

# The Straw that Broke the Constitution's Back?

## Qualitative Quantity in Judicial Review of Constitutional Amendments

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*Nowadays, democracies die by the use of legal, subtle, and incremental means. Facing such a challenge, the doctrine of 'unconstitutional constitutional amendments' is useless as it aims to block only revolutionary constitutional changes that strike the core of the basic principles of the democratic order, thereby effectively replacing it with a new one. But this is almost never the case. Democratic erosion rarely occurs by such a direct powerful assault but through more gentle and incremental means. However, the aggregation of such an incremental process may eventually bring about a substantive decay and transformation of the constitutional order. This chapter thus focuses on the possibility to have an aggregated model of judicial review of constitutional amendments, whereby constitutional change will be evaluated in a broader contextual and temporal context, in order to evaluate the aggregated effect of formal constitutional amendments on the basic principles of the constitutional order. The chapter reviews the notion of 'quantity turns into quality' in science and philosophy and applies the same rationale to law, and particularly to constitutional change. It demonstrates the usage of such a qualitative quantity approach by case-studies from Israel and Colombia.*

*Keyword:* Unconstitutional constitutional amendments, constitutional replacement doctrine, judicial review, when quantity turns to quality, unamendability, Colombia, Israel, Term Limits, Democratic erosion

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## I. Introduction

According to the doctrine of constitutional unamendability, certain constitutional principles that provide the constitution its identity are deemed as unamendable. They are beyond the power of the formal amendment process. And such unamendability may also be enforced through substantive judicial review even of constitutional amendments.

Perhaps one of the most famous jurisdictions in which constitutional unamendability is applied is Colombia. The Colombian Constitutional Court has proven to be a central player in constitutional change, often blocking major constitutional amendments. Famously, the Constitutional Court held that President Alvaro Uribe could amend the constitution to seek a second consecutive term in office, but not a third consecutive term.<sup>1</sup> The question is raised as to why a second consecutive term is a valid constitutional amendment while a third consecutive term is an unconstitutional replacement?

Throughout history, philosophers and scientists have postulated the contradiction that individual small changes, which are powerless to effect a qualitative change, at a certain point do exactly that: quantity changes into quality. The idea that, under certain conditions, even small things can cause big changes finds its expression in all kinds of modern sayings and proverbs: 'the straw that broke the camel's back', 'many hands make light work', 'constant dripping wears away the stone'; 'a death in thousand cuts', and so on.

This concept was first brought forward by the Megarian Greek philosophers in the fourth century bc. The paradox attracted little subsequent interest until the late nineteenth century when it was conceptualized first by Hegel as an abstract concept and then by Marxist philosophers in the neo-Hegelian tradition, especially Engels, who developed materialistic and scientific applications of the theory.

In this chapter I wish to propose that this theory of quantity transforming into quality was at play in the Colombian term limits

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<sup>1</sup> Colombian Constitutional Court, Decision C-141 of 2010.

case, and this notion may be a model for future aggregated review of constitutional amendments. This chapter proceeds as follows: Section II provides an overview of the doctrine of constitutional unamendability and its protection against revolutionary changes thereby its limited utility against minor constitutional changes. In Section III an overview of the notion of transition from quantity into quality in philosophy and science is provided. Section IV then moves to law in order to demonstrate how quantitative aggregation may be considered during legal analysis. Section V then focuses on two major constitutional decisions—from Colombia and Israel—to demonstrate how qualitative quantity can rationalize the application of constitutional unamendability even against constitutional amendments that do not revolutionize the constitutional order. Section VI concludes.

## **II. Constitutional Unamendability and the Protection against Revolutionary Amendments**

There is a global trend towards imposing substantive limitations (explicit or implicit) on constitutional amendment powers.<sup>2</sup> In recent decades, including explicit limits ('eternity clauses') in constitutions has become a central feature of modern global constitutional design.<sup>3</sup>

Moreover, even in countries where the constitution does not include any 'eternity clause', courts around the world have recognized a core of basic principles which is implicitly protected from amendments. The doctrine of 'implied limitations' on the constitutional amendment

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2 For elaboration, see Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford: Oxford University Press, 2017).

3 *Ibid.*, at 20–2 (showing that between 1789 and 1944, only 17 per cent of world constitutions enacted in this period included unamendable provisions; between 1945 and 1988, already 27 per cent of world constitutions enacted in those years included such provisions, and out of the constitutions which were enacted between 1989 and 2015, already more than half (54 per cent) included unamendable provisions). See also Richard Albert 'Constitutional Handcuffs' (2010) 42(3) *Arizona State Law Journal* 663; Yaniv Roznai, 'Unamendability and The Genetic Code of The Constitution' (2015) 27(2) *European Review of Public Law* 775; Michael Hein, 'Impeding Constitutional Amendments: Why are Entrenchment Clauses Codified in Contemporary Constitutions?' (2019) 54(2) *Acta Politica* 196.

power was most famously applied by the Indian courts. In *Kesavananda Bharati v State of Kerala* of 1973, the Indian Supreme Court held that the power of the parliament 'to amend the constitution does not include the power to alter the basic structure, or framework of the constitution so as to change its identity'.<sup>4</sup> This has come to be known as the 'basic structure doctrine'.<sup>5</sup>

Since its adoption in India, the basic structure doctrine has migrated to various other states, and was adopted and applied in numerous variations, as courts in Bangladesh, Pakistan, Uganda, Kenya, Taiwan, Peru, Belize, Malaysia, and Slovakia, declared that some basic features or principles of the constitution are so imperative to the constitutional order and its identity that they are beyond the amendment power even without any explicit limitations.<sup>6</sup> Constitutional amendments, according to this notion, are distinguished from revolutionary changes to the constitution. Amendments can indeed change the constitution but must operate within the boundaries of the existing constitutional order and its foundational principles; they must not comprise a change so radical that it has to be regarded as a new constitution.<sup>7</sup>

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4 *Kesavananda Bharati v State of Kerala*, AIR 1973 SC 1461.

5 Much has been written about this doctrine. See, e.g., Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (New Delhi: Oxford University Press, 2010).

6 See, e.g., Yaniv Roznai, 'The Migration of the Indian Basic Structure Doctrine', in Malik Lokendra (ed.), *Judicial Activism in India—A Festschrift in Honour of Justice V. R. Krishna Iyer* (New Delhi: Universal Law Publishing Co. Pvt Ltd, 2012), 240.

7 The basic theory behind this doctrine is that the constitutional amendment power is a delegated legal competence which acts in trust and therefore limited both explicitly and implicitly. First, it must obey those explicit conditions stipulated in the constitution. Secondly, the body which holds the constitutional amendment power in trust cannot use it in order to destroy the constitution, from which its authority derives. The amendment power is the internal method that the constitution provides for its self-preservation. By destroying the constitution, the delegated amending power undermines its own *raison d'être*. To amend the constitution so as to destroy it and create a new constitution would be an action *ultra vires*. In addition, since every constitution consists of a set of basic principles and features, which determine the totality of the constitutional order and make up the 'spirit of the constitution' and its identity, the constitutional amendment power cannot be used in order to destroy the basic principles of the constitution. The alteration of the constitution's core results in the collapse of the entire constitution and its replacement by

A central variation of this doctrine is the one developed in Colombia. The Colombian constitution of 1991 creates a distinction between amendment (which can be carried out by Congress alone or by referendum) and replacement carried out by the Constituent Assembly. However, it does not include any unamendable provisions and does not establish any principles determining when each route must be used. It also expressly limits judicial control over constitutional amendments to 'procedural errors' only. Nonetheless, the Constitutional Court gave a wide definition of the concept of 'procedural error', noting, in a line of judicial decisions, that the amendment power does not extend to the replacement of the constitution with a different one. It is only the constituent power, acting through extraordinary mechanisms such as a Constituent Assembly that can constitute a new constitution:

Congress derives its power to reform the Constitution from the constitution itself. It has a derivative or secondary status as a constituent force. Therefore, it can reform or amend the Constitution, but it cannot replace it or substitute it for another constitution. If Congress crosses the line between amending the Constitution, and replacing it, it violates its constitutional powers and competence. If that happens, the Court can overturn Congress' decision, not on the grounds of content review, but based on the fact that a branch of government has ignored its constitutional competence, and therefore, violated constitutional procedural rules.<sup>8</sup>

Accordingly, there is a difference between amending the constitution and replacing it. An amendment can indeed reform the constitution but may not be so radical so as to replace it with something completely

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another—but this is for the people's primary constituent power, not the delegated organs, to decide via a proper channel of higher-level democratic participation and deliberations. See Yaniv Roznai, 'Towards A Theory of Constitutional Unamendability: On the Nature and Scope of the Constitutional Amendment Powers' (2017) 18 *Jus Politicum* 5.

<sup>8</sup> Opinion C-1040/05, taken from the English summary of the decision which is available at the website of the Constitutional Court of Colombia, <https://www.corteconstitucional.gov.co/english/Decision.php?IdPublicacion=9203>, access date: 14.12.2020

different. This has become to be known as the ‘substitution’ or ‘replacement’ doctrine.<sup>9</sup>

But how do we know whether a constitutional amendment ‘replaces’ the constitution with a new one? Of course, a constitutional amendment can blatantly destroy the basic elements of the constitutional order replacing them with new ones. This was the case, for example, with the transition in Hungary from communism to democracy, a transformation brought about through formal constitutional amendments.<sup>10</sup> But what if the amendment only slightly deviates or infringes the basic constitutional principles? According to the doctrine, such an amendment—that does not replace the constitution with a new one—is surely allowed to stand.

Indeed, according to the established standards of review, only an extraordinary infringement of unamendable principles, or a constitutional change that ‘fundamentally abandons’ them, would allow judicial annulment of constitutional amendments. As the German Constitutional Court explained regarding the German ‘eternity clause’ (Article 79.3 of the Basic Law):<sup>11</sup>

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9 See, e.g., Carlos Bernal, ‘Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine’ (2013) 11(2) *International Journal of Constitutional Law* 339; Gonzalo Andres Ramirez-Cleves, ‘The Unconstitutionality of Constitutional Amendments in Colombia: The Tension between Majoritarian Democracy and Constitutional Democracy’, in Thomas Bustamante & Bernardo Gonçalves Fernandes (eds), *Democratizing Constitutional Law* (Switzerland: Springer, 2016), 213; Mario Alberto Cajas-Sarria, ‘Judicial review of constitutional amendments in Colombia: a political and historical perspective, 1955-2016’ (2017) 5(3) *Theory and Practice of Legislation* 245; Juan Gonzalez Bertomeu, ‘The Colombian Constitutional Court’s Doctrine on the Substitution of the Constitution’, in Richard Albert, Carlos Bernal, & Juliano Zaiden Benvindo (eds), *Constitutional Change and Transformation in Latin America* (Oxford: Hart Publishing, 2019), 119. 10 Yaniv Roznai, ‘Constitutional Transformations: The Case of Hungary’, in David Law (ed.), *Constitutionalism in Context* (Cambridge University Press, forthcoming 2021).

11 The German eternity clause prohibits amendments to the Basic Law that affect the division of the Federation into Länder; human dignity; the constitutional order; or basic institutional principles describing Germany as a democratic and social federal state. On the German eternity clause, see Helmut Goerlich, ‘Concept of

The purpose of [the unamendable provision] . . . is to prevent both abolition of the substance or basis of the existing constitutional order, by the formal legal means of amendment . . . and abuse of the Constitution to legalize a totalitarian regime. This provision thus prohibits a fundamental abandonment of the principles mentioned therein. Principles are from the very beginning not 'affected' as 'principles' if they are in general taken into consideration and are only modified for evidently pertinent reasons for a special case according to its peculiar character . . . Restriction on the legislator's amending the Constitution . . . must not, however, prevent the legislator from modifying by constitutional amendment even basic constitutional principles in a system—immanent manner.<sup>12</sup>

This notion seems to be applicable also to the Colombian Constitutional Replacement Doctrine. As Carlo Bernal wrote, concerning that doctrine, an amendment would count as a 'replacement of the constitution if, and only if, the infringement is of such magnitude that the political system can no longer be considered as an institutionalization of deliberative democracy'.<sup>13</sup> In other words, an amendment has to fundamentally abandon the principle of deliberative democracy in order to be deemed unconstitutional. Thus, the theory of unamendability allows, at least in theory, 'for a gradual deconstruction of the constitutional system, brought about piece by piece via constitutional amendments'.<sup>14</sup>

What if the constitution is being replaced with a new one not through a one-time revolutionary amendment à la Hungary 1989, but through an incremental series of amendments that each—on its own—may not

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Special Protection for Certain Elements and Principles of the Constitution against Amendments and Article 79(3), Basic Law of Germany' (2008) 1 NUJS Law Review 397; Ulrich K. Preuss, 'The Implications of "Eternity Clauses": The German Experience' (2011) 44(3) Israel Law Review 429.

12 30 BVerfGE 1, 24 (1970); see the English translation in Walter F. Murphy & Joseph Tanenhaus (eds), *Comparative Constitutional Law—Cases and Commentaries* (New York: St. Martin's Press 1977) 659, 661–2.

13 Bernal (n. 9), 357.

14 Roznai (n.1), 226.

amount to a replacement, but when examined accumulatively in the context of an ongoing gradual process, such a series of amendments may prove to be part of an incremental constitutional replacement in which the whole is greater than the sum of its parts?

In this chapter, I wish to claim that a possible solution for relaxing this difficulty may be by adopting the law of 'quantity turns into quality' when considering the accumulative impact of a series of amendments affecting a certain constitutional rule or principles. I will demonstrate this by two constitutional decisions from Colombia and Israel. But before showing how, perhaps it is better to delve into first explaining what the law of 'quantity turns into quality' is.

### III. The Transition from Quantity into Quality in Philosophy and Science

The Megarian philosopher Eubulides is usually credited with the first formulation of the 'sorites paradox'.<sup>15</sup> The paradox asks: Is one grain of sand a heap of sand? The answer is invariably—no. Then are two grains of sand a heap? Again, the answer is no. If we continue adding individual grains of sand—at what point will they transform into a heap? In a similar fashion, the 'Bald Man paradox' presents a man with a full head of hair who is obviously not bald. The removal of a single hair will not turn a non-bald man into a bald one. And yet it is obvious that a continuation of that process must eventually result in baldness.

A modern rendition of these puzzles was coined by Dorothy Edgington as 'the mañana paradox': 'the unwelcome task which needs to be done, but it's always a matter of indifference whether it's done today or tomorrow; [or] the dieter's paradox: I don't care at all about the difference to my weight one chocolate will make'.<sup>16</sup>

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15 The name 'sorites' is derived from the Greek word *soros*, meaning 'heap'. Dominic Hyde, 'The Sorites Paradox', in Giuseppina Ronzitti (ed.), *Vagueness: A Guide* (Switzerland: Springer, 2011), 1.

16 Dorothy Edgington, 'Vagueness by Degrees', in Rosanna Keefe & Peter Smith (eds), *Vagueness: A Reader* (Cambridge, Massachusetts: MIT Press, 1996), 296. Many theorists of the Ideal Language doctrine took the paradox to the direction of the vagueness of the term 'heap', concentrating on its semantic vagueness (see the



From these examples, it is clear that the numerical accumulation of minor changes may bring a major paradigmatic shift. Georg Wilhelm Friedrich Hegel was perhaps the first one to point to the significance of the transition from quantity to quality in social evolution. Hegelian dialectic is usually presented in a threefold manner, comprising three dialectical stages of development: a thesis, giving rise to its reaction; an antithesis, which contradicts or negates the thesis; and the tension between the two being resolved by means of a synthesis.<sup>17</sup> In more simplistic terms, one can consider it thus: problem → reaction → solution.

Another important dialectical principle for Hegel is the transition from quantity to quality, which he terms 'measure'.<sup>18</sup> Hegel describes a dialectic of existence: first, existence must be posited as pure Being (sein); but pure Being, upon examination, is found to be indistinguishable from Nothing (nichts). When it is realized that what is coming into being is, at the same time, also returning to nothing (in life, for example, one's living is also a dying), both Being and Nothing are united as Becoming.<sup>19</sup> As he elaborated in his *Encyclopaedia of the Philosophical Sciences*:

Each of the three spheres of the logical idea proves to be a systematic whole of thought-terms, and a phase of the Absolute. This is the case with Being, containing the three grades of quality, quantity and measure.

Quality is, in the first place, the character identical with being: so identical that a thing ceases to be what it is, if it loses its

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Stanford Encyclopaedia of Philosophy article on the Sorites Paradox, <https://plato.stanford.edu/entries/sorites-paradox/#SorIHist>, access date: 14.12.2020. However, it was also specifically used by later theorists such as Hegel and Engels in the context relevant to our discussion of incremental changes accumulating into significant ones.

17 See e.g. G. E. Mueller, 'The Hegel Legend of "Thesis-Antithesis-Synthesis"' (1958) 19(3) *Journal of the History of Ideas* 411–14, [http://hegel.net/articles/Mueller1958-](http://hegel.net/articles/Mueller1958-TheHegelLegendOfThesisAntithesisSynthesis.pdf)

[TheHegelLegendOfThesisAntithesisSynthesis.pdf](http://hegel.net/articles/Mueller1958-TheHegelLegendOfThesisAntithesisSynthesis.pdf), access date: 14.12.2020

18 G. W. F. Hegel *The Logic of Hegel. The Encyclopedia of the Philosophical Sciences* (Oxford: The Clarendon Press, 1874), §§107–11.

19 *Ibid.*, at §§86–88.

quality. Quantity, on the contrary, is the character external to being, and does not affect the being at all. Thus, e.g. a house remains what it is, whether it be greater or smaller; and red remains red, whether it be brighter or darker.

Measure, the third grade of being, which is the unity of the first two, is a qualitative quantity. All things have their measure: i.e. the quantitative terms of their existence, their being so or so great, does not matter within certain limits; but when these limits are exceeded by an additional more or less, the things cease to be what they were. From measure follows the advance to the second subdivision of the idea, Essence.<sup>20</sup>

Hegel further explains in later passages of the book:

The identity between quantity and quality, which is found in Measure, is at first only implicit, and not yet explicitly realised. In other words, these two categories, which unite in Measure, each claim an independent authority. On the one hand, the quantitative features of existence may be altered, without affecting its quality. On the other hand, this increase and diminution, immaterial though it be, has its limit, by exceeding which the quality suffers change. Thus the temperature of water is, in the first place, a point of no consequence in respect of its liquidity: still with the increase or diminution of the temperature of the liquid water, there comes a point where this state of cohesion suffers a qualitative change, and the water is converted into steam or ice. A quantitative change takes place, apparently without any further significance: but there is something lurking behind, and a seemingly innocent change of quantity acts as a kind of snare, to catch hold of the quality. The antinomy of Measure which this implies was exemplified under more than one garb among the Greeks. It was asked, for example, whether a single grain makes a heap of wheat, or whether it makes a bald-tail to tear out a single hair from the horse's tail. At first, no doubt, looking at the nature of quantity as an indifferent and external character of being, we are disposed to answer these questions in the negative. And yet, as we must admit,

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20 Hegel (n. 18), §85.

this indifferent increase and diminution has its limit: a point is finally reached, where a single additional grain makes a heap of wheat; and the bald-tail is produced, if we continue plucking out single hairs. These examples find a parallel in the story of the peasant who, as his ass trudged cheerfully along, went on adding ounce after ounce to its load, till at length it sunk under the unendurable burden. It would be a mistake to treat these examples as pedantic futility; they really turn on thoughts, an acquaintance with which is of great importance in practical life, especially in ethics. Thus in the matter of expenditure, there is a certain latitude within which a more or less does not matter; but when the Measure, imposed by the individual circumstances of the special case, is exceeded on the one side or the other, the qualitative nature of Measure (as in the above examples of the different temperature of water) makes itself felt, and a course, which a moment before was held good economy, turns into avarice or prodigality.<sup>21</sup>

Interestingly, this idea is not only relevant to physical science but also to political science, and may be important also for the study of constitutions:

The same principles may be applied in politics, when the constitution of a state has to be looked at as independent of, no less than as dependent on, the extent of its territory, the number of its inhabitants, and other quantitative points of the same kind. If we look, e.g. at a state with a territory of ten thousand square miles and a population of four millions we should, without hesitation, admit that a few square miles of land or a few thousand inhabitants more or less could exercise no essential influence on the character of its constitution. But on the other hand, we must not forget that by the continual increase or diminishing of a state, we finally get to a point where, apart from all other circumstances, this quantitative alteration alone necessarily draws with it an alteration in the quality of the constitution. The constitution of a little Swiss canton does not suit a great kingdom; and, similarly, the

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21 Hegel (n. 18), §§108.

constitution of the Roman republic was unsuitable when transferred to the small imperial towns of Germany.<sup>22</sup>

Trotsky, a self-proclaimed Marxist, and dialectician,<sup>23</sup> expanded on Hegels' dialectics in his *Defense of Marxism*:

Every individual is a dialectician to some extent or other, in most cases, unconsciously. A housewife knows that a certain amount of salt flavours soup agreeably, but that added salt makes the soup unpalatable. Consequently, an illiterate peasant woman guides herself in cooking soup by the Hegelian law of the transformation of quantity into quality. Similar examples from daily life could be cited without end. Even animals arrive at their practical conclusions not only on the basis of the Aristotelian syllogism but also on the basis of the Hegelian dialectic. Thus a fox is aware that quadrupeds and birds are nutritious and tasty. On sighting a hare, a rabbit, or a hen, a fox concludes: this particular creature belongs to the tasty and nutritive type, and—chases after the prey. We have here a complete syllogism, although the fox, we may suppose, never read Aristotle. When the same fox, however, encounters the first animal which exceeds it in size, for example, a wolf, it quickly concludes that quantity passes into quality, and turns to flee. Clearly, the legs of a fox are equipped with Hegelian tendencies, even if not fully conscious ones.<sup>24</sup>

In the writings of Hegel there are many examples of the law of dialectics drawn from history and nature. But Hegel's idealism necessarily gave his dialectics a highly abstract, and arbitrary character. Marx and Engels created a scientific, materialist basis to dialectics in their *Dialectical Materialism* theory which emphasizes the importance of real-world conditions—Marx mainly in terms of class, labour, and

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22 Ibid.

23 L. Trotsky, 'Testament of Leon Trotsky' (February 27, 1940), <https://www.marxist.com/testament-of-leon-trotsky.htm>, access date: 14.12.2020.

24 L. Trotsky, 'In Defense of Marxism, An Open Letter to Comrade Burnham, (1940)' (London, 1966), 91–119, <https://www.marxists.org/archive/trotsky/idom/dm/14-burnham.htm>, access date: 14.12.2020.

socio-economic interactions,<sup>25</sup> and Engels through the natural sciences.

Engels postulated three laws of dialectics from his reading of Hegel's Science of Logic, which he elucidated in his work Dialectics of Nature:

- a. The law of the unity and conflict of opposites.
- b. The law of the passage of quantitative changes into qualitative changes.
- c. The law of the negation of the negation.

Thus, he writes, on the law of the transformation of quantity into quality and vice versa:

All qualitative differences in nature rest on differences of chemical composition or on different quantities or forms of motion (energy) or, as is almost always the case, on both. Hence it is impossible to alter the quality of a body without addition or subtraction of matter or motion, i.e. without quantitative alteration of the body concerned. In this form, therefore, Hegel's mysterious principle appears not only quite rational but even rather obvious.<sup>26</sup>

Finally, the law of the transformation of quantity into quality also applies to natural sciences. The phrase 'phase transition' is used in science to denote what is essentially a qualitative leap. Similar processes can be seen in phenomena as varied as the weather, DNA molecules, and the mind itself. Thus, the dialectic principle of transitions between quantity and quality can be found in various scientific fields through phase transitions, in chemistry, for example. The existence of atomic weight was discovered in 1862 by Cannizzaro. In 1869, Russian scientist Dimitri Ivanovich Mendeleev, in collaboration with the German chemist Julius Meyer, worked out the

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25 Marx did not expound greatly on the principle of quantity turning into quality, enlarging mainly on other parts of Hegelian dialectics, and therefore there are no subsequent explanations of his philosophy.

26 F. Engels, C. P. Dutt, & J. B. S. Haldane, 'Dialectics of Nature' (1940), <https://www.marxists.org/archive/marx/works/1883/don/ch02.htm>, 14.12.2020.

periodic table of the elements, so-called because it showed the periodic recurrence of similar chemical properties. Mendeleev's innovation lay in the fact that he did not approach the elements from a purely quantitative standpoint in that he did not see the relation between the different atoms merely in terms of weight. The whole of Mendeleev's periodic table is based on the law of quantity and quality, deducing qualitative differences in the elements from quantitative differences in atomic weights.

Chemistry also involves changes of both a quantitative and qualitative character, both changes of degree and of state. This can clearly be seen in the change of state from gas to liquid or solid, which is usually related to variations of temperature and pressure. In 'Dialectics of Nature', Engels gives a series of examples of how, in chemistry, the simple quantitative addition of elements creates qualitatively different bodies:

The sphere, however, in which the law of nature discovered by Hegel celebrates its most important triumphs is that of chemistry. Chemistry can be termed the science of the qualitative changes of bodies as a result of changed quantitative composition. That was already known to Hegel himself (*Logic, Collected Works, III, p. 488*). As in the case of oxygen: if three atoms unite into a molecule, instead of the usual two, we get ozone, a body which is very considerably different from ordinary oxygen in its odour and reactions. Again, one can take the various proportions in which oxygen combines with nitrogen or sulphur, each of which produces a substance qualitatively different from any of the others! How different laughing gas (nitrogen monoxide  $N_2O$ ) is from nitric anhydride (nitrogen pentoxide,  $N_2O_5$ )! The first is a gas, the second at ordinary temperatures a solid crystalline substance. And yet the whole difference in composition is that the second contains five times as much oxygen as the first, and between the two of them are three more oxides of nitrogen ( $NO$ ,  $N_2O_3$ ,  $NO_2$ ), each of which is qualitatively different from the first two and from each other . . . the Hegelian law is valid not only for compound substances but also for the chemical elements themselves. We now know that

'the chemical properties of the elements are a periodic function of their atomic weights' (Roscoe-Schorlemmer, *Complete Text-Book of Chemistry*, II, p. 823), and that, therefore, their quality is determined by the quantity of their atomic weight. And the test of this has been brilliantly carried out. Mendeleev proved that various gaps occur in the series of related elements arranged according to atomic weights indicating that here new elements remain to be discovered. He described in advance the general chemical properties of one of these unknown elements, which he termed eka-aluminium, because it follows after aluminium in the series beginning with the latter, and he predicted its approximate specific and atomic weight as well as its atomic volume. A few years later, Lecoq de Boisbaudran actually discovered this element, and Mendeleev's predictions fitted with only very slight discrepancies. Eka-aluminium was realised in gallium (*ibid.*, p. 828). By means of the—unconscious— application of Hegel's law of the transformation of quantity into quality, Mendeleev achieved a scientific feat which it is not too bold to put on a par with that of Leverrier in calculating the orbit of the still unknown planet Neptune.<sup>27</sup>

The law of quantity and quality also applies in physics. For example, it serves to shed light on the controversial contradiction called the 'uncertainty principle'. Whereas it is impossible to know the exact position and velocity of an individual subatomic particle, it is possible to predict with great accuracy the behaviour of large numbers of particles. A further example: radioactive atoms decay in a way that makes a detailed prediction impossible. Yet large numbers of atoms decay at a rate so statistically reliable that they are used by scientists as natural 'clocks' with which they calculate the age of the earth, the sun, and the stars.<sup>28</sup> The fact that the laws governing the behaviour of subatomic particles are different to those that function at the 'normal'

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<sup>27</sup> *Ibid.*

<sup>28</sup> Alan Woods & Ted Grant 'Reason in Revolt; Marxist Philosophy and Modern Science' (2015), <https://www.marxist.com/reason-in-revolt-marxist-philosophy-and-modern-science/2.-philosophy-and-religion.htm>, access date: 14.12.2020.

level is an example of the transformation of quantity into quality. Thus, Engels writes:

In physics, bodies are treated as chemically unalterable or indifferent; we have to do with changes of their molecular states and with the change of form of the motion which in all cases, at least on one of the two sides, brings the molecule into play. Here every change is a transformation of quantity into quality, a consequence of the quantitative change of the quantity of motion of one form or another that is inherent in the body or communicated to it. 'Thus, for instance, the temperature of water is first of all indifferent in relation to its state as a liquid; but by increasing or decreasing the temperature of liquid water a point is reached at which this state of cohesion alters and the water becomes transformed on the one side into steam and on the other into ice.' (Hegel, *Encyclopedia, Collected Works*, VI, p. 217.) Similarly, a definite minimum current strength is required to cause the platinum wire of an electric incandescent lamp to glow; and every metal has its temperature of incandescence and fusion, every liquid its definite freezing and boiling point at a given pressure—in so far as our means allow us to produce the temperature required; finally also every gas has its critical point at which it can be liquefied by pressure and cooling. In short, the so-called physical constants are for the most part nothing but designations of the nodal points at which quantitative addition or subtraction of motion produces qualitative alteration in the state of the body concerned, at which, therefore, quantity is transformed into quality.<sup>29</sup>

In biology, we can see the law of the transformation of quantity into quality at work when we consider evolutionary processes of species. In biological terms a specific 'breed' or 'race' of an animal is defined by its capacity to inter-breed. But as evolutionary modifications take one group further away from another a point is reached where they can no longer inter-breed. At this point a new species has been formed. Paleontologists Stephen Jay Gould and Niles Eldredge have

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29 Ibid.



demonstrated that these processes are sometimes slow and protracted and at other times extremely rapid.<sup>30</sup> They show how a gradual accumulation of small changes at a certain point provokes a qualitative change. The term used to describe long periods of stability, interrupted by sudden bursts of change, is 'punctuated equilibria'. When this idea was proposed by Gould and Eldredge of the American Museum of Natural History in 1972, it provoked a hostile debate among biologists, for whom, until then, Darwinian evolution was synonymous with gradualism.

For a long time, it was thought that evolution precluded such drastic changes. It was pictured as a slow, gradual change. However, fossil records, although incomplete, present a very different picture, with long periods of gradual evolution punctuated by violent upheavals, accompanied by the mass extinction of some species and the rapid rise of others. Whether or not the dinosaurs became extinct as a consequence of a meteorite colliding with the earth, it seems highly improbable that most of the great extinctions were caused in this way. While external phenomena, including meteorite or comet impacts, can play a role as 'accidents' in the evolutionary process, it is necessary to seek an explanation of evolution as a result of its internal laws. The theory of 'punctuated equilibria', which is now supported by most paleontologists, represents a decisive break with the old gradualist interpretation of Darwinism, and presents a truly dialectical picture of evolution, in which long periods of stasis are interrupted by sudden leaps and catastrophic changes of all kinds. Gould wrote that:

. . . when presented as guidelines for a philosophy of change, not as dogmatic precepts true by fiat, the three classical laws of dialectics embody a holistic vision that views change as interaction among components of complete systems and sees the components themselves not as a priori entities, but as both products and inputs to the system. Thus, the law of 'interpenetrating opposites' records the inextricable

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30 Stephen Jay Gould & Niles Eldredge, 'Punctuated Equilibria: An Alternative to Phyletic Gradualism' in Thomas J.M. Schopf (ed.), *Models in Paleobiology* (San Francisco: Freeman, Cooper and Company, 1972), 82-115.

interdependence of components: the 'transformation of quantity to quality' defends a systems-based view of change that translates incremental inputs into alterations of state, and the 'negation of negation' describes the direction given to history because complex systems cannot revert exactly to previous states.<sup>31</sup>

It is precisely this idea of incremental imputes that translate to alterations of state—or in other words the transformation of quantity to quality—that I wish to apply in constitutional law, and more precisely in constitutional change.

#### IV. Quantity Turns into Quality in Law

Considerations of quantity in qualitative legal analysis are not new. One can consider this as a subset of aggregation in legal analysis.<sup>32</sup> For example, Ariel Porat and Eric A. Posner have examined examples of how aggregation might take place in torts, contracts, criminal law, and public law.<sup>33</sup> International law, for example, is one field where aggregation, and more specifically the transformation of quantity into quality, can take significance.

William Thomas Worster examined the situation where 'the quantitative growth and dispersion of a certain norm or other legal fact at some point results in a qualitative shift in the state of the law'.<sup>34</sup> This, to Worster, may be relevant for the creation of customary international law: 'the formation of customary international law could be described as a phase transition from one equilibrium state (e.g. rule

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31 Stephen Jay Gould, 'Nurturing Nature', in *An Urchin in the Storm: Essays about Books and Ideas*, (London: Penguin Books, 1990), 194.

32 See, e.g., Alon Harel & Ariel Porat, 'Aggregating Probabilities Across Cases: Criminal Responsibility for Unspecified Offenses' (2009) 94 *Minnesota Law Review* 261; Brandon L. Garrett, 'Aggregation and Constitutional Rights' (2012) 88 *Notre Dame Law Review* 593, 641–8; Zemer Blondheim & Nadiv Mordechay, 'Towards a Cumulative Effect Doctrine: Aggregation in Constitutional Judicial Review' (2014) 44(2) *Mishpatim* 596 (Hebrew).

33 Ariel Porat & Eric A. Posner, 'Aggregation and Law' (2012) 122 *Yale Law Journal* 2.

34 William Thomas Worster, 'The Transformation of Quantity into Quality: Critical Mass in The Formation of Customary International Law' (2013) 31(1) *Boston University International Law Journal* 4.

of permissiveness) to another (e.g. rule of prohibition) that is characterized as a build-up of quantitative practice eventually sufficient to reach a critical mass that forces a qualitative shift in the norm.<sup>35</sup>

Another example from international law is the 'accumulation of events' or 'needle prick' doctrine. According to this doctrine, a specific act of terrorism, or needle prick, though may not individually qualify as an armed attack that allows the victim state to respond with armed force in self defence, could amount to an armed attack entitling response when the totality of incidents are taken into consideration.<sup>36</sup> Put differently, the quantity of small events transform to a different legal state—that of an armed attack that allows action in self defence.

Such accumulation can also be relevant in judicial review. Consider, for example, these two cases from Israel. The first concerned the legality of the long-standing arrangement whereby 'Yeshiva students' (students of Jewish educational institutions that focus on the study of traditional religious texts) were granted postponement of their military service for so long as they continued their full-time studies. This has been confirmed by successive Ministers of Defence since 1948. Writing for the majority, Justice Aharon Barak wrote that the petitioners have not discharged the burden placed on them of showing that the Minister acted in an unreasonable manner. However, he also added that 'there is ultimate significance to the number of Yeshiva students whose service is deferred. There is a limit which no reasonable Minister of Defence may cross. Quantity makes a qualitative difference.'<sup>37</sup>

In the second case, an extended panel of nine justices of the Supreme Court decided the question of the constitutionality of the arrangement enacted by the Knesset (Israeli Parliament) in 2012, in amendment no.

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35 Ibid., 20.

36 Norman Menachem Feder, 'Reading the U.N. Charter Connotatively: Toward a New Definition of Armed Attack' (1987) 19 *New York University Journal of International Law and Politics* 395, 415.

37 H.C. 910/86, Yehuda Ressler and Others v Minister of Defense, 32(2) PD 441 (1988) para. 69 of Barak's judgment (Isr.)

3 of the Prevention of Infiltration Law (Offenses and Adjudication), 5714-1954, which allows holding infiltrators in custody for a period of three years. All nine justices of the panel held, unanimously, that the arrangement was unconstitutional because it disproportionately limited the constitutional right to liberty determined in Basic Law: Human Dignity and Liberty. In his judgment, Justice Amit emphasized that the content of his opinion relates to the situation today, in which the number of infiltrators stands at approximately 1 per cent of the population of Israel, as a *fait accompli*. At the same time, Justice Amit commented that one wonders about the numerical 'red line' of what the state can bear without concern for a real limitation of its sovereignty, its character, its national identity, its cultural-societal character, the makeup of its population, and the entirety of its unique characteristics, and without concern for its stability and of 'breaking its neck' in terms of crowding, welfare and economy, internal security, and public order. Against that backdrop, Justice Amit noted that when balancing between various basic rights or between basic rights and the vital interests of the state, we must be aware of the data, the assessments and the forecasts, as there are situations in which 'quantity makes quality'.<sup>38</sup>

So, the idea that the accumulation of minor changes can bring about a major change may also be relevant to legal analysis, and in our case, in the judicial review of constitutional amendments. But before turning to exemplify this, allow me to explain the problem first. Nowadays, democratic breakdowns occur not by an immediate break in the legal order but by subtle and gradual legal means that ultimately dismantle the constitutional system.<sup>39</sup> As Tom Ginsburg and Aziz Huq demonstrate in their book, *How to Save a Constitutional Democracy*, one of prime elements of the current wave of democratic erosion is its incrementalism: 'democratic erosion is typically aggregative process made up of many smaller increments. But those measures are rarely

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38 HCJ 7146/12, *Adam v the Knesset*, 64(2) P.D. 717 (2013) (Isr.), para. 2 of Amit's judgment.

39 See Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85 *University of Chicago Law Review* 545; Steven Levitsky & Daniel Ziblatt, *How Democracies Die* (New York: Crown, 2018).

frontal assaults on one of the three institutional predicates of liberal constitutional democracy, of the kind that might be associated with an overly totalitarian or fascist regime.<sup>40</sup> However, when such measures are taken accumulatively, the affect is momentous. As they state: 'a sufficient quantity of even incremental derogation from a democratic baseline . . . can precipitate a qualitative change that merits a shift in classification'.<sup>41</sup> Likewise, Wojciech Sadurski writes that the 'a broad assault upon liberaldemocratic constitutionalism produces a cumulative effect, and the whole is greater than the sum of its parts'.<sup>42</sup> And this is the crucial point. Often, each constitutional change on its own may not transform the constitutional order or be considered as a constitutional replacement, but the incremental aggregation of the changes may lead to a constitutional revolutionary change.<sup>43</sup>

The problem, as mentioned earlier in the chapter, is that constitutional unamendability is not aimed to prevent minor constitutional changes that deviate from or contradict unamendable principles, and which preserve the state's constitutional identity but aimed to preserve the constitutional order and guard it against revolutionary changes. Constitutional unamendability, as currently applied, allows for an incremental, gradual crumbling of the constitutional order brought about bit by bit by constitutional amendments. It is here, I claim, that the idea of 'Quantity transforms into Quality' may be of use in judicial review of constitutional amendments.

## V. When Quantity Transforms into Quality in Judicial Review of Constitutional Amendments: Two Examples

### A. Colombia

Probably the best known of the recent term limits cases are those issued by the Colombian Constitutional Court after President Alvaro

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40 Tom Ginsburg & Aziz Z. Huq, *How to Save a Constitutional Democracy* (Chicago: University of Chicago Press, 2018), 90–1.

41 *Ibid.*, 45.

42 Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford: Oxford University Press, 2019), 58.

43 See Gary J. Jacobsohn & Yaniv Roznai, *Constitutional Revolution* (New Heaven: Yale University Press, 2020).

Uribe, who held power from 2002 until 2010, first amended the constitution to allow a single consecutive re-election, and then attempted to amend it again to allow a possible third term. Both amendments were challenged as possible substitutions of the constitution. The Court allowed the first amendment, permitting Uribe to run for (and win) a second term in 2006.<sup>44</sup> However, the Court blocked the second attempt, to run for a third term, holding *inter alia* that allowance of a third consecutive term would constitute a substitution of the constitution and thus an unconstitutional constitutional amendment.<sup>45</sup> Uribe complied with the decision and was replaced with Juan Manuel Santos at the end of his second term in 2010.<sup>46</sup>

The reasoning of these two decisions mixed consideration of the domestic political context with comparative examination.<sup>47</sup> For example, in the first re-election decision, the Court noted that allowance of two consecutive terms in office did raise some risks that the president would abuse his power but held essentially that those risks were far from certain and fell within a tolerable range. It further strengthened its decision with a comparative analysis showing that permitting two consecutive presidential terms was fairly normal and common in other liberal democracies with pure presidential systems, and that there is no 'consensus' within Latin America as to the proper scope of presidential re-election. Thus, according to the Court, 'a constitutional amendment that suppresses the ban on presidential re-election, allowing it for one time only, does not constitute, in and of itself, a substitution of the Constitution'<sup>48</sup>

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44 Colombian Constitutional Court, Decision C-1040 of 2005.

45 Colombian Constitutional Court, Decision C-141 of 2010.

46 See, e.g., Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press, 2015); Rosalind Dixon & David Landau, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment' (2015)13(3) *International Journal of Constitutional Law* 606.

47 This is based upon M. J. Cepeda & D. Landau, *Colombian Constitutional Law: Leading Cases* (Oxford: Oxford University Press, 2017), 342–60.

48 Colombian Constitutional Court, Decision C-1040 of 2005; cited in Cepeda & Landau (n. 47), 353.

In sharp contrast, in the second re-election decision, the Court held that allowing three consecutive presidential terms would constitute a replacement of the existing principle of the separation of powers by creating an unduly strong and unchecked president. The Court carefully described the procedures for selecting all of the various bodies charged with checking presidential power, including courts, ombudspersons, procurators, and comptrollers. It noted that many of these institutions had long terms in office or terms staggered from that of the president, in order to preserve institutional independence. Yet it emphasized that with twelve consecutive years in office, the president would be able to select essentially all of these officials (or the institutions charged with selecting them), in many cases more than once. The Court also explained that it was likely that a president with twelve consecutive years in office would be able to exercise a dominant influence on the composition of Congress, and—even after eight years in office—hold dominating advantages over any potential opponents. Thus, the electoral playing field would inevitably be very tilted, regardless of any legal guarantees given to opposition candidates.

These conclusions from domestic constitutional design and constitutional theory were again bolstered by comparative analysis. Based on regional experience from both inside and outside of Latin America, the Court concluded that the current Colombian design allowing two consecutive four-year terms was already at the 'outer limit' of common practice, and that going beyond that limit raised 'serious risks of perversion of the regime'. The Court emphasized that allowing presidents to serve more than eight years in office also seemed to be associated with executive dominance, in other words with the distorted form of government called *presidencialismo* rather than a merely presidential form of government, and with problematic democratic outcomes. The Court thus prevented Uribe's attempt to amend the constitution in order to run for a third term:

'since the presidential system adopted in the Constitution of 1991 works from the presidency, a second re-election would rupture and substitute the Constitution in all cases . . . a second presidential re-election substitutes structural axes of

the Political Constitution, and thus [the law] . . . violates the Constitution and must be declared unconstitutional.<sup>49</sup>

I want to suggest an explanatory reasoning for this decision, based upon the logic of qualitative quantity. If one analyses the case in a 'purely scientific', mathematician way, one can wonder why running for a second term is allowed—as a matter of constitutional change—but changing the constitution in order to run for a third term is tantamount to a constitutional replacement? To put it differently, if +4 (years of term) is a constitutional amendment and not a replacement, why is another amendment that brings about +4 (years of term) considered a constitutional replacement? Precisely because the constitutional change was examined in a cumulative manner (4+4+4). The aggregated result (12) was so severe in its effect on the constitutional order to declare the amendment seeking for a third term as a prohibited replacement, notwithstanding the fact that the amendment itself brought about only a minor change (4). Here, the quantity (3 terms x 4 years) turned into quality—fundamentally abandoning the principle of term limits and thus an unconstitutional constitutional replacement.

## B. Israel

In 2017, the Israeli Supreme Court delivered a dramatic decision in which, for the first time in its history, it issued a nullification notice to a temporary Basic Law (a law carrying a constitutional status) that changed the annual budget rule to a biennial one, for the fifth time in a row, by applying a doctrine of 'misuse of constituent power'.<sup>50</sup>

This historical background is important. According to the established constitutional principle, the government must ordinarily submit an annual budget for the approval of the Knesset. This is a central mechanism for the Knesset to supervise the government. The

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49 Colombian Constitutional Court, Decision C-141 of 2010; cited in Cepeda & Landau (n. 47), 359.

50 HCJ 8260/16 Academic Center of Law and Business v Knesset, (6 September 2017). This section is built upon Yaniv Roznai, 'Constitutional Paternalism: The Israeli Supreme Court as Guardian of the Knesset' (2018–2019) 51(4) *Verfassung und Recht in Übersee* 415.



importance of this constitutional rule is evident in light of the constitutional consequences of the budget proposal being rejected: dissolvency of the Knesset.

Notwithstanding his rule, in 2009, considering the global economic crisis, the Ministry of Finance proposed a biennial budget for the years 2009–2010. Accordingly, due to special circumstances, the government decided that the biennial budget would be enacted as a temporary amendment to Basic Law: The State Economy. The Minister of Finance made it clear that this was a one-time amendment, stemming from a true case of urgency. This meant that government expenditures for the two-year period would be determined in advance, with the entire budget voted and approved by the Knesset only once. After this one-time temporary amendment, the government amended the Basic Law again, in another temporary amendment, proposing that the new temporary amendment is meant to be an experimental legislation, a ‘pilot’ to examine whether the mechanism of a biennial budget should be permanent.

This amendment was challenged before the Supreme Court in *MK Roni Bar-On v The Knesset*,<sup>51</sup> but was rejected by a seven-judge panel. Writing the main opinion of the Court, the President of the Supreme Court at that time, Dorit Beinisch, held that the use of temporary ordinances to establish the biennial budget is problematic and there may be certain cases in which a temporary amendment to a basic law will be considered a misuse of the title ‘basic law’. However, at this time, the Supreme Court would not intervene, because the government was justified in temporarily experimenting with the unconventional biennial budget before deciding whether to adopt it as a permanent arrangement. While the Court reasoned that biennial budgets do not constitute a serious danger to democracy, it did harshly criticize the use of temporary Basic Laws, declaring that such instruments contradict the fundamental concept which states that constitutional provisions are enduring and detract from the status of the Basic Laws. Accordingly, temporary constitutional amendments,

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51 HCJ 4908/10 Bar-on, MK v Knesset, 64(3) PD 275 (2011).

President Beinish urged the legislature, should be used sparingly and in extreme circumstances.

This advice, as we shall see, was ignored. At the end of the experimental period, it became clear that the budget deficit had only increased. As a result, the Minister of Finance and the Chairman of the Finance Committee announced that there would be no further amendments to the Basic Law and that future budgets will be approved year by year, according to the established constitutional rule. Even so, biennial budgets were approved for 2013–2014 and 2015–2016, against professional opinions from within the Finance Ministry and the Knesset legal advisor's office.

In 2017, the government decided, for the fifth time, to approve a biennial budget by way of another temporary order, which was challenged before an expanded panel of seven judges of the Supreme Court in the case of *Ramat Gan Academic Center of Law and Business v. Knesset* delivered on 6 September 2017.<sup>52</sup>

Justice Elyakim Rubinstein, writing the majority opinion, opened the judgment with the following statement: '[T]he case before us raises two worrying trends within Israeli parliamentary democracy, which are intertwined: one, the decreasing importance of the Knesset as a body responsible for supervising the government actions. The second, the undermining of the basic laws status, constitutional texts . . .'<sup>53</sup> The Supreme Court reiterated the presuppositions that the Knesset is the Israeli legislature, according to Article 1 of Basic Law: The Knesset, and that the government, on the other hand, is 'The Executive Authority of the State', according to Article 1 of Basic Law: The Government. One of the Knesset's main supervisory roles of the government's activities is approving the state budget. Although the government shapes the budget, it is the Knesset that approves it. Without this approval, the Knesset will be dissolved, and new elections will be held.

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52 Academic Center of Law and Business (n. 50)

53 Ibid.

The state budget is largely based on taxes collected from the public, and from this stem the fundamental principle of democracy by which the parliament decides on taxing policy and expenditure priorities, which the government then implements. More than just technical issues, the state budget and its approval are essential and lie at the root of democracy. When the Knesset lost its ability to frequently monitor the budget—it has lost its power. Approving a biennial budget does just that, by denying the Knesset one of its most essential tools of government supervision.

Beside the decline in the status of the Knesset, the Supreme Court notes also a decline in the status of the Basic Laws. The increasing use of temporary orders to amend Basic Laws is an example of the intolerable triviality with which the legislature and the executive authorities consider the constitutional documents of the state. The use of temporary orders is prevalent in the Israeli landscape regarding ordinary laws and other legislation, yet the Court fails to understand how amendments with a wide impact on the constitutional framework of the country are done time after time, without public deliberation, through temporary orders amending Basic Laws. The result of these actions is a continuous decline in the status of the Basic Law. As the concept of temporary orders itself contradicts the basic principle of a constitutional democracy, the use of temporary orders in cases such as these should be done very cautiously.

In his ruling, Justice Rubinstein used the doctrine of misuse of constituent power. This doctrine, which was already discussed in the case of Bar-On, centres on whether the use of temporary orders to amend Basic Laws, is, in itself, a 'wrongful use of constituent power, in a way which withholds the validity of the Basic Law via Temporary Orders as a basic law'.<sup>54</sup> In the case of Bar-On, as mentioned, it was ruled that under certain and extreme circumstances, the use of a temporary order to amend Basic Laws could justify judicial intervention. Justice Rubinstein stated that the amendment of the Basic Law by temporary orders, time after time and under the current

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54 Bar-on, MK (n. 50), para. 17 of Justice Beinisch Judgment.

circumstances, constitutes a misuse: 'the repeated use of a temporary order to amend the Basic Law not only overrides the public debate, but also undermines the status of the Basic Laws in a way that justifies a judicial action.'<sup>55</sup>

As for judicial remedy, Justice Rubinstein adopts the Knesset's position and instead of striking down the amendment he declares a 'nullification notice'. The practical meaning was that the Court allowed the current amendment yet forbade another future amendment of the Basic Law by a temporary order. If in the future such a temporary amendment would be passed, it will be struck down. The reasons for choosing this relief are twofold: first, the Court has yet to invalidate Basic Laws and therefore would rather practice extreme caution when doing so; second, the state budget had been enacted long before this verdict. Striking the budget now would have far-reaching implications on the government and the economy.<sup>56</sup>

This judgment raises an important question; why in the first challenge, the Bar-On case, was the temporary amendment establishing a biennial budget allowed but in the second challenge, in the Academic Center of Law and Business case, it was declared as an unconstitutional constitutional change? Why was the second regarded as a prohibited abuse of constituent power, while the first was not such an abuse?

The first and obvious answer is that the circumstances that allowed a temporary biennial budget had changed. In the first case, it was based on an experiment. But that experimental period that heavily justified the previous temporary amendment ended and was no longer relevant. With these circumstances, it is hard to justify the existence of a temporary order that serves only a specific government at a specific point of time, without an external objective anchoring. It was only governmental convenience that led to the continuation of the

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55 Academic Center of Law and Business (n. 51), para. 33 of Justice Rubinstein's judgment.

56 *Ibid.*, para. 34.

temporary amendments and the removal of the constitutional rule imposing upon it a political burden.

But it is more than that, I wish to suggest. It was the accumulation of the temporary amendments that was conclusive. As Justice Hanan Melcer explained in his opinion, a one-time temporary change of the annual budget rule to a biennial one is an infringement of the constitutional rule without essentially modifying the basic rule (annual budget). However, the recurring use of the temporary amendment turned the 'infringement' of the constitutional rule into its 'modification'. In other words, the Court has taken an aggregated review, considering not only the 'qualitative' effect of the fifth amendment on its own but also the 'quantity'—all the previous amendments that, when considering all the amendments together, have led the country not to have an annual budget for a decade. This was explained by Justice Hanan Melcer in his support of the majority's decision in the biennial budget case: 'The quantity turned into quality'.<sup>57</sup>

## VI. Conclusion

In a recent article,<sup>58</sup> Tamar Hostovsky Brandes and I argue that the time has come to consider an aggregated form of judicial review of constitutional amendments in order to face populist constitutionalism and democratic erosion. Assume the following scenario; a state is undergoing a process of democratic erosion. In an attempt to capture the court, the executive enact distinct changes to the legal structure, undermining separation of powers and judicial independence. Each of these in itself is not a constitutional replacement. None of them fundamentally abandon the constitutional order's fundamental principles and replaces them with new ones. However, taken accumulatively, these changes bring about a constitutional replacement. Accordingly, one may ask themselves why the court

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<sup>57</sup> *Ibid.*, para. 7 of Justice Melcer's judgment.

<sup>58</sup> Yaniv Roznai & Tamar Hostovsky Brandes, (2020) 14(1) 'Democratic Erosion, Populist Constitutionalism, and the Unconstitutional Constitutional Amendments Doctrine', *Law & Ethics of Human Rights* 19.

should not take into its consideration all prior constitutional changes in addition to a single constitutional change it is currently reviewing.

An aggregated review may relax—even if not solve—the challenge posed by the incremental use of subtle constitutional amendments undermining basic constitutional principles. One method to be applied in such scenarios is to consider the quantitative changes to basic constitutional principles in order to examine the qualitative effect on them. In other words, although the currently reviewed amendment is in itself of a minor extent, taken together with its preceding amendments, it may be regarded as ‘the Straw that broke the Constitution’s back’.

As I have attempted to demonstrate in this chapter, in many areas ‘a gradual accumulation of quantity at some point results in a change in the quality of the situation’.<sup>59</sup> Another such area may be constitutional change. Surely it is difficult to tell when a constitutional change becomes a constitutional replacement just as it is difficult to draw a bright line to tell high from low. Hegel’s dialectical principle provided a philosophical foundation for the transition from quantity change to quality change. One scholar suggested that from Hegelian philosophy one can infer the following proposition: ‘constitutional courts must keep an open and reliable channel for the observation of “quantity change” because factual understanding via effective measurement . . . is required to judge whether the transition happens’.<sup>60</sup>

Such logic, I have tried to demonstrate in this chapter, was precisely what stood at the basis of two dramatic judicial decisions in Colombia and Israel, where courts reviewed constitutional amendments declaring them to be prohibited modifications and thus unconstitutional: in these two cases the quantity transformed into quality.

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59 Worster (n. 34), 13.

60 Wen-Yu Chia, ‘Utilizing External-Knowledge in Means-Ends Analysis: A Comparative Study on Taiwanese and U. S. Cases Regarding Interdisciplinary Approaches to Constitutional Reasoning’ (2018) 13(1) National Taiwan University Law Review 1, 23.