



**Judicial Review of Constitutional Amendments in Georgia, France and
Germany – The Quest for Eternity**

By

Elene Janelidze

LL.M. SHORT THESIS

COURSE: Elements of Comparative Constitutional Law

PROFESSOR: Mathias Möschel, Dr.

Central European University

1051 Budapest, Nador utca 9

Hungary

Acknowledgments

I want to express my gratitude to my supervisor, **Prof. Mathias Möschel**, for his guidance and comprehensive advises – his thought-provoking classes have convinced me to engage in further analysis of this topic.

Many thanks go to my thesis-writing instructor, **Prof. Robin Bellers**, who helped me to take steps forward in advancing my writing skills.

This thesis is dedicated to my parents, whose unconditional love, support and encouragement encloses my whole life. Thanks for fighting for my opportunities.

Abstract

A short history of constitutionalism in Georgia consists of rather fast changes in the basic rules of the country. In this thesis I would like to turn the reader's attention to question the existing approach of the Constitutional Court of Georgia in dealing with the challenged constitutional amendments. The aim of the thesis is to explore the aspects of judicial review of constitutional amendments. The authority of the Judiciary is examined in this thesis with reference to the example of France and Germany and their respective systems of judicial review of constitutional amendments. The main goal for the thesis is to suggest an appropriate way for balancing the constituent power with the legislative competency. The general finding of the thesis will offer some ways forward for the contemporary authority of the Constitutional Court of Georgia.

Introduction	1
I. Constitutional Amendments	6
i. Functions of Constitutional Amendments	8
ii. Entrenchment Clauses and Procedures to Amend the Constitution	9
II. Judicial Review of Constitutional Amendments	13
i. Theoretical Framework	13
ii. Absence of Judicial Review of Constitutional Amendments	15
iii. Judicial Review of Constitutional Amendments – Shift to Eternity	22
III. Analysis	30
i. Unconstitutional Constitutional Amendments and Democracy	30
ii. Lessons for Georgia	32
Conclusion	35
Bibliography	37
Books and Articles	37
Cases	42
Statutes and International Instruments	44

*“Those who cannot carry their wine discreetly
and fear that they will be rash and insolent in their cups,
instruct their friends to remove them from the feast;
Those who have learned that they are unreasonable when they are sick,
give orders that in times of illness they are not to be obeyed.”¹*

Introduction

The idea of Constitutionalism is the idea of self-limitation. The authority is corrupt, so there is a need for the government that does not enjoy full freedom and is bound by the rule of law. Constitutionalism is the doctrine of the boundaries – the boundaries that are given to the constituted (the government) by the constituent (the adopters of the Constitution). The constituent power wants to clarify every detail of the constitutional system, while the constituted power prefers flexible rules. Democracy is the part of the constituted power – elected officials represent the people in the democratic states. The flexibility of the Constitution depends on the procedures, required to change the text. The following thesis examines the doctrine of “unconstitutional constitutional amendments.” The procedures to amend the constitution are defining characteristic of the level of state’s constitution’s rigidity. The rules about amendments can tell a lot about the basic values and principles of the Constitution itself. The purpose of this thesis is to examine the addressed issue from different perspectives and conclude, what can be improved about the rules of amendments of the Constitution of Georgia and how does the constituent power limit the constituted in this Country.

After re-gaining independence in 1991, Georgia enacted its second constitution on 24 August of 1995.² During its 21-year long history, this document was amended several times. These amendments

¹ Seneca, Lucius Annaeus. *On Anger*. 1909.

² Constitution of Georgia, 1995.

nowadays are the indivisible part of the Constitution of Georgia. However, it seems that the development of Georgian constitutionalism is far from over. The content of these constitutional amendments is broad and thus their constitutionality has been before the Constitutional Court of Georgia several times. The main intention of this thesis is to analyze the approach of the Constitutional Court of Georgia to judicially review such constitutional amendments.

Put shortly, the Constitutional Court of Georgia has refused to discuss the issue of the constitutionality of constitutional amendments in its decisions.³ Such restraint may be justified. The Constitutional Court of Georgia said that it does not have the legal authority to examine the material scope of the constitutional amendments without so-called “eternity clauses.” These are clauses that guarantee “the immunity of certain parts of the constitution from any constitutional amendment.”⁴

“Eternity clauses” establish the standards that protect certain essential values of a Constitution, important for the State. However, there is a threat that such clauses can make constitutions excessively rigid. Compared to the eternity clauses, some constitutions do not create difficulties for the Legislative to make the alterations in the basic laws of the country.

Respectively, examples for this difference are Germany and France. This thesis will compare the Georgian approach with the French and the German ones. The judicial review of constitutional amendments in these countries is based on different constitutional provisions. These provisions provide contrasting tactics for the bodies that check (or do not check) the constitutionality of constitutional amendments. Georgia, unlike France and Germany does not have the unamendable provision in the

³ See: 1. *Citizens of Georgia Irma Inashvili, David Tarkhan – Mouravi and Ioseb Manjavidze v. Parliament of Georgia*, 2013

2. *Citizen of Georgia Geronti Ashordia v Parliament of Georgia*, 2012

3. *Non – commercial Legal Entity “National League for Protection of Constitution” v Parliament of Georgia*, 2010

⁴ Preuss, Ulrich K. "The Implications of Eternity Clauses: The German Experience." *Isr. L. Rev.* 44 (2011): 429, p. 430.

Constitution. It is interesting, how the two absolutely different approaches are developed in France and Germany for the interpretation of eternity clauses.

The idea of the judicial review of constitutional amendments is based on the doctrine of “unconstitutional constitutional amendments.” Ulrich K. Preuss distinguishes the substantial review of constitutional amendments from the procedural review of constitutional amendments. His idea is that judicial review of constitutional amendments is not only the matter of constitutional technicality. In his article about the German experience of the eternity clauses, he supports the significance of substantial judicial review of constitutional amendments as the right way for preserving constitutional identity of the country.⁵ His definition of “real case of unconstitutional constitutional amendments involves revisions that have undergone the required procedure and become part of the constitution.”⁶ At first glance, the problem is paradoxical – how can a text of the constitution be unconstitutional? The goal of this thesis is to provide reflections on this topic. It aims to compare Georgian jurisdiction with French and German one and define, what the struggles of the constitutional courts are, while assessing constitutionality of constitutional amendments.

Another prominent scholar, Aharon Barak has dedicated his work to the doctrine of “unconstitutional constitutional amendments” and underlined, that one of the key issues of described problem is the quest for the standards according to which the constitutional courts will be able to make a judicial review.⁷ This quest can be understood as the “defense” of eternity clauses by the constitutional courts and the following paper aims to compare the case laws of above-mentioned countries and explain how their arguments supplement the debate about the “unconstitutional constitutional amendments.”

⁵ Preuss, Ulrich K. “Implications of Eternity Clauses: The German Experience, The.” *Isr. L. Rev.* 44 (2011): 429, p. 448.

⁶ Preuss, Ulrich K. “Implications of Eternity Clauses: The German Experience, The.” *Isr. L. Rev.* 44 (2011): 429, p. 448.

⁷ Barak, Aharon. “Unconstitutional Constitutional Amendments.” *Isr. L. Rev.* 44 (2011): 321, p. 333.

The first chapter will define the notion of the constitutional amendments. This chapter will provide the description of the problem that lies in finding the golden mean to balance rigidity and flexibility of a constitution. It will explain what the main functions of the constitutional amendments are and compare different procedures to make these changes, considering the various entrenchment clauses of the constitutions. This chapter will discuss the idea of “eternity clauses” as it is understood in France and Germany. The main sources for this comparison will be the national constitutions of Germany, France and Georgia. The goal is to describe how constitutional amendments work; show that there is a problem finding a golden mean between flexible and rigid constitutions and define how the states try to find this golden mean.

The second chapter is dedicated to the judicial review of constitutional amendments. There are several issues that will be discussed in this chapter. Firstly, the theoretical considerations concerning the judicial review, more broadly. Secondly, the absence of the judicial review in the countries where the constitutional court has refrained from examining the constitutionality of the constitutional amendments. Third and last, this chapter will inform the reader about the eternity clauses and other entrenchment clauses that give constitutional courts the basis to scrutinize the constitutionality of the constitutional amendments. The sources for this comparison are also national constitutions, generally, and scholarly articles that discuss this issue.

The third chapter will provide the analysis of the opinion by Venice Commission about the unconstitutional constitutional amendments from the perspective of democracy. This is the opinion where the Commission has shown its negative attitude about the “eternity clauses”. This chapter of the thesis will analyze such attitude and compare it with the ideas of scholars about the same issue. Lastly, I will examine the Georgian political and historical background concerning the constitutional amendments

and will try to identify the threats for the stability in the country. The chapter will expose the weaknesses of the constitutional system in Georgia and suggest solutions for them.

In conclusion, I will recommend the suitable solution for judicial review of constitutional amendments in Georgia. I will summarize the arguments that indicate the necessity of change in the present system that allocates the amending power in Georgia.

I. Constitutional Amendments

The process of constitutional amendment is not only a legal process, but also a political one. James Madison presented his view about the amending power in the 43rd volume of “Federalist Papers”:

That useful alterations will be suggested by experience, could not but be foreseen. It was requisite, therefore, that a mode for introducing them should be provided. The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults.⁸

Difficulties concerning constitutional amendments occurred immediately with the drafting of the first American Constitution of 1777, the Articles of Confederation. Madison allocates two extremes – framers of the basic laws should avoid both of them. Constitutional amendments can cause some threats to political stability in the country. Legal scholars argue that stability in a state is important for several reasons. On the one hand, it promotes the processes of democratic self-government and on the other hand, it facilitates certain valuable forms of constitutional pre-commitment – e.g. minority rights.⁹ Thus, amending power must be used carefully and expediently.

Balancing between flexible and rigid constitutions has been the issue of several opinions, delivered by the Venice Commission (“European Commission for Democracy through Law” - hereinafter: “the Commission”). In some cases, it has emphasized that the excessive rigidity of the constitutions is undesirable and prevents constitutional reform.¹⁰ However, the Commission has also indicated that frequent constitutional amendments have negative effects on constitutional and political stability.¹¹ In

⁸ Hamilton, Alexander, James Madison, John Jay, and Jack Richon Pole. *The Federalist*. Vol. 43. Hackett Publishing, 2005, p. 5.

⁹ Dixon, Rosalind. “Constitutional Amendment Rules: A Comparative Perspective.” *Edward Elgar*, 2011. at 102.

¹⁰ CDL-AD(2007)004, Opinion on the Constitution of Serbia, §§ 15, 100 and 104; CDLINF(2001)023, Interim Report on the Constitutional Situation of the Federal Republic of Yugoslavia.

¹¹ CDL-AD(2007)047, Opinion on the Constitution of Montenegro, § 126; CDL-AD(2008)015, Opinion on the Draft Constitution of Ukraine, § 105.

general, it has been acknowledged that amendments to a constitution cannot occur with every change of the political situation in the country or the formation of a new parliamentary majority.¹²

Nowadays, every modern constitution includes a provision about the rules to change the constitution itself. Framers of the basic laws realize that the text they compose will need alteration in the future. Any democratic society agrees on that. Disagreement lies within the divergent procedural rules of amending constitutions. In the beginning, it must be highlighted that the essence of constitutional provisions can be modified in the following ways: 1) judges of constitutional courts or supreme courts can interpret the provisions of the constitutions in a new manner, thus changing the meaning of the norm; 2) the entire Constitution can be replaced; or 3) some provisions of the Constitution can be altered or new provisions can be added to it.¹³

The following thesis will examine the last approach to constitutional changes – the formalistic procedure for changing the Basic Law of the country. Different jurisdictions have chosen different methods to create alterations in their national constitutions. Amendments to a constitution play a tremendous part when political values in a country change. In addition, they are the leverage for the governments to create substantial changes without extra – legal behavior.¹⁴ Whereas constitutional amendments are useful to avoid constitutional crises, it is necessary to reach a golden mean. Constitutions are different from other laws and this means that they cannot be changed as simply as inferior laws of legal hierarchy.

David A. Strauss has argued that rules about constitutional amendments are not substantial in state's constitutional system. He underlined, that the informal ways of changing the Constitution, i.e. the

¹² CDL-INF(2001)003, Report on Co-operation between the Venice Commission and the Republic of Moldova on constitutional reform, § 26.

¹³ Lutz, Donald S. "Toward a Theory of Constitutional Amendment." *American Political Science Review* 88, no. 02 (1994): 355-370. p.355

¹⁴ Katz, Elai. "On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment." *Colum. JL & Soc. Probs.* 29 (1995): 251. pp. 254-255

interpretations by the Justices of the constitutional courts or supreme courts do still occur and this interpretations are also of crucial importance. At first glance, the existence of judicial activism and the interpretation of constitutional provisions weaken the necessity for the formal procedure.¹⁵ However, this theory can be contradicted with the ideas of Rosalind Dixon. She acknowledges, that informal changes to the constitution are still occurring and they are still important. Thus, the written rules about the constitutional provisions pay commitment to the “rule of law” and constitutional transparency.¹⁶

According to Rosalind Dixon, existence of the constitutional amendment procedures in the constitutions not only promote the chance of constitutional change, but also increase the probability that such change will occur. She argues, that these procedures help to alter certain specific aspects of constitution with a “formal channel”.

i. Functions of Constitutional Amendments

The topic of this thesis is to explore the proper way for the constitutional courts to review constitutional amendments. This is the question of the competence. To better understand the scope of the competence, it is important to explore the functions of constitutional amendments. Constitutional amendments represent the example of the formal change of the constitutions. The Constitution becomes a living instrument with formal constitutional amendment rules. Besides that, Richard Alpert has put out several other purposes of constitutional amendments. The constitutional amendments and the rules about amending constitutions have the obligation to specify, “what is subject to or immune from formal amendment.” The main ideas and ideals of the Constitution can be found in such rules. The existence of

¹⁵ Strauss, David A. "The irrelevance of constitutional amendments." *Harvard Law Review* (2001): 1457-1505, p. 1488.

¹⁶ Dixon, Rosalind. "Constitutional Amendment Rules: A Comparative Perspective." *Edward Elgar*, 2011, p. 98.

formal procedural rules for constitutional amendments express that there is a distinction between ordinary laws and constitutional texts.¹⁷

Constitutions can be formally amended with explicit procedural rules and these rules are the part of the constitutions. It must be highlighted, that there is a clear difference between amending constitution and revising constitution. John Rawls defined amendments as “adjust[ing] basic constitutional values to changing political and social circumstances.”¹⁸ This definition highlights, that the scope of the amendment must be in concurrence with the ideas and values of the constitution. This is the concept of the Article 79(1) of the 1949 German Basic Law, which states: “this Basic Law may be amended only by a law expressly modifying or supplementing its text.”¹⁹

Constitutional Amendments play crucial role in reflecting the will of people. They carry the possibility for citizens to live in the state that is arranged, as they want it to be arranged. These rules are the hierarchically highest level of the means for the democratic representation.

ii. Entrenchment Clauses and Procedures to Amend the Constitution

The complicated nature of the amendments obliges framers of constitutions to provide specific procedures for making amendments to constitutions. Almost every constitution distinguishes constitutional amendments from normal laws in the hierarchy of legal provisions and creates additional thresholds for amending the basic law of the state.²⁰ These thresholds are called entrenchment clauses and they are created to balance the golden mean between flexibility and rigidity. Entrenchment clauses protect constitutions, because “[t]he power to “amend” the Constitution was not intended to include the power to

¹⁷ Albert, Richard. "The Structure of Constitutional Amendment Rules." (2014), p 913.

¹⁸ Rawls, John. *Political liberalism*. Columbia University Press, 2005, p 238.

¹⁹ Basic Law of the Federal Republic of Germany, 1949

²⁰ See the review in: Roznai, Yaniv. "Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea" (2013)." *American Journal of Comparative Law* 61: 657. P. 667.

E.g.: from 192 written constitutions 82 constitutions include unamendable provisions.

destroy it.”²¹ The latter phrase demonstrates the understanding of constitutional amendments - the idea of the amendment is to make correction to the existing document. Framers of every constitution want to protect the original text and the limits to the amending power do not enclose the possibility for the next generations to change substantial part of it.

Entrenchment clauses are provisions of the Constitution, serving the stability of the constitutional order in a specific country. Jon Elster provides an example from ancient Athens, where the sovereigns tried several times to entrench the provisions they enacted. They indicated in these provisions that anyone proposing to change them would suffer with death penalty. However there was no death penalty attached to a proposal to remove the death penalty. Thus, these efforts were “doomed to fail”, because they were not properly protecting the entrenched provisions.²² This example shows, how important it is to properly protect the ideas that are important for the framers. Death penalty was also very important for the ancient Athenians, but they failed to protect this idea accurately. The constitutional amendments are the threats for such ideas and ideals. Like death penalty, they can abolish nowadays every fundamental right protected by the Constitution.

Entrenchment clauses and the rules about the procedure of constitutional amendments are used in almost every country to protect the constitutional values. They underline the higher significance of constitutions over basic laws; they limit the authority of the legislators to hold the power of interpretation of the constitution according to their desire; they give the authority to framers to bind future political actors to their own choices.²³ The Venice Commission has emphasized, that it is necessary to have strong procedures about the constitutional amendments. The distinction must be made between the ordinary

²¹ Marbury, William L. "Limitations upon the Amending Power." *Harv. L. Rev.* 33 (1919): 223, p. 225

²² Elster, Jon. "Don't burn your bridge before you come to it: Some ambiguities and complexities of precommitment." *Tex. L. Rev.* 81 (2002): 1751, p. 1760

²³ Albert, Richard. "The Expressive Function of Constitutional Amendment Rules"(2013)." *McGill LJ* 59: 225-at. pp. 231-236

legislation and constitutional amendments for the preservation of “political stability, legitimacy, efficiency and quality of decision-making.”²⁴

There are different types of entrenchment clauses. I will analyze the three jurisdictions starting from the one where constitutional amendments are the easiest, i.e. in Georgia, to where they are the most difficult, i.e. in Germany. The Constitution of Georgia provides the rule for making amendments to the Constitution of Georgia. Its Article 102.(3) states that the “Bill about the constitutional amendments must be approved on two subsequent sessions of Parliament, held at least with three-month intervals, by a three-quarter majority of Parliament.”²⁵ This approach is rather easy for the legislative branch, compared to other states’ constitutions. According to the analysis of the abovementioned constitutional provision, it can be concluded that the special authority of the framers is less recognized in the Constitution of Georgia. Legal scholars from Georgia argue that Article 102.(3) it establishes a certain order, but this order in the future will be entirely in the hands of a three-quarter majority of the unicameral Legislature.²⁶

Entrenchment Clauses are stronger in the French Constitution. Article 89 of the Constitution of France provides that the basic law of the country can be changed by the President of the Republic upon the recommendation of the Prime Minister, or the Members of Parliament. The amendment to the Constitution must be approved by both houses of Parliament (i.e. the National Assembly and the Senate) and in case of approval, be submitted to a referendum. There is an important exception to this rule: The amendments must not be the submitted to referendum, if the President of the Republic submits it to the National Assembly, convened in Congress.²⁷ The Constitution of France provides that amendments of the Constitution of France cannot affect the Republican form of government or the territorial integrity of the

²⁴ Venice Commission, CDL-AD(2010)001, Report on Constitutional Amendment. Para. 238.

²⁵ Constitution of Georgia, 1996

²⁶ Nodia, Gia and Aphrasidze, David, eds., *From Superpresidentialism till Parliamentarianism: Constitutional Amendments in Georgia: Collection of Articles*, Konrad Adenauer Stiftung, (2013). pp. 170-171

²⁷ Constitution of France, 1958

country. These two provisions cannot be changed, thus they represent “eternity clauses” of the Constitution.

The most significant and explicit form of entrenchment is the notion of eternity clauses. The most obvious eternity clause can be found in the Basic Law of the Federal Republic of Germany. Article 79 paragraph 3 contains the eternity clause which limits constitutional amendments as follows: “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 Article 1 and 20 shall be inadmissible.”²⁸ Article 1 of the Basic Law protects human dignity, article 20 – rule of law, republicanism, democracy, social state and federalism. The enumerated values can never be limited or abolished by amendments. The immutability of eternal principles highlights the substance of the Basic Law and defines its identity. The Basic Law cannot exist without eternity clauses – their alteration would destroy identity.²⁹ Yaniv Roznai states that the unamendable provisions are the ties between the past, present and future of the country and they carry the “genetic code of the constitution”.³⁰

²⁸ Basic Law of the Federal Republic of Germany, 1949

²⁹ Preuss, Ulrich K. “Implications of Eternity Clauses: The German Experience, The.” *Isr. L. Rev.* 44 (2011): 429. p. 440.

³⁰ Roznai, Yaniv. "Unamendability and the Genetic Code of the Constitution." *Available at SSRN 2569279* (2015), p 27.

II. Judicial Review of Constitutional Amendments

The constitutions of Georgia, France and Germany have distinct entrenchment clauses, which help to create certain legal order. The crucial part in these jurisdictions is played by the state organs that have the authority to make a judicial review of laws, enacted by the Legislative. Judicial review by constitutional courts is complicated because of its counter-majoritarian character. It is the most important function to control the Legislative and dissolve the powers of the government. However, it is contentious if the doctrine of separation of powers gives the Judiciary possibility, to assess the constitutionality of unconstitutional amendments.

i. Theoretical Framework

The idea of “pre-commitment” with the separation of powers of the government is the main idea of constitutionalism. Separation of powers considers checking and balancing of three governmental branches. The system of checking and balancing exists because the three branches of the government have to control each other, to protect the rule of law and not to turn their ruling into tyranny. The idea of separation of powers and the constitutional review of ordinary statutes is so fundamental that nowadays it is “unthinkable to draft a democratic constitution without providing for its inclusion.”³¹ The constitutional review of ordinary bills, provisions and other legal documents has become an inseparable authority of the Judiciary. Glauca Florentino de Andrade has expressed the opinion, that the authority to review the constitutionality of the legislation is an “extraordinary tool for the preservation of a constitution.”³² The theory of this kind of review is extraordinary because it concerns the idea of sovereignty.³³ The power of people to amend the constitutions via their representatives in the Legislative branches is the manifestation of the sovereign power of people, which is the main idea of democracy.

³¹ Vanberg, Georg. *The Politics of Constitutional Review in Germany*. Cambridge University Press, 2004, p. 1.

³² Andrade, G.F., 2001. Comparative Constitutional Law: Judicial Review. *U. Pa. J. Const. L.*, 3, p.977. p. 988

³³ Halmai 182

The “eternal clauses” of the constitution create obstacles for the will of people because they hinder democratic process. Generally, constitutional review of ordinary legislation is considered to be non-democratic, but it is recognized to be the most satisfactory means to protect constitution. Without this judicial review the constitution is “easily broken.”³⁴ Judicial review of constitutional amendments exists if a state has acknowledged the distinction between constitutional and unconstitutional amendments. Many constitutions do not contain provisions that specify the authority of the constitutional or supreme courts to review constitutional amendments. Despite that, there are some constitutional courts that check the constitutionality of constitutional amendments and interpret the “silence” of constitutions in that way. The diagram created by Kemal Gözler shows that there are countries that do not have the constitutional provision about the “unconstitutional constitutional amendments” and still, some constitutional courts from these countries – (e.g. Austria), have declared themselves competent to review the constitutionality of constitutional amendments.³⁵ The European model of judicial review of constitutional amendments is explicit about the “silence” of the constitution, generally. There are some constitutional courts that have assumed as obvious their authority to protect constitutions against unconstitutional amendments.³⁶

It is argued that judicial review of the constitutional amendments is also the issue of the policy. The political decisions of the judges are the decisions in cases where the decisions could have been more than one.³⁷ If the judges of the constitutional courts would decide to assess the constitutionality of constitutional amendments, their interpretation of the constitution would mean change political decisions of the Legislative, not only be the judicial act. In addition to that critique, the controversy about judicial review of constitutional amendments arises also because there is no assumption that the interpretations of the judges can preserve the substance of the constitution. In the countries, where the constitutional courts have chosen to assess the

³⁴ Baranger 390

³⁵ Gözler, Kemal. *Judicial Review of Constitutional Amendments: A Comparative Study*. Bursa: *Ekin*, 2008, p. 103.

³⁶ Barak, Aharon. "Unconstitutional Constitutional Amendments." *Isr. L. Rev.* 44 (2011): 321, p. 332

³⁷ Robertson, David. *The judge as political theorist: contemporary constitutional review*. Princeton University Press, 2010, p.15

constitutionality of constitutional amendments, the judges of constitutional court have simultaneously the obligation to protect the constitution and the right to interpret it.³⁸ This is why almost every jurisdiction has different approach for the interpretation of the rules about constitutional amendments. There are courts that restrain themselves and there are courts that entitle themselves, but there is more to this than just this distinction.

ii. Absence of Judicial Review of Constitutional Amendments

The complete absence of judicial review of constitutional amendments is present in France and Georgia. Article 61 of the 1958 Constitution of France enumerates the authorities of the *Conseil constitutionnel* of France. Pursuant to this provision, the authority of the *Conseil constitutionnel* extends to the judicial review of the following acts: a) Organic Laws, before their promulgation, b) Private Members' Bills mentioned in article 11 before they are submitted to referendum, and c) the rules of procedure of the Houses of Parliament.³⁹

The authority to challenge institutional acts is granted to the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators. They could use this authority optionally. On the Organic Laws and on the Private members Bills the *Conseil constitutionnel* is obliged to deliver its opinion.⁴⁰

The *Conseil constitutionnel* has interpreted this authority in its decisions. These interpretations are very formal and are examples of judicial restraint. The Decision No 62-20 DC of 6th November of 1962 concerned the constitutionality of amendments passed by popular referendum, pursuant to Article 11 of the Constitution of France.⁴¹ The amendments were concerning the changes in the law of elections of the President of the Republic by direct universal suffrage. Article 11 does not include the ability to make

³⁸ Baranger, Denis. "Language of Eternity: Judicial Review of the Amending Power in France (or the Absence Thereof)." *Isr. L. Rev.* 44 (2011): 389, at 390

³⁹ Constitution of France, 1958.

⁴⁰ *Ibid.*

⁴¹ *Conseil constitutionnel*, Decision No 62-20 DC of 6 November 1962

constitutional amendments. Denis Baranger, a French constitutional scholar, mentions that Charles de Gaulle shocked many lawyers, even in the *Conseil constitutionnel*, because of his recourse to Article 11, instead of Article 89.⁴² Despite this, the *Conseil constitutionnel* did not strike down the amendments.

In this decision, the *Conseil constitutionnel* restrained itself from checking the constitutionality of constitutional amendments, adopted through the referenda by the will of the French people (“*le projet de loi adopté par le Peuple français*⁴³”). By this judgment the *Conseil constitutionnel* excluded its authority on constitutional amendments, with the argument that the will of the People cannot be the subject of judicial review.

In its other decision of March 26, 2003, No 2003-469 DC⁴⁴ about the constitutionality of constitutional amendments, the *Conseil constitutionnel* once again underlined that it has no competence to make the judicial review of the constitutional amendments. This decision was about amendments that had been initiated by the President of the Republic and enacted by both chambers of Parliament. On 17th March of 2003, Parliament, convened in Congress, passed the Government Bill of the President of the Republic of France. With this procedure it approved the constitutional amendments to the 1958 Constitution, concerning the decentralized organization of the Republic. The constitutional amendments were initiated on the basis of Article 89 of the Constitution.⁴⁵

As the Constitution of France gives the ability to the President of the Republic to avoid submitting constitutional amendment initiated by him/her to referendum, this case was substantially different from the previous ruling of the *Conseil constitutionnel*. It did not involve the will of the French people. The issue of the 2003 decision was the initiative by the President of the Republic to make the constitutional

⁴² Baranger, Denis. "Language of Eternity: Judicial Review of the Amending Power in France (or the Absence Thereof)." *Isr. L. Rev.* 44 (2011): 389, at 393

⁴³ *ibid.*

⁴⁴ *Conseil constitutionnel*, Decision No. 2003-469 DC of 26 March 2003

⁴⁵ Constitution of France, 1958

amendments to the Constitution of France, which “shall then be approved only if it is passed by a three-fifths majority of the votes cast.”

However, the *Conseil constitutionnel* ruled that the French Constitution had not empowered it with the authority to make a judicial review of constitutional amendments. The *Conseil constitutionnel* held, that pursuant to the Constitution, there was no clause about the constitutionality of constitutional amendments and their judicial review by the *Conseil constitutionnel*. Therefore, it had no authority to rule about the constitutional status of constitutional amendments.

The *Conseil constitutionnel* declared that there was no legal base, derived from these Articles 61 and 89 or also any other clauses of the French Constitution that granted the authority to the Council to check the constitutionality of constitutional amendments. The arguments of the *Conseil constitutionnel* in the latter decision are not different from the case of 1962, despite the different backgrounds of the cases. Both of the cases are decided on the bases of Article 61 of the Constitution, which describes the powers of the *Conseil constitutionnel*. These powers, given to the *Conseil constitutionnel* by the Constitution, serve the principle of horizontal separation of powers in the country. The power to judicially review and declare the constitutionality or unconstitutionality of statutes is the mechanism to balance the powers of the Parliament.

The difference between the two decisions from France lies in the initiator of the constitutional amendments. In the earlier decision the Council declared that it did not have the jurisdiction to decide about the constitutionality of constitutional amendments, passed by referendum. The peril of this decision is that it gives excessive powers to the President of the Republic and the members of the Parliament and hampers the checking and balancing by the Judiciary.

The *Conseil constitutionnel* is a political organ, which was developed in France when the administrative review of the laws already existed. Checking the constitutionality of laws in France can

be seen as more administrative function, than purely constitutional.⁴⁶ This means, that this organ is not fully representing with its decisions the idea of checking and balancing. The *Conseil constitutionnel* regards itself as the organ, which has to scrutinize the work of Parliament. Their decisions of 1962 and 2003 demonstrate the use of convenience and legal expertise, rather the interpretations of the constitutional provisions for protection of constitutional values.⁴⁷ The *Conseil constitutionnel* is the council that can advice Parliament and correct their work. The protection of political identity and constitutional values has never been the objective for them.

The Constitutional Court of Georgia, unlike French *Conseil constitutionnel* was created as the separate instrument for the protection of the Constitution of Georgia. This judicial body has the paramount importance to protect and fulfill the requirements of the Constitution and separation of powers. The Constitutional Court of Georgia was established in 1996. The legal basis for the establishment and functioning of the Constitutional Court was the Constitution of Georgia and “Organic Law about Constitutional Court”⁴⁸. Article 89 of the Constitution of Georgia contains the list of authorities granted to the Constitutional Court of Georgia. This list includes the possibility to challenge the constitutionality of the Constitutional Agreement (an agreement between the state and the Georgian Orthodox Church, signed in 2002), law, normative acts of the President and the Government, normative acts of supreme state bodies of the Autonomous Republic of Abkhazia and the Autonomous Republic of Adjara. It can also solve the disputes between governmental branches, declare the constitutionality of the referendum, elections and international treaties and agreements.⁴⁹ The list of the

⁴⁶ Baranger, Denis. "Language of Eternity: Judicial Review of the Amending Power in France (or the Absence Thereof)." *Isr. L. Rev.* 44 (2011): 389, p. 426

⁴⁷ Baranger, Denis. "Language of Eternity: Judicial Review of the Amending Power in France (or the Absence Thereof)." *Isr. L. Rev.* 44 (2011): 389, p. 427

⁴⁸ Organic Law about the Constitutional Court of Georgia, 1996, available online in Georgian: <https://matsne.gov.ge/ka/document/view/32944%23>!, accessed on 25 March, 2016

⁴⁹ Constitution of Georgia, 1995

authorities of the Constitutional Court of Georgia is explicit and does not mention the possibility to make judicial review of constitutional amendments.

The Constitutional Court of Georgia has interpreted the absence of declared provision about the judicial review of constitutional amendments very moderately. In 2010 several amendments had been made to the Constitution of Georgia. The applicants lodged a complaint before the Constitutional Court asking for the annulment of these amendments.⁵⁰ They were asking to declare unconstitutional those legislative acts, which made amendments to the Constitution. The Court said that pursuant to the Article 10 of the “Statute about Normative Acts” of Georgia the constitutional statutes are the integral parts of the Constitution.⁵¹ Constitutional amendments are the example of constitutional statutes and have the same legal power as the Constitution.

Therefore, it is concluded that the constitutional amendments, being an integral and organic part of the Constitution, create constitutional order. Constitutional order cannot be the object of the evaluation by the Constitutional Court of Georgia. In this decision the Court has emphasized that the authority to evaluate the constitutionality of the amendments is not granted to the Constitutional Court of Georgia. This a very formalistic reading of the requirements of the Article 89 of the Constitution and of the “Statute about the Constitutional Proceedings” of Georgia because it does not engage in interpretations. The Court founded this reading also on the Article 18 of this Statute states that the constitutional complaint shall not be examined, if the challenged issue is beyond the competence of the Constitutional Court.⁵²

⁵⁰ *Non – commercial Legal Entity “National League for Protection of Constitution” v Parliament of Georgia*, 2010

⁵¹ Statute about Normative Acts of Georgia, 2009, available online: <https://matsne.gov.ge/ka/document/view/90052%23>! accessed on 26 March

⁵² Statute about the Constitutional Proceedings of Georgia, 1996, available online in Georgian: <https://matsne.gov.ge/ka/document/view/32986%23>! accessed on 25 March, 2016

The Constitutional Court of Georgia was asked once again to assess the constitutionality of constitutional amendments in 2012.⁵³ The applicant argued, that the amendments of 2006 to the Constitution of Georgia were unconstitutional. These particular amendments to the Constitution were changing the terms of the elections of the President and Parliament. The applicant claimed that the contested constitutional laws violated the constitution. The reasoning of the Court was not different from the previous decision. It underlined that to assess the constitutional claim on the merits, it is it has to satisfy the precondition of the law. The Constitutional Court used the same argument derived from the Article 18 the Statute about the Constitutional Proceeding of Georgia.⁵⁴

Besides that, in this decision the Court also interpreted Article 6 of the Constitution of Georgia. Pursuant to this Article, “The Constitution of Georgia is the supreme law of the state. All other legal acts shall comply with the Constitution.”⁵⁵ The Court clarified that the competence of the Constitutional Court is limited to the legal acts, standing below the Constitution in the hierarchy of laws. This decision confirmed the decision of 2010, referencing to the interpretations, made in that decision.

The Constitutional Court of Georgia delivered its most important interpretation of the doctrine of “unconstitutional constitutional amendments” in the ruling of February 5, 2013.⁵⁶ Similar to France, it also declared the lack of competence and with this argument refused to review the case. This was no surprise - the previous two decisions of this Court were strictly limiting its own authority for the judicial review of constitutional amendments. The applicant argued in this case that the amendments to the Constitution of Georgia were unconstitutional. They believed that the act, amending the Constitution was opposed to their human dignity and the right of election.

⁵³ *Citizen of Georgia Geronti Ashordia v Parliament of Georgia*, 2012

⁵⁴ Statute about the Constitutional Proceedings of Georgia, 1996, available online in Georgian: <https://matsne.gov.ge/ka/document/view/32986%23>! accessed on 25 March, 2016

⁵⁵ Constitution of Georgia, 1996

⁵⁶ *Citizens of Georgia Irma Inashvili, David Tarkhan – Mouravi and Ioseb Manjavidze v. Parliament of Georgia*,

The Constitutional Court of Georgia did not examine this action for the following reasons: First, the Court held that the challenged legislative act was the constitutional law and after its entry into force it had become an integral part of the Constitution of Georgia. Thus, the Court had no authority to review the constitutionality of the Act separately; they had to review the constitutionality of the constitutional provision. Secondly, the Constitutional Court of Georgia ruled that the basic principles of the Constitution of Georgia had the important role of checking the constitutionality of the challenged provisions. However, it also emphasized that it had no legal foundation to deliver an opinion about the constitutionality based only on constitutional principles. The Constitutional Court also clarified that its authority was to check subordinate normative acts against the Constitution of Georgia. Otherwise, the possibility to challenge the constitutionality of every constitutional provision may have occurred.

The Constitutional Court noted that since the Constitution does not mention the so-called "eternity clauses", any other interpretation of the Court's own competence would be a violation of the principle of separation of powers. The Constitutional Court is bound by the text of the Constitution and it cannot evaluate and determine what should be in the Constitution.

*The Constitution of Georgia does not provide any other form of the amendment, rather than the Legislative's free and democratic expression of the will of the constitutional majority. The source for the Constitution and the government are the people who will reveal their will in the open, free, equal and democratic political process. The amendment of the Constitution is part of the political process, which is the realization of people's will through their elected representatives.*⁵⁷

The Constitutional Court of Georgia understands the "silence" of the Constitution of Georgia with extreme severity. It refuses to examine constitutional amendments without "eternity clauses". The Court concluded that it had no authority to invent "eternity clauses", as far as this is the power of the

⁵⁷ *Citizens of Georgia Irma Inashvili, David Tarkhan – Mouravi and Ioseb Manjavidze v. Parliament of Georgia,*

Legislative. It should be noted that the court did not exclude their authority to review constitutional amendments, in case of “eternity clauses”.⁵⁸

The reasoning of the Constitutional Court of Georgia in its last decision about this topic (unlike the decisions of the *Conseil constitutionnel*, which are short and formalistic) can show the dilemma between the two desires of the Constitutional Court. On the one hand, it wants to protect the constitutional principles and interfere with the constitutionality of the provision. On the other hand, it does not want to exceed its own authority. The threat to do the latter is stronger and the Court implicates in the decision the solution – eternity clauses of the constitution. The argument in favor of the separation of powers is also important in France. As it is suggested, the *Conseil constitutionnel* agrees that it does not have the power to review constitutional amendments, but it also does not fully exclude its competence in providing guidelines. The *Conseil constitutionnel* has emphasized that the power to judicially review is bound by the Constitution, showing that the Council can be involved in the amending process without making the judicial review of the constitutional amendments.⁵⁹

iii. Judicial Review of Constitutional Amendments – Shift to Eternity

The power to judicially review the constitutional amendments is the power of the Judiciary for checking and balancing the Legislative branch. Aharon Barak has underlined, that in the democratic societies, courts have the obligation to protect constitution and democracy. This protection is not limited to reviewing ordinary statutes. Sometimes the amendments can also violate the fundamental principles declared in the constitutions.⁶⁰ The doctrine of “unconstitutional constitutional amendments” protects written constitutions and gives the explicit power to the founders of the constitutions.

⁵⁸ Nodia, Gia and Aphrasidze, David, eds., *From Superpresidentialism till Parliamentarianism: Constitutional Amendments in Georgia: Collection of Articles*, Konrad Adenauer Stiftung, 2013. P. 203

⁵⁹ Baranger, Denis. "Language of Eternity: Judicial Review of the Amending Power in France (or the Absence Thereof)." *Isr. L. Rev.* 44 (2011): 389, p. 413.

⁶⁰ Barak, Aharon. "Unconstitutional Constitutional Amendments." *Isr. L. Rev.* 44 (2011): 321, p. 336

In XX century there was a significant shift in the constitutions towards creating the provisions that cannot be amended with the decision of the Legislative. This “universal trend” is being compared with the necessity of formal constitutions. After American and French Revolutions almost every country adopted written constitutions. After Second World War, the shift to eternity clauses became the trend of modernism for the constitutions.⁶¹ As it was stated in the decision of the Georgian Constitutional Court, the only source for the authority to review constitutional for the Constitutional Court is the provisions about the eternity clauses.

The German Federal Constitutional Court has reviewed the substantial constitutionality of the constitutional amendments in several decisions. The Article 79(3) of the Basic Law states that the constitutional amendments affecting the division of the Federation into Länder, their participation in the legislative process or the principles enumerated in the Articles 1 and 20 are prohibited. Pursuant to Article 79(2) the amendments in the Basic Law can be carried out “by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat.” and “Both houses of the national legislative branch have to approve the amendment by two-thirds.”⁶²

The Basic Law of Germany has not declared what are the specific obligations of the judges of the Federal Constitutional Court in reviewing the constitutional amendments and protecting the Basic Law with its own “eternity clauses”. Article 93(1) of the Basic Law of Germany stipulates the scope of the jurisdiction of this Court. It enumerates the list, on which the Federal Constitutional Court shall rule. According to this list, the Federal Constitutional Court of Germany has to decide on disputes of Federal and Land’s governments. In addition to this authority, paragraph 4a of this provision states that the Court shall rule “on constitutional complaints, which may be filed by any person alleging that one of his basic rights or one of his rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103 or

⁶¹ Roznai, Yaniv. "Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea" (2013)." *American Journal of Comparative Law* 61: 657. p. 667.

⁶² Basic Law of the Federal Republic of Germany, 1949

104 has been infringed by public authority;” This Article does not state that there is a special authority of the German Federal Constitutional Court to review constitutionality of constitutional amendments.

The absence of the provision about the constitutionality of constitutional amendments has not hindered the Federal Constitutional Court of Germany to interpret this right from the Basic Law of the country. The case of *Südweststaat (Southwest Case)* was the first case before the Constitutional Court in 1951, about the constitutionality of the constitutional amendment. This is the decision considered as *Marbury v. Madison* of Germany.⁶³ With this decision the Federal Constitutional Court of Germany defined the fundamental principles of legal interpretation. The Court said, that no clause could be interpreted independently, because the Basic Law “represents a logical unity.” On the issue of unconstitutional constitutional amendments the Court emphasized:

*A constitution has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a whole, a constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate.*⁶⁴

With this decision the Court ruled that the particular constitutional provisions or constitutional amendments could be unconstitutional if they will violate the “overreaching principles and fundamental decisions.” The Court held that democracy and federalism are among the “overreaching principles”. It also underlined that the Federal Constitutional Court could review the provisions or constitutional amendments that are in conflict with “higher law or fundamental principles of the Basic Law” and declare them unconstitutional.

Another decision about the constitutionality of unconstitutional amendments from the Federal Constitutional Court of Germany was delivered in 1953, two years after the *Southwest* Decision, in the *Article 117* case.⁶⁵ With this decision the Court upheld the idea of “eternity clauses”, “higher laws” and

⁶³ Kommers, Donald P., and Russell A. Miller. *The Constitutional Jurisprudence of the Federal Republic of Germany: Revised and Expanded*. Duke University Press, 2012, p. 85.

⁶⁴ 2 BVerfGE 1 (1951)

⁶⁵ 3 BVerfGE 225 (1953).

“unconstitutional constitutional amendments.” In this decision the Court embraced further the idea that there are several laws that can be regarded as the “higher provisions” (“übergesetzliche”) than the Basic Law of Germany. If the constitutional amendment was in contradiction with the limits of the principles of justice (“die äußersten Grenzen der Gerechtigkeit”) than the Court is obliged to strike down such provisions.

In these two decisions the Federal Constitutional Court has supported the idea of “unconstitutional constitutional amendments”. The Justices have asserted as the *obiter dicta* that there are some implicit limits for the amending power. It can be easily supposed this interpretation was the reaction to the positivism, which justified Nazi regime. Against positivism, the Court used the arguments from the natural law –viewpoint, expressing that there are higher laws than the Basic Law.⁶⁶

Other decision concerning unconstitutional constitutional amendments is the decision of December 15, 1970, the Federal Constitutional Court of Germany has decided on *Klass Case*.⁶⁷ In this case there the amendment to the Basic Law was challenged before the German Federal Constitutional Court. The Bundestag enacted the amendment on June 24, 1968. This amendment was changing the Article 10 of the German Basic Law, which states that “Privacy of correspondence, posts and telecommunications is inviolable ... and ... restrictions may only be ordered pursuant to a law.”⁶⁸ The text of the amendment added to the second sentence following sentence: “where a restriction serves to protect the free democratic basic order or the existence or security of the Federation or a Land the law may stipulate that the person affected shall not be informed of such restriction and that recourse to the Courts shall be replaced by a review of the case by bodies and subsidiary bodies appointed by Parliament.” This Amendment was giving the government the leverage to neglect privacy of the person on the basis of

⁶⁶ Cole, Taylor. "Three Constitutional Courts: A Comparison." *American Political Science Review* 53, no. 04 (1959): 963-984.

⁶⁷ 30 BVerfGE 1, (1970).

⁶⁸ Basic Law of the Federal Republic of Germany, 1949

protection of national security. The Federal Constitutional Court ruled that this amendment did not violate the fundamental principles enshrined in the eternity clause of the Basic Law because the control of surveillance measures by the Parliament is sufficient. The Court defined, that the Article 79(3) of the Basic Law serves for the protection of the constitutional order, “prohibits the abolition of the substance of the existing constitutional order and the creation of a totalitarian regime by the formal means of amendment.”⁶⁹ Kemal Gözler has underlined, that this sentence of the decision means that the substantial limits to the constitutional amendments are strictly limited to the Articles 1 and 20 of the Basic Law.

The examples of the logic of the Federal Constitutional Court can be seen in the “*Land Reform 1*” and “*Land Reform 2*” cases. In 1991, after German re-unification, the German reunification Treaty was signed. Article 41(1) and Annex III of this treaty provided that expropriations under occupation law or on the basis of sovereign acts by occupying powers cannot be reversed.⁷⁰ The Federal Constitutional Court of Germany had to decide if these provisions that were already added to the Basic Law as the subsection 3 of Article 143 were constitutional for the meaning of Article 79(3) of the Basic Law. The Court held that there was no violation of Article 79 paragraphs 1 and 2. It underlined, that the freedom from the obligation to return the property was not contradictory to immutable principles of Article 79(3).⁷¹ The Court emphasized that the protected values of the Basic Law were not affected by the introduction of these treaty. In the “*Land Reform 2*” case, in 1996 the Court sustained its former decision when the same provisions were challenged. In 1996 the applicants challenged this provisions against the principle of equality. The Court once again highlighted, that the “protection of property, insofar as it is covered by Article 79(3) ... gives no rise to constitutional objections.”⁷²

⁶⁹ 30 BVerfGE 1, (1970).

⁷⁰ 84 BVerfGE 90 (1991)

⁷¹ 84 BVerfGE 90 (1991)

⁷² 94 BVerfGE 12 (1996)

In addition to these decisions, the Federal Constitutional Court has reviewed the constitutionality of the Act Approving the Treaty of Lisbon against the standard of the Article 38 of the Basic Law. This Article protects the fundamental principle of right to vote, which guarantees the free, direct, general and equal participation of the people in the state government. In the decision of 2009 about the *Lisbon Treaty*, the Federal Constitutional Court underlined, that the right to vote was the identity of the constitution, thus declared it as an eternity clause of the Basic Law.⁷³ It held, that the participation through elections in the government of the state is the necessary for protecting human dignity and fundamental principles of democracy. Only the amendments that affect the Article 1 and 20 of the Basic Law can be justiciable. The eternity clauses have more authority than the amending power of the Legislature and the Court once again clarified, that the constituent power has founded the structure and substance of the Basic Law, which cannot be amended. This declaration was also the *obiter dicta* recognition of the Court's authority, because the Federal Constitutional Court did not declare unconstitutional the challenged provision. It is important for the Court to emphasize in every decision the limits of its own authority and generally the idea of the constitutional control of constitutional amendments.

The problematic issue of this thesis – “unconstitutional constitutional amendments” and their limits - was the concern of the challenged amendment in several cases from the case law of the Federal Constitutional Court of Germany. Surprisingly, the Court has assessed the constitutionality of various constitutional amendments, but it has not found any of them being unconstitutional.⁷⁴ Still, the German approach to the doctrine of “unconstitutional constitutional amendments” remains as it was declared in the above-mentioned decisions. This approach is creating the understanding of “supra-constitutionality”, which obliges constitutional courts to limit the amending power with the higher standards of natural

⁷³ 2 BverGE 2/08 (2009)

⁷⁴ Gözler, Kemal. *Judicial Review of Constitutional Amendments: A Comparative Study*. Bursa: *Ekin*, 2008, p. 102.

law.⁷⁵ Despite that, the shift to the eternity has been very careful in Germany. In the years after World War II the Court was more eager to protect the basic principles and values of the Basic Law. Later, the doctrine of “unconstitutional constitutional amendments” has not been interpreted with such high level of judicial activism.

German legal scholar, Ulrich Preuss, has distinguished the advantages and disadvantages of the eternity clauses of the constitutions. He argues that the “eternity clauses are” the protecting the constitutive elements of the text of the constitutions.⁷⁶ The Constitution of the state is not an ordinary document. It is created to protect the will of people, thus it has to speak loudly about its own ideas and ideals. This ideas and ideals have to be “eternal”. Otherwise, the bounding power of this document will weaken. If the ideas and ideals of the people are easily changed, the society is at the threat of collapse. Ulrich Preuss asserts that the amending power of the authority is dangerous power. It can lead to disorder and possibly to the civil war also.⁷⁷ If the state’s constitution can be easily changed, than the possibility of lawlessness and confrontation in this state is higher. The state has to defend the polity and the constituent power:

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.⁷⁸

In addition to that, possible threats of the doctrine of “unconstitutional constitutional amendments” are also examined in this discussion. It cannot be neglected, that the distinction between the

⁷⁵ Gözler, Kemal. *Judicial Review of Constitutional Amendments: A Comparative Study*. Bursa: Ekin, 2008, p. 103.

⁷⁶ Preuss, Ulrich K. "The Implications of Eternity Clauses: The German Experience." *Isr. L. Rev.* 44 (2011): 429, p. 445-447.

⁷⁷ Preuss, Ulrich K. "The Implications of Eternity Clauses: The German Experience." *Isr. L. Rev.* 44 (2011): 429, p. 446.

⁷⁸ Preuss, Ulrich K. "The Implications of Eternity Clauses: The German Experience." *Isr. L. Rev.* 44 (2011): 429, p. 446.

constitutional provisions will lead to “dualistic” constitution.⁷⁹ If some of the provisions of the constitution will represent the ideas and ideals, they will have supra-legality. This will mean that these provisions will have more legitimacy than others. In this kind of situation there is a probability that the controversies in the Constitutional Court will become the controversies about the constituent power, ideology and political values. This can also lead to loss of stability and/or oppression of the weak:

“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.”

However, the latter problem can be solved with the judicial activism of the constitutional courts. The constitutional courts of the states will still interpret eternity clauses and as Yaniv Roznai argues, these interpretations can give the modern and developed meaning to the eternity clauses.⁸⁰

⁷⁹ Preuss, Ulrich K. "The Implications of Eternity Clauses: The German Experience." *Isr. L. Rev.* 44 (2011): 429, p. 446.

⁸⁰ Roznai, Yaniv. "Unamendability and the Genetic Code of the Constitution." *Available at SSRN 2569279* (2015), p 26.

III. Analysis

i. Unconstitutional Constitutional Amendments and Democracy

The idea of eternal constitutional provisions comes in contradiction with the principles of the democracy. Unamendable provisions are the echo of Karl Löwenstein's "militant democracy" – the theory that is the cornerstone for the interpretation of the Basic Law.⁸¹ This theory is limiting the democratic manifestation of the will of people. The term constitutional democracy itself is a rather contradictory. Democracy is the principle of self-government, while the constitutionalism makes boundaries to the democratic choices.⁸²

The doctrine of "unconstitutional constitutional amendments" has been acknowledged by considerable amount of legal scholars and courts. This quest for eternity from the constitutional courts is the fight for more authority. The authority to make judicial review of the constitutional amendments. It is recognized that the constitutional courts are best suited to decide about the constitutionality of constitutional amendments, together with other legislative acts.⁸³ This kind of review declares constitutional amendments as unconstitutional not because of the amendment is in contradiction with the particular provision of the constitution, but because they violate the "spirit of the constitution".⁸⁴ The analysis by Ulrich Preuss shows that the constitutional courts have to make political decisions while deciding about the constitutionality of the constitutional amendments – protection of the constitution is the protection of "polity's political identity".⁸⁵

⁸¹ Preuss, Ulrich K. "The Implications of Eternity Clauses: The German Experience." *Isr. L. Rev.* 44 (2011): 429, p. 447.

⁸² Tushnet, Mark. "Forms of judicial review as expressions of constitutional patriotism." *Law and Philosophy* 22, no. 3 (2003): 353-379, p. 1

⁸³ Preuss, Ulrich K. "The Implications of Eternity Clauses: The German Experience." *Isr. L. Rev.* 44 (2011): 429, p. 441.

⁸⁴ Preuss, Ulrich K. "The Implications of Eternity Clauses: The German Experience." *Isr. L. Rev.* 44 (2011): 429, p. 448.

⁸⁵ Preuss, Ulrich K. "The Implications of Eternity Clauses: The German Experience." *Isr. L. Rev.* 44 (2011): 429, p. 448.

The “Venice Commission”, which protects the democracy through law, has delivered its own opinion about the idea of “unconstitutional constitutional amendments” and unamendability of some provisions.⁸⁶ It clarified, that there are arguments in favor of both sides. There are several countries that do not have the provisions and their constitutional system functions well without them. The Commission has emphasized that the existence of the eternity clauses is connected with the historical reasons and they are the integral part of the constitutional system of the state. The Commission considered that the problem is not superficial – there is no answer for the question whether the state needs an eternity clause in its basic law. The more explicit answer was given to the question of substance of unamendable clauses. The Commission highlighted that these clauses, being “complex and potentially controversial constitutional instruments”, should be used diligently. The advice for the states from the Commission was to use this limitation only for the protection of basic principles of the democratic order. Discussions and changes in countries are sometimes highly desired and the reform with constitutional amendments can be the recovery for the crushing political system.

The Commission stated, that generally, the idea of “unconstitutional constitutional amendments” is older trend of constitutionalism.⁸⁷ The courts, interpreting the eternity clauses must be careful and restrictive in their judicial activism. With this opinion the Commission tied the hands of the court, mostly because of the political character of the subject matter. Aharon Barak is convinced in the opposite – the courts cannot be limited in their activities. If political character of judicial activity leads to the annulment of the constitutional amendments, this decision is ought to be taken. The political decisions of the constitutional courts are means for the protection of democracy itself. The latter cannot function well without judicial activity.⁸⁸

⁸⁶ Venice Commission, CDL-AD(2010)001, Report on Constitutional Amendment. Paras. 217-218.

⁸⁷ Venice Commission, CDL-AD(2010)001, Report on Constitutional Amendment. Para. 214.

⁸⁸ Barak, Aharon. "Unconstitutional Constitutional Amendments." *Isr. L. Rev.* 44 (2011): 321, p. 336

On the one hand the Commission has advised constitutional courts not make political decisions about the constitutional amendments because of their political content, but on the other hand, we cannot disregard the idea the Constitutional law is substantially political law, because the constitutional adjudication provokes lawmaking.⁸⁹ The Commission considers that the principles and concepts that could be protected by the unamendable provisions of the constitution are always changing the meaning. “Sovereignty”, “democracy”, “republicanism” have been understood differently for the people of different times.

ii. Lessons for Georgia

The analysis of the theoretical framework and the case-law of the other states’ case law suggest that the judicial review of constitutional amendments in the states where the constitution does not mention this authority for the constitutional court, is alarming. The Venice Commission has emphasized, that the scrutiny for reviewing the constitutional amendments by the constitutional court must be very strict. The review done by the Constitutional Court of Georgia was scrupulous and was founded on the limitations of the Constitution of Georgia.

Previous chapters have shown that the substantive limits on the power to amend the constitution have played out well in several countries. The eternity clauses and entrenchments of the constitutions have positive influence in protecting the constitutional values of the state. Different approaches of the legal scholars and legal documents about the doctrine of “unconstitutional constitutional amendments” leave the debate about the doctrine of “unconstitutional constitutional amendments” unresolved. The controversy between the democracy and the constitutionalism is also important to understand the

⁸⁹ Stone Sweet, A. “The Politics of Constitutional Review in France and Europe.” *International Journal of Constitutional Law* 5, no. 1 (January 1, 2007): 69–92. doi:10.1093/icon/mol041, p. 72

approach of the Georgian Constitutional Court. This Court is restraining itself from reviewing the constitutionality of constitutional amendments because of the “silence” of the constitution. The Venice Commission does not oblige the states to have or not have eternity clauses. It obliges them to have harder procedure to amend the constitutions. It also advises, that in case of the absence of the clause about the unamendability, it must be considered that every provision of the constitution can be amended. It also emphasized that the substantive judicial review of constitutional amendments by the constitutional courts is

“problematic instrument, which should be exercised in those countries where is already follows from clear and established doctrine, and even there with care, allowing a margin of appreciation for the consultational legislator.”⁹⁰

The Constitution of Georgia does not provide eternity clauses. It can be concluded, this binds the Judges of the Constitutional Courts to declare constitutional amendments unconstitutional. The Constitution of Georgia is rather flexible, compared to the other states’ constitutions. Unicameral Parliament can easily make amendments to the Constitution of the state. We have seen from the described case-law that the constitutional amendments sometimes change political system in the country. For example in case of the 1961 year constitutional amendment to the Constitution of France and this amendment, initiated by Charles de Gaulle was not reviewed by the Council.

The suggestions of the Venice Commission and the ideas, discussed by legal scholars indicate the necessity of eternity clauses in the Constitution of Georgia. This necessity has been also described by the Georgian constitutional scholars, stating that the “Eternity clauses are of a

⁹⁰ Venice Commission, CDL-AD(2010)001, Report on Constitutional Amendment. Para. 235.

certain benefit, primarily to the stability of the state. However, this does not mean that the society will be in captivity of this principles”.⁹¹

The eternity clauses have to be indicated in the constitution of Georgia to give the constitutional court the power to protect stability, values of the constitution and fulfill the idea of the constitution and constitutionalism – to protect democracy and counter-majoritarian ideas together.

⁹¹ Nodia, Gia and Aphrasidze, David, eds., *From Superpresidentialism till Parliamentarianism: Constitutional Amendments in Georgia: Collection of Articles*, Konrad Adenauer Stiftung, 2013, p. 128

Conclusion

Antonin Scalia, who was originalist and was making the textual interpretation of the Constitution, said that “societies sometimes rot” and it is not obvious that the society is getting better and better.⁹² In the epigraph to this thesis I indicate the quote which describes how the pre-commitment works – sometimes people willingly restrain themselves from something, to protect “future selves”.

The main aim of this thesis was to make a comparative review of the doctrine of “unconstitutional constitutional amendments” and to suggest the better solution for the Constitutional Court of Georgia in dealing with the judicial review of constitutional amendments. This issue was regarded problematic because the case laws, legal documents and disputes in legal societies of Georgia did not cover the unique arguments provided in the thesis.

This paper explained that the doctrine of “unconstitutional constitutional amendments” very popular throughout the world. This doctrine is the foundation for many constitutional courts to play the decisive part with the power to assess the constitutionality of constitutional amendments. The French perspective on this issue is the example of the judicial restraint for annulling unconstitutional constitutional amendments. The *Conseil constitutionnel* of France has strictly underlined, that it does not have the ability to make a judicial review of constitutional amendments. Georgian constitutional court has the same approach in making the judicial review of constitutional amendments.

The aim of this thesis was to propose the better way for the Constitutional Court of Georgia to assess the constitutionality of constitutional amendments. Based on the arguments of legal scholars this thesis has shown that there are different approaches for that. The opinion by Venice Commission

⁹² Dorsen, N. (2005). The relevance of foreign legal materials in US constitutional cases: A conversation between Justice Antonin Scalia and Justice Stephen Breyer. *International Journal of Constitutional Law*, 3(4), 519-541, P 519

suggests that eternity clauses are necessary for the constitutional court to have the authority over the constitutional amendments and their annulment. This is crucial for the political system of Georgia, which has the flexible Constitution.

The suggestion of this essay is that the Constitution of Georgia needs the eternity clauses to give the authority to the Constitutional Court of Georgia to review the constitutional amendments. Without this authority, the Court has limited powers to do what the main aim of their existence is – to protect the constitution from unjust provisions, even from the majoritarian interference of Parliament.

It is important that the Constituent power of Georgia will understand the fear that they can be “rash and insolent in their cups and instruct their friends to remove them from the feast.”, meaning that they will limit the Legislative, because they tend to “rot.”

Bibliography

Books and Articles

1. Albert, Richard. "The Expressive Function of Constitutional Amendment Rules"(2013)." *McGill LJ* 59: 225-at.
2. Albert, Richard. "The Structure of Constitutional Amendment Rules." (2014).
3. Babeck, Wolfgang, Steven Fish, Zeno Reichenbecher and "Deutsche Gesellschaft für Internationale Zusammenarbeit". *Rewriting a Constitution: Georgia's Shift Towards Europe*. Nomos, 2012.
4. Barak, Aharon. "Unconstitutional Constitutional Amendments." *Isr. L. Rev.* 44 (2011): 321.
5. Baranger, Denis. "Language of Eternity: Judicial Review of the Amending Power in France (or the Absence Thereof)." *Isr. L. Rev.* 44 (2011): 389.
6. Beardsley, James. "Constitutional Review in France." *The Supreme Court Review* (1975): 189-259.
7. Cole, Taylor. "Three Constitutional Courts: A Comparison." *American Political Science Review* 53, no. 04 (1959): 963-984.
8. Collett, Teresa Stanton. "Judicial independence and accountability in an age of unconstitutional constitutional amendments." *Loy. U. Chi. LJ* 41 (2009): 327.
9. Dellinger, Walter. "The Legitimacy of Constitutional Change: Rethinking the Amendment Process." *Harvard Law Review* (1983): 386-432.
10. Dixon, Rosalind. "Constitutional Amendment Rules: A Comparative Perspective." *Edward Elgar*, 2011.

11. Dorsen, N. (2005). The relevance of foreign legal materials in US constitutional cases: A conversation between Justice Antonin Scalia and Justice Stephen Breyer. *International Journal of Constitutional Law*, 3(4), 519-541.
12. Elster, Jon. "Don't burn your bridge before you come to it: Some ambiguities and complexities of precommitment." *Tex. L. Rev.* 81 (2002): 1751.
13. Entin, Jonathan L. "Separation of Powers, the Political Branches, and the Limits of Judicial Review." *Ohio St. LJ* 51 (1990): 175.
14. Ely, J.H., 1980. *Democracy and distrust: A theory of judicial review*. Harvard University Press.
15. Fisher, Howard D. *The German Legal System and Legal Language*. Cavendish Publishing, 2002.
16. Friedman, Andrew. "Dead Hand Constitutionalism: Honduras and the Danger of Eternity Clauses in New Democracies." *Mexican Law Review* 4 (2011): 77.
17. Gözler, Kemal. *Judicial Review of Constitutional Amendments: A Comparative Study*. Bursa: Ekin, 2008.
18. Ginsburg, Tom. *Judicial review in new democracies: Constitutional courts in Asian cases*. Cambridge University Press, 2003.
19. Halmai, Gábor. "Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?" *Constellations* 19, no. 2 (June 2012): 182–203.
20. Hamilton, Alexander, James Madison, John Jay, and Jack Richon Pole. *The Federalist*. Vol. 43. Hackett Publishing, 2005.
21. Katz, Elai. "On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment." *Colum. JL & Soc. Probs.* 29 (1995): 251.

22. Kommers, Donald P., and Russell A. Miller. *The Constitutional Jurisprudence of the Federal Republic of Germany: Revised and Expanded*. Duke University Press, 2012,
23. Lutz, Donald S. "Toward a Theory of Constitutional Amendment." *American Political Science Review* 88, no. 02 (1994): 355-370.
24. Morton, Frederick Lee. "Judicial Review in France: A Comparative Analysis." *Am. J. Comp. L.* 36 (1988): 89.
25. Nodia, Gia and Aphrasidze, David, eds., *From Superpresidentialism till Parliamentarianism: Constitutional Amendments in Georgia: Collection of Articles*, Konrad Adenauer Stiftung, (2013) (ნოდია, გია და აფრასიძე დავით (რედაქტორები) სუპერპრეზიდენტული ტიპის საკანონმდებლო კონსტიტუციური ცვლლებები საქართველოში: სტატიების კრებული, Konrad Adenauer Stiftung, 2013.)
26. Nohlen, N., 2005. Germany: The Electronic Eavesdropping Case. *International Journal of Constitutional Law*, 3(4), pp.680-686.
27. Pfersmann, Otto. "Unconstitutional constitutional amendments: a normativist approach." *Zeitschrift für öffentliches Recht* 67 (2012): 81-113.
28. Preuss, Ulrich K. "Implications of Eternity Clauses: The German Experience, The." *Isr. L. Rev.* 44 (2011): 429.
29. Robertson, David. *The judge as political theorist: contemporary constitutional review*. Princeton University Press, 2010.
30. Roznai, Y., 2013. The theory and practice of "supra-constitutional" limits on constitutional amendments. *Int'l & Comp. LQ*, 62, pp.557-572.

31. Roznai, Yaniv. "Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea'(2013)." *American Journal of Comparative Law* 61: 657.
32. Roznai, Yaniv. "Unamendability and the Genetic Code of the Constitution." *Available at SSRN 2569279* (2015).
33. Samaha, Adam M. "Dead Hand Arguments and Constitutional Interpretation." *Columbia Law Review* (2008): 606-680.
34. Stender - Vorwachs, J. "Constitutionality of Acoustic Surveillance Measures upon Private Premises, The." *J. Acad. Legal Stud.* 1 (2005): 22.
35. Stone Sweet, A. "The Politics of Constitutional Review in France and Europe." *International Journal of Constitutional Law* 5, no. 1 (January 1, 2007): 69–92. doi:10.1093/icon/mol041.
36. Strauss, David A. "The irrelevance of constitutional amendments." *Harvard Law Review* (2001): 1457-1505.
37. Tushnet, Mark. "Forms of judicial review as expressions of constitutional patriotism." *Law and Philosophy* 22, no. 3 (2003): 353-379.
38. Weintal, Sharon. "Challenge of Reconciling Constitutional Eternity Clauses with Popular Sovereignty: Toward Three-Track Democracy in Israel as a Universal Holistic Constitutional System and Theory, The." *Isr. L. Rev.* 44 (2011): 449.
39. Weis, Lael K. "Constitutional amendment rules and interpretive fidelity to democracy." *Melb. UL Rev.* 38 (2014): 240.
40. Wright, R. George. "Could a Constitutional Amendment Be Unconstitutional." *Loy. U. Chi. LJ* 22 (1990): 741.

41. Wright, Susan. "Constitutional Implications in France of the Maastricht Treaty, The." *Tul. Eur. & Civ. LF* 9 (1994): 35.

Cases

Georgia

1. *Citizens of Georgia Irma Inashvili, David Tarkhan – Mouravi and Ioseb Manjavidze v. Parliament of Georgia*, 2013 (საქართველოს მოქალაქეები ირმა ინაშვილი, დავით თარხან - მოურავი და იოსებ მანჯავიძე საქართველოს პარლამენტის წინააღმდეგ, 2013)
2. *Citizen of Georgia Geronti Ashordia v Parliament of Georgia*, 2012 (საქართველოს მოქალაქე გერონტი აშორდია საქართველოს პარლამენტის წინააღმდეგ, 2012)
3. *Non – commercial Legal Entity “National League for Protection of Constitution” v Parliament of Georgia*, 2010 (არასამეწარმეო (არაკომერციული) იურიდიული პირი 'კონსტიტუციის დაცვის ეროვნული ლეგა' საქართველოს პარლამენტის წინააღმდეგ, 2010)

France

1. *Conseil constitutionnel, Decision No 62-20 DC of 6 November 1962*
2. *Conseil constitutionnel, Decision No. 2003-469 DC of 26 March 2003*

Germany

1. BVerfG, 23.10.1951 - 2 BvG 1/51
2. 30 BVerfGE 1, (1970).
3. 84 BverfGe 90 (1991)
4. 94 BVerfGE 12 (1996)

5. BverGE 2/08 (2009)

Statutes and International Instruments

1. Venice Commission, CDL-AD(2007)004, Opinion on the Constitution of Serbia, §§ 15, 100 and 104; CDLINF(2001)023, Interim Report on the Constitutional Situation of the Federal Republic of Yugoslavia.
2. Venice Commission, CDL-AD(2007)047, Opinion on the Constitution of Montenegro, § 126; CDL-AD(2008)015, Opinion on the Draft Constitution of Ukraine.
3. Venice Commission, CDL-INF(2001)003, Report on Co-operation between the Venice Commission and the Republic of Moldova on constitutional reform.
4. Venice Commission, CDL-AD(2010)001, Report on Constitutional Amendment.