



*Kemal Gözler*

# JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS

A Comparative Study



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EKIN PRESS



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Uludağ University, Turkey

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# ABBREVIATIONS

## I. ABBREVIATIONS OF REPORTERS AND CASE CITATION FORMATS

**A.I.R.:** ALL INDIA REPORTER.

*Case citation format:* A.I.R. 1980 S.C., 1789. “A.I.R.” is the All India Reporter, “1980” is the year of judgment, “S.C.” is the Supreme Court of India, and “1789” is the page number. *Other abbreviations:* S.C.: Supreme Court (India). S.C.C.: Supreme Court Cases (India). S.C.R.: Supreme Court Reports (India)

**AMKD:** ANAYASA MAHKEMESİ KARARLAR DERGİSİ [REPORTS OF THE DECISIONS OF THE CONSTITUTIONAL COURT (OF TURKEY)].

*Case citation format:* 9 AMKD 416, at 449 (1971). “AMKD” is the abbreviation of the reporter, “9” is the volume number of the reporter, “416” is the page number where the decision begins; “449” is the exact page number where the citation occurs; 1971 is the year in which the Court rendered its decision.

**BVerfGE:** SAMMLUNG DER ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [FEDERAL CONSTITUTIONAL COURT REPORTS] (Germany).

*Case citation format:* BVerfGE 94, 12 (1990). “BVerfGE” is the abbreviation of the reporter, “94” the volume number of the reporter, “12” is the page number and 1990 is the year of the reporter.

CC: CONSEIL CONSTITUTIONNEL (Constitutional Council) (France).

*Case citation format:* CC decision no. 2003-469 DC, Mar. 26, 2003, Rec. 293 (2003). “CC” is the Conseil Constitutionnel; “no. 2003-469” is the case number; “DC” is the abbreviation of “Déclaration de conformité”, “Rec” is the abbreviation of RECUEIL DES DÉCISIONS DU CONSEIL CONSTITUTIONNEL [CONSTITUTIONAL COUNCIL REPORTS]. “293” is the page number and 2003 is the year of the reporter.

I.R.: IRISH REPORTS.

*Case citation format:* [1935] 170 I.R. 198 (Ir.). “1935” is the year of decision; “170” is the volume number of the reporter, 198 is the page number. *Neutral citation format:* [1995] IESC 9. “IESC” is the abbreviation for the Supreme Court of Ireland, and “9” is the case number in the neutral citation system which is used for the cases often available on BAILLI web database (<http://www.bailii.org/>).

VfSlg: SAMMLUNG DER ERKENNTNISSE UND BESCHLÜSSE DES VERFASSUNGSGERICHTSHOFES, [REPORTS OF THE DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT (OF AUSTRIA)].

*Case citation format:* VfSlg, No. 2455. “VfSlg” is the abbreviation of the reporter and “2455” is the case number.

U.S.: UNITED STATES REPORTS.

*Case citation format:* 253 U.S. 350, at 386 (1920). “253” is the volume number of the reporter. “U.S.” is the abbreviation of the reporter, “350” is the first page of the opinion, and “386” is the exact page number where the citation is found and “1920” indicates the year in which the case was decided.

## II. ABBREVIATIONS OF PERIODICALS

Titles of the periodicals are abbreviated according to the *Bluebook* rules. The periodicals in languages other than English are given in full, not abbreviated.

AM. J. INT'L L.: American Journal of International Law

AM. POL. SCI. REV.: American Political Science Review

CAL. L. REV. : California Law Review

COLUM. L. REV.: Columbia Law Review

FORDHAM L. REV.: Fordham Law Review

HARV. L. REV.: Harvard Law Review

INT'L J. REFUGEE L.: International Journal of Refugee Law

INT'L & COMP. L. Q.: International and Comparative Law Quarterly

INT'L J. CONST. L (I.CON): International Journal of Constitutional Law

IOWA L. REV.: Iowa Law Review

J. CIVIL LIBERTIES: Journal of Civil Liberties

MICH. J. INT'L L.: Michigan Law Review

POL. SCI. Q.: Political Science Quarterly

VA. L. REV.: Virginia Law Review

## XII JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS

## INTRODUCTION

The main question dealt with in this monograph is the following: Can constitutional amendments be reviewed by constitutional courts? This question is, obviously, a question of competence because if constitutional courts have competence to review constitutional amendments, this review is possible; and if these courts do not have this competence, it is not. When such review is possible, the question is to what extent can constitutional courts review the constitutionality of constitutional amendments. Can constitutional courts review the substance of constitutional amendments besides their formal and procedural regularity? Thus, three questions arise: (1) Do constitutional courts have competence to review constitutional amendments? (2) Can constitutional courts review the formal regularity of constitutional amendments? (3) Can constitutional courts review the substance of constitutional amendments? These three questions will form the three parts of this monograph.

Before passing to the first question, in order to restrict the subject matter, it seems proper to note that this article does not discuss the question of whether the federal constitutional courts can review the constitutionality of constitutional amendments made to state constitutions because, without doubt, in a federal

system, state constitutional amendments must be conform with the federal constitution.<sup>1</sup> The question discussed in this article consists of whether the constitutional courts can review the constitutionality of constitutional amendments in unitary states or amendments made to the federal constitution in federal states.

The present monograph covers the state of the legislation and case law up to the end of April, 2007.

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<sup>1</sup> In many federal states, federal constitutional courts have reviewed the constitutionality of amendments made to state constitutions and have invalidated those which are contrary to the federal constitution. For example, the Austrian Federal Constitutional Court, in its decision of June 28, 2001, number G 103/00, ruled that Article 33(6) of the Constitution of the Land of Vorarlberg was incompatible with the Federal Constitution (An English précis of this decision is available in CODICES database of Venice Commission, at <http://codices.coe.int> (AUT-2001-2-004)). Likewise, the United States Supreme Court, in *Hawke v. Smith*, held that the provision of the Ohio Constitution requiring a referendum on the ratification of amendments to the Federal Constitution was unconstitutional (253 U.S. 221, at 230-231 (1920)).

# **Chapter 1**

## **DO CONSTITUTIONAL COURTS HAVE COMPETENCE TO REVIEW CONSTITUTIONAL AMENDMENTS?**

To answer the question of whether the constitutional courts have competence to rule on the constitutionality of constitutional amendments in a given country, one should examine this country's constitution in the first place. If there is a provision in the constitution regarding this competence, this question will be answered in accordance with this provision. Nonetheless, a constitution may be silent on this point. One must, therefore, distinguish between countries where there are and there are not constitutional provisions concerning the competence of the constitutional court to review constitutional amendments.

### **I. IF THERE IS A CONSTITUTIONAL PROVISION CONCERNING THE QUESTION OF COMPETENCE**

If there is a provision in a country's constitution relating to the competence of constitutional court for the review of constitutional amendments, the question of whether the judicial review of the constitutional amendment is or is not possible may be answered according to this provision. If the constitution pro-

vides that the constitutional court can review the constitutionality of constitutional amendments, such a review would be possible. On the other hand, if the constitution expressly prohibits the judicial review of constitutional amendments, it would not be possible. The first hypothesis is illustrated by the 1961 and 1982 Turkish, 1980 Chilean Constitution and 1991 Romanian Constitution. The second hypothesis is illustrated by the 1950 Indian Constitution, as amended in 1976.

#### A. THE CONSTITUTIONS EMPOWERING THE CONSTITUTIONAL COURTS TO REVIEW CONSTITUTIONAL AMENDMENTS

The 1961 and 1982 Turkish Constitutions, 1980 Chilean Constitution and 1991 Romanian Constitutions expressly vest the constitutional court with the competence to review the constitutionality of constitutional amendments.

##### *1. The Turkish Constitutions of 1961 and 1982*

Article 147 of the 1961 Turkish Constitution, as amended in 1971, stipulated that the Turkish Constitutional Court can review the formal regularity of constitutional amendments.<sup>1</sup> From 1971 to 1980, the Turkish Constitutional Court rendered five decisions reviewing the constitutionality of constitutional amendments. These decisions are discussed below.<sup>2</sup>

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<sup>1</sup> ANAYASA [Constitution] art. 147(1) (1961, amended 1971) (Turkey). For an the English translation of the 1961 Turkish Constitution, as amended in 1971, see THE TURKISH CONSTITUTION AS AMENDED (Mustafa Gerçeker, Erhan Yaşar and Orhan Tung trans., Directorate General of Press and Information 1978), available at <http://www.anayasa.gen.tr/1961constitution-amended.pdf> (last visited Apr. 3, 2006).

<sup>2</sup> See *infra* pp. 42-47.

The Turkish Constitution of 1982 also specifically regulates the judicial review of constitutional amendments. Article 148(1) of the Constitution explicitly empowers the Constitutional Court to review the constitutionality of constitutional amendments; however, it limits this review to form.<sup>3</sup> Under the 1982 Constitution, the Turkish Constitutional Court has only had one occasion to rule on the constitutionality of constitutional amendments under the 1982 Constitution.<sup>4</sup>

### 2. *The Chilean Constitution of 1980*

Under Article 82(2) of the 1980 Chilean Constitution, the Chilean Constitutional Court has the power “to resolve on questions regarding constitutionality which might arise during the processing... of constitutional amendment... submitted to the approval of Congress.”<sup>5</sup> Therefore in Chile, the Constitutional Court can review the constitutionality of constitutional amendments submitted to Congress for approval, during the process. The author is unaware of any decisions of the Chilean Constitutional Court concerning the constitutionality of constitutional amendments.

### 3. *The Romanian Constitution of 1991*

The Constitution of Romania established a preventive (*a priori*) review of the constitutionality of constitutional amend-

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<sup>3</sup> ANAYASA [Constitution] art. 148(2) (1982) (Turkey). An English translation of the 1982 Turkish Constitution is available at <http://www.byegm.gov.tr/mevzuat/anayasa/anayasa-ing.htm> (last visited Mar. 5, 2007).

<sup>4</sup> See *infra* pp. 47-48.

<sup>5</sup> CONSTITUCIÓN [CONST.] [Constitution] art. 82(2) (1980) (Chile). An English translation of Chilean Constitution of 1982 is available at <http://confinder.richmond.edu/admin/docs/Chile.pdf> (last updated Apr. 19, 2005).

ments. Article 144(a), in its original form in the Constitution of 1991, (now Article 146(a) of the 2003 version of the Constitution<sup>6</sup>) empowers the Constitutional Court “to adjudicate... *as ex officio*, on initiatives to revise the Constitution.” Before Parliament begins the procedure to enact a constitutional amendment, the project of the constitutional amendment must be submitted to the Constitutional Court, which will rule on its constitutionality within 10 days. The initiative to revise the Constitution may be deposited to the Parliament only with the decision of the Constitutional Court.<sup>7</sup>

The Romanian Constitutional Court reviewed *ex officio* the constitutionality of the initiatives for the revision of the Constitution in three cases in 1996, 2000, and 2003.<sup>8</sup> The first two initiatives were halted from continuing their legislative course because they failed to meet the constitutional requirements prescribed for a revision of the Constitution.<sup>9</sup> The constitutionality of the third legislative proposal was examined by the Constitutional Court in 2003. The Constitutional Court, in its decision

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<sup>6</sup> The Constitution of Romania of 1991 was amended and republished, in 2003, with updated denominations and a new number sequence of the text. For the English translation of both texts, *see* CODICES database of Venice Commission, at <http://codices.coe.int>; *select* Constitutions > English > Europe > Romania (last visited Mar. 23, 2007).

<sup>7</sup> Gheorge Iancu, Doina Suliman and Monica Ionescu, *Rapport de la Cour constitutionnelle de Roumanie [Report of the Constitutional Court of Romania]*, 2ème Congrès de l’ACCPUF [Proceedings of the 2<sup>nd</sup> Symposium of ACCPUF], Libreville, September 14-15, 2000), [http://www.accpuf.org/congres2/II-RAPPO/rapport\\_rom.pdf](http://www.accpuf.org/congres2/II-RAPPO/rapport_rom.pdf) (last visited Mar. 6, 2007).

<sup>8</sup> Nicalae Popa, *The Constitutional Court of Romania, Twelve Years of Activity: 1992-2004—Evolutions over the Last Three Years*, 7 THE CONSTITUTIONAL COURT’S BULLETIN (May 2004), available at <http://www.ccr.ro/default.aspx?page=publications/buletin/7/popa> (last visited Mar. 6, 2007).

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

No. 148, of April 16, 2003, declared certain provisions of this proposal unconstitutional on the ground that they transcended the limits on constitutional amendments as provided by Article 148 (2)<sup>10</sup> of the 1991 Romanian Constitution.<sup>11</sup> Later, Parliament debated and approved the text of the proposal which was modified according to decision of the Constitutional Court.<sup>12</sup> But after Parliament's approval, the constitutionality of the constitutional amendment was challenged before the Constitutional Court, by way of an objection of unconstitutionality. The Court, in the Decision No. 686 of September 30, 2003, rejected this objection on the ground that it does not have competence to review the law of constitutional amendments after the approval by the Parliament because the Constitutional Court has jurisdiction to exercise only a preventive (*a priori*) review on the initiative for constitutional amendments.<sup>13</sup>

Concerning Romania, it can be concluded that the judicial review of the constitutional amendments is possible, but only in a framework of an *a priori* review of the initiatives for constitutional amendments; not an *a posteriori* review of the enacted constitutional amendments.

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<sup>10</sup> Art. 148(2) stipulates as follows: "Likewise, no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms, or the safeguards thereof" (CONST. art.148(2) (2001) (Romania) See *supra* note 6)

<sup>11</sup> Romanian Constitutional Court, Decision No. 148 of April 16, 2003, on the issue of constitutionality of the legislative proposal for the revision of the Constitution of Romania, OFFICIAL GAZETTE OF ROMANIA, May 12, 2003, No. 317. The English translation of this decision is available at the website of the Romanian Constitutional Court at [http://www.ccr.ro/decisions/pdf/en/2003/D148\\_03.pdf](http://www.ccr.ro/decisions/pdf/en/2003/D148_03.pdf) (last visited Mar. 4, 2007).

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

<sup>13</sup> Popa, *supra* note 9.

**B. THE CONSTITUTION EXPRESSLY PROHIBITING THE  
REVIEW OF THE CONSTITUTIONAL AMENDMENTS:  
THE 1950 INDIAN CONSTITUTION (AS AMENDED 1976)**

If the constitution expressly prohibits the judicial review of constitutional amendments, this review, of course, would not be possible. This hypothesis is illustrated by the 1950 Indian Constitution as amended in 1976.

Clause 4 of Article 368 of the 1950 Indian Constitution, which was added by the 42<sup>nd</sup> Amendment in 1976, stipulated that “no amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article... shall be called in question in any court on any ground.”<sup>14</sup> Therefore in India, as of 1976, the Supreme Court of India was precluded from reviewing the constitutionality of constitutional amendments. There is no doubt on this issue because clause 4 of Article 368 of the Indian Constitution explicitly prohibits the judicial review of constitutional amendments. Moreover, clause 5 of the same Article states that “there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this Article.” This clause also provides that constitutional amendments cannot be judicially reviewed because the Indian Constitution does not impose any limitations on the power of the Indian Parliament to amend the constitution.

In the *Minerva Mills Ltd. v. Union of India* case, however, the Supreme Court of India reviewed the 42<sup>nd</sup> Amendment of the Indian Constitution and declared that this amendment was

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<sup>14</sup> INDIA CONST. art. 368 § 4: amended by the Constitution (Forty-second Amendment) Act, 1976, available at <http://lawmin.nic.in/coi.htm> (last visited Mar. 18, 2007).

unconstitutional on the ground that it violated the “basic structure of the Constitution.”<sup>15</sup>

The opinion of the Court in *Minerva Mills* is highly debatable because the Supreme Court of India does not have jurisdiction to rule on the constitutionality of constitutional amendments, and it is clear that the Court used a competence it does not possess. The Supreme Court usurped the power to amend the Constitution as this power was solely conferred to Parliament by way of Article 368 of the Constitution. Additionally, as it will be explained below,<sup>16</sup> the concept “basic structure of the Constitution” does not have a textual basis since it is not defined in the Constitution; thus it is a vague concept which may be defined differently as illustrated in the *Kesavananda Bharati* case which will be reviewed below.<sup>17</sup>

## II. IF THERE IS NO CONSTITUTIONAL PROVISION CONCERNING THE QUESTION OF COMPETENCE

As noted above, a constitution may be silent as to the judicial review of the constitutionality of constitutional amendments. Apart from the Turkish, Chilean, Indian and Romanian Constitutions, the other constitutions researched for this article did not contain a provision providing for the review of the con-

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<sup>15</sup> *Minerva Mills Ltd. v. Union of India*, A.I.R. 1980 S.C., 1789, 1981, available at <http://judis.nic.in/supremecourt/qrydisp.asp?tfnm=4488> (last visited Mar. 7, 2007). For comments on this judgment, see Anuranjan Sethi, *Basic Structure Doctrine: Some Reflections*, <http://ssrn.com/abstract=835165>, p. 11-13 (last visited Mar. 4, 2007); Rory O’Connell, *Guardians of the Constitution: Unconstitutional Constitutional Norms*, 4 J. CIVIL LIBERTIES 48, 72-73 (1999); S. P. SATHE, JUDICIAL ACTIVISM IN INDIA 87 (Oxford University Press 2002).

<sup>16</sup> See *infra* pp. 93-95.

<sup>17</sup> See *infra* pp. 91-93.

stitutionality of constitutional amendments. For instance, the Austrian Constitution of 1920, the French Constitution of 1958, the German Basic Law of 1949, the Hungarian Constitution of 1949, the Indian Constitution of 1950 (before 1976), the Irish Constitution of 1937, the Slovenian Constitution of 1991, the Turkish Constitution of 1961 (before 1971), and the United States Constitution does not regulate the issue of whether, in these countries, constitutional courts or supreme courts have the jurisdiction to review the constitutionality of constitutional amendments.

When the constitution is silent on the question of the judicial review of constitutional amendments, in order to answer this question, it is necessary to make a division between the American and European models of judicial review.<sup>18</sup>

#### A. THE COMPETENCE OF COURTS TO RULE ON CONSTITUTIONAL AMENDMENTS UNDER THE AMERICAN MODEL OF JUDICIAL REVIEW

Under the American model of judicial review, all courts have jurisdiction to examine the constitutionality of legal acts and norms in the course of deciding legal cases and controversies. In countries where there is an American model of judicial review, the jurisdiction of the courts, and in the last resort the

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<sup>18</sup> For a comparison on the differences of these two models of judicial review, see Louis Favoreu, *Constitutional Review in Europe*, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 38 at 40-42 (Louis Henkin and Albert J. Rosenthal eds., Columbia University Press 1990). The same division is made by Mauro Cappelletti in terms of “centralized” and “decentralized judicial review.” See Mauro Cappelletti, *Judicial Review in Comparative Perspective*, 58 CAL. L. REV. 1017 (1970).

supreme court, to review the constitutionality of constitutional amendments can be easily established, because in a legal case before the courts and the supreme court, the constitutionality of a constitutional amendment can be challenged by the parties claiming that this amendment is enacted contrary to the procedure of constitutional amendment, or that its substance violates the limitations imposing on constitutional amendments. In such a case, the fact that the courts or a supreme court examine this claim means that they review the constitutionality of this amendment. Therefore, under the American model of judicial review, the constitutionality of constitutional amendments may be reviewed by the courts, even if the constitution does not expressly vest the courts with this competence because, under such a model, the courts do not need to receive a special competence for this; under this system, every court has the power to examine the admissibility of the grounds invoked by the parties in the course of legal proceedings.

Indeed, in the countries following the American model of judicial review, the constitutionality of constitutional amendments was examined by courts in several cases. For example, in the cases of *Hollingsworth v. Virginia*, *National Prohibition, Dillon v. Gloss* and *United States v. Sprague* before the United States Supreme Court;<sup>19</sup> in the cases of *State (Ryan) v. Lennon* and *Abortion Information* before the Supreme Court of Ireland;<sup>20</sup> and in the cases of *Golaknath v. State of Punjab, Kesavananda Bharati v. State of Kerala, Indira Nehru Gandhi v. Raj Narain, Minerva Mills Ltd. v. Union of India*, and *Waman Rao v. Union of India* before the Supreme Court of India,<sup>21</sup> it is

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<sup>19</sup> See *infra* pp. 28-34.

<sup>20</sup> See *infra* pp. 82-83.

<sup>21</sup> See *infra* pp. 88-94.

claimed that different constitutional amendments are unconstitutional. The United States and Irish Supreme Courts rejected these claims and upheld the validity of attacked constitutional amendments, but the Indian Supreme Court, in some cases, accepted these claims, and declared unconstitutional of some constitutional amendments. The acceptance or rejection of these claims implies a judicial review of constitutional amendments. These cases will be examined later.<sup>22</sup>

#### B. THE COMPETENCE OF CONSTITUTIONAL COURTS TO RULE ON CONSTITUTIONAL AMENDMENTS UNDER THE EUROPEAN MODEL OF JUDICIAL REVIEW

Under the European model of judicial review, only a specialized court (called generally “constitutional court”) has jurisdiction to adjudicate the constitutionality of laws. In the countries where there is a European model of judicial review, the competence of the constitutional courts to review the constitutionality of constitutional amendments must explicitly emanate from a constitutional provision. In other words, even if the constitution does not expressly prohibit the judicial review of constitutional amendments, this review is not possible if there is not a constitutional provision expressly vesting the constitutional court with the competence to review constitutional amendments, because under the European model, being a specialized court, the constitutional court does not have a “general jurisdiction”, but only a “limited and special jurisdiction.” In other words, under this model, constitutional courts do not have jurisdiction to review all legal norms and acts,<sup>23</sup> but only those for

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<sup>22</sup> See *infra* pp. 28-34, 78-97.

<sup>23</sup> For example, constitutions, laws, codes, statutes, acts, bills, edicts, legislation, enactments, treaties, conventions, agreements, charters, pacts, de-

which the constitution explicitly give them the competence to review. Consequently, under this model, in order to have competence, a constitutional court should be expressly vested with this competence by the constitution. If the constitution is silent on the constitutional court's competence to review constitutional amendments, it means that the constitutional court does not have competence to rule on the constitutionality of the constitutional amendments.

In order to support this conclusion, the maxim *Expressio unius est exclusio alterius*<sup>24</sup> may be invoked. According to this canon of interpretation, the fact that the constitutional provision determining the competence of the constitutional court expressly enumerated legal acts, such as laws, decrees having force of law, which are subjected to the review of constitutional court means that the legal acts, such as constitutional amendments, which are not enumerated in this constitutional provision are not subjected to this review. If the constituent power wanted to vest the constitutional court with the competence to review the constitutionality, not only of laws, but also constitutional amendments, it could do it expressly. The fact that it does not means that it did not want to vest the constitutional court with such competence.

This conclusion is confirmed by the case-law of the French Constitutional Council and the Hungarian and Slovenian Constitutional Courts.

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crees, decrees having force of law, ordinances, bylaws, regulations, rules, rulings, decisions, verdicts, orders, directives, circulars, measures, principles, guidelines, instructions, standards, statements, announcements, proclamations, pronouncements, declarations, settlements, resolutions, etc.

<sup>24</sup> Express mention of one thing implies the exclusion of another.

### *1. French Constitutional Council*

The French Constitutional Council, in its decision of November 6, 1962, No. 62-20 DC, ruled that it did not have the jurisdiction to review the constitutional amendments adopted by way of referendum.<sup>25</sup> Likewise, the French Constitutional Council, in a decision dated March 26, 2003, No. 2003-469 DC, declared that it did not have the jurisdiction to decide on the constitutional amendments adopted by way of Parliament.<sup>26</sup> In the last case, several articles in the 1958 Constitution were amended by the Constitutional Law on Decentralized Organization of the Republic.<sup>27</sup> This Constitutional Law was referred to the Constitutional Council by more than 60 senators on the

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<sup>25</sup> CONSEIL CONSTITUTIONNEL [CC] (Constitutional Council) decision no. 1962-20DC, November 6, 1962, RECUEIL DES DECISIONS DU CONSEIL CONSTITUTIONNEL [hereinafter REC.] [CONSTITUTIONAL COUNCIL REPORTS] 27 (1962). The original French text is available at <http://www.conseil-constitutionnel.fr/decision/1962/6220dc.htm> (last visited Mar. 5, 2007). An English translation can be found in *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* 97-98 (Norman Dorsen *et al.*, eds., Thomson West 2003).

<sup>26</sup> CONSEIL CONSTITUTIONNEL [CC] (Constitutional Council) decision no. 2003-469 DC, Mar. 26, 2003, RECUEIL DES DECISIONS DU CONSEIL CONSTITUTIONNEL [REC.] [CONSTITUTIONAL COUNCIL REPORTS] 293 (2003). The original French text is available at <http://www.conseil-constitutionnel.fr/decision/2003/2003469/2003469dc.htm> (last visited Mar. 5, 2007). An English précis of this decision is available in CODICES database of Venice Commission, at <http://codices.coe.int> (FRA-2003-1-004).

<sup>27</sup> Law No. 2003/276 of March 28, 2003, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF THE FRENCH REPUBLIC], Mar. 29, 2003, p. 5570. The original French text is available at <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=JUSX0200146L> (last visited Feb. 20, 2007). For an English analysis of this Constitutional Amendment, see Xavier Philippe, *France: The Amendment of the French Constitution "on the Decentralized Organization of the Republic,"* 2 INT'L J. CONST. L. (I.CON) 691 (2004).

ground that it was contrary to the Constitution with respect to its form and substance.<sup>28</sup>

After noting that its jurisdiction is strictly defined by the Constitution and it is unable to rule on cases, other than those expressly specified by the provisions of Constitution, the Constitutional Council ruled that

Article 61 of the Constitution vests the Constitutional Council with the power to review the constitutionality of institutional acts and ordinary laws when they are referred to in the Constitutional Council under the conditions laid down by this Article. The Constitutional Council did not receive, neither from Article 61, Article 89, nor from another Article in the Constitution, the jurisdiction to rule on a revision of the Constitution.<sup>29</sup>

As noted by the Constitutional Council, in Article 61, or other articles of the Constitution, there is not a provision empowering the Constitutional Council to review the “constitutional amendments”, or more precisely “constitutional laws” (*lois constitutionnelles*). Article 61 vests Constitutional Council with the authority to review the constitutionality of “laws” (*lois*), but this Article does not even mention the term “constitutional laws” (*lois constitutionnelles*). Because the Constitutional Council based its conclusion on a strict interpretation of Article 61 of the 1958 Constitution, it is easy to understand why the Constitutional Council reached the conclusion that it did not have proper jurisdiction to rule on constitutional amendments.

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<sup>28</sup> See the original French text of the grounds of applicants, *available at* <http://www.conseil-constitutionnel.fr/decision/2003/2003469/saisine.htm> (last visited Feb. 21, 2007).

<sup>29</sup> CONSEIL CONSTITUTIONNEL [CC] (Constitutional Council) decision No. 2003-469DC, Mar. 26, 2003, *supra* note 27 (The quotation above is the author’s own translation from the original French text).

## 2. Hungarian Constitutional Court

The constitutionality of the Constitutional Amendment adopted on October 14, 1997 was challenged in a case No. 1260/B/1997 before the Hungarian Constitutional Court. The petitioner argued that this Amendment is unconstitutional because it violated the principles of sovereignty and certainty of law as protected by Article 2 of the Hungarian Constitution. The Constitutional Court first examined the question of whether it has jurisdiction to rule on constitutional amendments. After having observed that Article 32/A of the Hungarian Constitution<sup>30</sup> and Article 1 of Act XXXII of 1989<sup>31</sup> empower the Constitutional Court to review the constitutionality of *laws*, and not constitutional amendments, the Hungarian Court, in its decision of February 9, 1998, declared that the scope of its jurisdiction did not extend to the review of the constitutionality of laws amending the Constitution.<sup>32</sup>

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<sup>30</sup> CONSTITUTION OF THE REPUBLIC OF HUNGARY (Act XX of 1949 as revised and restated by Act XXXI of 1989), Art. 32/A. An English translation of Hungarian Constitution is available in CODICES database of Venice Commission, at <http://codices.coe.int>; *select* Constitutions > English > Europe > Hungary (last visited Mar. 4 2007).

<sup>31</sup> Act No. XXXII of 1989 on Constitutional Court, Art. 1. An English translation of this law is available in CODICES database of Venice Commission, at <http://codices.coe.int>; *select* Laws > English > Europe > Hungary (last visited Mar. 5, 2007).

<sup>32</sup> HUNGARIAN CONSTITUTIONAL COURT, Decision of Feb. 9, 1998, No. 1260/B/1997, *Alkotmánybírósági Közlöny* [Official Digest], 2/1998. An English précis of this decision is available in CODICES database of Venice Commission, at <http://codices.coe.int> (HUN-1998-1-001) (last visited Apr. 9, 2007).

### 3. *Slovenian Constitutional Court*

The Slovenian Constitutional Court, in a decision dated April 11, 1996, No. U-I-332/94, ruled that the provisions of the nature of constitutional norm did not fall within its jurisdiction. In that decision, the Slovenian Constitutional Court narrowly interpreted the word “statutes” in the phrase “conformity of statutes with this Constitution”, found in Article 160 of the Constitution determining its competence, and declared that this word did contain norms of a constitutional nature.<sup>33</sup>

### 3. *Irish Supreme Court*

The Irish system of constitutional review is a “mixed model.” In Ireland, constitutional review is exercised by the Supreme Court and the High Court, and not a specialized constitutional court; however, concerning the competence of constitutional review, the Irish system is similar to the European model, rather than the American model because this competence is accorded to the Supreme Court and the High Court by the Constitution.<sup>34</sup> In other words, the competence of these courts emanates from the text of the constitution; therefore, these courts do not have a “general jurisdiction”, but only a “limited and special jurisdiction.” For this reason, in Ireland, the judicial review of constitutional amendments is not possible because the constitution does not expressly grant this power to the Supreme Court

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<sup>33</sup> The English translation of this decision is available at the official web site of the Constitutional Court of Slovenian Republic, at <http://odlocitve.usrs.si/usrs/us-odl.nsf/o/8EBF190D9E2129ECC12571720029D40D> (last visited Mar. 6, 2007).

<sup>34</sup> Irish Constitution (Bunreacht Na Héireann) [Ir. CONST.] 1937, art. 34, available at <http://www.taoiseach.gov.ie/index.asp?docID=262> (last visited Mar. 6, 2007).

nor to the High Court. This conclusion is confirmed by the Irish Supreme Court in the *Riordan v. An Taoiseach* case in which the Court ruled that it could not review the constitutionality of a constitutional amendment.<sup>35</sup> In this case, the constitutionality of the Nineteenth Amendment was challenged. This Amendment was approved on May 22, 1998 by referendum and signed and promulgated by the President of Republic on June 3, 1998. Mr. Denis Riordan requested the Supreme Court to declare that “the 19th Amendment of the Constitution Act, 1998 is repugnant to the Constitution and is therefore unconstitutional, null, void and inoperative.” The Supreme Court of Ireland rejected this request on the ground that a constitutional amendment

is different in kind from ordinary legislation. Whereas ordinary legislation requires the participation of the President and the two houses of Parliament, a constitutional amendment requires the co-operation of the President, the two houses of Parliament and the people.... A proposed amendment to the Constitution will usually be designed to change something in the Constitution and will therefore, until enacted, be inconsistent with the existing text of the Constitution, but, once approved by the people under Article 46 and promulgated by the President as law, it will form part of the Constitution and cannot be attacked as unconstitutional. When the President promulgates a Bill to amend the Constitution duly passed by the people in accordance with Article 46<sup>36</sup> “as a law” within the meaning

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<sup>35</sup> *Riordan v. An Taoiseach* [1999] IESC 1 (May 20, 1999, Appeal No. 202/98) (Ir.), available at <http://www.bailii.org/ie/cases/IESC/1999/1.html> (last visited Mar. 6, 2007).

<sup>36</sup> Article 46 of the 1937 Irish Constitution regulates the procedure of the constitutional amendment.

of Article 46 s.5<sup>37</sup> she is promulgating it as part of the basic law or “bunrecht” because it is an amendment to the Constitution duly approved by the people. Such “law” is in a totally different position from the “law” referred to in Article 15 s.4<sup>38</sup> of the Constitution which refers only to a law “enacted by the Oireachtas.”<sup>39</sup>

It can be observed that the Supreme Court of Ireland does not consider itself competent to review the constitutionality of constitutional amendments because, according to the Court, the constitutional amendments are different from ordinary laws which are subject to its jurisdiction.

### C. CAN CONSTITUTIONAL AMENDMENTS BE DEEMED TO BE “LAW” AND CONSEQUENTLY BE REVIEWED BY CONSTITUTIONAL COURTS?

As concluded above,<sup>40</sup> under the European model, the judicial review of constitutional amendments is not possible if there

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<sup>37</sup> Section 5 of the Article 46 stipulates as follows: “A Bill containing a proposal for the amendment of this Constitution shall be signed by the President forthwith upon his being satisfied that the provisions of this Article have been complied with in respect thereof and that such proposal has been duly approved by the people in accordance with the provisions of section 1 of Article 47 of this Constitution and shall be duly promulgated by the President as a law” (Ir. CONST., 1937, art. 46 § 5).

<sup>38</sup> Section 4 of Art. 15 of the 1937 Irish Constitution states as follows: “1° The Oireachtas shall not enact any law which is in any respect repugnant to this Constitution or any provision thereof. 2° Every law enacted by the Oireachtas which is in any respect repugnant to this Constitution or to any provision thereof, shall, but to the extent only of such repugnancy, be invalid (Ir. CONST., 1937, art. 15 § 4).

<sup>39</sup> Riordan v. An Taoiseach [1999] IESC 1, available at <http://www.bailii.org/ie/cases/IESC/1999/1.html> (last visited Mar. 6, 2007).

<sup>40</sup> See *supra* pp. 12-18.

is not an express constitutional provision empowering the constitutional court to rule on constitutional amendments. But under such system, there is certainly a constitutional provision vesting the constitutional court with the competence to review the constitutionality of *laws*.<sup>41</sup> Can the competence of the constitutional court to review constitutional amendments emanate from this provision? This question can be answered in the affirmative, if *constitutional amendments* are deemed to be *laws*. If constitutional amendments can be included in the word “law”, they can be reviewed by constitutional courts without any need of additional competence because constitutional courts already have competence to review the constitutionality of *laws*. But, can constitutional amendments fall within the meaning of the word “law” used in constitutional provisions determining the competence of the constitutional courts?

In order to support the idea that *constitutional amendments* are deemed to be *law*, the following arguments can be advanced: First, constitutional amendments are indisputably *laws* with respect to their *form* as evidenced by the fact that, in many countries, constitutional amendments take the form of *laws*. As such, they are referred to as *laws*, as well as promulgated under the title of *laws* in the official gazettes. To illustrate that constitutional amendments are laws, in many countries, constitutional amendments are called “law on the amendment to the constitution”, “law amending the constitution”, or “constitutional law.” Furthermore, some constitutions specify that a constitutional amendment is made by a “law.” For example, Article 79(1) of the 1949 German Basic Law states that “this Basic Law may be amended only by a *law* expressly modifying or supplementing

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<sup>41</sup> For example, art. 93 of the German Basic Law, art. 140(1) of the Austrian Constitution, and art. 147 of the 1961 Turkish Constitution.

its text.”<sup>42</sup> If constitutional amendments, as their names indicate, were “laws”, the constitutional courts could review their constitutionality, even in the absence of a special competence with regard to those amendments.

But the idea that the constitutional amendments can be deemed to be *laws* presents several weaknesses. First although *laws of constitutional amendments* and *ordinary laws* are similar to each other with respect to the procedure and the form in which they are enacted; their legal force is, nonetheless, different because constitutional amendments have a higher rank in the hierarchy of legal norms. Secondly, the validity of the opinion stating that the constitutional amendments can be included in the term “law”, and consequently, can be reviewed by constitutional courts, depends on the question of whether the term “law” can be broadly interpreted. The term “law” in a constitutional provision determining the competence of constitutional courts cannot be broadly interpreted, since, as noted above, under the European model of judicial review, the constitutional courts do not have a “general jurisdiction”, but only a “limited and special jurisdiction.” In other words, for constitutional courts, *not having* jurisdiction is the general rule, while *having* it is the exception. As a result, constitutional provisions vesting constitutional courts with the jurisdiction to review the constitutionality of legal norms are of an exceptional nature, and therefore they should be interpreted narrowly due to the principle of *exceptio est strictissimae interpretationis*.<sup>43</sup>

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<sup>42</sup> GRUNDGESETZ [GG] [Constitution] art. 79(1) (1949) (F.R.G). An English translation of the 1949 German Basic Law [*Grundgesetz für die Bundesrepublik Deutschland*] is available in CODICES database of Venice Commission, at <http://codices.coe.int/>; *select* Constitutions > English > Europe > Germany (last visited Mar. 20, 2007).

<sup>43</sup> Exceptions must be interpreted in the strictest manner.

Despite these weaknesses, the German, Austrian and Turkish Constitutional Courts have adopted a positive answer to the question of whether constitutional amendments can be deemed to be “laws.” These Courts declared that they have jurisdiction with regard to constitutional amendments, and thus have reviewed their conformity with the constitution.

### 1. German Constitutional Court

The competence of German Constitutional Court is determined by Article 93 of the 1949 Basic Law. In this Article, there is not a provision vesting the Constitutional Court with the jurisdiction to review the “constitutional amendments”, and the term “constitutional amendment” is not even mentioned in that Article. Article 93(1)(2) empowers the Constitutional Court to rule on “the formal and material compatibility of *federal or land legislation* with this Basic Law.”<sup>44</sup> However, as analyzed below,<sup>45</sup> the German Constitutional Court, in its decisions of December 15, 1970, April 23, 1991, April 18, 1996, May 14, 1996, and March 3, 2004, reviewed the constitutionality of constitutional amendments. In those decisions, even if the question of whether the constitutional amendments can be included in the term “federal legislation” (*Bundesrecht*) was not separately discussed, it is plausible to conclude that the Constitutional Court has implicitly interpreted the term “federal legislation” to include not only ordinary federal laws, but also the “law expressly modifying or supplementing the text of Basic Law” (*i.e.*, constitutional amendments), because, if the Constitutional Court would have interpreted the term “federal legislation” in another

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<sup>44</sup> GRUNDGESETZ [GG] [Constitution] art. 93(1)(2) (1949) (F.R.G). *See supra* note 42. Emphasis added.

<sup>45</sup> *See infra* pp. 56-64.

manner, it would have declared itself incompetent to review of the constitutionality of constitutional amendments.

## 2. *Austrian Constitutional Court*

The same observation is valid also for the Austrian Constitutional Court. Article 140(1) of the Austrian Constitution<sup>46</sup> empowers to the Constitutional Court to rule on the constitutionality of “a federal or land law” (*eines Bundes- oder Landesgesetzes*). Although this Article does not mention the terms “constitutional laws” (*Verfassungsgesetz*) or “constitutional provisions” (*Verfassungsbestimmung*), the Austrian Constitutional Court has interpreted the term “federal law” (*Bundesgesetzes*) to include not only “ordinary laws”, but also “constitutional laws” (*Verfassungsgesetz*) and “constitutional provisions” (*Verfassungsbestimmung*). If this were not the case, the Constitutional Court could not have reviewed the constitutionality of constitutional amendments in its decisions dated December 12, 1952, June 23, 1988, September 29, 1988 and March 10, 2001. These decisions will be studied below.<sup>47</sup>

## 3. *Turkish Constitutional Court*

The 1961 Turkish Constitution, before 1971 amendment, does not include a specific provision relating to the review of the constitutionality of constitutional amendments. Between 1961 and 1971, Article 147 of the 1961 Constitution stipulated that “the Constitutional Court shall review the constitutionality

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<sup>46</sup> BUNDES-VERFASSUNGSGESETZ [B-VG] [Constitution] art.140, ¶ 1 (Austria). An English translation of the 1920 Austrian Federal Constitution (*Bundes-Verfassungsgesetz*) is available in CODICES database of Venice Commission, at <http://codices.coe.int>; *select* Constitutions > English > Europe > Austria (last visited Mar. 20, 2007).

<sup>47</sup> *See infra* pp. 34-39.

of laws.”<sup>48</sup> The Turkish Constitutional Court, nonetheless, in its decisions of June 16, 1970, No. 1970/31<sup>49</sup> and April 3, 1971, No.1971/37,<sup>50</sup> declared itself competent to review the constitutionality of constitutional amendments because, according to the Constitutional Court, “laws of constitutional amendment” are also “laws” which are subjected to its jurisdiction.<sup>51</sup>

One can conclude that the term “law” does not include the “laws of constitutional amendment”, and consequently, that the decisions of the German, Austrian and Turkish Constitutional Courts are ill-founded. The decisions of constitutional courts, however, are binding, and consequently, the constitutional court’s interpretation of the term “law” is valid regardless of whether there are individuals who are of a different opinion. Hence, if a constitutional court interprets the term “law” as including “law of constitutional amendment”, and consequently declares that it has the jurisdiction to rule on the constitutionality of constitutional amendments, the validity of this decision cannot be challenged. This decision can be criticized, but it is, nonetheless, valid and produces legal consequences. To illustrate, the United States Supreme Court, in the famous case *Marbury v. Madison*, declared that it had the jurisdiction to review the constitutionality of laws,<sup>52</sup> even though the United

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<sup>48</sup> ANAYASA [Constitution] art. 147 (1961) (Turkey). For an the English translation of the 1961 Turkish Constitution, before amendment of 1971, see CONSTITUTION OF THE TURKISH REPUBLIC (Sadık Balkan, Ahmet E. Uysal and Kemal H. Karpat trans., 1961), available at <http://www.anayasa.gen.tr/1961constitution-text.pdf> (last visited Mar. 20, 2007).

<sup>49</sup> 8 ANAYASA MAHKEMESİ KARARLAR DERGISİ [hereinafter AMKD] [REPORTS OF THE DECISIONS OF THE CONSTITUTIONAL COURT] 313 (1970).

<sup>50</sup> 9 AMKD 416 (1971).

<sup>51</sup> 8 AMKD 313, at 322 (1970); 9 AMKD 416, at 428-429 (1971).

<sup>52</sup> 5 U.S. (1 Cranch) 137 (1803).

States Constitution does not explicitly provide that the U.S. Supreme Court shall have the authority to review the constitutionality of laws. Thus, for two centuries, the U.S. Supreme Court has reviewed the constitutionality of laws, and in some instances, declared some of them unconstitutional. Many lawyers and scholars have severely criticized some of the U.S. Supreme Court's decisions, but the Court continues to review the constitutionality of laws. The same could be said with respect to the review of the constitutionality of constitutional amendments. Even if the constitutional courts did not receive special competence from the constitution, they could declare themselves competent to review the constitutionality of constitutional amendments, and although its decisions could be criticized, they would be valid.

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*Scope of the Review.* – As explained above, the judicial review of constitutionality of constitutional amendments is possible in some countries such as Austria, Germany, India, Romania, Turkey and the United States. Now, in these countries, the scope of the judicial review of constitutional amendments must be determined. Can constitutional courts review the constitutionality of constitutional amendments with respect to both form and substance? It is suitable to examine this question by sub-dividing it in two: Can constitutional courts review the formal regularity of constitutional amendments, and constitutional courts review the substance of constitutional amendments? These two questions will be studied in the following chapters of this monograph.



## **Chapter 2**

# **CAN CONSTITUTIONAL COURTS REVIEW THE FORMAL AND PROCEDURAL REGULARITY OF CONSTITUTIONAL AMENDMENTS?**

The review of the constitutionality of constitutional amendments with respect to their form and procedure, or in other word, the review of the formal regularity of constitutional amendments, consists in the verification of whether the conditions provided for in the constitution for their proposal, debate, adoption, ratification, and promulgation are fulfilled. In order to amend the constitution, many constitutions require a “qualified majority”, such as two-thirds or three-fifths, of the total member of the parliament or of total number of votes cast. Other constitutions provide the ratification of constitutional amendments by means of a referendum. The verification of whether a constitutional amendment is enacted in conformity with those rules of procedure constitutes a “review of formal and procedural regularity” of the constitutional amendment. For example if a constitutional amendment is adopted by parliament with a majority of three-fifths of its total members, when a majority of two-thirds of the total members is required by the constitution, this constitutional amendment would be contrary to the constitution with

respect to form. The issue then becomes whether constitutional courts can review and invalidate such a constitutional amendment.

This question can be answered affirmatively. After having declared itself competent to rule on a constitutional amendment, a constitutional court can examine its formal and procedural regularity. A constitutional amendment is valid only if it was enacted in conformity with the conditions of form and procedure provided for in the constitution. For example, when the constitution requires a majority of two-thirds of the total members of parliament, if a constitutional amendment is adopted by an absolute majority of the parliament, the constitutional amendment is not valid. Likewise, when the constitution prescribes a referendum for its ratification, if a constitutional amendment is put into effect without a referendum, such a constitutional amendment would not be valid. Consequently, the constitutional court can examine the conformity of a constitutional amendment with the conditions of form and procedure and if the court finds that this amendment is contrary to these conditions, then it can declare the amendment invalid. In this manner, the United States Supreme Court, the Austrian Federal Constitutional Court, and the Turkish Constitutional court have reviewed the formal and procedural regularity constitutionality of constitutional amendments.

## **I. THE UNITED STATES SUPREME COURT**

The following cases are examples of where the United States Supreme Court reviewed the formal and procedural regularity of constitutional amendments.

### 1. *Hollingsworth v. Virginia*<sup>1</sup>

As noted by Walter Dellinger,<sup>2</sup> in the United States, the judicial review of constitutional amendments is older than the judicial review of laws. The first decision of the Supreme Court relating to the constitutionality of constitutional amendments came in 1798 in *Hollingsworth v. Virginia*, five years before the *Marbury v. Madison* (1803) establishing the judicial review of laws. In *Hollingsworth v. Virginia*, it was argued that the Eleventh Amendment had not been adopted in conformity with the Constitution because it “was never submitted to the President for his approbation”,<sup>3</sup> as was allegedly required by Article I, § 7, cl. 3 of the Constitution. The Supreme Court rejected this argument saying that “the negative of the President applies only to the ordinary cases of legislation: He has nothing to do with the proposition, or adoption, of amendments to the Constitution.”<sup>4</sup> In this case, the Supreme Court declared that the Eleventh Amendment had been “constitutionally adopted.”<sup>5</sup>

### 2. *National Prohibition Cases (State of Rhode Island v. Palmer, and Seven Other Cases)*<sup>6</sup>

In these cases, it is claimed, *inter alia*, that the Eighteenth Amendment had been adopted by the two-third of the members present, and not of the total members of both Houses, as was

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<sup>1</sup> 3 U.S. (3 Dallas) 378 (1798).

<sup>2</sup> Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, HARV. L. REV. 386, 403 (1983).

<sup>3</sup> 3 U.S. (3 Dallas) 378, at 379 (1798).

<sup>4</sup> *Id.* at 382.

<sup>5</sup> *Id.*

<sup>6</sup> 253 U.S. 350 (1920).

arguably required by Article V<sup>7</sup> of the Constitution. The Supreme Court rejected this claim and held that “the two-thirds vote in each house which is required in proposing an amendment is a vote of two-thirds of the members present –assuming the presence of a quorum– and not a vote of two-thirds of the entire membership, present and absent.”<sup>8</sup>

### 3. *Dillon v. Gloss*<sup>9</sup>

This case is also related to the Eighteenth Amendment prohibiting the manufacture, sale, and transportation of intoxicating liquors in the United States. J. J. Dillon was arrested on January 17, 1920, and charged with transporting intoxicating liquor in violation of the National Prohibition Act. Dillon filed a petition for a writ of *habeas corpus*, but his petition was denied by an order.<sup>10</sup> Dillon appealed against this order before the Supreme Court. The appellant invoked two grounds. First, Dillon argued that the seven years time-limitation for the ratification, provided under Section 3<sup>11</sup> of the Amendment, was not reasonable. The Supreme Court rejected this argument and held that Congress has the power to fix a time limit for the ratification of an

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<sup>7</sup> Article V stipulates as follows: “The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution ...” (U.S. CONST. art V).

<sup>8</sup> 253 U.S. 350, at 386 (1920).

<sup>9</sup> 256 U.S. 368 (1921).

<sup>10</sup> *Ex parte Dillon* (D. C.) 262 Fed. 563, *quoted in* 256 U.S. 368, at 370 (1921).

<sup>11</sup> Sec. 3 of the Eighteenth Amendment provides as follows: “This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress” (U.S. CONST. amend. XVII, § 3).

amendment and that the seven year period was reasonable.<sup>12</sup> Secondly, Dillon claimed that the amendment had not come into effect on the day of his arrest, January 17, 1920.<sup>13</sup> The last necessary state ratified the amendment on January 16, 1919, and the Secretary of State certified the ratification on January 29, 1919.<sup>14</sup> Because Article 1 of the Amendment provides that the Amendment goes into effect after one year from its ratification, on January 29, 1920, the appellant argued that there was not a legal ground for his arrest on January 17, 1920. The Supreme Court rejected Dillon's claim, for the reason that the Secretary of State's proclamation is not material for being in effect, and that the amendment process is consumed by the last state ratification, thus the amendment went into effect on January 16, 1920, one year after the ratification of the last state.<sup>15</sup>

#### 4. *United States v. Sprague*<sup>16</sup>

This case is also related to the Eighteenth Amendment. The Eighteenth Amendment had been ratified by legislatures of states, and not by the conventions. The appellants contended that this Amendment could only be ratified by the conventions.

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<sup>12</sup> “Whether a definite period for ratification shall be fixed, so that all may know what it is and speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification. It is not questioned that seven years, the period fixed in this instance, was reasonable, if power existed to fix a definite time; nor could it well be questioned considering the periods within which prior amendments were ratified” (256 U.S. 368, at 376 (1921)).

<sup>13</sup> 256 U.S. 368, at 371 (1921).

<sup>14</sup> *Id.* at 376.

<sup>15</sup> *Id.* at 377.

<sup>16</sup> 282 U.S. 716 (1931).

They argued that it was in the intent of the framers of the Constitution that the “amendments conferring on the United States new direct powers over individuals shall be ratified in conventions; and that the Eighteenth is of this character.”<sup>17</sup> The Supreme Court rejected this claim and held that the choice of the mode of ratification is dependent on the sole discretion of Congress.<sup>18</sup>

### 5. *Coleman v. Miller*<sup>19</sup>

In June 1924, Congress proposed an amendment to the Constitution known as the *Child Labor Amendment*.<sup>20</sup> In January 1925, the Legislature of Kansas adopted a resolution rejecting the proposed amendment and a certified copy of the resolution was sent to the Secretary of State of the United States.<sup>21</sup> After twelve years, in January, 1937, the Legislature of Kansas ratified the same proposed amendment. Twenty-one members of the Senate and three members of the House of Representatives of Kansas attacked the validity of the ratification by bringing an original proceeding for a writ of mandamus in the Supreme Court of Kansas. They sought to restrain the Secretary of State of Kansas from authenticating the resolution ratifying the proposed amendment.<sup>22</sup> The Supreme Court of Kansas denied

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<sup>17</sup> *Id.* at 719.

<sup>18</sup> *Id.* at 730.

<sup>19</sup> 307 U.S. 433 (1939).

<sup>20</sup> Child Labor Amendment provided that “Congress shall have power to limit, regulate and prohibit the labor of persons under eighteen years of age” (H.R.J. Res. 184, 68<sup>th</sup> Cong., 1<sup>st</sup> Sess., 43 Stat. 670 (1924), *quoted in* Dellinger, *supra* note 2 at 389).

<sup>21</sup> 307 U.S. 433, at 435 (1939).

<sup>22</sup> *Id.* at 436.

the writ of mandamus and upheld the validity of the Kansas legislature's ratification.<sup>23</sup>

The case was appealed to the Supreme Court. The plaintiffs urged two principal grounds of invalidity: (1) The Kansas legislature could not later ratify a proposed amendment which it initially rejected. (2) The amendment, which had been proposed in 1924, had lost its vitality due to the lapse of time, and hence, it could not be ratified by the Kansas legislature in 1937.<sup>24</sup> The Supreme Court rejected those arguments. The Supreme Court held that the questions relating to the effect of the previous rejection of the amendment and of the lapse of time since its submission to the ratification were "questions deemed to be political and not justiciable."<sup>25</sup> Concerning these questions, the Supreme Court has concluded that "the Congress in controlling the promulgation of the adoption of a constitutional amendment has the final determination."<sup>26</sup>

In summary, the United States Supreme Court, in *Hollingsworth v. Virginia*,<sup>27</sup> *National Prohibition Cases*,<sup>28</sup> *Dillon v. Gloss*<sup>29</sup> and *United States v. Sprague* (1931),<sup>30</sup> has reviewed the regularity of the procedure by which the constitutional amendments have been adopted. But the Supreme Court, in *Coleman v. Miller*,<sup>31</sup> refused to review the procedural regularity of the

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<sup>23</sup> *Id.* at 437.

<sup>24</sup> *Id.* at 451.

<sup>25</sup> *Id.* at 454.

<sup>26</sup> *Id.* at 456.

<sup>27</sup> 3 U.S. 378 (Dall.) (1798).

<sup>28</sup> 253 U.S. 350 (1920).

<sup>29</sup> 256 U.S. 368 (1921).

<sup>30</sup> 282 U.S. 716 (1931).

<sup>31</sup> 307 U.S. 433 (1939).

*Child Labor Amendment* for that reason its proposition and ratification were deemed to be “political questions.”<sup>32</sup>

## II. AUSTRIAN CONSTITUTIONAL COURT

First, it should be pointed out that under the Austrian Constitution of 1920 (revised in 1929, reinstated in 1945), there are no substantive limits for constitutional amendments. In other words, all of the provisions of the Constitution can be amended. The Austrian Constitution, however, provides the conditions of form and procedure for the constitutional amendments. Article 44 of the Constitution distinguishes between the *partial revision* and the *total revision* of the Constitution and submits them to the different procedures. Under Article 44(1) of the Constitution, the amendments that fall under partial revisions, which are called “constitutional laws” (*Verfassungsgesetz*) or “constitutional provisions” (*Verfassungsbestimmung*), can be enacted by the Parliament.<sup>33</sup> But, section 3 of the same Article requires that those providing for a “total revision” (*Gesamtänderung*)<sup>34</sup> of the Constitution be submitted to a referendum.<sup>35</sup>

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<sup>32</sup> *Id.* at 454.

<sup>33</sup> Article 44(1) of the Austrian Constitution provides as follows: “Constitutional laws or constitutional provisions contained in simple laws can be passed by the National Council only in the presence of at least half the members and by a two thirds majority of the votes cast; they shall be explicitly specified as such (‘constitutional law’, ‘constitutional provision’)” (BUNDESVERFASSUNGSGESETZ [B-VG] [Constitution] art.44, ¶ 1 (Austria). An English translation of the 1920 Austrian Federal Constitution (*Bundes-Verfassungsgesetz*) is available in CODICES database of Venice Commission, at <http://codices.coe.int>; *select* Constitutions > English > Europe > Austria (last visited Mar. 20, 2007).

<sup>34</sup> See generally Alexander Somek, *Constitutional Theory as a Problem of Constitutional Law: On the Constitutional Court’s Total Revision of Austrian Constitutional Law*, VIENNA WORKING PAPERS IN LEGAL THEORY, PO-

*1. Decision of December 12, 1952 (Länder Citizenship)*<sup>36</sup>

In this case, it was argued that the Constitutional Law on *Länder* Citizenship is contrary to the Constitution, because it was adopted by Parliament and not by way of a referendum, as arguably required by Article 44(3) of the Constitution, since it is a “total revision.”<sup>37</sup> In this case, the Austrian Constitutional Court had, for the first time in history, the occasion to rule on the question of whether it was competent to rule on the constitutionality of constitutional amendments. The Austrian Court answered this question in the following way. First, the Constitutional Court declared itself incompetent to review the constitutionality of constitutional laws with respect to their *substance*, “since, in general, any standard for such an examination is missing.”<sup>38</sup> However the Austrian Constitutional Court declared itself competent to review the constitutionality of constitutional

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LITICAL PHILOSOPHY, AND APPLIED ETHICS, No. 7, Vienna 1998, *available at* [http://www.juridicum.at/component/option,com\\_docman/task,doc\\_download/gid,21/Itemid,91/](http://www.juridicum.at/component/option,com_docman/task,doc_download/gid,21/Itemid,91/) (last visited July 26, 2006).

<sup>35</sup> Article 44(3) of the Austrian Constitution stipulates as follows: “Any total revision of the Federal Constitution shall upon conclusion of the procedure pursuant to Art. 42 above but before its authentication by the Federal President be submitted to a referendum by the entire nation” (BUNDESVERFASSUNGSGESETZ [B-VG] [Constitution] art.44, ¶ 3 (Austria). *See supra* note 33).

<sup>36</sup> SAMMLUNG DER ERKENNTNISSE UND BESCHLÜSSE DES VERFASSUNGSGERICHTSHOFES [hereinafter VfSlg], [REPORTS OF THE DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT], No. 2455, *quoted in* Taylor Cole, *Three Constitutional Courts: A Comparison*, 3 AM. POL. SCI. REV. 963, 974 (1959).

<sup>37</sup> SYLVIE PEYROU-PISTOULEY, *LA COUR CONSTITUTIONNELLE ET LE CONTROLE DE LA CONSTITUTIONNALITE DES LOIS EN AUTRICHE* [THE CONSTITUTIONAL COURT AND THE CONTROL OF THE CONSTITUTIONALITY OF LAWS IN AUSTRIA] 176 (Economica 1993).

<sup>38</sup> VfSlg, No.2455, *quoted in* Cole, *supra* note 36, at 974.

laws with respect to their *procedure* because according to the Court, the constitutional laws must be enacted in conformity with the procedure proscribed by Article 44 of the Constitution.<sup>39</sup> The third paragraph of this Article stipulates that “any total revision of the Federal Constitution shall...be submitted to a referendum by the entire nation”; therefore, according to the Constitutional Court, it is necessary to determine whether the impugned constitutional law involves a “total revision.” If this constitutional law were deemed to be a “total revision”, it would be contrary to Article 44(3) of the Constitution because it was not adopted by referendum, and for this reason, it is necessary for the Federal Constitutional Court to define what is a “total revision” (*Gesamtänderung*). At first glance, it appears that a “total revision” is the modification of all articles of the Constitution, but the Austrian Constitutional Court has defined “total revision” to mean a constitutional amendment which can affect one of the “leading principles” (*leitender Grundsatz*) of the Federal Constitution.<sup>40</sup> And in this decision, the Constitutional Court considered that the democratic principle, the principle of the rule of law and the federal principle as the “leading principles.” Consequently, if a constitutional amendment affecting one of those fundamental principles is adopted without referendum, it would be contrary to Article 44(3) of the Constitution. In the instant case, however, the Constitutional Court ruled that the Constitutional Law on *Länder* Citizenship, which was

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<sup>39</sup> VfSlg, No. 2455, *quoted in* PEYROU-PISTOULEY, *supra* note 37, at 176.

<sup>40</sup> VfSlg, No. 2455, *quoted in* Otto Pfersmann, *La révision constitutionnelle en Autriche et en Allemagne fédérale: théorie, pratique, limites* [*Constitutional amendment in Austria and Federal Germany: Theory, Practice, Limits*], LA RÉVISION DE LA CONSTITUTION [AMENDMENT OF THE CONSTITUTION] 7, 40 (Economica & Presses universitaires d'Aix-Marseille 1993).

adopted by the parliament, is not contrary to Article 44(3) of the Constitution because it does not affect one of the leading principles; hence, since it does not involve a “total revision”, it does not need to be submitted to a referendum.<sup>41</sup>

It is important to underline that the democratic principle, the principle of the rule of law, and the federal principle, are considered to be “leading principles” by the Austrian Constitutional Court, are not “immutable principles.” But the constitutional amendments affecting one of these principles must be submitted to the referendum of entire federal population.

## 2. *Decision of June 23, 1988*<sup>42</sup>

The Austrian Constitutional Court, in this decision, ruled that a constitutional law concerning taxi licenses<sup>43</sup> involved a “total revision” of the Constitution, and therefore, it should be approved by referendum, but, in the instant case, it was adopted by parliamentary way. Consequently, the Constitutional Court declared that this constitutional law is contrary to Article 44(3) of the Constitution and annulled it.<sup>44</sup>

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<sup>41</sup> VfSlg, N.2455, *quoted in* Cole, *supra* note 36, at 974.

<sup>42</sup> VfSlg, 29, V 102/88, *quoted in* Siegbert Morscher, *La hiérarchie des normes constitutionnelles et sa fonction dans la protection des droits fondamentaux* [*The Hierarchy of Constitutional Norms and its Function in the Protection of fundamental Rights*], (Ulrike Steinhorst trans.), 6 ANNUAIRE INTERNATIONAL DE JUSTICE CONSTITUTIONNELLE 25, 34 (1990).

<sup>43</sup> BUNDESGESETZBLATT [Official Gazette of Federal Laws], 1987/281, *quoted in* Pfersmann, *supra* note 40, at 38.

<sup>44</sup> VfSlg, 29, V 102/88, *quoted in* Morscher, *supra* note 42, at 34.

### 3. *Decision of September 29, 1988*<sup>45</sup>

In 1986, a constitutional law obliged the owners of motor vehicle to provide the name of the person who driving their vehicle in case the driver was involved in a traffic offence where the offender could not identified on the spur of the moment.<sup>46</sup> The Austrian Constitutional Court did not annul this constitutional law, but maintained its jurisprudence by stating that all constitutional laws adopted by way of the parliament must conform to the fundamental principles of the Federal Constitution.<sup>47</sup> Otherwise, they must be approved by a referendum as required under Article 44(3) of the Constitution.

### 4. *Decision of March 10, 2001*<sup>48</sup>

A provision of a constitutional law<sup>49</sup> provided that the statutes of the *Länder*, on the organization and jurisdiction of organs which are established in order to review the awards of public contracts, should not be deemed to be unconstitutional. The Austrian Constitutional Court stated that this provision made “all legislation of the *Länder* on the organization and jurisdiction of institutions in the field of public procurement re-

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<sup>45</sup> VfSlg, 11.829, *quoted in* Pfersmann, *supra* note 40, at 39; G 72, 102-104, 122-125, 136, 151-160/88, *quoted in* Morscher, *supra* note 42, at 35.

<sup>46</sup> BUNDESGESETZBLATT [OFFICIAL GAZETTE OF FEDERAL LAWS], 1986/106, *quoted in* Pfersmann, *supra* note 40, at 39.

<sup>47</sup> VfSlg, 11.829, *quoted in* Morscher, *supra* note 42, at 35.

<sup>48</sup> G 12/00, G 48-51/00. An English précis of this decision is available in CODICES database of Venice Commission, at <http://codices.coe.int> (AUT-2001-1-003) (last visited Mar. 21, 2007).

<sup>49</sup> Paragraph 126a of the Federal Procurement Law (*Bundesvergabegesetz*), *quoted in* the decision of March 10, 2001 of the Austrian Constitutional Court, available in CODICES database of Venice Commission, at <http://codices.coe.int> (AUT-2001-1-003) (last visited April 5, 2007).

view exempt from the Federal Constitution. Thus the Constitution should be deprived of its normative power for this part of the legal order.”<sup>50</sup> According to the Court, “the loss of the Constitution’s normative power...violates the rule of law” being a “fundamental principle” of the Constitution. Therefore, a constitutional amendment affecting this principle involves a total revision necessitating the adoption by referendum under Article 44(3) of the Constitution. But the impugned constitutional provision is adopted by the parliament and not by referendum, thus it is unconstitutional. For that reason, the Constitutional Court annulled the provision of the constitutional law.<sup>51</sup>

*Criticism.*- Even though, the Austrian Constitutional Court acknowledged that it does not have jurisdiction to examine the substance of constitutional amendments because “any standard for such an examination is missing”, as explained above, due to its definition of “total revision”, the Constitutional Court has, in fact, reviewed the substance of the constitutional amendments adopted by way of the Parliament. The Austrian Constitutional Court’s definition of “total revision” is apparently controversial. For the layperson “total revision of the Constitution” means the modification of all articles of the Constitution, but for the Austrian Constitutional Court, as explained above, “total revision” means a constitutional amendment which can affect one of the “leading principles” of the Constitution. This definition seems to be baseless because the Constitution does not define the total revision as such. On the other hand, “leading principles” by which the Constitutional Court defined the concept of “total revision”, cannot be objectively

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<sup>50</sup> Decision of March 10, 2001, G 12/00, G 48-51/00. *See supra* note 48.

<sup>51</sup> *Id.*

determinable because there is no provision in the Austrian Constitution determining these principles.

### III. TURKISH CONSTITUTIONAL COURT

It is necessary to divide the case-law of Turkish Constitutional Court into three periods because the constitutional regulation concerning the judicial review of constitutional amendments in each period differs from other.

#### A. UNDER THE 1961 TURKISH CONSTITUTION, BEFORE THE 1971 AMENDMENT

In the 1961 Turkish Constitution, before the 1971 Amendment, there was no special provision on the question of the constitutionality of constitutional amendments. During this period, however, the Turkish Constitutional Court declared itself competent to review the constitutionality of constitutional amendments and reviewed the formal regularity of constitutional amendments in the following decisions:

##### *1. Decision of June 16, 1970, No. 1970/31*<sup>52</sup>

Article 68 of the 1961 Turkish Constitution provided that persons convicted of certain crimes shall not be elected deputies, even if they have been amnestied. The second part of the clause (“even if they have been amnestied”) was repealed by the Constitutional Amendment of November 6, 1969.<sup>53</sup> This constitutional amendment was challenged by the Worker Party before the Constitutional Court. It is argued that this constitutional amendment was unconstitutional with respect to both its form

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<sup>52</sup> 8 AMKD 313 (1970).

<sup>53</sup> RESMI GAZETE [OFFICIAL GAZETTE], Nov. 12, 1969, No. 13349.

and substance. The Constitutional Court declared itself competent to review the constitutionality of constitutional amendments with respect to both form and substance.<sup>54</sup> In instant case, the Constitutional Court, in an eight-to-seven vote, ruled that this constitutional amendment was not enacted in conformity with the procedure of amendment laid down by Article 155 of the 1961 Constitution which provides that the adoption of a proposal for constitutional amendment shall require a two-third majority of the total number of members of each assembly. In the deliberation of the Constitutional Amendment of November 6, 1969, the National Assembly first voted separately on the amendment's articles with a simple majority, and then it voted the entire amendment with a two-third majority of the total number of its members. But the Constitutional Court held, with a vote of eight-to-seven, that not only did the entire text of the amendment have to be adopted with a two-third vote, but each article, as well. Consequently the Turkish Constitutional Court invalidated the constitutional amendment of November 6, 1969.<sup>55</sup>

## 2. *Decision of April 3, 1971, No. 1971/37*<sup>56</sup>

The Turkish Constitutional Court, in this decision, examined the formal and procedural regularity of the constitutional amendment of April 17, 1970.<sup>57</sup> The Court did not find a formal or procedural irregularity.<sup>58</sup> In this decision, the Court also re-

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<sup>54</sup> 8 AMKD 313, at 322-323.

<sup>55</sup> *Id.* at 325-332.

<sup>56</sup> 9 AMKD 416 (1970).

<sup>57</sup> *RESMI GAZETE* [OFFICIAL GAZETTE], Apr. 22, 1970, No. 13578.

<sup>58</sup> 9 AMKD 416, at 426.

viewed the substance of this amendment. This aspect of the decision will be analyzed later.<sup>59</sup>

## B. UNDER THE 1961 TURKISH CONSTITUTION (AS AMENDED IN 1971)

Article 147 of the 1961 Turkish Constitution, as amended in 1971, stipulated that the Turkish Constitutional Court can review the formal regularity of constitutional amendments.<sup>60</sup> As a result, from 1971 to 1980, the Constitutional Court could only review the constitutionality of constitutional amendments with respect to their *form*, but not their *substance*. This notwithstanding, as is explained below, the Turkish Constitutional Court held that the prohibition to amend the republican form of state is a condition of form, and not a condition of substance. During this period, the Turkish Constitutional Court rendered five decisions reviewing the constitutionality of constitutional amendments. These decisions are discussed below.

### *1. Decision of April 15, 1975, No. 1975/87<sup>61</sup>*

The constitutional amendment of March 15, 1973 added a last paragraph to Article 138 of the 1961 Constitution. This paragraph provides that “the majority of the members of the military courts shall have the quality of judges. This condition

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<sup>59</sup> See *infra* pp. 95-97.

<sup>60</sup> ANAYASA [Constitution] art. 147(1) (1961, amended 1971) (Turkey). For an the English translation of the 1961 Turkish Constitution, as amended in 1971, see THE TURKISH CONSTITUTION AS AMENDED (Mustafa Gerçeker, Erhan Yaşar and Orhan Tung trans., Directorate General of Press and Information 1978), available at <http://www.anayasa.gen.tr/1961constitution-amended.pdf> (last visited Apr. 3, 2006).

<sup>61</sup> 13 AMKD 403 (1975).

is not required in time of war.” The second sentence was annulled on April 15, 1975, by the Constitutional Court, for the reason that it is contrary to the prohibition of amending the republican form of state. The Constitutional Court’s reasoning can be described as follows: The fact that the majority of the members of a military court, in time of war, can be non-judges (Article 138 *in fine*) violates the principle that courts must be independent (Article 7), this is a component of the rule of law principle (Article 2), and the latter principle is an integral part of the republican form of state (Article 1) which, pursuant to Article 9 of the 1961 Constitution, cannot be amended.<sup>62</sup>

3. *Decisions of March 23, 1976, No. 1976/19*<sup>63</sup> *and October 12, 1976, No. 1976/46*<sup>64</sup>

Article 38 of the 1961 Constitution was amended on September 20, 1971. The new version of Article 38 provides that the compensation for the expropriation of real estate cannot exceed the value its owner previously declared to the tax administration.<sup>65</sup> It is argued that the new version of Article 38 of the 1961 Constitution violates the prohibition to amend the republican form of state. The Turkish Constitutional Court, in its decision of March 23, 1976, rejected this argument and ruled, in an eight-to-seven vote, that the amended version of Article 38 is not contrary to the prohibition to amend the republican form of state.<sup>66</sup> But, six months later, the Constitutional Court, in its de-

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<sup>62</sup> *Id.* at 447-448.

<sup>63</sup> 14 AMKD 118 (1976).

<sup>64</sup> *Id.* at 252-285.

<sup>65</sup> ANAYASA [Constitution] art. 38(2) (1961, amended 1971) (Turkey).  
See *supra* note 60.

<sup>66</sup> 14 AMKD 118, at 134-136 (1976).

cision of October 12, 1976, reversed the holding in an eight-to-seven vote. In its judgment, the Court invalidated the amended version of Article 38 for the reason that the calculation of the compensation for expropriation on the basis of the fiscal value affects the “core” of the property right, protected by Article 36. Consequently pursuant to Article 9, the rule of law principle as provided in Article 2 and which is a component of the republican form of state (Article 1), cannot be changed by a constitutional amendment.<sup>67</sup>

3. *Decision of January 28, 1977, No. 1977/4*<sup>68</sup>

The constitutional amendment of September 20, 1971, modifying Article 144 of the 1961 Constitution, precluded the judicial review of the decisions made by the Supreme Council of Judges.<sup>69</sup> It is claimed, by way of the concrete judicial review, that the amended version of Article 144 is contrary to Constitution. The Turkish Constitutional Court acknowledged this and ruled that the new version of Article 144, providing that “there shall be no appeal to any judicial instance against decisions of the Supreme Council of Judges” was contrary to the prohibition to amend the republican form of state. According to the Constitutional Court, the preclusion of judicial review affects the rule of law principle as protected by Article 2 and which is a characteristic of the Turkish Republic; therefore, this preclusion falls under the prohibition to amend the republican form of state, as provided by Article 9.

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<sup>67</sup> *Id.* at 274-276.

<sup>68</sup> 15 AMKD 106-131 (1977).

<sup>69</sup> ANAYASA [Constitution] art. 144 (1961, amended 1971) (Turkey). *See supra* note 60.

4. *Decision of September 27, 1977, No. 1977/117*<sup>70</sup>

The constitutional amendment of September 20, 1971, modifying Article 137 of the 1961 Constitution, precluded the judicial review of the decisions of the Supreme Council of Prosecutors.<sup>71</sup> It is claimed, by way of concrete review of constitutionality, the revised version of Article 144 is contrary to the Constitution. In this case, which is similar to the previous case, the Turkish Constitutional Court ruled that the preclusion of judicial review of the decisions made by the Supreme Council of Prosecutors is contrary to the prohibition to amend the republican form of state for the above-mentioned reasons relating to the decision of January 28, 1977.

In the decisions discussed above, the Turkish Constitutional Court first declared itself incompetent to rule on the *substance* of constitutional amendments. The Court affirmed that it could only rule on the *formal regularity* of constitutional amendments. That is correct because Article 147 of the Turkish Constitution of 1961 as amended in 1971 explicitly empowered the Constitutional Court to review only the formal regularity of constitutional amendments;<sup>72</sup> however, it should be noted that the Court defined the concept of “formal regularity” broadly. According to the Court, “formal regularity” encompasses not only the conditions relating to the proposition, deliberation, and ratification of a constitutional amendment, but also the prohibition of modifying the republican form of state. In other words, in view of the Constitutional Court, it can review the confor-

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<sup>70</sup> 15 AMKD 444 (1977).

<sup>71</sup> ANAYASA [Constitution] art. 137 (1961, amended 1971) (Turkey). *See supra* note 60.

<sup>72</sup> ANAYASA [Constitution] art. 147 (1961, amended 1971) (Turkey). *See supra* note 60.

mity of the constitutional amendments not only with Article 155 which determines the conditions of form and procedure of constitutional amendments, but also with Article 9 which further provides that the republican form of state cannot be amended, nor can its amendment be proposed. In addition, in those decisions, the Constitutional Court broadly interpreted the concept of “republican form of state.” According to the Turkish Constitutional Court, it is prohibited to amend, not only the “republican form of state” itself as provided by Article 1, but also *its characteristics*, as defined by Article 2 of the Constitution, *i.e.* rule of law, democracy, social state, secularism, etc. In other words, according to the Constitutional Court, not only the republican form of state, but also its characteristics are intangibles.

*Criticism.*- The above-mentioned Turkish Constitutional Court’s decisions can be subjected to severe criticism. First, the definition of the *formal regularity* of constitutional amendments, as defined by the Constitutional Court, is ill-founded. The question of whether a constitutional amendment affects the immutability of the republican form of state is not a question of form or procedure, but a question of substance because, without looking at the text of the constitutional amendment, it is impossible to determine if it violates this immutability. Secondly, the broad interpretation of the concept of “republican form” is also ill-founded because, according to Article 9, only the clause providing that “the form of Turkish State is republic” is an immutable clause, and this clause is only found in Article 1. If the framers of the 1961 Constitution wanted to protect not only the republican form of the Turkish State, but also its characteristics, which are provided in Article 2, they could have prohibited the amendment of these characteristics. Additionally, the immuta-

bility of some constitutional provisions carves out an exception to the general rule providing that all of provisions of the Constitution can be amended. As an exception, according to the maxim *exceptio est strictissimae interpretationis*,<sup>73</sup> it should be narrowly interpreted.

Notwithstanding the fact that this article criticizes these decisions which were rendered by the Turkish Constitutional Court, they are valid because, under Article 152 of the 1961 Turkish Constitution, the decisions of the Constitutional Court are final and binding on the legislative, executive, and judicial organs. Albeit utterly ill-founded, these decisions have had legal consequences. For example, the provisions of the constitutional amendments which have been annulled by these decisions have lost their validity. Consequently, it can conclude that between 1971 and 1980, in Turkey, the review of the constitutionality of constitutional amendments with respect to their form and substance<sup>74</sup> was possible.

### C. UNDER THE 1982 TURKISH CONSTITUTION

The Turkish Constitution of 1982 specifically regulates the judicial review of constitutional amendments. Article 148(1) of the Constitution explicitly empowers the Constitutional Court to review the constitutionality of constitutional amendments; however, it limits this review to form. In other words, constitutional amendments can be examined and reviewed only with regard to their form, and thus the Constitutional Court cannot review the substance of constitutional amendments. In addition to this and

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<sup>73</sup> Exceptions must be interpreted in the strictest manner.

<sup>74</sup> This is based on the Constitutional Court's interpretation of "formal regularity."

taking the lessons learned from the Constitutional Court's misinterpretation of the concept "formal regularity" during the 1970's, the framers of the 1982 Constitution, in Article 148(2), defined the scope of the term "review in respect of form." According to this Article, the review of the formal regularity of constitutional amendments "shall be restricted to consideration of whether the requisite majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates under urgent procedure was complied with."<sup>75</sup> Consequently, under the 1982 Constitution, unlike the 1961 Constitution, the Turkish Constitutional Court cannot review the substance of constitutional amendments by broadly interpreting the concept of "formal regularity."

Until now (December 2006), the Turkish Constitutional Court has only had one occasion to rule on the constitutionality of constitutional amendments under the 1982 Constitution. In that case, concerning the Law on Constitutional Amendment of May 17, 1987 one-fifth of the members of the Turkish Parliament submitted an application for annulment action to the Constitutional Court, on the ground that the enactment of the Law on Constitutional Amendment was in conflict with the provisions of the Constitution. The Constitutional Court, in its decision dated June 8, 1987, No. 1987/15,<sup>76</sup> ruled that it did not have the jurisdiction to accept an application for annulment action based on any grounds other than those mentioned in Article 148(1) of Constitution, (*i.e.*, whether the requisite majorities were obtained for the proposal and in the ballot, and whether

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<sup>75</sup> ANAYASA [Constitution] art. 148(2) (1982) (Turkey). An English translation of the 1982 Turkish Constitution is available at <http://www.byegm.gov.tr/mevzuat/anayasa/anayasa-ing.htm> (last visited Mar. 5, 2007).

<sup>76</sup> 23 AMKD 282 (1987).

the prohibition on debates under urgent procedure was complied with); therefore, the Constitutional Court declared that the application was inadmissible for the reason that the pleas in law on which the application was based, was not one of the procedural irregularities restrictively enumerated in Article 148(1).



## **Chapter 3**

# **CAN CONSTITUTIONAL COURTS REVIEW THE SUBSTANCE OF CONSTITUTIONAL AMENDMENTS?**

Having seen that constitutional courts in some countries (Austria, Germany, India, Ireland, Turkey, the United States), have competence to rule on the constitutional amendments and can review the formal and procedural regularity of constitutional amendments, the following question must now be asked: Can constitutional courts in these countries, going much further, review the substance of constitutional amendments? To answer this question affirmatively, the following question must first be answered: Are there any substantive limits on constitutional amendments? Without such limits, the judicial review of the substance of constitutional amendments is conceptually impossible because such a review consists in verifying whether the provisions of a constitutional amendment are compatible with these limits. If these limits do not exist, the judicial review of the substance of constitutional amendments will be logically impossible. Therefore, the question of whether or not the constitutional courts can review the substance of constitutional amendments can be answered as follows: If there are substan-

tive limits in the constitution, the judicial review of the substance of constitutional amendments is possible, but if there are no such limits, such review is not possible. These two assertions merit further analyses.

### **I. IF THERE ARE SUBSTANTIVE LIMITS IN THE CONSTITUTION, THE JUDICIAL REVIEW OF THE SUBSTANCE OF CONSTITUTIONAL AMENDMENTS IS POSSIBLE**

Different constitutions delineate expressly different substantive limits on the power of constitutional amendment. In other words, different constitutions provide some “immutable principles” by prohibiting the amendment of some of its provisions. For example,<sup>1</sup> under Article 89 of the 1958 French Constitution,<sup>2</sup> Article 139 of the 1947 Italian Constitution<sup>3</sup> and Article 288 of the 1975 Portugal Constitution,<sup>4</sup> the principle “republican form of government” cannot be object of a constitutional amendment. Likewise, Article 4 of the 1982 Turkish Constitution stipulates that “the provision of article 1 of the Constitu-

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<sup>1</sup> For an inventory of these limits, see MARIE-FRANÇOISE RIGAU, *LA THEORIE DES LIMITES MATERIELLES A L'EXERCICE DE LA FONCTION CONSTITUANTE* [THEORY OF SUBSTANTIAL LIMITS ON THE EXERCISE OF THE CONSTITUENT POWER] 41-93 (Larcier 1985); KEMAL GÖZLER, *LE POUVOIR DE REVISION CONSTITUTIONNELLE* [POWER OF CONSTITUTIONAL AMENDMENT] 287-310 (Presses universitaires du Septentrion 1997).

<sup>2</sup> 1958 CONST. art. 89 (France), available at <http://www.assemblee-nationale.fr/english/8ab.asp> (last visited Mar. 21, 2007).

<sup>3</sup> COSTITUZIONE [COST.] art. 139 (Italy), available at [http://www.oefre.unibe.ch/law/icl/it00000\\_.html](http://www.oefre.unibe.ch/law/icl/it00000_.html) (last visited Mar. 21, 2007).

<sup>4</sup> CONSTITUIÇÃO [CONST.] art. 288 (1975) (Portugal), available at [http://www.parlamento.pt/ingles/cons%5Fleg/crp\\_ing/index.html](http://www.parlamento.pt/ingles/cons%5Fleg/crp_ing/index.html) (last visited Mar. 15, 2007).

tion, establishing the form of the state as a Republic, the provisions in article 2 on the characteristics of the Republic, and the provision of article 3 shall not be amended, nor shall their amendment be proposed.”<sup>5</sup> Similarly, Article 79(3) of the 1949 German Basic Law prohibits the amendment of the principles laid down in Articles 1 and 20.<sup>6</sup> In the same way, in federal states, the amendments to the provisions relating to the federal form of the state and the protection of member states are forbidden. For example, under Article V of the United States Constitution, it is provided that “no state, without its consent, shall be deprived of its equal suffrage in the Senate.” Also, according to Article 79(3) of the German Basic Law, amendments “affecting the division of the Federation into *Länder* and their participation in the legislative process” are prohibited.<sup>7</sup> Similar restrictions exist in Article 128(6) of the 1900 Australian Constitution.<sup>8</sup>

The legal validity of these substantive limits is beyond the dispute because they were laid down in constitution by the constituent power. Therefore, the amending power, being a power created and organized by constitution, is bound by the limits

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<sup>5</sup> ANAYASA [Constitution] art. 4 (1982). An English translation of the 1982 Turkish Constitution is available at <http://www.byegm.gov.tr/mevzuat/anayasa/anayasa-ing.htm> (last visited Mar. 5, 2007).

<sup>6</sup> GRUNDESETZ [GG] [Constitution] art. 79(1) (1949) (F.R.G.). An English translation of the 1949 German Basic Law [*Grundgesetz für die Bundesrepublik Deutschland*] is available in CODICES database of Venice Commission, at <http://codices.coe.int/>; *select* Constitutions > English > Europe > Germany (last visited Mar. 20, 2007).

<sup>7</sup> *Id.*

<sup>8</sup> CONST. art. 128(6) (1900) (Australia), available at <http://www.aph.gov.au/senate/general/constitution/chapter8.htm> (last reviewed May 21, 2003).

provided by constitution. Consequently, in countries where the constitutional amendments can be reviewed with respect to their procedure by constitutional courts, they can be also reviewed with respect to their compatibility with these substantive limits. In other words, a constitutional court can examine the question of whether the substance of constitutional amendments conforms to the immutable provisions of constitution, as well as the question of whether the constitutional amendment was adopted by the majority of the parliament as provided in the constitution. There is not a legal difference between these two questions.

Before reviewing the examples of the judicial review of the substance of constitutional amendments from the case-law of German and Turkish Constitutional Courts, it is worthy to note that, although it seems to be contradictory, a constitution may impose substantive limits on constitutional amendment on the one hand, and on the other hand, it may expressly prohibit the review of the substance of constitutional amendments. For example, the 1982 Turkish Constitution imposes several substantive limits on constitutional amendments, providing that the first three articles of the Constitution cannot be amended.<sup>9</sup> But the same Constitution precluded the Constitutional Court from reviewing the substance of constitutional amendments.<sup>10</sup> In such a system, it is obvious that these substantives limits cannot be sanctioned by judicial review of constitutional court. In the absence of the constitutional court's sanction, it is plausible to conclude that only amending power has the authority to determine the meaning of these limits.

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<sup>9</sup> ANAYASA [Constitution] art. 4 (1982). *See supra* note 5.

<sup>10</sup> ANAYASA [Constitution] art. 148 (1982). *See supra* note 5.

*Examples of the Judicial Review of the Substance of Constitutional Amendments: German and Turkish Constitutional Courts' Case-law.* – To illustrate the manner in which constitutional courts review the conformity of constitutional amendments with the explicit substantive limits (*i.e.*, immutable provisions of constitution), the following cases from the German and Turkish Constitutional Courts will be analyzed.

#### A. GERMAN CONSTITUTIONAL COURT

The German Federal Constitutional Court reviewed the substantial regularity of the constitutional amendment in the following five cases. But, prior to analyzing these cases, it seems proper to review the substantive limits imposed by the 1949 German Basic Law on constitutional amendments.

*Substantive Limits.* – Under Article 79(3) of the 1949 German Basic Law, constitutional amendments affecting the division of the Federation into *Länders*, their participation in the legislative process, or the principles enumerated in Articles 1 and 20 are prohibited. Article 1 declares the principle of the inviolability of human dignity,<sup>11</sup> and Article 20 contains the fundamental principles regarding the political and social structure of the Republic of Germany, such as the democratic state, social and federal state, the binding force of the constitution and

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<sup>11</sup> Article 1 of the German Basic Law provides as follows:

“(1) The dignity of man is inviolable. To respect and protect it shall be the duty of all public authority.

(2) The German people therefore uphold human rights as inviolable and inalienable and as the basis of every community, of peace and justice in the world.

(3) The following basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law” (GG [CONSTITUTION] art. 1 (F.R.G.). *See supra* note 6).

the laws and the defense of constitutional order.<sup>12</sup> In Germany, these principles cannot be modified through constitutional amendments, and for this reason, in Germany, Article 79(3) has been described as the “eternity clause.”<sup>13</sup>

*1. Klass Case (Decision of December 15, 1970)*<sup>14</sup>

Under Article 10 of the German Basic Law, the “(1) privacy of correspondence, posts and telecommunications is inviolable, [and] (2) [r]estrictions may only be ordered pursuant to a law.” The 17<sup>th</sup> Amendment, enacted on June 24, 1968,<sup>15</sup> inserted a sentence in the second paragraph of this Article providing that “where a restriction serves to protect the free democratic basic order or the existence or security of the Federation or a Land the law may stipulate that the person affected shall not

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<sup>12</sup> Article 20 of the German Basic Law stipulates as follows:

“(1) The Federal Republic of Germany shall be a democratic and social federal state.

(2) All public authority emanates from the people. It shall be exercised by the people through elections and referendums and by specific legislative, executive and judicial bodies.

(3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

(4) All Germans have the right to resist anybody attempting to do away with this constitutional order, should no other remedy be possible” (GG [CONSTITUTION] art. 1 (F.R.G.). See *supra* note 6).

<sup>13</sup> NIGEL FOSTER & SATISH SULE, *GERMAN LEGAL SYSTEM AND LAWS* 198 (3<sup>rd</sup> Ed., Oxford Univ. Press 2003).

<sup>14</sup> SAMMLUNG DER ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [hereinafter *BverfGE*] [FEDERAL CONSTITUTIONAL COURT REPORTS] 30, 1 (1970). An English translation can be found in *COMPARATIVE CONSTITUTIONAL LAW: CASES AND COMMENTARIES* 659-665 (Walter F. Murphy & Joseph Tanenhaus trans. & eds., St. Martin’s Press 1977).

<sup>15</sup> BUNDESGESETZBLATT [FEDERAL LAW GAZETTE] I, 709, *quoted in quoted in* FOSTER & SULE, *supra* note 13, at 551).

be informed of such restriction and that recourse to the courts shall be replaced by a review of the case by bodies and subsidiary bodies appointed by Parliament.” In other words, this Amendment allowed for an infringement on the privacy of communications in order to protect the national security; and moreover, it replaced the process of judicial review with the parliamentary review of the legality of surveillance measures in certain national security cases.

This constitutional amendment was challenged before the German Federal Constitutional Court in the *Klass* case. It was asserted that the sentence inserted in the second paragraph of Article 10 of the Basic Law by the constitutional amendment of June 24, 1968 violated the fundamental principles which were declared as immutable by Article 79(3) of the Basic Law. More specifically, the limitation placed on the privacy of communications and the replacement of judicial review of surveillance measures with a control by an agency appointed by Parliament, infringe the fundamental principles of human dignity, the separation of powers, and the rule of law all which are immutable principles under Article 79(3) of the Basic Law. Despite three strong dissenting opinions, the Federal Constitutional Court rejected this argument and held that new version of Article 10(2) (*i.e.*, the infringement on the privacy of communications and the preclusion of judicial review of surveillance measures) does not violate the immutable principles of the Basic Law, such as human dignity, the separation of powers, and the rule of law, enumerated in Article 79(3). According to the majority of the members of the Constitutional Court, first, the control of surveillance measures by an agency appointed by Parliament, rather than judicial review, is a sufficient guaranty for the legal-

ity of the surveillance procedures.<sup>16</sup> Secondly, according to the Court, Article 79(3) should be narrowly interpreted because it is an exception to the general rule, which “must not...prevent the legislator from modifying by constitutional amendment even basic constitutional principles in a system-immanent manner.”<sup>17</sup>

By adhering to a strict interpretation, the German Constitutional Court interpreted that Article 79(3) to mean that it prohibits the abolition of the substance of the existing constitutional order and the creation of a totalitarian regime by the formal legal means of amendment.<sup>18</sup> In other words, according to the Court, the substantial limits placed on the constitutional amendments consist of those explicitly mentioned in Articles 1 and 20. Since, the principle of rule of law is not explicitly mentioned in one of these two Articles, it is not intangible.<sup>19</sup> Thus, the restrictions placed on the privacy of correspondence and communication and the replacement the judicial review with a review by a body appointed by Parliament are not contrary to one of the immutable principles mentioned in Articles 1 and 20 which are referred to in article 79(3) of the Basic Law.<sup>20</sup>

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<sup>16</sup> BVerfGE 30, 1 (1970). See English translation by Renate Chestnut in COMPARATIVE CONSTITUTIONAL LAW: CASES AND COMMENTARIES, *supra* note 14, at 661.

<sup>17</sup> *Id.* at 662.

<sup>18</sup> *Id.* at 661.

<sup>19</sup> *Id.* at 662.

<sup>20</sup> It is suitable to note that the new version of the Article 10(2) was challenged also before the European Court of Human Rights, in the case *Klass v. Germany*. The European Court reached the same conclusion. The Court found that the aim of the constitutional amendment (art. 10(2)) “is indeed to safeguard national security and/or to prevent disorder or crime in pursuance of article 8, para.2 of the European Convention of Human Rights.” The Court concluded that “the exclusion of judicial control does not exceed the limits of

It should be noted that there are three strong dissenting opinions<sup>21</sup> in that judgment. According to three judges<sup>22</sup> over eight the constitutional amendment should be annulled on the basis of Article 79(3). They argued that the amendment violates the principles of “human dignity” (Article 1) and “individual legal protection” which are further derived from the principle of the “separation of power” (Article 20(2)) which are immutable principles of the Constitution.<sup>23</sup>

## 2. “*Land Reform I*” Case (*Decision of April 23, 1991*)<sup>24</sup>

The case in question arose from the German reunification. Article 41(1) and Annex III of the German Reunification Treaty of August 31, 1990 provide that property expropriated and collectivized in the zone of Soviet occupation from 1945 to 1949 should not be restituted to its original owners. This provision of the Treaty was incorporated into Article 143(3)<sup>25</sup> of the Basic

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what may be deemed necessary in a democratic society”, because the parliamentary control of surveillance measures is sufficient “to exercise an effective and continuous control” (*Klass and others v. Federal Republic of Germany*, Judgment of September 6, 1978, Series A, No. 28, § 46, 56, available in HUDOC database at <http://cmiskp.echr.coe.int/> (last visited Mar. 21, 2007).

<sup>21</sup> An English translation of the dissenting opinions can be found at COMPARATIVE CONSTITUTIONAL LAW: CASES AND COMMENTARIES, *supra* note 14, at 663-65.

<sup>22</sup> Justices Geller, Dr. von Schlabrendorff and Prof. Dr. Rupp. *See Id.* at 663.

<sup>23</sup> *Id.* at 663-65.

<sup>24</sup> BVerfGE 84, 90 (1991). Combined Nos. 1 BvR 1170/90, 1174/90, 1175/90. For comments on this decision, *see* Charles E. Stewart, “*Land Reform*” *Decision*, 85 AM. J. INT’L L. 690 (1991); Jonathan J. Doyle, *A Bitter Inheritance: East German Real Property and the Supreme Constitutional Court’s “Land Reform” Decision of April 23, 1991*, 13 MICH. J. INT’L L. 832 (1992).

<sup>25</sup> Article 143(3) provides as follows: “Notwithstanding paragraphs (1) and (2) above, article 41 of the Unification Treaty and implementing provi-

Law by the 36<sup>th</sup> Constitutional Amendment of September 23, 1990 (*i.e.* the unification amendment). Fourteen expropriated owners attacked the constitutionality of this provision before the Federal Constitutional Court by way of a “constitutional claim” (*Verfassungsbeschwerde*) and they argued that this constitutional amendment was contrary to Article 79(3) of the Basic Law.

The Constitutional Court first examined the procedural regularity of the constitutional amendment and concluded that the constitutional amendment was enacted in conformity with the paragraphs 1 and 2 of Article 79 of the Basic Law. The Constitutional Court, later, reviewed the substance of the constitutional amendment, *i.e.*, the conformity of the amended disposition (Article 143(3)) with the substantive limits provided for in Article 79(3) of Basic Law.<sup>26</sup> The Federal Constitutional Court held that the immutable principles enumerated in Article 79(3) were not affected by the provision of 143(3) (*i.e.*, no return of property). According to the Court, the question of whether no return of property clause was contrary to Article 79(3) of the Basic Law was not posed because these expropriations were undertaken from 1945 to 1949, when the Basic Law is not yet in effect. In other words, the German Basic Law does not protect owners from expropriations imputable to foreign authorities, and in the instant case, the expropriations from 1945 to 1949 were imputable, not to the ex-German Democratic Republic, but to the Soviet occupation authorities. Therefore the

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sions shall remain valid in so far as they provide for the irreversibility of encroachments upon property in the territory specified in article 3 of the said Treaty” (GG [CONSTITUTION] art. 143(3) (1982). *See supra* note 6).

<sup>26</sup> Michel Fromont & Olivier Jouanjan, *République fédérale d'Allemagne [Federal Republic of Germany]*, 7 ANNUAIRE INTERNATIONAL DE JUSTICE CONSTITUTIONNELLE 362, 372 (1991).

expropriations which took place under Soviet occupation were not within the jurisdiction of the Federal Republic of Germany.<sup>27</sup> Finally, the immutable principles as provided by Article 79(3) of the Basic Law do not protect German citizens' rights against the acts of a foreign state; thus, these immutable principles were not affected by a no return of property (Article 143(3)).

### 3. "Land Reform II" Case (Decision of April 18, 1996)<sup>28</sup>

This decision is on the same topic as the decision discussed above. In this case, although the complainants argued that Article 143(3) of the Basic Law violates the principle of equality because the restitution of property expropriated after 1949 was possible, whereas the restitution of property expropriated between 1945 and 1949 was excluded, the Federal Constitutional Court sustained its former decision. It reiterated that a constitutional amendment would only be deemed to be unconstitutional if it affected one of the immutable principles enumerated in Article 79(3) of the Basic Law. And according to the Court, "the principle of equality as protected by Article 3 of the Basic Law does not fall under the above-mentioned principles."<sup>29</sup> Consequently, the Constitutional Court rejected the arguments of claimants and held that Article 143(3) of the Basic Law is constitutional.

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<sup>27</sup> Stewart, *supra* note 24, at 696.

<sup>28</sup> BVerfGE 94, 12 (1990) (BvR 1452/90, 1459/90 and 2031/94). An English précis of this decision is available in CODICES database of Venice Commission, at <http://codices.coe.int> (AUT-1996-1-009) (last visited Mar. 18, 2007).

<sup>29</sup> *Id.*

#### 4. *Asylum Cases (Decision of May 14, 1996)*<sup>30</sup>

Article 16a was incorporated into the Basic Law by the 39<sup>th</sup> Amendment on June 28, 1993. The second paragraph of this Article provides that the right to asylum “may not be invoked by anybody who enters the country from a member state of the European Communities or another third country where the application of the Convention relating to the Status of Refugees and the Convention for the Protection of Human Rights and Fundamental Freedoms is assured.”<sup>31</sup> It was argued that this provision is contrary to Article 1, relating to the protection of human dignity, which is an immutable principle pursuant to Article 79(3) of the Basic Law. The German Federal Constitutional Court rejected this argument and held that the right to asylum does not fall under the principle of human dignity (Article 1), and thus, Article 16a does not violate Article 79(3) of the Basic Law.

On the same day, the Federal Constitutional Court issued two other decisions concerning Article 16a. In its decision 2

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<sup>30</sup> 2 BvR 1938/93; 2 BvR 2315/93. An English précis of this decision is available in CODICES database of Venice Commission, at <http://codices.coe.int> (GER-1996-2-014) (last visited Mar. 15, 2007). See also “New Political Asylum Law Found Constitutional Press Release 27/96 from 14 May 1996” available at <http://www.jura.uni-sb.de/Entscheidungen/abstracts/asyl.html> (last visited Mar. 14, 2007). For comments on this decision, see Bardo Fassbinder, *German Federal Constitutional Court, May 14, 1996: Three Decisions Concerning German Law of Political Asylum*, 91 AM. J. INT’L L. 355 (1997); Reinhard Marx & Katharina Lumpp, *The German Constitutional Court’s Decision of 14 May 1996 on the Concept of ‘Safe Third Countries’ – A Basis for Burden-Sharing in Europe?* 8 INT. J. REFUGEE LAW 419 (1996); Vicki Traulsen, *The German Federal Constitutional Court’s Decision on Asylum Law*, 39 GERMAN YEARBOOK OF INTERNATIONAL LAW 544 (1996).

<sup>31</sup> GG [CONSTITUTION] art. 16a(2) (F.R.G.). See *supra* note 6.

BvR 1507/93, 2 BvR 1508/93, the Federal Constitutional Court held that the third paragraph of Article 16a providing for the possibility of rejecting an application for asylum by persons who come from a “secure State of origin”,<sup>32</sup> does not violate Article 79(3) of the Basic Law.<sup>33</sup> In its decision 2 BvR 1516/93, the Constitutional Court ruled that the fourth paragraph restricting the possibility of remaining in the Federal Republic of Germany during the proceedings of an asylum case, if the claim is manifestly ill-founded, is constitutional.<sup>34</sup>

*5. Acoustic Surveillance of Homes (Decision of March 3, 2004)*<sup>35</sup>

Article 13(3) of the Basic Law was modified by the 45<sup>th</sup> Amendment, dated March 26, 1998. The new version of Article

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<sup>32</sup> Under Article 16a(3), a “secure state” is a state “where the legal situation, the application of the law and the general political circumstances justify the assumption that neither political persecution nor inhumane or degrading punishment or treatment takes place there.” These states will be determined by legislation requiring the consent of the *Bundesrat* (GG [CONSTITUTION] art. 16a(2) (F.R.G.)). See *supra* note 6).

<sup>33</sup> Decision of May 14, 1996, 2 BvR 1507/93, 2 BvR 1508/93. English précis of these decisions are available in CODICES database of Venice Commission, at <http://codices.coe.int> (GER-1996-2-015) (last visited Mar. 12, 2007).

<sup>34</sup> Decision of May 14, 1996, 2 BvR 1516/93. An English précis of this decision is available in CODICES database of Venice Commission, at <http://codices.coe.int> (GER-1996-2-016) (last visited Mar. 12, 2007).

<sup>35</sup> 1 BvR 2378/98, 1 BvR 1084/99. An English précis of these decisions are available in CODICES database of Venice Commission, at <http://codices.coe.int> (GER-2004-1-002) (last visited Mar. 12, 2007). An English translation by Andrea Müller of this decision can be found at <http://www.jura.uni-sb.de/lawweb/pressreleases/lauschangriff.html> (Press Release No. 22/2004, Mar. 3, 2004) (last visited Mar. 10, 2007). For comments on this decision, see Jutta Stender-Vorwachs, *The Decision of the Bundesverfassungsgericht of March 3, 2004 Concerning Acoustic Surveillance of Housing Space*, 5 GER-

13(3)<sup>36</sup> allows the prosecution to employ, on the basis of judicial order, technical means for the acoustic surveillance of homes for the purpose of criminal prosecution. The claimants argued that that this provision violated the inviolability of human dignity,<sup>37</sup> as protected by Article 1, which is an immutable principle pursuant to Article 79(3) of the Basic Law. The German Constitutional Court rejected this argument and ruled that the acoustic surveillance of homes does not affect the inviolability of human dignity; therefore, it is in conformity with Article 79(3) of the Basic Law.<sup>38</sup>

## B. TURKISH CONSTITUTIONAL COURT

Under Article 9 of the 1961 Turkish Constitution, “the provision of the Constitution establishing the form of the state as a republic shall not be amended nor shall any motion therefore be

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MAN LAW JOURNAL 1337 (2004); Nicolas Nohlen, *Germany: The Electronic Eavesdropping Case*, 3 INT’L J. CONST. L (I.CON) 680 (2005); Kim Lane Scheppelle, *Other People’s Patriot Acts: Europe’s Response to September 11*, 50 LOY. L. REV. 89 (2004), available at <http://lsr.nellco.org/upenn/wps/papers/57/> > (last visited Mar. 5, 2007).

<sup>36</sup> Article 13(3) stipulates as follows: “If certain facts justify the suspicion that someone who committed a serious crime, as specified by law, it is permissible for the prosecution of the deed to employ, on the basis of a judicial order, technical means for the acoustical surveillance of residencies, in which the accused presumably dwells, if the determination of the factual situation would be disproportionately more difficult or hopeless. A time limit is to be established. The decision shall be ordered by a judicial panel composed of three judges. In case of danger by delay, such a decision can also be made by a single judge” (GG [CONSTITUTION] art. 16a(2) (F.R.G.). See *supra* note 6).

<sup>37</sup> Stender-Vorwachs, *supra* note 35, at 1344.

<sup>38</sup> See the English précis of the decision of March 3, 2004, available in CODICES database of Venice Commission, at <http://codices.coe.int> (GER-2004-1-002) (last visited Mar. 12, 2007).

made.”<sup>39</sup> Accordingly, the 1961 Constitution placed only one substantial limitation on the amending power: the intangibility of republican form of state. As explained above,<sup>40</sup> the 1961 Turkish Constitution, prior to the 1971 Amendment, did not include a special provision concerning the question of whether constitutional amendments could be subject to judicial review. However, the Turkish Constitutional Court, in a decision dated June 16, 1970, No. 1970/31,<sup>41</sup> reviewed the procedural regularity of the Constitutional Amendment of November 6, 1969 and annulled it because of its procedural irregularity. In that decision, the Turkish Constitutional Court declared itself competent to review the substance of the constitutional amendment, but since this amendment was initially invalidated, due to its procedural irregularity, the Court held that it is not necessary to rule on the substantial regularity of that amendment.<sup>42</sup>

*Decision of April 3, 1971, No. 1971/37*<sup>43</sup>. – The Constitutional Amendment of April 17, 1970,<sup>44</sup> postponed the elections of Senate for one year and four months. The Turkish Workers Party submitted an application for annulment to the Constitutional Court and argued that this constitutional amendment was contrary to the constitution with respect to both its form and substance, but the Turkish Constitutional Court rejected this argument. The Court first examined the formal regularity of the constitutional amendment and did not find a formal or proce-

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<sup>39</sup> ANAYASA [Constitution] art. 9 (1982). *See supra* note 5.

<sup>40</sup> *See supra* pp. 23-24.

<sup>41</sup> 8 AMKD 313 (1970).

<sup>42</sup> *Id.* at 323, 332.

<sup>43</sup> 9 AMKD 416 (1971).

<sup>44</sup> RESMI GAZETE [OFFICIAL GAZETTE], Apr. 22, 1970, No. 13578.

dural irregularity.<sup>45</sup> Secondly, the Court discussed the question of whether it has the jurisdiction to review the constitutionality of constitutional amendments with respect to their substance. The Turkish Constitutional Court declared itself competent to review the conformity of the constitutional amendment with the republican form of state as protected by Article 9. Moreover, the Turkish Constitutional Court interpreted the concept of “republican form of state” broadly by providing that it encompassed the characteristics of the Turkish Republic, such as the rule of law, secularism, social state, and democracy. In the instant case, the Turkish Constitutional Court examined the conformity of the Constitutional Amendment of April 17, 1970 with the republican form of state, and concluded that the constitutional amendment (postponement of the senatorial elections for one year and four months) did not affect the intangibility of the republican form of state nor the fundamental principles of the Constitution.<sup>46</sup>

## **II. IF THERE ARE NO SUBSTANTIVE LIMITS IN THE CONSTITUTION, THE JUDICIAL REVIEW OF THE SUBSTANCE OF CONSTITUTIONAL AMENDMENTS IS NOT POSSIBLE**

If the substantive limits do not exist, constitutional courts cannot review the substance of constitutional amendments because they do not have the criterion by which they can evaluate the regularity of the substance of constitutional amendments. In other words, the judicial review of the constitutional amendments presupposes the existence of substantive limits on the amending power. In a constitutional system where there is no

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<sup>45</sup> 9 AMKD 416, at 426 (1971).

<sup>46</sup> *Id.* at 429-30.

substantive limit on the constitutional amendments, there is no judicial power to review the substance of procedurally correct constitutional amendments.

In the writer's view, the answer to this question of whether constitutional courts can review the substance of constitutional amendments is simple such as described in the above paragraph. But, when it comes to the substantive limits on the power to amend the constitution, some scholars are not satisfied with enumerating the substantive limits written in the text of the constitution and go much further, trying to find other substantive limits on constitutional amendments. They argue that there are some substantive limits which are not expressly written in the text of the constitution, however they are capable of imposing on the amending power. This kind of limits is called "implied", "implicit" or "intrinsic substantive limits"<sup>47</sup> as opposed to "express" or "explicit substantive limits."<sup>48</sup> These "alleged" im-

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<sup>47</sup> For the examples of these designations, see George D. Skinner, *Intrinsic Limitations on the Power of Constitutional Amendment*, 18 MICH. L. REV. 213 (1920); Gary Jeffrey Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective*, 4 INT'L J. CONST. L. (I.CON) 460, at 461, 463, 470, 471, 474, 478, 480 (2006); Virgilio Afonso da Silva, *A Fossilied Constitution*, 17 RATIO JURIS 454, at 458-459 (2004).

<sup>48</sup> It should be noted that wordings such as "implied", "implicit" or "intrinsic substantive limits" are misleading, because the adjectives "implied", "implicit" or "intrinsic" create the impression that these limits are virtually contained in the constitution itself. But, in reality, these limits not only are not formulated by the text of the constitution, but also they cannot be inferred directly or indirectly from a constitutional provision. In other words, these alleged limits do not find their sources in the text of the constitution. Adjective *implied* is defined by *Oxford English Dictionary* as "contained or stated by implication; involved in what is expressed; necessarily intended though not expressed"; *implicit* as "implied though not plainly expressed"; *intrinsic* as "belonging to the thing in itself, or by its very nature" (<http://www.oed.com>, last visited Mar. 22, 2007).

plied or implicit substantive limits are not written at all in the text of the constitution; they are invented or discovered by some scholars of constitutional law. For that reason, Marie-Françoise Rigaux names these limits as “substantive limits inferred from a doctrinal interpretation.”<sup>49</sup>

#### A. THE ARGUMENTS IN FAVOR OF THE EXISTENCE OF IMPLICIT SUBSTANTIVE LIMITS

Several arguments are advanced in favor of the existence of so-called implied substantive limits on constitutional amendments. These arguments may be grouped into the following three categories:

##### *1. Arguments Based on the Interpretation of the Word “Amend”*

According to Walter F. Murphy, “the word *amend*, which comes from the Latin *emendere*, means to correct or improve; amend does not mean ‘to deconstitute and reconstitute’”.<sup>50</sup> William L. Marbury, in 1919, affirmed that “the power to ‘amend’ the Constitution was not intended to include the power to *destroy* it.”<sup>51</sup> Parting from this meaning of word “amend”, some

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<sup>49</sup> RIGAUX, *supra* note 1, at 95.

<sup>50</sup> Walter F. Murphy, *Merlin’s Memory: The Past and Future Imperfect of the Once and Future Polity*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 117 (Sanford Levinson ed., Princeton University Press 1995), available also at <<http://site.ebrary.com/lib/kocuniv/Doc?id=10035811&ppg=178>> (last visited Mar. 16, 2007).

<sup>51</sup> William L. Marbury, *The Limitations upon the Amending Power*, 33 HARV. L. REV. 232, 225 (1919). Emphasis in original. Marbury’s assertion is affirmed by the Indian Supreme Court, in *Minerva Mills*: “The power to destroy is not a power to amend” (*Minerva Mills Ltd. v. Union of India*, 1981

scholars,<sup>52</sup> and even a Supreme Court,<sup>53</sup> asserted that the power to amend cannot replace one constitutional system with another or alter the basic structure or essential features of the constitution. Likewise, some authors argued that the constitution has an “inner unity”, “identity” or “spirit” and the amending power can not ruin this “inner unity”, “identity” or “spirit” of the constitution.<sup>54</sup> Finally it is also contented that the amending power can not modify entirely constitution.

*Criticism.* – These arguments are highly disputable. First, if the constitution does not prohibit its complete revision, the power to amend can modify the constitution completely. Indeed some constitutions, such as the Constitutions of Austria (Article 44), Spain (Article 168) and Switzerland (Article 139) expressly provided their total revision. Likewise, the concepts of “inner unity”, “identity” or “spirit” of the constitution are vague concepts which cannot be objectively determined. Constitutions do

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S.C.R (1) 206, 207, available also at <<http://judis.nic.in/supremecourt/qrydisp.asp?tfnm=4488>> (last visited Mar. 23, 2007).

<sup>52</sup> See, e.g., Murphy, *supra* note 50, at 180.

<sup>53</sup> As it will be study later (*see infra*, pp. 92-94), the Supreme Court of India, in *Kesavananda Bharati v. State of Kerala*, held that “the power to amend does not include the power to alter the basic structure, or framework of the Constitution so as to change its identity” (*Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225; AIR 1973 SC 1461. Excerpts from this judgment are available in *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* 1175-1180 (Norman Dorsen *et al.*, eds., Thomson West 2003).

<sup>54</sup> See, e.g., Murphy, *supra* note 50, at 180. For an analysis and criticism of the concept of the spirit of constitution, *see* Kemal Gözler, *Sur la validité des limites à la révision constitutionnelle déduites de l'esprit de la constitution [On the Validity of Limitations on Constitutional Amendment Inferred from the Spirit of Constitution]*, 31 ANNALES DE LA FACULTE DE DROIT D'ISTANBUL 109 (1997), available at <http://www.anayasa.gen.tr/esprit.htm> (last visited Mar. 22, 2007).

not define their “inner unity”, “identity” or “spirit” and they do not specify that their “inner unity”, “identity” or “spirit” is immutable.<sup>55</sup> These concepts are deprived of positive legal validity. Finally, it is difficult to infer a legal consequence from the grammatical interpretation of the word *amend* because if the constitution does not prohibit its total revision or preclude a constitutional provision from amendment, the amendment procedure may be used for one, two, three or all articles of the constitution (*i.e.*, the amending power can replace one constitution with another). Moreover, naturally, this grammatical argument may be valid in English, but not valid in other languages. For example, for the word *amendment*, the 1958 French Constitution uses the word *revision*,<sup>56</sup> the 1947 Italian Constitution *revisione*,<sup>57</sup> the 1976 Portuguese Constitution *revisão*,<sup>58</sup> the 1978

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<sup>55</sup> Except for the 1814 Norwegian Constitution and the 1990 Nepalese Constitution. Article 112 of the Norwegian Constitution of 1814 stipulates that constitutional amendments “must never, however, contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the *spirit* of the Constitution” (An English translation of the Constitution of Norway is available at [http://www.oefre.unibe.ch/law/icl/no00000\\_.html](http://www.oefre.unibe.ch/law/icl/no00000_.html) (last visited Mar. 22, 2007) (Emphasis added). Article 116(1) of the 1990 Nepalese Constitution states as follows: “A bill to amend or repeal any Article of this Constitution, *without prejudicing the spirit of the Preamble of this Constitution*, may be introduced in either House of Parliament” (an English translation of the Constitution of Nepal is available at [http://www.oefre.unibe.ch/law/icl/np00000\\_.html](http://www.oefre.unibe.ch/law/icl/np00000_.html) (last visited Mar. 23, 2007) (Emphasis added).

<sup>56</sup> 1958 CONST. art. 89 (France). The original French text is available at [http://www.elysee.fr/elysee/francais/les\\_institutions/les\\_textes\\_fondateurs/la\\_constitution\\_de\\_1958/la\\_constitution\\_de\\_1958.21061.html](http://www.elysee.fr/elysee/francais/les_institutions/les_textes_fondateurs/la_constitution_de_1958/la_constitution_de_1958.21061.html), last visited Mar. 24, 2007).

<sup>57</sup> COSTITUZIONE DELLA REPUBBLICA ITALIANA [COST.] arts. 138-139 (Italy). The original Italian text available at <http://www.quirinale.it/costituzione/costituzione.htm> (last visited Mar. 24, 2007).

Spanish Constitution *reforma*,<sup>59</sup> the 1949 German Constitution *Änderung*,<sup>60</sup> and the 1982 Turkish Constitution *değişiklik*.<sup>61</sup> The meaning of these terms is not exactly the same as that of *amendment*. For instance, Turkish word *değişiklik* means *change* rather than *amendment*.

## 2. Arguments Based on the Theory of Supra-Constitutionality<sup>62</sup>

Some scholars<sup>63</sup> argue that there are some principles which are superior to the constitution. If a constitutional amendment violates these principles, it will be null and void, and it should be invalidated by the constitutional court. Therefore, the supra-constitutional principles form the substantive limitations on the power to amend the constitution. But, when it comes to making

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<sup>58</sup> CONSTITUIÇÃO DA REPUBLICA PORTUGUESA [COST.] arts. 284-289 (Portugal). The original Portuguese text is available at [http://www.parlamento.pt/const\\_leg/crp\\_port/index.html](http://www.parlamento.pt/const_leg/crp_port/index.html), (last visited Mar. 15, 2007).

<sup>59</sup> CONSTITUCION ESPAÑOLA [C.E.] arts. 166-169 (Spain). The original Spanish text available at <http://www.senado.es/constitu/index.html> (last visited Mar. 22, 2007).

<sup>60</sup> GRUNDGESETZ [GG] [Constitution] art. 79 (1949) (F.R.G). The Original German text is available at <http://www.jura.uni-sb.de/BIJUS/grundgesetz/>, (last visited Mar. 26, 2007).

<sup>61</sup> ANAYASA [Constitution] art. 175 (1982) (Turkey). The original Turkish text is available at <HTTP://www.anayasa.gen.tr/1982ay.htm>, (last visited Mar. 24, 2007).

<sup>62</sup> For an analysis and criticism of the concept of “supra-constitutionality”, see GÖZLER, *supra* note 1, at 287-310.

<sup>63</sup> For example see Serge Arné, *Existe-t-il des normes supra-constitutionnelles? [Are There Supra-Constitutional Norms]*, REVUE DU DROIT PUBLIC 459-512 (1993); Stéphane Rials, *Supraconstitutionnalité et systématique du droit [Supra-Constitutionality and System of Law]*, ARCHIVES DE PHILOSOPHIE DU DROIT 57 (1986).

the list of the supra-constitutional principles, the supporters of this theory do not agree; each of them draws a different list according to his own perceptions.

For example, in France, Serge Arné asserted that the following principles must be figured among the supra-constitutional principles: “The respect of human dignity”, “non-discrimination and solidarity”, “pluralism.”<sup>64</sup> But Stéphane Rials, another supporter of the supra-constitutionality, gives these four principles as supra-constitutional, “(1) the constitution must be written; (2) the nation is the unique holder of supreme power and consequently constituent; (3) the principle of the separation of powers; and (4) the Fundamental rights are superior to the constituent will.”<sup>65</sup>

In Ireland, Roderick O’Hanlon defended the superiority of natural law over the constitution. According to O’Hanlon, “there is a law superior to all positive law, which is not capable of being altered by legislation, or even by a simple amendment of the Constitution itself.”<sup>66</sup> In O’Hanlon’s view, a constitutional amendment which offended a natural law value, such as the right to life of the unborn, can not have the “character of law.”<sup>67</sup>

In the United States, Walter Murphy argued that there are “prohibitions imposed by natural law” upon to amending

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<sup>64</sup> Arné, *supra* note 63, at 474-475.

<sup>65</sup> Rials, *supra* note 63, at 64.

<sup>66</sup> Roderick O’Hanlon, *Natural Rights and the Irish Constitution*, 11 IRISH LAW TIMES 8, at 10 (1993), *quoted in* Cathryn Costello, *Ireland’s Nice Referanda*, 1 EUROPEAN CONSTITUTIONAL LAW REVIEW 357, at 376, note 71 (2005).

<sup>67</sup> *Id.*

power.<sup>68</sup> According to Murphy, “the classic natural-law theory that an unjust enactment, of whatever sort, is not law at all but a mere act of arbitrary will, incapable of imposing obligation” may be deployed in order to limit the amending power.<sup>69</sup> Jeff Rosen also argued that there are “natural rights limitations on the amendment power.”<sup>70</sup>

*Criticism.* – The theory of supra-constitutionality is highly problematic and controversial. Without accepting the natural law theory, it is impossible to admit to the legal validity of supra-constitutional principles because they do not have a textual basis. Whatever the intellectual worth of natural law may be, this theory cannot, in this research, be admitted because it is impossible to construct a theory of the judicial review of constitutional amendments on the premises of the natural law.

Even if the theory of the existence of supra-constitutional principles were accepted for one moment, it would be impossible to objectively determine these principles because everybody will define and determine these principles according to his or her doctrinal preferences, profiting from the fact that they do not have textual sources. Indeed, as already observed, the advocates of the existence of supra-constitutional principles do not agree on the list of such principles. This demonstrates that, even if the existence of these principles is accepted, they cannot be used as reference norm in the judicial review of the constitutional amendments because they are indeterminable. In this situation, the review of the conformity of constitutional amend-

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<sup>68</sup> Murphy, *supra* note 50, at 180.

<sup>69</sup> *Id.* at 181.

<sup>70</sup> Jeff Rosen, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L. J. 1073, at 1080 (1991).

ments with supra-constitutional principles would be a usurpation of amending power by the constitutional court.

### 3. *Arguments Based on the Theory of Hierarchy between Provisions of the Constitution*<sup>71</sup>

Some scholars<sup>72</sup> asserted that the norms of a constitution do not have the same legal value. There may be a hierarchy among the different provisions of the same constitution; some provisions of the constitution may be superior to the other provisions of the constitution. The power to amend cannot modify the hierarchically superior provisions of the constitution. Thus these provisions constitute substantive limits on constitutional amendments. In other words, some fundamental norms of the constitution are so fundamental and sacrosanct that they are beyond the competence of the amending power. It is generally asserted that the constitutional provisions relating to the human dignity,<sup>73</sup> some or all fundamental rights, the basic principles of the state, such as democratic state, rule of law, social state, federalism or unitary state, popular sovereignty are superior to

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<sup>71</sup> For an analysis and criticism of the concept of the hierarchy between constitutional norms, see Kemal Gözler, *La question de la hiérarchie entre les normes constitutionnelles [Question of Hierarchy Between Constitutional Norms]*, 32 ANNALES DE LA FACULTÉ DE DROIT D'ISTANBUL 65 (1998), available at <http://www.anayasa.gen.tr/hierarchie.htm> (last visited Mar. 23, 2007). See generally, HIERARCHY OF CONSTITUTIONAL NORMS AND ITS FUNCTION IN THE PROTECTION OF FUNDAMENTAL RIGHTS (VIII<sup>th</sup> Conference of European Constitutional Courts, Ankara May 7-10, 1990) (Publications of the Constitutional Court of Turkey 1990) (5 Volumes).

<sup>72</sup> For example, Marcel Bridel & Pierre Moor, *Observations sur la hiérarchie des règles constitutionnelles [Observations on the Hierarchy of Constitutional Rules]*, 87 REVUE DU DROIT SUISSE (= ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT) 405 (1968).

<sup>73</sup> Murphy, *supra* note 50, at 176.

other provisions of the constitution. For example, Robert Badinter, the ex-president of the French Constitutional Council, in a colloquium, argued that, “there are, in our constitutional systems, intangible liberties that the constituent power cannot remove.”<sup>74</sup> Dominique Turpin affirmed that human rights, such as liberty, propriety, personal security, and resistance to oppression are superior to other constitutional rights, therefore they are cannot be abolished by the amending power.<sup>75</sup> Maryse Baudrez asserted that “all constitutional provisions concerning human rights cannot be revised.”<sup>76</sup> Olivier Beaud contented that the provisions of the Constitution concerning the popular sovereignty are superior to the other provisions of the Constitution, therefore the amending power cannot modify these provisions.<sup>77</sup>

*Criticism.*— Undoubtedly, there may be a hierarchy between provisions of the constitution from a *purely moral or politic point of view*. For example, it can be asserted that Article 7 of the 1999 Swiss Constitution providing that “human dignity

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<sup>74</sup> Oral intervention of Robert Badinter at the Colloquium of May 25-26, 1989 in the French Constitutional Council, in *LA DECLARATION DES DROITS DE L'HOMME ET DU CITOYEN ET LA JURISPRUDENCE* 33 (P.U.F. 1989).

<sup>75</sup> DOMINIQUE TURPIN, *CONTENTIEUX CONSTITUTIONNEL [CONSTITUTIONAL JURISDICTION]* 86-87 (P.U.F. 1986).

<sup>76</sup> Maryse Baudrez & Jean-Claude Escarras, *La révision de la Constitution italienne: doctrine et complexité des faits [Amendment of the Italian Constitution]*, in *LA REVISION DE LA CONSTITUTION [CONSTITUTIONAL AMENDMENT]* 139, at 141 (Symposium, Mar. 20 and Dec. 16, 1992) (Economica & Presses universitaires d'Aix-Marseille 1993).

<sup>77</sup> Olivier Beaud, *La souveraineté de l'Etat, le pouvoir constituant et le Traité de Maastricht: remarques sur la méconnaissance de la limitation de la révision constitutionnelle [Sovereignty of State, Constituent Power and The Maastricht Treaty: Remarks on the Unawareness of the Limitations upon Constitutional Amendment]*, *REVUE FRANÇAISE DE DROIT ADMINISTRATIF* 1045, at 1054, 1059-1063 (1993).

is to be respected and protected” is more important than Article 88 of the said Constitution stipulating that “the Federation establishes principles on networks of footpaths and hiking trails.” But from a *legal point of view*, there is no hierarchy between these two articles of the Swiss Constitution. Articles 7 and 88 are two provisions which are contained in the same text, and which are laid down by the same constituent power, and thus, they have the same legal value.

In the constitutions examined in this monograph, there is absolutely no provision stipulating that one part or one provision of the constitution is superior to the other parts or provisions of the constitution. Therefore, the theory of the existence of the hierarchy between constitutional norms is baseless. This theory, like the theory of supra-constitutionality, is deprived of positive legal value. As a result, this theory is also untenable without accepting the existence of the natural law.

A constituent power had the possibility of precluding some provisions of the constitution from being amended. As explained above,<sup>78</sup> Articles 1 and 20 of the German Basic Law, and Articles 1-3 of the 1982 Turkish Constitution are excluded from amendment. The fact that a constituent power did not preclude some constitutional provisions from being amended means that it empowered the amending power to modify all provisions of the constitution. Similarly the fact that a constituent power prohibited the amendment of only some constitutional provisions means that it allowed the amending power to modify all provisions of the constitution, except the amendment of those which are prohibited. Therefore one cannot assert that not only the provisions which are precluded from amendment,

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<sup>78</sup> See *supra* p. 55, 66.

but also those which are related to a basic value, such as human rights, the rule of law, social state, popular sovereignty, and so on, are beyond of amending power. In other words, if the constitution prohibited the amendment of only one or some of its provisions, the other provisions would be modifiable by amending power.

In sum, from a legal point of view, it is impossible to establish a hierarchy between the provisions of the same constitution. Between the provisions of the same constitution, there may be not a hierarchical relationship, but a relationship of priority/posteriority with regard to their effective date, or a relationship of specialty/generality with regard to their extent. If there were a contradiction between the two provisions of the same constitution, the contradiction would be solved according to the principles of *lex posterior derogat legi priori* and *lex specialis derogat legi generali*.

If in a constitution there are not immutable provisions (*i.e.*, explicit substantive limits), all provisions of the constitution are modifiable by amending power. Therefore in a country where there are no substantive limits written in the text of the constitution, constitutional courts cannot review the substance of the constitutional amendments. A constitutional amendment enacted in conformity with the constitution which is in effect has the same legal force as the constitution itself. In other words, a provision amended or altered by way of a constitutional amendment becomes part of the constitution. This provision holds, in the hierarchy of norms, the same rank as the other provisions of the constitution. Consequently it is logically impossible to conceive a review of the constitutionality of constitutional amendments because there can be no criterion for this review.

## B. CASE-LAW OF CONSTITUTIONAL COURTS REJECTING THE EXISTENCE OF IMPLICIT SUBSTANTIVE LIMITS

The United States Supreme Court, the Irish Supreme Court and the German Constitutional Court (after 1970) rejected the existence of the implicit substantive limits on constitutional amendments. According to these courts, there are no substantive limits imposed on the amending power, other than those which are written expressly in the text of the Constitution.

### *1. The United States Supreme Court*

As observed above,<sup>79</sup> the United States Supreme Court, in *Hollingsworth v. Virginia*,<sup>80</sup> *National Prohibition Cases*,<sup>81</sup> *Dillon v. Gloss*<sup>82</sup> and *United States v. Sprague*<sup>83</sup> reviewed the formal and procedural regularity of constitutional amendments. However, the U.S. Supreme Court never reviewed the substance of constitutional amendments. Indeed, in the U.S. Constitution, there is only one express substantive limitation on the amending power: “No state, without its consent, shall be deprived of its equal suffrage in the Senate.”<sup>84</sup> Therefore, except for this limitation, in the United States, the judicial review of constitutional amendments is logically impossible, due to lack of substantive limits.

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<sup>79</sup> See *supra* pp. 28-34.

<sup>80</sup> 3 U.S. 378 (Dall.) (1798).

<sup>81</sup> 253 U.S. 350 (1920).

<sup>82</sup> 256 U.S. 368 (1921).

<sup>83</sup> 282 U.S. 716 (1931).

<sup>84</sup> U.S. Constitution, Art. V.

However in the United States, during the 1920s and on the occasion of the Eighteenth Amendment, a controversy arose on the existence of the implicit substantive limits on the amending power. Some authors<sup>85</sup> have argued that there are some “implied” or “intrinsic” substantive limits on the amending power other than the substantive limit (equal suffrage of states in the Senate) provided expressly by Article V; but others<sup>86</sup> denied this thesis. Finally, the U.S. Supreme Court, in the *National Prohibition Cases*, rejected the thesis of the existence of implicit substantive limits on the amending power.

In the *National Prohibition Cases (State of Rhode Island v. Palmer)*,<sup>87</sup> it was argued that not only the procedure by which the Eighteenth Amendment was adopted, but also its substance is contrary to the Constitution because, allegedly, this amendment “deprived the states of their police powers secured by the Tenth Amendment and thereby altered the Constitution so fundamentally as to be not an ‘amendment’ but a first step towards destruction.”<sup>88</sup> It was also argued that this Amendment “was a mere ‘addition’ and not an ‘amendment’, because it was not germane to anything in the original Constitution.”<sup>89</sup> The Supreme Court clearly rejected this argument in announcing the following conclusions:

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<sup>85</sup> For example see Marbury, *supra* note 51; Skinner, *supra* note 47.

<sup>86</sup> For example see Lester B. Orfield, *The Scope of the Federal Amending Power*, 28 MICH. L. REV. 550 (1930); D. O. McGovney, *Is the Eighteenth Amendment Void because of Its Contents?*, 20 COLUM. L. REV. 499 (1920).

<sup>87</sup> 253 U.S. 350 (1920).

<sup>88</sup> Quoted in Thomas Reed Powell, *The Supreme Court and the Constitution: 1919-1920*, 35 POL. SCI. Q. 411, at 413 (1920).

<sup>89</sup> *Id.* These arguments were originally developed by William L. Marbury. See Marbury, *supra* note 51, at 225.

[...] (4) The prohibition of the manufacture, sale, transportation, importation and exportation of intoxicating liquors for beverage purposes, as embodied in the Eighteenth Amendment, is within the power to amend reserved by article 5 of the Constitution.

(5) That amendment, by lawful proposal and ratification, has become a part of the Constitution, and must be respected and given effect the same as other provisions of that instrument.<sup>90</sup>

After the *National Prohibition Cases* (1920), until now, in the United States, the controversy on the existence of the implicit limitations on the amending power continued. On different occasions, such as with the flag burning issue, some authors<sup>91</sup> contented that there were certain implied limitations on the amending power; but others<sup>92</sup> rejected this thesis. But until now, the contention of the existence of implicit limitations was not invoked in a legal case before the U.S. Supreme Court, and therefore, the Supreme Court did not rule on this issue.

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<sup>90</sup> 253 U.S. 350, at 386.

<sup>91</sup> For example Murphy, *supra* note 50, at 163-190; Rosen, *supra* note 70, at 1073-1092; Raymond Ku, *Consensus of the Governed: The Legitimacy of Constitutional Change*, 64 *FORDHAM L. REV.* 535 (1995); Jason Mazzone, *Unamendments*, 90 *IOWA L. REV.* 1747 (2005) available at SSRN, <http://ssrn.com/abstract=803864> (last visited Mar. 24, 2007); Jacobsohn, *supra* note 47, at 461, 463, 470, 471, 474, 478, 480.

<sup>92</sup> For example Laurence H. Tribe, *A Constitution We Are Amending: In A Defense of a Restrained Judicial Role*, 97 *HARV. L. REV.* 433 (1983); John R. Vile, *The Case against Implicit Limits on Constitutional Amending Process*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 191 (Sanford Levinson ed., Princeton University Press, 1995).

## 2. Irish Supreme Court

The Supreme Court of Ireland had the opportunity to review the constitutionality of the constitutional amendments in the *State (Ryan)* and *Abortion Information* cases.

In *State (Ryan) v. Lennon* (1935)<sup>93</sup>, the plaintiff argued that Article 2A, which inserted by the 17<sup>th</sup> Amendment (October 17, 1931), in the Constitution of the Irish Free State of 1922, was invalid.<sup>94</sup> The Supreme Court rejected this claim and held that the Constitution of 1922 gave the Parliament the power to amend the Constitution, but it did not impose any substantive limitations on the Parliament's amending power. It can, therefore, be concluded that, the amendment is valid and its substance is not subject to review.<sup>95</sup>

In Ireland, the issue of the constitutionality of constitutional amendments raised again after the Thirteenth and Fourteenth Amendments, which were adopted by referendum in November 1992, guaranteed the right to obtain information about abortion services available abroad and the freedom to travel for this purpose. Relating to these amendments, Roderick O'Hanlon asserted that the right to life of the unborn, as a natural law value, is superior to any positive law, and thus the Thirteenth and Fourteenth Amendments, which infringed upon this right, should be deemed invalid.<sup>96</sup> In *Abortion Information Case*

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<sup>93</sup> *State (Ryan) v. Lennon* [1935] 170 I.R. 198 (Ir.). For comments, see Rory O'Connell, *Guardians of the Constitution: Unconstitutional Constitutional Norms*, 4 J. CIVIL LIBERTIES 48, 56-61 (1999); Jacobssohn, *supra* note 47, at 465-468.

<sup>94</sup> Quoted in O'Connell, *supra* note 93, at 58.

<sup>95</sup> *Id.*

<sup>96</sup> O'Hanlon, *supra* 66, at 10. See also Roderick O'Hanlon, *The Judiciary and the Moral Law*, 11 IRISH LAW TIMES 129, at 130 (1993) quoted in Ian

(1995),<sup>97</sup> “the counsel for the unborn” made an argument similar to the O’Hanlon argument. He argued that “the natural law is the foundation upon which the Constitution was built and ranks superior to the Constitution, [such] that no provision of the Constitution... can be contrary to Natural Law, and if it is, [it] cannot be enforced.”<sup>98</sup> His reasoning was that since the constitutional amendment relating to obtaining information on abortions violates the natural law, it is invalid.<sup>99</sup> The Supreme Court of Ireland rejected this argument in stating clearly that “the Court does not accept this argument.”<sup>100</sup> Thus, according to the Supreme Court of Ireland, as observed by Rory O’Connell, “there is no power to review the substance of a constitutional amendment, provided it is carried out in a procedurally correct manner.”<sup>101</sup>

As examined above,<sup>102</sup> in 1999, the Irish Supreme Court, in the *Riordan v. An Taoiseach* case, ruled that it is incompetent to review the constitutionality of constitutional amendments.<sup>103</sup>

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Walsh, *Between Scylla and Charybdis: The Supreme Court and the Regulation of Information Bill (1995)*, 7 CORK ONLINE LAW REVIEW note 10 (2003), <http://www.ucc.ie/colr/2003vii.html> (last visited Mar. 25, 2007).

<sup>97</sup> *Abortion Information Case (Article 26 and the Regulation of Information (Services outside the State for the Termination of Pregnancies) Bill 1995, In Re* [1995] IESC 9 (Date of Judgment: 12/05/ 1995), available at <http://www.bailii.org/ie/cases/IESC/1995/9.html> (last visited Mar. 27, 2007).

<sup>98</sup> *Id.* at 38.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> O’Connell, *supra* note 93, at 65.

<sup>102</sup> *See supra* pp. 17-19.

<sup>103</sup> *Riordan v. An Taoiseach* [1999] IESC 1 (May 20, 1999, Appeal No. 202/98) (Ir.), available at <http://www.bailii.org/ie/cases/IESC/1999/1.html> (last visited Mar. 6, 2007).

### 3. German Constitutional Court

As explained above,<sup>104</sup> in Germany, there are express substantive limits on constitutional amendments provided by Article 79(3) of the 1949 German Basic Law, and as observed above, the German Constitutional Court reviewed the conformity of the constitutional amendments with these substantive limits. However, as will be explained below,<sup>105</sup> the German Constitutional Court, in the 1950s, in the *Southwest Case (1951)*<sup>106</sup> and in the *Article 117 Case (1953)*,<sup>107</sup> affirmed, but only as *obiter dictum*, the existence of some substantive limitations on the amending power, other than those expressly provided in Article 79(3). But after 1970, rejecting the doctrine of the existence of implicit substantive limitations, the German Constitutional Court referred only to the express limitations provided by Article 79(3), in the cases in which the constitutionality of constitutional amendments was reviewed.<sup>108</sup>

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<sup>104</sup> See *supra* pp. 55-56.

<sup>105</sup> See *infra* pp. 85-89.

<sup>106</sup> BVerfGE 1, 14 (1951).

<sup>107</sup> BVerfGE 3, 225 (1953).

<sup>108</sup> In the *Klass Case*, the doctrine of the implicit substantive limitations is accepted only in the dissenting opinions. According to the dissenting judges, "certain fundamental decisions of the Basic Law maker are inviolable" (Decision of December 15, 1970, BVerfGE 30, 1. An English translation of the dissenting opinions by Renate Chestnut can be found in *COMPARATIVE CONSTITUTIONAL LAW: CASES AND COMMENTARIES*, *supra* note 14, at 663-665).

### C. CASE-LAW OF CONSTITUTIONAL COURTS ACCEPTING THE EXISTENCE OF IMPLICIT SUBSTANTIVE LIMITS

However some constitutional courts, such as German Constitutional Court (in the 1950s, but only as *obiter dictum*), the Indian Supreme Court and the Turkish Constitutional Court (under 1961 Constitution) held that the amending power is limited not only by the substantive limits explicitly written in the text of the constitution, but also by those which are not provided by the constitution. And according to these courts, they can review the conformity of constitutional amendments with these substantial limits which are not expressly written in the text of the constitution. The case-law of these courts will be analyzed below.

#### 1. *The German Federal Constitutional Court in the 1950s*

The theory of the existence of implicit substantive limits on constitutional amendments has its origins in the German Federal Constitutional Court's two decisions in the 1950s.

a) *Southwest Case (Decision of October 23, 1951)*.— The German Federal Constitutional Court, in this case, held that

a constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate... [A]ny constitutional provision must be interpreted in such a way that it is compatible with those elementary principles and with the basic decisions of the framers of the Constitution.<sup>109</sup>

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<sup>109</sup> BverfGE 1, 14 (1951). An English translation of the important parts of this judgment by Renate Chestnut can be found in *COMPARATIVE CONSTITUTIONAL LAW: CASES AND COMMENTARIES*, *supra* note 14, at 208-212, the

Moreover in this decision, the Federal Constitutional Court noted that it agrees with the following statement made by the Bavarian Constitutional Court:

That a constitutional provision itself may be null and void is not conceptually impossible just because it is a part of the Constitution. There are constitutional principles that are so fundamental and so much an expression of a law that has precedence even over the Constitution that they also bind the framers of the Constitution, and other constitutional provisions that do not rank so high may be null and void because they contravene these principles.<sup>110</sup>

As the above statements demonstrate, the Federal Constitutional Court asserted the superiority of the overarching and fun-

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quotation is at 209. For comments on this judgment, see Gerhard Leibholz, *The Federal Constitutional Court in Germany and the "Southwest Case"*, 46 AM. POL. SCI. REV. 723 (1952); Gottfried Dietze, *Unconstitutional Constitutional Norms? Constitutional Development in Postwar Germany*, 42 VA. L. REV. 1, at 2-17 (1956); Peter Jambrek & Klemen Jaklič, *Contribution to the Opinion of the Venice Commission on the Constitutional Amendments Concerning Legislative Elections in Slovenia*, [http://www.venice.coe.int/docs/2000/CDL-INF\(2000\)013-e.asp](http://www.venice.coe.int/docs/2000/CDL-INF(2000)013-e.asp) (last visited Mar. 24, 2007); O'Connell, *supra* note 93, at 53-56.

<sup>110</sup> BverfGE, 1, 14 (1951) (in COMPARATIVE CONSTITUTIONAL LAW: CASES AND COMMENTARIES, *supra* note 14, at 209). The quoted Bavarian Constitutional Court's decision is that of April 24, 1950, ENTSCHEIDUNGEN DES BAYERISCHEN VERFASSUNGSGERICHTSHOFES [BAYERN CONSTITUTIONAL COURT REPORTS] 6, 47 (1950). See DONALD D. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 542, note 90 (2<sup>nd</sup> Ed., Duke University Press 1997). Kommers' translation of this extract from the Bavarian Constitutional Court is a little different: "It is not conceptually impossible to regard a constitutional provision as void even though it is part of the Constitution. Some constitutional principles are so basic and so much the expression of a legal principle which antedates the Constitution that they bind the constitutional framer himself. Other constitutional provisions which are not of equal rank may be void if they contravene them" (*Id.*).

damental principles of the Constitution over other constitutional provisions. Thus, the Federal Constitutional Court held that there are substantive limits other than those laid down in Article 79(3), and it can review the conformity of constitutional amendments with these limits.<sup>111</sup>

As is explained above,<sup>112</sup> it is impossible to establish a hierarchy between the provisions of the same constitution. Hopefully, the Federal Constitutional Court affirmed the existence of the hierarchy between the constitutional norms as only *obiter dictum*,<sup>113</sup> and did not invalidate a constitutional amendment on the ground that it violates these “overarching principles.”

*b) Article 117 Case (Decision of December 18, 1953).*— Two years later, the German Federal Constitutional Court, in the so-called *Article 117 Case* (1953),<sup>114</sup> affirmed, still as *obiter dicta*, that there are “higher-law principle of justice” and in

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<sup>111</sup> In Germany, the doctrine that constitutional amendment may be unconstitutional if it is in conflict with the core values or spirit of the constitution as whole is examined under the concept of “unconstitutional constitutional norms” (*Verfassungswidrig Verfassungsnormen*). For an analysis of this concept, see KOMMERS, *supra* note 110, at 48; Dietze, *supra* note 109 at 1-22. This concept is an oxymoron and should be avoided. But this concept is started to be used by some Anglo-Saxon scholars too, such as, O’Connell, *supra* note 93, at 72-73; Mazzone, *supra* note 91; Jacobsohn, *supra* note 47.

<sup>112</sup> See *supra* pp. 75-78.

<sup>113</sup> KOMMERS, *supra* note 110, at 542, note 90

<sup>114</sup> BverfGE 3, 225 (1953). For comments on this judgment, see Dietze, *supra* note 239, at 17-20; DAVID P. CURIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 219, note 201 (The University of Chicago Press 1994); Kommers, *supra* note 110, at 48; Peter Jambrek & Klemen Jaklič, *Contribution to the Opinion of the Venice Commission on the Constitutional Amendments Concerning Legislative Elections in Slovenia*, [http://www.venice.coe.int/docs/2000/CDL-INF\(2000\)013-e.asp](http://www.venice.coe.int/docs/2000/CDL-INF(2000)013-e.asp) (last visited Mar. 24, 2007); O’Connell, *supra* note 93, at 54.

event “that a provision of the Basic Law exceeded the outer limits of the higher-law (*‘übergesetzliche’*) principle of justice (*‘die äußersten Grenzen der Gerechtigkeit’*), it would be the Court’s duty to strike it down.”<sup>115</sup> Thus, in the *Article 117 Case*, it is suggested “that there exists a range of ‘super positive’ norms variously referred to as the ‘natural law’ or ‘justice’.”<sup>116</sup>

The theory affirmed in this judgment is more than a hierarchy between constitutional norms, it is a theory of supra-constitutionality. As explained above<sup>117</sup>, without accepting the natural law theory, it is impossible to admit that some natural law principle restricts the amending power. As in the *Southwest Case*, the Federal Constitutional Court affirmed this as *obiter dictum*, and did not invalidate a constitutional amendment on this basis. Therefore the theory of limitation of amending power by higher-law principle of justice originated by the German Federal Constitutional Court only has a doctrinal concern.

After 1953, the German Constitutional Court declined to refer to supra-positive principles as implicit limits on constitutional amendments. The attitude of the German Constitutional Court in *Southwest Case (1951)* and *Article 117 Case (1953)*,

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<sup>115</sup> BverfGE 3, 225, at 234 (1953), *quoted in* CURIE, *supra* note 114, at 219, note 201. See also KOMMERS, *supra* note 110, at 48.

<sup>116</sup> O’Connell, *supra* note 93, at 54. As Taylor Cole observed, words and phrases such as “supra-positive basic norms”, “natural justice”, “fundamental postulates of justice”, “norms of objective ethics”, etc., have been used in this case (Taylor Cole, *Three Constitutional Courts: A Comparison*, 3 AM. POL. SCI. REV. 963, at 973 (1959)).

<sup>117</sup> See *supra* pp. 73-74.

may be explained as “a reaction against the earlier positivist justifications for the Nazi regime.”<sup>118</sup>

## 2. *Supreme Court of India*

The Supreme Court of India, in the *Golaknath*, *Kesavananda*, *Indira Nehru Gandhi*, *Minerva Mills* and *Waman Rao* cases, held that there are some implicit limitations on the amending power and that constitutional amendments which violate these limitations are invalid.

In the *Golaknath v. State of Punjab* case (1967),<sup>119</sup> the constitutionality of 17<sup>th</sup> Amendment (1964) was challenged. By a 6 to 5 majority judgment, the Supreme Court held that

fundamental rights cannot be abridged or taken away by the amending procedure in Art. 368<sup>120</sup> of the Constitution.

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<sup>118</sup> Cole, *supra* note 116, at 974. See also Paul G. Kauper, *The Constitutions of West Germany and the United States: A Comparative Study*, 58 MICH. L. REV. 1091, at 1179 (1960).

<sup>119</sup> *Golaknath v. State of Punjab* (Date of Judgment: February 27, 1967), AIR 1967 SC 1643, available at <http://judis.nic.in/supremecourt/qrydisp.asp?tfnm=2449> (last visited Mar. 25, 2007). For comments on this judgment, see K. Subba Rao, *The Two Judgments: Golaknath and Kesavananda Bharati*, 2 SUPREME COURT CASES (JOURNAL) 1 (1973), available at <http://www.ebc-india.com/lawyer/articles/73v2a1.htm> (last visited Mar. 27, 2007); David Gwynn Morgan, *The Indian “Essential Features” Case*, 30 INT’L & COMP. L. Q. 307 (1981); O’Connell, *supra* note 93, at 53-56; Anuranjan Sethi, *Basic Structure Doctrine: Some Reflections*, <http://ssrn.com/abstract=835165>, p. 6-8, 26-27 (last visited Mar. 4, 2007); S. P. SATHE, JUDICIAL ACTIVISM IN INDIA 65-70 (Oxford University Press 2002).

<sup>120</sup> Art. 386 of the Indian Constitution states as follows: “368. *Power of Parliament to amend the Constitution and procedure therefore.*— (1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.

An amendment to the Constitution is “law” within the meaning of Art. 13(2)<sup>121</sup> and is therefore subject to Part III<sup>122</sup> of the Constitution.<sup>123</sup>

However the court declared that the constitutional amendments in this case are in force<sup>124</sup> through the application of the

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(2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in—

- (a) article 54, article 55, article 73, article 162 or article 241, or
- (b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or
- (c) any of the Lists in the Seventh Schedule, or
- (d) the representation of States in Parliament, or
- (e) the provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent” (INDIA CONST. art. 368).

<sup>121</sup> Art. 13(2) reads: “The State shall not make any *law* which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void” (INDIA CONST. art. 13 § 2. Emphasis added).

<sup>122</sup> Part III of the 1950 Indian Constitution (Arts. 12 to 36) regulates the fundamental rights, such as right to equality, right to freedom, right against exploitation, right to freedom of religion, cultural and educational rights, right to constitutional remedies ((INDIA CONST. arts. 12-36).

<sup>123</sup> Golaknath v. State of Punjab, 1967 S.C.R. (2) 762, available at <http://judis.nic.in/supremecourt/qrydisp.asp?tfnm=2449> (last visited Mar. 26, 2007).

<sup>124</sup> *Id.* at 766.

doctrine of “prospective overruling” evolved by the courts in the United States of America.<sup>125</sup>

This decision is highly controversial because it presupposes the superiority of the Part III (Articles 12-36) of the Constitution over the other parts of the same Constitution. As we explained above,<sup>126</sup> it is impossible to establish a hierarchy between the parts of the same constitution. In the Indian Constitution, there is absolutely no provision stipulating that Part III of the Constitution is superior to other parts, nor that the provisions of this Part are excluded from amendment.

On the other hand, the interpretation of word “law” in Article 13(2)<sup>127</sup> by the Supreme Court is highly disputable for two reasons. First, the word “law” in constitutional provisions refers to ordinary legislation, not constitutional amendments because the constitutional provisions other than that which regulates the amendment procedure are addressed to ordinary legislative power, and not to amending power. Secondly, if the interpretation of the Court is accepted, there will be no difference between legislative power and amending power. But, in the Indian Constitution legislative power and amending power are not the same; the former is regulated by Articles 107-111 and the latter by Article 368. It is the ordinary legislative power, but not the amending power, which must comply with the provisions of the Constitution. In the Indian Constitution there are not substantive limitations on amending power, therefore the amending power has competence to amend any provisions of the constitution, including the Part III of the Constitution.

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<sup>125</sup> See O’Connell, *supra* note 93, at 68; Sethi, *supra* note 119, at 86.

<sup>126</sup> See *supra* pp. 75-78.

<sup>127</sup> See *supra* note 121.

Indeed, six year later, in the *Kesavananda Bharati v. State of Kerala* case (1973),<sup>128</sup> the Supreme Court reversed its own previous decision in *Golakhnath*, in declaring that

the decision of the majority in *Golakhnath* that the word “law” in article 13(2) included amendments to the Constitution and the article operated as a limitation upon the power to amend the Constitution in Article 368 is erroneous and is overruled.<sup>129</sup>

Moreover, in the *Kesavananda* case, the Supreme Court rejected the thesis of intangibility of fundamental rights (Part III of the Indian Constitution) which was affirmed in *Galoknath* and held that “the power of amendment ... includes within itself the power to add, alter or repeal the various articles of the Constitution including those relating to fundamental rights.”<sup>130</sup>

The Supreme Court of India, in *Kesavananda*, overruled the doctrine of the superiority of the Part III (fundamental rights) of the Constitution over the other parts of the Constitution, but the same Court developed another doctrine, the doctrine of basic structure, which is also deprived of textual basis.

In 1973, 13 judges of the Supreme Court, in the *Kesavananda Bharati v. State of Kerala* case,<sup>131</sup> examined the valid-

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<sup>128</sup> *Kesavananda Bharati v. State of Kerala* (Date of Judgment: April 24, 1973) A.I.R. 1973 S.C. 1461. Extracts from this judgment were reproduced in *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS*, *supra* note 53, at 1175-1180.

<sup>129</sup> *Id.* (in *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS*, *supra* note 53, at 1176).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* For comments on this judgment, see Morgan, *supra* note 119; Subba Rao, *supra* note 119; Joseph Minattur, *The Ratio in the Kesavananda Bharati Case*, 1 *SUPREME COURT CASES (JOURNAL)* 73 (1974), available at

ity of the 24<sup>th</sup>, 25<sup>th</sup> and 29<sup>th</sup> amendments. The Court, by a majority of 7 to 6, ruled that “the power to amend does not include the power to alter the basic structure, or framework of the Constitution so as to change its identity.”<sup>132</sup>

The Supreme Court of India confirmed its “basic structure doctrine” in the *Indira Nehru Gandhi v. Raj Narain* case (1975).<sup>133</sup> In this case, the Supreme Court invalidated the 39<sup>th</sup> Amendment (1975) to the Constitution on the ground that it violated the basic structure of the Constitution.<sup>134</sup>

After these decisions, in 1976, to extirpate the basic structure doctrine,<sup>135</sup> the Indian Parliament retailed<sup>136</sup> with the 42<sup>nd</sup> Amendment which added the clauses 4 ad 5 to Article 368. Clause 4 expressly precluded the judicial review of constitutional amendments, and clause 5 specified that the amending power is not limited. The Supreme Court of India, in the *Minerva Mills Ltd. v. Union of India* case (1980), invalidated the 42<sup>nd</sup> Amendment on the ground that “a limited amending power

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<http://www.ebc-india.com/lawyer/articles/74v1a5.htm> (last visited Mar. 27, 2007); Sethi, *supra* note 119, at 4-13; O’Connell, *supra* note 93, at 66-73; Jacobsohn, *supra* note 47, at 470-486; Sathe, *supra* note 119, at 69-71.

<sup>132</sup> Kesavananda Bharati v. State of Kerala (1973) 4 S.C.C. 225; A.I.R. 1973 S.C. 1461. See excerpt from this judgment in COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS, *supra* note 53, at 1176.

<sup>133</sup> Indira Nehru Gandhi v. Raj Narain (Date of Judgment: Juni 24, 1975), A.I.R. 1975 S.C. 1590; 1975 S.C.C. (2) 159, available at <http://judis.nic.in/supremecourt/qrydisp.asp?tfnm=5960> (last visited Mar. 27, 2007). For comments on this judgment, see Morgan, *supra* note 119, at 326-331; O’Connell, *supra* note 93, at 70-72; Sathe, *supra* note 119, at 73-77.

<sup>134</sup> *Id.*

<sup>135</sup> Morgan, *supra* note 119, at 331.

<sup>136</sup> O’Connell, *supra* note 93, at 71.

is one of the basic features of Indian Constitution and therefore, the limitations on that power cannot be destroyed.”<sup>137</sup>

The Supreme Court of India, in the case of *Waman Rao v. Union of India* (1981), reviewed the substance of the First and Fourth Amendments which were enacted respectively in 1951 and 1955.<sup>138</sup> In this case, the Supreme Court also reaffirmed its basic structure doctrine. But this time, it upheld the validity of the challenged constitutional amendments on the basis that these amendments “do not damage any of the basic or essential structure of the Constitution or its basic structure and are valid and constitutional being within the constituent power of the Parliament.”<sup>139</sup>

*Criticism.* – The doctrine of “basic structure of the Constitution”<sup>140</sup> is very controversial. This doctrine does not have a textual basis. There is not, in the Indian Constitution, a provi-

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<sup>137</sup> *Minerva Mills Ltd. v. Union of India* (Date of Judgment: July 31, 1980), A.I.R. 1980 S.C. 1789, 1981 SCR (1) 206, at 207, available at <http://judis.nic.in/supremecourt/qrydisp.asp?tfnm=4488> (last visited Mar. 28, 2007). For comments on this judgment, see Sethi, *supra* note 119, at 11-13; O’Connell, *supra* note 93, at 72-73. Sathe, *supra* note 119, at 87.

<sup>138</sup> *Waman Rao & Ors. etc. etc. v. Union of India and Ors.*, (Date of Judgment: May 9, 1980) A.I.R. 1981 S.C.R. 1, 1980 S.C.C. 587, available at <http://judis.nic.in/supremecourt/qrydisp.asp?tfnm=4504> (last visited Apr. 6, 2006).

<sup>139</sup> *Id.*

<sup>140</sup> The doctrine of “basic structure” is introduced into India by a German scholar, Dietrich Conrad. See Dietrich Conrad, *Limitation of Amendment Procedures and the Constituent Power*, 15-16 INDIAN YEARBOOK OF INTERNATIONAL AFFAIRS 375 (1970). For the D. Conrad’s influence on the Indian Supreme Court, see A. G. Noorani, “Behind the Basic Structure Doctrine: On India’s Debt to a German Jurist, Professor Dietrich Conrad”, 18 FRONTLINE (April 28 - May 11, 2001), available at <http://www.hinduonnet.com/fline/fl1809/18090950.htm> (last visited Feb. 12, 2007).

sion stipulating that this constitution has a basic structure and that this structure is beyond the competence of amending power. Therefore the limitation of the amending power by the basic structure of the Constitution is deprived of positive legal validity. Moreover, not having its origin in the text of the constitution, the concept of the “basic structure of the Constitution” cannot be defined. What constituted the basic structure of the Constitution? Which principles are or not included in this concept? An objective and unanimous answer cannot be given to this question. Indeed, in the *Kesavananda Bharati* case, the majority of judges who admit the existence a “basic structure of the Constitution” did not agree with the list of the principles included in this concept. Each judge drew a different list.<sup>141</sup> If

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<sup>141</sup> O’Connel, *supra* note 93, at 70; Sethi, *supra* note 119, at 10; COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS, *supra* note 53, at 1177. For example Chief Justice Sikri affirmed that the concept of basic structure consists of the following features:

- “(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” (COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS, *supra* note 53, at 1177).

Justices Shelat and Grover added two features to this:

“(1) The mandate to built a welfare state contained in the Directive Principles of State Policy;

- (2) Unity and integrity of the Nation;

Justices Hegde and Mukherjea came down with a different list:

- (1) The Sovereignty of India;
- (2) The democratic character of the polity;
- (3) The unity of the country;
- (4) Essential features of individual freedoms;
- (5) The mandate to build a welfare state.

Justice Jaganmohan Reddy give the following list:

each judge is able to define the basic structure concept according to his own view, a constitutional amendment would be valid or invalid according to the personal preferences of the judges. In this instance, the judges will acquire the power to amend the constitution, which is given to the Parliament in Article 368 of the Constitution. For that reason, as noted by Anuranjan Sethi, the basic structure doctrine can be shown as a “vulgar display of usurpation of constitutional power by the Supreme Court of India.”<sup>142</sup> As illustrated in the case-law of the Indian Supreme Court, when there is no explicit substantive limitation on the amending power, the attempt by a constitutional court to review the substance of the constitutional amendments would be dangerous for a democratic system in which the amending power belongs to the people or its representatives, not to judges.

### 3. *Turkish Constitutional Court*

As explained above,<sup>143</sup> in the 1961 Turkish Constitution, there was only one substantive limit on the amending power: the immutability of the republican form of the State. But ac-

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- “(1) A sovereign democratic republic;  
 (2) Parliamentary democracy  
 (3) Three organ of the state” (See Sethi, *supra* note 119, at 10-11).

<sup>142</sup> Sethi, *supra* note 119, at 12. Similarly, S. P. Sathe concluded that “the Court has clearly transcended the limits of the judicial function and has undertaken functions which really belong to... the legislature” (S. P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J. L. & POL’Y 29-108, at 88 (2001), available at [http://law.wustl.edu/journal/6/p\\_29\\_Sathe.pdf](http://law.wustl.edu/journal/6/p_29_Sathe.pdf) (last visited Mar. 12, 2007). Likewise, T. R. Andhyarujina said that the “exercise of such power by the judiciary is not only anti-majoritarian but inconsistent with constitutional democracy” (T. R. ANDHYARUJINA, *JUDICIAL ACTIVISM AND CONSTITUTIONAL DEMOCRACY IN INDIA* 10 (1992), quoted in Sathe, *supra* note 119, at 70).

<sup>143</sup> See *supra* p. 65.

ording to the Turkish Constitutional Court, under the 1961 Constitution, the amending power was limited not only by this explicit substantive limit, but also by other limits which are not expressly written in the text of the Constitution, such as spirit of the constitution, basic rights and freedoms, rule of law principle, requirements of contemporary civilization, and coherence of the constitution.

The Turkish Constitutional Court, in its decision of September 26, 1965, No. 1965/40,<sup>144</sup> affirmed, as *obiter dicta*, that, the amending power cannot abolish the Constitution and destroy the rule of law. According to the Court,

it is clear that the Constituent Assembly... adopted the Article 155 [amendment procedure] in order to enable only the amendments which are conform to the spirit of the constitution. The constitutional amendments which... destroy the basic rights and freedoms, rule of law principle, in one word, demolish the essence of the 1961 Constitution... cannot be made in application of the Article 155.<sup>145</sup>

In the decision of April 3, 1971, No. 1971/37, the Turkish Constitutional Court declared itself competent to review the conformity of constitutional amendments not only with respect to the intangibility of the republican form of the State, as provided by Article 9, but also with respect to the other principles which are not expressly written in the text of the Constitution.<sup>146</sup> The Court affirmed that constitutional amendments must be in conformity with the “requirements of contemporary civiliza-

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<sup>144</sup> 4 AMKD 290 (1965).

<sup>145</sup> *Id.* at 329.

<sup>146</sup> 9 AMKD 416, at 428 (1971).

tion” and that they must not damage the “coherence and system of the constitution.”<sup>147</sup>

These decisions of the Turkish Constitutional Court are highly disputable. The principles or notions such as spirit of the constitution, requirements of contemporary civilization, and coherence of the constitution which the Constitutional Court made reference do not have a textual basis. The others, such as the rule of law, basic rights and freedoms have their basis in the Constitution, but their immutability is not provided by the Constitution. Therefore their validity cannot be accepted without admitting the natural law theory.

On the other hand, under the 1961 Constitution, the Turkish Constitutional Court interpreted the explicit substantive limit very broadly, (*i.e.* the immutability of the republican form of the State which is provided by the Constitution). As explained above, the Court included several principles, such as the rule of law, democratic state, social state, the secularism into this immutability. Therefore, these principles became implied limitations on the amending power. As explained above, this broad interpretation seems to be erroneous according to the maxim *exceptio est strictissimae interpretationis*.<sup>148</sup>

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<sup>147</sup> *Id.* at 428-429.

<sup>148</sup> Exceptions must be interpreted in the strictest manner.



## CONCLUSION

The question of whether the constitutional amendments can be reviewed by constitutional courts can be answered in the following way:

If country's constitution includes a provision concerning this question, whether the judicial review of the constitutional amendment is or is not permissible would be governed by this provision. If the constitution provided that the constitutional court can review the constitutionality of constitutional amendments, such a review would be possible. This hypothesis is illustrated by the Turkish, Chilean and Romanian Constitutions. But if the constitution expressly prohibits the judicial review of constitutional amendments, it would not be possible. This hypothesis is illustrated by the 1950 Indian Constitution as amended in 1976.

If the constitution (such as the Austrian, French, German, Hungarian, Irish, Slovenian, and the United States Constitutions) is silent as to the judicial review of constitutional amendments, such review is possible under the American model of judicial review because under such a system, in a legal case before the courts, the constitutionality of a constitutional amendment can be challenged by the parties claiming that the

procedure by which the amendment has been adopted is contrary to the constitution or that its substance violates the limitations imposed on the constitutional amendments. The admission or rejection of this claim by the courts implies the judicial review of constitutional amendments, as illustrated by the case-law of the United States and Indian Supreme Courts.

Under the European model of judicial review, the judicial review of constitutional amendments is not possible, if there is not an express constitutional provision empowering the constitutional court to review constitutional amendments, because in that model, the competence of the constitutional court emanate only from the Constitution. This is confirmed by the case-law of the French Constitutional Council and the Hungarian and Slovenian Constitutional Courts. But, under the European model, some constitutional courts, such as the Austrian, German and Turkish Constitutional Courts, have declared themselves competent to review the constitutionality of constitutional amendments. According to these courts, constitutional amendments can be deemed to be “laws”, and consequently the courts can review their constitutionality, without any need to receive additional competence, because they already have competence to review the constitutionality of *laws*.

In the countries where the judicial review of the constitutional amendments is possible, the scope of this review must be determined. Can constitutional courts review the constitutionality of constitutional amendments with respect to both form and substance?

The constitutional courts, having declared themselves competent to review the constitutionality of constitutional amendments, can review the procedural and formal regularity of con-

stitutional amendments. A review for procedural and formal regularity is straightforward because the constitution provides the exact conditions of form and procedure which must be followed for the enactment of a constitutional amendment. A constitutional amendment is only valid if it was enacted in conformity with these conditions. The United States Supreme Court (excepting *Coleman v. Miller* case), the Austrian Federal Constitutional Court, and the Turkish Constitutional Court have reviewed the formal regularity of constitutional amendments.

The judicial review of the substance of constitutional amendments is possible if there are, in the constitution, substantive limits on the amending power; but if there are not such limits, such review is not possible, because such a review consists in verifying whether the provisions of a constitutional amendment are compatible with these limits. If these limits do not exist, this review will be logically impossible. The German and Turkish Constitutions impose substantial limits on the amending power, by providing some immutable principles and provisions. Therefore in Germany and Turkey, the judicial review of the substance of constitutional amendments is possible. In fact, the German Constitutional Court has reviewed the conformity of constitutional amendments with the immutable principles enumerated in Articles 1 and 20 of the 1949 Basic Law. Likewise, the Turkish Constitutional Court, under the 1961 Constitution, reviewed the conformity of constitutional amendments with the intangibility of republican form of state.

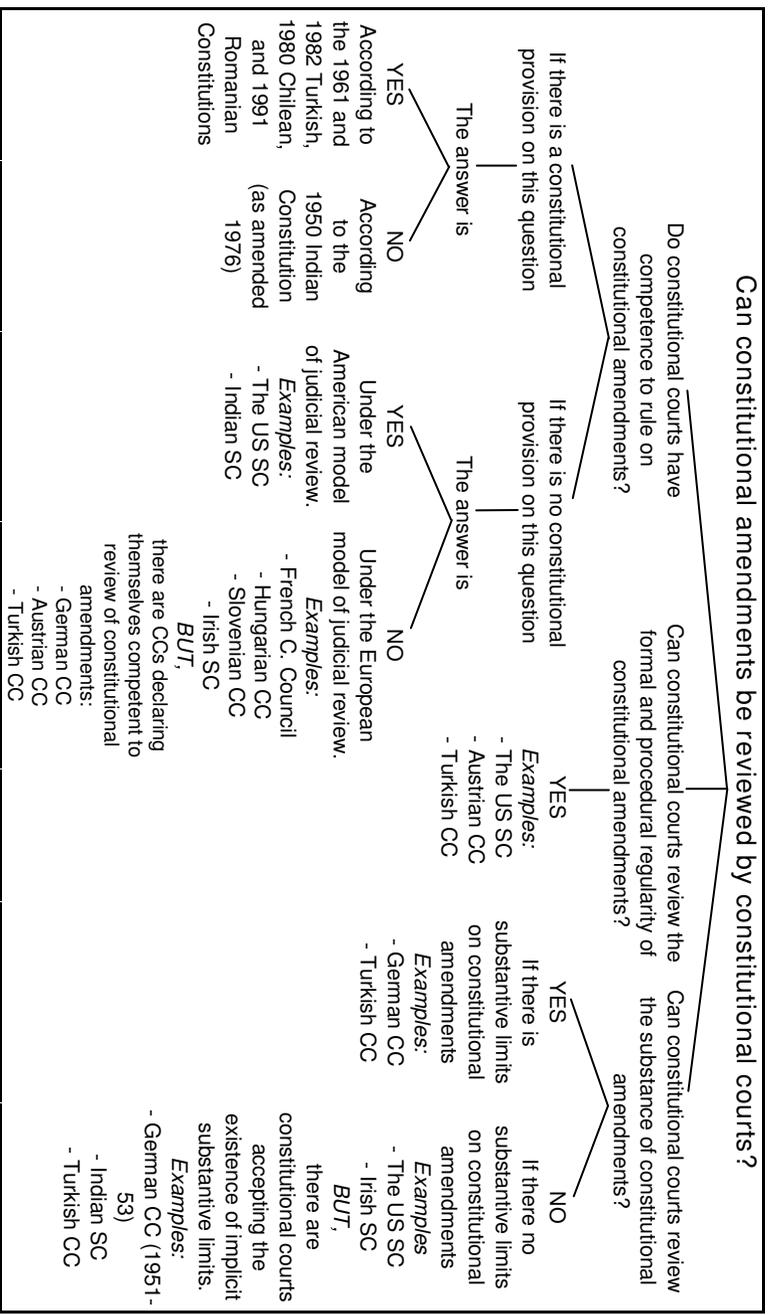
When it comes to the substantive limits on the power to amend the constitution, some scholars are not satisfied with enumerating the substantive limits written in the text of the constitution and they argue that there are some substantive limits on constitutional amendments which are not written expressly in

the text of the constitution. This kind of limits is called “implicit substantive limits” as opposed to “explicit substantive limits.” The theory of the existence of the implicit substantive limits on the amending power is highly problematic and controversial. Without accepting the natural law theory, it is impossible to admit to the legal validity of these “alleged” implicit substantive limits, because they do not have any textual basis.

The United States Supreme Court, the German Constitutional Court (after 1970), and the Irish Supreme Court have rejected the idea that there are implicit substantive limits on the power to amend the constitution. But the Indian Supreme Court has admitted the existence of the implicit substantive limits on the amending power. The Supreme Court of India, in the *Golaknath v. State of Punjab* case, affirmed that the amending power cannot alter the Part III (fundamental rights) of the Constitution. The same Court, in *Kesavananda Bharati v. State of Kerala*, *Indira Nehru Gandhi v. Raj Narfain*, *Minerva Mills Ltd. v. Union of India*, *Waman Rao v. Union of India*, held that the amending power cannot modify the “basic structure of the Constitution” and invalidated the constitutional amendments which violate this structure. The German Constitutional Court, in *Southwest Case* and *Article 117 Case* also asserted the existence of some implicit limits on the amending power, but it was only as *obiter dicta*, and the German Court has never invalidated a constitutional amendment on the basis that it violates the implicit substantive limits.

The conclusions reached in this monograph can be summarized in the following diagram.

# DIAGRAM: JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS



Abbreviations: CC Constitutional Court. SC Supreme Court



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This monograph is an attempt to answer the following questions: Can constitutional courts review the constitutionality of constitutional amendments? If yes, to what extent? It is endeavored, in a comparative perspective, to answer these questions by examining the constitutions of several countries and the case law of the Austrian, German, Hungarian, Romanian, Slovenian and Turkish Constitutional Courts, French Constitutional Council, Indian, Irish, and the United States Supreme Courts.

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