

CONSTITUTIONAL UNAMENDABILITY IN ISRAEL: REMARKS FOLLOWING PROFESSORS BAXI, HOQUE & SINGH

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I. INTRODUCTION

I am thrilled and honored that the Indian Journal of Constitutional & Administrative Law (IJCAL) has dedicated part of its volume to a symposium on “unconstitutional constitutional amendments”.¹ I am even more thrilled that three most distinguished scholars, whom I truly admire: Upendra Baxi, Ridwanul Hoque and M.P. Singh, have dedicated time and effort to review the book and reflect upon it. I am truly privileged and grateful to them. Allow me to take this opportunity to send my deepest appreciations to the editors of the IJCAL for this symposium.

Since one of the aims of the IJCAL is to be a platform for Comparative Constitutional Law studies, reflecting on Indian Constitutional law, I wanted to take this opportunity and use Baxi, Hoque and Singh’s essays as a starting point to make several remarks on whether the famous Indian ‘basic structure doctrine’ is applicable in Israeli Constitutional law. That way, I can also introduce some of the peculiarities of Israeli Constitutional law to Indian and other readers.

II. A (VERY) BRIEF INTRODUCTION TO ISRAELI CONSTITUTIONAL LAW

Israel has no one formal document known as ‘the Constitution’.² While the Declaration of the Establishment of the State of Israel of May 14, 1948 promises that a formal Constitution would be adopted

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¹ Yaniv Roznai, *Unconstitutional Constitutional Amendments – The Limits of Amendment Powers* (OUP, 2017).

² On Israeli Constitutional law, see generally, Suzie Navot, *The Constitution of Israel – A Contextual Analysis* (Hart Publishing, 2014); Gideon Sapir, *The Israeli Constitution - From Evolution to Revolution* (OUP, 2018).

by the Elected Constituent Assembly no later than October 1, 1948,³ after the establishment of the states heated debates in the Israeli Parliament (the Knesset) surrounded the question on whether to adopt a constitution as explicitly stated in the Declaration of Independence or not. With disagreements on this question, in 1950 a political compromise was reached: the constitution-drafting process would evolve in stages, in the shape of Basic Laws that, at the end of the process, would be unified to a full formal constitution.⁴ This has become to be known as the ‘Harari compromise’, named after MK Yizhar Harari who proposed this formula. In other words, instead of an Indian Style one-stage constitution-making process by a Constituent Assembly, Israeli constitution-making turned into an incremental enterprise according to which the constitution would be enacted in stages through a series of Basic Laws.⁵

Since the Harari compromise until the early 1990s, the Knesset enacted several basic laws regulating the governmental structure and institutions: the Knesset, the Israeli Lands, the President, the Government, the State Economy, The Military, Jerusalem as the Capital of Israel, the Judiciary, and the State Comptroller. There was no Bill of Rights.⁶ The legal status of these basic laws, according to the early jurisprudence of the Supreme Court, was equivalent to ordinary statutes. i.e., an ordinary law could violate and even change a basic law.⁷ The overarching principle was that of Parliamentary Supremacy: “The Knesset is sovereign and has the power to enact any law and give it content – as it pleases. It is entirely inconceivable that a duly enacted Knesset law, or any provision thereof, should for any reason be deprived of validity.”⁸

This principle has gone through a paradigm shift in the early and mid1990-s. In 1992 the Knesset enacted a partially entrenched bill of rights in the form of two Basic Laws on fundamental rights: Basic Law: Human

³ The Declaration of the Establishment of the State of Israel, Official Gazette: Number 1; Tel Aviv, 5 Iyar 5708, 14.5.1948 Page 1.

⁴ See Z. Sigal and A. S. Rehany, ‘The Promised Constitution of The Promised Land: The Israeli Constitutional Experience’ (1997) 12(2) *Denning Law Journal* 63, 67. On this debate see generally Joshua Segev, ‘Who Needs a Constitution? In Defense of the Non-Decision Constitution-Making Tactic in Israel’ (2007) 70(2) *Albany Law Review* 409.

⁵ Hanna Lerner, *Making Constitutions in Deeply Divided Societies* (CUP, 2011), 51-75.

⁶ The lack of a Bill of Rights did not prevent the Supreme Court from protecting individual rights through interpretive means. See Jeffrey M. Albert, ‘Constitutional Adjudication without a Constitution: The case of Israel’ (1969) 82 *Harvard Law Review* 1245; Amos Shapira, ‘The Status of Fundamental Individual Rights in the Absence of a Written Constitution’ (1974) 9 *Israel Law Review* (1974) 497; Baruch Bracha, ‘The Protection of Human Rights in Israel’ (1982) 12 *Israel YearBook on Human Rights* 110; Amos Shapira, ‘Judicial Review Without a Constitution: The Israeli Paradox’ (1983) 56 *Temple Law Quarterly* 405; Asher Maoz, ‘Defending Civil Liberties Without a Constitution – The Israeli Experience’ (1988) 16 *Melbourne University Law Review* 815.

⁷ See e.g. HCJ 148/73 Keniel v. The Minister of Justice [1973] IsrSC 23(1) 794; HCJ 179/82 Ressler v. The Minister of Defense [1983] IsrSC 36(4) 421. The only exception was that laws had to conform with the procedural requirements of formally entrenched provisions stipulated in the basic laws. See HCJ 98/69, Bergman v. Minister of Finance (1969) 23(I) P.D. 693. See Melville B. Nimmer, ‘The Uses of Judicial Review in Israel’s Quest for a Constitution’ (1970) 70 *Columbia Law Review* 1218

⁸ CA 228/63 Ezuz v. Azar 17(1) PD 2541, 2547 (1963). See also Batzul v. Minister of the Interior 19(1) P.D. 337, 349 (1963) See Eliahu Likhovski, ‘The Courts and the Legislative Supremacy of the Knesset’ (1968) 3 *Israel Law Review* 345.

Dignity and Liberty and Basic Law: Freedom of Occupation. These two basic laws include a limitation clause that stipulates four cumulative conditions that, only if met, allow infringement of protected rights: “There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required or by regulation enacted by virtue of express authorization in such law”.⁹ Accordingly it prevents the legislature from enacting certain laws.¹⁰

The significance of these two Basic Laws was manifested in a speech Justice Aharon Barak of the Israeli Supreme Court delivered on May 18, 1992, in which he declared that “recently a revolution has occurred in Israel. I am speaking of a constitutional revolution, in which the Knesset, as the constitutive branch, enacted Basic Law: Human Dignity and Freedom, and Basic Law: Freedom of Occupation. By virtue of this basic legislation, human rights in Israel have become legal norms of preferred constitutional status much like the situation in the United States, Canada and many other countries. ... the revolution is not one of content so much as of force. With the enactment of the Basic Laws, these fundamental rights ... bind the Knesset itself. Above the Knesset as the legislative branch stands the Knesset as constitutive branch, and above the ordinary law of the Knesset stand the two Basic Laws.”¹¹

This ‘constitutional revolution’ was formally accepted in courts in 1995, with the famous *United Mizrahi Bank Case*, in which the Israeli Supreme Court ruled that the Knesset holds constituent authority; the basic laws thus carry a normative constitutional status superior to ordinary legislation; the Knesset holds only limited legislative powers and is only authorized to enact statutes that befit the provisions of the basic laws; and the court possesses the authority to conduct judicial review of legislation and invalidate laws that contradict the substantive provisions established in the basic laws.¹² With this judicial decision, Israel has turned to a state governed by constitutional supremacy rather than parliamentary supremacy.¹³

⁹See Sec. 8 of the Basic Law: Human Dignity and Liberty 1391 LSI 150 (1992) (Isr.); See also Sec. 4 of the Basic Law: Freedom of Occupation 1454 LSI 90 (1994) (Isr.).

¹⁰ Ariel L. Bendor, ‘Is it a Duck? On the Israeli Written Constitution’ (2005) *Yale Israel Journal* 53, 56.

¹¹ Aharon Barak, ‘A Constitutional Revolution: Israel’s Basic Laws’ (1993) 4 *Constitutional Forum* 83, 84.

¹² CA 6821/93 *United Mizrahi Bank Ltd. v. Migdal Cooperative Village*, 49(4) P.D. 221 (1995). See Suzie Navot, ‘Mizrahi Bank Case (Isr)’, *Max Planck Encyclopedia of Comparative Constitutional Law*, <http://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e597?rskey=9d8OP8andresult=32andprd=MPECCOL>.

¹³ See Daphne Barak-Erez, ‘From an Unwritten to a Written Constitution: The Israeli challenge in American Perspective’ (1994) 26 *Columbia Human Rights Law Review* 309; See Rivka Weill, ‘Hybrid Constitutionalism: The Israeli Case for Judicial Review and Why We Should Care’ (2012) 30 *Berkeley Journal of International Law* 349.

The question remains, whether the Knesset, when it enacts or amends basic laws by using its constituent authority, is limited in any way? And can the court review basic laws that carry a constitutional ranking? These are complicated issues which I cannot fully analyze here.¹⁴ I only intend to make three remarks, following the Indian experience of implied limits on the amending power using the essays of Baxi, Hoque and Singh as a reference point. The main question is, as India has been a great source of inspiration to the world with its ‘basic structure doctrine’, can the doctrine be useful for the development of Israeli constitutional law?

This question of implied limits to the Knesset’s constituent authority has recently received a great attention with the enactment of Basic Law: Israel as the Nation State of the Jewish People,¹⁵ which was accompanied by a heated political and public debate on whether the Supreme Court possesses the authority to review and even invalidate basic laws, at the backdrop of legal challenges submitted to the High Court of Justice against the new basic law.¹⁶

In the remaining sections of this article I want to reflect on three issues: whether it is appropriate for the Indian idea of ‘basic structure’ to migrate to and apply in Israel; what type of constituent authority the Knesset exercises when it enacts and amend basic laws and what if the Knesset would explicitly limit the court’s authority from reviewing basic laws on substantive grounds.

III. THE MIGRATION OF A CONSTITUTIONAL IDEA

Indian jurisprudence on the limits of amendment power is world-famous for its ‘basic structure doctrine’, as adopted in the well-known *Kesavananda Bharati v. State of Kerala* decision,¹⁷ according to which

¹⁴ For a review of the Israeli jurisprudence on this issue, see Suzie Navot and Yaniv Roznai, ‘From Supra-Constitutional Principles to the Misuse of Constituent Power in Israel’ (forthcoming 2019) *European Review of Law Reform*, <https://ssrn.com/abstract=3248187>

¹⁵ The Basic-Law: The Nation State was enacted on July 19, 2018. Opponents of the basic law claim that because it fails to mention neither the democratic character of the state nor the principle of equality, it alienates the non-Jewish minority in the state and aims to shift the balance in the “Jewish and Democratic” character of the state towards the former. Supporters of the basic law state that it is mainly declarative and does not change the existing state of affairs. See generally Simon Rabinovitch (ed.), *Defining Israel: The Jewish State, Democracy, and the Law* (Hebrew Union College Press, 2018).

¹⁶ See e.g. Revital Hovel and Noa Shpigel, ‘Israel’s Justice Minister Warns of “An Earthquake” if Top Court Kills Nation-state Law’ *Haaretz* (August 5, 2018), <https://www.haaretz.com/israel-news/.premium-justice-minister-warns-of-earthquake-if-court-kills-nation-state-law-1.6343122>

¹⁷ *Kesavananda Bharati v. State of Kerala* (1973) S.C.R. 1.

constitutional amendments cannot violate the basic structure of the constitution so as to change its identity.¹⁸

In his book review, Professor M.P. Singh emphasises that the 'basic structure' has migrated to India through Heidelberg University Professor Dietrich Conrad, who delivered a lecture at Banaras Hindu University in India on implied limitations on the amendment power which formed the basis for the acceptance of the doctrine in the Supreme Court of India. And from India, it migrated to many countries in Asia, South East and Far-east Asia, Africa and Central and South America.¹⁹ Indeed, the basic structure doctrine did not remain in India. It migrated to other jurisdictions and became influential in protecting the supremacy of constitutions around the world.²⁰

The famous Indian jurisprudence on the implied limits of formal amendments also caught the eye of Prof. Aharon Barak, Former President of the Israeli Supreme Court. It was reported that in 2004, when Prof. Aharon Barak was the President of the Israeli Supreme Court,²¹ he had a formal visit to India. After this visit, which Barak describes as a 'dream coming true', President Barak stated that he was "deeply impressed with the approach of the Indian Supreme Court that positioned various features of the Indian Constitution above constitutional amendments by Parliament."²²

The famous Kesavananda case was cited by President Barak in a judicial decision of 2006, concerning the relationship between basic laws and basic constitutional principles,²³ although in that case President Barak opined that there was no need to decide this question. Kesavananda was also cited by the Israeli Supreme Court in a more recent decision in which the Israeli Supreme Court issued a nullification notice to a

¹⁸ On the Basic Structure Doctrine, see e.g. Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (OUP, 2010).

¹⁹ M.P. Singh, 'Book Review – Unconstitutional Constitutional Amendments', this volume.

²⁰ Yaniv Roznai, 'The Migration of the Indian Basic Structure Doctrine' in Malik Lokendra (ed.), *Judicial Activism in India— A Festschrift in Honour of Justice V. R. Krishna Iyer* (Universal Law Publishing Co., 2012), 240; Yaniv Roznai, 'Unconstitutional Constitutional Amendments— The Migration and Success of a Constitutional Idea' (2013) 61(3) *American Journal of Comparative Law* 657.

²¹ Justice Barak retired in 2006 from the court. Since then he has been an active professor of law as the IDC Herzliya.

²² Omer Carmon, 'Aharon Barak: The Indian Approach Positions Constitutional Features Above Parliament's Constitutional Amendments' *NEWS1* (22.02.2004), <http://www.news1.co.il/Archive/001-D-40766-00.html>

²³ HCJ 6427/02 Movement for Quality Government v Knesset, 61(1) PD 619 (2005), para. 73 to President's Barak opinion. Prof. Barak also cites the Indian experience in his scholarly articles; see e.g. See Aharon Barak, 'Unconstitutional Constitutional Amendments' (2011) 44(3) *Israel Law Review* 321, fn. 27; Aharon Barak, 'On Constitutional Implications and Constitutional Structure' in David Dyzenhaus & Malcolm Thorburn (eds.), *Philosophical Foundations of Constitutional Law* (OUP, 2016), 53, fn 80.

temporary Basic Law that changed the annual budget rule to biennial one, for the fifth time in a row, by applying a doctrine of misuse of constituent power”.²⁴

Is the Indian ‘basic structure doctrine’ applicable to the Israeli constitution?

Before delving into this question, it is interesting to start earlier, with the Golaknath case.²⁵ In Golaknath, it was held that the limitation on infringing fundamental rights applies also to constitutional amendments (this was later overturned by Kesavananda). The argument was simple. Article 13 prohibited Parliament from making any law abridging fundamental rights. Because an amendment was deemed to be a ‘law’, Parliament’s power to amend the constitution could not be used to abridge fundamental rights.

In order to avoid such a decision, in Bangladesh, the 2nd Amendment Act of 1973 explicitly stated that Parliament’s duty “not [to] make any law inconsistent with any [fundamental rights] provisions” shall not apply to a constitutional amendment.²⁶

Interestingly, a similar rationale was recently applied by the Supreme Court of Papua New Guinea when deciding that Section 38(1) of the Constitution, which limits the Parliament’s power to make laws regulating or restricting fundamental rights, extends also to constitutional amendments.²⁷

Arguably, a similar limitation may exist in Israel. Basic Law: Human Dignity and Liberty explicitly states in its limitation clause (Section 8): “There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required.” Prima facie, if the Knesset is prohibited from infringing protected rights not according to the conditions stipulated in the limitation clause, this limitation may apply to the Knesset either in its ordinary

²⁴ HCJ 8260/16 Ramat Gan Academic Center of Law and Business v. Knesset (Sept. 6, 2017) (Isr.). For a review of this case, see Yaniv Roznai, ‘Constitutional Paternalism: The Israeli Supreme Court as Guardian of the Knesset’ (forthcoming) 51(3) *Verfassung und Recht in Übersee*.

²⁵ IC Golaknath v. Punjab AIR [1967] SC 1643.

²⁶ See Ridwanul Hoque, ‘Implicit Unamendability in South Asia: The Core of the Case for the Basic-structure Doctrine’, in this vol.

²⁷ Namah v. Pato [2016] PGSC 13; SC1497, <<http://www.pacii.org/pg/cases/PGSC/2016/13.html>>.

legislative heat or in its constituent assembly heat, i.e. when it enacts basic laws.²⁸ In other words, the constitutional limitation clause might also apply to basic laws enacted by the Knesset.

Nonetheless, such an approach was rejected by the Israeli Supreme Court. In the Porat case, the HCJ held the following: “The aim of the limitation clause is to limit the ordinary legislation... the limitation clause is not aimed towards the Knesset when it amends basic laws through the established constitutional procedure specially designed for that matter. Indeed, one has to distinguish between infringement or limitation of a basic right that are not derived from amending basic laws (for example, infringement by a regular law) and infringement or limitation of a basic right while amending the basic law itself. The constitutionality of the former is set by the conditions of the limitation clause. The constitutionality of the latter is conditioned in fulfilling the requirements of the procedural conditions for amendment.”²⁹

As Prof. Barak explains, the limitation clause deals with a law that seeks to infringe a protected fundamental right. It does not deal with a basic law seeking to violate a different basic law. The limitation clause is aimed to a violation of a protected right by a lower norm than a basic law. But when the violation takes place through a basic law – it cannot be invalidated because of the limitation clause because this is a violation that takes a place in a normative level equal to that of the basic laws on human rights themselves, in which case the inner limitations that are set in these basic laws do not apply.³⁰ In other words, the Knesset’s constituent authority is limited by the formal procedures for amendments and not by the substantive requirements of the limitation clause that apply only to the sub-constitutional level. However, does this mean that when the Knesset uses its constituent authority it is omnipotent or in contrast implied limits – such as the basic structure – do apply?

In 2011, five years after his retirement from the bench, Prof. Aharon Barak explored in an academic article the question of “unconstitutional constitutional amendments” in Israel, drawing from comparative

²⁸ In Israel, in general, laws are enacted through the ordinary legislative process, there is no special procedure for enacting basic laws. See generally, Suzie Navot, ‘Israel’, in Dawn Oliver and Carlo Fusaro (eds.), *How Constitutions Change – A Comparative Study* (Hart Publishing, 2011), 191.

²⁹ HCJ 1398/94 Shay Porat v The Government of Israel, PD 57(5) 913, 914 (1994).

³⁰ Aharon Barak, ‘The Constitutional Revolution - 12th Anniversary’ (2004) 1 *IDC Law Review* 3 10-11 (Hebrew). See also Avigdor Klagsbald, ‘A Contradiction to a Basic Law’ (2006) 48 *Hapraklit* 293, 307 (Hebrew.) (arguing that a basic law that contradicts another basic law is not subject to the substantive limitation clause).

experience. Prof. Barak argued that the Knesset's constituent authority is not unlimited. It is limited by supra-constitutional principles,³¹ yet these limitations are narrower than accepted in comparative constitutional law because the constitution-making process in Israel is still on-going:

“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 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. It must act within the framework of the principle-based standards upon which Israel’s Declaration of Independence and the entire constitutional project are based 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.”³²

Put it differently, it would be perplexing to adopt a ‘basic structure’ doctrine *a la* Indian style before there is a full structure of the constitution. The constitution-making process is still on-going.³³

This notion was adopted by the President of the Supreme Court, Esther Hayut in a recent judgment concerning an amendment to Basic Law: the Knesset that allows the removal from the legislature of lawmakers whose actions constitute incitement to racism or support for an armed struggle against the State of Israel. Writing the court’s opinion, President Hayut wrote in her judgment that although the amendment “seriously infringes basic rights”, “it cannot be said that it contradicts the core of state’s democratic

³¹ On these limits, see Navot and Roznai, *supra* note 14.

³² See Barak, ‘Unconstitutional Constitutional Amendments’, *supra* note 23, at 321.

³³ See Gideon Sapir, Daphna Barak-Erez, and Aharon Barak (eds.), *Israeli constitutional law in the making* (Hart Publishing, 2013).

identity”. Citing Prof. Barak, President Hayut wrote that “For now, and considering the unfinished stage in which the Israeli constitutional enterprise is at, and especially as there are no established procedures for enacting and amending basic laws, there is a great difficulty in adopting a comprehensive doctrine concerning unconstitutional constitutional amendments such as we find in comparative law. It is worthy that the doctrine to be applied in this context in the Israel law ought to be set upon the completion of the basic law enterprise towards a full constitution.”³⁴ Importantly, this is not a rejection of the idea of implied limits. It is simply that at that case, the court did not see the need to examine their applicability. As President Hayut concludes, it is better to leave the complex question regarding the applicability of the doctrine in Israeli law undecided for now.³⁵

In the recent debate on the Basic Law: The Nation State, references to the Indian Doctrine, have risen again with those advocating for the court’s ability to review basic laws rely, among others, on the Indian experience – a comparison that those objecting the court’s authority to review basic laws criticize as inappropriate.³⁶

As for myself, I agree with Prof. Barak that a comprehensive doctrine as exists in India is inapplicable in Israel. But this does not mean that the Knesset has an unlimited constituent authority and that the court should not review basic laws. Especially in the Israeli system of government, when basic laws are easily amendable, where the legislature is composed of a single chamber, with government’s dominance in the legislative process, there is a greater fear for abuse of constituent authority by the Knesset and an increasing justification for judicial review of imposed limits.³⁷ But where do we draw these limits from? This question concerns the limited nature of the Knesset’s constituent power.

IV. PRIMARY OR SECONDARY CONSTITUENT POWER?

³⁴ HCJ 10214/16 MK Yousef Jabareen v. Knesset (27 May 2018), para. 25.

³⁵ Ibid.

³⁶ Barak Kedem, ‘Aharon Barak’s Song of Praise to Indian Law’ *INN* (14 October 2018), <https://www.inn.co.il/Articles/Article.aspx/18234> (Hebrew)

³⁷ See e.g. Yaniv Roznai, ‘Limits to Basic Law’ *Jerusalem Post* (15 August 2018), <https://www.jpost.com/Opinion/Limits-to-Basic-Law-564976>

Prof. Upendra Baxi focuses his fascinating essay on the concept of constituent power.³⁸ While writing my book, I have learned a great deal from Prof. Baxi's writings, especially on the question of constituent power.³⁹ One of the book's basic themes focuses on the distinction between primary and secondary constituent power; the secondary constituent power is a legal competence holding its power in trust and is inherently limited.⁴⁰

This distinction becomes much blurred in the Israeli case, as there was no constitutional moment and no 'original' constitution-making process. Thus, the question of whether the Knesset possesses primary or secondary constituent power is a thorny one.

One approach is that of Prof. Claude Klein. Prof. Klein distinguishes between the Knesset's original and derived powers. The original constituent power was transferred from the first elected constituent assembly (the First Knesset) to the following Knessets. Therefore, the Knesset nowadays holds a triple authority: original constituent power, derived constituent power, and legislative power.⁴¹ According to Prof. Klein, the original constituent power is activated when there is a need for a new constitution for a state. That authority, in such a case, acts almost in a vacuum; and there is no authority above it within the legal order. It is sovereign. The constituent authority may express its sovereignty both concerning the form of the constitution and its content. Prof. Klein argues that the original constituent power continues to exist regarding topics on which no basic laws were enacted yet; and on topics regarding which basic laws were already enacted, the Knesset exhausted its original constituent power. And when the Knesset amends such basic laws it acts as a derived constituent power. Consequently, according to Prof. Klein, when adopting new basic laws, in contrast with amending existing basic laws, the Knesset acts as original constituent power.⁴²

³⁸ Upendra Baxi, 'A New Theory about Constituent Power?', this vol.

³⁹ See e.g. Upendra Baxi, 'Some Reflections on the Nature of Constituent Power' in Rajeev Dhavan and Alice Jacov (eds), *Indian Constitution— Trends and Issues* (N.M. Tripathi Private Ltd., 1978), 122.

⁴⁰ See also Yaniv Roznai, 'Towards A Theory of Constitutional Unamendability: On the Nature and Scope of the Constitutional Amendment Powers' (2017) 18 *Jus Politicum – Revue de Droit Politique* 5.

⁴¹ See Claude Klein, 'The Constituent Power in Israel' (1970) 2 *Mishpatim* 51 (Hebrew); Claude Klein, 'Is There a Need for an Amending Power Theory?' (1978) 13 *Israel Law Review* 203; Claude Klein, 'Basic Law: Human Dignity and Liberty' (1992) 1 *HaMishpat* 123, 126 (Hebrew).

⁴² Claude Klein, 'After the Mizrahi Bank Case – The Constituent Power as Seen by the Supreme Court' (1997) 28 *Mishpatim* 341 (Hebrew).

This approach carries interesting implications concerning the limitations that may apply on the Knesset's constituent power. When the Knesset amends basic laws, it acts as a derived constituent power and is limited not to undermine the legitimation basis the original constituent power awarded it. Yet, when it adopts new basic laws it acts as an original constituent power and therefore as sovereign.

This approach may bring about strange consequences. If the Knesset fears that due to certain limits it cannot amend a basic law, can it then enact a new basic law claiming that these are new constitutional issues? For example, instead of amending Basic Law: Human Dignity in a way that would restrict its protection for immigrants, can it enact a Basic Law: Immigration and argue that this is a new topic not covered yet by the existing basic laws and accordingly this is an exercise of an unlimited original constitution power? This, I believe, is an unwarranted situation.

My approach is different. I believe that both in enacting new basic laws and amending existing basic laws the Knesset exercises a limited secondary (or derived) constituent power. My approach is thus closer to that of Prof. Ariel Bendor.

According to Prof. Bendor, the authority of the Knesset as a constituent assembly derived directly from the first legal norm of the Israeli legal system – the declaration of independence. In adopting the Declaration of Independence, and in it the rule that a constituent assembly would be elected to write a constitution, the People's Council was acting as an original constituent assembly. The constituent assembly elected according and following to the Declaration of Independence was no longer original by nature as it was acting – and still is – by virtue of an authorization of a legal institution, and not from the direct will of the sovereign. i.e., only the People's Council of 1948, which adopted the Declaration of the Establishment of the State, held 'original constituent power'. The Knesset now holds only a 'derived constituent power', that is still a 'constituent authority' by one that is limited by the values of the Declaration of Independence, mainly, the Jewish and Democratic characters of the State.⁴³

Prof. Barak has recently developed the idea regarding the limits of the Knesset's constituent authority. According to Barak, the interpretation of the Declaration of Independence establishes the "genetic code"

⁴³ Ariel Bendor, 'The Legal Status of the Basic Laws' in Aharon Barak and Chaim Berenson (eds.) *Berenson Book* (Vol 2., Nevo Publishing, 2000), 119 (Hebrew).

of the Constituent Assembly, which is intended to establish a constitution that will realize the vision of the people and its creed. It is unauthorized to act contrary to the vision. Accordingly, even if one accepts the view that the Knesset possess constituent authority, it is unauthorized to nullify the character of the State of Israel as a Jewish and democratic state.⁴⁴

According to Prof. Bendor, and I completely agree with this point, the categorization of the Knesset as a derived constituent authority corresponds better with the on-going character of the basic laws scheme. This is not a revolutionary scheme. It does not seek to break the existing normative continuum and establish a new constitutional order. It corresponds with the existing governmental and constitutional continuity and deriving from it.⁴⁵ And I will add that the Knesset's legislative powers, even in the constitutional sphere, resembles what in other countries would be tantamount to an amendment rather than a constitution-making process. It is an existing political organ – a constituted organ, acting within an existing legal order through established procedures. And these procedures themselves are similar to those of ordinary legislation and do not necessarily represent 'higher law-making' process. Accordingly, I accept the claim that the core values of the State as Jewish and Democratic impose limits on the Knesset's power both in enacting and amending basic laws. It is the people who are the sovereign, not the Knesset, and the people have not authorized the Knesset Members to decide that Israel is no longer a democratic or a Jewish State.

Prof. Baxi asks, "what may be the relation between the idea an 'original position' and 'constituent power'?"⁴⁶ In Israel, I believe, the construction of constituent power is not akin to those of 'original position'. There is no 'veil of ignorance' and the Knesset's constituent power mingles high-level constitutional politics with every-day politics. This is because the continuing constituent assembly is the same body that decides the everyday political decisions and through a similar procedure. The identity of bodies causes the mingling of longer-range issues of constitutional planning with short-term interests of political power and raises the risk of misusing constituent authority for short political interest or

⁴⁴Aharon Barak, 'The Declaration of Independence and the Constituent Assembly' (forthcoming, 2018) 11 *Hukim – Journal on Legislation* (Hebrew).

⁴⁵ Bendor, *supra* note 43.

⁴⁶ Baxi, *supra* note 38.

convenience.⁴⁷ And this is one of the reasons why I believe judicial review of basic laws is a necessity. But what if the Knesset would now limit the court's authority to review basic laws?

V. ON THE EXCLUSION OF JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS

In his clever and interesting essay, Prof. Ridwanul Hoque reviews unamendability and justiciability of constitutional amendments in South Asia.⁴⁸ Prof. Hoque, at several points in his article, mentions the attempt by legislatures to exclude the possibility of courts to substantively review constitutional amendments. For example, in Pakistan, the 8th Amendment excluded judicial review of constitutional amendments, and in India, following Kesavananda, the 42nd Amendment emphasized for the removal of doubt that “there shall be no limitation whatever on the constituent power of Parliament to amend [...] this Constitution” and that “No amendment of this Constitution ... shall be called in question in any court on any ground.”

The Israeli Supreme Court may face a similar limitation if it would invalidate a basic law or part thereof. Already following its notice of invalidation of a basic law in the abovementioned biennial budget case,⁴⁹ the Minister of Justice proposed a draft for a new basic law - Basic Law: Legislation that, among others, restricts the court's authority from substantive judicial review of basic laws.⁵⁰ The Minister of Justice pronounced a similar reluctance regarding the ability of courts to review basic laws in an op-ed in which she claimed that the Israeli Supreme Court lacks the authority to review basic laws, and that such an idea is dangerous as it would turn the court into the constituent assembly.⁵¹ The Minister also interviewed on the radio and claimed that if the Supreme Court would invalidate Basic Law: The Nation State, this would be “an earthquake that would start a war between the branches.”⁵²

⁴⁷ See e.g. Nadav Dishon, ‘Temporary Constitutional Amendments as a Means to Undermine the Democratic Order - Insights from the Israeli Experience’ (2018) 51(3) *Israel Law Review* 389.

⁴⁸ Hoque, *supra* note 26

⁴⁹ HCJ 8260/16 (n 24).

⁵⁰ See in Yaniv Roznai, ‘Israel – A Crisis of Liberal Democracy?’, in Mark A. Graber, Sanford Levinson and Mark Tushnet (eds.), *Constitutional Democracy in Crisis?* (OUP, 2018), ch.21.

⁵¹ Ayelet Shaket, ‘The Basic Law of All of Us’ *Israel Hayom* (August 2, 2018), <https://www.israelhayom.co.il/opinion/576425> (Hebrew)

⁵² Hovel and Shpigel, *supra* note 16.

Can such a basic law that would exclude the possibility of reviewing basic law stand? Comparative constitutional law may have something to teach us about such proposed provisions.

In Hungary, in 2012, the Constitutional Court struck down some articles in the Transitional Provisions of the new Fundamental Law of 2011 on the grounds that their adoption was *ultra vires*.⁵³ In its decision, the Constitutional Court stated that “constitutional legality has not only procedural, formal and public law validity requirements, but also substantive ones. ... As appropriate, the Constitutional Court may even examine the free enforcement and the constitutionalization of the substantive requirements, guarantees and values of democratic States under the rule of law.”⁵⁴ In response, the Parliament enacted the 4th Amendment that prohibited judicial review of the Fundamental Law and constitutional amendments except on procedural grounds.⁵⁵ A challenge to the Fourth Amendment was rejected in 2013, when the constitutional Court held that it lacks the authority to review constitutional amendments on substantive grounds.⁵⁶

South Asia provides us with examples of an opposite result. In India, in 1980, the Indian Supreme Court delivered the *Minerva Mills* judgment, holding that since section 55 of the 42nd Amendment removed all limitations on Parliament’s amendment power it was beyond Parliament’s limited amendment power and therefore void: “Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power ... Parliament cannot, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one.”⁵⁷

In Pakistan, in its famous 2015 decision, the High Court ruled that Parliament’s amendment power was limited by substantive implied limitations and that the court is empowered to review amendments vis-à-vis these limits.⁵⁸ This decision can hardly be reconciled with the 8th Amendment exclusion of judicial review.

⁵³ Constitutional Court, Decision 45/2012 (XII. 29).

⁵⁴ *Id.*

⁵⁵ Art. 12 (5): ““The Constitutional Court may only review the Fundamental Law and amendments to the Fundamental Law for their conformity with the procedural requirements of the Fundamental Law pertaining to the adoption of the Fundamental Law or its amendments.”

⁵⁶ Hungarian Constitutional Court, Decision 12/2013 (V. 24).

⁵⁷ *Minerva Mills v. Union of India*, AIR 1980 SC 1789, 1798. A similar decision was delivered recently in Belize. See the decision of the Supreme Court of Belize in *British Caribbean Bank Ltd v. AG Belize* (Claim No. 597 of 2011).

⁵⁸ *District Bar Association, Rawalpindi and Others v. Federation of Pakistan and Others* (5 August 2015).

Prof. Hoque is thus correct in claiming that “to arrive at this basic-structure decision, the Court had to disapply a clear constitutional bar on judicial review of constitutional amendments.... In this case, the Court did not hold unconstitutional the clauses...but rendered them ineffective. For the Court, because of the implicit limits on parliament’s amendment power, Art. 239(5) & (6) [declaring that no amendment would be called into question in courts and that there are no limitations on parliament’s amending power – Y.R.] would not stand in the way of its power to scrutinize the legality of any amendment.”⁵⁹

The experience of South Asia teaches us that a limited secondary constituent power cannot turn itself into unlimited, and that often – notwithstanding an explicit constitutional provision excluding judicial review (enacted through a constitutional amendment by the limited amendment power) – courts would still hold that they possess such an authority, in order to guard the constitution.

With regard to the Israeli example, I opine that the idea according to which when the Knesset enacts or amends basic laws it should hold unlimited powers, immune from judicial scrutiny does not correspond with global trends imposing limits on violating basic constitutional principles and is inappropriate in the Israeli system of government. As Navot and I state elsewhere: “In Israel, where the legislature is composed of a single-chamber, when basic laws are easily amended, coupled with the dominance of the government in the legislative process, there is a greater fear for an abuse of constituent power. Judicial review of basic laws, especially in the absence of any supra-national court, seems necessary. Otherwise, the Knesset that possess two hats – the ordinary legislature and the constituent authority – would practically be omnipotent and would be able to immune any law from judicial review simply by labeling it as a ‘basic law’”.⁶⁰

⁵⁹ Hoque (n 26).

⁶⁰ Navot and Roznai (n 14).

CONCLUSION

Indian jurisprudence has brought the world a real-life experience of a question with great theoretical and practical implications – what the nature and scope of constitutional amendment power is. I am honored to have been given the opportunity to explore this question in my book. And, I am more than fortunate that the IJCAL dedicates part of this volume to my exploration. I am grateful to Zaid Deva, the Executive Editor for this opportunity and to the three mostly distinguished scholars, Prof. Baxi, Hoque and Singh, whom I greatly admire, who have taken the time and effort to reflect upon my book. I hope that their contributions together with my modest analysis of the Israeli struggle with this topic, would advance our understanding of constituent power, amending power, and the role of courts.