A View on the Future of Judicial Review of Constitutional Amendments in Turkey

An Invitation to Judicial Dialogue

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Abstract

In this article, I discuss and analyse the Turkish case concerning judicial review of constitutional amendments in light of a recent decision by the Constitutional Court of Turkey (CCT). In the said decision, the CCT rejected carrying out judicial review over a controversial constitutional amendment, which lifted MPs' parliamentary immunity. This decision urges to consider its implications for the possible future cases. I refer to comparative constitutional law with the hope to shed more light on the Turkish example and grasp it comprehensively. In this respect, I illustrate the most crucial arguments developed by the Supreme Court of India (SCI), the Bundesverfassungsgericht (BVG), and the Conseil Constitutionnel (FCC) in their case law. Based on the comparative account, I draw some lessons for the CCT and invite it to get into a judicial dialogue with other supreme/constitutional courts with regard to the issue.

Keywords: basic structure doctrine, Constitutional Court of Turkey, constitutional identity, judicial dialogue, immunity amendment, unconstitutional constitutional amendments.

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A Introduction

The issue of unconstitutional constitutional amendments has recently become one of most debated subjects of comparative constitutional studies.[1] The rise in the interest derives, not always but mostly, from the fact that the tool of constitutional amendment has been abusively employed by populist or authoritarian governments to achieve their aims. In some jurisdictions, the courts have thwarted the abusive exercise of amending power by annulling the constitutional amendments. Despite the growing interest in the issue, however, the Turkish case has not attracted enough attention. Therefore, the focus of this article is the Turkish case. I believe, though, that the comparative perspective is necessary to comprehend the Turkish case thoroughly and put it into the global picture more adequately.

The outline of the article is as follows. I embark on providing an overview on the Immunity Amendment and the judgment of the Constitutional Court of Turkey (CCT) thereupon. In its judgment, the CCT seems to have overturned its precedent by which the CCT once endorsed the idea that content of constitutional amendment could be subject to judicial review. Next, I proceed with my comparative account, in which I address the key arguments of the Supreme Court of India (SCI), the Bundesverfassungsgericht (BVG), and the Conseil Constitutionnel (FCC),[2] and I simultaneously consider the related literature in this part. Finally, based on my comparative account, I attempt to draw some conclusions and lessons, which may be of use to the CCT in the future. Thereby, I invite the CCT to get into a judicial dialogue with other supreme/constitutional courts.

B The Immunity Amendment and Judgment of the CCT

On 20 May 2016, the Turkish Parliament passed a bill amending the 1982 Constitution. The Amendment Bill (the Immunity Amendment), which provided one

1 In addition to many articles, for two recent books completely dedicated to the subject, *see* S. Krishnaswamy, *Democracy and Constitutionalism in India – A Study of the Basic Structure Doctrine*, Oxford, Oxford University Press, 2009; Y. Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*, Oxford, Oxford University Press, 2017. For some recent articles, particularly *see* G. Halmai, 'Judicial Review of Constitutional Amendments and New Constitutions in Comparative Perspective', *Wake Forest Law Review*, Vol. 13, 2016, pp. 101-135; R. Passchier & M. Stremler, 'Unconstitutional Constitutional Amendments in European Union Law: Considering the Existence of Substantive Constraints on Treaty Revision', *Cambridge Journal of International and Comparative Law*, Vol. 5, No. 2, 2016, pp. 337-362 ; J. Colón-Ríos, 'Introduction: The Forms and Limits of Constitutional Amendments', *International Journal of Constitutional Law*, Vol. 13, No. 3, 2015, pp. 567-574. Among many papers and studies of R. Albert, who has been writing about the issue extensively, *see*, for the recent ones, Richard Albert, 'Four Unconstitutional Constitutions and Their Democratic Foundations', *Cornell International Law Journal*, Vol. 50, 2017, pp. 169-198; 'The Theory and Doctrine of Unconstitutional Constitutional Amendment *in* Canada', *Queen's Law Journal*, Vol. 41, 2016, pp. 143-206.

2 I take the liberty to include India, Germany, and France in my comparison, as I feel more confident to speak about these jurisdictions since I have spent quite a time to conduct research on these jurisdictions in my PhD thesis.

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substantive article only, lifted the parliamentary immunity of lawmakers, but it did so only temporarily. In other words, the Amendment was provisional or *ad hoc*. From the *ad hoc* status of the Immunity Amendment results the conclusion that if a lawmaker is alleged to commit a crime after the date of entry into force of the Amendment, he or she will keep the immunity, and lifting it will be subject to the regular procedure set out in the Constitution and the Rules of Procedure of the Parliament. In short, as the Venice Commission aptly called, the Immunity Amendment was 'one shot exception'.[3]

The wording of the Amendment read as follows:[4]

> (Paragraph 1) On the date when this Article is adopted in the Grand National Assembly of Turkey, the provision of the first sentence of the second paragraph of Article 83 of the Constitution shall not be applied to the MPs who have files regarding the lifting of the parliamentary immunity, which were submitted from the competent authorities authorized to investigate or give investigation or prosecution permit, chief public prosecutor's office and courts to the Ministry of Justice, the Prime Ministry, Office of Speaker of the Grand National Assembly of Turkey and the Presidency of Joint Committee consisting of the members of Constitution and Justice Commissions.
>
> (Paragraph 2) Within fifteen days as of the entry into force of this Article, the files in the Presidency of the Grand National Assembly of Turkey, Prime Ministry and Ministry of Justice regarding the lifting of parliamentary immunities shall be returned to the competent authority under the presidency of the joint commission composed of the members of Constitution and Justice Commissions so as to take the required actions.[5]

Three of the four political parties sitting in the Parliament supported the Immunity Amendment. The ruling Justice and Development Party (AKP), as the architect of the Bill, and the far-right Nationalist Movement Party eagerly voted for it. The main opposition party, the Republican People's Party (CHP), reluctantly, and sometimes in an unprincipled and puzzled manner, also voted for the Amendment. The CHP, while having supported it in the ballot, claimed, though, that the Amendment Bill was *unconstitutional*. Moreover, the CHP did not allow its MPs to act together with the Peoples' Democratic Party (HDP), whose MPs were the primary target of the Amendment, to challenge the constitutionality of the Bill before the CCT.

According to the Amendment Clause (Art. 175) of the 1982 Turkish Constitution, if an amendment bill gets at least two-thirds (at that time it was 367 out of

3 European Commission for Democracy through Law (Venice Commission), *Turkey – Opinion on the Suspension of the Second Paragraph of Article 83 of the Constitution (Parliamentary Inviolability)* (CDL-AD (2016) 027, Opinion No 858/2016 14 October 2016), available at: http://venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)027-e (last accessed 10 March 2018).

4 For the English translation of the 1982 Constitution of Turkey, which was used in this article, available at: https://global.tbmm.gov.tr/docs/constitution_en.pdf) (last accessed 12 March 2018).

5 Amendment Bill, No. 6718 published in the Official Gazette on 8 June 2016, No. 27936.

550) of the MPs' votes, it is at the discretion of the President of the Republic to send it to a referendum. A referendum is *mandatory* if the bill gains the support of less than two-thirds of MPs. The minimum margin for an amendment bill to pass through the Parliament is three-fifth (330) votes. The Immunity Amendment satisfied the required number of votes (373). The President signed the Bill into law without sending it to a referendum.[6]

Following its promulgation in the Official Gazette, seventy MPs challenged the constitutionality of the Immunity Amendment before the CCT and requested its annulment. Each of the seventy MPs lodged an individual application with the CCT; therefore, legally speaking, there were seventy separate lawsuits. The MPs filed their applications pursuant to Article 85 of the Constitution, which bestows the right to appeal on them to the CCT in case of lifting his/her immunity by the *decision* of Parliament. Article 85 reads:

> If the parliamentary immunity of a deputy has been lifted or if the loss of membership has been decided according to the first, third or fourth paragraphs of Article 84, the deputy in question or another deputy may, within seven days from the date of the decision of the Plenary, appeal to the Constitutional Court, for the decision to be annulled on the grounds that it is contrary to the Constitution, law or the Rules of Procedure. The Constitutional Court shall make the final decision on the appeal within fifteen days.

On the other hand, the constitutionality of an amendment bill can be challenged before the CCT through a specific method called the *abstract judicial review* (the details of which are specified in Articles 148, 150, and 151 of the Constitution), which puts the Turkish model under the European one.[7] At this point, one issue needs to be mentioned and clarified. The application (appeal) process provided by Article 85 is different from the abstract judicial review of legislative acts, which includes constitutional amendments. The abstract judicial review requires an application (on grounds of procedural deficiencies within ten days (Art. 148)) signed by at least one-fifth (110) of the MPs following the promulgation of an amendment bill in the Official Gazette. However, only seventy MPs filed their (separate) applications in the Immunity Case. Therefore, the total number of the applicants fell short of meeting the necessary one-fifth (110) requirement for making an application for the abstract judicial review. Besides, Article 148 stipulates that amendment bills can be challenged only concerning whether they have met the certain procedural requirements, which were, however, not the issue causing for concern in this case.

6 The Bill was enforced first in November 2016, and several HDP's MPs were taken into custody and later arrested.

7 On the European or Kelsenian model of judicial review, particularly *see* H. Kelsen, 'Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution', *The Journal of Politics*, Vol. 4, No. 2, 1942, pp. 183-200; G. Dietze, 'Judicial Review in Europe', *Michigan Law Review*, Vol. 55, No. 4, 1957, pp. 539-566. On the historical roots of judicial review in Europe, *see* M. Cappelletti & J.C. Adams, 'Judicial Review of Legislation: European Antecedents and Adaptations', *Harvard Law Review*, Vol. 79, No. 6, 1966, pp. 1207-1224.

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The CCT merged the seventy applications and delivered its judgment under one single decision and simply, by way of a strict formalist manner, rejected the applications in the following way:

> 11. In order to conduct judicial review pursuant to Article 85 of the Constitution, there must be a parliamentary *decision* lifting the parliamentary immunity. However, in the current (Immunity) Case, the contested legal regulation was adopted by way of the constitutional amendment process initiated by the 316 MPs' signatures and submitted to the Parliament with the title of 'The Bill Amending the Constitution of the Republic of Turkey'. The procedure instigated by the said Bill is a special one set out in Article 175 of the Constitution... Under this particular procedure, proposal to amend the Constitution, its adoption and its entry into force are subject to some certain conditions as well as that a different legal significance and force is attributed to the outcome of the Parliamentary will. An amendment bill adopted through this procedure *cannot be at all the subject of judicial review regarding its content*; the procedural review is possible only within the framework specified by Article 148 (emphasis added).
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> 14. The action for annulment (or the abstract judicial review) is a special method of judicial review recognized by the Constitution. It is specified explicitly in the Constitution that this method is subject to strict and specific procedural conditions. It is not possible to bring an action for annulment by relying on the grounds that the Bill requested to be annulled is a *decision* of the Parliament. Therefore, it is not possible to carry out the abstract judicial review under Article 85. Considering and accepting otherwise, Article 148 ... would be meaningless, and this would result in its ineffectiveness.[8]

Regardless of whether the CCT's justification was right or even convincing in the Immunity Case, the more important point to draw attention is that the CCT seems to have reversed, though by an *obiter dictum*, its precedent established (under the 1982 Constitution) by the Headscarf Decision in 2008,[9] and reiterated by 2010 Amendment Bill decision,[10] according to which the CCT could review contents of constitutional amendments. As it is not possible to provide the larger context of these two decisions, the most important point to note is that the CCT has justified these decisions in the following way: Article 4, determining the

8 2016/54 E., 2016/117 K., published in the Official Gazette on 3 June 2016.

9 2008/16 E., 2008/116 K., published in the Official Gazette on 22 October 2008. On the Headscarf Decision, *see* Y. Roznai & S. Yolcu, 'An Unconstitutional Constitutional Amendment – The Turkish Perspective: A Comment on the Turkish Constitutional Court's Headscarf Decision', *International Journal of Constitutional Law*, Vol. 10, No. 1, 2012, pp. 175-207; A. Acar, 'Tension in the Turkish Constitutional Democracy: Legal Theory, Constitutional Review and Democracy', *Ankara Law Review*, Vol. 6, No. 2, 2019, pp. 141-173. For an assessment on the constitutional crisis of Turkey between 2007 and 2010, including the Headscarf Decision, *see* L. Köker, 'Turkey's Political-Constitutional Crisis: An Assessment of the Role of the Constitutional Court', *Constellations*, Vol. 17, 2010, pp. 332-333.

10 2010/49 E., 2010/87 K., published in the Official Gazette on 30 December 2010.

unamendable status of the first three articles of the Constitution, stipulates that there shall be no *proposal* to amend the first three articles. Any proposal attempting to amend, affect, or undermine these articles and principles therein enables the CCT to review the content of amendments. In this way, it would be possible to find out whether the Parliament has adopted an amendment that is allowed by the Constitution. In a nutshell, the CCT argued that what is stipulated in Article 4 constitutes a requirement of *form* that constitutional amendments shall meet. Thus, the CCT maintained that the review it made was not a substantive review, which is not allowed by Article 148, but rather a formal or procedural review, which is within the competence of the CCT, as specified by Article 148.

Although these two decisions were problematic at certain points,[11] the details of which cannot unfortunately be provided here due to the limited scope of the article, they cannot be, nevertheless, simply disregarded. Now, considering that the CCT declared in the Immunity Case that "an amendment bill … *cannot be at all the subject of judicial review regarding its content*", it may have significant implications for possible future cases, although it was an *obiter dictum*.

The assumption that there may be cases in the future is based on the following consideration. Turkey adopted a radical and controversial constitutional amendment package in April 2017, which has transformed the political system from parliamentarism to presidentialism. It was ratified in the referendum by a slim majority. Due to the significant number of opponents and the fact that the introduced presidential system has set an asymmetric power relationship between parliament and the president, it is probable that Turkey may undergo another amendment process in the near future, due to the fact that the new system is open to cause serious problems and deadlocks.[12] In fact, some voices demanding to restore the parliamentary system have been already raised by some political actors. So, a different composition of the parliament in the future may attempt to amend the Constitution for restoring the parliamentary system or, in a counter scenario, political actors may attempt to bring even stricter and more illiberal changes to the already-flawed system. For example, amending, among

11 Concerning this point, *see* in this volume, E. Özbudun, 'Judicial Review of Constitutional Amendments in Turkey: The Question of Unamendability', pp. 283-284.

12 For the controversial aspects of the 2017 Amendments, *see* B.E. Oder, 'Turkey's Ultimate Shift to a Presidential System: The Most Recent Constitutional Amendments in Details', *ConstitutionNet,* available at: www.constitutionnet.org/news/turkeys-ultimate-shift-presidential-system-most-recent-constitutional-amendments-details (last accessed 8 February 2018); S. Esen, 'Analysis: The 2017 Constitutional Reforms in Turkey: Removal of Parliamentarism or Democracy?', *Blog of the IACL, AIDC*, available at: https://blog-iacl-aidc.org/test-3/2018/5/26/analysis-the-2017-constitutional-reforms-in-turkey-removal-of-parliamentarism-or-democracy (last accessed 18 March 2018). Also *see* European Commission for Democracy through Law (Venice Commission), 'On the Amendments to the Constitution Adopted by the Grand National Assembly on 21 January 2017 and to Be Submitted to a National Referendum on 16 April 2017 – Opinion No. 875/2017', Strasbourg, Council of Europe, 13 March 2017, para(s). 47, 55, 119, 127, 130, and so on, available at: www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2017)005-e (last accessed 18 March 2018).

other things, the two-term limit on running presidency is probable.[13] In any of these scenarios, the amendments may end up before the CCT. Therefore, the arguments raised in this article can be useful when the CCT gets into a judicial dialogue with other supreme or constitutional courts on the matter, and the following part can be read as a framework for such a judicial dialogue.

C Comparative Constitutional Law Concerning Judicial Review of Constitutional Amendments[14]

There are different views among scholars concerning the issue of unconstitutional constitutional amendments, and the supreme/constitutional courts in various jurisdictions have developed different (interpretive) strategies to deal with the matter.[15]

Some scholars argue that constitutional amendments can be declared unconstitutional in jurisdictions where the constitutions contain unamendable constitutional norms.[16] Here are examples of such unamendable rules: Articles 1, 20, and 79(3) of the German Basic Law; Article 89(5) of the French Constitution; Articles 1, 2, and 3 of the Turkish 1982 Constitution, just to mention a few.[17] The supporters of this view argue that the existence of the unamendable clause in a constitution entails that any attempt to amend *directly* these rules would be unconstitutional. Therefore, such an amendment can be invalidated by the courts. The view is taken to the point that a constitutional amendment that does not *directly* aim at the unamendable clause *per se* but undermines the values protected by it can also be declared unconstitutional by the courts. The BVG of Germany has invoked this line of arguments in some cases.

13 In fact, restoring the parliamentary system was one of the campaign promises of the Nation's Alliance composed of four opposition parties in the election held on 24 June 2018. For the probable different scenarios after the June election, *see* M. Pierini, 'Three Scenarios for Turkey's Elections', available at: https://carnegieeurope.eu/2018/06/05/three-scenarios-for-turkey-s-elections-pub-76507 (last accessed on 19 June 2018). It is possible that these scenarios may become relevant and come into question again.

14 This part of the article is largely drawn from my unpublished PhD thesis, A. Acar, *Between Legality and Legitimacy: The Case of Judicial Review of Constitutional Amendments from a Comparative Law Perspective*, European University Institute, Florence, 2015.

15 For a broader scope of comparison, *see* K. Gözler, *Judicial Review of Constitutional Amendments – A Comparative Study*, Bursa/Turkey, Ekin Press, 2008; R. Albert, 'Nonconstitutional Amendments', *Canadian Journal of Law and Jurisprudence*, Vol. XXII, 2009, pp. 5-47, Roznai, 2017. In the meantime, our focus in this article is on the substantive limits and judicial review of constitutional amendments in accordance with these substantive limits. For the procedural aspect of the issue, *see* L. Garlicki & Z.A. Garlicka, 'Review of Constitutionality of Constitutional Amendments (An Imperfect Response to Imperfections?)', *Anayasa Hukuku Dergisi*, Vol. 1, 2012, pp. 194-203.

16 On this view, Gözler, 2008, pp. 52-66.

17 More on unamendable constitutional rules or what is also called constitutional handcuffs, *see* R. Albert, 'Constitutional Handcuffs', *Arizona State Law Journal*, Vol. 42, 2010, pp. 664-715.

The BVG has appealed to the eternal clause, that is, Article 79(3), to review the contents of several constitutional amendments.[18] It would suffice to consider the most recent case, which is the *Case of Acoustic Surveillance of Homes*,[19] to have a general idea about the German experience. In this case, the BVG had to deal with the question of whether the Forty-Fifth Amendment to the Basic Law was constitutional or not. The Forty-Fifth Amendment was adopted on 26 March 1998, and it amended Article 13 (guaranteeing the inviolability of the home) by inserting the new paragraphs (3-6). These new paragraphs were added with the intention of allowing acoustic surveillance in people's homes for the purpose of criminal prosecution.[20] Following this amendment, the Law of Criminal Procedure was also changed (by the Act to Improve the Suppression of Organized Crime) to put the said constitutional amendment into practice. The primary target of the amendment and the change in the Act was to fight against organized crimes and terrorism. Given the context of Germany, that is, the police state of the Nazi era and surveillance by Stasi in the German Democratic Republic, the amendment (and the law) was a cause for great political and legal concern.[21]

The main contested-provision of the Forty-Fifth Amendment, that is, Article 13(3), stipulates that the orders of surveillance have to be given by a panel of three judges, but when time is of the essence, it can be given by a single judge.[22] It further lays down four conditions: (a) surveillance can be carried out only when there are clear facts that justify the suspicion that the suspect has committed a serious crime defined by a law; (b) the suspect is supposedly staying in the home, which is to put under surveillance; (c) there must be no other available option, which is not disproportionately difficult or unproductive, to investigate the matter; and (d) surveillance shall be for a limited time.

The applicants in the *Case of Acoustic Surveillance of Homes* claimed, among other things, that the said amendment and the change made to the Law of Criminal Procedure were incompatible with the inviolability of home, which is protected by Article 13(1), the prohibition of restrictions that affect the essence of a basic right of Article 19(2), and particularly by human dignity protected by Article 1(1) of the Basic Law.

The inviolability of home is closely connected with and considered within human dignity. As pointed out by Nicole Jacoby, who discusses the BVG's judg-

18 It should be mentioned, though, that the Bundesverfassungsgericht has not declared any amendment unconstitutional so far. For the full list of cases, which directly or indirectly dealt with the judicial review of constitutional amendments in Germany, *see* European Commission for Democracy through Law Venice Commission, *Report on Constitutional Amendment (CDL-AD(2010)001)*, 2010, para 230, footnote 157, available at: www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)001-e (last accessed 15 January 2018).

19 BVerfG, 1 BvR 2378/98, 1 BvR 1084/99 (3 March 2004).

20 N. Nohlen, 'Germany: The Electronic Eavesdropping Case', *International Journal of Constitutional Law*, Vol. 3, 2005, p. 680.

21 The so-called 'Der Grosser Lauschangriff' (The Great Eavesdropping); *see* Nohlen, 2005.

22 However, paras. 4 and 5 of the same Forty-Fifth Amendment rendered it possible that in certain cases, acoustic surveillance or electronic eavesdropping can be carried out at the order of authorities designated by law when there is not enough time to obtain judicial order. Yet, in such cases, judicial approval has to be obtained without delay.

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ment in the case, "[s]ince its creation, the human dignity clause has been invoked in a wide range of context…."[23] The human dignity is among the unamendable constitutional principle of the Basic Law as referred to by Article 79(3), and it is formulated in a way that it is not subject to any constitutional limitation or "[it] has no proviso".[24]

The following was part of the reasoning of the BVG in the case:

> Human dignity is a fundamental principle of constitution and the highest constitutional value.[25] Article 79 (3) Basic Law prohibits constitutional amendments affecting the principles set out in Articles 1 and 20 of the Basic Law. They include the requirement to respect and protect human dignity …, but also the commitment to inviolable and inalienable human rights as the basis of every human community, peace and justice …[26] [On the other hand] the BVF must respect the legislature's constitutional power to amend any basic rights to restrict or even repeal, *provided it does not affect the principles laid down in Article 1 and Article 20 of the Basic Law*.[27] The acoustic surveillance of house for the purpose of criminal prosecution of Article 13.1 and Article 2.1 does not …violate the human dignity in conjunction with Article 1.1 of the Basic Law. However, the way in which housing surveillance is carried out can lead to a situation in which human dignity is violated.[28]

As a result, the BVG held, by a majority of six to two,[29] that the Forty-Fifth Amendment was *not* contrary to the Basic Law. However, the BVG ruled that some of the challenged-provisions of the Law of Criminal Procedure did not satisfy the criteria required by the Basic Law, thus invalidated them. Accordingly, the BVG accommodated the Forty-Fifth Amendment, on the one hand, and it did not dispense with human dignity, on the other hand. At the same time, the BVG did not jeopardize the democratic legitimacy of the Parliament's amending power. To couch another way, the BVG interpreted the said amendment in a way in which the essence of the constitutional protection of human dignity would not be violated or compromised, and the democratic power of the Parliament would not be taken away. The way the BVG interpreted the Basic Law and the Amendment is

23 N. Jacoby, 'Redefining the Right to Be Let Alone: Privacy Rights and the Constitutionality of Technical Surveillance Measures in Germany and the United States', *Georgia Journal of International and Comparative Law*, Vol. 35, No. 3, 2007, p. 454.

24 Jacoby, 2007, p. 458.

25 1 BvR 2378/98, para. 115.

26 *Ibid*., para. 109

27 *Ibid*., para. 111.

28 *Ibid*., para. 114.

29 Even though they agreed with the ruling of the court declaring certain provisions of the Law of Criminal Procedure unconstitutional, two justices (Jaeger and Hohmann-Dennhardt) did not agree with the ruling of the majority concerning constitutionality of the said amendment; thus, they presented dissenting opinions, according to which Art. 13(3) was unconstitutional as it contravened human dignity, 1 BvR 2378/98, para. 355.

known as *Verfassungskonforme Auslegung*, that is, constitution-conforming interpretation.[30]

Another argument for claiming that courts can control contents of constitutional amendments involves the so-called implied limitations. The advocates of this view hold that even if a constitution does not contain an explicit unamendable rule, judicial review of amendments may, nevertheless, be possible, since there are (always) implicit limitations to the amending power. In the literature, the existence of implicit limitations has been supported by two distinct strategies.

The first strategy claims that implicit limitations can be inferred from the text of constitution taken and interpreted as a whole, that is, through a structural interpretation. The core of Yaniv Roznai's arguments in his recent book[31] can be read in this line. To put it succinctly, he argues that the amending power (or what he calls the secondary constituent power) has inherently a limited nature, because it hinges on delegation. Being a delegated power, the amending power is always subject to the limitations drawn by the primary constituent power, either by way of explicit unamendable rules or, in case that such explicit rules do not appear, by way of implicit limitations, which always exists as the basic structure and identity of the constitution.[32]

The implicit limitation strategy is indeed the position taken by the SCI, which has developed *the basic structure* doctrine. Therefore, looking closely into India's example will be illuminating about this strategy. Yet, before getting into the details of the case law of the SCI, let me first briefly explore the concept of constitutional identity, since it is interchangeably used with the basic structure.

Carl Schmitt is probably the first who invoked the term 'constitutional identity' as a normative tool. He developed it to argue for the limited (nature of) amending power. According to Schmitt, a constitutional amendment can be neither the *annihilation* nor the *elimination* of a constitution; it can be carried out provided that "the identity and continuity of the constitution as entirety is preserved".[33] In Schmitt's view, amending power cannot make *fundamental political decisions*, which, in his understanding, seems to be equivalent to constitutional identity. According to one of his examples, an existing amendment mechanism of a constitution cannot be amended to allow for a less strict amendment mechanism – *e.g.* changing the qualified majority necessary for amending the constitu-

30 According to the constitution-conforming or constitution-compatible interpretation, a law would not be in contradiction to the Basic Law if it can be interpreted in conformity with it. If, among possible alternatives, the law cannot be interpreted in conformity with the Constitution, then it would be (declared) unconstitutional.

31 Roznai, 2017.

32 Roznai calls his theory of substantive unamendability the *fundamentalist structuralism*, which can be read as a version of the basic structure doctrine, Roznai, 2017, p. 8. On Roznai's book, *see* my review 'On Yaniv Roznai's Theory of Substantive Unamendability', *European Constitutional Law Review*, Vol. 13, No. 4, pp. 836-848.

33 C. Schmitt, *Constitutional Theory*, trans. by J. Seitzer, Duke University Press, 2008, p. 150. For the historical, political, and legal environment in which Carl Schmitt developed this view, *see* P. C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory & Practice of Weimar Constitutionalism,* Durham; London, Duke University Press, 1997, pp. 6-7.

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tion to the simple majority.[34] He also argues that a monarchical constitution cannot be amended to make the state to be ruled democratically.[35] However, it is not clear whether, in Schmitt's view, a court can review, and thus declare, unconstitutional a constitutional amendment purported to be against the constitutional identity.[36]

In this respect, George Fletcher offers a more relevant use of the concept by arguing that judges can invoke constitutional identity when the constitutional language is vague in cases that concern the fundamental issues of constitutional law.[37] In fact, as stated aptly by Wojciech Sadurski, "the ultimate pragmatic goal" of dealing with constitutional identity is to advise "the authoritative institutions about what are the sources of law in a given constitutional system."[38] However, appealing to the constitutional identity by judges is not always easy and clear. This implicitness makes the matter blurry and urges one to understand constitutional culture/tradition[39] and/or the national identity[40] since the term 'constitutional identity' is identified with these latter terms. This, in turn, creates more ambiguity, and a vicious circle emerges. Furthermore, it is not clear, in Fletcher's reflection, whether constitutional identity can be invoked to strike down constitutional amendments. Gary Jacobsohn believes this to be the case. In his view,

34 For more on this, *see* R. Albert, 'Amending Constitutional Amendment Rules', *International Journal of Constitutional Law*, Vol. 13, 2015, p. 667.

35 Schmitt, 2008, pp. 150-151. However, Schmitt does support the view that whatever the amending power cannot do through amendment mechanism can be made by the constituent power. Thus, a monarchical state can be turned into a democratic one, but it can be done so by exercising the constituent power, not the amending one. To have a clear idea of what the concept of constitutional identity implies, looking into the distinction between constitutional *revision* and constitutional amendment will be telling. For this distinction, *see* R. Albert, 'Amendment and Revision in the Unmaking of Constitutions', *Boston College Law School Legal Studies Research Paper No. 420*, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841110## (last accessed 15 February 2018).

36 As David Dyzenhaus perfectly illustrates, it is possible to imagine that Schmitt may hold the view that the matter is not justiciable, but rather a political question. On Schmitt's view of legality concerning the 20 July 1932 coup carried out by the conservative-nationalist Federal German government against the social-democrat government of the Prussian state, *see* D. Dyzenhaus, 'Legal Theory in the Collapse of Weimar: Contemporary Lessons?', *The American Political Science Review*, Vol. 91, 1997, pp. 125-127.

37 G.P. Fletcher, 'Constitutional Identity', *Cardozo Law Review*, Vol. 12, 1992-1993, p. 737.

38 W. Sadurski, 'European Constitutional Identity?', *Sydney Law School Research Paper No. 06/37*, 2006, p. 5, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=939674 (last accessed 15 April 2018).

39 As correctly described by Robin West, George Fletcher's '"constitutional identity" refer[s] to … our collective and individual self-conception which we owe to our shared constitutional heritage, and which at least on occasion determines outcomes in close constitutional cases in ways that "overarching principles of political morality" do not.' R. West, 'Toward a First Amendment Jurisprudence of Respect: A Comment on George Fletcher's *Constitutional Identity*', *Cardozo Law Review*, Vol. 14, 1992-1993, p. 759.

40 Ruti G. Teitel agrees with George Fletcher on the point that '[n]ational identity operates as a justification for, or reactionary argument against progress in constitutional theory'. R.G. Teitel, 'Reactionary Constitutional Identity', *Cardozo Law Review*, Vol. 14, 1992-1993, p. 748. Yet, she departs from Fletcher on certain aspects, *e.g.*, on what she calls reactionary constitutional identity, which she seems to equate with majoritarian democracy or conservatism.

constitutional identity is a justiciable concept. According to him, the concept of constitutional identity has (or should have) some bearing on the validity of constitutional amendments.[41]

Let me now return to the case law of the SCI. Based on the basic structure doctrine, or the constitutional identity, the SCI has not only reviewed the contents of several constitutional amendments[42] but also declared some of them unconstitutional. The landmark case is *Kesavananda Bharati v. State of Kerala* case.[43] *Kesavananda* case originated from a long struggle between the Parliament and the SCI concerning the scope of protection of the right to property. Later, the doctrine has been extended to review many different subjects.

In the struggle concerning the right to property, the Parliament attempted to curb its scope by granting immunities from the courts' review on some Land Reform Acts, which permitted the provincial states or the federal state to confiscate lands, sometimes even without due compensation. However, the SCI did not allow, most of the time, these attempts. The struggle resulted in the Twenty-Fifth Amendment, which added Article 31C to the Constitution, and the new article stipulated:

> Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31; and *no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy* (emphasis added).

In its long and rather tedious decision in *Kesavananda*, the SCI invalidated this emphasized provision of Article 31C. The Court had some difficulties in constructing and justifying the judgment. In fact, it was one of the reasons why the decision was held by a bare majority of seven to six. What follows is the illustration of the main arguments and reasoning of the majority.

41 G.J. Jacobsohn, 'Constitutional Identity', *The Review of Politics*, Vol. 68, 2006, p. 375. Jacobsohn conceives the basic structure doctrine developed by the SCI as a more expressive term of the constitutional identity, pp. 378-379.

42 *Indira Gandhi v. Rajnarain* 1976 2 SCR 347: AIR 1975 SC 2299, *Minerva Mills Ltd. v. Union of India,* 1981 SCR (1) 206, 1980 SCC (3) 625 and *P Sambamoorthy v. AP*, (1987) 1 SCC 124: AIR 1987 SC 663, all of which are available at: http://judis.nic.in/supremecourt/chejudis.asp (last accessed 12 March 2018). In all of these cases, the basic structure doctrine was invoked to review the contents of the constitutional amendments challenged before the court. The last case in this respect is *Supreme Court Advocates Association v. Union of India,* by which the Ninety-Nineth Amendment (creating the so-called National Judicial Appointments Commission, NJAC) was held unconstitutional based on the basic structure doctrine on 13 November 2015.

43 *Kesavananda Bharati v. State of Kerala,* (1973) 4 SCC 225: AIR 1973 SC 146. (The paragraph numbers hereafter referred to are as seen in the *Kesavananda* decision, which can be found at: http://judis.nic.in/supremecourt/chejudis.asp) (last accessed 12 March 2018).

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Chief Justice Sikri, who delivered the opinion on behalf of the majority, considered first whether *Golaknath v. State of Punjab*[44] case was decided rightly. In the *Golaknath* case, the SCI ruled that Article 368 of the Constitution of India specifies only the procedure that constitutional amendment acts shall follow and satisfy. In other words, it was decided in that case that the power to amend the Constitution of India resides in Articles 245, 246, and 248 of the Constitution. As these three articles regulate the legislative process, the SCI held that constitutional amendments are passed through the ordinary legislative process. Therefore, the amending power was an ordinary legislative power; it was not a constituent power. The SCI further ruled that an amendment act is 'law' within the meaning of Clause 2 of Article 13, which reads as follows:

> The State shall not make any law which takes away or abridges the rights conferred by this Part [III] and *any law* made in contravention of this clause shall, to the extent of the contravention, be void.

Justice Sikri in *Kesevananda* considered that the SCI should decide on the nature of the power conferred on Parliament by Article 368. He first started with a literal interpretation of the terms 'power to amend', 'amend', or 'amendment – for which he documented all usages as seen in the Constitution of India to show in what sense the terms were used.[45] As a result of the assessment, Justice Sikri concluded, first, that Parliament has the power to amend the constitution, and it is the amending power. Secondly, he reached the conclusion that amendment acts or constitutional laws are *not* an equivalent of 'law' within the scope of Clause 2 Article 13.[46] The consequence is that "every provision is *prima facie* amendable...."[47] Accordingly, the amending power could be exercised by Parliament, even upon Part III (dealing with fundamental rights) by way of "reasonable abridgements of fundamental rights".[48] However, the majority in *Kesavananda* did not stop at this point.

Justice Sikri next moved to the *scope* of the amending power. For this, he employed a structural interpretation of the Constitution.[49] He made an extensive reference to comparative law and the case law of the commonwealth countries, such as Canada, Australia, and Ceylon (Sri Lanka), with a view to finding the implied or implicit limitations on the amending power in those jurisdictions[50]

44 *Golaknath v. State of Punjab, 1967 SCR (2) 762: 1967 AIR 1643* available at: http://judis.nic.in/supremecourt/chejudis.asp (last accessed 12 February 2018). The Supreme Court held in the *Golaknath* case that the First, Fourth and Seventeenth Amendments were unconstitutional. However, the court invoked the prospective overruling doctrine, thus the amendments remained in force.

45 S.P. Sathe, 'India: From Positivism to Structuralism', *in* J. Goldsworthy (Ed.), *Interpreting Constitutions, A Comparative Study*, Oxford, Oxford University Press 2007, pp. 215-265. *Kesavananda*, para(s). 64-88.

46 *Kesavananda*, para. 20.

47 *Ibid*., para. 77.

48 *Ibid*., para. 311.

49 *Ibid*., para. 92.

50 *Ibid*., paras. 227-273.

and came up with the idea that the Constitution of India has some essential features or it is built on a basic structure. Thus, the power to amend would be *ultra vires*, Justice Sikri went on, if it annihilates these essential features or the basic structure. Accordingly, Parliament does not have the power to *destroy* the basic structure as opposed to the claim raised by the Advocate General in the motion submitted in *Kesavananda* stating that Parliament could even "abrogate fundamental rights such as freedom of speech and expression, freedom to form associations and unions, and freedom or religion… that democracy can even be replaced and one-party rule established".[51]

Each Justice constituting the majority in *Kesavananda* believed that the basic structure of the Constitution is crystallized in the *Preamble*. However, they formulated its elements slightly differently.[52] Justice Sikri counted six features as the basic structure of the Constitution. These are as follows:

> (1) Supremacy of the Constitution; (2) Republican and Democratic form of Government; (3) Secular Character of the Constitution; (4) Separation of powers between the Legislature, the executive and the judiciary; (5) Federal character of the Constitution; [and] [6] the dignity and freedom of the individual.[53]

Relying on these arguments, Chief Justice Sikri together with six other justices further argued that according to newly inserted Article 31C, "the sky is the limit because it leaves to each State to adopt measures towards securing the principles specified in Clauses (b) and (c) of Article 39."[54] If this provision were allowed, then nothing could preclude state legislatures from merely inserting into any act the wording that 'this act is to give effect to directive principles of state as specified in clauses (b) and (c) of Article 39'. This way Article 31C would enable each state legislature to amend the constitution *indirectly* in the way they see fit.[55] Any law to be adopted in this manner could not be able to be called into question before any court as envisioned by Article 31C. In this sense, if a law abrogates or takes away fundamental rights, there would be no legal protection. This would be, however, contrary to what the Constitution intended to do under its basic structure. The result of Article 31C would render meaningless the protection of fundamental rights as laid down in Part III and mainly in Articles 14, 19, and 31. As the SCI put it, "(1) There is no equality… (2) There need not be any freedom of speech, (3) There need be no personal liberty which is covered by Article 19 (1) (b), and (4) The property will be at the mercy of the State. In other words, confiscation of property of an individual would be permissible."[56] Consequently, Article 31C was declared void.

51 *Ibid*., paras. 10, 309.
52 *Ibid*., Justices Shelat & Grover, para(s). 511-517; Justices Hegde & Mukherja, para(s). 681-700; Justice Jaganmohan, para(s). 1198; Justice Khanna, para. 1526.
53 *Ibid*. para(s). 316-317.
54 *Ibid*. para. 459.
55 *Ibid*. para. 462.
56 *Ibid*. para. 461.

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The second strategy of implicit limitation for reviewing contents of constitutional amendments involves natural law. The idea of natural law may be employed as it provides arguments and elements to account for ultra-legal criteria for validity of the law and legal system, at the top of which lies the Constitution.[57] This point is explicitly pointed out by George R. Wright: "at least some versions of natural law thinking hold that an inviolable 'higher law' restricts the substance of constitutional amendments."[58]

It is true that there is not one and unique natural law theory. Therefore, to put the basic claim of natural law very roughly, one can refer to Blackstone's classic definition:

> [t]his law of nature being coeval with mankind and dictated by God himself is of course *superior* in obligation to any other. It is binding over the whole globe, in all countries and at all times. *No human laws* are of any validity if contrary to this, and such of them as are valid derive their force and all their authority, mediately or immediately, from this original (emphasis added).[59]

Although the implications of some other contemporary natural lawyers' views can be addressed,[60] let me immediately move into its direct use by Walter Murphy with regard to the issue under consideration.

Walter F. Murphy explicitly endorses the natural law to account for unconstitutional constitutional amendments. He presents the following argument. In a constitution, there are some fundamental principles that go beyond the constitutional text. To this effect, he suggests a sort of ranking of constitutional norms,

57 For more on the relation between natural law and (unconstitutional) constitutional amendments, *see* Y. Roznai, 'The Theory and Practice of "Supra-Constitutional" Limits on Constitutional Amendments', *International and Comparative Law Quarterly*, Vol. 62, 2013, pp. 560-572.

58 G.R. Wright, 'Could a Constitutional Amendment Be Unconstitutional?', *Loyola University of Chicago Law Journal*, Vol. 22, 1990-1991, p. 756.

59 W. Blackstone, *The Commentaries on the Laws of England*, Vol. 1, 4th ed., adapted to the present state of the law by Robert Malcolm Kerr, London, John Murray, 1876, p. 23.

60 If one needs to invoke contemporary views of natural law to analyse the subject matter in question, two prominent representatives can be taken: Ronald Dworkin and Robert Alexy. According to Dworkin's theory, law is, in general, an interpretive practice, which inherently, thus inevitably, requires giving place to principles, which may be considered – when the cases, at least in hard cases, emerge – *above* positive legal rules. Namely, the principles stand above or prevail over legal rules and that legal rule can also be an act amending the constitution. The inference from this approach is that if a constitutional amendment is contrary to the principles, Dworkin conceives, then that amendment may be held unconstitutional. It should be noted, however, that whether Dworkin would agree with this conclusion is not clear. I just provide a possible, but not necessarily certain, inference from Dworkin's theory. For his concept of law, *see* R. Dworkin, 'The Model of Rules', *The University of Chicago Law Review*, Vol. 35, 1967, pp. 14-46; *Taking Rights Seriously*, Cambridge; Massachusetts, Harvard University Press, 1977; *Law's Empire*, Cambridge; Massachusetts, The Belknap Press of Harvard University Press, 1986. Robert Alexy's version of natural law may also be considered as an insightful candidate to analyse the issue of unconstitutional constitutional amendments. According to Alexy's version of natural law predominantly inspired from Radbruch's formula, any law, including *constitutional amendments*, shall not be counted as law so long as it is *extremely*, *unbearably*, or intolerably unjust. Particularly, *see,* R. Alexy, *The Argument from Injustice : A Reply to Legal Positivism,* Oxford, Clarendon Press, 2002.

or as he calls them constitutional values.[61] Murphy describes human dignity, regardless of whether it is incorporated in the text of the constitution or not – and this makes his view the one that fall within natural law – as the core value of constitutionalism, in general.[62] In his view, any constitutional amendment attempting to undermine this fundamental value may be held unconstitutional. Murphy also asserts that an already-existing provision of a constitution that is not fundamental might be declared null and void if it contravenes the fundamental values,[63] and this latter argument includes by itself any constitutional amendment.[64]

So far, I have considered the views and some courts' practices that accept the idea that constitutional amendments can be (held) unconstitutional. What about

61 From the point of view of legal theory, this is a sort of natural law that, as clearly stated by Mesmin Saint Hubert, makes reference to natural law through appealing to higher constitutional values or supra-constitutionality, M. Saint-Hubert, 'La Cour Supreme de l'Inde, garantie de la structure fondamentale de la constitution', *Revue internationale de droit comparé*, Vol. 52, 2000, pp. 631-632.

62 W.F. Murphy, 'An Ordering of Constitutional Values', *Southern California Law Review*, Vol. 53, 1979-1980, p. 758. (although offering primarily an approach to constitutional interpretation, Murphy illustrates that one of the main tasks of constitutional interpretation is to determine a set of jurisprudential values and principles from the constitutional document and rank them according to their importance for the political system). John Rawls raised a similar argument, yet from a totally different perspective. He touches upon and discusses, albeit hypothetically, the issue of unconstitutionality of amendments in one of his masterpieces, *Political Liberalism*. Rawls poses the following hypothetical question: What would happen if there were an amendment repealing the First Amendment? Rawls' answer is that such an amendment cannot be allowed, J. Rawls, *Political Liberalism*, New York, Columbia University Press (expanded ed.), 2005, pp. 238-239.

63 W.F. Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order*, Baltimore, MD: John Hopkins University Press, 2007, pp. 502-508.

64 Natural law is invoked by Justice Roderick O'Hanlon of the Irish High Court in one of the cases related to the issue under consideration. He invited the Supreme Court judges to turn to natural law in the case of Abortion Information Case. [1995] IESC 9, [1995] 1 IR 1. In this case, the validity of Art. 26 of the Information Bill Act and the thirteenth and fourteenth Constitutional Amendments granting rights to obtain information about abortion services abroad and right to travel for this purpose was challenged. Justice Roderick O'Hanlon claimed that the right to life of unborn, which is protected by the Irish Constitution under Art. 40.3.3, is above any positive law; thus, relying on this, he invited the Irish Supreme Court to annul those amendments. R.J. O'Hanlon, 'Natural Rights and the Irish Constitution', *Irish Law Times*, Vol. 11, 1993, p. 8. Connected with this, Walter Murphy claims that the interpreters of the Constitution in Ireland (and France and the United States) can refer to natural law or natural rights 'to judge the validity of constitutional changes', since the constitutions of these countries, in some way, embrace or make reference to natural law. W.F. Murphy, 'Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity', *in* S. Levinson (Ed.), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*, Princeton, Princeton University, 1995, p. 181. The counsel, in the case, took the same stance; however, the Supreme Court of Ireland rejected the claim. The decision of the Irish Supreme Court and the related part of the counsel's invocation of natural law can be found at: www.bailii.org/ie/cases/IESC/1995/9.html (last accessed 24 March 2018). For more on natural law concerning the Irish constitutional jurisprudence, *see* J. Jeffers, 'Dead or Alive?: The Fate of Natural Law in Irish Constitutional Jurisprudence', *Galway Student Law Review*, Vol. 2, 2003, pp. 1-16.

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the (contrary) view that rejects the substantive judicial review of constitutional amendments?

According to one of these views, the Venice Commission holds that there is no correlation between the existence of unamendable constitutional norms and judicial review of constitutional amendments. The former does not necessarily follow or require the latter.[65] In the Commission's view, the unconstitutionality of amendments is one thing; their annulment by a court is another. When the supporters of this view are asked, how then unamendable constitutional norms make sense, the Norwegian example is recalled. Article 112 of the Norwegian Constitution stipulates that a constitutional amendment "must never contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions, which do not alter the spirit of the Constitution". This example is invoked to prove that without judicial enforcement, any unamendable constitutional norms can make sense in a political realm; it can be a directive for the parliament. A reflection on this view at practice can be seen in France.

In the French scholarship, there are adherents to the view arguing that the FCC cannot carry out substantive judicial review over constitutional amendments, but there are also supporters of the opposite view. This split among the French scholarship was tested in an actual case brought before the FCC in 2003.[66] In 2003, the French Parliament amended the Constitution, the main aim of which was to decentralize the organization of the republic. The amendment contained, among others, a provision, which added the following proposition to Article 1 of the Constitution: "the organization of the state is decentralized." This provision was challenged before the FCC on the grounds that it was contrary to the republican form of the French State (Article 1), which is specified as unamendable by Article 89(5). The attempt to add the said decentralization-proposition was claimed to be unconstitutional.

In its decision, the FCC ruled that it had no competence to decide on the matter. Its competence is confined, the FCC held, to the strict textual reading of the Constitution;[67] more precisely, to Article 61, which specifies what kind of legislative acts can be reviewed, and constitutional amendment is not among them.[68] This decision has stimulated a scholarly debate, and it suffices to refer to the basic arguments of two scholars concerning it.[69]

65 Venice Commission, 2010, para. 225.

66 The issue is said to go back to the earlier decisions of the Constitutional Council, such as Décision, n° 20, 1962 DC and also the decision of the council with regard to the Maastricht Treaty in 1992. In the so-called Maastricht II decision, the Constitutional Council held that Art. 7, 16, 89(5) cannot be subjected to constitutional amendment. Yet, it maintained that the constituent power can abrogate, modify, or complete the nature of constitutional values in a form it deems appropriate, Décision, n° 92–312 DC du 02 Septembre 1992), [19].

67 One scholar said the Conseil Constitutionnel preferred a restrictive interpretation of Art. 61, read together with Art. 89(5). W. Zimmer, 'Jurisprudence du Conseil Constitutionnel- 1er janvier- 31 mars 2003', *Revue française de Droit constitutionnel*, Vol. 54, 2003, p. 383.

68 Conseil Constitutionnel, Décision n° 2003-469 DC (26 mars 2003).

69 For the views of scholars joining the discussion, *see* O. Gohin, 'La Réforme constitutionnelle de la décentralisation: épilogue et retour à la décision du Conseil Constitutionnel du 26 mars 2003' *Petites Affiches*, No. 113, 6 juin 2003, pp. 7-11.

Marthe Fatin-Rouge Stéfanini finds the decision to be, politically as well as legally, sensible. If it was decided otherwise, Stéfanini goes on, that would be contrary to the idea of democracy and the rule of law in France.[70] Contrary to this, Willy Zimmer argues: "it is quite improper to limit this guarantee [of Article 89(5)] to a prohibition of return to a monarchical government."[71] Similar to Walter Murphy, he maintains that the French Constitution contains various values, which are subject to be ranking, and the republican form of the French state is among the higher values of the French Constitution. Therefore, judicial review should be possible to see if a constitutional amendment attempts to undermine these values or not.[72]

D Conclusion

The Amendment Bill in the Immunity Case is obviously a practice of constitutional bad faith[73] or of constitutional dismemberment,[74] given that it is manifestly against the principle of equality, which is an essential component of constitutionalism in general and the rule of law in particular. The latter is also among the unamendable constitutional principles of the 1982 Turkish Constitution (Article 2). Therefore, the Immunity Amendment could have been very well considered unconstitutional based on the CCT's competent assumed by the Headscarf in 2008 and reinforced by 2010 Amendment Bill decisions. The decision of the CCT in the Immunity Case implies that the CCT will no longer conduct judicial review over contents of constitutional amendments. However, in a country like Turkey, where the substantive understanding of democracy (as well as procedural one) has had constant and serious structural problems, such an implication of the Immunity Case may bring about implausible consequences, which may lead to some detrimental outcomes to the political and legal order.

Based on the jurisdictions I have visited, it appears to be plausible to offer the following observations. In jurisdictions where the courts have reviewed the content of constitutional amendments and invalidated some of them, the practice of *democracy* seems to have some problems, in terms of either procedural or sub-

70 M.F.-R. Stéfanini, 'Jurisprudence du Conseil Constitutionnel- 1er janvier- 31 mars 2003', *Revue française de Droit constitutionnel*, Vol. 54, 2003, pp. 375-379.

71 Zimmer, 2003, p. 385.

72 As mentioned by a scholar, the disagreement in France also stems from the different understanding of *pouvouir constituant originaire* and *pouvouir constituant derivé*. P. Jan, 'L'immunité juridictionnelle des lois de révision constitutionnelle', *Petites Affiches*, No. 218, 31 octobre 2003, pp. 4-11.

73 D.E. Pozen, 'Constitutional Bad Faith', *Harvard Law Review*, Vol. 129, 2016, pp. 885-955. For an assessment in the same line on the Immunity Amendment, *see* K. Gözler, '1982 Anayasası Hâlâ Yürürlükte mi? Anayasasızlaştırma Üzerine Bir Deneme [Is the Constitution of 1982 Still in Force? An Essay on Deconstitutionalization]', available at: www.anayasa.gen.tr/anayasasizlastirma.htm (last accessed 17 April 2018).

74 R. Albert, 'Constitutional Amendment and Dismemberment', *The Yale Journal of International Law*, Vol. 43, No. 1, p. 27-28.

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stantial understanding of democracy or both, for example, in India and Turkey.[75] In jurisdictions where the courts have rejected to review contents of constitutional amendments (France) or in some others where the courts have reviewed contents of amendments but not declared them unconstitutional (Germany), it seems that no serious or grave problems in terms of substantive as well as procedural (institutional design) understanding of democracy occur, even though the practice of democracy may not be perfect, whatever that means. These remarks, of course, bear some reductionism, yet they are not completely irrelevant or out of context; suffice to check some democracy and the rule-of-law index developed by various nongovernmental organizations (NGOs) and/or institutions around the world.

The question of unconstitutionality of amendments in those jurisdictions, where democratic practice has rather firmly been settled, seems to be framed as a moral-political issue of justice or appropriateness of the amendment, and it is almost taken for granted that no such question of unconstitutionality of an amendment may arise. This holds true especially for France and maybe the United States, even though the latter was not specifically considered in this article.[76] This allows me to infer that the courts in more stably functioning democracies are rather reluctant to intervene in constitutional amendment practice and let it be decided by political actors.[77] The opposite of this conclusion seems to be supported by the empirical data, in that the courts in some jurisdictions with low-

75 The experience of some Latin American countries, like Brazil and Colombia and Hungary, can be probably added to this observation. They have some similarities with the jurisdictions I have considered in this article, especially with India's experience. On the experience of Brazil concerning judicial review of constitutional amendments, *see* C.H. Mendes, 'Judicial Review of Constitutional Amendments in the Brazilian Supreme Court', *Florida Journal of International Law*, Vol. 17, 2005, pp. 450-462; and of Colombia, *see* C. Bernal, 'Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine', *International Journal of Constitutional Law*, Vol. 11, 2013, pp. 339-357. Hungary can also be added to this list. On the Hungarian Supreme Court's case law, *see* Halmai, 2016, pp. 129-134.

76 Just to note that the majority of US scholarship as well as the US Supreme Court's case law affirm this observation. Particularly, *see* L.H. Tribe, 'A Constitution We Are Amending: In Defense of a Restrained Judicial Role', *Harvard Law Review*, Vol. 97, 1983, pp. 442-443. In his debate with Tribe, Walter Dellinger argues that a constitutional amendment may be subject to the judicial review, but only with regard to procedural requirements that constitutional amendments must meet. In other words, Dellinger also thinks that substantive review is not possible and plausible, W. Dellinger, 'The Legitimacy of Constitutional Change: Rethinking the Amendment Process', *Harvard Law Review*, Vol. 97, 1983, p. 389. Also *see* B.A. Ackerman, *We the People: Foundations,* Cambridge; Massachusetts, Belknap Press of Harvard University Press, 1991, p. 15, also pp. 319-322; R. Albert, 'Counterconstitutionalism', *Dalhouse Law Journal*, Vol. 31, 2008, pp. 47-48 (rejecting any unamendability, which includes those eternal constitutional rules as well as 'judicially-constructed doctrines', as unamendability undermines participatory democracy). For a rare example of the view that supports the substantive judicial review of constitutional amendments by courts in the United States, *see* M. Haddad, 'Substantive Content of Constitutional Amendments: Political Question or Justiciable Concern?', *The Wayne Law Review*, Vol. 42, 1995-1996, pp. 1685-1718.

77 I thank Vicente F. Benítez-Rojas for drawing my attention to this point. Colombia, Brazil, Hungary, Czech Republic can be added to this list.

demanding procedural requirements for amending the constitution (India, Turkey) appear to be more prone to uphold the theory of unconstitutional constitutional amendments developed under different names, concepts, and interpretive strategies.[78]

The foregoing observations bring me now to the main conclusions. For this conclusion, I am inspired by Jeremy Waldron's arguments, which he raised against the judicial review *qua* institution. Waldron determines four conditions or assumptions in making his case *against* judicial review. The first condition he addresses is that the society shall have well-functioning democratic institutions, which include a representative legislature elected by universal suffrage. The second is that the society shall have a healthy judicial system set up on a non-representative basis. The third one requires that most of the citizens and officials take the (individual and minority) rights seriously. Finally, regardless of the serious belief in rights, reasonable disagreement about rights may exist.[79]

The conclusion I draw is that to the extent that Jeremy Waldron's four assumptions or conditions hold true in a political system, courts may refrain from reviewing the contents of constitutional amendments. When there is a grave structural problem, at least in one of these conditions, the courts should take the problem seriously and respond in a way that democratic functioning of the system is established or restored, or at least further corrosion in the system is prevented, should a constitutional amendment undermine one of the core democratic values. This seems to be contradictory to the conclusion above-mentioned. Therefore, the following thoughts are necessary to underline.

Currently, Turkey has had some serious problems concerning all four conditions addressed by Waldron. Some are grave, especially concerning the second,[80]

78 For a view that correlates amendment mechanism with the type of democracy, *see* A. Lijphart, *The Patterns of Democracy*, Yale University Press, 1999, pp. 216-231. Lijphart considers the rigidity and flexibility of the amendment mechanisms and judicial review as variables to correlate them with his two models of democracy, *i.e.*, consensus and majoritarian.

79 J. Waldron, 'The Core of the Case against Judicial Review', *The Yale Law Journal*, 115, 2005-2006, p. 1360.

80 According to a report of the Parliamentary Assembly of the Council of Europe, Turkey's democracy has some serious problems with regard to many aspects, including freedom of expression and media, weak system of check and balances, erosion of the rule of law, suspicion about the independence of judiciary, etc., *see* I. Godskesen & N. Vučković, 'The Functioning of Democratic Institutions in Turkey', 6 June 2016, available at: https://www.ecoi.net/file_upload/1226_1465286865_document.pdf (last accessed 12 April 2018). International Commission of Jurist points out that '[s]ince 2014, legislative and practical measures further eroding the already compromised independence of judges, prosecutors and lawyers have made the rule of law increasingly fragile and unreliable', *Turkey: the Judicial System in Peril – A Briefing Paper*, 2016, available at: https://www.icj.org/wp-content/uploads/2016/07/Turkey-Judiciary-in-Peril-Publications-Reports-Fact-Findings-Mission-Reports-2016-ENG.pdf (last accessed 16 February, 2018). This is probably why European Network of Councils for the Judiciary (ENCJ) decided, on 8 December 2016, to suspend the observer status of the High Council for Judges and Prosecutors of Turkey (HSYK) as the ENCJ found the HSYK to be not independent any more, available at: https://www.encj.eu/index.php (last accessed 20 February 2018). Furthermore, while Turkey's overall ranking of the rule of law index developed by World Justice Project was 59 in 2014 (out of 99 countries), it has dramatically declined in the following two years: 80 in 2015 (out of 102 countries), 99 in 2016 (out of 113 countries), and 101 in 2017-2018 index (out of 113 countries).

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third, and fourth conditions,[81] while some other is not, concerning the first condition.[82] Therefore, the CCT has an important task to consider the democratic functioning of the system, which is, indeed, what the CCT (and indeed any constitutional court) should stand for. In this connection, I argue that the CCT has a legally valid mechanism at its disposal to review the contents of constitutional amendments.[83] This mechanism, i.e. the review of form rather than content, is legally possible and, in fact, the only available tool for the CCT to conduct judicial review of constitutional amendments.

It should be noted, though, that the margin of legality of this mechanism is very narrow; that is, it is not straightforward or without disagreement; and therefore, its legitimacy threshold is higher, even more so, when one considers the CCT's earlier distorted and ill-constructed uses of this mechanism, especially in the Headscarf Case. For example, the CCT may have employed the constitutional-conforming interpretation, with which the court is familiar,[84] regarding the Headscarf Case; it could, thus, have upheld the amendment under review then as constitutional. Therefore, legitimacy and the survival of the mechanism depend strictly on its fine-tuned application.

Since arguing that the CCT has a legally available tool to carry out judicial review over contents of constitutional amendments does not immediately bring legitimacy with itself, the CCT should restrictively employ it. More precisely, it should be limited to protection of the fundamental rights and freedoms (including its essential institutional design and requirements, like the independence of judiciary), in the future by means of careful and well-crafted arguments. The justifications and reasoning of the CCT will play a crucial role in getting acceptance and deference by other state institutions as well as by the public. In this respect, the case law and the reasoning and justifications of the BVG of Germany and the SCI may be taken as a reference and the following considerations should be taken into account.

The CCT should vigilantly take into account the drafting as well as the deliberation process of an amendment bill. If an amendment is an outcome of reconci-

81 The society in Turkey has become extremely polarized, and in an '…unprecedented level…', E. Fuat Keyman, 'The Ak Party: Dominant Party, New Turkey and Polarization', *Insight Turkey*, Vol. 16, 2014, pp. 29-30. This polarization becomes very pernicious, disagreement about many things, including rights and freedoms, is getting not reasonable any longer, Riada Asimovic Akyol, 'Turkey's pervasive political and social polarisation', *Al-Jazeera* available at: www.aljazeera.com/indepth/opinion/2016/02/turkey-pervasive-political-social-polarisation-160207140647531.html (last accessed 21 March 2018).

82 *Republic of Turkey – Early Parliamentary Elections 1 November 2015- OSCE/ODIHR Limited Election Observation Mission Final Report,* 28 January 2016, available at: www.osce.org/odihr/elections/turkey/186031 (last accessed 15 March 2018).

83 For a similar view, *see* A. Arato, 'Democratic Constitution-making and Unfreezing the Turkish Process', *Philosophy & Social Criticism*, Vol. 36, 2010, p. 481.

84 In another case dealing with the headscarf controversy in Turkey, the constitutional court had held in 1991 that a contested (ordinary) legal provision, which aimed to allow wearing headscarves at the higher education institutions, was constitutional, but it did not allow wearing headscarves. *See* 1990/36 E., 1991/8 K., published in the Official Gazette on 31 July 1991. The rule in question was formulated as the following: 'Choice of dress shall be free in institutions of higher education, provided that it does not contravene the laws in force.'

liation or a compromise among political parties at the Parliament, this may be a caution for the CCT not to conduct a review of the content of such an amendment. A free public participation may also be a factor for the CCT to consider in not reviewing the content of an amendment, in that as much as the public opinion is heard and taken into account during the deliberation process, the CCT may refrain from reviewing the content. These are required, but not sufficient. The more important aspect of whether or not the CCT can review the content of an amendment should be to see if the amendment undermines the fundamental rights and freedoms and core values of the constitutionalism in general, such as separation of powers. If they are under a grave attack or seriously undermined by the amendment, judicial review may be carried out. Unfortunately, the protection of fundamental rights is not part of the constitutional identity of the 1982 Constitution, but to the extent the CCT implements and put them into practice, it can contribute them to become as such.[85] Once the level of democracy France has reached is attained in Turkey, the CCT may follow the FCC concerning the issue.

85 Z. Arslan, 'Türkiye'nin Anayasal Kimliği ve 'Yeni Anayasa' Arayışı [The Constitutional Identity of Turkey and the Quest for New Constitution]', in A.R. Çoban, S. Gülener, M. Sağlam, & H. Ekinci, (Eds.), *Haşim Kılıç'a Armağan*, Vol. 1, Ankara, Anayasa Mahkemesi Yay., 2015, pp. 285-302.

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