THE IMPLICATIONS OF "ETERNITY CLAUSES": THE GERMAN EXPERIENCE

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This paper explores the conceptual possibility and implications of the concept of unconstitutional constitutional amendments. In the first section, the author argues that unconstitutional constitutional norms are conceptually impossible within the conventional hierarchical model of norms. In the second section, the author discusses the normative particularity of the amending power and concludes that an unlimited power may endanger the constitution. In sections III and IV, the author explains why so-called "eternity clauses," in order to fend off such a danger, have been designed to place certain immutable elements of the constitution beyond the limits of the amending power. The paradigmatic case is the German Basic Law and a recent decision by the Federal Constitutional Court that discusses the implications of the "eternity clause" with reference to the distinction between constituent power and the constituted amending power. The author develops an alternative understanding of that distinction and its consequences for the amending power. The possible adverse effects of "eternity clauses" on the normality of the constitution are briefly considered in the final section.

INTRODUCTION

It is usually understood that a written constitution essentially consists of rules concerning the machinery of government, a bill of rights, and stipulations on the amendment of the constitution. As a matter of fact, the history of constitutionalism provides several examples of constitutions that lacked a bill of rights. These include the U.S. Constitution during the brief period between September 13, 1788 and December 15, 1791 and the Constitution of the German Empire of 1871 (valid until the Empire's collapse in November 1918). Thus, it is a matter of argument whether a bill of rights is an indispensable part of a constitution. By contrast, amendment rules, while at first glance appearing to be merely technical in character, are in fact essential and indispensable. The constitution is an institutional device that constitutes a polity in which all categories of political power are authorized by the supreme law of the land—*nulla potestas extra constitutionem* (there is no authority beyond the constitution). In a constitutional polity, all powers are constituted powers

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and derive their authority from the constitution.[1] If an extra-constitutional power—for example the armed forces of a state or a religious leader—had the authority to change the constitutional set-up of the polity, the existing powers and their institutional structure would no longer depend upon the constitution but upon that extra-constitutional authority. This, then, would destroy the premise of constitutionalism. In sum, the authority to change the constitution needs a constitutional foundation. The amending power must be established as a constituted power, much as the legislative, executive, and judicial powers. A polity whose constitution lacks such an authorization would be in a dilemma: it would either be forced to make changes in its institutional set-up through means not authorized by the constitution and recognize a political authority beyond the constitution or it would have to relinquish constitutional changes altogether. In the real world of constitutional states, this alternative rarely exists in such a pure form. Rather, we find constitutional systems with different gradations of constitutional amendability, ranging from "rigid" constitutions with very high barriers (e.g., requirement of a constitutional convention plus a large super-majority) to "flexible" constitutions with very slight constraints (e.g., changes by ordinary legislative majorities).[2]

Since the amending power is a constituted power, it is subject to the constitution; thus, it can violate its normative standards. At the same time, it has the power to change these very constitutional standards and, consequently, to evade the constraining requirements of the constitution. Hence, the ambiguous character of the amending power: it is necessary to preserve the flexibility and sustainability of the constitutional order, but it can destroy it by amending the constitution in an anti-constitutional tenor.

But are unconstitutional constitutional amendments really conceivable? This question is the topic of the present article. It starts with a brief analysis of the status of constitutional amendments within the hierarchy of norms (I), followed by an exposition of the ambivalent, possibly dangerous, character of the amending power (II). The next section provides a brief account of the German Basic Law's approach to coping with the ambiguous character of the amending power, which had already been debated passionately among constitutional lawyers in the 1920's with respect to the Weimar Constitution of 1919 (III). Finally, the implications, merits, and risks of so-called "eternity clauses"—the immunity of certain parts of the constitution from any constitutional amendment—are discussed in sections IV and V.

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[1] *Cf.* Paul Kirchhof, *Die Identität der Verfassung in ihren unabänderlichen Inhalten*, *in* 1 HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 775, 788 et seq. (Josef Isensee & Paul Kirchhof eds., 1987).

[2] On this distinction, see AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES (1999).

I. CONSTITUTIONAL AMENDMENTS WITHIN THE HIERARCHY OF LEGAL NORMS

At first, the concept of unconstitutional constitutional amendments strikes us as strange. It seems inconceivable within the logic of a legal hierarchy. Our conventional wisdom tells us that within the logic of legal hierarchy, only those legal norms can be unconstitutional which have a subconstitutional rank. According to this conceptual framework, a norm of a higher rank defines the conditions that an inferior norm must fulfill in order to be valid. Thus, the constitution delineates the characteristics of what constitutes a valid statute and, ex negativo, an unconstitutional statute. Statutes are unconstitutional if their content or their creation process contradicts rules of the constitution. But does the hierarchical logic that applies to the relationship between constitutions and statues apply to the relationship between constitutional amendments and constitutions?

As expounded above, the power to amend the constitution is a constituted power, which is therefore subject to the relevant rules of the constitution that define the requirements of a valid constitutional amendment. This is also true for so-called self-amendments, where the amending clause of a constitution can be used for its own amendment. This applies to all institutional varieties of amending power.[3] Any act that does not meet these requirements lacks the conditions of validity as a constitutional amendment. It cannot become part of the constitution and change its contents.

As such, it follows that an amending act that violates the procedural requirements of the amendment process established by the constitution cannot effect a change of the constitution. As a constitutional amendment it is null and void. As long as an authorized institution—most probably a court—has not established its invalidity, the amending law is presumed valid. The constitutional amendment is, in fact, unconstitutional.

A more difficult case concerns an amending act that has met the constitutionally fixed procedural requirements of its enactment, while its content is at variance with the substance of the existing constitution. Suppose the constitution contains the fundamental right to life, while the amending act establishes the death penalty as an element of the constitutional norms of criminal justice. Such an amendment act cannot be invalid on the ground that the constitution forbids revisions that contradict its existing content. After all, the purpose of revising a constitution is to change its existing content. The prohibition or legal invalidity of constitutional amendments that contradict the constitution's content would abolish the amendment power altogether.

Since the amendment is valid, the amended constitution in this hypothetical case contains two clauses whose content is contradictory. According to German constitutional doctrine, an inconsistent legal norm violates the *Rechtsstaat* principle of the

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[3] *See infra* section III.A.

Basic Law, which requires that the law has to determine the rights and obligations of its addressees in a precise and predictable manner.[4] But this cannot apply to the constitution, because a constitution cannot be measured against a superior standard. There is no supra-constitutional *Rechtsstaat* principle. Nor can inconsistent clauses in a constitution be subject to meta rules or collision rules, that is to say, priority rules that determine which rule is applicable in a case in which two conflicting norms apply (as in the legal discipline of conflict of laws, also known as private international law). Meta rules or collision rules do not rank conflicting norms according to the criterion of their substantive significance but according to their formal status in the world of legal sources. All clauses of a constitution share the same rank, even if some of them contradict each other.

This also applies to the relationship between the original clauses of and subsequent amendments to the constitution. At first glance, there seems to be a normative hierarchy between the clauses created by the constituent power and those that have been added by the amending power, which is obviously a constituted power. But this is not the case. The authorization of the amending power by the constituent power to revise the constitution implies that the constituted powers are entitled to substitute their constitutional will for that of the constituent power. The will of the constituent power is embodied in the constitution; hence, the authorization to amend the constitution is tantamount to an authorization to amend the will of the constituent power proper.[5] Consequently, the original constitution and the revised constitution enjoy the same level of normative validity.

Thus, the inconsistency of different clauses within a constitution as such does not entail the invalidity of any of them. A constitutional amendment that has been enacted by the authorized legal body cannot be discounted on the grounds that its content has a lower rank than the content of the constitution. Two inconsistent constitutional provisions with equally authoritative sources may exist side by side at the same level of hierarchy. In our example, the fundamental right to life has no higher rank than the amendment introducing the death penalty. Whoever is authorized to amend the constitution is entitled to introduce substantive provisions that contradict other clauses of the constitution, as long as the procedural requirements of constitutional amendments are fulfilled. In the absence of an unequivocal collision rule, it is the task of the authoritative interpreter of the constitution—most frequently the Constitutional Court—to find a consistent interpretation of it on a case-by-case basis.

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[4] *See, e.g.*, Horst Dreier, in 2 GRUNDGESETZ: KOMMENTAR, art. 20 (*Rechtsstaat*), marginal note 129 (Horst Dreier ed., 1998); 1 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] [DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT] 14 (45) (1951); 17 BVERFGE 306 (314) (1964); 25 BVERFGE 216 (227) (1969).

[5] As argued below, the relationship between constituent power and constituted powers is somewhat less tangible, but for the purposes of the present argument the more conventional conceptualization does no harm.

To conclude, constitutional amendments are invalid because they do not meet the procedural conditions of their validity. They do not cause difficult juristic problems. By contrast, those amendments that contradict the substance of the constitution are valid and effect the change of the constitution because this is the rationale of constitutional amendments. Therefore, they also do not seem to raise juristic problems. Is this really true? Imagine a constitutional order of liberal (i.e., competitive) democracy in which the citizens elect a parliament and a president for a constitutionally fixed period of time and in which the parliament is endowed with the power to amend the constitution with two-thirds of the votes of its members. Suppose that the parliament, dominated by a party or party coalition that achieved slightly more than two-thirds of the seats in the last elections, establishes in due procedural form the following constitutional clauses: that the term of the present parliament is prolonged until a date to be determined by the president, that the term of the president, including the present incumbent, is indefinite, and that the president may appoint his or her successor at any time. Obviously, these amendments, enacted according to the procedural rules of the constitution, destroy core elements of the political order. Can we accept this amendment as a rightful change to the constitution or must we conceive of constitutional amendments that are valid and unconstitutional at the same time? This raises the question of the limits of the amending power. Before an answer is provided, a few remarks about the special character of the amending power seem appropriate.

II. THE DILEMMA OF CONSTITUTIONAL AMENDMENTS

The power to amend the constitution is peculiar and not fully understandable in terms of the hierarchical model of the legal pyramid. In fact, the authority to amend the constitution is, as Carl Schmitt rightly observed, not self-evident.[6] No matter which constitutional institution is endowed with the amending power, not one of them operates within the routine of a consolidated order with a functionally differentiated scheme of institutional tasks "like establishing statutes, conducting trials, undertaking administrative acts, etc."[7] The amendment power embodies a dilemma. On the one hand, every political system is in need of a certain degree of institutional flexibility in order to adapt to various changes, be it "(1) changes in the environment within which the political system operates (including economics, technology, foreign relations, demographics, etc.); (2) changes in the value system distributed across the population; (3) unwanted or unexpected institutional effects; and (4) the cumulative effect of decisions made by the legislature, executive, and judiciary."[8] Flexibility is an important condition for the durability of a constitution.

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[6] CARL SCHMITT, CONSTITUTIONAL THEORY 150 (Jeffrey Seitzer ed. & trans., 2008) (1928).

[7] *Id*.

[8] Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AMERICAN POLITICAL SCIENCE REVIEW 355, 357 (1994).

On the other hand, the obvious instrument of institutional change—constitutional revisions—has implications whose possible negative effects may outweigh the benefits of institutional flexibility. This has to do with the difference between a statutory law and a constitution. Juristic logic teaches that, if there is a need for institutional adjustment to new circumstances, it must be satisfied by the author of the relevant institution or by a superior power. Laws are adjusted—modified or repealed and replaced with other laws—by the legislature. In a world of positive law, a legislative body is not bound by its prior laws and can repeal or change them at will. Positivism is the legal theory of a dynamic society that disposes of the instruments to adjust to permanently changing circumstances. This is the sociological rationale of the collision rule of *lex posterior derogat legi anteriori*.[9] Yet what applies to the system of legality is not valid for the constitution. The constitution is a particular law in that its author—the constituent power—disappears, as it were, after fulfilling its mission, namely the creation of a constitution. To be more precise: the constituent power of the people consists only in its capacity to transform it into constituted powers of a polity. Once this has been achieved through the enactment of the constitution, the constituent power of the people has been entirely depleted and converted into the constitution. Whatever "the people" may "will" after their self-transformation into a polity, it can only be expressed through the means of the constitution, that is, through the actions of constituted powers. This situation creates the need to endow the amending power with the same amount of power that the constituent power exercised when it created the constitution. The protection of the continued existence of the constitution requires its openness to all kinds of potential future changes, a kind of "general power" similar to that of an executor and trustee of a will. The only difference between the authority of the amending power and the constituent power is that the former has to exercise its power within the framework of the constitution. This means that the amending power is bound procedurally and not with respect to the substance of the constitution.

It is not clear whether the purely procedural limitation of the amending power is sufficient to effectively protect the constitution against anti-constitutional forces. There are some doubts in this regard. Thus, in the absence of an explicit clause that establishes the contrary, the rules about the formal requirements of a constitutional amendment can also be amended pursuant to those very rules themselves (so-called self-amendment[10]). An electoral majority that is lucky enough to muster the necessary quorum and meets the procedural requirements could change the requirements for all future amendments for its own benefit and disempower its political competi-

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[9] *Cf.* NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM 76 et seq., 437 et seq. (Fatima Kastner et al. eds., Klaus A. Ziegert trans., 2004).

[10] For a discussion of the logical problems of self-amendments, see PETER SUBER, THE PARADOX OF SELF-AMENDMENT: A STUDY OF LOGIC, LAW, OMNIPOTENCE, AND CHANGE (1990).

tors, for example through new rules about the electoral process. But even if the constitutional stipulations about amendments were immune to any change by the amending power, the limitation of its authority simply by means of procedural requirements turns the integrity of the constitution into an Achilles' heel. The amending power could profoundly change the substance of the constitution, including the institutional set-up of the polity, and transform it into the instrument of a temporary majority to continue its rule through constitutional means. The above case, although fictional, is not purely imaginary.

Thus, a constitution at the disposal of a constituted power carries with it certain risks. It may be tantamount to the authority of a constituted power to assume constituent power. To be sure, the authority to revise the constitution does not include the authority to create a completely new constitution. In practice, however, it will be difficult to distinguish between a "major" or "total" revision of the constitution and the replacement of an existing constitution with a completely new one. In sum, the amending power creates a dilemma: to preserve the adaptability and, hence, longevity of the constitution, the constituent power must establish the amending power, but it is this very amending power that endangers the constitution, because it has no inherent stop rule that prevents it from converting the constitution from a warrantor of democratic freedom into an instrument of authoritarian or totalitarian domination.

A way out of this dilemma could be found if there were methods to discriminate between permissible and impermissible constitutional amendments. That would create the possibility of unconstitutional constitutional amendments: amendments that transgress the stop rule of impermissible amendments would be unconstitutional. The following section reconstructs the evolution of this problem up to the constitutional innovation of the imposition of substantive limitations upon the amending power based on the German Basic Law of 1949.[11]

III. THE GERMAN BASIC LAW'S WAY OUT OF THE DILEMMA

The history of the German Basic Law's rules on the limitation of the amending power dates to the Weimar Constitution, which in many respects has served as a negative paradigm for the design of the Basic Law after World War II.[12]

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[11] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, last amended by Gesetz zur Änderung des Grundgesetzes [Law Amending Basic Law], July 21, 2010, BGBl. I at 944.

[12] VERFASSUNG DES DEUTSCHEN REICHS [CONSTITUTION OF THE GERMAN REICH], Aug. 11, 1919, RGBl. I at 1383; *see* WEIMARS LANGE SCHATTEN—"WEIMAR" ALS ARGUMENT NACH 1945 (Christoph Gusy ed., 2003).

A. THE WEIMAR CONSTITUTION (1919)

Article 76 of the Weimar Constitution stipulated that constitutional amendments could be performed by legislation and that they required the presence of two-thirds of the members of the *Reichstag* (Diet)—the popularly elected house of parliament—and the approval of two-thirds of the members present. As a consequence, less than 50% of the members of the *Reichstag* could amend the constitution. The role of the *Reichsrat* (the body in which the German *Länder* (states) were represented) in this regard was negligible. These relatively undemanding preconditions for a constitutional amendment were exceptional but not unique at the time. The Polish Constitution of 1921 was even less demanding, in that the constituent Sejm required no more than the presence of at least 50% of its members and the approval of two-thirds, and the next Sejm elected according to the rules of that constitution required no more than three-fifths of the votes.[13]

The key issue in article 76 of the Weimar Constitution was the stipulation that constitutional amendments were carried out through legislation: a constitutional amendment was a mere variety of an ordinary law.[14] Obviously, this was not a constitutional matter. Many of the early—and contemporary—constitutions mark the extraordinary character of constitutional revisions by establishing separate institutions or institutional devices in order to clearly distance the amendment power from the function of ordinary legislation, as well as to avoid conflicts of interest among the members of the legislative bodies.

With the dawn of modern constitutionalism, proposed amendments to the U.S. Constitution (adopted in 1787) required the approval of two-thirds of both Houses of Congress or, on the application of the legislatures of two-thirds of the several states, the convocation of a convention to propose amendments. These had to be ratified by "the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress," in order to become part of the constitution.[15] The French Constitution of 1791 required the election of a special Assembly of Revision for constitutional amendments after three consecutive legislatures had proposed changes to the constitution.[16] After 1945, during the era of democratization, the barriers to constitutional amendments were lowered but still remained high enough to mark a clear difference between constitutional amendments and ordinary legislation. The Italian Constitution of 1946 requires two-thirds of the votes of both houses of parliament for laws

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[13] POLISH CONST., Mar. 17, 1921, art. 125.

[14] Walter Jellinek, *Das verfassungsändernde Reichsgesetz*, *in* 2 HANDBUCH DES STAATSRECHTS 182, 182 (Gerhard Anschütz & Richard Thoma eds., 1932).

[15] U.S. CONST. art. V.

[16] 1791 CONST. tit. VII (Fr.).

amending the constitution or other constitutional laws, preceded by two successive debates at intervals of no less than three months. If those laws have been supported by an absolute majority in each house in the second round of voting, they must be submitted to a popular referendum if, within three months of their publication, such a request is made by one-fifth of the members of a house or 500,000 voters or five regional councils.[17] The French Constitution of 1958 bestows the right of constitutional amendment upon the two houses of parliament. The decisions—passed by the two houses in identical terms—have to be submitted to a referendum. A referendum can be avoided if the president decides to submit it to the two houses convened in congress; the government bill to amend the constitution is then approved only if it is passed by a three-fifths majority of the votes cast.[18]

Many further examples could be cited in support of the observation that the Weimar Constitution's conception of constitutional amendments as special cases of parliamentary legislation was and remains exceptional when compared with the constitutional mainstream of the last 200 years. An odd consequence resulted from this equation of ordinary legislation and constitutional revision: the constitution could be revised through any that which had been passed with a two-thirds majority of the parliament and without altering the text of the constitution. The term for this constitutional oddity was *Verfassungsdurchbrechung* (breach of the constitution).[19] Thus, the parliament could amend the constitution without being aware of doing so.[20] Many significant laws of such character were enacted on this basis, including enabling acts during the republic's critical period between 1919 and 1923 or ex post facto criminal laws.[21] The acceptance of *Verfassungsdurchbrechungen* signaled the predominate belief in the era following World War I that the people's sovereignty was embodied in the national assembly, which included the right to change its constitution at will. In the democratic age, characterized by universal suffrage and the political emancipation of the popular masses, the doctrine of the sanctity of the constituent power of the people that predominated during the 18th century was transferred onto the central institution of the popular will, namely the parliament. After all, article 6 of the French Declaration of the Rights of Man and of the Citizen of 1789 declared that the "[l]aw is the expression of the general will." Did this not

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17 Art. 138 COSTITUZIONE [COST.] (It.).

18 1958 CONST. art. 89 (Fr.).

19 *See* Richard Thoma, *Grundbegriffe und Grundsätze*, *in* 2 HANDBUCH DES DEUTSCHEN STAATSRECHTS 108, 155 et seq. (Gerhard Anschütz & Richard Thoma eds., 1932); Jellinek, *supra* note 14, at 187 et seq.; ERNST RUDOLF HUBER, DEUTSCHE VERFASSUNGSGESCHICHTE SEIT 1789: 4. DIE WEIMARER REICHSVERFASSUNG 421 et seq. (1981); Hans Schneider, *Die Reichsverfassung vom 11. August 1919*, *in* HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 85, 131 et seq. (Josef Isensee & Paul Kirchhof eds., 1987).

20 *Cf.* Jellinek, *supra* note 14, at 188.

21 HUBER, *supra* note 19, at 423.

imply that the legislating parliament was the appropriate representation of the people's capacity and right to form the general will?

In light of this tradition, it comes as no surprise that the supporters of the constitution defended the fusion of the amending and the legislative powers, and the resulting relative ease of amending the constitution, as consistent with the principle of popular sovereignty. At the same time, the conservative forces among the constitutional scholars, those who were skeptical or outright hostile to the constitution, expressed broad criticism of this state of affairs, especially with regard to *Verfassungsdurchbrechungen*.[22] This antagonism epitomized the different attitudes toward the idea of popular sovereignty realized in the Weimar Constitution. The skeptics and opponents of the constitution on the political right aimed to take the right to exercise democratic self-determination away from the *Reichstag*, which they resented as a mere assembly of disruptive party delegates unable to embody the German people as a homogeneous political body. In contrast, the supporters (largely on the centre-left and left of the political spectrum) accepted the conflictual and divisive character of democratic mass politics and regarded the parliament with its pluralist and antagonistic party groups as the appropriate democratic forum of a conflict-ridden class society.

Carl Schmitt was the pioneer of the intellectual movement that aimed to limit the amendment power of the *Reichstag*. His basic conceptual lever was the distinction between a formal or relative concept of the constitution, which he defined as the sum total of the provisions in the text of the constitution, that is to say, the constitutional law rules, and a positive concept, according to which the constitution is "the complete decision over the Type and form of the Political Unity."[23] What he had in mind was the political identity of the nation. According to Schmitt's doctrine, its protection was exclusively reserved for the constituent power of the people and was beyond the authority of the *Reichstag*. This led him to make a distinction between constitutional amendment, constitutional annihilation, and constitutional elimination.[24] Constitutional annihilation would occur if the constituted power arrogated the authority of the constituent power and changed the identity of a polity. Schmitt provides an example of the transformation of a "state resting on the monarchical principle into one ruled by the constitution-making power of the people."[25] Hardly different from annihilation is constitutional elimination, which would take place if another political decision was substituted "for fundamental political decisions that

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[22] For a detailed historical account of this part of the constitutional history of Weimar, see HUBER, *supra* note 19, at 418 et seq.

[23] SCHMITT, *supra* note 6, at 67 (§ 2), 75 (§ 3). The German text refers to: "Die Verfassung als eine Vielheit einzelner Gesetze" vs. "Die Verfassung als Gesamtentscheidung über Art und Form der politischen Einheit."

[24] SCHMITT, *supra* note 6, at 150 et seq.

[25] *Id.* at 151.

constitute the constitution (in contrast to constitutional law rules)."[26] Both cases can be understood as varieties of unconstitutional constitutional amendments.

Schmitt's personal resentment of parliamentarism and political pluralism,[27] notwithstanding his objections to the equation of legislation and constitutional revision, was not unfounded. His examples of cases in which the political substance of a constitution would be affected—for example the transformation of a monarchical state into a democratic one and vice versa—were plausible as well, although the criterion as such is quite vague and dangerous. At what point does a major constitutional alteration become so fundamental that it serves as a substitute for constitutive elements of the constitution? And why should a fundamental constitutional element not be replaced if the supermajority represented by the amending power determines the need for a new one? Moreover, the distinction between a formal and a positive or substantial concept of the constitution may tempt some political actors to regard the violation of the formal constitution's provisions as acceptable because they do not touch upon the constitutional substance. This, then, could create a slippery slope that ultimately erodes the authority of the written constitution altogether.

B. THE BASIC LAW (1949)

The drafters of the Basic Law, traumatized by the near-defenseless collapse of the Weimar Republic and the unprecedented crimes of the Nazi regime, took great pains to avoid the weaknesses of the Weimar Constitution and to fortify the Basic Law against a repeat of this experience. In addition to other innovations, such as the possibility to prohibit anti-constitutional political parties (art. 21) and the forfeiture of basic rights should they be abused to combat the free democratic order (art. 18), they broke new ground by dividing the Basic Law into amendable and immutable components. They refrained from the obvious option of establishing a separate institution for constitutional amendments (as in some of the cases enumerated above) and instead followed the historical example of the Weimar Constitution (and, incidentally, Bismarck's Imperial Constitution of 1871) by bestowing that function upon the legislative organs of the *Bundestag* (the popularly elected house of parliament) and the *Bundesrat* (the house representing the German *Länder*). The *Bundestag* and the *Bundesrat* could change the Basic Law conjointly with a two-thirds majority in each house (art. 79 § 2). But article 79 § 3 incorporated Schmitt's idea that certain core elements of the constitution should remain unamendable, even by supermajorities in both houses.

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[26] *Id.* at 153.

[27] *See, e.g.*, CARL SCHMITT, THE CRISIS OF PARLIAMENTARY DEMOCRACY (Ellen Kennedy trans., 1988) (1923).

Article 79 § 3 reads:[28]

> Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 [human dignity] and 20 [the rule of law, republicanism, democracy, social state, and federalism] shall be inadmissible.

The unamendable stipulations of the constitution were designed to exist forever, which is why article 79 § 3 is usually called the "eternity clause" of the Basic Law. To be sure, this clause and the principles that it protects are not declared to be eternally valid; rather, they cannot be changed through constitutional means, that is, by any constituted authority of the Basic Law. In other words, the principles immunized against revision by article 79 § 3 can only be changed by the extra-constitutional power of the German people (i.e., the constituent power). Obviously, the collapse of the Weimar Republic and its constitution was the motivating force behind this clause. Weimar has become the paradigm for "democratic suicide": the elimination of constitutional democracy by the institutional means of that very democracy. Although the widespread belief that the Nazi Party came to power by legal methods in 1933 is a myth, it is hardly deniable that this seizure of power—which abolished the Weimar Republic—was facilitated by certain weaknesses in the Republic's constitutional system. Hitler's appointment as the Chancellor of the German *Reich* by President Hindenburg on 30 January 1933 was the only act that conformed to the rules of the Weimar Constitution.[29]

IV. INTRICACIES OF THE "ETERNITY CLAUSE"

The prevailing perception among the authors of the Basic Law was that the new German constitution had to be protected against any self-destructive potential.[30] Karl Loewenstein's analysis of the devastating effects of totalitarian mass movements on the fate of the European constitutional democracies after World War I arguably played a major role in the framing of that perception.[31] His idea of "militant demo-

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[28] In the original German: "Eine Änderung dieses Grundgesetzes, durch welche die Gliederung des Bundes in Länder, die grundsätzliche Mitwirkung der Länder bei der Gesetzgebung oder die in den Artikeln 1 und 20 niedergelegten Grundsätze berührt werden, ist unzulässig."

[29] Horst Möller, *Die nationalsozialistische Machtergreifung. Konterrevolution oder Revolution?*, 31(1) VIERTELJAHRSHEFTE FÜR ZEITGESCHICHTE 25, 26 (1983); *see also* Norbert Frei, *"Machtergreifung." Anmerkungen zu einem historischen Begriff*, 31(1) VIERTELJAHRSHEFTE FÜR ZEITGESCHICHTE 136 (1983).

[30] *See* WEIMARS LANGE SCHATTEN, *supra* note 12.

[31] Karl Loewenstein, *Militant Democracy and Fundamental Rights*, 31(3) AMERICAN POLITICAL SCIENCE REVIEW 417-33 & 638-58 (1937).

cracy" was to become a cornerstone of the ensuing interpretation of the Basic Law, largely based upon the "eternity clause" of article 79 § 3. According to this interpretation, the immutability of the principles laid down in this clause marked out a normative core that defined the constitutional identity of the polity. According to this doctrine, these principles could not be altered without destroying this very identity.

The fact of the matter is that the collapse of the Weimar Republic cannot be attributed to a misuse of the amending power against which article 79 § 3 of the Basic Law was intended to serve as protection. None of the Weimar Constitution's numerous amendments intended to annihilate or profoundly change the Weimar Republic's identity as a constitutional democracy. Hitler's seizure of power was not the result of a prior constitutional revision involving the transformation of the political system into a totalitarian regime. Rather, it was caused by the anti-constitutional actions of the Nazi Party after Hitler's inauguration as Chancellor of the *Reich*, which occurred according to the letter—but certainly not the spirit—of the constitution. This does not mean that the amendment rules were irrelevant to the Weimar Constitution's demise. However, it was more the indirect effect of the equation of ordinary legislation and constitutional amendment that gradually eroded the status of the constitution as the supreme law of the polity.

This effect has certainly been avoided under the Basic Law. The distinction between ordinary legislation and constitutional amendment is highlighted in the first sentence of article 79 § 1, which aims to prevent the above-mentioned notorious *Verfassungsdurchbrechungen* of the Weimar era. It reads as follows: "The Basic Law may be amended only by a law expressly modifying or supplementing its text." Thus, a law, even if it has been enacted with a two-thirds majority in both houses of parliament, cannot have the status of a constitutional amendment unless the intended change of the constitution is expressly inserted into its text.

While this procedural precaution avoids the equation of legislation and constitutional amendment and, of course, any kind of tacit or "unconscious" constitutional amendment, it does not protect the constitution against normative distortion of its constitutional substance through a two-thirds majority in both houses of parliament. This can only be prevented by article 79 § 3. The establishment of an unalterable substantive normative core of the constitution is tantamount to creating a supra-constitutional standard by which constitutional amendments must be measured. An amendment that does not meet this standard is unconstitutional, making it an "unconstitutional constitutional amendment." This can occur when both houses, with the required two-thirds majority, enact a law that expressly changes the constitutional text but violates the substantive "supra-constitutional" standard.

The institution best suited to verify an unconstitutional constitutional amendment is the constitutional court, which has the authority to review the constitutionality of

legislative acts. In Germany, the Federal Constitutional Court (*Bundesverfassungsgericht*) has left no doubt that its authority of judicial review includes the authority to examine whether the constitution-amending legislative power has respected the limits of article 79 § 3 of the Basic Law.[32] The most recent and politically highly controversial case was the review of the constitutionality of the Lisbon Treaty, a revision of the founding treaties of the European Union concluded by its member states and ratified according to their respective constitutional rules. In its seminal ruling of 30 June 2009, the Federal Constitutional Court affirmed that the "so-called eternity guarantee even takes the disposal of the identity of the free constitutional order out of the hands of the constitution-amending legislature."[33]

The crucial issue was whether the Lisbon Treaty (in the form of a domestic ratification law that had been approved in both houses with a two-thirds majority) affected the principle of democracy referred to in article 79 § 3 of the Basic Law, inasmuch as it might entail Germany joining a federal European state. The Court stated that "[d]ue to the irrevocable transfer of sovereignty to a new subject of legitimization that goes with it, this step is reserved to the directly declared will of the German people alone [i.e., to its constituent power]."[34]

Here, the "eternity clause" protects the inherent right of the constituent power of the people to freely decide their political order:

> It is the constituent authority alone, and not the constitutional authority emanating from the constitution, which is entitled to release the state constituted by the Basic Law. … No constitutional body has been granted the power to amend the constitutional principles which are essential pursuant to Article 79.3 of the Basic Law.[35]

This statement is misleading, as it implies a division within the Basic Law between its constituted powers and its constituent power. Actually, this division does not exist. Since the will of the constituent power is embodied in the constitution, respect for the constituent power's privilege to unbind the constituted powers from the bonds of the "eternity clause" is simply respect for the constitution and its stop rule for constitutional change laid down in article 79 § 3. In other words, respect for the constituent power is equivalent to respect for the constitution and vice versa.

However, it is not by accident that the German Constitutional Court invoked the constituent power of the German people. Evidently, this power is not bound by any

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[32] *Cf.* 30 BVERFGE 1 (24) (1970); 94 BVERFGE 12 (33-34) (1996); 109 BVERFGE 279 (310) (2004); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 30, 2009, 2 BvE 2/08, § 403, *available at* http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html.

[33] BVerfG, June 30, 2009, 2 BvE 2/08, § 216.

[34] *Id.* § 228.

[35] *Id.* §§ 179, 218.

constitutional stipulation, including the "eternity clause" of article 79 § 3. The constituent power includes the people's pre-constitutional right of self-determination, which manifests itself in the creation of a constitution. However, it is not depleted by the establishment of a constitution. It persists as the pre-constitutional supreme worldly power that can replace the existing constitution with a new one at any time. It is not part of the constitution; rather, it antecedes it. The German Basic Law is a rare example of the seemingly paradoxical inclusion of the pre-constitutional right of the German people to shake off the bonds of their existing constitution and replace it with a new one. In its final article—article 146—the Basic Law stipulates that it shall cease to apply on the day on which "a constitution freely adopted by the German people takes effect." The German Constitutional Court referred to this right when it made the above-mentioned statement that the irrevocable transfer of sovereignty to a new subject, for instance Germany's accession to a European federal state, is reserved to the constituent power of the German people, which alone could overcome the barrier of the "eternity clause."

This creates a strange constellation. On the one hand, respect for the constituent power of the people requires deference to the constitution, including the limitations of the amending power established by the "eternity clause." This entails the defense of the constitution against any unconstitutional or anti-constitutional forces, even if they claim to embody "the people" and its constituent power. On the other hand, respect for the constituent power requires the recognition of the pre-constitutional legitimacy of the people's actuation of their pre-constitutional right of self-determination beyond the limits of the constitution. This obviously creates a double-bind effect for the constituted powers, notably for the constitutional court. As guardians of the constitution, they must discard the idea of extra-constitutional actions of the people, while at the same time they must not deny the people's pre-constitutional natural right of self-determination. After all, it was the exercise of this pre-constitutional right that generated the Basic Law in the first place.

In the case in point, the German Federal Constitutional Court made use of both arguments. It defended the "eternity clause" against potential encroachments by the constitution-amending legislative powers, which means that it defended the constituent power as embodied in the constitution. However, by indicating that only the directly declared will of the German people alone can override the barrier of the "eternity clause" of article 79 § 3, it accepted that the actuation of its constituent power is a legitimate option. To put it differently, the defense of the constituent power as embodied in the constitution, including the "eternity clause," annihilates the constituent power in its quality as the people's right to self-determination. It requires the defense of the constitution by rendering the pre-constitutional freedom of the people eternally tacit and inactive. Conversely, the defense of the constituent power in its quality as the people's right to self-determination threatens to under-

mine the integrity of the constitution and open the door to uncertainty, arbitrary rule, and possibly chaos. The German Constitutional Court's argument implies that the immutable elements of the constitution cannot be changed or abolished by the constituted powers, whereas this remains a pre-constitutional right of the constituent power. This reasoning ends in a constitutional dilemma.

However, this is a misguided juristic construction. It is erroneous to conceptualize constituted powers and constituent power as distinct entities, since the latter is the creator of the former, although constitutional parlance obviously suggests such an understanding. If we say that the constituent power is the power of a people to constitute themselves as a polity, we think of an unorganized multitude that, by the very act of constitution-making, transforms itself through a collective act of will power into a corporate body organized by the constitution. It is through an act of self-creation, self-empowerment, or self-constitution that a multitude becomes a constituent power. Yet an unorganized multitude is obviously unable to act collectively; it needs some kind of constitution that enables its self-constitution in the first place. In the historical reality of constitution-making, there have always been organized minorities that assumed leadership in the disputes and struggles that necessarily surface when an *ancien régime* is waning. They assumed leadership because they were able to convince the passive majority of society that they were acting on behalf of the interests of the whole society. They organized the process of the self-constitution of the new polity, invoking the pre-constitutional constituent power of the people. Consequently, they attributed their revolutionary power to "the people" or "the nation." This retroactive ascription is the core of the juristic construction of the relationship between the constituent power and the constitution. It has a paradoxical character in that, contrary to conventional wisdom, the constitution presupposes the constituent power. A mass mobilization against an established regime is the actuation of the people's constituent power only if it generates a new political order based on a constitution. If it is defeated by the forces of the old regime, it is just a failed revolution. The act of self-constitution of an unconstituted multitude can only occur "if individuals retroactively identify themselves as the members of a polity in constituent action by exercising the powers granted to them by a constitution."[36] In other words, by way of a reflexive twist, the collective "self"—the "we the people" or the nation—can conceive of a constituent power only *as* a constituted entity. The integrity of the constitution is the reality of the constituent power. The constitution is an institutionalized reminder of the retroactively constructed "fact"

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[36] Hans Lindahl, *Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood*, *in* THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM 9, 19 (Martin Loughlin & Neil Walker eds., 2007); *see also* Ulrich K. Preuss, *Disconnecting Constitutions from Statehood: Is Global Constitutionalism a Viable Concept?*, *in* THE TWILIGHT OF CONSTITUTIONALISM? 23 (Petra Dobner & Martin Loughlin eds., 2010).

that, at the beginning of the constitution, there was a collective will of the people to live in a polity. The fact is a myth, and a necessary one. This myth feeds the legitimacy of the constitution, and the vitality of the constitution feeds the belief in this constitutional narrative. The easier its amendability, the weaker the memory and the appreciation of the founding act and its promise of political unity, that is, the less convincing the narrative of the political foundation myth.

On this understanding, an "eternity clause" in a constitution is an attempt to keep this narrative alive without undermining the capacity of each generation to adapt the constitution to new needs and challenges. It cannot be understood as demarcating issues that are placed beyond the authority of constituted powers on the grounds that they mark domains reserved for the constituent power. As the constituent power presupposes the constituted powers, there is no division of responsibilities between constituted powers and constituent power: the constituent power is not an independent agent that can exist outside of a constitution. Constituted powers and constituent power are logically interdependent. A constituent power cannot exist without a constitution, and, without a constituent power, a constitution may exist without foundation or, in Kelsen's parlance, a hypothetical *Grundnorm*.[37]

"Eternity clauses" mark out issues that corroborate the constitutive elements of the founding act. They define the essential elements of the foundation myth. In other words, they define the collective "self" of the polity—the "we the people." If the "eternal" normative stipulations were changed, the collective self—or identity—of the polity as embodied in the constitution would collapse. Such a collapse would not release the constituent power of the people, because, as we have seen, the constituent power is a myth that presupposes the actuality of a constitution. Instead, it would entail disorder, an unregulated struggle for power of competing forces, disorder, lawlessness, and possibly civil war. Hence, the defense of this identity by the constituted powers of the state does not imply the disempowerment of the constituent power. Quite the contrary, by defending the "self" of the polity, they keep the memory and the appreciation of the constituent power alive. This is the essence of the idea of unconstitutional constitutional amendments. Constitutional amendments that touch upon the identity-engendering norms of the constitution are not "unconstitutional" in the sense that they violate a constitutional clause: they are "unconstitutional" because they destroy the constitution altogether by destroying the founding myth of its constituent power.[38]

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[37] *Cf.* Lindahl, *supra* note 36, at 32; HANS KELSEN, PURE THEORY OF LAW 154 et seq. (Max Knight trans., 1967) (2d rev. ed. 1960).

[38] Compare the elaborate concept of "constitutional identity" developed by Paul Kirchhof. *See* Kirchhof, *supra* note 1.

V. A SHORT NOTE ON POSSIBLE ADVERSE EFFECTS OF "ETERNITY CLAUSES"

While political self-defense is a convincing justification for "eternity clauses" in constitutions, their adverse side effects should not be ignored. They give rise to the danger that normal politics may turn into existential politics. In a constitutional order, conflicts—be they economic, social, political, or cultural—are fought out within the limits of the constitution, which defines the legality of the involved parties' actions. Deep divisions and conflicts tend to be translated into identity conflicts that make compromise extremely difficult. Identity conflicts are not about getting more or less but about the attribution of non-divisible goods and bads, that is to say, they are "conflicts of the either-or, nondivisible category that are characteristic of societies split along rival ethnic, linguistic, or religious lines."[39] Modern constitutions that merely include elements of legality—clearly defined rights, duties, competences, and procedures—tend to mitigate identity conflicts because of their individualistic bias, which places the idea of citizenship in the center of their conceptual structure.

However, a constitution, which expressly defines certain principles and values as embodying its identity, turns controversies into conflicts about values and the essence of the polity's identity. The constitution is split between two levels: one embodying constitutional legality, the other the identity-engendering values and principles as defined in the "eternity clause." In other words, it incorporates the duality of legality and super-legality. One may call this a dualistic constitution. Generally, constitutional norms tend to be vague and open to different interpretations. Norms designed to embody the identity of the polity—in the case of the German Basic Law, for example, the principles of human dignity, democracy, and social state[40]—are even more indeterminate and often form the highly contested subject of struggles for the "right" interpretation. Due to their superior cultural capital, the most resourceful classes in society usually have better chances to define a polity's identity and impose their definition on the society at large. A constitution with an open invitation to define the identity of the polity and establish a level of super-legality thus entrenches the status of the powerful.

By contrast, a constitution in the spirit of legality is primarily a weapon of the poor and the weak against the arbitrariness of their manifold dependencies. Drawing strict lines between public—and indirectly also private—power, on the one hand, and the spheres of individual freedom, on the other, the constitution ensures a certain degree of certainty and predictability.

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[39] Albert O. Hirschman, *Social Conflicts as Pillars of Democratic Market Societies*, *in* A PROPENSITY TO SELF-SUBVERSION 231, 244 (Albert O. Hirschman ed., 1995).

[40] GG, art. 79 § 3, in conjunction with arts. 1 and 20.

The problem of a dualistic constitution is the latent possibility that the legality of the constitution will be overruled by its super-legality. In high-stakes conflicts, the invocation of the super-legality of the constitution is an obvious strategy to fortify one's stance and undermine the legitimacy of one's opponent. Ruling elites, in particular, may be tempted to identify their values and interests with the identity of the polity as a whole and exclude non-conformist and dissenting segments of society as enemies of the constitution, by accusing them of intending to challenge the existential values of the polity and ultimately the existence of the polity itself. The above-mentioned concept of militant democracy, suggestive and understandable as it was in view of the totalitarian challenges of the 20th century, still requires the identification of enemies who have a status of less than full citizenship.

Once again, Germany may serve as an example. The German Federal Constitutional Court has held that the Basic Law has established a *wehrhafte Demokratie* (militant democracy).[41] This concept is essentially based on three articles that establish restrictions on the fundamental rights of those individuals, associations, and political parties that "misuse" their rights "in order to combat the free democratic basic order."[42] A real or alleged hostile attitude toward the "free democratic order" of the Basic Law—rather than violations of legally defined prohibitions—constitutes an act that demands the forfeiture of basic rights. Whereas these specific articles have been applied only rarely, their spirit (i.e. the concept of militant democracy) has served as an interpretative guideline for the application of "normal" legal rules. Applicants for a position in the civil service have been rejected on the ground that they were affiliated in some way with political groups regarded as anti-constitutional, although neither they nor the individual applicant had violated any law. It amounted to "guilt by association," a phenomenon that also occurred in the framework of the U.S. constitution, especially in the 1950's.[43] It is a matter of debate whether we must accept constitutional aberrations of that kind as the price for the protection of a liberal and democratic constitution.

CONCLUSION

The topic of "unconstitutional constitutional amendments" is not a mere matter of constitutional technicality. It involves the issue of the constitution's sustainability and the protection of what has been called its identity. However, this issue is not affected in cases that at first glance might be confused with unconstitutional

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[41] 39 BVERFGE 334 (349) (1975) (with express reference to the "eternity clause" of art. 79 § 3); more recently: BVerfG, May 6, 2008, 2 BvR 337/08.

[42] GG, arts. 9 § 2, 18 & 21 § 2.

[43] ROBERT J. BRESLER, FREEDOM OF ASSOCIATION: RIGHTS AND LIBERTIES UNDER THE LAW 29 et seq. (2004).

constitutional amendments, namely amending laws that do not meet the procedural requirements laid down in the constitution (e.g., those enacted on the basis of two-thirds of the votes cast rather than two-thirds of the members of the competent organ). Such a law cannot produce the intended effect—the revision of the constitution—because it is invalid, irrespective of the procedures through which its invalidity is verified. Thus, its content cannot become part of the constitution. The problem of unconstitutional constitutional amendments concerns only certain components of a constitution.

The real case of unconstitutional constitutional amendments involves revisions that have undergone the required procedure and become part of the constitution. However, the mere fact that the new clause is at odds with other components of the constitution does not mean that the amendment is unconstitutional. The old clauses of the constitution and the amendment have the same rank. If no super-constitutional standard exists by which the validity of two conflicting constitutional norms can be measured, it is impossible to make a judgment about the constitutionality of either. In fact, the concept of unconstitutional constitutional amendments presupposes a super-constitutional standard that is defined by those principles and values that are regarded as constituting the political identity of the polity—the "we the people"—as enshrined in the constitution and retroactively attributed to the imaginary constituent power. Amendments that touch upon these genuinely constitutive elements of the constitution are unconstitutional not because they contradict particular clauses of the constitution but because they are incompatible with the spirit or political essence of the polity that permeates the constitution. Hence, the idea of unconstitutional constitutional amendments is a political rather than a juristic concept. If, as in Germany, the Constitutional Court exercises the authority to assess the constitutionality of constitutional amendments, then it is the guardian not only of the constitution but also of the polity's political identity. Thus, the concept of unconstitutional constitutional amendments is ambiguous and increases the porosity of the dividing line between democracy and juristocracy.