major constraint on the Court. For stability of the regime, constitutional amendment should be rare.

At the same time, she observes, the Israeli court lacks some of the constraints that apply to the U.S. Supreme Court, including the tradition of stare decisis, doctrines of avoidance of constitutional decisions, ease of controversy, limitations, inability to review failures to prosecute, the primarily appellate jurisdiction of the U.S. Supreme Court, and text and intent understood as constraints. Are the latter preferable to the relative ease of amendment of unincorporated Basic Laws? Could the answer vary in different polities?

4. HUNGARY AND SOUTH AFRICA ON THE DEATH PENALTY

The new constitutional courts of Hungary and of South Africa each broke ground by declaring their country’s respective death penalty laws unconstitutional as one of their earliest acts.

a. South Africa’s Mabuwayane Decision: The Constitutional Court of South Africa, created by the transitional constitutional provisions of 1993, unanimously held the death sentence to be unconstitutional under that constitution. Satsa v. Makwanyane, Case No. CCT/3/94, 1995 (3) S.A. 391, 1185 (4) BCLR 685 (CC) (June 6 1995). According to the Court’s decision, the death penalty was debated in discussions of the interim constitution, which was the product of the Multi-Party Negotiating Process, whose final draft was adopted by Parliament. The failure to address the death penalty specifically in any consideration of the interim constitution was “not accidental,” and reflected a “Solomonic decision” that the constitutional court decide whether the death penalty was consistent with the basic rights of the Constitution.

Section 11(2) of that interim constitution prohibited “cruel, inhuman, or degrading treatment or punishment,” while section 9 provided that “everyone shall have the right to life,” and section 10 that “everyone shall have the right to respect for and protection of his or her dignity.” Section 33(1) provided, (in terms similar to those of Section 1 of the Canadian Charter), that “any limitation on rights must be justifiable in an open society in terms of one or more of the following: equality[,] must be both reasonable and necessary[,] and must not negate the essential content of the right.”

The Court’s opinion extensively analyzed court decisions, constitutional provisions, and treaties of nations around the world, including India, Germany, the United States, and other countries of Europe and Africa (referring, inter alia, to Sorrentino). It addressed the relevance of public opinion, which the court assumed would hold capital punishment for murder in South Africa; but, the Court said, public opinion “is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favor.” Finding that the death penalty infringes on fundamental rights, it evaluated the necessity and reasonableness of the limitation (relying, inter alia, on Canada’s Gheske test).

Turning to justifications for the death penalty for murder, the Court found the evidence did not support the conclusion that the death penalty deterring murder more than life imprisonment did. The Court also noted evidence that the death penalty was imposed arbitrarily. With respect to retribution, the Court wrote that while “punishment must be some extent commensurate with the offence … there is no requirement that it be equivalent or identical to it … The state does not need to engage in the cold and calculated killing of murderers in order to express moral outrage at their conduct.” It found an impairment of the essential content of the right.

The rights to life and dignity are the most important of all human rights. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. This is not achieved by objectifying murderers and putting them to death to serve as an example to others. Retribution cannot be accorded the same weight under our Constitution as the rights to life and dignity.

In the ongoing process of drafting an entrenched constitution for the new South Africa, despite public opposition to the death penalty decision, the drafters did not overrule the Court’s decision, possibly because of the experiences of oppressive justice that many in the liberation movement had suffered under apartheid. Lecture by Justice Albie Sachs, Georgetown University Law Center (Oct. 1996); Final Constitution of South Africa (1996).

b. Hungary’s Death Penalty Decision: In its first ever decision, the Hungarian Constitutional Court struck down that country’s death penalty law by a 9-1 vote. On Capital Punishment, Decision 23/1990: 31 October 1990 (Hungarian Constitutional Court), in CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT (László Solyom & Georg Brunner, eds., 2000). The Court acted, not on review of a criminal conviction and sentence to death as in South Africa, but on a complaint filed by a Hungarian law professor on behalf of the League Against Capital Punishment. The Court appointed three experts to give their opinions on the question, and all three spoke against capital punishment. The Minister of Justice likewise took the position that capital punishment was unconstitutional, suggesting “that the abolition of capital punishment was in harmony with European legal development.” Id. at 120. After hearing the experts in the morning, the Court returned in the afternoon and declared the death penalty invalid. The lone dissent argued that the decision to abolish the death penalty was one for the Parliament, and not the Constitutional Court. See also George P. Fletcher, Searching for the Rule of Law in the Wake of Communism, 1992 Brigham Young U. L. Rev. 145; Ethan Klingberg, Judicial Review and Hungary’s Transition from Comm, to Democracy, 1992 Brigham Young U. L. Rev. 41, 79–80.

As in South Africa, there was no text specifically addressing the death penalty in the amended Hungarian Constitution. Article 54(1) at the time provided that in Hungary, “every human being has the inherent right to life and to human dignity of which no one can be arbitrarily deprived,” while Article 54(2) provided that “no one shall be subjected to torture, to cruel, inhuman or degrading treatment or
punishment." The Court's opinion relied not only on Article 54(1) but also on Article 8's recognition of the "invisible and inalienable fundamental rights of man" and provisions that "rules pertaining to fundamental rights... shall be determined by statute which, however, may not limit the essential content of any fundamental right." It concluded that the death penalty "imposes upon the essential content of the fundamental right to life and human dignity," and was thus unconstitutional. Some of the Court's discussion focused on the "true" or "false" deterrent effects of the death penalty. One judge (Szlőke) addressed the question of retribution, but argued that long terms of imprisonment would be sufficient to meet retributive interests.

Chief Justice Sólyom, in another concurrence, took the position that the right to life and to human dignity in Article 54, unaided by the provisions of Article 8, were so "sized in" as to preclude state imposition of the death penalty. [The right to human dignity will fulfill its function only if it is interpreted in unity with the individual person's right to life... Human dignity is a quality of human life which naturally accompanies it... Due to its indivisibility, the right to life and human dignity is theoretically unlimitable and constitutes a theoretical boundary... Capital punishment is arbitrary not because it limits the essential content of the right to life but because the right to life and dignity—due to their characteristics—is from the outset unlimitable."

As noted in Chapter II, many believe that the decision was motivated in part to aid Hungary's efforts to be accepted into the Council of Europe, which reportedly had demanded that Hungary (1) establish an independent judiciary, (2) respect the freedom of the press, (3) reduce pretrial detention time prior to appearance before a magistrate, and (4) abolish capital punishment.

Can one see these as potential "foundational" cases for Hungary's and South Africa's constitutional courts? Is the death penalty so touched with international concern (both in terms of potential violations of law and in terms of the expressed interests of other nations) that these court decisions should be regarded in some sense as compelled? Can they be regarded as "antigovernment," in the sense used by Shamir?

NOTE ON CONSTITUTIONAL REVIEW AND PUBLIC LAW, DOMESTIC AND INTERNATIONAL

Judicial review of governmental acts may be a central feature of constitutionalism. It is thus important in understanding systems of judicial review to keep in mind the role of nonconstitutional forms of judicially enforced public law. Consider the following argument that the conditions of decentralized judicial review in the United States lead to an under-

1 For more recent developments in Hungary, see Chapter IV supra.

appreciation of the importance of judicial enforcement of rights under sources of law not strictly constitutional.

Martin Shapiro & Alec Stone Sweet, ON LAW, POLITICS AND JUDICIALISATION (2002)

... [Moving to Europe] we are concerned with constitutional law and with the constitutional law in Europe. American constitutional law scholars have... to reject... constitutional law... constitutional law... constitutional law... constitutional law. As a result, those wearing constitutional law blindness are likely to focus exclusively on constitutional law when they move from American rights to European rights. To do so would miss the boat... Some of the most significant rights developments in Europe lie not just in constitutional law but in the realm between constitutional law and statutes, that is, in higher laws that are not itself constitutional law...

European Convention rights... typically... enter into the national legal order by virtue of national statutes... that, in effect, "domesticize" the Convention by incorporating it into national law. Rights domesticated by statute occupy a statutory, not a constitutional, rung in the hierarchy of legal norms.

Constitutional blinding also distort any attempt to deal with the new constitutional law in the United Kingdom. Until recently, the closest thing to constitutional individual rights in a country without a written constitution were some old statutes... and certain judge-made restraints on administration action. The vehicle for these restraints, however, has been the administrative law doctrines of ultra vires and natural justice. Of course, if American scholars actually did public law, which includes administrative law, this would not have mattered so much. But most of them do only constitutional law and so are quite unprepared to deal with English administrative law... Even before the new [1988 Human Rights Act]... UK courts had adopted the position that they could not imagine that Parliament would enact statutes that violated the European Convention, which the UK had signed. It followed that it was the duty of judges to interpret statutes in such a way as to bring them into accord with the Convention... [This

1 [Editors' Note: As the authors note, in "a few 'eminent' states," the European Convention enters through nonconstitutional provisions. A 'nonic' state is one that as a matter of domestic constitutional law fully incorporates international commitments without the necessity of additional internal legislation, as is required in "ducal" states.]