of separation of powers and (ii) The independence of the Judiciary’.¹¹² The Court further declared, ‘the judicial power of the court resides in the Judiciary and no other’ under Article 121(1).¹¹³ It then implied that the judicial power was unamendable by citing a passage in the Indian Supreme Court’s judgment in *Kesavananda*, which stated that it was ‘not permissible for the legislature to encroach upon the judicial sphere’.¹¹⁴ The Federal Court went on to call the concepts of judicial power, judicial independence, and the separation of powers ‘critical’ and ‘sacrosanct’.¹¹⁵

¹⁰⁴ *District Bar Association v Federation of Pakistan* PLD 2015 SC 401 [104].

¹⁰⁵ *ibid*; Yap and Abeyratne (n 95) 145–146.

¹⁰⁶ Yvonne Tew, *Constitutional Statecraft in Asian Courts* (OUP 2020) 41–51.

¹⁰⁷ *ibid* 53–54.

¹⁰⁸ *Semenyih Jaya v Pentadbir Tanah Daerah Hulu Langat* [2017] 3 MLJ 561 (Federal Court).

¹⁰⁹ Constitution of Malaysia (1957), art 121(1).

¹¹⁰ *ibid* (as amended in 1988); HP Lee and Yvonne Tew, ‘The Law and Politics of Unconstitutional Constitutional Amendments in Malaysia’ in Abeyratne and Bui (n 61).

¹¹¹ *Semenyih Jaya* (n 110) [50].

¹¹² *ibid* [74].

¹¹³ *ibid* [86].

¹¹⁴ *ibid* [87].

¹¹⁵ *ibid* [90].

The Federal Court further entrenched the BSD in *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak and Others* (2018).¹¹⁶ This case concerned another 1988 constitutional amendment to Article 121. The amendment inserted a new clause, Article 121(1A), which provided that the civil courts ‘shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah [Sharia] courts’.¹¹⁷ The applicant, Indira Gandhi, and her spouse were not members of the Islamic faith when they were married. Her husband subsequently converted to Islam, along with their three children, without her knowledge. He then obtained custody orders for the children from a Syariah court, which the applicant, as a non-Muslim, could not challenge. She, therefore, approached the civil courts for relief, but this matter was arguably out of their jurisdiction, as it pertained to religious matters that, under Article 121(1A), were the sole province of the Syariah courts.¹¹⁸

The Federal Court, however, ruled in the applicant’s favor and quashed the conversion and custody orders, for civil courts had jurisdiction over all constitutional matters even if Islamic Law was involved.¹¹⁹ It made clear that judicial independence and the separation of powers constitute part of the Constitution’s basic structure and that, ‘The inherent judicial power of the civil courts under art 121(1) is inextricably intertwined with their constitutional role as a check and balance mechanism’.¹²⁰ The Court went on to read down the impugned constitutional amendment, stating ‘the amendment inserting clause 1A into Article 121 does not oust the jurisdiction of the civil courts nor does it confer judicial power on the Sharia courts’.¹²¹ And if the Malaysian Parliament were to empower the Sharia courts with judicial power, the Court made clear that such an amendment would be ‘invalid, if not downright repugnant, to the notion of judicial power inherent in the basic structure of the constitution’.¹²²

The following year, in *Alma Nudo Atenza v Public Prosecutor* (2019), the Federal Court expanded the application of the BSD.¹²³ Building on the judgments in *Semenyih Jaya* and *Indira Gandhi*, Chief Justice Richard Malanjum declared that:

while the Federal Constitution does not specifically explicate the doctrine of basic structure, what the doctrine signifies is that a parliamentary enactment is open to scrutiny not only for clear-cut violation of the [Constitution] but also for violation of the doctrine or principles that constitute the constitutional foundations.¹²⁴

It is worth stressing that the Federal Court, to date, has not invalidated a single constitutional amendment. It has used the BSD, instead, as an interpretive tool to read down amendments that undermined the judiciary. In the process, the Court has insulated judicial power from political or legislative interference. The doctrine is, therefore, not fully entrenched, and its

¹¹⁶ *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak* [2018] 1 MLJ 545 (Federal Court).

¹¹⁷ Constitution of Malaysia (1957), art 121A; Tew (n 106) 63.

¹¹⁸ Lee and Tew (n 110).

¹¹⁹ *ibid.*

¹²⁰ *Indira Gandhi* (n 116) [42]; Yaniv Roznai, ‘Constitutional Amendability and Unamendability in South-East Asia’ (2019) J Comp L 188.

¹²¹ *Indira Gandhi* (n 116) [92].

¹²² *ibid.*

¹²³ *Alma Nudo Atenza v Public Prosecutor* [2019] 4 MLJ 1 (Federal Court).

¹²⁴ *ibid* [73].

future applicability in the Malaysian context is uncertain. To wit, in *Maria Chin Abdullah v Director-General of Immigration* (2021), a divided Federal Court declined to apply the BSD to a case involving judicial power.¹²⁵ The applicant, Maria Chin, was subject to a travel ban and prevented from leaving Malaysia. The ban, according to Malaysia's Immigration Act, could not be subject to judicial review. The applicant challenged the constitutionality of this provision on grounds, inter alia, that it violated principles of judicial power and the separation of powers that the Federal Court had deemed part of the basic structure in *Semenyih Jaya* and *Indira Gandhi*.¹²⁶

The Federal Court struck down the travel ban on administrative law grounds, but ruled 4–3 against the applicant on the constitutional issue. One justice in the majority, Abdul Rahman Sebli, expressed deep skepticism of the Court's past judgments on the BSD. He said their references to the doctrine were 'at best *obiter dicta*' and that '*Semenyih Jaya*, *Indira Gandhi*, and *Alma Nudo* cannot be read ... as deciding that Parliament has no power to amend the Federal Constitution'.¹²⁷ While this judgment may not doom the BSD in Malaysia, it suggests that the doctrine will, at most, be deployed as an interpretive aid to read down constitutional amendments rather than a cudgel to strike down amendments in the vein of India, Bangladesh, or Slovakia.

Finally, Israel presents another interesting case. Israel has no rigid constitution and a fortiori no explicit unamendable provisions. There are numerous Basic Laws that function as constitutional documents, superior to ordinary legislation (although enacted through precisely the same process) and enforced by strong judicial review.¹²⁸ But these Basic Laws lack any eternity or substantive restrictions on the formal amendment power. Moreover, there are generally no procedural or temporal limits on the Knesset's constituent power, and, with some very minor exceptions, Basic Laws can be enacted and amended through a simple majority, even in one day.¹²⁹ Does that mean that in exercising its constituent power, the Knesset is omnipotent? Not necessarily.

For many years, the Israel Supreme Court has stated that there are basic constitutional principles, mainly the Jewish and Democratic character of the state, that might limit even the Knesset's constituent power.¹³⁰ But such judicial statements were always voiced with due precaution, as *obiter dicta* and, thus, as non-binding. Until recently, there was no precedent regarding the limits to the Knesset's constituent authority, and a fortiori no Basic Law was

¹²⁵ *Maria Chin Abdullah v Director-General of Immigration* [2021] 1 MLJ 750 (Federal Court).

¹²⁶ Lee and Tew (n 110).

¹²⁷ *Maria Chin* (n 125) [165], [167].

¹²⁸ See Rivka Weill, 'Hybrid Constitutionalism: The Israeli Case for Judicial Review and Why We Should Care' (2012) 30 Berkeley J Int'l L 349.

¹²⁹ Suzie Navot, 'Israel' in Dawn Oliver and Carlo Fusaro (eds), *How Constitutions Change: A Comparative Study* (Hart 2011) 191.

¹³⁰ See, for elaboration, Suzie Navot and Yaniv Roznai, 'From Supra-Constitutional Principles to the Misuse of Constituent Power in Israel' (2019) 21(3) Eur J Law Reform 403; Mazen Masri, 'Unamendability in Israel – A Critical Perspective' in Richard Albert and Bertil E Oder (eds), *An Unamendable Constitution? Unamendability in Constitutional Democracies* (Springer 2018) 169; Sharon Weintal, 'The Challenge of Reconciling Constitutional Eternity Clauses with Popular Sovereignty: Toward Three-Track Democracy in Israel as a Universal Holistic Constitutional System and Theory' (2011) 44(3) Israel L Rev 449.

ever invalidated for violating basic constitutional values. However, the question received an interesting treatment in the dramatic judgment on the 'Basic Law: Israel as the Nation State of the Jewish People' (2018). This Basic Law was meant to be another 'chapter' in the Israeli Constitution dealing with the nation's identity. It establishes that Israel is the 'national home of the Jewish people', and deals with state symbols such as the flag and national anthem, the official language, national holidays, the Sabbath, and Jerusalem as the capital, etc.¹³¹

After the enactment of this Basic Law, 15 petitions were filed to the High Court of Justice (HCJ) asking that the 'Basic Law: Israel as the Nation State of the Jewish People' be declared null. The petitions focused on several arguments. Because the Basic Law mentions neither the democratic character of the state nor the principle of equality, it alienates the non-Jewish minority in the state and shifts the balance in the 'Jewish and Democratic' character of the state toward the former. Moreover, the provisions regarding the 'exclusive' right to self-determination for the Jewish people (Article 2), the lowered status of the Arabic language from an official language to 'a special status', and the provision according to which 'The state views the development of Jewish settlement as a national value and will act to encourage and promote its establishment and consolidation' (Article 7) are allegedly discriminatory towards non-Jews. The challenges against the 'constitutionality' of the Basic Law brought to the fore whether the HCJ possess the power to review Basic Laws, which have constitutional status.

On 8 July 2021, an 11-judge panel rejected the petitions.¹³² They issued a monumental 201-page decision, including separate opinions from each of the ten judges in the majority. It also includes the single minority opinion of Justice Kar'a, the only Arab judge in the Court and the only judge who thought that several of the Basic Law's provisions should be invalidated for undermining the core democratic identity of the state and shaking the foundations of its constitutional structure.

The main opinion of the majority was written by President Hayut, who stated that there was no interference with the other Basic Laws. But there is also no clear statement or decision as to whether the Court is empowered to repeal or invalidate a Basic Law. The Court, in other words, decided not to decide. As President Hayut wrote:

I do believe that in principle, the question of the adoption of a comprehensive doctrine to examine the constitutionality of amendments to the Constitution, should be decided upon the completion of the enterprise of the basic laws into a complete constitution. It is clear, therefore, that the same doctrines in comparative law which I have discussed above cannot be applied as such.¹³³

Consistent with her approach in earlier cases, she felt it was not the time to adopt a comprehensive doctrine regarding the constitutionality of constitutional amendments, because the constitution-making process was still ongoing.

Nevertheless, even if the Court decided not to rule on the issue of its power to strike down a Basic Law, the ruling clearly states that the Knesset is not 'omnipotent' in legislating or amending Basic Laws. As President Hayut made clear, 'However, this does not necessarily mean that in the absence of such a comprehensive doctrine, the powers of the Constituent

¹³¹ For an English translation of the full text of the Basic Law, see here: <<https://m.knesset.gov.il/EN/activity/documents/BasicLawsPDF/BasicLawNationState.pdf>> (accessed 29 March 2023).

¹³² HCJ 5555/18 *Hasson v the Knesset* (8 July 2021).

¹³³ *ibid* [15] (President Hayut).

Assembly in Israel are unlimited'.¹³⁴ The Court declared that the constituent power of the Knesset is limited in the sense that 'The Knesset cannot deny in a Basic Law the very existence of Israel as a Jewish and democratic state'.¹³⁵ Accordingly, it is beyond the constituent power of the Knesset to deny the basic characteristics of the State of Israel as a Jewish and democratic state, even by Basic Laws. And for this matter, it was irrelevant for President Hayut and the Court that the constitution-making process is still on-going:

Indeed, our constitutional structure is incomplete and it is quite possible that floors and branches will be added along the way, but these two pillars – the Jewish pillar and the democratic pillar – have long been placed in it. Denial of any of them leads to the collapse of the entire structure.¹³⁶

Thus, following this decision, the idea of a limited constituent power, which has been mentioned in several decisions over the years, is now clearly anchored. The Knesset is bound only by a minimal limitation that prohibits it to change Israel's core character as 'Jewish and Democratic'.

But most importantly for our purposes, the majority ruled that there was no need to decide upon the power of the court to invalidate Basic Laws, because, as President Hayut noted:

Even if I assume for the purpose of this case that the court is empowered to judicially review the content of Basic Laws, the Basic Law: the Nation State does not negate the Jewish and democratic characteristics of the state in a manner that justifies interference within its content.¹³⁷

The Court solved the constitutional difficulties through interpretation.

The Court interpreted the 'problematic' provisions of the Basic Law narrowly, as compatible with the principles of democracy and equality. It read down the amendment while opening the option for strong judicial review of Basic Laws. According to the Court, the Basic Law does not undermine the democratic nature of Israel because all the principles that are missing from the Basic Law (such as the principle of equality and the idea of a democratic state) exist anyway in the Israeli legal system, as well as in other Basic Laws, and are, therefore, binding. The Court stated, for example, that the impugned Basic Law does not negate the character of the State of Israel as a democratic state, it does not give priority to the Jewish identity of Israel over the principle of democracy, it does not detract from or limit the status of equality in the legal system, and it does not deny personal rights to those who belong to minority groups. Those conclusions were reached following a process that the Court described as an 'enabling interpretation' – and what we described in the German case as *verfassungskonforme Auslegung*, as well as a presumption of constitutional harmony. As this Basic Law is only one chapter in the Israeli constitutional project, it ought to be read together with the other Basic Laws, and especially with 'Basic Law: Human Dignity and Liberty', which protects Israel's democratic identity and – due to the Court's jurisprudence – also the right to equality (which is not enshrined in the text).

Accordingly, the Court assumes that the Knesset intended to protect equality among all citizens of the state (even if the minority is not mentioned) and that the Knesset intended to

¹³⁴ *ibid.*

¹³⁵ *ibid* [16].

¹³⁶ *ibid* [18].

¹³⁷ *ibid* [35].

preserve the democratic values of the state (even if the term ‘Jewish and democratic state’ is not mentioned). It is this ‘basic principles interpretation’ that allows the Court to refrain from intervening in the provisions to reconcile ‘Basic Law: The Nation State’ with Israel’s democratic values and to leave undecided the challenging question of its own authority to invalidate Basic Laws that violate the core values of Jewish and democratic statehood.

According to Rivka Weill, this interpretive move has crucial consequences. This, she writes:

marked the first time that the Court applied this interpretation method to Basic Laws. Previously, it had only been applied to ordinary legislation, ensuring that it aligns with the Basic Laws, which are superior. However, now it has been applied to Basic Laws, where no hierarchy sets one Basic Law as superior to any other. ... With this understanding in mind, we can appreciate the true revolutionary nature of the *Hasson* decision. In many ways, it is more radical than voiding *Basic Law: Nation State*. The Court had officially rejected the petitions, including their request that the Court rewrite this Basic Law and read democracy and the right for equality into it. However, by exercising constitutional avoidance, the Court has in fact done just that. It didn’t wait for the Knesset to react. Rather, the Court remedied *Basic Law: Nation State* on its own. Now, because of the *Hasson* ruling, *Basic Law: Nation State* doesn’t need to just be read in tandem with other Basic Laws which uphold democracy and the right for equality. Rather, the principle of democracy and the right for equality are now an intrinsic part of *Basic Law: Nation State* itself. Any other approach would undermine the Basic Law’s validity and would leave it vulnerable to challenges in Court on grounds of unconstitutionality.¹³⁸

So, in this case, basic principles interpretation appears similar to adopting the UCA doctrine. There was no real need to decide upon the power for judicial review of Basic Laws over a Basic Law that does not deny the basic principles of the state. And yet, the Court was willing to anchor the idea of a limited constituent power. As Judge Hendel wrote: ‘the opinion of my colleague, President A. Hayut, is well constructed. All that was required to be decided was decided, and what was not required was not decided’.¹³⁹ And, indeed, it corresponds with the general notion that before the invalidation of amendments, ‘every interpretive effort must be made to reconcile amendments with protected rights and basic constitutional principles’.¹⁴⁰

5. CONCLUSION

Constitutional unamendability initially seems like a mechanism that creates a complete, almost hermetic, protection of certain principles against constitutional change. However, a closer look reveals that unamendability and stagnation are far from synonymous. Unamendability, whether in its explicit or implicit form, and when judicially enforced by courts, still allows for formal constitutional change, even of unamendable principles. How is that possible? Here, judicial interpretation comes into play.

Basic structure interpretation acts on at least three different levels. At the first level, courts must interpret the protected values and principles such as human dignity, territorial integrity,

¹³⁸ Rivka Weill, ‘A Covert Constitutional Revolution? Is Basic Law: Israel – the Nation-State of the Jewish People Democratic?’ (Balkinization, 19 December 2021) <<https://balkin.blogspot.com/2021/12/a-covert-constitutional-revolution-is.html>> (accessed 29 March 2023).

¹³⁹ *Hasson* (n 132), at the opening of Justice Hendel’s opinion.

¹⁴⁰ Roznai (n 2) 220.

democracy, or the rule of law. These are abstract, contested principles that may have both formal and substantive aspects. And as principles, they are not amenable to binary yes-or-no interpretations but, rather, may be achieved or fulfilled to various degrees. Thus, courts are often called upon to determine which essential features are protected from amendment, either explicitly or implicitly. Part of this interpretive exercise includes defining the scope of the unamendable elements – for instance, is the entire principle unamendable or merely certain features thereof? Judicial decisions that identify these unamendable principles and interpret their scope affect the ability of other institutional actors in bringing about formal changes to the constitution. Thus, the wider the scope of unamendability, the narrower the authority of the amending bodies and vice versa. And, as the Romanian and German examples demonstrate, even when explicit unamendable provisions exist, courts often interpret the relevant principles narrowly, thereby leaving in place amendments that *prima facie* violate fundamental rights and other important constitutional principles.

At the second level, courts are asked to determine which procedures must be followed with respect to a particular amendment. This occurs in constitutions that contain multiple amendment tiers, with more stringent procedures reserved for changes to core principles, or for replacing the constitution in whole or in part. As we have seen, such tiering is usually provided for in the constitutional text. For instance, in Sri Lanka, the Supreme Court was asked to determine whether a public referendum was required to approve an amendment that touched upon an entrenched constitutional provision. But courts may also impose additional procedural requirements that are not textually grounded. In Thailand, the Constitutional Court required a referendum for a major constitutional amendment, even though no such provision existed in the 2007 Thai Constitution. The Kenyan High Court went further, holding that the BSD applied in Kenya and invoking the primary constituent power to create a heightened amendment tier for essential constitutional features. However, this judgment was overturned by the Kenyan Supreme Court, which noted that the constitutional text provided sufficient tiering and public participation in the amendment process.

At the third level, courts must interpret amendments that may conflict with unamendable parts of the constitution. In a few countries, such as India, Bangladesh, and Slovakia, courts have invalidated constitutional amendments for violating their respective constitution's basic structure or material core. An alternative, and less confrontational approach, is for courts to limit the scope or application of constitutionally problematic amendments such that they do not violate unamendable provisions or principles. As examples from Brazil, Israel, Malaysia, and Pakistan demonstrate, both with respect to explicit and implicit unamendability, constitutional amendments that conflicted with unamendable principles were interpreted narrowly to be 'in accordance with' or 'conforming to' the constitution and its basic values. This interpretative move of reading down amendments allowed courts in these countries to eliminate or mitigate constitutional conflicts without recourse to invalidation.

Thus, basic structure interpretation plays two main roles. The first is to develop a holistic, harmonious, and coherent reading of the constitution, by which the various provisions are not treated in isolation but as linked to each in a manner that creates an inner unit. Second, courts generally allow for a degree of constitutional change notwithstanding the idea that core constitutional values are protected. Judicial interpretation is, therefore, a vital safety valve mechanism to balance rigidity and flexibility.

Of course, like any legal tool, the power to interpret and *a fortiori* to invalidate constitutional amendments may be open to misuse and abuse. And great care must be taken when

courts exercise this powerful weapon, particularly when it is used for protecting their own institutional interests and powers. Here, a cautious basic structure interpretation may prove crucial for maintaining due separation of powers and the legitimacy of the entire UCA doctrine. In the end, as we have seen, the power of interpretation may be just as strong as that of invalidation.