Gábor Halmai

Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?

A great number of petitions reached the Hungarian Constitutional Court concerning the November 2010 constitutional amendments that sought to curtail the Court’s powers and allow for the possibility of implementing a tax measure with retroactive effect. In their decision 61/2011. (VII. 13.), which was accompanied by three dissenting and three concurring opinions, the judges of the Court refused to perform a review of the substance of these amendments. At the same time, however – and this was a first in the Court’s judicial practice –, they undertook an investigation concerning the question whether these amendments were valid constitutionally in terms of the procedure that led to their adoption, even if they did not find that the petition was well-grounded in this regard. The three dissenting judges, however, believed that an examination of the merits was also necessary, and two of them would have nullified the impugned constitutional amendments, which they thought – albeit to differing degrees – unconstitutional.

Judicial review of constitutional amendments

The underlying serious constitutional law problem behind this decision is in how far the power amending the constitution may be regarded as sovereign in terms of changing the provisions of the constitution, maybe even its entire structure.

What constitutes the grossest interference with the sovereignty of the power to amend the constitution are those provisions that qualify themselves as immutable. This implies – either expressed explicitly or assumed implicitly, but logically, as in Germany – that constitutional amendments themselves are subject to the constitutional court’s review to determine whether they are in breach of “eternal clauses.” As the example of India, among others, shows, the review of constitutional amendments by the constitutional court is conceivable even without the presence of immutable provisions in the constitution.

The high degree of rigidity in constitutional arrangements, as well as the constitutional review of constitutional amendments, is not only a reflection of distrust towards future framers of new constitutions or those who might wish to amend the existing documents, but in

---

1 Professor of Law, Eötvös Loránd University, Budapest
the view of some it is an outright interference with the sovereignty of future generations. According to the critics, it also exacerbates tensions between the legislature and constitutional courts by depriving parliaments of the possibility to interpret “eternal clauses” and placing the latter responsibility exclusively in the hands of the courts.²

Of course, future generations generally deserve the lack of trust – evinced by these eternal clauses – that the foregoing generations, or more specifically the framers of their constitutions, had in them. For if we peruse the list of those countries – from Germany through Turkey, India, Brazil, the Republic of South Africa all the way to the former Soviet republics such as Azerbaijan, Kyrgyzstan, Moldova and the Ukraine – where such solutions have been employed, we will usually find former despotic or colonial regimes. In these cases the constitutional provisions set in stone serve to prevent a restoration of dictatorship.³

The Brazilian Constitution of 1988, for instance, is very mistrustful of the legislature. For one, its Article 60 formulates very strict requirements vis-à-vis the adoption of constitutional amendments (a three-fifth majority and two rounds of deliberations in both chambers of the National Congress, the House of Representatives and the Senate), and at the same time it imposes rigid limitations on substance of amendments, too. Pursuant to the latter, proposed constitutional amendments may not 1) seek to alter the federal nature of the state; 2) universal, direct and confidential suffrage; 3) the assertion of the principle of separation of powers; and 4) the individual rights and safeguards regulated by Article 78, which the jurisprudence of the Federal Supreme Court subsequently extended to all fundamental rights.⁴

The third limitation on the power to amend the Constitution is the extraordinarily expansive judicial review designed in the course of the 2004 constitutional reform, which amalgamates elements of the Continental European and the American systems.

In Columbia, following the adoption of the 1991 Constitution, the newly established Constitutional Court began gradually extending its protection to the constitutional order even


³ It is of course undeniable that this instrument was not always capable of preventing the return of dictatorships. See for example the case of Uganda, in spite of the decision reviewing the 2004 constitutional amendment: Semogerere et al. v. Attorney General, Constitutional Appeal No. 1 of 2002 (2004). Cited by Gary Jeffrey JACOBSOHN: Constitutional Identity, Cambridge, Harvard University Press, 2010, 37, footnote 6.

⁴ To reinforce the principles of the 1988 Constitution, the framers of the Constitution themselves put into the document the possibility of a referendum and a potential revision within five years of its adoption. The referendum did indeed take place in 1993, when 66% of the voters opted for the republican form of government, while 10 percent would have preferred a monarchy. A presidential system was favored by 55% against the 25% who wished to adopt a parliamentary system. A comprehensive constitutional revision did not take place, however. See Keith S. ROSENN: Conflict Resolution and Constitutionalism. The Making of the Brazilian Constitution of 1988 in Framing the State in Times of Transition, Case Studies in Constitution Making, ed. Laurel E. MILLER, Washington D.C., United States Institute of Peace Press, 2010, 453.
without an eternal clause in the constitution that would expressly authorize the judicial body to review constitutional amendments. This legalization of politics began as the Court proceeded to subject the government’s decisions regarding the proclamation of a state of emergency to strict constitutional review. As a result, the country spent less than 20% of the period between 1991 and 2003 in a state of emergency, in marked contrast to the period between 1949-1991, when this status prevailed 80% of the time. In the former 13-year period, the Constitutional Court affirmed the government’s decision regarding a state of emergency five times, on three occasions in its entirety, while it rejected these decisions in four instances.

In its efforts to guard the values of the constitutional order, in 2010 the Constitutional Court went so far in a February 26 decision as to nullify the law that would have called for a referendum on the constitutional amendment allowing the President of the Republic to run for a third term of office. According to the judges of the Constitutional Court, this reform would have violated a basic principle of democracy, which would have affected the constitutional order in its entirety.

In Peru the Supreme Court – also lacking an express constitutional mandate – laid down the foundations of its authority to review constitutional amendments during a review of the pensions reform of 2005, even though it did not hold that a violation of the Constitution had taken place in that particular case.

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

In Kyrgyzstan, citing formal grounds the Constitutional Court first nullified two constitutional amendments – adopted on November 9, 2006 and November 30, 2006, respectively – in its September 14, 2007 decision, but did so without being authorized by then effective constitution to do so.\textsuperscript{10} It was only later, with the 2011 constitutional amendment on the Constitutional Law Panel of the Supreme Court, that the judicial body was endowed with the authority to offer its opinions in the context of a preliminary review of constitutional amendments.\textsuperscript{11} Interestingly, this expansion of powers occurred only after in the early phase of democratic transition, immediately prior to the adoption of the first constitution based on the rule of law, the Constitutional Court, which had been compromised in the Akayev-era, was suspended in April 2010. Indeed, even the Constitution affirmed in a popular referendum on June 27 only reestablished the court as a division of the Supreme Court, still allowing for the possibility of removing judges with the votes of two-thirds of Parliament.\textsuperscript{12}

Initially the immutable features of constitutions mostly tended to be the republican form of government and the federal arrangement of the state, but later they came to encompass protection of fundamental rights, as – in addition to the abovementioned Brazilian example – the cases of Greece (1975), Portugal (1976), Namibia (1990) and the Czech Republic (1993) also illustrate. It can even be said that at the time when their respective constitutions were solidified, these countries were, to say the least, in a tough spot in terms of their social and economic situations, which made guaranteeing these fundamental rights difficult. This contributed to the efforts to seek safeguards to help avoid temptation.\textsuperscript{13}

Pursuant to Article 9 of the Czech Republic’s Constitution of 1993, the Constitution may only be amended through the adoption of constitutional laws. According to Paragraph (2) of the very same provision, no kind of amendment may prejudice the substantive

\textsuperscript{10} See NUßBERGER (footnote 8) 324.
\textsuperscript{11} The constitutional act was adopted on May 12, 2011. For the opinion of the Council of Europe’s Venice Commission on the law see Opinion on the draft constitutional law on the Constitutional Chamber of the Supreme Court of Kyrgyzstan. Adopted by the Venice Commission at its 87th Plenary Session (Venice, June 17-18, 2011); http://www.venice.coe.int/docs/2011/CDL-AD(2011)018-e.pdf.
\textsuperscript{13} In an interview with the Austrian Neue Kronen Zeitung the Hungarian prime minister, Viktor Orbán, proudly proclaims that in light of the country’s difficult economic situation he wishes to use the new Basic Law to constitutionally subject the next ten governments’ economic policy measures to a requirement of seeking a consensus (he would to this by enshrining some fundamental tenets of economic policy in so-called supermajority laws). Since in this case the freezing of economic policy has occurred with the simultaneous exclusion of the judicial review of the pertinent revisions’ constitutionality, this measure – in contrast with the solution of “eternal clauses” – actually guarantees the possibility of violating fundamental rights. See “Nur toter Fisch schwimmt mit dem Strom.” Neue Kronen Zeitung, June 10, 2011; http://www.krone.at/Nachrichten/Orban_Nur_toter_Fisch_schwimmt_mit_dem_Strom-Krone-Interview-StoryDrucken-267398.
requirements of democratic rule of law. The Constitutional Court’s interpretation of this provision suggests that the underlying reasons for this limitation are to be found in the tragic experiences of the 20th century, especially in the context of Weimar Germany, which led to the usurpation of power by the Nazis, and the totalitarian communist regimes. Based on the aforementioned Article 9, as well as Article 35 (4), which lays down the procedural rules for adopting constitutional laws, the Constitutional Court’s jurisprudence examines the constitutionality of constitutional laws from three angles: the constitutionality of the procedure used for their adoption, whether those passing the constitutional amendment had the legitimate authority to do so, and, with regard to substance, whether the provisions satisfy the requirements of democratic rule of law. It was based on the latter two that in its September 10, 2009, decision the Court nullified constitutional law 195/2009 that – in the interest of quickly resolving the Czech crisis of government – would have cut short the term of the House of Representatives. The judges of the Court saw this act as a singular measure that may not be used to amend the constitution and, moreover, they also judged that the act is in violation of the ban on legislation with retroactive effect, which is part and parcel of the rule of law.\footnote{2009/09/10 - Pl. ÚS 27/09 See http://www.usoud.cz/view/pl-27-09.}

There have also been instances when it was not a domestic court but an international judicial body that offered protection against unconstitutional constitutional amendments. In December 2004, Nicaraguan President Enrique Bolaños turned to the Central American Court of Justice to take issue with a constitutional amendment in his country, which he claimed came into existence through a violation of the constitutional provisions concerning constitutional amendments, and at the same time also substantively reduced presidential powers to such a degree that they thereby permanently upset the balance of powers. He argued that the changes did not constitute plain constitutional amendments, but that in reality they had effectively transformed the constitutional order from a presidential system of government to a parliamentary regime, which is a change that falls within the authority not of the power that has the authority to amend the Constitution, but rather into that of the constituent power. On March 29, 2006, the Central American Court of Justice ruled that parliament had indeed violated the Constitution and that the impugned amendments undermine the independence of the executive power. The Court based its jurisdiction in the case on the argument that the peace and stability of the region – the safeguarding of which was the purpose that inspired the establishment of the Court – hinged to a significant degree...
on the preservation of rule of law in the member states. Since the replacement of the presidential system with a parliamentary system may only occur in the context of the wholesale revision of the Constitution, the Court concluded that the impugned constitutional amendment violated the Constitution. Though the Court’s decision failed to invalidate the reform, it certainly played a role in the fact that based on an agreement between the president and the leader of the governing party, Daniel Ortega, its entry into effect was delayed until the end of Bolaños’ term in office in January 2007.

Historically the first – still effective – rule for eternity appeared in Article 112 of the 1814 Norwegian Constitution, which provided that no constitutional amendment may violate the Constitution’s principles or spirit. In terms of immutability, this provision was followed by the 1884 amendment of the 1875 Constitution of the French 3rd Republic with the provision that prohibited changing the republican form of government by way of constitutional amendment. This clause became a legacy that is still effective by way of Article 89 of the 1958 Constitution of the Fifth Republic.

The Austrian Federal Constitutional Law (Bundesverfassungsgesetz) of 1920 was the first in Europe to provide a separate basis for judicial review with regard to all federal and state laws, also extending to the federal and state constitutional laws which enjoy constitutional rank (Bundes- and Landesverfassungsgesetze). Over 60 constitutional laws are currently recorded at the federal level. Among these are acts on personal liberty, the implementation of the Conventions on the Elimination of All Forms of Racial Discrimination, the house of Habsburg, and the independence of Austria. Ordinary laws and agreements between states may also contain provisions of constitutional import, and these, too, may be subject to review by the Constitutional Court. An example of the former is Article 1 of the Act on Data Protection, while Article 7 of the Austrian State Treaty illustrates the latter. When it comes to constitutional laws, a review by the Constitutional Court may be initiated either by courts or individual persons whose rights have been violated, or, if the issue is an

---

17 Since there is no constitutional court in Norway, ordinary courts have the power of review, but it is also true that no such review has taken place with regard to the over two hundred constitutional amendments enacted since 1814.
abstract review of norms, then the government or a third of all MPs may make such a request. The standards for constitutional review are the Constitutional Laws themselves and the fundamental principles enshrined therein.\textsuperscript{20}

After World War II, the Italian constitution of 1947 also followed the Austrian model of constitutional review, as did the German Basic Law of 1949. As far as the Italian constitution is concerned, its Article 139 delimits the authority of the constitution-amending power in the context of changes to the republican form of government. In addition to constitutional amendments, this ban also extends to laws of constitutional effect whose ranking is on par with constitutional provisions. In 1988 a law with constitutional effect came before the Constitutional Court, mandating that the members of the Trentino-Alto Adige regional legislature are liable for the opinions expressed in their capacity as representatives and for the votes they cast in the proceedings of said body. The grounds for constitutional review was the violation of the principle of equality, since the members of the national legislature enjoyed immunity. Though the court ultimately failed to perform an investigation of the merits due to the insufficient clarity of the petition, its decision nevertheless held \textit{obiter dicta} that Article 139 constitutes the explicit limit of constitutional amendments and that Constitutional Court has the jurisdiction to review.\textsuperscript{21} Pursuant to the decision’s operative parts, the Italian Constitution contains some fundamental principles related to the republican form of government, which may not be modified in the framework of a constitutional amendment. In its later practice, the Constitutional Court also included equality among these principles, as well as the agreement with the Catholic Church and the implementation of Italy’s undertakings pursuant to the primary Community legislation, that is the founding treaties.

\textit{Germany}

Following World War II, it was the desire to prevent a return of National Socialism that led those drafting the German Basic Law (\textit{Grundgesetz}) to introduce an eternal clause.\textsuperscript{22} Pursuant to article 79 (3) of the \textit{Grundgesetz}, any constitutional amendment that would impinge on the division of the federation into states, the participation of the federal states in the legislative work, as well as the fundamental principles laid out in Articles 1 and 20 of the

\textsuperscript{20} GRABENWARTER- HOLUBEK (footnote 18) 270-272.
\textsuperscript{21} \url{http://www.jus.unitn.it/download/gestione/fulvio.cortese/20101209_2054Ccost_1146_1988.pdf}.
\textsuperscript{22} The members of the \textit{Parlamentarischer Rat} were naturally aware that the provision is incapable of preventing the revolutionary restoration of dictatorship, but they thought that at the very least revolutionaries who – like the Nazi party’s rise to power in 1933 – seek to take control of the government by operating “under the guise of legality” would be compelled to turn openly against the \textit{Grundgesetz}. See Hauke MÖLLER: \textit{Die verfassungsgebende Gewalt des Volkes und die Schranken der Verfassungsrevision}, Diss., Universität Hamburg, 2004, 148; \url{http://www.hauke-moeller.org/art79.pdf}. 
Basic Law, are disallowed. The constitutional principles enshrined in the latter two articles are
the following: the protection of human dignity [Article 1 (1)], the recognition of human rights
[Article 1 (2)], the binding of public power to fundamental rights [Article 1 (3)], the federal
arrangement of the state and the republican form of government (principle of republicanism),
the social nature of the state [Article 20 (1)], the principle of democracy [Article 20 (2)],
popular sovereignty [Article 20 (2) first sentence], the separation of powers [Article 20 (2)
second sentence], the binding of the three branches of public power to the constitution, and of
the executive and judicial power to the laws [Article 20 (3)].

The Grundgesetz does not determine a specific scope of powers for the Federal
Constitutional Court in terms of reviewing constitutional amendments with a view towards
protecting the eternal clauses, but the judges of the Court made clear right at the outset that
this would be the only way to adhere to the relevant provisions of the Basic Law. The first
such case came before the Constitutional Court in 1951, the year of its establishment,
regarding the formation of the southwestern federal state (Südweststaat) of the Federal
Republic of Germany. In its decision, the Court developed its thesis concerning the internal
unity of the Grundgesetz, arguing that the constitution is a coherent document whose
provisions form a “logical-teleological unity,” express an “objective system of values”
(“objektive Werteordnung”), part of which are the values expressed in Article 79 (3).

Two years later, in the process of examining the constitutionality of the new family law
regulations that sought to implement the constitutional requirement of giving men and women
equal rights, some Constitutional Court judges went so far as to contrast positive law with a
natural law that is superior it, and they referred to the concept of justice, which they argued
binds not only the power that enacts legislation and the power that amends the constitution,
but even the power that drafts the constitution itself.

In response to the terrorist threat posed by the Red Army Faction and the increasing
threat of espionage on account of the latter, in 1970 the German Parliament changed the
provisions guaranteeing the confidentiality of correspondence and telecommunications,
enshrined in Article 10 of the Grundgesetz. The changes allowed for violating privacy of
communication in certain cases specified in a separate law, without informing the person
involved and with the possibility of administrative rather than judicial review. Numerous
abstract norm control petitions and constitutional law complaints were filed against the

23 BVerfGE 1, 14, 32 (1951). Seven years later the court expounded in more detail on the Grundgesetz’s
“objective order of values” in its famous Lüth judgment. BVerfGE 7, 198, 208 (1958).
24 BVerfGE 3, 225 (1953). The opinion in the judgment explicitly refers to Radbruch’s work entitled
Gesetzliches Unrecht und übergesetzliches Recht, in: Süddeutsche Juristenzeitung, 1946. 105-108
“wiretapping” amendment. The eight members of the Federal Constitutional Court’s second Senate were evenly divided, and hence the impugned provision remained effective, since pursuant to the law on the Constitutional Court it would have taken a majority to declare it unconstitutional. Ultimately, the four judges who formulated an opinion rejecting the petitions – emphasizing the need for a standardized, coherent interpretation of the Grundgesetz –, based their reasoning on the concept of “militant democracy” (“streitbare Demokratie”), thus justifying the proportional nature of the restriction. These judges proposed that Article 79 (3) only bars the elimination of the foundations of a liberal democracy, but it allows for taking specific measures in the defense of the rule of law without prejudice to the basic principles. The four dissenting liberal judges, in contrast, considered that Article 79 not only rules out the complete elimination of the principles enshrined in Grundgesetz Articles 1 and 20, but any type of restriction imposed on them. And the examined wiretap provisions, they argued, limit human dignity guaranteed by Article 1, and, through the removal of the judicial route, they also violate the separation of powers safeguarded by Article 20, since administrative legal remedies are neither neutral nor independent from the legislature and the executive.

It was in the context of this petition that the Federal Constitutional Court came closest to declaring unconstitutional and nullifying a constitutional amendment. A natural law type of argument, a reference to justice, crops up again in 1991, in the unanimous reasoning of the Federal Constitutional Court in a case concerning expropriations in the former German Democratic Republic.

A natural law approach is occasionally discernible in the decisions of the German Federal Constitutional Court to this very day. In its decision of November 4, 2009, the first Senate of the Court declared as unconstitutional the incitement provisions of the German

---

26 Ever since the failure of the Weimar Republic, the concept of “militant democracy” – coined by German political scientist Karl Löwenstein who emigrated to the United States to escape Nazism – seeks the answer to the question of what political and legal instruments in the service of protecting democracy might render a rule of law setting capable of checking the emotionally-based politics proffered by extremist political movements. See Karl Löwenstein: Militant Democracy and Fundamental Rights, 31 American Political Science Review, 1937, 417. In acting against the enemies of the constitution, one of the customary instruments used by a militant state based on the rule of law are restrictions on hate speech and the freedom of assembly for gatherings that are hostile to the constitutional order, as well as the ban on associations and parties that constitute a danger to the constitutional regime. The notion of a “militant state based on the rule of law” (önvédő jogállam in Hungarian) was established in Hungarian legal literature by András Sajó. See András Sajó: Önvédő jogállam [Militant state based on the rule of law], Fundamentum, 2002/3-4, 55-68.
27 BVerfGE 84, 90 (1991). Certain representatives of academic constitutional law took issue with the fact that the decision was founded on natural law, arguing that the judges of the Constitutional Court expand the “eternal clause’s” scope of application. See Matthias J. Herdegen: Unjust Laws, Human Rights, and the German Constitution: Germany’s recent Confrontation with the Past, 32 Columbia Journal of Transnational Law, 1995, 591, 605.
Penal Code, which had been made stricter in 2005 to allow for the prohibition of neo-Nazi gatherings, such as the annual march at Rudolf Hess’ place of internment in the Bavarian town of Wunsiedel. The judges on the Court reasoned that the “exceptional” treatment provided for by the Penal Code’s Article 130 (4) with regard to demonstrations that approve of, glorify, or justify National Socialist tyranny, is justified precisely on the grounds that it would be impossible to restrict such events with ordinary legislation because the monstrosities of the unique Nazi regime burst apart the boundaries of ordinary categories, which is why ordinary laws are insufficient against them. And the German Basic Law was enacted precisely so as to exclude forever the possibility of the illegality of National Socialism. The most surprising element of the reasoning is that in extending constitutional legitimacy to the curtailment of hate speech, the members of the Court – in contrast to the hitherto accustomed solution – do not reach back to the Grundgesetz’s provisions on human dignity but refer to a seemingly extra-legal explanation.

Questions about whether the norms of the European Union violate Article 79 (3) of the Grundgesetz form a special subset of issues under the “eternal clause.” If namely the Federal Constitutional Court were to make such a determination, then it would be impossible to apply the given Union legal norm and as a result Germany would violate Union law. The constitutional explanation for such a situation is that Grundgesetz Article 23 (1), which allows for the possibility of transferring powers to the institutions of the Union, calls for applying Article 79 (3) to this eventuality as well.

In the past nearly four decades the Federal Constitutional Court has developed three different ways and functions of reviewing the constitutionality of legal norms issued by the European Union’s organs and institutions. In its 1974 Solange I decision, the Court examined whether the secondary Union law applied by the German administrative bodies is compatible with the fundamental rights guarantees laid down in the Grundgesetz. We can refer to this type of constitutional control as fundamental rights-based review. Pursuant to the judges’ reasoning, Union law cannot be regarded as either part of the German legal system or as a set of international legal norms, but is the autonomous source of law of a sui generis interstate institution that is in the process of increasingly comprehensive integration. It follows from the existence of two legal spheres that are independent of one another that the

---

28 BVerfG, 1 BvR 2150/08 vom 4. 11.2009, Absatz-Nr. (1-110); http://www.bverg.de/entscheidungen/rs20091104_1bvr215008.html. For a detailed analysis of the decision see Gábor HALMAI: A német Szövetségi Alkotmánybíróság a náci rezsimet dicsőítő gyűlések tilalmáról [On the German Federal Constitutional Court’s ban on assemblies glorifying the Nazi regime], Fundamentum, 2009/4, 143-147.

European Court of Justice may not decide whether community law is compatible with the Basic Law, and neither can the German Federal Constitutional Court adjudicate whether secondary community law is compatible with primary law. All these do not result in a violation of Grundgesetz Article 79 (3) so long as (hence the decision’s name, “Solange”) the two legal systems are not in conflict with one another in terms of their substance. When a conflict does arise, however, then – especially in light of the fact that the EU does not have a catalogue of fundamental rights codified by a democratically elected parliament – the Basic Law’s stricter fundamental rights guarantees prevail. Twelve years later, in its Solange II decision, the Federal Constitutional Court held that since its last ruling on the question the EU had adopted the fundamental rights guarantees that were suitable for eliminating potential conflicts, and hence the level of fundamental rights protection meets the requirements of the Grundgesetz.

The second method of judicial review by the Constitutional Court was introduced by the 1993 Maastricht decision of the Federal Constitutional Court. The objective of the so-called ultra vires control – which was created in the wake of petitions contesting the German government’s signing of the Maastricht Treaty – was to determine whether the community legal acts that were being created fell within the range of powers that had been given to the EU, and whether they may thus be applied in Germany. The 2009 decision on the Lisbon Treaty examined whether the agreement was compatible with the Basic Law’s constitutional identity; that is why this review function may best be referred to as review of constitutional identity. Both of the latter judgments take the democracy principle in the Grundgesetz’s Article 20 as their constitutional starting point. According to the judges’ decision, this democracy requirement rules out the possibility of Germany becoming part of a real European federal state. It traces this ban back to the Grundgesetz’s Article 79 (3). With regard to the new powers given to Brussels by the Lisbon Treaty, after an exacting examination and a restrictive interpretation of certain powers, the Federal Constitutional Court ultimately concluded that the Treaty is consistent with the Basic Law.

30 BVerfGE 73, 229 (1986).
33 This decision has been the subject of numerous criticisms in European law literature in Germany. See for example Armin von Bogdandy: Prinzipien der Rechtsfortbildung im europäischen Rechtsraum. Überlegungen zum Lissabon-Urteil des Bundesverfassungsgerichts, Neue Juristische Wochenschrift, vol. 63, No. 1-2, 2010, 1-5. Bogdandy thinks that the Court’s reasoning leads to the conclusion that the foreign policy objectives concerning a European federal state, pursued by all the Federal Republic’s CDU chancellors from Adenauer over Erhard all the way to Kohl, were unconstitutional.
In a decision dated March 2010, the first senate of the Federal Constitutional Court also examined the EU’s data management regulations on the basis of German constitutional identity, arguing that citizens’ freedom from the state’s unwarranted telecommunications data management is also part of this constitutional identity, which is why the Grundgesetz allows the state to assume such powers only in exceptional cases. The central issue of the Honeywell decision, handed down in July 2010, was whether a controversial ruling by the European Court of Justice qualifies as an ultra vires act, which would imply that its application would be barred in Germany. Ultimately, the judges of the Court rejected the petition, but in their ruling they clearly reaffirmed that in principle they have the power to review ultra vires. In other words they left open the possibility of similar examinations in the future.

On May 4, 2011, the second Senate of the Court issued another ruling, this time on the constitutionality of preventive detention (Sicherungswahrung). In this decision the judges continue to regard the Grundgesetz as a norm superior to international legal agreements, including the European Convention on Human Rights, but at the same time they formulate the requirement of construing the Grundgesetz in a manner that is “friendly towards international law” (völkerrechtsfreundliche Auslegung). Some welcome the decision as the first sign of the Federal Constitutional Court’s new understanding of sovereignty, in which the judges’ take leave of the national hierarchy of norms, with the Basic Law on top.

India

At 300 pages and over 370 articles, India’s 1949 Constitution is to this day the world’s longest. Though it does not contain any immutable provisions, the majority requirements for amending various passages differ, depending on the importance of the provision in question: the greater part of them can be changed with the votes of two-thirds of those present in both houses and the endorsement of the president. The most important articles also need to be

34 1 BvR 256/08, 1 BvR 263/08, 1 BvR 568/08.
35 2 BvR 2661/06.
36 Judgment handed down on November 22, 2005, in the No. C-144/04 Mangold case [ECJ 2005, p. I-9981]. Pursuant to the decision of the European Court of Justice, those provisions of German labor law which allow for exceptions to general regulations providing that employment contracts concluded with employees 52 years or older must be for a fixed time violate the ban on discrimination. In an article published in a daily newspaper even Roman Herzog, former Federal President and former President of the Federal Constitutional Court, sharply criticized the decision. See Roman HERZOG- Lüder GERKEN: Stoppt den Europäischen Gerichtshof, Frankfurter Allgemeine Zeitung, September 8, 2008.
38 2 BvR 2365/09.
ratified by the majority of states in addition to the aforementioned requirements, while a
smaller part of provisions may be amended with a simple majority of votes. Based on the
constitutional interpretation advanced by India’s Supreme Court, a judicial review of
constitutional amendments may only take place if formal constitutional violations have taken
place. The Supreme Court rejected the possibility of reviewing constitutional amendments
first in 1951, and again in 1965.40

Indira Gandhi, who first ascended to power in 1966, developed a penchant for using
constitutional amendments to circumvent judicial review, primarily in the context of property
rights issues. The case that brought about a shift in the Supreme Court’s attitude was the 1967
Golak Nath v. State Punjab case,41 in which a majority of the judges took the position that
even a constitutional amendment adopted according to proper formal procedures may not
violate constitutional rights. As one of the commentators of Indian constitutional development
says: “[T]hus commenced the war over primacy between Parliament and the Court.”42 The
decision also helped Indira Gandhi’s populist campaign, which led to an electoral victory
exceeding a two-thirds majority in 1971, and encouraged the prime minister to pass four
constitutional amendments shortly thereafter. One of these (the 24th overall) expressly forbade
the Supreme Court to review constitutional amendments.

The state of emergency imposed on account of the war with Pakistan and the
subsequent nationalizations led to the Court’s most important decision, rendered in the
Kesavananda case in 1973. The 800 page ruling, which resulted from a 7:6 vote, formally
recognized Parliament’s right to enact constitutional amendments that impinge on
fundamental rights, and in that respect therefore overturned the Golak Nath decision:
“Fundamental rights . . . are given by the Constitution, and, therefore, they can be abridged or
taken away by the . . . amending
process of the Constitution itself.”43 At the same time the majority of judges reserved the
Court’s right to invalidate constitutional amendments if those are in breach of the Indian
Constitution’s “basic structure.”

In response to the charges of electoral fraud leveled against her, and to avert the threat
of losing office, in June 1975 Indira Gandhi declared a state of emergency again, and among
the first measures introduced in that context she initiated several historically unprecedented

40 Shankari Prasad Deo v. Union of India 1951 (3) SCR 106; Sajjan Singh v. State of Rajasthan 1965 (1) SCR
933.
42 Granville Austin: Working a Democratic Constitution. The Indian Experience, New York, Oxford University
constitutional amendments. The first, No. 39, barred the judicial route in controversies relating to the election of the prime minister, for example. Number 38 ruled out the constitutional review of laws that were enacted under the state of emergency and violated fundamental rights. Gandhi’s reasoning in justifying the amendments – which followed Carl Schmitt to the extreme – suggested that the constituent and constitution-amending power was the unconditional expression of the people’s sovereign will. This enraged the members of the Supreme Court so much that they – even while they upheld the validity of her election as premier – rejected the two constitutional amendments.44

Prime Minister’s Gandhi struck back one last time with constitutional amendment No. 42 in 1980, which contained the nigh provocative statement that “no constitutional amendment may be questioned on no grounds whatsoever or by any court.” In the case of Minerva Mills Ltd. v. Union of India, the Court struck down this amendment, too, by arguing that even though Parliament is entitled to change the Constitution any time, the latter is “a precious heritage; therefore, you cannot destroy its identity.”45 The firm stance adopted by the judges of the Supreme Court resulted in the doctrine of “basic structure” that has remained a protective element against aspirations to upset constitutionality in India, and may serve as a model for other countries to this very day.46

The first countries to apply the Indian model where its neighbors, Bangladesh and above all Sri Lanka. The Bangladeshi Supreme Court nullified a constitutional amendment as well, which would have deprived the body of the right to decide at its own discretion about the transfer of judges between courts. The Court’s opinion cites judicial independence as a fundamental principle of the Constitution, and is in this respect reminiscent of those Indian precedents in which the organizational prerogatives of the administration of justice were understood as part of the basic constitutional structure.47 In its ruling issued on February 2, 2010 the Supreme Court has ruled that the Fifth Amendment to the Constitution, which legitimized the governments that were in power from the time of the August 15, 1975 coup through April 9, 1979, was illegal. The decision allows the government to ban religion-based

45 Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1798.
47 See JACOBSOHN (footnote 2), 68, footnote 83.
political parties, and restores the spirit of the 1972 Constitution, which was based on the four fundamental principles of nationalism, socialism, democracy and secularism.\textsuperscript{48}

Protecting the identity of the Constitution first occurred in Sri Lanka in the context of constitutional amendment No. 13 of 1987. This amendment sought to introduce some level of decentralization – modeled on Indian federalism – in the previously centralized unitary state structure. The ethnic Sinhalese majority, which is overwhelmingly Buddhist, rejected this change – also viewing it as an encroachment by undesirable Hindu influence – and turned to the highest judicial forum citing the Constitution’s Article 1, declaring the unitarian nature of the state, Article 2 guaranteeing popular sovereignty, and Article 9, which enshrined Buddhism as the dominant religion. By a vote of 5:4, the Court upheld the amendment, which simultaneously implied that it rejected putting it up for a popular referendum. According to Justice Sharvananda, who wrote for the majority, the Constitution’s identity is not violated by the amendment, since the planned decentralization does not turn the state into a federation, which means that the basic structure remains unaltered.\textsuperscript{49} In his dissent representing the minority view, Chief Justice Wanasundera argued for allowing the issue to be put to a popular vote based on the protection of the Constitution’s identity.

Subsequently, the Court’s majority rejected putting to a popular vote several constitutional amendments that obviously served the political interests of the ruling party against the opposition, such as for example depriving opposition members of parliament of their seats, extending the Parliament’s term, and the elimination of safeguards against the extension of the state of emergency. The Supreme Court’s abstention vis-à-vis the government’s unconstitutional endeavors led to a general disenchantment with democratic processes and constitutionalism in Sri Lanka.\textsuperscript{50}

A constitution in another one of India’s neighbors was also infected with the notion of unconstitutional constitutional amendments. Pursuant to Article 116 (1) of the 1990 Nepalese Constitution, a bill seeking to amend the Constitution may only be presented to Parliament if it is not antithetical to the Constitution’s preamble.\textsuperscript{51} As is apparent – unlike with the Indian solution that served as a model –, in reality this means a preliminary judicial review of unconstitutional constitutional amendments. Similarly to its Indian counterpart, the Nepalese


\textsuperscript{49} See The Thirteenth Amendments to the Constitution and the Provincial Councils Bill, 325. Cited in JACOBSOHN (footnote 2) 64-65.

\textsuperscript{50} For details see Radhika COOMARASWAMY: Uses and Usurpation of Constitutional Ideology, in Douglas GREENBERG - Stanley N. KATZ - Melanie Beth OLIVERIO and Steven C. WHEATLEY: Constitutionalism and Democracy, New York, Oxford University Press, 1993, 159-171.

Constitution did not directly refer judicial review into the authority of the Supreme Court, but the general assumption is that the highest judicial forum is entitled to it.\textsuperscript{52} Yet before the judicial body had the chance to develop a relevant jurisprudence, the monarchy in Nepal was toppled and the 1990 Constitution was supplanted by the temporary Basic Law of January 15, 2007, whose Article 148 on the amendment of the Constitution no longer contains the provision that refers to the spirit of the Constitution, which served as a constraint on potential amendments.\textsuperscript{53} It is at this point unclear whether the new constitution that is being drafted will contain a similar provision and, if that is indeed the case, whether the Supreme Court will be willing to render decisions in the relevant cases.

\textit{Turkey}

Pursuant to Article 4 of the 1982 Constitution the basic law’s Article 1, declaring the republic, its Article 2 enshrining the state’s democratic, secular, social and rule of law-based character, as well as Article 3 providing for its unitary character, are all essential elements of Turkish constitutional identity that may not be altered. At the same time, Article 148 only authorizes the Constitutional Court to exercise judicial review in the case of formal mistakes when it comes to constitutional amendments. Correspondingly, up until 2008 the Constitutional Court rejected petitions directed at the examination of the substance of constitutional amendments.\textsuperscript{54}

In the so-called headscarf decision of June 5, 2005, for the first time the judges of the Constitutional Court nullified two acts – which had been adopted by the Grand National Assembly with an 80\% majority – amending the Constitution based on a review of their substance.\textsuperscript{55} The amendments had been introduced by the Justice and Development Party (AKP), which is committed to a “conservative democracy” and “passive secularism,” and sought to mildly relax the consistent and wide-ranging secularization implemented by Kemal Atatürk, as well as to make religion more visible in the country whose population is 99\% Muslim. To this end, the ruling party wanted to ease the ban on wearing a headscarf, which was a key element of Atatürk’s secularization program and which was affirmed by the Constitutional Court in a 1989 ruling,\textsuperscript{56} but nevertheless enjoyed the support of only 22\% of the populace. The intended amendment sought above all to change the Constitutional Court’s

\textsuperscript{53} \url{http://www.worldstatesmen.org/Nepal_Interim_Constitution2007.pdf}.
\textsuperscript{55} E.2008/16, K.2008/116.
\textsuperscript{56} The decision rendering void this headscarf-friendly legislation was essentially reaffirmed by the Grand Chamber of the European Court of Human Rights’ 2005 decision in \textit{Leyla Sahin v. Turkey}. 
jurisprudence with regard to prohibiting female university students from wearing a headscarf at school.

In its 9:2 ruling the Constitutional Court first explained on which interpretation of the Constitution it based its authority to review constitutional amendments. According to its reasoning, Article 148, which provides the authority for reviewing constitutional amendments, and Article 4, which is regarded as the Constitution’s “eternal clause,” must be examined jointly as a unit, and thus the review extends to a protection of fundamental principles as well. The Court at the same time also argued for its expansively construed jurisdiction by saying that the power to amend the Constitution is only a secondary constituent power, which – unlike the primary pouvoir constituant – may be subject to limitation. In this instance, therefore, the judges of the Court made clear that the constitutional amendments in question undermine secularism as one of the “fundamental principles of the republic.”

(Following the decision many observers anticipated that the Court would ban the initiator of the amendments, the AKP, in the context of the pertinent case before the Court, as it had previously done in 1998 with the Refah, another Islamist party. Ultimately, however, in their decision of July 30, 2008 – adopted with a slim majority –, the judges left it at a “severe warning” for the party to cease its politics of guiding the country towards Islam.)

In March 2010, another package of constitutional amendments, consisting of 23 articles, was presented to Turkish Parliament. While a portion of the proposed provisions undoubtedly improved the constitutional position of fundamental rights, the changes suggested for the Council of Judges and Prosecutors raised serious constitutional concerns that the government was seeking to bring the Constitutional Court and the administration of justice under its control. One of the problematic amendments increased the number of Constitutional Court judges from 11 to 17, with three elected by Parliament (in the second round of balloting a

---

57 The amendments had an interesting afterlife in that since October 2010, following the letter by the Joint Council of Universities, it is forbidden to ask a student to leave university lectures for wearing a headscarf. By so doing, the Council – explicitly or implicitly – has misunderstood the Constitutional Court’s standing jurisprudence that contradicts this.

58 In its February 3, 2003, decision in the case of Refah Partisi (Welfare Party) and Others v. Turkey, the European Court of Human Rights in Strasbourg reaffirmed this decision ([GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II).

59 Not only the ruling AKP, but the Western media, too, viewed the amendments this way. See Türkische Verfassungsreform - Ein Schritt in die richtige Richtung, Frankfurter Allgemeine Zeitung, September 13, 2010 (online edition); Thomas SEIBERT: Die Türkei, demokratisch wie nie zuvor, Die Zeit, September 13, 2010 (online edition).

60 Some – such as for example Andrew Arato, who has been tracking Turkish constitutional developments for a long time now – have even proposed that the fundamental rights changes only served to conceal the objective of subordinating the third branch of government to the executive. See the interview with Arato in the August 26-27, 2010 edition of the daily Milliyet. Cited in Ece GOZTEPE: Eine Analyse der Verfassungsänderungen in der Türkei vom 7. Mai 2010: Ein Schritt in Richtung mehr Demokratie?, Europäische Grundrechte Zeitschrift, 37. Jg. Heft 22-23, 2010, 686.
simple majority was enough), while fourteen would be appointed by the President of the Republic who had previously belonged to the ruling party. Thus, the appointment of the majority of judges was in the hands of the government. 61

The opposition Republican People’s Party (CHP) turned to the Constitutional Court in a petition requesting that the entire package of constitutional amendments, as well as individual parts of it taken separately, be declared unconstitutional. In its decision, the Constitutional Court followed the course charted in 2008, in that it employed a similar reasoning and continued to claim for itself the jurisdiction to review constitutional amendments, yet at the same time accorded the parliamentary majority a greater margin of appreciation in shaping the institutional order created by the Constitution. Though it did nullify some minor measures, its decision overwhelmingly left the constitutional amendment package intact. 62 Following the decision, at the 12 September, 2010, referendum 57.88% of voters supported the constitutional amendment.

At first glance there are substantial similarities between the decisions of the Indian Supreme Court defending the basic constitutional structure and the Turkish Constitutional Court’s ruling in defense of the fundamental principles of the republic, even in the sense that both bodies undertook a review of the substance of the constitutional amendments before them without an express constitutional authorization to do so, which – as we saw above – the Sri Lankan Supreme Court justices refused to do even though they were explicitly authorized to do so. At the same time, as Andrew Arato points out, there is a significant difference between the Indian and Turkish situations: while the principles of the Indian Constitution are the result of a democratic process, the 1982 Turkish Constitution is the product of an authoritarian regime. In other words, unlike their Turkish colleagues, the Indian judges stand up in the defense of a democratic pouvoir constituant. 63 That is another reason why it would be important if following the June 2011 parliamentary elections government and opposition parties in Turkey could agree on drafting a new, democratic constitution.

South Africa

61 The similarity between these amendments and the 2010 constitutional amendment introduced by the Hungarian government, which sought to ensure the nomination and elections of constitutional court judges loyal to the government, as well as the regulations enshrined in the 2010 Basic Law, are almost uncanny. So is the fact that the Turkish constitutional amendment, just like the Hungarian Basic Law, institutionalized – as a compensation of sorts – genuine constitutional complaints, which is of course the least political type of jurisdiction of any body safeguarding the constitution.
62 E. 2010/49, K. 2010/87. The provisions thus declared unconstitutional pertained to those rules concerning the election of Constitutional Court judges and members of the Council of Justice which regulated how many candidates it was possible to simultaneously vote for.
63 See Andrew Arato: The Turkish Constitutional Crisis and the Road Beyond, American: A Magazine of Ideas, June 30, 2008.
South Africa’s post-apartheid constitutional arrangements represent the most extreme form of restrictions on the sovereignty of the constitution’s framers, since the provisional Constitution of 1993 not only provided for the mandatory review of the constitutionality of constitutional amendments, but also for that of the new, final constitution, as one of the preconditions for its adoption. One of the reasons behind this was of course what Andrew Arato has termed the post-sovereign nature of the process of adopting the constitution, that is the fact that the provisional constitution created in the first phase of a two-step constitution-making process was not drafted by a legitimate body. Nevertheless, as we can see in the cases of Hungary and Poland, for example, the case of other, also post-sovereign constitution-making processes has not only failed to yield such an exceptionally strong authority, but in fact constitutional courts were not even accorded the power to review constitutional amendments.

Article 73 of the provisional Constitution adopted in December 1993 gave two years – starting with the first session of the new parliament, the National Assembly – for the completion of the new document, while Article 74 enumerated the 34 principles whose fulfillment the Constitutional Court – which had also been set up pursuant to the provisions of the transitional basic law – would have to review and certify. This approval procedure was meant to legitimate both, the new Constitution and the Constitutional Court.

After repeatedly questioning representatives of political parties and civil organizations, and only after having emphasized that the constitution is a monumental achievement and that it satisfies the requirements of the overwhelming majority of the constitutional principles under review, the Court ultimately ended up formulating a total of eleven constitutional objections concerning eight of the document’s articles, on the basis of which it refused to endorse the draft constitution in the first attempt. Among the problematic provisions was that the document failed to ensure that detailed rules on constitutional adjudication may only be laid down in an act whose adoption requires a qualified majority and, furthermore, that the fundamental rights and freedoms were not sufficiently protected against modifications by a simple majority of parliament, as well as the document’s failure to provide a proper structural framework for municipal governments. Parliament accepted all of the Constitutional Court’s


objections and amended the pertinent provisions. The document thus altered was unanimously approved by the Constitutional Court.

The Constitution thusly created – which is deemed the “crowning success of democratic transition”67 – itself institutionalizes a rigid system for the process of amending the Constitution in as far as amendments continue to be subject to the Constitutional Court’s power of review. The parliamentary majority required for amendments depends on which provisions of the Constitution they envision to change: the fundamental provisions enshrined in the first chapter may only be amended with the votes of at least 75 percent of all representatives and the consent of at least six of the nine provinces, while the articles of the fundamental rights chapter also require the affirmation of six provinces and at least two-thirds of MPs. For all other amendments – unless they pertain to the provinces – the votes of two-thirds of MPs is sufficient.68 Amendments are further rendered more difficult by the possibility that the President may send the bill back to Parliament with a political veto or, alternatively, to the Constitutional Court with a constitutional veto. Indeed, if the head of the state fails to do either, then within thirty days a third of all MPs may themselves turn to the Constitutional Court.69 This differentiated system of rules for adopting constitutional amendments is one of the characteristics of a “multi-level” constitution, the most internally consistent example of which happens to be the South African constitution.70

Unlimited power to amend the constitution: Ireland

Let us now consider a counter-example that rejects the judicial review of constitutional amendments by the constitutional court and favors constitutional sovereignty: the case of Ireland.

The case of State (Ryan) v Lemmon71 came before the Irish courts in 1934. The issue was whether a constitutional amendment violates the plaintiff’s right to personal liberty and his right to the application of the habeas corpus rule, which is provided by Ireland’s 1922 Constitution.72 According to the Judge Kennedy, who constituted the minority of the three-judge panel, the amendment is antithetical to the rule of law and would push Ireland into a

---

68 To put these majority requirements into perspective, it should be noted that South Africa’s leading party, the African National Congress (ANC) won 69% of the votes in the 2004 elections and 65% in 2009. See Election Commission of South Africa; http://www.elections.org.za.
69 See the Constitution’s Articles 74 and 80, as well as 84 (2) (b) and (c).
70 See Andrew Arato: Multi Track Constitutionalism Beyond Carl Schmitt, Constellations, Fall, 2011, 18:3.
The two other judges did not share his position: in their view the court has no other responsibility with regard to a constitutional amendment than to examine whether its adoption was formally in order, that is whether it occurred pursuant to the relevant provisions of the Constitution. The 1922 Constitution was replaced by the 1937 Constitution, and the latter’s 14th Amendment – adopted in 1995 – ensured citizens’ right to access information about abortion possibilities available abroad. The Amendment was attacked in court on the grounds that it contravenes the 8th Amendment of the Constitution, which secures the fetus’ right to life. The legal representative of the fetus argued before the court that the judicial body may not apply any legal provision or amendments that are antithetical to natural law. The court, however, rejected this reasoning and upheld the 14th Amendment as the legitimate outcome of the popular will. Pursuant to the court’s opinion – similarly to the Ryan case –, based on the principle of the supremacy of popular sovereignty no obstacle may be placed in the way of the people’s privilege to amend the Constitution. Subsequently, the court reaffirmed its commitment to popular sovereignty in several similar rulings: “There can be no question of a constitutional amendment properly placed before the people and approved by them being itself unconstitutional.”; “No organ of the State, including this Court, is competent to review or nullify a decision of the people. […] The will of the people as expressed in a referendum providing for the amendment of the Constitution is sacrosanct and if freely given, cannot be interfered with.” At the same time, the court’s democratic positivism must be assessed jointly with the preamble of the Irish Constitution, which begins with a reference to the Holy Trinity and then emphasizes the Irish people’s commitment to Jesus Christ.

The Hungarian Constitutional Court’s decision on constitutional amendments: a death sentence of the rule of law?

In July 2010, the new Hungarian government elected in April adopted a law that imposed a so-called „special-tax” on severance, bonuses and other rewards for state employees who left the public service and received such financial benefits in excess of 2 million forints (~

77 Act XC on the creation or amendment of certain economic and financial laws (2010. XC. tv. Egyes gazdasági és pénzügyi tárgyú törvények megalkotásáról, illetve módosításáról).
$9,000). The tax rate was set at 98% and was to be retroactively applied to all money paid out over the preceding year. The government argued that its predecessor had used severance payments as an instrument for rewarding political loyalists in the public service. At the same time, the punitive tax rate applied not only to the presumed target group of high level former civil servants but also to teachers, doctors and other professional groups who had received such benefits after decades of service.

In October the Constitutional Court struck down the special tax in a unanimous decision.\textsuperscript{78} Noting that justice demands the measure, the government at the very day of the decision introduced amendments to the Constitution allowing retroactive legislation in certain cases, and removing the Constitutional Court’s jurisdiction to review laws pertaining – among other things – to budgetary and tax policy. According to the latter amendment the constitutional court judges can only review these financial laws from the perspective of those rights (the right to life and human dignity, protection of personal data, freedom of thought, conscience and religion, or the right to Hungarian citizenship), that they typically cannot breach. This withdrawal of the right to review financial laws created a solution found nowhere else in the world, since there is no other institution functioning as a constitutional court whose right of review has been restricted based on the object of the legal norms to be reviewed. Therefore, in the case of laws that are not reviewable by the court the requirement that the constitution be a fundamental law, and that it be binding on everyone, is not fulfilled.

Together with the constitutional amendment the government also reintroduced the nullified law with unchanged provisions, even expanding its retroactivity application to the preceding five years.\textsuperscript{79} In response to various petitions seeking to invalidate the government’s both constitutional amendments, the Court soon came to face with the question of whether this measures were unconstitutional and if it had the authority to review it. It issued a decision in July 2011, a year after the retroactive special tax was first adopted.

\textit{A one-sided legal comparison}

\textsuperscript{78} Constitutional Court decision 184/2010. (X. 28.)
\textsuperscript{79} Ultimately, the Court found a “loophole” in the constitutional amendment limiting its jurisdiction and nullified the act again in May 2011, citing a violation of human dignity. At the same time, in the context of many other laws its diminished jurisdiction did stop the Court from intervening. Ultimately the retroactive effect of the law was greatly reduced, as it only applied to the beginning of 2010 rather than to 2005, as originally intended. Constitutional Court decision 37/2011. (V. 10.)
After a presentation of the wide-ranging package of petitions and of the constitutional amendments impugned by the latter, as well as the legal and constitutional provisions that the petitions cited in support of their arguments, the opinion of the majority decision issued by the Hungarian Constitutional Court, written by Judge Mihály Bihari, begins with the Constitutional Court’s jurisdiction to review constitutional amendments. The reasoning on this issue is introduced by a comparative analysis that is meant to buttress the majority position, but is tendentious, one-sided, and lacking in any type of scientific foundation. The selectiveness of the examples in the comparative framework is best demonstrated by the fact that even though the analysis focuses on the “constitutional courts of countries following the so-called European model of (centralized) judicial review,” it conveniently “forgets” to mention the Italian and Czech constitutional courts, and from outside Europe also the Indian Supreme Court, which – as we saw - has the most expansive jurisprudence in this area, as well as the South African and Columbian Constitutional Courts, and the Peruvian, Brazilian, Sri Lankan and Nepalese Supreme Courts. But the analysis also might have mentioned Azerbaijan, Kyrgyzstan, Moldova and the Ukraine among the successor states of the USSR. If the judge who delivered the opinion had understood the concept of unconstitutional constitutional amendments, and the closely related issue of the function of eternal constitutional clauses, then he would have realized that it makes more sense to look for examples in the those Asian, African, Latin American and European countries that – like Hungary – seek to prevent the return of a totalitarian regime by limiting total sovereignty when it comes to amending or drafting a constitution. (That is why it should be hardly surprising to find that such legacies are absent in the Western European states that are fortunate enough not have such a historical background.)

The second serious distortion in the comparative analysis is the argument that – according to the judge delivering the opinion – is meant to substantiate the majority position and claims that the German Federal Constitutional Court has never reached a conclusion of unconstitutionality as a result of judicial review, while the others also have only rarely arrived at such a determination. Apart from the fact that this is not even true with regard to the Indian Supreme Court – left out of the analysis –, which has found Prime Minister Indira Gandhi’s

80 This is not the first time that the Constitutional Court has employed selective comparisons to bolster its position. This is for example what happened in decision 154/2008. (XII. 17.), which struck down civil unions. For a critical analysis see Gábor HALMAI - Eszter POLGÁRI - Péter SÖLYOM - Renáta ÚTITZ – Martin VERMAN: Távol Európától. Kiemel kerelem alacsony színvonalon [Far from Europe. A low level of preeminent protection], Fundamentum, 2009/1, 89-108.

comprehensive constitutional reforms antithetical to the basic structure of the Indian Constitution, it is also irrelevant with regard to examining the issue of jurisdiction. Even if no constitutional amendment had ever been nullified, the underlying constitutional issue to be decided would still be whether and how the judicial limitation of the power to amend the constitution could be substantiated. Obviously the Court needs not “strain itself” with investigating this if the constitution were to expressly grants it such powers. In the absence of these, however – for example in the case of the Hungarian Constitution – the body performing judicial review must itself find a solution to this dilemma by interpreting the constitution. The simplest method for so doing – which was a possibility that was open to the Constitutional Court judges – is the Austrian solution, which posits that since the constitutional court’s right of review extends to all laws, and since laws of a constitutional rank (and in the Hungarian domestic context acts amending the Constitution) are also laws, the jurisdiction is evident.

The jurisprudence hitherto

The Hungarian Constitutional Court has already several times been confronted with the dilemma of whether unconstitutional constitutional amendments are subject to judicial review. First it faced this question in its ruling 23/1994. (IV. 29.), wherein the judicial body cited lacking jurisdiction when it dismissed a petition to review a constitutional amendment. The antecedent of this case was the Court’s 3/1990. (III. 4.) decision, in which the judges ruled unconstitutional the provision of the electoral laws which said that a citizen who is abroad on the day of the balloting is considered to have been obstructed from voting. Parliament did not wish to amend the relevant law before the first democratic election, which is why it enshrined the limitation that the judges of the Constitutional Court had deemed unconstitutional in the Constitution. Prior to the 1994 election, some Hungarian diplomats on a mission abroad attacked this provision in a petition to the Constitutional Court, but the body declared that it lacked jurisdiction, even though it had previously, when the impugned provision had only been a law and not a constitutional clause, declared it to be unconstitutional in terms of substance.

The February 1998 Constitutional Court decision No. 1260/B/1997 extended the rejection of judicial review also to those decrees that give legal effect to regulations amending

---

That is why it is difficult to understand why the opinion of the majority decision says “it needs to be emphasized, however, that in all these cases it is either the given state’s constitution that determines the constitutional court’s right to undertake constitutional (amendment) review, or the judicial body protecting the constitution itself expands – without express constitutional authorization to do so – its jurisdiction to include constitutional review.” Indeed, *Tertium non datur.*
constitutional rules and expressed that it would only have undertaken an examination if the potential nullification of this decree would not result in any changes to the text of the Constitution. Four judges wrote a dissent to this opinion, while others submitted a concurring opinion. Judge Tamás Lábady, who was one of the dissenters in the case, argued that precisely in the specific case at hand the decree on the entry into effect did not change the text of the Constitution and could therefore have been the subject of review. Another indication of how divided the judges were was an interview statement in 1997 by the Court’s president at the time, László Sólyom, who had partaken in rendering the first, unanimous decision, but was not among the signatories of the second ruling: “The majority of the Constitutional Court does not wish to examine the constitutionality of constitutional amendments, even though such a review could be justified on theoretical grounds.”

In his respective concurring and dissenting opinions attached to the two Constitutional Court decisions [184/2010. (X. 18.) and 37/2011. (V. 10.)] reviewing the constitutionality of the 98% special tax regulation, which had been backed up by a fairly obviously unconstitutional constitutional amendment, Judge László Kiss expressed his own view, which ran counter to the majority of the judicial body. He argued that the Constitutional Court “must do all in its power to ensure that – as a result of its interpretation of the Constitution – no contradictions exist between various constitutional provisions.”

Contradictory majority reasoning

The majority opinion on the merits begins with an examination of procedural validity, in other words with the investigation of the eventual failures of the law-making process. In so doing, the body subjected to intense criticism the constitutional amendment practices of the Parliament constituted on May 14, 2010. Up to the point when the decision in question was handed down by the Court, Parliament had adopted ten constitutional amendments within 13 months (and nine within seven months), which affected 33 provisions of the Constitution. (In other words it would be no exaggeration to say that even before adopting the Basic Law (i.e. the new constitution) on April 18, 2011, and in fact partially even subsequently, Parliament substantially transformed the state’s constitutional order.) Of these amendments only two were proposed by the government – or rather the Minister for Public Administration and Justice acting in the government’s name, the rest – including the restriction of the powers of the Constitutional Court, the special tax that was to be effective retroactively covering a five-

83 See Gábor Attila TóTH: A “nehéz eseteknél” a bíró erkölcsi felfogása jut szerephez. Beszélgetés Sólyom Lászlóval, az Alkotmánybíróság elnökével [When it comes to the “hard cases”, the judge’s moral opinions come into play. Interview with László Sólyom, president of the Constitutional Court], Fundamentum, 1997/1, 34.
year period, the reduction in the number of MPs, the elevation of the National Media and Infocommunications Authority to a constitutional level – were adopted in response to bills presented by individual MPs, and were in several cases passed with high priority, resulting in a shorter than usual procedure of law-making.

As far as the legal basis for the jurisdiction to determine the unconstitutional nature of the constitutional amendment process is concerned, the majority reasoning does not waste much space on explaining why it changes – as it happens, fortuitously – its hitherto generally rejecting jurisprudence, it merely notes: “[I]t is not possible to rule out the Constitutional Court’s jurisdiction with regard to the review of the procedural invalidity of constitutional provisions, since unlawfully or even unconstitutionally adopted legal provisions that suffer from constitutional invalidity are considered automatically void, as if they had never been created in the first place.” The only question the opinion fails to clarify is the following: if from a procedural angle a constitutional amendment is considered a law, then why is it not considered a law in terms of substance, that is if it may be reviewed as a law in one respect, then why not in the other. Two voices coming from opposite ends point out this contradiction, or more specifically this lack of real reasoning. In his concurring opinion joined by the Court’s president, Péter Paczolay, Judge István Stumpf recommends dismissing the examination of both, procedure and merits, while in his dissent András Bragyova proposes that both should have been undertaken.

In the substantive examination of procedural unconstitutionality, the majority notes that the amendment procedures raise “problems of legitimacy” because the necessary consultations (for example with the Constitutional Court regarding the consequences of limiting its powers) failed to take place, and even goes as far as to say that the successive amendment of the Constitution, performed with the aim of realizing or achieving current political interests and ends, is highly disconcerting with respect to the requirements of democratic rule of law because it jeopardizes the stability of the Constitution. Based on the above, the majority notes: the procedure “obviously fails to fully satisfy the requirements of democratic rule of law.” This formulation is somewhat reminiscent of Mikhail Bulgakov’s “sturgeon of second freshness” at the buffet in The Master and Margarita; according to the majority of the Hungarian Constitutional Court’s judges, however, this fish is edible, as the final verdict ends up saying that “formally the procedure has meet the procedural rules laid out in the Constitution and the Act on legislation.” Hence the judicial body denied the petition seeking to obtain a judgment of invalidity on procedural grounds. As far as satisfying the requirements of the Act on legislation, for instance, the opinion itself states that the
consultations prescribed by said act have failed to take place. Thus a more thorough, circumspect reasoning might have at least touched upon the question of why the procedural requirements of the Act on legislation are not constitutional requirements. For example in a rather extreme situation in which an MP introduced a constitutional amendment on a Wednesday without a preliminary process, without previous consultations or an impact study, etc., the amendment was adopted in a vote on Thursday, was promulgated on Friday, and entered into effect on Monday.

This lack of intellectual depth also extends to the substantive constitutional examination, which is to a significant degree based on the fallacious thesis that since the Hungarian Constitution does not contain any immutable provisions, the Constitutional Court does not have a standard against which to assess the substance of the constitutional amendments. Only few constitutions contain explicit “eternal clauses,” however. The most famous is undoubtedly the German Grundgesetz’s Article 79 (3), but as we saw above even this provision lacks an explicit jurisdictional rule that would authorize the Federal Constitutional Court to protect the immutable constitutional provisions during the process wherein constitutional amendments are enacted. It was the judges of the Court in Karlsruhe who endowed themselves with this power by construing the Grundgesetz accordingly. The same was true of most judicial bodies which – acting as guardians of their respective constitutions – in the process of reviewing constitutional amendments derived this jurisdiction for themselves even without an “eternal clause.” The most prominent example is the Indian Supreme Court’s doctrine on the “basic structure” of the Constitution, which the Court used for the purposes of providing a basis for conducting a review even without an unchangeable rule and without express constitutional authorization to do so. Naturally, those who – like the author of the majority opinion – use the instrument of comparative law selectively from the start by acknowledging only solutions that buttress their thesis could easily arrive at the conclusion – which is completely divorced from the facts – that “constitutional courts generally tend to refrain from establishing for themselves the jurisdiction to review the constitution.” (Another distortion is manifest in the terminology employed by the majority reasoning, which consistently refers to reviewing the constitution, rather than reviewing constitutional amendments, even though a review is possible before these amendments enter into effect; indeed, even a deferment of their entry into effect is conceivable in the interest of conducting a review.) Thus in spite of the fact that the petitioners offered several standards for
review, from the “invisible constitution”\textsuperscript{84} over the essence and the fundamental values of the democratic state on the rule of law all the way to the \textit{ius cogens} norm and fundamental principle – generally recognized legal principle – of international law, the majority – at least in the context of reviewing the substance of the amendments – has adhered to its previous jurisprudence. They dismissed the petitions even though the Court’s reasoning contains the following passages: “Based on the principles enshrined in international agreements, the Hungarian Constitution has immutable parts whose immutability is not based on the will of the Constitutions’ creators, but rather on \textit{ius cogens} and those international agreements to which the Republic of Hungary is party. […] The norms, principles and fundamental values of \textit{ius cogens} together constitute a standard that all future constitutional amendments and constitutions need to satisfy.” In these words the majority binds not only the constitutional amendments reviewed here to these standards, but even the Basic Law adopted on April 18, 2011. At the same time it appears that the majority believes that it is not within the powers of the Constitutional Court to ensure that the constitutional amendment (or the new constitution) satisfy these standards, meaning that there is effectively no way to enforce them. Judge Péter Kovács – and he is joined by Mihály Bihari, the Constitutional Court judge who delivered the decision –, however, notes that if the constitutional amendment were to contravene or grossly violate an international legal obligation that Hungary had assumed, and which was impossible to withdraw from due to the legal or political bearings of the obligation in question, and if this conflict could not be resolved by constitutional interpretation, then the Constitutional Court would be entitled to review it. What the opinion fails to address or answer, however, is whether for example the requirements concerning democratic rule of law in Article 2 of the Treaty on the European Union constitute such obligations, and whether the impugned constitutional amendments violate these requirements. In his concurring opinion, even Judge István Stumpf – who evidently believes that the dismissal of all petitions would have been the right course – points out the contradiction between the operative part of the decision that dismisses the petition and the above-cited reasoning. If that was not in fact his view, but in

\textsuperscript{84} The concept of an invisible constitution was developed by the former president of the Constitutional Court, László Sólyom. The idea behind this concept is that the Court’s jurisprudence offers a theoretical framework for evaluating the question of constitutionality, thus complementing the text of the Constitution, and in fact superseding it when the latter is amended in a way that violates crucial constitutional values. In introducing the notion, Sólyom wrote the following in his concurring opinion in 23/1990. (X. 31.) on the death penalty: “The Constitutional Court must continue the work of laying down the theoretical foundations of the Constitution and the rights enshrined therein, and of creating a coherent system through its decisions. This system may stand above the Constitution – which is still often amended to satisfy current political interests – as an ‘invisible constitution,’ serving as a stable measure of constitutionality. In so doing, the Constitutional Court enjoys a latitude as long as it remains within the conceptual confines of constitutionality.”
reality he thought that a substantive review of the constitutional amendments was warranted, then at least as far as this particular issue was concerned he would have attached a dissenting rather than a concurring opinion to the majority stance.

Nevertheless, in spite of dismissing the petition on account of lacking jurisdiction, the majority opinion does reserve the Court a signaling right – or rather obligation – which is just as absent from the Constitution as the possibility of judicial review. Indeed, even the standard formulated as the constitutional basis for this obligation is nowhere to be found in the written text of the Constitution. (In describing “constitutional protection through signaling” as a phenomenon that is beyond the “Constitutional Court’s normative jurisdiction,” Judge András Holló evinces a keen appreciation of the fact that signalization is situated outside the Constitution. In other words it appears that there are indeed jurisdictions outside the Constitution. And this standard reads as follows: “[T]he attained level of constitutional protection of rights and its system of guarantees may not be diminished.” As an example, the opinion invokes a scenario wherein the limitation of the jurisdiction of the Constitutional Court goes as far as to upset the system of separation of powers that is based on checks and balances. What it fails to address, however, is when such a point is reached, nor does it explain whether the present amendment has upset said balance. The only specifically mentioned example is a situation in which the constituent power wishes to adopt a legal provision, which had previously been nullified by the Constitutional Court, by putting it into the constitution. As we discussed above, that is exactly what happened in 1990 with the restrictions on suffrage that had been declared unconstitutional, without the Constitutional Court indicating this to the constituent power.

With regard to the two principal constitutional amendments impugned by petitions, the restriction of the Constitutional Court’s jurisdiction and the retroactive special tax, the majority indicated to the constituent power that there are contradictions between the new provisions and some of the Constitution’s existing provisions, especially the requirements of rule of law and legal security in Article 2 (1). These contradictions, thus the majority, necessitate an intervention by the constituent power. Another distortion crops up here, namely that this signaling is akin to that which the judicial body indicated in its decision 23/1990. (X. 31.) on the unconstitutionality of the death penalty, where the Court called attention to the contradiction between Article 8 (2), which provides the basis for the unconstitutionality of the death penalty, and Article 54 (1), which fails to unavoidably rule out the most severe penalty. However, the vast difference between the two cases is that in 1990 the majority of the Court’s judges resolved the contradiction by offering a constitutional interpretation – specifically in
favor of Article 8 (2) – while at this point the majority opinion did not see this as a workable solution.

The majority also dismissed the petitions seeking a determination that the Constitution’s Articles 32/A and 70/I (2) are in breach of international agreements. The dismissal’s holding that the petitions were not filed by someone entitled to make such a submission is in order. After all, pursuant to the law only the National Assembly, a permanent committee thereof, or any member of parliament, the president of the republic, the government or any of its members, the president of the State Audit Office, the president of the Supreme Court, or the prosecutor general were entitled to file such a petition. What is wrong, however, is that the Constitutional Court did not wish to exercise its right to proceed *ex officio*, arguing that the “existence of its jurisdiction or the lack thereof may be the subject of controversy in this case.” Yet would it not be self-evident to clarify such controversies in the framework of an *ex officio* proceeding? In his concurring opinion, István Stumpf, too, points out this contradiction in the reasoning. He does so of course only with the intention of expressing his support for dismissing the petition. If he did not believe that dismissal is the right course of action, but thought instead that a substantial examination would have been necessary with regard to the constitutional omission, then he would have written a dissent rather than a concurring opinion in this respect as well.

The majority decision also rejects the petitions that request a review of how the restriction of the Constitution Court’s jurisdiction is transposed into the Act on the Constitutional Court, arguing that such a review would indirectly examine the constitutional provisions with similar content. Here the majority proved unable to resolve a contradiction, which was a necessary consequence of its wrong decision regarding the constitutional amendment. What is at issue here is that the judicial body failed again to substantively examine the impugned legal provision, which according to the standing practice should have resulted in a dismissal rather than a rejection. Yet invoking lacking jurisdiction, which always manifests itself in dismissal, would obviously have been difficult to defend in the context of a law.

*Radical and less radical dissents*

Three judges filed a dissenting opinion. One dissent was penned by András Bragyova, who saw the Constitutional Court’s jurisdiction as given with respect to both petitions, that is he thought it would have been necessary to undertake a substantive constitutional review of the impugned constitutional amendments, and at least with regard to the limitation of the
Constitutional Court’s fundamental rights protection jurisdiction he would have held that the amendment in question was unconstitutional. The extraordinarily concise dissent trenchantly sheds light on the contradictions of the majority reasoning, and above all on the following question: If the majority believes that the Constitutional Court lacks jurisdiction to examine the constitutionality of constitutional amendments, then how can it still proceed to examine their formal validity? With regard to the rejection of substantive examination, Bragyova believes that though the majority has not changed its previous stance, it has nevertheless reached the same conclusion with a different reasoning: while prior decisions argued that it is conceptually impossible to declare constitutional amendments that had become incorporated into the constitution unconstitutional, now a judicial review was not ruled out on theoretical grounds but rather with reference to the Constitution’s lacking express authorization to perform such an examination.

At the same time Bragyova does not agree with the third possible argument – as we saw above the current decision does not unequivocally embrace this – for a rejection, according to which there can be no constitutional law standard for assessing the substance of constitutional amendments. His view is that if a Constitution contains rules with regard to the powers and the substance of constitutional amendments – as the Hungarian does –, then the Constitutional Court inevitably has the jurisdiction to review the constitutionality of amendments. Article 19 (3), which is a jurisdictional norm that makes amending the Constitution possible, simultaneously demarcates the limits and conditions of amendments. And it is the Constitutional Court’s responsibility to review whether the amendment was enacted within the limits imposed by said authorization. On the other hand, Bragyova argues, the Constitution does not allow certain contents in potential amendments: in that sense certain norms within the Constitution are immutable. The most important among these is Article 8 (1), pursuant to which “the Republic of Hungary shall recognize the inviolable and inalienable fundamental human rights.” According to this norm, which is not derived from natural law but is self-referential, human rights stem not from the Constitution but from an independent source that is superior to the former. On account of the superior nature of this source, the Constitution cannot abrogate human rights. Another source of the Constitution’s immutable content in Bragyova’s view is the preamble of the 1989 Constitution, which establishes the multi-party system, rule of law, parliamentary democracy and social market economy as values that may not be subject to restrictions.

Based on the above, András Bragyova thought that the impugned constitutional amendments could have been subjected to a constitutional review, though unfortunately he
himself failed to perform this test. Instead, he found it sufficient to state that the restrictions on the Constitutional Court’s power to protect fundamental rights, which the petitions impugned, certainly constitute a restriction of human rights as well and, are hence in breach of the Constitution’s Article 8 (1).

In contrast to Bragyova’s dissent, the dissenting opinion of László Kiss reveals that he not only agrees with the examination of procedural invalidity, but also with its result, that is the rejection of the invalidity claim. This is as far as his agreement with the majority goes, however, since – in concordance with the views of the petition of his earlier colleague at the University of Pécs and predecessor as judge of the Constitutional Court, Antal Ádám – Kiss believes that a substantial review should have been undertaken on the basis of the standard provided by the “essential core” of the republican Constitution. He argues that among the fundamental structural provisions in the effective constitutional text are the rule of law, the protection of the attained level of human rights, as well as the most important principles of voting rights, furthermore the prohibition on obtaining or exercising power by violent means and on holding absolute power, and the norms regulating the right of resistance (ius resistendi). Viewed in the context of the meaning they have acquired as a result of the Constitutional Court’s effort to construe them, they may implicitly be conceived of as eternal clauses.

László Kiss goes a step further than Bragyova in seeking to measure the impugned constitutional amendments against a standard he has developed, in that in addition to viewing as unconstitutional the significant restriction of the Constitutional Court’s jurisdiction, he also assesses that the use of a constitutional amendment to include the retroactively effective tax in the Constitution is a cause of serious incoherency and constitutes an inherent contradiction, thus upsetting the previously existing internal consistency of the Constitution, and is as such antithetical with the attained level of rule of law. Kiss’ dissent also deserves praise for taking the effort to expose the one-sided comparative analysis advanced by the majority opinion, pointing for example to the jurisprudence of the Italian, Czech and Indian Constitutional Courts, which extends to reviews of constitutional amendments – the majority omitted any mention of this.

Judge Miklós Lévay’s dissenting opinion differs from the majority opinion on only one point: he believes that the Constitutional Court has the power to review the legal act amending the constitution. This review should have been conducted on the basis of the Constitution’s “essential core.” As an example of how the Constitutional Court is bound by the Constitution in interpreting constitutional values, Lévay mentions as an example what
decision 47/2007. (VII. 3.) on the President of the Republic’s right of awarding medals and
distinctions had to say on the constitutional order of the Republic. Based on all the above,
Lévay considers that the text of the impugned constitutional amendments contravenes certain
provisions that are part of the Constitution’s “essential core,” yet he does not believe that
these contradictions should have been resolved by the way of declaring unconstitutionality
and nullifying the Constitution’s new provisions. Instead, the Court ought to have called upon
the National Assembly, as the constitution-amending power, to terminate this contradiction.

In his dissenting opinion, László Kiss views the use of signaling instead of review as
insufficient in the case of constitutional amendments that deliberately pursue political ends,
such as the ones impugned by the petitions. Signaling, thus Kiss, is at best suitable for giving
the constituent power the impression that if it wants to enact something at any price, then it
must put it into the Constitution and the Constitutional Court will “in all such cases stand by
with its weapons lowered and unloaded, at most expressing its disapproval.”

In this sense the Court created a very bad precedent indeed when the majority of
Constitutional Court judges voluntarily signed the death sentence of judicial review. Taking
the allegory further, one might of course object that even a decision that would have declared
the constitutional amendments unconstitutional, and which would have consequently nullified them,
could not have averted the passing of judicial review, neither in the short-term in the
context of the Constitution in force, nor in the long-run in the context of the Basic Law passed
on 18 April 2011, entering into force on 1 January 2012.85

A committed German critic of the constitutional amendments and the Basic Law claims
in his excellent blog that it would not have served the interests of constitutionalism if the
judges of the Court had chosen the occasion of their own powers being at stake to change
their previous jurisprudence on this question.86 Yet, does not the question
of the restriction of
their jurisdiction point to a larger issue whose significance points beyond protecting the
Court’s interests narrowly understood, and does this issue not concern Hungarian
constitutionalism in its entirety? And did not Chief Justice Marshall’s opinion in Marbury v.
Madison, which instituted the previously unknown practice of judicial review in the Court’s

85 The Basic Law takes the considerable restriction on ex-post control of the Constitutional Court over from the
challenged amendment for as long as state debt exceeds half of what is referred to in the Hungarian text as
“entire domestic product”, the content of which is uncertain. For a detailed critique of the Basic Law see Opinion
on the Fundamental Law of Hungary, Andrew Arato, Gábor Halmai and János Kis (ed.), with Zoltán Fleck,
Gábor Gadó, Gábor Halmai, Szabolcs Hegyi, Gábor Juhász, János Kis, Balázs Majtényi, Gábor Attila Tóth.
Available in English from the page of the Law and Public Affairs, Princeton University:
constitutional jurisprudence thereby revolutionizing constitutionalism across the globe, pertain directly to the Court’s powers? The greatest problem of the majority of judges on the Hungarian Constitutional Court is precisely that they gave up on the ideal of constitutionalism.