

THE SUBSTANTIVE VALIDITY OF CONSTITUTIONAL AMENDMENTS IN SOUTH AFRICA*

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The South African Constitution establishes procedures for amending any of its provisions and empowers the Constitutional Court to decide on the constitutionality of these amendments. Whether or not the Constitution imposes judicially enforceable substantive limits on the powers of Parliament to amend the Constitution is not clear. This article argues that the Constitution does not impose substantive limits on the power of constitutional amendment. However, the fact that the Constitution establishes different procedures for the amendment of different sections creates an implied hierarchy within the Constitution. This implied hierarchy enables the Constitutional Court to scrutinise the substance of constitutional amendments to determine compliance with the proper procedure for each amendment. Nevertheless, once the court ascertains that an amendment has been enacted by following the appropriate procedure, the amendment cannot be attacked on substantive grounds. Contrary to the views of some scholars, the Constitution does not recognise the 'basic structure' doctrine. It does not recognise extra-constitutional limits on the power of constitutional amendment. The principal purpose of the explicit authorisation of the Constitutional Court to decide on the constitutionality of amendments is to affirm its exclusive jurisdiction in relation to these amendments.

I INTRODUCTION: THE NECESSITY OF CONSTITUTIONAL AMENDMENTS

Constitutions are the most important politico-legal documents in any polity. Constitutions embody the aspirations and values of a nation. They define and regulate the relationship between the state and its citizens, and guarantee certain basic human rights. Constitutions also establish a maze of institutions and frameworks to guide the achievement of stated aspirations and goals. In that respect, constitutions are more about the future than the past, although the values and institutional choices are informed by past experiences not only of that nation but of other nations. One conventional and highly significant feature of a constitution is that it is the supreme law of the land. Constitutions regulate the creation and validity of all other rules and practices.

Constitutions are often crafted in general terms to ensure that they survive changing times and circumstances. However, nothing is static. Constitutions operate within and should respond to a dynamic socio-political context. As fundamental laws overseeing the life and evolution of a nation, constitutions are in constant need of improvement. To maintain their significance and authority, constitutions must change and grow with a nation. They must adapt to changing socio-political and economic circumstances as well as to changes in popular value systems. Indeed, constitutional drafters around the world accept change as inevitable. Change is necessary to ensure the

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continuity and betterment of an established constitutional order. As Edmund Burke aptly observed, '[a] state without the means of some change is without the means of its own conservation. Without such means it might even risk the loss of that part of the constitution which it wished the most religiously to preserve.'¹

Sometimes in constitutional law, as in life, change is not only desirable but also necessary. This inevitability of change, and the need for improvement it breeds, is traditionally reflected in the inclusion of formal amendment procedures regulating the modification, repeal or replacement of constitutional standards.² One of the most common features of constitutions around the world is the fact that they establish procedures through which they may be amended. A constitutional amendment procedure is necessary to allow constitutions to adapt to pressing needs, and to align constitutional principles and provisions with emerging philosophical thought, political and social consensus, and human experience.³ Appropriate amendment procedures are necessary to respond to imperfection; or to 'perfect imperfection'.⁴

In addition to the practical need for continuous correction to accommodate inevitable socio-political changes, amendment procedures are theoretically justifiable as they 'recognize the general power and right of the people to alter their constitution and government'.⁵ The establishment of a constitutional amendment procedure is an expression of popular sovereignty and of human fallibilities. In addition, some scholars have interpreted amendment procedures as an alternative to full-fledged (often violent)

¹ Edmund Burke *Reflections on the Revolution in France* (1790) available at http://www.constitution.org/eb/rev_fran.htm, accessed on 16 October 2012.

² On the significances of constitutional amendment procedures, see Donald S Lutz 'Toward a theory of constitutional amendment' (1994) 88 *American Political Science Review* 355; Adrian Vermeule 'Constitutional amendments and the constitutional common law' (September 2004), Public Law and Legal Theory Working Paper no 73, The Law School, University of Chicago, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=590341&download=yes, accessed on 18 April 2013.

³ In addition to formal constitutional amendment procedures, scholars have identified other mechanisms through which constitutions are amended *in fact* outside the formal procedures and without actually changing constitutional text (informal constitutional amendment procedures). Perhaps the most significant of these informal amendment procedures is the shift in constitutional understanding brought about by judicial interpretation — see Bruce Ackerman *We the People: Transformation* (1998); Louis Fisher *Constitutional Dialogues: Interpretation as Political Process* (1988); and Stephen M Griffin *American Constitutionalism: From Theory to Politics* (1996). Amendment processes are only a part of the process of constitutional evolution. This article focuses on constitutional amendments that are enacted following prescribed procedures and which modify the text of a constitution.

⁴ John Hatchard "'Perfecting imperfection": Developing procedures for amending constitutions in Commonwealth Africa' (1998) 36 *The Journal of Modern African Studies* 381 at 384. See also Stanford Levinson (ed) *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (1995).

⁵ Raymond Ku 'Consensus of the governed: The legitimacy of constitutional change' (1995) 64 *Fordham LR* 535 at 542.

revolutions.⁶ The resort to constitutional amendment represents ‘a point at which something less radical than revolution but distinctly more radical than ordinary legal evolution is called for’.⁷ Constitutional amendment provisions constitute ‘a very conservative rendering of the right of revolution’.⁸ Ironically, therefore, the continuous existence and effectiveness of a constitution requires procedures to amend it.

Constitutional theory and practice reveals that constitutions should (and indeed do) establish clear procedures for amendment to accommodate the inevitability of change and the need for adaptation.⁹ Nevertheless, the fact that constitutions need amendment procedures does not mean that constitutions should be easily amended. Constitutional theory and practice strongly supports the conclusion that constitutional amendment procedures must be more rigorous than ordinary law-making procedures. As a fundamental law setting out the basic rules of politics and social interaction, a constitution should as far as possible be insulated from the vagrancies of ordinary politics and the abusive tendencies of transient and populist majorities.¹⁰ Restrictions on the power of amending constitutions form the bedrock of modern constitutionalism. Indeed, without a special amendment procedure, a constitution would be unable to preserve its essential aspects. Easy amendment procedures ‘might become a device for undermining the very states of affairs it [a constitution] is designed to preserve’.¹¹

Often the strictness of constitutional amendment procedures is reflected in the adoption of supermajority requirements and in rules requiring the involvement of various institutions in the amendment process.¹² Sometimes constitutions require that a popular referendum should be held before an amendment can take effect. In some cases, the proposed amendment should be supported by a special majority of the voters in a referendum (and not

⁶ John R Vile ‘The amending process: Alternative to revolution’ (1983) 11 *South-eastern Political Review* 49.

⁷ Laurence H Tribe ‘A constitution we are amending: In defense of a restrained judicial role’ (1983) 97 *Harvard LR* 433 at 436.

⁸ Walter Dellinger ‘The legitimacy of constitutional change: Rethinking the amendment process’ (1983) 97 *Harvard LR* 386 at 431.

⁹ According to data compiled by the Comparative Constitutions Project, more than 80 per cent of all constitutions between 1850 and 2008 have amendment clauses. See Comparative Constitutions Project ‘Option reports: Constitutional amendment’ (22 May 2008), available at <http://www.constitutionmaking.org>, accessed on 12 April 2013. See however David A Strauss ‘The irrelevance of constitutional amendments’ (2001) 114 *Harvard LR* 1457 at 1459, who argues that constitutional amendment rules are largely irrelevant.

¹⁰ See generally Levinson op cit note 4.

¹¹ Mark Brandon ‘The “Original” Thirteenth Amendment and the limits to formal constitutional change’ in Levinson op cit note 4 at 215.

¹² For a discussion of constitutional amendment procedures in African countries, see Charles Fombad ‘Some perspectives on durability and change under modern African constitutions’ (2013) 11 *International Journal of Constitutional Law* 382. However, Fombad does not consider the existence of judicially enforceable substantive limits on the power of constitutional amendments, which is the focus of this article.

merely an absolute majority). The involvement of the people generates wide publicity of the proposed amendment, encourages popular participation, and most importantly provides an additional safeguard against partisan and regressive amendments, particularly in countries with a single dominant leader or political party.¹³ Most constitutions impose stringent procedural requirements before an amendment may be validly enacted. In some countries, certain constitutional provisions may not be amended at all. In addition, some constitutions establish judicially enforceable substantive limits on the power of constitutional amendment.¹⁴ The procedural and substantive safeguards are intended to ensure reasonable continuity and stability of the constitutional system. The hope is that the establishment of several veto players in the amendment process will prevent the enactment of partisan and regressive amendments.¹⁵

The Constitution of the Republic of South Africa, 1996 establishes institutional and procedural safeguards to preclude potentially regressive amendments. Nevertheless, the Constitution does not expressly insulate any of its provisions from amendment. Whether or not the Constitution can be interpreted to so as allow the imposition of substantive limits on the power of constitutional amendment is debatable. The purpose of this article is to explore whether the Constitution recognises implied substantive limits on Parliament's power to amend beyond the expressly established procedural and institutional safeguards.¹⁶ Part two provides the context within which this question is addressed. Part three explores the debate whether there should be substantive limits on the power to amend constitutional provi-

¹³ Hatchard op cit note 4 at 392–4. See also John Hatchard 'Undermining the constitution by constitutional means: Some thoughts on the new constitutions of Southern Africa' (1995) 28 *CILSA* 21 at 25.

¹⁴ For a comparative discussion of the judicial control of constitutional amendments, see Kemal Gözler *Judicial Review of Constitutional Amendments: A Comparative Study* (2008).

¹⁵ Bjorn Erik Rasch & Roger D Congleton 'Amendment procedures and constitutional stability' in Roger D Congleton & Birgitta Swedenborg (eds) *Democratic Constitutional Design and Public Policy: Analysis and Evidence* (2006) 319–42, who conclude that the number of veto players affects the number of constitutional amendments that will be enacted. The author is not aware of any research that systematically studies the impact of judicially enforceable substantive limits on the power of amendment on the frequency of amendments.

¹⁶ This article focuses on constitutional amendments, not the complete and systematic overhaul or revision of constitutions. The total revision of the Constitution should arguably require processes different from the amendment procedure established in the Constitution. In addition, it should be noted that the validity of provincial Constitutions as well as any amendments to them must be compatible with the final Constitution. Under ss 144 and 167(4)(f) of the South African Constitution, the Constitutional Court has exclusive jurisdiction to certify provincial constitutions and amendments to them. See, for example, *Certification of the KwaZulu-Natal Constitution* 1996 (4) SA 1098 (CC). Obviously, the overall validity of provincial constitutions depends on their compatibility with the 1996 Constitution. This article is only concerned with amendments to the 1996 Constitution.

sions. Part four discusses the process of constitutional amendment and investigates the extent to which the Constitution empowers the Constitutional Court to investigate the substantive validity of constitutional amendments. Part five concludes the article.

II CONSTITUTIONAL AMENDMENTS IN SOUTH AFRICA: THE CONTEXT

The overriding purpose of constitutional amendment procedures should be to strike a fine balance between the twin goals of continuity and change, and between excessive rigidity and flexibility. Arguably, these goals have not been met in Africa, where the manipulation of even strict constitutional amendment procedures has been commonplace.¹⁷ Perhaps the most vivid manifestation of this trend is found in amendments that abolish term limits to guarantee incumbent leaders perpetual rule.¹⁸ There have also been constitutional amendments intended to reverse unfavourable court decisions,¹⁹ and changes to electoral systems in order to favour incumbent leaders or ruling parties.²⁰

To prevent partisan, self-serving and retrogressive amendments, some constitutions establish procedures through which the substantive validity of constitutional amendments may be determined.²¹ At first glance, the idea of determining the constitutionality of a constitutional amendment may appear to be a contradiction in terms. A constitutional amendment that is passed following prescribed procedures essentially becomes part of the constitution. How then can one determine the constitutionality of a constitutional provision itself? A constitutional amendment is inconsistent with the existing constitution by definition. The whole purpose of a constitutional amend-

¹⁷ For a discussion on how incumbents have abused amendment procedures in Africa, see generally Fombad *op cit* note 12.

¹⁸ For a discussion of amendments to abolish term-limits in Africa, see Charles Fombad & Nat Inegbedion 'Presidential term limits and their impact on constitutionalism in Africa' in Charles Fombad & Christina Murray (eds) *Fostering Constitutionalism in Africa* (2010) 1.

¹⁹ Constitutional amendments have been used to reverse adverse decisions of courts in, for instance, Zimbabwe. See Zimbabwe Lawyers for Human Rights 'Amendments to the Constitution of Zimbabwe: A constant assault on democracy and constitutionalism' available at <http://www1.umn.edu/humanrts/research/constitution%20statement-sunday%20mirror.pdf>, accessed on 10 January 2011. See also Hatchard *op cit* note 4 at 385–8.

²⁰ For instance, an amendment to the Constitution of the Democratic Republic of Congo ('DRC') in January 2012 abolished second round presidential elections in cases where no single candidate obtains the support of the absolute majority of the voters in the first round. As a consequence of the amendment, a candidate who wins the first round of elections will automatically become president, even if that candidate has not obtained 50 + 1 per cent of the votes.

²¹ Some constitutions also insulate certain provisions from constitutional amendment. See for instance the Constitutions of Algeria, Namibia, and Germany. However, such an approach has been criticised as inappropriate as it tries to freeze certain politico-legal conceptions. See e.g. Fombad *op cit* note 12.

ment is to add, change or abolish one or more existing constitutional rules. Even though it is possible that a constitutional amendment may contradict an existing constitutional standard, there is generally no recognised hierarchy between constitutional provisions, unless the constitution clearly establishes different amendment rules applicable to different provisions of the constitution, as is the case in South Africa. Nevertheless, some constitutions expressly impose substantive limits on the power of constitutional amendment.²² In a few countries, such as India, the highest courts have read-in implied substantive limits on the power of constitutional amendment.²³

The overwhelming majority of written constitutions around the world establish clear procedures for amendment.²⁴ The South African Constitution is no exception. The Constitution contains provisions outlining the processes through which its provisions may be amended. In fact, the Constitution (to date) has been successfully amended on seventeen occasions since its promulgation in 1996. However, the effects of most of these amendments have largely been technical, with insignificant substantive or political implications.²⁵ So far, none of the amendments have radically altered essential aspects of the South African Constitution. But it is possible that future constitutional amendments may alter this country's Constitution fundamentally. For instance, suppose that there is a proposal for constitutional amendment which:

- seeks to subject the judgments of the Constitutional Court to approval or review by Parliament or any other political organ, or a proposal for amendment which seeks to in any other way constrain the final powers of the Constitutional Court;
- proposes to do away with, amalgamate, or significantly reduce the powers of the provinces;
- undermines the final powers of or abolishes any of the Chapter Nine Institutions;
- specifically defines marriage as 'a union between a man and a woman';
- authorises the expropriation of land without adequate compensation; or
- re-introduces the death penalty.

In simple and general terms, assume that a constitutional amendment that has been passed following appropriate procedures, has the effect of undermining the Bill of Rights or other fundamental aspects of the Constitution.

²² For instance, the Constitution of Angola establishes substantive limits on the powers of the National Assembly to amend the Constitution. It also expressly empowers the Constitutional Court to enforce such limits. See arts 227(c) and 235–237 of the 2010 Constitution of Angola.

²³ *Kesavananda Bharati v State of Kerala* [1973] AIR 1461 (SC).

²⁴ Comparative Constitutions Project op cit note 9.

²⁵ Pierre de Vos 'On changing the Constitution' available at <http://constitutionallyspeaking.co.za/on-changing-the-constitution/>, accessed on 2 November 2012 observing that 'almost all of these amendments passed so far have been mere technical amendments of no real substantive or political effect' and 'entirely uncontroversial', except perhaps the amendments in relation to floor-crossing.

Does the Constitutional Court have the power to invalidate such an amendment? Should it have the power to do so?

The possibilities of these amendments being enacted may be remote, but they are certainly not unrealistic. Intense pressure from domestic and international actors will significantly limit the enactment of potentially regressive amendments. Nevertheless, the socio-political context is less than reassuring. The National House of Traditional Leaders has proposed amendments to the Constitution to reverse the decisions of the Constitutional Court in relation to gay rights.²⁶ Senior officials of the ruling party, the African National Congress ('ANC'), have criticised the Constitutional Court as 'counter-revolutionary' and the Ministry of Justice and Constitutional Development has begun a process to review the judgments of the Constitutional Court.²⁷ There have also been proposals for amendments to restrict the powers of courts to issue appropriate remedies.²⁸ In short, the political organs have increasingly become critical of the powers and operation of the Constitutional Court. Additionally, the ANC has indicated its desire to amend some 'elements' of the Constitution to accelerate socio-economic transformation. There have been some calls to abolish or reduce the powers of the provinces.²⁹ There is also a move to establish traditional courts, which may have negative consequences for individual rights, particularly of vulnerable groups. The possible reinstatement of the death penalty has been discussed,³⁰ and the former President of the ANC Youth League, Julius Malema, has established a new political party, Economic Freedom Fighters

²⁶ See 'Report of the Constitutional Review Committee on 2011 Public Submissions dated 26 April 2012' Item 2, Submission 5, available at <http://www.pmg.org.za/files/doc/2012/comreports/120426pjjusticereport.htm>, accessed on 12 August 2013; 'South African traditional leaders oppose gay rights' 6 May 2012, *The Raw Story* available at <http://www.rawstory.com/rs/2012/05/06/south-african-traditional-leaders-oppose-gay-rights/>, accessed on 12 August 2013, where the House proposed an exclusion of 'sexual orientation' from ch 2 of the Constitution.

²⁷ See Department of Justice and Constitutional Development 'Discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African State' (February 2012) available at <http://www.info.gov.za/view/DownloadFileAction?id=161854>, accessed on 17 April 2013. For a discussion of this document see Pierre de Vos 'Assessment of judiciary represents a retreat for reactionary forces of government' (27 March 2012) available at <http://constitutionallyspeaking.co.za/2012/03/27/>, accessed on 17 April 2013.

²⁸ See the Fourteenth Constitution Amendment Bill, 2005.

²⁹ See, for instance, G E Devenish 'South Africa: ANC provincial grab would be more than a mere amendment' *Business Day*, 17 August 2009, available at <http://www.bdlive.co.za/articles/2009/08/17/anc-provincial-grab-would-be-more-than-a-mere-amendment;jsessionid=B38C7C3AD6EE190826344FAF118ACB46.present2.bdfm>, accessed on 16 April 2013.

³⁰ For instance, a survey conducted on the possible reinstatement of the death penalty in February 2013 indicated that a significant number of the respondents were in favour of reinstating the death penalty. See 'Youth want death penalty reinstated', *News24*, 22 February 2013, available at <http://www.news24.com/SouthAfrica/News/Youth-want-death-penalty-reinstated-20130222>, accessed on 30 July 2013.

(‘EFF’), with the stated objectives of expropriating land without compensation and nationalising mines, banks and other strategic sectors of the economy.³¹

These potential threats should be seen within the context of the absolute dominance of the two parliamentary houses by the ANC, which is likely to continue for the foreseeable future. The ANC currently controls 62 per cent of the seats in the National Assembly.³² The ruling party similarly dominates the National Council of Provinces. This unrivalled control of the political organs gives the ANC the potential capacity to amend most of the provisions of the Constitution, including (potentially) the Bill of the Rights. The only formal barrier to potentially regressive amendments is the existence of judicially enforceable substantive limits on the power of amendment. As such, the study of the substantive validity of constitutional amendments does not merely indulge one’s academic curiosity. It has clear practical importance for our body politic.

The South African Constitution establishes processes for the amendment of *any* of its provisions.³³ It also grants the Constitutional Court the exclusive jurisdiction ‘to decide on the constitutionality of any constitutional amendment’.³⁴ Although the origins of this jurisdiction are not clear, it may be the result of the negotiated political compromise between the apartheid government, the ANC and other competing parties and groups which preceded the settling of the Constitution.³⁵ The Constitutional Court was conceived as an institutional bulwark to uphold the political compromise that informed the contents of the Constitution and to enforce fundamental rights and other provisions of the Constitution. The establishment of strict amendment procedures and the empowering of the Constitutional Court was seen to enhance the credibility of the pact and to constrain the desires of any new government to undermine it in any significant way. Most importantly, the final Constitution was adopted after the Constitutional Court certified its compatibility with the 34 Constitutional Principles included in the interim Constitution.³⁶ The initial validity of the final Constitution depended on its

³¹ ‘Economic Freedom Fighters National Central Command press statement’ 11 July 2013, available at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71654?oid=390814&sn=Detail&pid=71616>, accessed on 31 July 2013.

³² A total of 13 political parties are represented in the National Assembly. The ANC has 249 of the 400 seats in the Assembly. The main opposition party, the Democratic Alliance, has 89 seats. The results are based on the outcome of the 2014 elections.

³³ Section 74 of the Constitution.

³⁴ Section 167(4)(d) of the Constitution.

³⁵ However, Sarkin observes that most of the 26 political parties that were involved in the drafting of the interim Constitution had ‘little apparent legitimacy and no mandate’. See Jeremy Sarkin ‘The drafting of South Africa’s Final Constitution from a human-rights perspective’ (1999) 47 *American Journal of Comparative Law* 67 at 68.

³⁶ *Certification of the Amended Text of the Constitution of the Republic of South Africa* 1997 (2) SA 97 (CC); *Certification of the Constitution of the Republic of South Africa, 1996*

compatibility with these principles. In fact, the Constitutional Court refused to certify initial drafts of the final Constitution for incompatibility with the Constitutional Principles in relation to the amendment procedure.³⁷ The drafters of the final Constitution may similarly have assumed that the validity of future constitutional amendments should also be subjected to certain extra-constitutional principles, although not necessarily the 34 Constitutional Principles.³⁸

The recognition of the power of the Constitutional Court to review the validity of constitutional amendments raises interesting questions. What are the implications of and the relationship between the two provisions, one recognising the power to amend *any* constitutional provision, and another empowering the Constitutional Court to scrutinise the constitutional validity of amendments? While it is clear that the Constitution empowers the court to control the *formal* or *procedural* validity of constitutional amendments,³⁹ what is more interesting is whether the Constitution also gives the Constitutional Court the power to scrutinise the *substantive* validity of constitutional amendments that have been enacted following prescribed procedures. Although the Constitution authorises the court to decide on the constitutionality of constitutional amendments, it does not expressly provide any substantive standards or principles on the basis of which the court may determine the validity of constitutional amendments.

The concept of controlling the substantive validity of constitutional amendments is not entirely new. In addition to the theoretical debates

1996 (4) SA 744 (CC). Section 71(1) and (2) of the interim Constitution established 34 Constitutional Principles with which the final Constitution was required to comply. The power of certifying the compatibility of the final Constitution with the Principles was conferred on the Constitutional Court.

³⁷ For a discussion of the impact of the certification process in shaping the amendment rules established in the final Constitution, see Andrew J H Henderson 'Cry the beloved Constitution? Constitutional amendment, the vanished imperative of the constitutional principles and the controlling values of section 1' (1997) 114 *SALJ* 542 at 544.

³⁸ The Constitutional Court has made it clear that the 34 Principles do not have direct relevance in determining the validity of amendments to the final Constitution. Moreover, s 71(3) of the interim Constitution implied that, once certified by the Constitutional Court, compliance or non-compliance with the 34 Principles cannot be raised in the future. Most importantly, s 242 of the final Constitution 'expressly repeals the Principles', as the Principles were contained in schedule 4 of the Interim Constitution: see Henderson *op cit* note 37 at 548, who observes that 'the Principles have vanished from the constitutional stage'. Nevertheless, the Principles may still play a role in the interpretation of the Constitution if a court accepts the Principles as '[b]ackground evidence . . . to show why particular provisions were or were not included in the Constitution'. See *S v Makwanyane & another* 1995 (3) SA 391 (CC) para 19.

³⁹ Hence, if a constitutional amendment has been passed without approval by the required super-majority, the court will invalidate such amendment. See, for instance, *Premier of Kwazulu-Natal & others v President of the Republic of South Africa & others* 1996 (1) SA 769 (CC) where the main issue was whether the proper constitutional amendment procedure was followed.

surrounding the concept, some courts have grappled with the issue in case law. Perhaps the most famous expression of the theme can be found in the jurisprudence of the Supreme Court of India. The Court of Appeal of Tanzania has also had the opportunity to expound on the position of the Tanzanian Constitution in relation to controlling the substantive validity of constitutional amendments. By a narrow seven to six majority, the Indian Supreme Court ruled that Parliament does not have the power to amend the 'basic structure' of the Indian Constitution.⁴⁰ After exhaustively considering the decisions of the Indian Supreme Court, the Tanzanian Court of Appeal unanimously rejected the basic structure doctrine and held that the Constitution of Tanzania allows Parliament to amend *any* provision of the Constitution in accordance with the required procedures.⁴¹ Interestingly, the respective constitutions do not explicitly address the power to decide on the substantive constitutionality of constitutional amendments. It is also noteworthy that the two courts arrived at diametrically opposite conclusions. In contrast to the Indian and Tanzanian Constitutions, the South African Constitution expressly empowers the Constitutional Court to decide on the constitutionality of constitutional amendments.⁴² The empowering provision has to be interpreted in the light of the fact that the South African Constitution anticipates and allows the possibility of amending *any* of its provisions.⁴³ The parts that follow discuss the debate on the desirability of imposing substantive limits on the power of constitutional amendment, and explore the issue of controlling the substantive validity of constitutional amendments in South Africa.

III SUBSTANTIVE LIMITS ON THE POWER OF CONSTITUTIONAL AMENDMENT

The rigidity or leniency of amendment procedures generally reflects the desire of constitutional drafters to ensure constitutional stability. *Ceteris paribus*, the involvement of several veto players in the amendment process reduces the number of amendments and enhances constitutional continuity.⁴⁴ Some constitutions go as far as to preclude the amendment of certain

⁴⁰ *Bharati* supra note 23 where the Indian Supreme Court held that, although there are no express provisions in the Indian Constitution limiting the power conferred on Parliament to amend the Constitution, 'the power to amend does not include the power to alter the basic structure, or framework of the Constitution so as to change its identity'. Former Indian Chief Justice Bhagwati described this judgment as the 'most remarkable instance of judicial activism, for it has gone the farthest extent in limiting the constituent power of Parliament': P N Bhagwati 'Judicial activism and public interest litigation' (1984–1985) 23 *Columbian Journal of Transnational Law* 561 at 562.

⁴¹ *The Honorable Attorney General v Reverend Christopher Mtikila*, Misc Civil Cause No 10 of 2005, Court of Appeal (June 2010). The judgment was written by Ramadhani CJ, with all the six other judges concurring.

⁴² Section 167(4)(d) of the Constitution.

⁴³ Section 74 of the Constitution.

⁴⁴ See generally Rasch & Congleton op cit note 15.

constitutional rules. Some other constitutions impose substantive limits, in addition to the procedural limits on constitutional amendment. Constitutional practice reveals that constitutional amendment procedures are typically more rigorous than ordinary law-making processes. However, the imposition of judicially enforceable substantive limits on the power of constitutional amendments is subject to heated debate. Obviously those who oppose the establishment of strict procedures of constitutional amendment will almost in turn oppose substantive limits on the power of constitutional amendment. In fact, even those who support a strict amendment procedure may not support the imposition of substantive limits on the power of amendment. And those who are opposed to substantive limits may actually support strict amendment procedures. Finally, those who oppose the power of independent constitutional adjudicators to review the constitutionality of laws will necessarily oppose the judicial enforcement of substantive limits on the power of constitutional amendment.⁴⁵

(a) *Arguments for reviewing the substantive validity of constitutional amendments*

The discussion on the existence of substantive limits on the power of constitutional amendment is particularly robust in the United States. Some writers have argued that the power to amend the US Constitution is subject to implied substantive limits, even when the procedure established in art 5 has been followed.⁴⁶ It should be noted that there is nothing in the text of the US Constitution which imposes substantive limits on constitutional amendments or authorises the Supreme Court to scrutinise the validity of constitutional amendments.⁴⁷ In fact, even the power to review the constitutionality of legislation was arguably a judicial invention.⁴⁸ Despite the lack of a clear authorisation, it has been argued that the Supreme Court has and should have the power to invalidate constitutional amendments that undermine the essential aspects of the US Constitution.⁴⁹ There are three main justifications

⁴⁵ See, for instance, Jeremy Waldron 'The core of the case against judicial review' (2005–2006) 115 *Yale LJ* 1346 arguing that judicial review runs counter to the right to democratic governance and the right to political participation which he describes as the 'right of rights'; Larry Kramer *The People Themselves: Popular Constitutionalism and Judicial Review* (2004); Mark Tushnet *Taking the Constitution Away from the Courts* (1999).

⁴⁶ Article 5 of the US Constitution establishes the procedures for constitutional amendment.

⁴⁷ However, the Constitution originally created two exceptions to the power of constitutional amendment. The first one was temporary: it forbade amendments intended to prohibit the slave trade before 1808. Slavery was legally abolished after the 1861–1865 US Civil War. The second prohibits constitutional amendments depriving a state, without its consent, of its equal representation in the Senate. This latter limit still stands.

⁴⁸ The power of US courts to review the constitutionality of statutes was first established in the famous case of *Marbury v Madison* 5 US (1 Cranch) 137 (1803).

⁴⁹ The possible existence of implied substantive limits on the power of constitutional amendment was initially discussed by Thomas Cooley 'The power to amend

for the idea of implied limits on Congress to amend constitutional provisions. Some of the arguments are based on semantics; that is, on the interpretation of the word 'amendment' in art 5 of the US Constitution. Other justifications rely on what the ideal goal of amendments ought to be, which is arguably to make constitutions better from the perspective of self-government and democratic participation. Some of the arguments are more fundamental: certain values and principles are metaphysically superior to the provisions of the Constitution itself and, by extension, the power of amendment.

Rawls contends that constitutional amendments should not undermine 'constitutional essentials' (the core political freedoms) derived from long-standing American politico-legal tradition. Amendments, he says, have two principal purposes — 'to adjust basic constitutional values to changing political and social circumstances, or to incorporate into the constitution a broader and more inclusive understanding of those values', and 'to adapt basic institutions in order to remove weaknesses [in the original document] that come to light in subsequent constitutional practice'.⁵⁰ Quite simply, in his view, the ideal purpose of constitutional amendments is to correct imperfections. As such, amendments that weaken fundamental constitutional values should be invalid. Moreover, Rawls posits that an amendment cannot include the power to bring about a 'constitutional breakdown, or revolution in the proper sense' by changing the basic foundations of the Constitution.⁵¹ Since amendments that affect constitutional essentials bring about a form of 'constitutional breakdown', they should not be allowed. Therefore, the Supreme Court should invalidate any such 'revolutionary' amendments.

Murphy similarly argues that the word 'amendment' connotes the need to improve or correct, not the desire to deconstruct, replace, or abandon the fundamental principles that underlie the Constitution. As such, '[v]alid amendments can operate only within the existing political system; they cannot . . . replace the polity'.⁵² Any change that proposes to transform the identity of the American polity into 'a political system that was totalitarian, or even so authoritarian as not to allow a wide space for human freedom, would be illegitimate, no matter how pure the procedures and widespread the public support'.⁵³ In addition to the fundamental normative principles that underlie the US Constitution, Murphy claims that the Constitution recognises principles of natural law and natural rights which provide normative

the federal constitution' (1893) 2 *Michigan LJ* 109. Cooley argues that certain limits on the amending power are so fundamental that their existence should not depend on whether they have been expressly recognised. For a robust discussion of the theoretical aspects of the constitutional amendment process in the US, see John R Vile *The Constitutional Amending Process in American Political Thought* (1993).

⁵⁰ John Rawls *Political Liberalism* (1993) 238–9.

⁵¹ *Ibid* at 239.

⁵² Walter F Murphy 'Merlin's memory: The past and future imperfect of the once and future polity' in Levinson *op cit* note 4 at 177.

⁵³ *Ibid* at 179.

limits on the amending power.⁵⁴ As such, the mere fact that an amendment is passed in accordance with the procedure established in art 5 does not and should not automatically determine its validity.

Macedo contends that fundamental liberties ‘represent basic structural commitments to institutionalising a process of free and reasonable self-government’; hence any attempt to amend these freedoms would be ‘unintelligible and revolting from the perspective of the Constitution as a whole’.⁵⁵ Freeman agrees:

‘Without freedom of thought, inquiry, and discussion, public reasoning about the constitution and democracy itself would not be possible. For the sovereign people to attempt to give up these liberties for the sake of other values is not a legitimate amendment to the constitution. It is constitutional suicide, the destruction of the most fundamental features of a democratic society. These basic liberties are then “inalienable,” to use the eighteenth century term; they cannot be bartered away. As such they are constitutionally entrenched.’⁵⁶

In summary, these scholars claim that constitutional amendments which may undermine fundamental values inherent in the US Constitution are invalid and should be struck down by the Supreme Court. Constitutions are unified instruments premised on and designed to achieve identifiable ‘fundamental’ or ‘essential’ values. Theoretically, these values precede and must outlive constitutional rules. They are extra-constitutional. As such, constitutional amendments or changes ‘must continue to make sense *within* the pre-existing scheme of Constitutional meaning’.⁵⁷ In short, certain aspects of constitutions are so fundamental that any change to undermine them should not be allowed, even if supported by the overwhelming majority of the people and their representatives.

Beyond the context of the US Constitution, the idea of imposing substantive limits on the power of constitutional amendment has roots in liberal political thought and principles of natural law.⁵⁸ Liberalism emphasises the virtues of limited government and the continuous enforcement of certain inherent limits to government power. To ensure this continuity, the limits to government power should be given effect against any process, including constitutional amendments. Natural law theory similarly posits that certain moral principles and norms are unalterable. Positive law, whether constitu-

⁵⁴ Ibid at 180–1 observing that ‘[w]hatever one’s opinion of the intellectual worth of natural law and natural rights, the text of the supreme law of the land recognizes and protects them’.

⁵⁵ Stephen Macedo *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism* (1990) 183.

⁵⁶ Samuel Freeman ‘Political liberalism and the possibility of a just democratic Constitution’ (1994) 69 *Chicago-Kent LR* 619 at 663.

⁵⁷ William F Harris II *The Interpretable Constitution* (1993) 172, who observes that constitutional meaning should be ‘found in the character of its *project*, not in its *sentences*’ (emphasis in the original).

⁵⁸ See generally John Finnis ‘Liberalism and natural law theory’ (1993–1994) 45 *Mercer LR* 687.

tional or otherwise, should always conform to these principles. The arguments of the aforementioned authors are particularly pertinent in societies founded on principles of liberalism.

The reasoning of the US writers described above has gained expression in the decisions of certain constitutional adjudicators. One of the most progressive constitutional adjudicators in the world, the Indian Supreme Court, has a remarkable jurisprudence on implied substantive limits on the amending power.⁵⁹ Under art 368 of the Indian Constitution, its Parliament has the power to 'amend' any provision of the Constitution by a two-thirds majority vote. Amendments to certain provisions listed in art 368(2) also require the approval of at least half of the legislative councils of the states. Despite the fact that the Constitution does not clearly establish substantive limits on the power of constitutional amendment, the Supreme Court held that there are nevertheless certain features of the Constitution that may not be abrogated through amendments.⁶⁰ The decision in *Kesavananda Bharati v State of Kerala*⁶¹ created what has come to be known as the 'basic structure' doctrine. The main issue for determination was the extent and scope of the amending power of Parliament under the Indian Constitution. The 24th Amendment authorised Parliament to restrict fundamental rights through constitutional amendment. The 25th Amendment restricted the right to property and the amount of compensation in cases of expropriation. The 29th Amendment incorporated a law on land reform, which was partly struck down by the Supreme Court as unconstitutional, in Schedule Nine of the Indian Constitution.⁶² In *Bharati*, the Supreme Court had to determine the

⁵⁹ For a discussion on the jurisprudence of the Indian Supreme Court on substantive limits on the power of constitutional amendment, see M K Bhandari *The Basic Structure of the Indian Constitution: A Critical Reconsideration* (1993). See also Gary Jacobson 'An unconstitutional constitution? A comparative perspective' (2006) 4 *International Journal of Constitutional Law* 460.

⁶⁰ *Bharati* supra note 23. This controversial doctrine was first conceived by Mudholkar J in *Sajjan Singh v State of Rajasthan* AIR 1965 SC 845. The doctrine was subsequently endorsed in other cases: see *Indira Gandhi v Raj Narain* AIR 1975 SC 2299; *Minerva Mills v Union of India* AIR 1980 SC 1789; *SP Gupta v Union of India* AIR 1982 SC 149. In *Indira Gandhi v Raj Narain*, the Supreme Court invalidated part of the 39th Amendment which purported to exclude the judicial review of elections and election results. The amendment was enacted to prevent the review of the election of the then Prime Minister Indira Gandhi. In *Minerva Mills v Union of India*, the Supreme Court invalidated the 42nd Amendment which attempted to abolish the basic structure doctrine and to exclude any limitations whatsoever on the constituent power of Parliament to amend the Indian Constitution. The basic structure doctrine has been upheld in a recent case in 2007 — *IR Coelho v State of Tamil Nadu* AIR 2007 SC 861 where the court observed that some of the fundamental rights form part of the basic features of the Constitution, and cannot therefore be undermined even through constitutional amendments.

⁶¹ *Supra* note 23.

⁶² Schedule Nine was added by the first constitutional amendment to enable Parliament to add certain laws into the Schedule. Laws in schedule nine are insulated from judicial review.

validity of the three constitutional amendments. But before that, the court had to first decide on whether there were substantive limits on the powers of Parliament to amend the Constitution.

The court concluded that Parliament had a general power to amend any provision. Nevertheless, the majority of the judges held that ‘the power to amend does not include the power to alter the basic structure of the Constitution so as to change its identity’.⁶³ Despite the fact that the Indian Constitution does not explicitly preclude the amendment of any of its provisions, the court held that there are nevertheless certain basic structures or frameworks which may not be undermined through any procedure, including constitutional amendments. These basic structures may not be tampered with by transient political majorities. Bhandari succinctly captured the philosophy behind the basic structure doctrine:

[The] edifice of the Indian Constitution is built upon the pillars of a constitutional philosophy. Every philosophy like a religion has two main features, namely the basic and circumstantial. The core of religion always remains constant, but the practices associated with it may change. Likewise, the Indian Constitution contains certain features which are so essential that they cannot be changed or destroyed.⁶⁴

In establishing the basic structure doctrine, the court, first, held that the power to ‘amend’ does not include the power to abrogate the Constitution or otherwise obliterate basic constitutional norms. Secondly, and most importantly, the majority of the judges observed that certain principles founded on individual dignity and freedoms were especially fundamental and therefore immutable. The court ‘discovered’ the basic features doctrine from the Preamble as well as the history and composition of the constituent assembly which adopted the Indian Constitution.⁶⁵ Interestingly, the court held that the Constitution would have clearly authorised possible amendments to these principles had that been the intention of the original drafters. Hence, in the absence of a clear provision, the court found that Parliament could not enact amendments in violation of these principles. However, it can also be argued that, had the drafters intended to preclude amendments to certain constitutional provisions and principles, they would have done so

⁶³ *Bharati* supra note 23. For a discussion and critique of this decision, see David Gwynn Morgan ‘The Indian “essential features” case’ (1981) 30 *ICLQ* 307.

⁶⁴ Bhandari op cit note 59. See, however, Anuranjan Sethi ‘Basic structure doctrine: Some reflections’ (October 2005) at 12 available at <http://ssrn.com/abstract=835165>, accessed on 18 April 2013, who observes that the basic structure doctrine is a ‘vulgar display of usurpation of constitutional power by the Supreme Court of India’; and S P Sathe ‘Judicial activism: The Indian experience’ (2001) 6 *Washington University J of Law and Policy* 29 at 88 concluding that ‘the Court has clearly transcended the limits of the judicial function and has undertaken functions which really belong to . . . the legislature’.

⁶⁵ For a critique of the reliance on the Preamble, the history of the Constitution and the composition of the constituent assembly which adopted the Constitution, see Morgan op cit note 63.

expressly. Following this line of argument, in the absence of such preclusion, Parliament can amend any provision of the Constitution by following the prescribed procedures. In summary, a strict interpretation of the word 'amend' as used in the Constitution of India, and an ordering of constitutional principles, provided the foundation for the decision of the court. Interestingly, the court did not provide a comprehensive list of the 'basic' principles or structures of the Constitution. Indeed, as Shelat J and Grover J noted, the essential features 'cannot be catalogued but can only be illustrated'. In addition to the power of judicial review, the majority of the judges indicated that the supremacy of the Constitution, the democratic and republican nature of the state, the sovereignty, unity and integrity of the state, federalism, secularism, the separation of powers between the three levels of government, and fundamental rights, constituted essential features which could not be abrogated through constitutional amendments. In the particular case, part of the 25th Amendment (which excluded the judicial review of certain laws) was found to be unconstitutional.

Unlike the Constitution of India, the Constitution of Germany expressly protects certain provisions from any constitutional amendment.⁶⁶ The entrenchment of these provisions was designed to preclude a repeat of the extensive (ab)use of law to undermine fundamental human rights which had been a characteristic feature of law in Nazi Germany. Based on the entrenched provisions, the Constitutional Court of Germany observed that it could invalidate amendments to other provisions of the Constitution if the amendments undermined the liberal and democratic character of the state without expressly amending arts 1 or 20 of the Constitution.⁶⁷ In addition, the court has indicated that there may be instances warranting the invalidation of properly enacted constitutional amendments to provisions other than those which may not be amended at all. Accordingly, constitutional amend-

⁶⁶ Article 79 of the Basic Law of the Federal Republic of Germany, 1949. This article provides as follows: 'Amendments of this Constitution affecting the division of the Federation into States, the participation in principle of the States in legislation, or the basic principles laid down in arts 1 and 20 are inadmissible.' Article 1(1) provides: 'Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.' Article 20 provides that Germany is a democratic and social federal state founded on popular sovereignty, the rule of law and separation of powers, and guarantees the right to resist any person seeking to abolish the constitutional order, should no other remedy be available. See Nigel Foster & Satish Sule *German Legal System and Laws* 3 ed (2003) 198, who describe these provisions as the 'eternity clauses'.

⁶⁷ *Art 117 case*, 3 BVerfGE 225 cited in Rory O'Connell 'Guardians of the Constitution: Unconstitutional constitutional norms' (1999) 4 *Journal of Civil Liberties* 48 at 54. See also M Herdegen 'Unjust laws, human rights and the German Constitution: Germany's recent confrontation with the past' (1995) 32 *Columbia J of Transnational Law* 591 at 605 observing that, in BVerfGE 84, 90, the Constitutional Court expanded the list of non-amendable precepts in Art 79.3 to include other 'fundamental claims of justice'. See also M Herdegen 'Natural law, constitutional values and human rights' (1998) 19 *Human Rights LJ* 37 at 38.

ments that may undermine the ‘inner unity’, coherence and the general purposes and core norms of the Constitution may be invalidated.⁶⁸ Nevertheless, the court has not invalidated any constitutional amendment based on any extra-constitutional principles. Most importantly, it has generally interpreted its powers to control the substantive validity of constitutional amendments narrowly.⁶⁹

(b) *Arguments against imposing substantive limits on the power of constitutional amendment*

Some writers oppose the idea of imposing substantive limits on the power of constitutional amendment, whether the limits are implied or explicit. These authors emphasise the power of the people and their representatives to change constitutional rules to reflect their evolving and contemporary philosophical understandings and experiences. They argue that the imposition of substantive limits in this way is democratically problematic as it limits the power not only of transient political majorities but also the constituent power itself. The imposition of general substantive limits on, or the insulation of, certain provisions from constitutional amendment essentially renders immutable and sacrosanct certain principles or provisions of the Constitution. These writers question the wisdom of such insulation, and posit that it may even reflect arrogance on the part of the generation that wrote the Constitution. Regardless of how apparently important some principles are said to be, the constituent power of the future generation should not be absolutely barred by constitutional writers of the past from reconsidering the value and desirability of those principles.

Michelman argues that the people would not feel they ‘had proper self-government if everything that mattered in our higher law were irrevocably and permanently placed beyond the people’s sovereign reach’.⁷⁰ The right to self-government implies that the people should be allowed to change provisions and values inscribed in the Constitution following the appropriate procedures. Quite simply, the power to make a constitution includes and should include the power to unmake it. Rubinfeld emphatically observes that

‘the very principle that gives the Constitution legitimate authority — the principle of self-government over time — requires that a nation be able to reject any part of a constitution whose commitments are no longer the people’s

⁶⁸ See Donald Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* (1997) 45, noting the views of the German Constitutional Court that the Constitution forms a unified ‘logical-teleological entity’.

⁶⁹ See discussions on the decisions of the German Constitutional Court in Gozler *op cit* note 14 at 55–64.

⁷⁰ Frank Michelman ‘Thirteen easy pieces’ (1995) 93 *Michigan LR* 1297 at 1303. However, Michelman supports the establishment of rigid amendment procedures. He observes that the American people would not feel that they have ‘real higher law if our [constitutional] amendment rule did not in some palpable degree entrench the rest of the Constitution’ (*ibid*).

own. Thus written constitutionalism requires a process not only of popular constitution-writing, but also of popular constitution-rewriting.⁷¹

Eisgruber similarly posits that the right to self-government includes the right to make ‘bad’ or ‘controversial’ normative and institutional choices, including through constitutional amendments:

‘A constitutional procedure that enables people to entrench good rules and institutions will also enable them to entrench bad rules and institutions. A people must have the freedom to make controversial political choices, and that freedom will necessarily entail the freedom to choose badly.’⁷²

Even if one endorses the desirability of substantive limits on the amending power, the power of constitutional adjudicators to control compliance with these abstract values is not inevitable.⁷³ The existence of fundamental principles does not necessarily lead to the conclusion that courts should have the power to ensure compliance of constitutional amendments with such principles. Dellinger argues that controversies regarding ‘the political wisdom of proposed amendments are only arguments; they can never be translated into judicial rules of positive law that confine the ultimate discretion of the proposing Congress and the ratifying legislatures’.⁷⁴ It may indeed be desirable and necessary to identify certain enduring principles,

‘[y]et these criteria of amendment appropriateness surely must not be elaborated or enforced by courts — not because they fail to sound in principle as opposed to mere policy or prudence, and not because courts are less adept than Congress at detecting the “consensus” that some observers believe an amendment should reflect, but because allowing the judiciary to pass on the merits of constitutional amendments would unequivocally subordinate the amendment process to the legal system it is intended to override and would thus gravely threaten the integrity of the entire structure. . . . The merit of a suggested constitutional amendment is thus a true “political question” — a matter that the Constitution addresses, but that it nevertheless commits to judicially unreviewable resolution by the political branches of government.’⁷⁵

In general, and beyond the debate in the US context, theorists who oppose the idea of substantive limits on the amending power emphasise the principle of self-government which anchors democratic theories. Democratic self-governance requires that the people should have the power to amend any constitutional standards, either directly or through their representatives.

⁷¹ Jed Rubenfeld *Freedom and Time: A Theory of Constitutional Self-Government* (2001) 174.

⁷² Christopher L Eisgruber *Constitutional Self-Government* (2001) 120.

⁷³ See, however, Walter F Murphy ‘An ordering of constitutional values’ (1980) 53 *Southern California LR* 703 at 755–6, who argues that the US Supreme Court could invalidate an amendment wholly contrary to the Constitution’s paramount value of human dignity, which, according to Murphy, stands higher in status than other values.

⁷⁴ Walter Dellinger ‘Constitutional politics: A rejoinder’ (1983) 97 *Harvard LR* 446 at 448.

⁷⁵ Tribe *op cit* note 7 at 442–3.

Although many of these theorists support the existence of limits on the powers of fleeting majorities, including through supermajority amendment procedures, they oppose the establishment of absolute limits that shield certain provisions or principles beyond discussion and reconsideration. They emphasise the desirability of continuous dialogue on what constitutes 'fundamental' principles, taking into account changing social, political, cultural and economic circumstances. Constitutional amendment rules should not absolutely foreclose such dialogue. For such theorists, it is unwise absolutely to preclude the prospect of change when experience amply demonstrates that circumstances may demand it. In general, social democratic theories emphasise a more active, and therefore less restrained, state than liberal democratic theories.⁷⁶ They also stress the 'will of the people'.⁷⁷ These theories are critical not only of substantive limits on the power of constitutional amendment but also of excessively rigid amendment procedures. The arguments of these scholars are based on democratic principles that do not factor into the reckoning potentially regressive outcomes such as authoritarianism or totalitarianism, identified as worst-case scenarios by authors who support the establishment of substantive limits on the power of constitutional amendment. As such, they oppose the idea of imposing substantive limits on the power of constitutional amendment fully aware of the possibility that the amendment procedure may be (ab)used to undermine constitutional democracy itself. The arguments are therefore relevant to any country, such as South Africa, regardless of the actual socio-political context.

The Tanzanian Court of Appeal impliedly agreed with these theoretical justifications.⁷⁸ Article 98 of the Tanzanian Constitution allows Parliament to enact laws 'altering any provision' with the support of not less than two-thirds of all the Members of Parliament.⁷⁹ Since the Constitution establishes procedures for the amendment of *any* provision without any explicit exception, the court unanimously ruled that Parliament has the

⁷⁶ See generally Philip Pettit 'Towards a social democratic theory of the state' (1987) 35 *Political Studies* 537.

⁷⁷ Marxist democratic theories similarly emphasise the sovereignty of representative institutions. These theories consider democracy as a purely majoritarian decision-making procedure and are opposed not only to substantive limits on the power of constitutional amendment but also to supermajority amendment procedures. See generally Lawrence Crocker 'Marx, liberty, and democracy' in John P Burke, Lawrence Crocker & Lyman H Legters (eds) *Marxism and the Good Society* (1981) 32 at 48 and 49. It should be noted that the author is not against the establishment of supermajority amendment procedures and other procedural limitations on the powers of the majority to amend constitutional provisions. To the contrary, the requirements for changing constitutional provisions should be significantly more rigorous than those applying to statutes.

⁷⁸ *The Honorable Attorney General v Reverend Christopher Mtikila* supra note 41.

⁷⁹ Article 98(1)(a) of the Constitution of the United Republic of Tanzania. Some amendments in addition require the approval of at least two-thirds of the Parliament of Zanzibar. The United Republic of Tanzania is a loose federal union of Mainland Tanzania and the Island of Zanzibar.

power to amend all constitutional provisions. However, the court observed that it has the power to review amendments for compliance with procedural requirements. Moreover, the court simply observed that the Constitution does not establish any judicially enforceable substantive limits on the power of amending the Constitution. It did not explicitly conclude that it is theoretically inappropriate for a constitution to impose substantive limits and to entrust the power of controlling the substantive validity of constitutional amendments to courts. That is, the court only addressed *what is*, not *what ought to be*, in relation to substantive limits on the power of constitutional amendment.

In summary, theorists are divided on whether there should be certain essential principles that may not be undermined even through constitutional amendments. Liberal political thought and natural law theory provide the philosophical basis to the idea of insulating certain enduring norms and principles from alteration through any process, including constitutional amendments. Pragmatism, emanating out of experiences of abuse of the amending power, provides additional support to imposing substantive limits on the power of constitutional amendment. On the other hand, democratic theories of self-government provide support for arguments to the effect that nothing should be permanently insulated from popular debate and reconsideration. At first blush, this suggests that there should not be substantive limits on the power of constitutional amendment. Nevertheless, a substantive understanding of democracy may actually support the establishment of substantive limits if these limits enhance popular participation and democratic entitlement. For instance, a provision insulating the amendment of the 'one person one vote' principle may be democratically defensible.

In practice, there are very few constitutional adjudicators around the world that have dared to invalidate constitutional amendments on substantive grounds.⁸⁰ Most importantly, the overwhelming majority of constitutions around the world do not explicitly empower their constitutional adjudicators to scrutinise the substantive validity of constitutional amendments. The power of courts to decide on the substantive validity of constitutional amendments is clearly the exception. The norm is that constitutions may be amended following prescribed procedures. In fact, even the power of courts to review the constitutionality of statutes, let alone constitutional amendments, has not obtained universal recognition.⁸¹

⁸⁰ See Kemal *op cit* note 14 at 78ff. The Supreme Court of India, the Supreme Court of Bangladesh and the Constitutional Court of Colombia are some of the very few constitutional adjudicators that have endorsed versions of the basic structure doctrine. See Carlos Bernal 'Unconstitutional constitutional amendments in the case of Colombia: An analysis of the justification and meaning of the constitutional replacement doctrine' (2013) 11 *International J of Constitutional Law* 339.

⁸¹ David S Law & Mila Versteeg 'The declining influence of the United States Constitution (2012) 87 *New York University LR* 763 at 793. As of 2006, about eighteen per cent of the world's constitutions did not empower courts to review the constitutional validity of legislation, let alone constitutional amendments. Countries which

IV CONSTITUTIONAL AMENDMENTS IN THE SOUTH AFRICAN CONSTITUTION

Clearly, the establishment of justiciable substantive limits on the power of constitutional amendment is theoretically and practically controversial. Nevertheless, the South African Constitution expressly confers the power of deciding on the constitutionality of constitutional amendments on the Constitutional Court.⁸² However, several contentious issues may be identified in relation to this jurisdiction of the court. First, the Constitution does not explicitly determine whether there are any substantive limits to the power of constitutional amendment. Secondly, assuming that the Constitution does recognise substantive limits, it does not outline the normative standards based on which the Court may evaluate the validity of constitutional amendments.

(a) *Constitutional amendment procedures in South Africa*

The South African Constitution may be amended through special procedures and with the support of special majorities. The required majorities and procedures to amend constitutional provisions in the final Constitution were made more rigorous following the first *Certification* judgment.⁸³ The final Constitution recognises five different categories of amendment procedures.⁸⁴ The institutions involved and the percentage of majority vote required differs in relation to the different categories.

The most rigid provision of the Constitution outlines the underlying values of the South African nation. Section 1 of the Constitution may only be amended if a proposal for its amendment obtains the approval of 75 per cent of the members of the National Assembly and the support of at least six of the nine provinces in the National Council of Provinces.⁸⁵

Provisions in Chapter Two of the Constitution, which contains the Bill of Rights, similarly require relatively strict amendment rules. The human-rights

do not allow courts to review the constitutionality of laws will obviously not allow the judicial review of constitutional amendments.

⁸² Section 167(4)(d) of the Constitution.

⁸³ *Certification of the Constitution of the Republic of South Africa, 1996* supra note 36, section E; and *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* supra note 36 paras 48ff. For instance, the final Constitution establishes special majority rules as well as special procedures such as the 30-day time limit and the involvement of the National Council of Provinces in relation to amendments to the Bill of Rights and those that affect the powers, functions and boundaries of provinces. For a discussion of the process that gave rise to the amendment rules and the impact of the constitutional certification process on the provisions regulating amendment, see Henderson *op cit* note 37.

⁸⁴ For a discussion of the different category of amendment procedures, see G E Devenish 'A jurisprudential assessment of the process of constitutional amendment and the basic structure doctrine in South African constitutional law' (2005) 68 *THRHR* 243.

⁸⁵ Section 74(1) of the Constitution. Logically, the same stringent process is required before s 74(1) itself is amended.

provisions may only be amended with the support of at least two-thirds of the members of the National Assembly and at least six of the nine provinces in the National Council of Provinces.⁸⁶

All other provisions of the Constitution may be amended by a two-thirds majority vote of the National Assembly.⁸⁷ However, if the amendment relates to a matter that affects the National Council of Provinces, or has the effect of altering provincial boundaries, powers, functions or institutions, or amends a provision that deals specifically with a provincial matter, there is also need for approval by at least six provinces in the National Council of Provinces.⁸⁸ In addition, if a proposed amendment only affects a specific province/s, the legislative council of the affected province/s should consent to the proposed amendment.⁸⁹

The Constitution does not prescribe any particularly cumbersome rules in relation to the tabling of proposals for constitutional amendment. As such, all those entities that have the power to propose 'ordinary' Bills also have the power to table proposals for constitutional amendment. However, what the Constitution does do is to impose time limits (a type of 'cooling-off' period) on the tabling of amendment proposals. A person or committee intending to introduce a Bill for the amendment of the Constitution should publish the proposed amendment in the Government Gazette for public comment at least 30 days before it is tabled before Parliament.⁹⁰ Moreover, a Bill proposing a constitutional amendment may not be put to vote in the National Assembly within 30 days of its introduction, if the Assembly is sitting, or 30 days of its tabling in the Assembly, if the Assembly is in recess.⁹¹ Within the same period, the particulars of the proposed amendment should also be submitted to the provincial legislatures for their views. In addition, even if the amendment does not require the approval of the National Council of Provinces, the proposed amendment should be submitted for public debate to the Council. Once the time and public engagement requirements are fulfilled, any provision may be amended if the proposal for amendment obtains the support of the required majority in the relevant institution/s.

It should be noted that the Constitution does not establish special quorum rules before the National Assembly takes decisions on proposed constitutional amendments.⁹² In the absence of a clear provision establishing special

⁸⁶ Section 74(2).

⁸⁷ Section 74(3)(a).

⁸⁸ Section 74(3)(b).

⁸⁹ Section 74(8).

⁹⁰ Section 74(5) (a), (b) and (c).

⁹¹ Section 74(7).

⁹² In Tanzania, for instance, s 98(1) of the Constitution requires that amendments to the Constitution must be approved by at least two-thirds of *all* members of the National Assembly. This was confirmed by the Court of Appeal of Tanzania in *The Honorable Attorney General v Reverend Christopher Mtikila* supra note 41. As such, at least two-thirds of the members of the Assembly should be present before voting on

quorum rules, the general rule in s 53(1)(a) applies to Bills proposing constitutional amendments.⁹³ Moreover, the Constitution does not anticipate any possibility that proposals for constitutional amendments must be subjected to popular referendum. The people do not have any formal involvement either in the tabling or approval of constitutional amendments.⁹⁴ Nevertheless, referenda may be organised before Parliament decides to approve or reject a proposed constitutional amendment.⁹⁵ This reflects the primacy given to the notion of representative democracy in the South African Constitution, despite discrete manifestations of direct or participatory democracy. For instance, the national and provincial legislators have the duty to involve the public in the making of laws and policies.⁹⁶

In addition, the involvement of the provinces in the constitutional amendment process is largely limited to their participation in the National Council of Provinces. As such, the Constitution does not require that, in addition to an affirmative vote of the National Council of Provinces, each of the provinces should also ratify a proposed amendment. This is because delegates of the provinces in the Council vote as blocks where each province has a single vote. An additional requirement that the legislative councils of the Provinces should vote on a proposed amendment would have been redundant. The South African Constitution follows the German model in largely limiting the participation of the provinces in constitutional amendments to that allowed within the framework of the Council of Provinces. Nevertheless, if an amendment only affects a specific province or provinces and not all of them, the amendment should be approved by that province or

proposed constitutional amendments. Under art 94(1), unless otherwise specified, half of all members of the National Assembly constitute a quorum.

⁹³ Under this section, at least a majority of the members of the National Assembly must be present before a vote may be taken on a Bill or an amendment to a Bill. 'Bill' should be interpreted to include Bills proposing constitutional amendments under s 74. However, it may be argued that s 74 requires a two-thirds majority vote of *all* the members of the National Assembly, and not at least half of the members of the Assembly, as s 53(1)(a) provides. Nevertheless, nothing in the text of the Constitution or the *Certification* judgments (supra note 36) implies that s 74 is referring to *all* members of the National Assembly. If that were the intention, the drafters of the Constitution would have done so expressly. Indeed, in some other countries, such as Tanzania, the constitutions explicitly establish special quorum rules in relation to constitutional amendments. See s 98(1) of the Constitution of Tanzania.

⁹⁴ It should also be noted that the final Constitution was adopted by an elected Constitutional Assembly. It was not submitted to popular referendum.

⁹⁵ Section 84(2)(g) of the Constitution.

⁹⁶ Section 59(1)(a) in relation to the National Assembly; s 72(1)(a) in relation to the National Council of Provinces; and s 118(1)(a) in relation to provincial legislatures. Under these provisions, before approving proposals for constitutional amendments, both national and provincial legislative organs have to engage the public. However, the provisions do not require that the political organs should necessarily follow the popular view — see, for instance, *Doctors for Life International v Speaker of the National Assembly & others* 2006 (6) SA 416 (CC).

those provinces.⁹⁷ However, s 74(8), which requires the consent of the specific province/s before a constitutional amendment affecting that province/s is approved, does not expressly require that any amendment to it should be supported by the legislatures of *all* provinces. The consequences of this omission could be devastating to 'pariah' provinces, such as the Western Cape. For instance, if the National Assembly wanted to enact an amendment that specifically affects a province, it may first abolish s 74(8) with the support of six provinces but without the need to secure the approval of the affected province. It could then pass other amendments that affect a specific province. To avoid this absurd possibility, a purposive approach may induce the Constitutional Court to interpret s 74(8) as affecting each province *individually*.⁹⁸ Any amendment to it should therefore require the approval of all the legislatures of the provinces. Alternatively, it may be argued that the amendment provisions give effect to and are expressions of the supremacy of the Constitution, which is one of the fundamental values enshrined in s 1 of the Constitution. It follows that an amendment to any of the amendment provisions should comply with the requirements for amending s 1.

Most importantly for the purpose of this article, there are no provisions in the South African Constitution that are insulated from proposals for constitutional amendment, unlike the German Constitution which includes some provisions that may not be amended in any circumstances.⁹⁹ Rather than expressly excluding certain provisions from constitutional amendment, the drafters of the final Constitution of South Africa opted to empower the Constitutional Court to 'decide on the constitutionality of any amendment to the Constitution'.¹⁰⁰ The power to control the constitutionality of constitutional amendments makes the South African Constitution one of the most powerful constitutional courts in the world. The Constitutional Court is the guardian of the Constitution in every sense of the term. It has the power not only to ensure observance of the Constitution, but also to control changes to it. However, the implications of this power to the existence of substantive limits on the amending power of Parliament are not entirely clear. Part IV(b) investigates whether the Constitution anticipates any additional limits, such as the basic structure doctrine of the Indian Supreme Court, to the procedural safeguards discussed above.

(b) *The power of the South African Constitutional Court to decide on the substantive validity of constitutional amendments*

As I indicated earlier, the South African Constitution does not explicitly prohibit the amendment of any of its provisions. In fact, it allows the

⁹⁷ Section 74(8) of the Constitution.

⁹⁸ However, this argument may be difficult to make. The Constitutional Court has held that amendments that are of 'equal application' to all provinces do not need the approval of provincial legislatures. See *Premier of KwaZulu-Natal v President of the Republic of South Africa* supra note 39 para 23.

⁹⁹ Article 79 of the Basic Law of the Federal Republic of Germany, 1949.

¹⁰⁰ Section 167(4)(d) of the Constitution.

amendment of *any* of its provisions.¹⁰¹ The Constitution did not attempt to ‘immortalise what can simply not be immortalised’.¹⁰²

One of the 34 Constitutional Principles that guided the drafting and adoption of the final Constitution specifically addressed issues of amendment. Principle XV provided that ‘[a]mendments to the Constitution shall require special procedures involving special majorities’. Principle II provided that universally accepted human rights should be protected by ‘entrenched and justiciable provisions’. Under Principle XVIII (4 and 5), amendments to the final Constitution which alter the powers, boundaries, functions or institutions of the provinces should, in addition to any other procedure for amendment, be subject to approval by a special majority of the legislatures of the province/s. Alternatively, the Principle allowed the drafters the option of requiring approval by a two-thirds majority of the National Council of Provinces.

There is nothing in these principles which implies that some constitutional provisions should not be subject to constitutional amendment at all, or that the Constitutional Court should be empowered to control the substantive validity of constitutional amendments. In fact, the Constitutional Court noted in the first *Certification* judgment that the Constitutional Principles did ‘not require that the Bill of Rights should be immune from amendment or be practically unamendable’.¹⁰³ However, the Certification judgments did not address the possible empowerment of the Constitutional Court to control the constitutionality of constitutional amendments. The judgments simply indicated that some provisions should be entrenched and that amendments to them should require ‘special procedures’, in addition to ‘special majorities’, such as the involvement of more than one chamber of Parliament, and time limits. This led to the revision of the provisions of the draft constitution dealing with constitutional amendments.¹⁰⁴ The express empowerment of the Constitutional Court to control the constitutionality of constitutional amendments was an innovation of the final Constitution.

The question is whether the Constitution mandates the Constitutional Court to inquire into the substantive validity of constitutional amendments. The power of courts to inquire into the formal and procedural validity of constitutional amendments is implicit in any constitution, unless the consti-

¹⁰¹ Section 74(3).

¹⁰² Fombad op cit note 12 at 410. Fombad argues that the inclusion of unamendable provisions is ill-advised and undesirable. He suggests that stringent amendment procedures are theoretically and practically preferable to unamendable provisions. Fombad does not consider the possibility of empowering constitutional courts to decide on the validity of constitutional amendments as an alternative to the inclusion of provisions that cannot be amended.

¹⁰³ *Certification of the Constitution of the Republic of South Africa, 1996* supra note 36 para 159.

¹⁰⁴ See generally *Certification of the Amended Text of the Constitution of the Republic of South Africa 1996* supra note 36 paras 152–9; *Certification of the Constitution of the Republic of South Africa, 1996* supra note 36.

tution expressly precludes it.¹⁰⁵ Had it not been for purposes of including the control of the substantive validity of constitutional amendments, there would be no need for an express provision empowering the Constitutional Court to decide on the constitutionality of constitutional amendments.¹⁰⁶ Hence, it can be argued that the Constitutional Court has the power to determine the procedural as well as the substantive validity of constitutional amendments. It may also be argued on the line of the basic structure doctrine that the South African Constitution actually imposes substantive limits on the power of amendment.

Some Constitutional Court decisions before and after the adoption of the final Constitution can be interpreted to imply that the basic structure doctrine has relevance in South African constitutional jurisprudence.¹⁰⁷ The notion of the basic structure doctrine was initially mentioned in passing by Sachs J in *The Executive Council of the Western Cape Legislature v President of the Republic of South Africa*.¹⁰⁸ According to him, 'Parliament can, if it follows certain procedures, amend the Constitution which gave life to it'.¹⁰⁹ Sachs J simply refers to the special procedures that Parliament has to follow in order to amend the Constitution.¹¹⁰ Despite the affirmation of the powers of Parliament to amend the Constitution, Sachs J mentions the debate in other jurisdictions on 'whether there are certain features of the constitutional order so fundamental that even if Parliament followed the necessary amendment procedures, it could change them'.¹¹¹ Sachs J appears to have taken the view that amendments that change fundamental features cannot be enacted by

¹⁰⁵ In fact, as early as in 1951, the Appellate Division invalidated a constitutional amendment for failure to comply with the procedural requirements for amendment — see *Harris & others v Minister of the Interior* 1952 (2) SA 428 (A). The amendment was enacted by the National Party with a view to disenfranchise coloured voters. However, since the provision enfranchising coloured voters was an entrenched provision, the amendment needed the support of at least two-thirds of the members of Parliament in a joint session. However, the National Party did not control two-thirds of the seats of Parliament. The Party therefore decided to enact the amendment through the ordinary legislative procedure with the support of the simple majority of Parliament. The Appellate Division ruled that, even though Parliament was supreme, it had the duty to follow prescribed procedures. As such, the amendment was invalid. For a discussion of this and related cases, see Denis V Cowen 'The entrenched sections of the South Africa Act: Two great legal battles' (1953) 70 *SALJ* 238; Erwin N Griswold 'The "Coloured Vote Case" in South Africa' (1952) 65 *Harvard LR* 1361; H W R Wade 'The Senate Act case and the entrenched sections of the South Africa Act' (1957) 74 *SALJ* 160.

¹⁰⁶ Section 167(4)(d) of the Constitution.

¹⁰⁷ Devenish op cit note 84 at 252 concluding that the jurisprudence of the court at most indicates that there is 'an implied recognition' of the basic structure doctrine.

¹⁰⁸ *Executive Council of the Western Cape Legislature & others v President of the Republic of South Africa & others* 1995 (4) SA 877 (CC) para 204.

¹⁰⁹ Ibid para 201.

¹¹⁰ Ibid para 202.

¹¹¹ Ibid para 204. Sachs J mentions as examples of unacceptable amendments instances where Parliament decides to abolish itself; or Parliament gives itself eternal life; or Parliament issues a perpetual holiday.

Parliament. However, he did not clarify whether the Constitutional Court had the power to invalidate such amendments. Sachs J appears to be clear on the possible existence of limits on the power of constitutional amendment, but not on the mechanisms of enforcing such limits. In any case, his view was obiter and was expressed in a separate concurring judgment to that of the majority.

The Constitutional Court similarly mentioned the basic structure doctrine in passing in another case. In *Premier of KwaZulu-Natal v President of the Republic of South Africa*,¹¹² Mohamed J noted that amendments that are enacted after following the proper procedure were ‘constitutionally unassailable’. Nevertheless, he did not exclude the possibility that even properly enacted amendments may be found to be invalid. Citing the basic structure jurisprudence of the Indian Supreme Court, Mohamed J observed that ‘[i]t may perhaps be that a purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and re-organizing the fundamental premises of the Constitution, might not qualify as an “amendment” at all’.¹¹³ The court did not find it necessary to decide the issue. Nevertheless, Mohamed J concluded that, even if the court were to recognise the existence of implied limits on the power of constitutional amendment, the issues involved in the particular case could not conceivably have fallen within the category of ‘basic’ features or structures.¹¹⁴

The basic structure doctrine was discussed in the aforementioned cases in the context of the interim Constitution. In a case that involved the constitutionality of floor-crossing after the final Constitution was adopted, Chaskalson CJ observed that amendments enacted in accordance with the procedural requirements ‘become part of the Constitution. Once part of the Constitution, they cannot be challenged on the grounds of inconsistency with other provisions of the Constitution.’¹¹⁵ As such, ‘there is little if any scope for challenging the constitutionality of amendments that are passed in accordance with the prescribed procedures and majorities’.¹¹⁶ The court did not outline what it meant by the ‘little’ scope for challenging amendments passed in accordance with the prescribed procedure. The applicants had argued that the proportional representation electoral system and the right to

¹¹² *Supra* note 39 para 47.

¹¹³ *Ibid* para 47.

¹¹⁴ *Ibid* para 49. The constitutional amendment that was challenged in the instant case moved the power of determining the salaries and allowances of premiers and members of provincial executive councils from the provincial legislature to the President of the Republic.

¹¹⁵ *United Democratic Movement v President of the Republic of South Africa & others (African Christian Democratic Party & others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae)* 2003 (1) SA 495 (CC).

¹¹⁶ *Ibid* para 12. The court further observed that ‘the Constitution, as amended, must be read as a whole and its provisions must be interpreted in harmony with one another’.

vote constituted part of the 'basic structures' of the Constitution, and as such they could not be amended at all.¹¹⁷ They relied on the views expressed by Mohamed J in *Premier of KwaZulu-Natal & others v President of the Republic of South Africa & others*. Chaskalson CJ did not find it necessary to decide the matter. Nevertheless, he observed that even if the 'basic structures' principle was applicable, the proportional representation electoral system and the anti-defection rules would not have fallen in what can be considered as 'basic structures' of the South African Constitution.¹¹⁸

In the light of these cases then, the exact status of the basic structure doctrine in South African constitutional law remains unclear.¹¹⁹ Even if we assume that the court did imply the existence of some fundamental values which even constitutional amendments may not contradict, it does not necessarily follow that the court would be the organ in charge of enforcing such values. Nevertheless, some authors have argued that the Constitutional Court should rely on the basic structure doctrine to invalidate amendments that are 'manifestly undemocratic'.¹²⁰ The jurisprudential basis of the doctrine may be 'found either in natural law or in international law'.¹²¹ Devenish particularly invokes the concept of *ius cogens*, which refers to international rules that have achieved a status from which no derogation is allowed.¹²² The problem with this view is that the South African Constitution does not distinguish between different rules of international law. It merely indicates that the Constitutional Court should 'consider' international law in interpreting the Bill of Rights.¹²³ Other than this, the Constitution is superior to all conduct and laws, whether national or international.¹²⁴ Customary international law is only applicable to the extent it is not incompatible with the Constitution or an Act of Parliament.¹²⁵ Therefore, international law, including rules that have achieved the status of *ius cogens* through customary practice, are subordinate to the Constitution.

¹¹⁷ Ibid.

¹¹⁸ Ibid para 17.

¹¹⁹ Devenish op cit note 84 at 250.

¹²⁰ Ibid at 252 arguing that '[i]f the legislature were to act in a patently undemocratic manner, and to undermine the basic principles on which the Constitution is premised, then the exercise of the basic structure doctrine would . . . be justified'. Also see Henderson op cit note 37 at 554, who suggests that the Constitutional Court may endorse the basic structure doctrine to prevent the removal of the underlying values incorporated in s 1. Nevertheless, he believes that this would be difficult: 'The Court would be hard pressed to hold that a "feature" or "structure" not listed in s 1 was "essential" or "basic" to the constitutional order.'

¹²¹ Devenish op cit note 84 at 251.

¹²² Article 53 of the Vienna Convention of the Law of Treaties, 1969. It should be noted that art 53 only talks about the compatibility of treaties with peremptory norms of international law (*ius cogens*). It does not address the relationship between *ius cogens* and domestic laws.

¹²³ Sections 39(1)(b) and 233 of the Constitution.

¹²⁴ Section 2.

¹²⁵ Section 232.

In any case, the principle that national law may not be invoked to justify failure to discharge an international duty only applies to international tribunals.¹²⁶ Unless the relevant constitution provides otherwise, domestic courts are required to decide cases according to their constitutions, even if their decision may contradict the international obligations of the state. It is therefore difficult to use international law as a standard to measure the validity of constitutional amendments. It should also be noted that constitutional amendments require much more stringent procedures than the approval of international law by states.¹²⁷ Thus, it appears absurd to subject the validity of constitutional amendments to international law.

The second possible source of the fundamental norms based on which the validity of constitutional amendments may be tested is 'natural law'. Reliance on natural law is, however, problematic. There is no reference to natural law in s 1 of the South African Constitution, which defines the founding principles of the South African polity. Natural law is important only to the extent that it has been given expression in the Constitution. Indeed, parts of the Bill of Rights codify principles of natural law. Nevertheless, the Constitution clearly establishes procedures through which the Bill of Rights may be amended. If these clear manifestations of natural law may be amended, it is unacceptable to argue that elements of natural law which have not been expressly codified will determine the validity of constitutional amendments. It is inappropriate to give principles outside the Constitution a status over and above the principles that are expressly enunciated in the Constitution. As such, however relevant they may be in interpreting the Constitution, neither international law nor principles of natural law may provide the normative standards based on which the validity of constitutional amendments may be evaluated.

Following this argument, an interpretation of the provisions of the Constitution relevant to amendments supports the conclusion that *any* provision of the Constitution may be amended. If the Constitutional Court does endorse the basic structure doctrine in the future, pragmatic and contextual concerns (such as where a single political group may use its dominance to push through regressive constitutional amendments) will provide the most defensible justifications. Given the context provided in part II above, where a populist and majoritarian radical political rhetoric may potentially gain prominence, subjecting constitutional amendments to implied substantive limits may be more defensible in South Africa than in other countries with established democratic and constitutional culture and moderate political philosophies. Indeed, the practical need to rein in an unruly single dominant party which could change any constitutional provision provided additional justification to the largely principled explanation of the Indian Supreme Court in establishing the basic structure doctrine.

¹²⁶ Article 27 of the Vienna Convention of the Law Treaties, 1969.

¹²⁷ Compare s 74 with s 231 of the Constitution.

Beyond pragmatism, however, there is no textual basis for the concept of the basic structure doctrine in the South African Constitution. In fact, a textual reading of the amendment provisions would call into question any pragmatic reading of the amendment provisions. The detail with which the drafters addressed the issue of constitutional amendment procedures rules out any possibility for the establishment of additional implied hurdles to constitutional amendment. Moreover, there is reason to believe that the drafters of the Constitution were aware of the law and practice, for instance, in Germany where the Constitution clearly insulates certain principles from any future modification.¹²⁸ The fact that they did not include similar provisions may imply that the omission was deliberate. In fact, even s 1 of the Constitution, which defines the fundamental values underlying the South African polity — and which restates some of the unalterable principles in the German Constitution — can be amended, as I have indicated above. If these values can be amended or modified, it would be absurd for the Constitutional Court to read in implied limits having the effect that other aspects could not be changed. Moreover, nothing suggests that the drafters actually intended to empower the Constitutional Court to control the substantive validity of constitutional amendments. The drafters of the Constitution did not intend to impose any permanent limitations to the right of self-government. Therefore, it would appear that all parts of the Constitution are subject to continuous popular (re)evaluation and, whenever necessary, change.

The fact that the Constitution contains an express power of the Constitutional Court to decide on the constitutionality of constitutional amendments may have been for purposes of completeness and clarity, rather than to enable the court to go beyond testing the procedural validity of constitutional amendments. Perhaps the principal consequence of the provision specifically empowering the Constitutional Court to decide on the validity of constitutional amendments lies in excluding all other courts from deciding on the constitutionality of constitutional amendments, even on procedural grounds. That is, the purpose is merely to affirm the exclusive jurisdiction of the Constitutional Court in relation to constitutional amendments. This could explain why the Constitution does not outline any substantive standards which the Constitutional Court could use to evaluate the validity of constitutional amendments.

Given this absence, so long as the proper procedure is followed, the progressive decisions of the Constitutional Court upholding gay rights may

¹²⁸ See *Certification of the Constitution of the Republic of South Africa, 1996* supra note 36 para 159 where the Constitutional Court observed that the Constitutional Principles did 'not require that the Bill of Rights should be immune from amendment or practically unamendable'. See also Bertus de Villiers 'Managing constitutional change in South Africa' in Bertus de Villiers & Jabu Sindane (eds) *Managing Constitutional Change* (1993) 335 at 355, who recommends, based on the German experience, the inclusion of judicially enforceable substantive limits on the amending power in the final Constitution.

be reversed; Parliament may abolish the provinces; the right to compensation on expropriation of land may be discarded;¹²⁹ and the death penalty may be reintroduced. It is likely that any regressive proposals for amendment would face intense opposition both inside and outside Parliament. However, if any such amendment were to be approved by Parliament, the Constitutional Court does not seem to have the jurisdiction to invalidate it.

In fact, even the powers of the Constitutional Court itself are not immune from constitutional amendment. Parliament may, through constitutional amendment, potentially subject the decisions of the Constitutional Court to parliamentary approval,¹³⁰ or authorise itself to enact 'notwithstanding clauses'.¹³¹ A constitutional amendment may also require that any decision of the Constitutional Court invalidating laws made by Parliament should be supported by at least two-thirds of the judges of the Constitutional Court, or impose similar supermajority requirements on the court.¹³²

Nevertheless, it may be argued that, although the provisions dealing with the Constitutional Court are not found in s 1 of the Constitution, any amendment tampering with the powers of the Constitutional Court may only be enacted following the most stringent amendment procedure estab-

¹²⁹ It should be noted that *Bharati* supra note 23, in which the Indian Supreme Court established the basic structure doctrine, involved a challenge to government attempts to expropriate property without paying adequate (market-value) compensation and to insulate laws authorising expropriation from judicial review.

¹³⁰ In the United Kingdom, for instance, courts only have the power to declare legislation incompatible with the Human Rights Act 1998 — see s 4. Parliament has the discretion (not the obligation) to follow up on declarations of incompatibility and to amend the impugned law or provision. See generally Stephen Gardbaum 'Reassessing the new Commonwealth model of constitutionalism' (2010) 8 *International J of Constitutional Law* 167; and Stephen Gardbaum 'The new Commonwealth model of constitutionalism' (2001) 49 *American J of Comparative Law* 707.

¹³¹ In Canada, both the federal and state parliaments are allowed to enact laws notwithstanding the implications of the law to the Canadian Charter of Rights, 1992 — s 33 of the Charter. If a law includes a 'notwithstanding' clause, the Supreme Court of Canada and other courts are excluded from inquiring into the compatibility of the law with the Charter of Rights. However, 'notwithstanding' clauses have a default sunset clause of five years. As such, unless the relevant legislature extends the 'notwithstanding' clause, the law may be challenged after five years. See generally Dale Gibson *The Law of the Charter: General Principles* (1986) 125; Peter Hogg 'Discovering dialogue' (2004) 23 *Supreme Court LR* 3; Peter Hogg 'A comparison of the Bill of Rights and the Charter' in Walter S Tarnopolsky & G Gérard A Beaudoin (eds) *The Canadian Charter of Rights and Freedoms: Commentary* (1982).

¹³² In some states of the US, supermajority rules for judicial decisions have been introduced. In such cases, before a law can be invalidated as unconstitutional, the decision of the court should be supported by a supermajority of the judges. The Nebraska Constitution, for instance, requires the support of five out of seven judges to invalidate a state law on constitutional grounds. The North Dakota Constitution similarly requires the supporting vote of five out of six judges to invalidate a state law. For a discussion of the history and practice of the supermajority rules in judicial systems in the US, see Evan H Caminker 'Thayerian deference to Congress and Supreme Court supermajority rule: Lessons from the past' (2003) 78 *Indiana LJ* 73.

lished in s 1.¹³³ The principal role of the Constitutional Court is to ensure the supremacy of the Constitution. As such, constitutional amendments undermining the powers of the Constitutional Court affect s 1(c) of the Constitution, which establishes the supremacy of the Constitution and the rule of the law as fundamental values. At a minimum, amendments affecting the Constitutional Court affect the power relationships between the central government and the provinces, as the court is the final arbiter of disputes between the two spheres of government.¹³⁴

It is important to note that the fact that the basic structure doctrine has been endorsed by the Indian Supreme Court does not necessarily imply that it should also be adopted in South Africa. There are certain fundamental differences which militate against such an imitation. First, the amendment procedure in the Indian Constitution is lenient. The overwhelming majority of the Indian Constitution may be amended through a mere two-thirds majority vote in each of the two legislative houses.¹³⁵ Amendments affecting very few provisions also require the approval of the legislature of at least half of the states (provinces). On the other hand, the amendment procedure in South Africa is quite rigid. In fact, the constitutional amendment procedure in India is almost as rigid as the most lenient of the five categories of amendment procedure in South Africa (a mere two-thirds majority vote of the National Assembly). Secondly, India follows the first-past-the-post electoral system. This means that a party that has not won two-thirds of the votes may actually win two-thirds or more of the seats in Parliament. As such, the approval of a constitutional amendment does not necessarily imply that two-thirds of the voters or their representatives support the amendment. On the other hand, South Africa follows the electoral system of proportional representation. This ensures that the number of seats generally corresponds to the number of votes a party obtains in an election. In short, amendments in South Africa can legitimately claim wider popular support than amendments in India. *Ceteris paribus*, the amendment procedure in South Africa is more likely to prevent regressive amendments than the procedure in India. Thirdly, the doctrine was established in the midst of a deliberate effort on the part of the then Indian Parliament to undermine democratic governance and constitutionalism, and in particular to weaken the powers of the Supreme Court. It is difficult to speculate how the court would have reacted had there not been a calculated and persistent attempt on the part of the then government to undermine constitutional limits on parliamentary power. The basic structure doctrine was developed to address real and perceived risks to the constitutional order in the Indian context. There have not been any such continuous battles between Parliament and the Constitutional Court in

¹³³ See Pierre De Vos 'A 75% majority needed to amend powers of the Constitutional Court?' available at <http://constitutionallyspeaking.co.za/a-75-majority-needed-to-amend-powers-of-constitutional-court/>, accessed on 16 October 2012.

¹³⁴ Section 167(4)(a) of the Constitution.

¹³⁵ Article 368 of the Constitution of India, 1950.

South Africa thus far. In short, the circumstances in India are such that the basic structure doctrine may be more justifiable than any similar doctrine in South Africa.

The absence of extra-constitutional substantive limits on the power of constitutional amendment does not necessarily mean that the provision empowering the Constitutional Court to control the constitutionality of constitutional amendments is irrelevant. There are several instances in which the Constitutional Court may invalidate constitutional amendments on substantive grounds. This power emanates from the fact that the Constitution establishes different procedures to amend different constitutional provisions.¹³⁶ Disputes may arise as to whether a particular constitutional amendment was adopted following the proper procedure. To resolve any such disputes, the Constitutional Court will have to determine, first, whether the substance of the amendment affects provisions other than those which the amendment explicitly purports to amend.¹³⁷ For instance, a purported amendment to the Bill of Rights or any other provision of the Constitution may affect the substantive content of s 1 of the Constitution. In such instances, the court could invalidate the amendment and could order Parliament to follow the procedure for amending s 1. To this extent, s 1 can have a 'radiating, protective ambit'.¹³⁸ Whether or not a proposed amendment undermines the values entrenched in s 1 has to be determined on an individual basis in the context of the peculiar circumstances and consequences of the amendment. Such a determination defies any attempt to establish a general menu of provisions or principles that are inherent in the values enshrined in s 1.

The Constitutional Court may also engage in analysing the substantive validity of constitutional amendments even outside the context of s 1. If a proposed amendment to any provision outside the Bill of Rights actually affects the content of one or more of the rights, the Court could invalidate such constitutional amendment and could indicate the necessity of following the procedure established for amending the Bill of Rights. In addition, given the procedure for amending provisions that affect the powers, functions and boundaries of provinces requires the involvement of the National Council of Provinces, the court would have to resolve substantive disputes on whether the substance of a proposed amendment would actually affect the powers and functions of the provinces. Nevertheless, once the court affirms that an amendment has been enacted in accordance with the appropriate procedure, the amendment is unassailable.

¹³⁶ Devenish op cit note 84.

¹³⁷ See, for instance, *United Democratic Movement v The President of the Republic of South Africa* supra note 115. In this case, the Constitutional Court had to determine the normative implications of the floor-crossing amendments to the founding principles in s 1 as well as any of the Bills of Rights to ensure that the appropriate amendment procedure was followed.

¹³⁸ Henderson op cit note 37 at 549.

In summary, the Constitutional Court cannot avoid considering the substance of a constitutional amendment while determining the procedural validity of that amendment. This is made possible by the fact that the Constitution establishes an implied hierarchy between the different sections of the Constitution, with s 1 and the Bill of Rights occupying the top two rungs of the ladder. Had the Constitution only recognised a uniform constitutional amendment procedure, the court would have had no role at all in reviewing the substance of constitutional amendments.

In addition, the Constitution imposes a duty on the central and provincial legislative organs to 'involve the public' in the making of laws and policies.¹³⁹ The jurisprudence of the Constitutional Court reveals that this duty is binding and judicially enforceable.¹⁴⁰ As such, the court could invalidate, and has invalidated,¹⁴¹ a constitutional amendment if any of the legislative organs fail to discharge their responsibility of facilitating the involvement of the people in the making of laws, including laws that approve proposed constitutional amendments. To that extent, the Constitutional Court has the right and responsibility to consider the compatibility of the law-making process with the duty to facilitate public involvement.

V CONCLUSION

The desirability of imposing fundamental limits on the power of constitutional amendments is contentious. The judicial enforceability of such fundamental limits is even more controversial. This article contends that constitutions may recognise certain fundamental limits on the power of constitutional amendment. The existence of judicially enforceable substantive limits on the amending power may indeed be desirable and even necessary in certain circumstances. The fact of potential abuse of the amendment power, as evidenced in the constitutional history of many African countries, may justify the imposition of some limits on such power. In particular, in countries with a single dominant party, the legislature may not effectively play its role of safeguarding fundamental constitutional

¹³⁹ Section 59(1)(a) of the Constitution in relation to the National Assembly, s 72(1)(a) in relation to the National Council of Provinces, and s 118(1)(a) in relation to provincial legislatures.

¹⁴⁰ See *Doctors for Life* supra note 96 paras 13–30; *Glenister v President of the Republic of South Africa & others* 2011 (3) SA 347 (CC). For a discussion of cases where the Constitutional Court enforced the duty to involve the public in the making of laws and invalidated a constitutional amendment for failure to involve the public, see Karen Syma Czapskiy & Rashida Manjoo 'The right of public participation in the law-making process and the role of legislature in the promotion of this right' (2008) 19 *Duke J of Comparative and International Law* 1; Linda Nyati 'Public participation: What has the Constitutional Court given the public?' (2010) 12 *Law, Democracy and Development* 102.

¹⁴¹ *Matatiele Municipality & others v President of the Republic of South Africa & others* (2) 2007 (1) BCLR 47 (CC).

principles and provisions. In fact, it may be complacent in undermining such principles.

The imposition of substantive limits may also be particularly relevant in states with significant ethnic, religious or racial cleavages. In countries where there are almost permanent majorities and minorities, as is arguably the case in South Africa,¹⁴² there is often significant distrust amongst dominant political forces. The entrenchment of certain principles may be necessary to uphold fragile relationships and an agreeable balance of power. The absence of such limits may have devastating political and economic consequences for minority groups. Substantive limits to the amendment of fundamental principles may also be relevant in countries where the culture of democracy has not taken root in political and social thinking. At the risk of over-generalisation, the explicit inclusion of substantive limits on the power of constitutional amendment may be more practical and justifiable in new democracies than in established or matured liberal democracies. Perhaps the absolute entrenchment of certain principles in the German Constitution could have justified a similar approach in South Africa. The adoption of constitutional democracy in both states was preceded by the prevalence of the notion of parliamentary democracy and a reaction to the extensive (ab)use of law to undermine fundamental notions of equality and freedom.

Nevertheless, any such limits on the amending powers of Parliament should be explicitly established, and cannot be implied. The incorporation of immutable guarantees or principles should be the outcome of political consensus, not judicial innovation. Moreover, any conviction that there should be substantive limits on the power of constitutional amendment does not necessarily imply that such limits should be judicially enforceable.¹⁴³ That power is not inevitable and cannot be left for judicial interpretation or implication. The idea of judicially enforceable implied limits on the power of constitutional amendment is particularly unacceptable in cases where a constitution explicitly outlines the fundamental principles and subjects such principles to amendment, as is the case in South Africa. In the absence of clearly defined and enforceable substantive limits, the judicial control of constitutional amendments will lead to a situation where courts effectively arrogate the role of the people and their elected representatives in defining a polity's 'fundamental' values over which there may be reasonable disagree-

¹⁴² According to Census 2011, South Africa's population stands at 51.77 million, up from the census 2001 count of 44.8 million. Africans are in the majority, making up 79.2 per cent of the population; coloured and white people each make up 8.9 per cent of the total; and the Indian/Asian population 2.5 per cent. 'Other' population groups make up 0.5 per cent of the total.

¹⁴³ The fact that certain principles are not judicially enforceable does not mean that they are not enforceable at all. Popular periodic elections, social movements, and even revolutions are also mechanisms of enforcing certain basic principles. As such, the possibility of losing elections or a violent popular revolt may discourage governments from changing some constitutional rules.

ment.¹⁴⁴ The absence of clearly defined limits also means that every constitutional judge will have his or her own list of what is basic and what is not.¹⁴⁵ The judicial power to define basic social and political values belies the ideal that courts should merely apply settled rules and principles, not discover some vague ‘fundamental’ values to invalidate the best judgments of the overwhelming majority of the political representatives. In the absence of clearly established substantive limits, and an explicit jurisdiction to enforce substantive limits on constitutional amendments, the power and responsibility of ensuring compliance with any desirable substantive limits lies beyond the courtroom. Only the democratic process or a revolution could legitimately and effectively stymie any temptation to legitimise undemocratic behaviour through constitutional amendments.¹⁴⁶

Although the Constitution of South Africa empowers the Constitutional Court to decide on the constitutionality of constitutional amendments, it does not impose substantive limits on the power of constitutional amendments. Moreover, the Constitutional Court has not yet defined the status of the basic structure doctrine in South African constitutional law. Any endorsement of the doctrine will constitute an extraordinary *Marbury v*

¹⁴⁴ See generally Jeremy Waldron *Law and Disagreement* (1999) part III; and Waldron op cit note 45, who argues against judicial review based on the idea that a popularly elected and representative body, not the courts, should have the power to settle reasonable disputes on fundamental social, political and economic issues. For Waldron, given the inherent and persistent diversity and plurality of opinion (reasonable disagreement) over the most fundamental values, majoritarianism is the only decision-making procedure that can ensure the full respect of the equal autonomy and worth of each citizen and each individual’s right to fair and equal political participation.

¹⁴⁵ See Sir William Wade ‘Bedrock or quicksand’ in *Public Law in Britain and India* (1992) 12, who observes that the doctrine ‘gives a very wide discretion to the judges to say what they consider to be the basic and unalterable law of the land’.

¹⁴⁶ In addition, international human rights adjudication to which a country has voluntarily subscribed may provide additional limitation to the powers of Parliament to undermine fundamental rights through constitutional amendments. In the case of South Africa, for instance, the African Commission on Human and Peoples’ Rights has the power to review complaints alleging violations of human rights. Since domestic law, including the Constitution, may not be invoked to justify a violation of an international duty, the Commission may find a constitutional amendment and any constitutional rule for that matter incompatible with the African Charter on Human and Peoples’ Rights. South Africa ratified the African Charter, which establishes the African Commission, on 9 July 1996. The fact that an international tribunal can review the compatibility of a constitution or a constitutional amendment while domestic courts may not do so unless the Constitution expressly says so, creates a paradox. As such, the increasing relevance of international human rights adjudication may provide an incentive for states to empower their domestic courts to review constitutional amendments at least based on human rights provisions. See Adem K Abebe ‘A partial supranational solution to the problem of regressive constitutional amendments’ *International J of Constitutional Law Blog*, 20 June 2013, available at <http://www.icconnectblog.com/2013/06/a-partial-supranational-solution-to-the-problem-of-regressive-constitutional-amendments/>, accessed on 31 July 2013.

*Madison*¹⁴⁷ moment in relation to the judicial review of constitutional amendments. It has been argued that the provision authorising the court to decide on the constitutionality of constitutional amendments does not have the effect of insulating any of the constitutional provisions from amendment.¹⁴⁸ Nor does it imply the establishment of general substantive limits on the powers of Parliament to amend the Constitution. As I have argued above, the judicial creation of implied limits to the power of constitutional amendment will undermine the continuous supremacy of the constituent power, 'We, the people of South Africa' and elected representatives,¹⁴⁹ which brought the Constitution into existence.

Nevertheless, while reviewing the procedural validity of constitutional amendments, the Constitutional Court will inevitably be drawn into substantive determinations. The existence of different categories of amendment rules may then justify the *partial* importation of the basic structure doctrine to South African constitutional law. It is possible that the Constitutional Court may require that all amendments that affect 'fundamental' aspects of the Constitution may only be amended following the procedure established for amending s 1. Whether or not an amendment affects 'fundamental' aspects of the Constitution will have to be determined on a case-by-case basis. It is unwise to attempt to come up with a general list of such 'fundamental' principles. Beyond this, however, the doctrine does not have any direct relevance to South African constitutional law. Moreover, the power of the Constitutional Court only extends to the *constitutionality* of constitutional amendments. The court is not empowered to assess the *legitimacy* or *appropriateness* of constitutional amendments. Any substantive limits to the power of constitutional amendment are immanent rather than transcendent. The sources of authority are to be found in the Constitution itself rather than in external moral or philosophical precepts. The decision cannot be based on natural law theory or any other metaphysically higher law. It also excludes the 34 Constitutional Principles that guided the adoption of the Constitution, although the court might rely on them to the extent that the text of the final Constitution incorporates them.

In conclusion, constitutional amendment rules are important to incorporate evolving notions of justice and fairness based on experience, pragmatism and emerging principles and consensus. Nevertheless, the amendment procedure also poses potential risks to the strengthening of constitutional democracy in South Africa, and in particular the role of the Constitutional Court in protecting and reinforcing the democratic system. The dominant political groups have expressed dissatisfaction with, and at times have actively criticised, some of the decisions of the court. There will be moments where they may attempt to reverse such decisions through constitutional amendment. We should not take for granted the existence and guardianship role of

¹⁴⁷ *Supra* note 48.

¹⁴⁸ Section 167(4)(d) of the Constitution.

¹⁴⁹ The Preamble to the Constitution.

the Constitutional Court. The more aggressive the Constitutional Court becomes, the more willing the political organs will become to take measures to constrain its powers, including (if necessary) by exercising powers of constitutional amendment.¹⁵⁰ The invention of implied limits on the power of constitutional amendment may threaten the institutional security of the court. Because of its inherent vulnerability as the 'weakest' branch of government, the Constitutional Court may become a victim of its own successes. The court must therefore tread cautiously so as not to endanger its institutional security.¹⁵¹

Hopefully, future proposals for constitutional amendments will not undermine the essence of constitutional democracy and human rights in South Africa. Although the Constitutional Court has some role in making the adoption of regressive constitutional amendments more difficult, the main responsibility of preventing such amendments lies in actors other than the court.¹⁵² Political actors, civil society organisations, the media, international actors, and perhaps most importantly the people, are more potent in limiting the possibility of enacting regressive amendments than courtrooms. This conclusion stands even if the amendment may have the unlikely effect of abrogating the constitutional democratic system and doing away with the Constitutional Court itself. In any case, the capacity of any constitutional court to resist concerted efforts of populist and dominant political groups to abrogate the democratic system is questionable.¹⁵³ Indeed, the observations of Justice Khanna, one of the judges in the Supreme Court of India who decided in favour of the basic structure doctrine in *Bharati*,¹⁵⁴ reflect this limited judicial capability in overcoming authoritarian tendencies:¹⁵⁵

¹⁵⁰ For example, in a reaction to the purported aggressiveness of the Brazilian Constitutional Court, the Brazilian Congress proposed to amend the Constitution to impose higher threshold to invalidate laws (such as a two-thirds majority of judges). See Vanice Regina Lírio do Valle 'The judicialization of pure politics in Brazil' *International J of Constitutional Law Blog*, 7 May 2013, available at <http://www.iconnectblog.com/2013/05/the-judicialization-of-pure-politics-in-brazil/>, accessed on 31 July 2013.

¹⁵¹ The court has, indeed, been aware of its institutional vulnerability. Studies have found that the court generally attempts to balance principle with pragmatism to strengthen its legal legitimacy without endangering its institutional security. Sometimes, the court compromises on principled decision-making to avoid confrontation with the political organs. See Theunis Roux 'Principle and pragmatism on the Constitutional Court of South Africa' (2009) 7 *International J of Constitutional Law* 106 at 117 and 125–36.

¹⁵² In this regard, borrowing from the concept of revolutions developed by Hans Kelsen, Henderson indicated that the Constitutional Court may consider changes to fundamental aspects of the Constitution as signalling revolutionary changes which should be given effect: see Henderson *op cit* note 37 at 554 and 555. Henderson further observes that the fate of a constitution, and the principles and institutions it establishes, depends on factors outside the Constitution itself, in particular the people.

¹⁵³ The best courts can do in such circumstances is to legitimise the causes of less dominant groups opposing authoritarian tendencies of the dominant group.

¹⁵⁴ *Supra* note 23.

¹⁵⁵ Cited in Morgan *op cit* note 63 at 335 (citations omitted).

‘There is no modern instance, it is said, in which any judiciary has saved a whole people from the grave currents of intolerance, passion and tyranny which have threatened liberty and free institutions. The attitude of a society and of its organized political forces rather than of its legal machinery, is the controlling force in the character of free institutions. The ramparts of defence against tyranny are ultimately in the hearts of the people.’