

## INTERNAL AND EXTERNAL LIMITS OF CONSTITUTIONAL AMENDMENT SOVEREIGNTY

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### Why limit the constitutional amendment power?

Since John Locke's idea that a Constitution should be "the sacred and unalterable form and rule of government [...] forever" did not find any serious followers in the modern world, Constitutions usually do contain rules about constitutional amendments. But there are no general patterns as to the application of amendments. Some countries are more inclined to modify the text of their Constitutions. For instance, the German Basic Law of 1949 was modified on more than 50 occasions, the 1958 Constitution of the Fifth French Republic on 25 occasions, the 1937 Constitution of Ireland on 29 occasions and the 1978 Constitution of Spain only twice.<sup>1</sup> Other countries have separate 'constitutional laws' that also enjoy super legislative authority. In Austria, since 1945, there have been more than 800 modifications to the 1920 Constitution, mostly in the form of a constitutional law or as special constitutional provisions inserted into ordinary laws, while in Italy, besides 14 amendments introduced into the text of the 1947 Constitution, 20 separate 'constitutional laws' have been adopted.<sup>2</sup> In other countries, formal constitutional amendments remain exceptional. In the United States, the Constitution has been

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<sup>1</sup> See L. Garlicki & Z.A. Garlicka, 'Review of Constitutionality of Unconstitutional Amendments (An Imperfect Response to Imperfection?)', *Anayasa Hukuku Degrisi: Journal of Constitutional Law*, Vol. 1, 2012, p. 185.

<sup>2</sup> *Id.*

changed only 27 times on the federal level since 1787, and the last changes were adopted in 1964, 1967, 1971 and 1992. This does not mean that the meaning of the federal Constitution has not been changed by way of interpretation. The state rate of amendment is almost 10 times the federal rate.<sup>3</sup>

The authority to amend the Constitution does not include the authority to enact a new one. To limit the amendments to the Constitution safeguards the sovereignty of the people, especially in cases where the Constitution is easily amended. One of the crucial questions concerning the limits of Constitution-making sovereignty is whether there are any limits to constitutional change. In other words, are there certain principles, institutions, rights and liberties or, as John Rawls calls them, ‘constitutional essentials,’ that must be and remain part of the Constitution, and may not be removed by means of the amending power.<sup>4</sup> In discussing Article V of the U.S. Constitution<sup>5</sup> and the role of the Supreme Court, Rawls argues that there are limits to what can be a valid constitutional amendment.<sup>6</sup> Rawls cites with approval<sup>7</sup> the work of Stephen Macedo, who argues that parts of the Constitution are more fundamental than other provisions, and an amendment that repealed fundamental constitutional freedoms would be “unintelligible and revolting from the perspective of the Constitution as a whole”.<sup>8</sup> Therefore, according to Macedo,

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<sup>3</sup> *Id.*

<sup>4</sup> See this question posed concerning Rawls’s idea of ‘constitutional essentials’ by C.A. Kelbey, ‘Are There Limits to Constitutional Change? Rawls on Comprehensive Doctrines, Unconstitutional Amendments, and the Basis of Equality’, *Fordham Law Review*, Vol. 72, 2004, pp. 1487-1536.

<sup>5</sup> Article V originally forbade the abolition of the African slave trade until 1808, and without time limits, prohibits the deprivation of a state of equal representation in the Senate without its content. The idea of explicitly limiting the amendment power also appeared in the state Constitutions between 1776 and 1783. For instance, the Delaware Constitution (1776) prohibited amendments to the Declaration of Rights, the articles establishing the state’s name, the bicameral legislature, the legislature’s power over its own officers and members, the ban on slave importation, and the establishment of any one religious sect.

<sup>6</sup> See J. Rawls, *Political Liberalism*, 2nd edn, Columbia University Press, New York, 1996, p. 231.

<sup>7</sup> *Id.*, p. 238.

<sup>8</sup> S. Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism*, Clarendon Press, Oxford, 1990, p. 183, n. 116.

the first freedoms of speech and the press, the requirement of warrants for police searches, the right to confront witnesses, and to a trial by jury, even the elaborate procedures required to amend the Constitution, all these provisions and more represent basic structural commitments to institutionalizing a process of free and reasonable self-government.<sup>9</sup>

**Thus, he concludes that**

an amendment which sought to expunge that basic commitment and to wipe out basic political and personal freedoms intrinsic to reasonable self-government suggest a desire to revolutionize rather than correct and amend [...] and so it would properly be held by the Supreme Court to be a nullity.<sup>10</sup>

Also, Walter F. Murphy has argued for a position that is similar to Rawls's and Macedo's, on textual, semantic and normative bases. His textual argument is based, for instance, on the wording of the First Amendment, which prohibits its own repeal by an Act of Congress:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.<sup>11</sup>

The semantic meaning of the word 'amend' means correcting or improving, not deconstructing, reconstructing, or replacing and abandoning the fundamental

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See Murphy, 1995, p. 179.

principles of the Constitution. Murphy also notes that normative constraints impose prohibition on the amending power:

Any change that would transform the polity into a political system that was totalitarian, or even so authoritarian as not to allow a wide space for human freedom, would be illegitimate, no matter how pure the procedures and widespread the public support.<sup>12</sup>

Murphy uses the hypothetical case – which very much reminds me of the constitutional counter-revolution in Hungary from 2010 onwards – that the people decide to abolish constitutional democracy in return for a charismatic leader’s promise of prosperity in a time of severe economic downturn. Although the people can agree to such a transformation, Murphy asks:

May a people who accepted constitutional democracy democratically or constitutionally authorize such a political transmutation? May the new system validly claim to draw its authority from the consent of the governed?<sup>13</sup>

Murphy thinks not.

But there are also scholars opposing this position. Richard Albert goes as far as claiming that some democratic constitutions undermine participatory democracy as the promise of constitutionalism by enshrining ‘counterconstitutional’ unamendability constitutional clauses:

Unamendability clauses are objectionable as a matter of theory because they chill constitutional discourse and prevent reconsideration of the constitutional

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*, p. 175.

text, the very document that is the embodiment of a people's nationhood and their vision for themselves and their state... unamendability clauses are supraconstitutional because only they limit the universe of constitutional possibilities that are open to the people.<sup>14</sup>

Jed Rubinfeld also argues – very much in line with Hungarian Prime Minister Viktor Orbán – that “constitutionalism always permits the possibility of legitimate rupture, of a revolutionary process of popular rewriting that takes place, in part or in whole, outside every existing political institution”.<sup>15</sup> Also, Christopher L. Eisgruber shares this opinion referring to Article V of the U.S. Constitution that

a constitutional procedure that enables people to entrench good rules and institutions will also enable them to entrench bad rules and institutions. A people must have the freedom to make controversial political choices, and that freedom will necessarily entail the freedom to choose badly.<sup>16</sup>

Similarly, Walter Dellinger claims that “the formal amendment process set forth in Article V represents a domestication of the right to revolution”.<sup>17</sup> On the basis of this procedural argument, Dellinger also rejects the Supreme Court’s power to exercise judicial review of the substance of constitutional amendments: “Judicial review of the

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<sup>14</sup> R. Albert, ‘Counterconstitutionalism’, *Dalhousie L. J.*, Vol. 31. 2008, p. 47-48.

<sup>15</sup> J. Rubensfeld, *Freedom and Time: A Theory of Constitutional Self-Government*, Yale University Press, New Haven, CT, 2001, p. 174.

<sup>16</sup> C.L. Eisgruber, *Constitutional Self-Government*, Harvard University Press, Cambridge, MA, 2001, p. 120.

<sup>17</sup> W. Dellinger, ‘The Legitimacy of Constitutional Change: Rethinking the Amendment Process’, *Harvard Law Review*, Vol. 97, 1983, p. 431.

merits of proposed amendments is illegitimate for the simple reason that the Constitution places virtually no limits on the content of amendments.”<sup>18</sup>

Opposing this view on possible judicial review, Rawls, also considering a hypothetical amendment, questions

whether an amendment to repeal the First Amendment, say, and to make a particular religion the state religion with all the consequences of that, or to repeal the Fourteenth Amendment with its equal protection of laws, must be accepted by the Court as a valid amendment.<sup>19</sup>

For Rawls, the First Amendment is

entrenched in the sense of being validated by long historical practice. They may be amended but not simply repealed and reversed [...] The successful practice of its ideas and principles over two centuries place restrictions on what can now count as an amendment, whether was true at the beginning.<sup>20</sup>

## **Judicial Review of Constitutional Amendments**

The underlying serious constitutional law problem behind the problem of the constitutionality and judicial review of constitutional amendments is in how far the

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<sup>18</sup> W. Dellinger, ‘Constitutional Politics: A Rejoinder’, *Harvard Law Review*, Vol. 97, 1983, pp. 447-448.

<sup>19</sup> See Rawls, 1996, p. 238. Rawls here refers to Bruce Ackerman, who suggests that the Supreme Court must look upon the amendment under discussion as valid. B. Ackerman, *We the People: Foundations*, The Belknap Press of Harvard University Press, Cambridge, MA, 1992, pp. 319-322.

<sup>20</sup> *Id.*, pp. 238-339.

power amending the Constitution may be regarded as sovereign in terms of changing the provisions of the Constitution, maybe even its entire structure.

What amounts to the grossest interference with the sovereignty of the power to amend the Constitution are those provisions that qualify themselves as immutable. This implies – either expressed explicitly or assumed implicitly, but logically, as in Germany – that constitutional amendments themselves are subject to the Constitutional Court’s review to determine whether they are in breach of ‘eternal clauses.’ As the example of India and many other states shows, the review of constitutional amendments by the Constitutional Court is conceivable without the presence of immutable provisions in the Constitution, and even without the explicit authorization of the courts by the Constitution.<sup>21</sup>

In Switzerland, on the other hand, explicit limits to the amendment power are present in the Constitution without judicial review. According to Articles 193(4), 194(2) of the 1999 Constitution, when there is a partial or even total revision of the Constitution, “The mandatory provisions of international law must not be violated.”<sup>22</sup> In 1996, both chambers of the Federal Assembly (Bundesversammlung) declared a People’s Initiative (Volksinitiative) to amend the Constitution to be invalid for violating the internationally recognized peremptory prohibition of *refoulement*. According to the Volksinitiative, for the revision of the Constitution by more than 100,000 people eligible to vote, asylum seekers who enter the country unlawfully

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<sup>21</sup> As Aharon Barak observes, the silence of the Constitutions of Germany, Austria and Turkey (until 1971) regarding the court’s authority to examine constitutionality of an amendment to the Constitution did not lead the Constitutional Courts of those countries to conclude that they do not have such authority. See A. Barak, ‘Unconstitutional Constitutional Amendments’, in H.G. Schemers & D.F. Waelbroeck (Eds.), *Judicial Protection in the European Union*, 6th edn, Kluwer, The Hague, 2001, p. 736.

<sup>22</sup> As opposed to amendments, total or partial revisions are reserved for a change that affects the most important constitutional structures or arrangements and cannot be adopted without following very demanding procedural requirements. See G. Biaggini, ‘Switzerland’, in D. Oliver & C. Fusaro (Eds.), *How Constitutions Change – A Comparative Study*, Hart Publishing, Oxford, 2011, pp. 316-317.

would be deported immediately and without the option of appeal. In response to the initiative, the Federal Council issued a recommendation noting the peremptory (or *ius cogens*) character of the non-refoulement principle, and proposed that the Federal Assembly invalidate the Volksinitiative, which it did on 14 March 1996; consequently, the Volksinitiative did not form the subject of a referendum to amend the Constitution.<sup>23</sup>

The high degree of rigidity in constitutional arrangements, as well as the constitutional review of constitutional amendments, is not only a reflection of distrust towards future framers of new Constitutions or those who might wish to amend the existing documents, but in the view of some, it is an outright interference with the sovereignty of future generations. Louis Michael Seidman goes even further in his recent book in which he argues that the American people, notwithstanding the Constitution's preamble, did not consent to be bound by the document, to which only a small minority of the population at the time of the framing could vote, and of course none of them are still around. The fact, Seidman says, that the framers chose to assert authority over the generations hundreds of years later hardly justifies their following the old dictates.<sup>24</sup> One can argue that because the U.S. Constitution may be amended, and the future generations have generally not or have only very rarely done so, they have consented to be bound by it. But as Seidman points out, the American Constitution is the most difficult to amend in the world: even if a solid majority of the American public and their representatives in Congress agree that the Constitution should be changed, the amendment will often be unsuccessful, since it requires an

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<sup>23</sup> With regard to the initiative to ban the construction of minarets, however, the Federal authorities did not find any violation of peremptory norms, claiming that the freedom to exercise one's religion and the prohibition on discrimination does not form part of *ius cogens*. Botschaft zur Volksinitiative, 'Gegen den Bau von Minaretten', Bundesblatt, 2008, pp. 7603, 7609-7612.

<sup>24</sup> L.M. Seidman, *On Constitutional Disobedience*, Oxford University Press, Oxford, 2013.

affirmative vote of two-thirds of both houses of Congress and approval of three-quarters of the states. In any event, the argument for constitutional obligation based on the amendment clause is circular, because it begs the question of why we should be bound by the amendment clause in the first place; therefore, this argument does not legitimate to disobey the Constitution,<sup>25</sup> and the real question is whether future generations should be totally free to amend it.

According to the critics, judicial review of constitutional amendments also exacerbates tensions between the legislature and Constitutional Courts by depriving parliaments of the possibility to interpret ‘eternal clauses’ and placing the latter responsibility exclusively in the hands of the courts.<sup>26</sup>

Of course, future generations generally deserve the lack of trust – evinced by these eternal clauses – which the foregoing generations, or more specifically the framers of their Constitutions, had in them. For if we peruse the list of those countries – from Germany through Turkey, India, Brazil and the Republic of South Africa all the way to the former Soviet republics such as Azerbaijan, Kyrgyzstan, Moldova and the Ukraine – where such solutions have been employed, we will usually find former despotic or colonial regimes. In these cases, the constitutional provisions set in stone serve to prevent a restoration of dictatorship.<sup>27</sup> Similarly, to prevent the restoration of a former dictatorship, there is an argument that Constitutional Courts defending

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<sup>25</sup> See D. Cole, ‘Should We Discard the Constitution?’, *New York Review of Books*, 10 July 2013.

<sup>26</sup> See M.F. Mohallem, ‘Immutable Clauses and Judicial Review in India, Brazil and South Africa. Expanding Constitutional Courts’ Authority’, *The International Journal of Human Rights*, Vol. 15, No. 5, 2011, pp. 765-766.

<sup>27</sup> It is undeniable that this instrument was not always capable of preventing the return of dictatorships. See for example the case of Uganda, in spite of the decision reviewing the 2004 constitutional amendment: *Semogerere et al. v. Attorney General*, Constitutional Appeal No. 1 of 2002 (2004). Cited by G.J. Jacobsohn, *Constitutional Identity*, Harvard University Press, Cambridge, 2010, p. 37, n. 6.

Constitutions should be given the right to review the constitutionality of constitutional amendments.<sup>28</sup>

The post-independence Constitution of Zimbabwe represents a unique eternity approach, which is a mixture of substantial and procedural rules. According to the 1979 Lancaster House Agreement that ended the war and led to the democratic elections in 1980, the text of the Constitution provided that there could be no amendment to specific clause for the first ten years of independence. Together with the guarantee of a specific number of white seats in the new Parliament was the inclusion of the clause that protected existing property rights and specified that land could only be obtained by the new government for purposes of land reform on the basis of the ‘willing seller, willing buyer’ principle. The reason for the ten years’ limit was that the new 1980 Constitution continued the tradition of parliamentary sovereignty that Zimbabwe had inherited from Britain.<sup>29</sup>

Also, the Brazilian Constitution of 1988 is very mistrustful of the legislature. For one, its Article 60 formulates very strict requirements *vis-à-vis* the adoption of constitutional amendments (a three-fifth majority and two rounds of deliberations in both chambers of the National Congress, the House of Representatives and the Senate), and at the same time it imposes rigid limitations on the substance of amendments, too. Pursuant to the latter, proposed constitutional amendments may not:

(a) seek to alter the federal nature of the state; (b) universal, direct and confidential

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<sup>28</sup> See this argument in R. Dixon, ‘Transnational Constitutionalism and Unconstitutional Constitutional Amendments’, *Chicago Public Law and Legal Theory Working Paper*, No. 349, 2011.

<sup>29</sup> In 1990, the Zimbabwean legislature moved very quickly to remove the ‘willing buyer, willing seller’ limitations in the Constitution, and when the ruling ZANU (PF) party and its President Robert Mugabe began to face a serious electoral challenge in the late 1990s the slow pace of land redistribution became a focus of government rhetoric, and Zimbabwe adopted even more aggressive policies of land acquisition, which, after 2000, led to a wave of farm invasions and a subsequent collapse of the economy. See H. Klug, *In the Shadow of Zimbabwe: Land Property and Constitutional Amendment in Southern Africa* (2013), paper for the panel ‘Amending and Revising Constitutions: New Theory and Practice in Comparative Perspective’ at the Law and Society Annual Meeting, Boston, 31 May, pp. 3-4.

suffrage; (c) the assertion of the principle of separation of powers; and (d) the individual rights and safeguards regulated by Article 78, which the jurisprudence of the Federal Supreme Court subsequently extended to all fundamental rights.<sup>30</sup> The third limitation on the power to amend the Constitution is the extraordinarily expansive judicial review designed in the course of the 2004 constitutional reform, which amalgamates elements of the Continental European and the American systems. Even though the Brazilian Constitution – similarly the German Grundgesetz – does not expressly provide for the authority to review constitutional amendments, such a practice is widely accepted by the Brazilian Supreme Court. Despite these strong requirements, the Constitution has been amended 71 times from 1988 to the present. In 1926, the Court held that all constitutional amendments are subject to judicial review by the Supreme Court of Brazil.

In Columbia, the Constitution of 1991 can be amended in three forms: by Congress' legislation, by a constituent assembly or by a referendum, approved by Congress.

Article 241(1) of the Constitution empowers the Constitutional Court to review constitutional amendments 'exclusively for errors of procedure' and not substance.

The newly established Constitutional Court began gradually extending its protection to the constitutional order even without an eternal clause in the constitution that would expressly authorize the judicial body to review constitutional amendments.

By the end of 2012, 37 reforms had been approved by Congress and one by referendum. These amendments adopted by Congress can even be challenged by an

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<sup>30</sup> To reinforce the principles of the 1988 Constitution, the framers of the Constitution themselves put into the document the possibility of a referendum and a potential revision within five years of its adoption. The referendum did indeed take place in 1993, when 66% of the voters opted for the republican form of government, while 10% would have preferred a monarchy. A presidential system was favoured by 55% against the 25% who wished to adopt a parliamentary system. A comprehensive constitutional revision did not take place, however. See K.S. Rosenn, 'Conflict Resolution and Constitutionalism. The Making of the Brazilian Constitution of 1988', in L.E. Miller (Ed.), *Framing the State in Times of Transition. Case Studies in Constitution Making*, United States Institute of Peace Press, Washington, DC, 2010, p. 453.

individual citizen through an *actio popularis*, as ordinary statutes have been challenged in Colombia since 1910. The so-called action of unconstitutionality may only be filed within a year following the enactment of a constitutional amendment. This legalization of politics began as the Court proceeded to subject the government's decisions regarding the proclamation of a state of emergency to strict constitutional review.<sup>31</sup> As a result, the country spent less than 20% of the period between 1991 and 2003 in a state of emergency, in marked contrast to the period between 1949 and 1991, when this status prevailed 80% of the time. In the former 13-year period, the Constitutional Court affirmed the government's decision regarding a state of emergency five times, on three occasions in its entirety, while it rejected these decisions in four instances.<sup>32</sup> In its efforts to guard the values of the constitutional order, the Constitutional Court first gave a wide definition of the concept of 'procedural error' in the constitutional amendment procedures.

In 2003, the Court noted that the amendment power does not extend to the replacement of the Constitution with a different one. Procedure and substance are thus related because when the amending power 'substitutes' the Constitution it acts in *ultra vires*. The Court recognizes this as 'substitution theory'.<sup>33</sup> The Constitutional Court is also competent to decide *ex officio* on the constitutionality of a call for a referendum to amend the Constitution, exclusively for 'errors of procedure'. This doctrine, entailing a review of competence of the amending organ, was introduced in the previously mentioned 2003 decision when the Court examined the

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<sup>31</sup> Cf. D.T. Fox, G. Gallón-Giraldo & A. Stetson, 'Lessons of the Colombian Constitutional Reform of 1991. Toward the Securing of Peace and Reconciliation?', in L.E. Miller (Ed.), *Framing the State in Times of Transition. Case Studies in Constitution Making*, United States Institute of Peace Press, Washington, DC, 2010, p. 483.

<sup>32</sup> See R.U. Yepes, 'Judicialization of Politics in Colombia: Cases, Merits and Risks', *International Journal of Human Rights*, Vol. 4, No. 6, 2007, pp. 51-52.

<sup>33</sup> See Decision 551/03, 8 July 2003. The Constitutional Court repeated this concept in its opinion C-1040/05 regarding presidential re-election.

constitutionality of a call for a referendum to amend several articles of the Constitution.

During the last ten years, almost all constitutional amendments have been challenged on grounds of substitution of the Constitution. The most controversial decision was rendered in the so-called First Re-election Case. In 2005, the Court held that an amendment that allowed for presidential re-election was not a substitution of an essential element of the basic identity of the Constitution. Since 1991, presidential re-election has been forbidden. The Court concluded that allowing a president to be re-elected for one additional four-year term increased presidential power, but did not destroy the principle of separation of powers or the system of checks and balances. The amendment did not replace the principles with opposing ones.

The Court struck down four amendments for excess of competence. First, in this same case, the Court found unconstitutional a norm that gave to the Council of State (the highest court for administrative law cases) the power to adopt the rules concerning the rights and duties of candidates if the president decided to run for re-election. Second, in 2009 the Court declared unconstitutional a legislative act that sought to enrol civil servants in administrative careers who had previously not competed for them.

Third, in 2010 the Constitutional Court went so far in a 26 February decision as to nullify the law that would have called for a referendum on the constitutional amendment allowing the President of the Republic to run for a third term of office. According to the judges of the Constitutional Court, this reform would have violated a basic principle of democracy, which would have affected the constitutional order in its entirety.<sup>34</sup> Fourth, in 2012 the Constitutional Court declared unconstitutional an

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<sup>34</sup> See A.R. Brewer-Carias, *Presentation of the General Report on Constitutional Courts As Positive Legislators in Comparative Perspective*, XVIII International Congress of Comparative Law of the

amendment that provided that rules on conflict of interest would not apply to members of Congress participating in the deliberation and voting on constitutional amendments.

In Peru, the Supreme Court – also lacking an express constitutional mandate – laid down the foundations of its authority to review constitutional amendments during a review of the pensions reform of 2005, even though it did not hold that a violation of the Constitution had taken place in that particular case.<sup>35</sup> In another decision in 2005, the Court emphasized what it regarded as the material limits of a reform, namely the fundamental principles that give identity to the Constitution. These are the principles of human dignity, the republican form of government, the democratic rule of law, the people's sovereign power and any other fundamental matter the Constitution recognizes.<sup>36</sup>

In the Ukraine, a request for a preliminary opinion by the Constitutional Court is one of the procedural elements that are necessary for a valid constitutional amendment. This is why in its decision dated 30 September 2010, the Constitutional Court nullified constitutional amendment No. 2222-IV, which Parliament had adopted in 2004. Although the judges of the Constitutional Court had been asked for their opinion on the first draft, changes were subsequently made to the draft that Parliament failed to return for preliminary judicial review.<sup>37</sup>

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International Academy of Comparative Law at the George Washington University Law School, Washington, 27 July 2010, p. 5.

<sup>35</sup> Opinion No. 0050-2004-AI/TC, No. 004-2005-PI/TC, No. 007-2005-PI/TC, No. 009-2005-PI/TC. Cited in G.J. Jacobsohn, 'An Unconstitutional Constitution? A Comparative Perspective', *International Journal of Constitutional Law*, Vol. 4, No. 3, 2006, p. 37, n. 7.

<sup>36</sup> Opinion No. 0024-2005-PI/TC, at para. 12 (2 November 2005).

<sup>37</sup> 20-rp/2010. For details see A. Nussberger, 'Neujustierung der Rolle zentraler Verfassungsorgane im politischen Prozess. Zur Aktuellen Verfassungsentwicklung in der Ukraine, Kirgistan und Russland', in H. Küpper (Ed.), *Von Kontinuität und Brüchen: Ostrecht im Wandel der Zeiten. Festschrift für Friedrich Christian Schroeder zum 75. Geburtstag*, Frankfurt am Main, Peter Lang, 2011, p. 323.

In Kyrgyzstan, citing formal grounds, the Constitutional Court first nullified two constitutional amendments – adopted on 9 November 2006 and 30 November 2006, respectively – in its 14 September 2007 decision, but did so without being authorized by the then effective constitution to do so.<sup>38</sup> Since the Constitutional Court had been compromised in the Akayev-era it was suspended in April 2010, after in the early phase of democratic transition, immediately prior to the adoption of the first constitution based on the rule of law. Indeed, even the Constitution affirmed in a popular referendum on 27 June only re-established the court as a division of the Supreme Court, still allowing for the possibility of removing judges with the votes of two-thirds of Parliament.<sup>39</sup> It was only later, with the 2011 constitutional amendment on the Constitutional Law Panel of the Supreme Court, that the judicial body was endowed with the authority to offer its opinions in the context of a preliminary review of constitutional amendments.<sup>40</sup>

Initially the immutable features of constitutions mostly tended to be the republican form of government and the federal arrangement of the state, but later they came to encompass the protection of fundamental rights, as – in addition to the above-mentioned Brazilian example – the cases of Greece (1975), Portugal (1976), Namibia (1990) and the Czech Republic (1993) also illustrate. It can even be said that at the time when their respective constitutions were solidified, these countries were, to say the least, in a tough spot in terms of their social and economic situations, which made

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<sup>38</sup> See Nussberger, 2011, p. 324.

<sup>39</sup> For the Venice Commission's opinion on the new Constitution see *Opinion on the draft Constitution of the Kyrgyz Republic* (version published on 21 May 2010), adopted by the Venice Commission at its 83rd Plenary Session, Venice, 4 June 2010, <[www.venice.coe.int/docs/2010/CDL-AD\(2010\)015-e.pdf](http://www.venice.coe.int/docs/2010/CDL-AD(2010)015-e.pdf)>.

<sup>40</sup> The constitutional act was adopted on 12 May 2011. For the opinion of the Council of Europe's Venice Commission on the law, see *Opinion on the draft constitutional law on the Constitutional Chamber of the Supreme Court of Kyrgyzstan*, adopted by the Venice Commission at its 87th Plenary Session, Venice, 17-18, June 2011, <[www.venice.coe.int/docs/2011/CDL-AD\(2011\)018-e.pdf](http://www.venice.coe.int/docs/2011/CDL-AD(2011)018-e.pdf)>.

guaranteeing these fundamental rights difficult. This contributed to the efforts to seek safeguards to help avoid temptation.<sup>41</sup>

Pursuant to Article 9 of the Czech Republic's Constitution of 1993, the Constitution may only be amended through the adoption of constitutional laws. According to Paragraph (2) of the very same provision, no kind of amendment may prejudice the substantive requirements of the democratic rule of law. The Constitutional Court's interpretation of this provision suggests that the underlying reasons for this limitation are to be found in the tragic experiences of the 20th century, especially in the context of Weimar Germany, which led to the usurpation of power by the Nazis and the totalitarian communist regimes. On the basis of the aforementioned Article 9, as well as Article 35 (4), which lays down the procedural rules for adopting constitutional laws, the Constitutional Court's jurisprudence examines the constitutionality of constitutional laws from three angles: the constitutionality of the procedure used for their adoption, whether those passing the constitutional amendment had the legitimate authority to do so, and, with regard to substance, whether the provisions satisfy the requirements of democratic rule of law. It was based on the latter two that in its 10 September 2009 decision the Court nullified constitutional law 195/2009 that, in the interest of quickly resolving the Czech crisis of government, would have cut short the term of the House of Representatives. The judges of the Court saw this act as a singular measure that may not be used to amend the Constitution and, moreover, they

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<sup>41</sup> In an interview with the Austrian *Neue Kronen Zeitung*, the Hungarian prime minister, Viktor Orbán, proudly proclaims that in light of the country's difficult economic situation he wishes to use the new Basic Law to constitutionally subject the next 10 governments' economic policy measures to a requirement of seeking a consensus (he would do this by enshrining some fundamental tenets of economic policy in so-called supermajority laws). Since, in this case, the freezing of economic policy had occurred with the simultaneous exclusion of the judicial review of the pertinent revisions' constitutionality, this measure – in contrast to the solution of 'eternal clauses' – actually guarantees the possibility of violating fundamental rights. See 'Nur toter Fisch schwimmt mit dem Strom', *Neue Kronen Zeitung*, 10 June 2011, <[www.krone.at/Nachrichten/Orban\\_Nur\\_toter\\_Fisch\\_schwimmt\\_mit\\_dem\\_Strom-Krone-Interview-StoryDrucken-267398](http://www.krone.at/Nachrichten/Orban_Nur_toter_Fisch_schwimmt_mit_dem_Strom-Krone-Interview-StoryDrucken-267398)>.

also judged that the act is in violation of the ban on legislation with retroactive effect, which is part and parcel of the rule of law.<sup>42</sup> In its reasoning, the Court particularly considered Article 9(1) of the Czech Constitution, according to which “this Constitution may be supplemented or amended only by constitutional acts”, and Article 9(2), which reads “any changes in the essential requirements for a democratic state governed by the rule of law are impermissible”. Yaniv Roznai argues against this reasoning, stating that a constitutional act that dissolves a chamber of Parliament in order to go for early elections, this extraordinary ‘weapon day judgment’ does not constitute in fact an abandonment of the rule of law that deserves an annulment, but deserves a clearer case to be exercised. According to Roznai, Article 9(2) of the Constitution was aimed at securing and maintaining a certain constitutional identity, and it is doubtful that if the constitutional act would be allowed to stand, the Czech’s constitutional identity would be altered.<sup>43</sup> Concerning the overall assessment of the decision, I would agree with the Court, because I also see the signs of a slippery slope effect in the case. Let us imagine that a governing majority right after an election, when winners are usually more popular, wants to change the Constitution, introducing a self-dissolution possibility of the Parliament, in order to hold a new election and get even more seats. In this case, the retroactive effect of the constitutional amendment would be violating legal certainty and security, which is an essential part of rule of law. The Czech case has this potential, and I do not think that the good faith of the members of the Czech Parliament makes any difference. If a constitutional amendment can be used against the principle of the rule of law, it is enough. The

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<sup>42</sup> 2009/09/10 – Pl. ÚS 27/09, *see* <[www.usoud.cz/view/pl-27-09](http://www.usoud.cz/view/pl-27-09)>.

<sup>43</sup> *See* Y. Roznai, ‘Legisprudence Limitations on Constitutional Amendments? Reflections Following the Czech Constitutional Court’s Declarations of Unconstitutional Constitutional Amendment’, 8 *Vienna Journal on International Constitutional Law*, forthcoming 2014.

vulnerability of the constitutional identity seems to be a to high of a standard for the review in this case.

And there is a formal ground too to legitimate the decision of the Constitutional Court, namely to argue that a constitutional act can possibly be only normative, and not concrete, as in the case of the dissolution. This argument is similar to the Hungarian Constitutional Court's reasoning in its Decision 45/2012 (XII. 29.) AB, to be discussed later, in which the Hungarian judges annulled the Transitory Provisions to the 2011 Fundamental Law. The Hungarian judges' procedural argument says that, if the Parliament wanted a provision to be part of the Constitution, it was not enough to declare that the Transitional Provisions had constitutional status. Instead, the Parliament had to use the formal procedure laid out in the Constitution to make a constitutional amendment.

There have also been instances when it was not a domestic court but an international judicial body that offered protection against unconstitutional constitutional amendments. In December 2004, Nicaraguan President Enrique Bolaños turned to both the Nicaraguan Supreme Court and the Central American Court of Justice (CCJ) to take issue with a constitutional amendment in his country, which he claimed came into existence through a violation of the constitutional provisions concerning constitutional amendments, and at the same time also substantively reduced presidential powers to such a degree that they thereby permanently upset the balance of powers. He argued that the changes did not constitute plain constitutional amendments, but that in reality they had effectively transformed the constitutional order from a presidential system of government to a parliamentary regime, which is a change that falls within the authority not of the power that has the authority to amend the Constitution, but rather of the constituent power. The CCJ accepted jurisdiction

over the petition in January 2005 and called upon the National Assembly to suspend the amendment process until a final decision had been made. That same month the Supreme Court of Nicaragua held that it – and not the CCJ – had jurisdiction over the dispute. Meanwhile, the National Assembly ignored the CCJ’s interim order and approved the amendments. On 29 March 2005, the CCJ ruled that parliament had indeed violated the Constitution and that the impugned amendments undermined the independence of the executive power. The Court based its jurisdiction in the case on the argument that the peace and stability of the region – the safeguarding of which was the purpose that inspired the establishment of the Court – hinged to a significant degree on the preservation of rule of law in the member states. Since the replacement of the presidential system with a parliamentary system may occur only in the context of the wholesale revision of the Constitution, the Court concluded that the impugned constitutional amendment violated the Constitution.<sup>44</sup> However, the same day, the Supreme Court of Nicaragua delivered its ruling on the case, holding that the CCJ’s decision was invalid. Nicaragua was left with ‘two Constitutions’: valid nationally and invalid internationally. But even if the CCJ’s decision failed to invalidate the reform, it certainly played a role in the fact that eventually the president and the Assembly reached an agreement to reconsider the amendments by the next elections and to suspend their application until after that time. Indeed, after the elections, the new government suspended the implementation of the new amendments until the end of Bolaños’ term in office in January 2007.<sup>45</sup>

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<sup>44</sup> Cf. S. Schnably, ‘Emerging International Law Constraints on Constitutional Structure and Revision: A Preliminary Appraisal’, *University of Miami Law Review*, Vol. 62, 2008, pp. 417-489.

<sup>45</sup> See T. Rogers, ‘Nicaragua: Embattled President Negotiates Deal’, *Miami Herald*, 12 October 2005. Cited in L.D. Walker & P.J. Williams, ‘The Nicaraguan Constitutional Experience. Process, Conflict, Contradictions, and Change’, in L.E. Miller (Ed.), *Framing the State in Times of Transition. Case Studies in Constitution Making*, United States Institute of Peace Press, Washington, DC, 2010, pp. 503-504, n. 116.

Another example of the role of international tribunals with regard to the domestic validity of laws, especially constitutional ones that contradict international law, is Security Council (SC) Resolution 554 of 1984, regarding the new Constitution of South Africa of 1983 that entrenched apartheid. In that resolution, the SC declared that it “strongly rejects and declares as null and void the so-called ‘new Constitution’” owing to its contradiction of the principles of the UN Charter, mainly racial equality.<sup>46</sup> Whereas South Africa had to ‘accept and carry out’ this decision of the SC in accordance with Article 25 of the UN Charter, the country condemned the resolution as a ‘gross interference in domestic affairs’. So although the Constitution was declared ‘null and void’ by the SC resolution, it remained in force for 10 more years, until the Interim Constitution of 1993 replaced it. The lessons to be learned from these cases is that on the one hand supranational courts can declare constitutional amendments to be unconstitutional, but on the other hand this declaration need not necessarily affect the validity of the amendment within the domestic sphere.

Historically, the first – still effective – rule for eternity appeared in Article 112 of the 1814 Norwegian Constitution, which provided that no constitutional amendment may violate the Constitution’s principles or spirit.<sup>47</sup> In terms of immutability, this provision was followed by the 1884 amendment of the 1875 Constitution of the French 3rd Republic with the provision that prohibited changing the republican form of government by way of constitutional amendment: “The republican form of government cannot be made the subject of a proposition for revision.” This amendment marked the triumph of the Republicans over the Monarchists. By 1884 it

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<sup>46</sup> S.C. Res. 554, U.N. Doc. S/RES/554 (17 August 1984).

<sup>47</sup> Since there is no Constitutional Court in Norway, ordinary courts have the power of review, but it is also true that no such review has taken place with regard to the over 200 constitutional amendments enacted since 1814.

became crystal clear that France desired a republican form of government, but the 1791 Constitution's Preamble stated that the National Assembly "abolishes irrevocably the institutions which were injurious to liberty and equality of rights." The 'eternity clause' of the 1884 amendment is repeated in Article 95 of the Constitution of 1946, and it appears in Article 89 of the 1958 Constitution of the Fifth Republic with slightly different wording: "The republican form of government shall not be object of any amendment." But it is important to note that while France was one of the originators of the idea to explicitly limit amending power, contrary to other countries in which this idea led to judicial review of constitutional amendments, France took a rather restrained position, rejecting judicial review of constitutional amendments adopted by way of referendum by the *Conseil Constitutionnel*.<sup>48</sup>

Influenced by ideas from the U.S. Constitution and the French Revolution, during the first half of the 19th century, Latin American states widely used unamendable provisions in their Constitutions. First, the Mexican Constitution of 1824 stated that "the religion of the Mexican Nation is, and shall be perpetually, the Apostolical Roman Catholic" (Art. 3), and that "the Articles of this Constitution, and of the Constitution Act, which establish the Liberty and Independence of the Mexican Nation, its Religion, Form of Government, Liberty of the Press, and Division of the Supreme Power of the Confederation, and of the States, shall never be reformed" (Art. 171). Later, the Venezuelan Constitution of 1830 stipulated that "the authority possessed by Congress to modify the Constitution does not extend to the Form of Government, which shall always continue to be republican, popular, representative, responsible, and alternate" (Art. 228). The Peruvian Constitution of 1839 stated that "The form of the popular Representative Government consolidated in unity,

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<sup>48</sup> Conseil Constitutionnel 62-20 DC of 6 November 1962.

responsible, and alternative, and the division and independence of the Legislative, Executive, and Judicial Power is unalterable” (Art. 183). Ecuador’s Constitution of 1843 protects the form of government from amendments (Art. 110), a protection that was extended in the Constitution of 1851 to the State’s religion (Art. 139). Ecuador repeated a similar list of unamendable provisions in several of its subsequent Constitutions, with the present Constitution of 2008 prohibiting amendments from altering the “fundamental structure or the nature and constituent elements of the State” and from setting “constraints on rights and guarantees” (Art. 441). The Honduran Constitution of 1848 prohibited amendments “regarding guarantees” unless they extended existing ones, and changes to the division of powers (Art. 91). The Dominican Republic’s Constitution of 1865 stipulated that “the power conferred on the Chambers to reform the Constitution does not extend to the form of government that will always be Republican, Democratic, representative, responsible and alternative” (Art. 139). This formula has been repeated, in similar terms, in 22 Constitutions of the Dominican Republic. El Salvador’s Constitution of 1886 prohibited amending those articles that stipulated the prohibition of the president’s re-election and the duration of the presidential term (Art. 148), a prohibition that was repeated in later Constitutions (Art. 171 of 1945, and Art. 248 of 1983).

The Austrian Federal Constitutional Law (*Bundesverfassungsgesetz*) of 1920 was the first in Europe to provide a separate basis for judicial review with regard to all federal and state laws, also extending to the federal and state constitutional laws, which enjoy constitutional rank (*Bundes- and Landesverfassungsgesetze*).<sup>49</sup> Over 60 constitutional laws are currently recorded at the federal level. Among these are acts on personal liberty, the implementation of the Conventions on the Elimination of All Forms of

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<sup>49</sup> Art. 140. For the legal commentary, see H. Mayer, *Das österreichische Bundes-Verfassungsgesetz. Kurzkomentar*, Mainzische Verlags- und Universitätsbuchhandlung, Wien, 2007, pp. 477-489.

Racial Discrimination, the house of Habsburg, and the independence of Austria. Ordinary laws and agreements between states may also contain provisions of constitutional import, and these, too, may be subject to review by the Constitutional Court. An example of the former is Article 1 of the Act on Data Protection, while Article 7 of the Austrian State Treaty illustrates the latter.<sup>50</sup> When it comes to constitutional laws, a review by the Constitutional Court may be initiated either by courts or individual persons whose rights have been violated, or, if the issue is an abstract review of norms, then the government or a third of all MPs may make such a request. The standards for constitutional review are the Constitutional Laws themselves and the fundamental principles enshrined therein.<sup>51</sup>

The Austrian model of constitutional adjudication was followed after World War II by the Italian Constitution in 1947 and the German Constitution in 1949. Article 139 of the Italian Constitution places an obstacle for a Constitution-making power in regard to changing the republican form of governance. Besides the classical amendments to the Constitution, this restriction is prevalent for constitutional laws amending the Constitution too. In 1988, the Constitutional Court reviewed a constitutional law, according to which members of the legislative body of the Trentino-Alto-Adige region are accountable for their opinions expressed and votes cast. The constitutional review was requested because of challenged equality, as the legislators on the national level were immune to this law. The court did not have a substantive inquiry, because of the lack of clarity of the review request, but its decision stated, with the obligatory nature of *obiter dictum*, that Article 139 of the Constitution places an explicit obstacle to constitutional amendments, and the

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<sup>50</sup> Cf. C. Grabenwarter & M. Holoubek, *Verfassungsrecht – Allgemeines Verwaltungsrecht*, Facultas, Wien, 2009, pp. 49-50.

<sup>51</sup> *Id.*, pp. 270-272.

Constitutional Court has jurisdiction to decide about it.<sup>52</sup> According to the operative part of the decision, the Italian Constitution contains some basic principles, relating to the republican system of government, which cannot be amended. Besides equality, the Constitutional Court in its jurisprudence also listed concordance with the Catholic Church, as well as the implementation of duties in relation to community law, among these principles. It is noted that the Austrian, German and Italian Constitutional Courts can review the constitutionality of constitutional amendments, but it does not mean that in practice they would often annul such amendments. The German and Italian courts have never made such decisions. The Austrian Federal Constitutional Court made such a decision on 11 October 2001 for the first time in its practice and for the first time in Europe as well.<sup>53</sup> It was followed by a decision by the Czech Constitutional Court annulling the constitutional law regarding the shortening of the fifth Parliamentary term.<sup>54</sup>

On the other hand, some scholars argue that the extended power of judicial review has resulted in a controversy over the power of the legislature to correct or invalidate the decisions made by the Constitutional Court by enacting a statute with constitutional law status.<sup>55</sup> These scholars suggest that the Constitution should be amended by adopting an ‘incorporation principle’ à la Article 79 of the German Grundgesetz, *i.e.* that all constitutional provisions and all amendments must be incorporated into the constitutional document, and ‘incorporated overruling’ ought to be exempt from

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<sup>52</sup> N. 1146 Sentenza 15-29 Dicembre 1988, La Corte Costituzionale.

<sup>53</sup> G 12/00-17, Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes, VfSlg 16.327/2001. About the decision, see O. Pfersmann, ‘Unconstitutional Constitutional Amendments: A Normative Approach’, *Zeitschrift für öffentliches Recht*, Vol. 67, 2012, pp. 81-113, 83.

<sup>54</sup> Pl. ÚS 27/09, 10 September 2009.

<sup>55</sup> See A. Somek, ‘Constitutional Theory as a Problem of Constitutional Law. On the Constitutional Court’s Total Revision of Austrian Constitutional Law’, *Israel Law Review*, Vol. 32, 1998, p. 569.

judicial review.<sup>56</sup> According to these recommendations, against a total revision of the Constitution, affecting ‘fundamental principles’ of the Constitution, such as federalism, parliamentary democracy, republicanism, separation of powers, rule of law (Rechtsstaatlichkeit) and liberalism (*i.e.* Bill of Rights), it is enough guarantee that these must be submitted to a referendum, as it happened in the case of the accession of Austria to the European Union.

After World War II, the Italian Constitution of 1947 also followed the Austrian model of constitutional review, as did the German Basic Law of 1949. As far as the Italian Constitution is concerned, its Article 139 delimits the authority of the Constitution-amending power in the context of changes to the republican form of government. In addition to constitutional amendments, this ban also extends to laws of constitutional effect whose ranking is on a par with constitutional provisions. In 1988 a law with constitutional effect came before the Constitutional Court, mandating that the members of the Trentino-Alto Adige regional legislature are liable for the opinions expressed in their capacity as representatives and for the votes they cast in the proceedings of the said body. The ground for constitutional review was the violation of the principle of equality, since the members of the national legislature enjoyed immunity. Although the court ultimately failed to perform an investigation of the merits owing to the insufficient clarity of the petition, its decision nevertheless held *obiter dicta* that Article 139 constitutes the explicit limit of constitutional amendments and that Constitutional Court has the jurisdiction to review.<sup>57</sup> Pursuant to the decision’s operative parts, the Italian Constitution contains some fundamental principles related to the republican form of government, which may not be modified

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<sup>56</sup> B.-C. Funk, ‘Wer schützt die Verfassung vor dem Verfassungsgesetzgeber? Plädoyer für ein anderes Verfassungs’, *Journal für Rechtspolitik*, Vol. 1, 1998, p. 95.

<sup>57</sup> <[www.jus.unitn.it/download/gestione/fulvio.cortese/20101209\\_2054Ccost\\_1146\\_1988.pdf](http://www.jus.unitn.it/download/gestione/fulvio.cortese/20101209_2054Ccost_1146_1988.pdf)>.

in the framework of a constitutional amendment. In its later practice, the Constitutional Court also included equality among these principles, as well as the agreement with the Catholic Church and the implementation of Italy's undertakings pursuant to the primary Community legislation, *i.e.* the founding treaties.

The Constitutions of Greece were traditionally characterized by a high degree of rigidity. This tradition has been followed by the 1975 Constitution, enacted after the 1967-1974 dictatorship. Article 110(1) of this current Constitution specifies certain provisions that cannot be the subject of revision. This protection includes: maintaining the form of government as a Parliamentary Republic; certain fundamental rights and freedoms, such as human dignity, equality, freedom of personal development, personal liberty and religious freedom; and separation of powers.

### **Pursuits of an unlimited amendment power**

Let us now consider counter-examples that reject both the limited nature of the constitutional amending power and the judicial review of constitutional amendments by the Constitutional Court.

#### **Sri Lanka, Malaysia and Singapore**

The constitutional jurisprudence of these **three** countries regularly refers to the Indian basic structure doctrine, but this reference serves the rejection of it. Protecting the identity of the Constitution first occurred in Sri Lanka in the context of constitutional amendment No. **13** of **1987**. This amendment sought to introduce some level of decentralization – modelled on Indian federalism – in the previously centralized unitary state structure. The ethnic Sinhalese majority, which is overwhelmingly Buddhist, rejected this change – also viewing it as an encroachment by undesirable

Hindu influence – and turned to the highest judicial forum citing the Constitution’s Article 1, declaring the unitarian nature of the state; Article 2, guaranteeing popular sovereignty and Article 9, which enshrined Buddhism as the dominant religion. By a vote of 5:4, the Court upheld the amendment, which simultaneously implied that it rejected putting it up for a popular referendum. According to Justice Sharvananda, who wrote for the majority, the Constitution’s identity is not violated by the amendment, since the planned decentralization does not turn the state into a federation, which means that the basic structure remains unaltered.<sup>58</sup> The argument of the majority is based upon the wording of the Constitutions of 1972 and 1978, which expressly provide for the amendment or repeal of any provisions of the Constitution or for the repeal of the entire Constitution. The Supreme Court held that due to the exhaustive language that allows the repeal of any provisions, there is no basis for the contention that some provisions of the Constitution are unamendable, and therefore, it would be improper to apply the Indian basic structure in Sri Lanka. In his dissent representing the minority view, Chief Justice Wanasundera argued for allowing the issue to be put to a popular vote based on the protection of the Constitution’s identity. Subsequently, the Court’s majority rejected putting to a popular vote several constitutional amendments that obviously served the political interests of the ruling party against the opposition, such as depriving the opposition members of parliament of their seats, extending the Parliament’s term and the elimination of safeguards against the extension of the state of emergency. The Supreme Court’s abstention *vis-*

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<sup>58</sup> See The Thirteenth Amendments to the Constitution and the Provincial Councils Bill, 1999. LRC 1 (Const), 325. Cited in Jacobsohn, 2006, pp. 64-65.

*à-vis* the government's unconstitutional endeavours led to a general disenchantment with democratic processes and constitutionalism in Sri Lanka.<sup>59</sup>

The Indian basic structure doctrine was presented in Malaysia in several cases, but the Malaysian Federal Court refused to apply it, granting Parliament the right to amend the Constitution without material constraints.<sup>60</sup> The basic structure doctrine also migrated to Singapore's legal discourse, and similarly to the Malaysian cases, the Supreme Court in the case of *Teo Soh Lung v. Minister for Home Affairs*<sup>61</sup> also rejected the argument, reasoning that as an amendment is part of the Constitution itself, it could never be invalid if it was enacted in compliance with the amendment procedure. Had the Constitution's framers intended to prohibit certain amendments, **one** could reasonably expect them to have included a provision to that effect. Furthermore, the reasoning continued, if the courts were allowed to impose limitations on the amendment power, they would be usurping Parliament's legislative functions.

#### Ireland

Ireland favours constitutional sovereignty. The case of *State (Ryan) v. Lemmon*<sup>62</sup> came before the Irish courts in **1934**. The issue was whether a constitutional amendment violates the plaintiff's right to personal liberty and his right to the application of the *habeas corpus* rule, which is provided by Ireland's **1922** Constitution.<sup>63</sup> According to Chief Justice Hugh Kennedy, who constituted the

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<sup>59</sup> For details see R. Coomaraswamy, 'Uses and Usurpation of Constitutional Ideology', in D. Greenberg, S.N. Katz, M.B. Oliverio, & S.C. Wheatley (Eds.), *Constitutionalism and Democracy*, Oxford University Press, New York, 1993, pp. 159-171.

<sup>60</sup> See *Government of the State of Kelantan v. Government of the Federation of Malaysia and Anor* (1963) MLJ 355.

<sup>61</sup> (1989) 2 MLJ 449, 456-457.

<sup>62</sup> *State (Ryan) v. Lemmon*, (1935) 170 IR 197.

<sup>63</sup> For a detailed discussion of the case and the judicial decisions, see R. O'Connell, 'Guardians of the Constitution: Unconstitutional Constitutional Norms', *Journal of Civil Liberties*, Vol. 4, 1999, pp. 48-75.

minority of the three-judge panel of the Supreme Court, the amendment is antithetical to the rule of law and would push Ireland into a state of near anarchy. The Chief Justice argued that the court can substantially review constitutional amendments. The 17th Amendment, he stated, is “no mere amendment...but effects a radical alteration of the basic scheme and principles of the Constitution...” He regarded the ‘spectacular assertion of natural law values’ as possible limitations to the amendment power. The two other judges (Justice FitzGibbon and Justice Murnaghan) did not share his position: in their view the court has no other responsibility with regard to a constitutional amendment than to examine whether its adoption was formally in order, *i.e.* whether it occurred pursuant to the relevant provisions of the Constitution. The majority held that as no explicit limitations exist on the amending power (with the exception not to violate the Anglo-Irish Treaty), the amendment was therefore formally valid and there could be no substantive judicial review of amendments. It is not for judges, the majority held, to decide whether constitutional provisions are valid or not and whether a hierarchy of constitutional norms exist.<sup>64</sup>

The 1922 Constitution was replaced by the 1937 Constitution and the latter’s 14th Amendment – adopted in 1995 – ensured citizens’ right to access information about abortion possibilities available abroad.<sup>65</sup> The Amendment was attacked in court on the grounds that it contravenes the 8th Amendment of the Constitution, which secures the fêtes’ right to life. The legal representative of the fêtes argued before the court that the judicial body may not apply any legal provision or amendments that are antithetical to natural law. The court, however, rejected this reasoning and upheld the 14th Amendment as the legitimate outcome of the popular will. Pursuant to the court’s

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<sup>64</sup> *Id.*, p. 236.

<sup>65</sup> Art. 26 and the regulation of Information (Services outside the State for the Termination of Pregnancies) Bill 1995 (1995) 9 IESC 38.

opinion – similarly to the Ryan case – based on the principle of the supremacy of popular sovereignty, no obstacle may be placed in the way of the people’s privilege to amend the Constitution. Subsequently, the court reaffirmed its commitment to popular sovereignty in several similar rulings: “There can be no question of a constitutional amendment properly placed before the people and approved by them being itself unconstitutional”<sup>66</sup>; or

No organ of the State, including this Court, is competent to review or nullify a decision of the people. [...] The will of the people as expressed in a referendum providing for the amendment of the Constitution is sacrosanct and if freely given, cannot be interfered with.<sup>67</sup>

At the same time, the court’s democratic positivism must be assessed jointly with the preamble of the Irish Constitution, which begins with a reference to the Holy Trinity and then emphasizes the Irish people’s commitment to Jesus Christ.<sup>68</sup>

While the consequent jurisprudence of the Irish Supreme Court repeats the superior right of the people to amend the Constitution, some constitutional scholars argue that the fact that the amendment power is not limited by natural law does not necessarily mean that it may not be limited by other limits, such as explicit limits (*e.g.* the Anglo-Irish Treaty) or implicit limits, for instance, if a constitutional amendment will attempt to change the very basic structure of the Constitution.<sup>69</sup> Since this latter situation has never occurred yet, we can conclude that in Ireland, there is an unlimited power to amend the Constitution. But certainly there is also no explicit ban on the

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<sup>66</sup> *Riordan v. An Taoiseach*, (1999) IESC 1, 4, <[www.bailii.org/ie/cases/IESC/1999/](http://www.bailii.org/ie/cases/IESC/1999/)>.

<sup>67</sup> *Hanafin v. Minister of the Environment*, (1996) 2 ILRM 61, p. 183.

<sup>68</sup> See Jacobsohn, 2006, p. 469.

<sup>69</sup> See Y. Roznai, ‘The Theory and Practice of ‘Supra-Constitutional’ Limits on Constitutional Amendments’, 62(3) *International and Comparative Law Quarterly*, Vol. 62, No. 3, 2013, pp. 557-597.

review power of the courts regarding substantive constitutional amendments, as is the case in Hungary since April 2013.

### Hungary

As the events in Hungary since 2011 show, the question of restricting constitutional jurisdiction points to a larger issue whose significance points beyond protecting the Court's interests narrowly understood and concerns Hungarian constitutionalism in its entirety. In the last days of 2011, the Parliament has enacted the so-called Act on the Transitional Provisions to the Fundamental Law with a claimed constitutional status, which partly supplemented the new Constitution even before it came into effect. At the very end of 2012, in the Decision 45/2012. (XII. 29.), the Constitutional Court ruled that those parts of the Transitional Provisions of the Fundamental Law, which are not transitory in nature, cannot be deemed to be part of the Constitution and are therefore invalid. Although this decision did not go into the substance of the constitutionality of the Transitional Provisions, since the petition of the ombudsman asked exclusively for a formal review, the majority of the judges this time emphasized in the reasoning that in order to keep the unity of the Constitution they may consider looking at the substance of a constitutional amendment.

As a reaction to this decision, in March 2013 the MPs of the governing parties enacted the fourth amendment to the Basic Law. One part of the long amendment just elevates the annulled non-transitory provisions of the Transitional Act into the main text of the Basic Law, in some cases with somewhat modified formulation, while in others unchanged. The following provisions were lifted to the constitutional rank without any alteration: the rules on the nationalities, the authorization of mayors with administrative competences, the authorization of both the Chief State Prosecutor and the President of the Judicial Council to select another court, if they think that the

competent one is overloaded with cases, as well as the extension of the restriction of the review power of the Constitutional Court in financial matters even after the state debt does not exceed half of the entire domestic product, for laws, which were enacted in the period when the debt did exceed the limit.

Among the amendments there are those that were not part of the Transitional Provisions but are also consequences of a previous CC annulment. One of them is the authorization of the legislature to set conditions for state support in higher education, for instance to stipulate that graduates of state universities remain in the country for a certain period after graduation. (Without a prior Constitutional Court decision the amendment also limits the autonomy of universities by allowing the government to supervise their financial management.) Another strike back against the Constitutional Court for a declaration of unconstitutionality is the authorization of both the legislature and self-governments to criminalize homelessness. In a recent decision, the Court also declared a ban on political advertisements in the electoral campaign. The reaction to this is the possibility, according to the amended text of the Basic Law, to limit political ads in a cardinal law. At the end of 2012 the Court annulled the very definition of the family in the law on the protection of families as to exclusive. Now the Basic Law defines marriage and the parents–children relationship as the basis of family relationships, not mentioning extramarital relations and parenting. Also, the Constitutional Court expressed constitutional concerns towards private law limitations of hate speech, which violates the dignity of groups. The new amendment allows such limitations, to protect not only racial and other minorities, but also the dignity of the members of the Hungarian nation, who form the overwhelming majority of the population.

Finally, there is a set of amendments related to the power of the Constitutional Court itself, as a direct reaction to recent unwelcome decisions of the judges. As an indirect reaction to the readiness of the Court to review the substance of constitutional amendments, expressed in the decision on the unconstitutionality of the non-transitory elements of the Transitional Provisions, the new text of the Basic Law, while allowing the review of the procedural aspects of an amendment, specifically excludes any substantive review.

In his letter to Mr. Thorbjørn Jagland, Secretary General Council of Europe, Mr. Tibor Navracsis, Minister of Public Administration and Justice, explains:

The Proposal contains that constitutionality of the Fundamental Law itself and any amendments thereto may be examined by the Constitutional Court from a procedural point of view, in order to check their compliance with procedural law requirements regulated in the Fundamental Law. This is a new competence for the Constitutional Court, because under the Fundamental Law so far it had no legal possibility at all for any review of the amendments to the Fundamental Law. The provision is in accordance with the case law of Constitutional Court based on the former Constitution under which, for the last time in decision [61/2011](#), the Constitutional Court explicitly reinforced that it had no power to review in merits the amendments to the Constitution. Neither did the decision of [45/2012](#) on the Transitional Provisions overrule this former practice.

As we have seen, unfortunately none of these arguments are correct. In its mentioned decision [45/2012](#). (XII. 29.), the Constitutional Court emphasized in the reasoning that it is the constitutional responsibility of the Court to protect the unity of the

Constitution, and to ensure that the text of the Constitution can be clearly identified.

The justices added that an amendment of the Constitution cannot create an irresolvable inconsistency in the text of the Constitution. Therefore, they argued:

In certain cases, the Constitutional Court can examine the continuous realization of the substantial constitutional requirements, guarantees and values of the democratic state governed by rule of law, and their incorporation into the constitution.

In this decision, therefore, the Court concluded that it had the theoretical power to review constitutional amendments for their substantive constitutionality.

As we can see, the formal review power in the case of constitutional amendments is not a new competence for the Constitutional Court, since the Court has derived this from its competences under both the old and the new Constitutions. While the Court had in the past said it did not have the power to review amendments to the Constitution on substantive grounds, the Court in its decision [45/2012](#) has indeed changed its opinion, taking the power to review future constitutional amendments for their substantive conflict with basic constitutional principles. Therefore, the Fourth Amendment's ban on substantive review of constitutional amendments is a direct reaction to this decision of the Constitutional Court from December 2012. The real reason for this ban is to prevent the Court from evaluating on substantive grounds the Fourth Amendment or any subsequent amendment. The ban on substantive review of constitutional amendments in the Fourth Amendment has therefore allowed the government to escape review by inserting any previously declared unconstitutional provision directly into the Constitution. This move abolished the difference between ordinary and constitutional politics, between statutory legislation and Constitution-

making. Now the government's two-thirds majority is above any power that might constrain it. It can, constitutionally speaking, now do anything it wants.

This situation has been demonstrated by a decision of the Constitutional Court ruled on 21 May 2013 on the constitutionality of the Fourth Amendment. In its petition the ombudsman argued that, on the **one** hand, by failing to discuss parts of the suggested modification to the amendment at the plenary session, the Parliament has violated the formal requirements of the amendment procedure, and on the other, some provisions of the amendment, which are in contradiction to provisions of the Basic Law, endanger the unity of the Constitution, which is in his view also a formal requirement of the amendment procedure. The majority of the judges have not found any formal mistake in the amendment procedure and have therefore rejected the first part of the petition, and arguing with the lack of their competence have not reviewed the contradictions among constitutional provisions based on the ombudsman's unity of the constitution argument. The majority of the judges argued that there is no substantial limit to the amendment power, and consequently, the Constitutional Court has no jurisdiction for such a review.

## **Conclusions**

Despite the recent development in Hungary, and in other countries, like Malaysia, Singapore and Sri Lanka, where courts also reject the notion of implicit limits, claiming that the amending power is unlimited in the absence of any explicit limits, the global trend, especially after World War II, is towards acceptance of the idea of either explicit or implicit limitations on constitutional amendment power, acknowledging by Constitution drafters or courts that certain supra-constitutional

principles are unamendable, *i.e.* their amendment is prohibited, and accepting the competence of constitutional courts to review these amendments and annul those that contradict the ‘basic structure’ or ‘constitutional essentials’. A review conducted of 192 written Constitutions reveals that as of 2011, 82 Constitutions include unamendable provisions (42%) and, even more astoundingly, of 537 past and present national Constitutions, 172 Constitutions (32%) include unamendable provisions.<sup>70</sup> Whereas in the past unamendable provisions laconically protected mainly the form of government of the state, after World War II the protection was extended to many other features of the state, including fundamental rights and freedoms, which earlier were only protected from amendment by two constitutions: in Honduras (1848) and in Mexico (1824). The Constitution of Portugal of 1976 protects 14 constitutional subjects from amendment (Art. 288), including, for example, rights of the workers and trade unions. Protected principles in various Constitutions can be universal, common to all modern democratic societies, such as human dignity, or in particular, reflecting the specific ideals and values of a distinct political culture, such as federalism. These universal and particular principles include the state’s religion, such as Islam, the official language, secularism or separation of state and church, the rule of law, multiparty system, political pluralism or other democratic characteristics, territorial integrity or independence, judicial review or independence of the courts, separation of powers, rule of the Constitutions, sovereignty of the people and the state’s existence, or even such general provision as the spirit of the Constitution. This trend is linked to the general rise of ‘world constitutionalism’, the global spread of ‘supranational constitutionalism’, and judicial review, preventing the possibility of abusing the majority rule.

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<sup>70</sup> See Y. Roznai, ‘Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea’, *American Journal of Comparative Law*, Vol. 61, No. 3, 2013.

