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The "Basic Structure" of the Constitution as an Enforceable Yardstick in Comparative Constitutional Adjudication

A "Estrutura Básica" da Constituição como Critério na Justiça Constitucional Comparada

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Resumo

Este artigo trata da elaboração e uso do conceito de estrutura básica da constituição em diferentes jurisdições, principalmente da Europa e da América Latina. Por meio dessa análise comparada, pretende-se provar que o critério empregado para o julgamento constitucional de emendas tem um alcance e conteúdo específicos, e que tanto o alcance quanto o conteúdo são decididos principalmente pelos tribunais. Depois de explicar os argumentos que os tribunais empregaram para justificar seu papel, o artigo se concentra nas diferentes denominações de "estrutura básica" no conjunto dos estudos de casos selecionados, concentrando-se, finalmente, no papel dos tribunais constitucionais e supremos.

Palavras-chave: justiça constitucional, emendas constitucionais, direito comparado, critério, estrutura básica.

Abstract

This article deals with the elaboration and use of the concept of a basic structure of the constitution in different jurisdiction, especially from Europe and Latin America. Through this comparative analysis, it aims to prove that the yardstick employed for constitutional adjudication on amendments has a specific scope and content, and that both scope and content are mainly decided by courts. After explaining the arguments courts have employed in order to justify their role, it focuses on the different denominations of the

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"basic structure" in the set of the selected case studies, finally concentrating on the role of constitutional and supreme courts.

Keywords: constitutional adjudication, constitutional amendments, comparative law, yardstick, basic structure.

Introduction

The paper analyzes, from a comparative perspective, the elaboration by Supreme and Constitutional Courts of the concept of "basic structure" *lato sensu*, i.e. a series of elements that cannot be amended because their change would lead to the replacement/annulment/dismemberment (Albert, 2018) of the original constitution.

Through several examples from Europe and Latin America, the text examines the arguments and grounds used by comparative jurisprudence in order to construe and implement such limits to the amending power. It also differentiates between diverse amending procedures, explaining to what extent the corresponding Courts have adopted distinct yardsticks according to the specific procedure and its level of inclusiveness.

The paper has as background the Indian case law, because it provided the first elaboration of the concept of "basic structure"[2], which has been widely analyzed by the scholarship (see at least Lakshminath, 2002; Krishnaswamy, 2011; Basu, 2014; Seervai, 2015; Joshi, 2015; on the historical and political aspects, as well as a chronological reconstruction of the connections between the Supreme Court of India and legislative and executive powers, see Thiruvengadam, 2017; Albert, Nakashidze, Olcay, 2018; Dixon, Landau, 2015), assessing the elements of similarity and difference with respect to posterior uses of similar doctrines by other national Courts.

For each case, all the relevant formants (Sacco, 1991) are considered: constitutional clauses on constitutional amendments' limits; doctrinal reconstructions of those limits and scholarship on the corresponding role of the Courts; finally, domestic case law. In particular, the arguments employed by Courts in order to justify their own intervention, as well as the scope of the yardstick used in the review are critically assessed.

Overall, the paper aims to prove three main assumptions through the comparative analysis:

1. that the yardstick used in the adjudication on constitutional amendments only consists of the "basic structure" or basic/fundamental /supreme principles or identity of the constitution, needing to be kept separate from the yardstick employed in ordinary judicial review of legislation;
2. that that yardstick, differently named in each legal system, can always be related to the concept of "democracy", although just sometimes it is explicitly phrased and labeled this way, especially with reference to the separation of powers;
3. that the identification of the "basic structure" is devoted mainly to judicial elaboration, even for those countries whose constitution contains explicit clauses limiting the amending power.

[2] See the leading case Kesavananda Bharati v. State of Kerala and Another (1973) 4 SCC 225, in which this expression is used for the first time.

The paper emphasizes the migration and diffusion of the concept of "basic structure" in the selected case studies, inferring ideas from the comparative analysis in order to assess to what extent there has been circulation of arguments and ideas, in particular within Europe and Latin America. Focusing on these two areas will enrich the debates on contemporary legal comparison and potential global scholarship, proposing original conclusions, drawing inspiration from on the Indian doctrine and the other comparable doctrines.

Constitutional courts justifying their role in safeguarding the basic structure of the Constitution

Constitutional adjudication on constitutional amendments differs from the control of legislation not from the subjective point of view (as the subjects involved are normally the Constitutional/Supreme Court and the legislator as it happens with ordinary legislation) but from the objective perspective. The *object* of the control is represented by hierarchically higher norms, endowed with the force to modify, by means of a change, addition or abrogation, a part of the constitution.

The procedure for passing such norms is different from the one to be used to adopt ordinary legislation, generally requiring a higher majority/consensus or additional forms of procedural complexity. Such sources are still an expression of a constituted power, regulated and limited by the constitution itself, independently from the various denominations attributed to it (for example, in Latin America, expressions like *poder constituyente derivado* are common).

Additionally, if the object of control is not an ordinary law, nor is it the original constitution, i.e. the outcome of the work of the constituent power.

The number of cases that prove this point is wide. One can recall the judgments by the Chilean Constitutional Court on its lack of jurisdiction concerning the constitutionality of the 1980 constitution (Judgments n. 46, 21/12/1987 and n. 272, 18/3/1998); the first decisions by the Constitutional Chamber of the Supreme Court of Costa Rica (Judgments 1-92 and 2-92), as well as the judgments by the Mexican Supreme Court in the case *Manuel Camacho Solís v. Congress of the Union and others* (Judgment on the "Amparo en revisión" 1334/1998). In these judgments, a specific philosophical argument is (at least implicitly) employed, namely the apagogical argument or *reductio ad absurdum*: if the source of law that established the corresponding Court were to be struck down, consequently also the decision taken by the Court itself would lack legitimacy.

The exception to this trend is shown by the judgment adopted on April 22, 2015 by the Constitutional Chamber of the Honduran Supreme Court (Landau, Dixon, Roznai, 2019). In that decision, in fact, the original unamendable provision included in the 1982 Honduran constitution concerning presidential re-election was struck down.

With the exclusion of this case, comparative case law shows the intention to differentiate between the norms contained in the original constitution and the amendments, as Courts treat them, in the first case, as parts of the original source and, in the second, as "derived" sources, outcome of the exercise of a constituted power.

Different arguments have been used by Courts in order to justify their check on constitutional amendments. I am inclined to classify them through a threefold partition (Ragone, 2013): a) the existence of eternity clauses postulates a control over their respect; b) constitutional amendments

are hierarchically lower with respect to constitutional fundamental principles; c) judicial review represents one of the elements of the "basic structure" as such (as it is in the Indian case).

Concerning the reasoning *sub* a), the German case is of great interest: the constitution contains in Article 79 an eternity clause that forbids that the organization of the Federation in *Länder* be modified, as well as their participation in the legislative activity and the principles established in Articles 1 and 20 of the constitution (Lücke, 2007). The irreformable aspects are essentially related to two areas, federalism and the protection of human rights. The set of rules that determine the "constitutional identity" include human dignity, inviolable human rights, the obligation of public powers to respect and implement such rights - Article 1 - and the configuration of the State as federal, social, democratic and based on the rule of law - Article 20 - (Hain, 1999; Heun, 2011).

The Federal Constitutional Court has repeatedly affirmed that it is authorized to verify the consistency of constitutional amendments with those clauses. The most known case occurred after the reform of the regulation of telephone tapping (so-called *G-10 Gesetz*), which was legally permitted since 1968, diminishing privacy and secrecy of communications. The tapping was carried out without the intercepted being informed and was ordered and supervised by a parliamentary commission, without any judicial intervention. The Federal Constitutional Court did not strike down the reform, framing it as an exception connected to an extraordinary situation (BVerfGE 30,1, 1970).

There were some subsequent cases, such as the reform of political asylum (1993) and the changes to the surveillance on suspects of serious crimes (1998), which also were not considered contrary to the core of human rights (BVerfGE 109, 279, 2004). Again, the Court considered that these were proportionate tools with respect to the public interest pursued, and they provided sufficient guarantees (Leisner, 1999; Palermo, 2008).

Another decision was adopted concerning the amendment that followed the reunification of the country: Article 143 established that people whose property had been expropriated between 1945 and 1949 (i.e. during the Soviet occupation) were not entitled to any restitution. Several affected individuals filed individual complaints (so-called *Verfassungsbeschwerde*), but the Federal Constitutional Court found that the reform did not affect the right of property, because the norm referred to expropriations accepted by international legal standards and enforced before the constitution itself had entered into force (see BVerfGE 84,90, 1991, and also BVerfGE 94,12, 1996).

In general, in the German case, the existence of the eternity clause proved essential, because it was used to support the intervention of the Court as the defender of the identity of the constitution. Otherwise, the only protection of the constitution would be the will and good faith of political actors. In light of the consistent jurisprudence and the lack of significant opposite theorizations, scholarly works have focused on the eternity clause and the concrete judgments more than the analysis of the theoretical-general scope of the question (Pfersmann, 1993).

Concerning the argument *sub* b), the assimilation (to a certain extent) of constitutional amendments to ordinary legislation has been employed to affirm that constitutional adjudication on amendments derives logically from the hierarchy of norms. The idea is that all amendments are subordinate to the constitution as they are regulated and limited by it, although the yardstick is more restricted in comparison with the one that has to be used for ordinary legislation, covering exclusively the supreme principles or the basic structure.

The empirical analysis proves that no reasoning is based exclusively on just one of the arguments, but some Courts have relied mainly on this thesis (Ragone, 2012).

In Italy, the first decisions in which the Constitutional Court elaborated a sort of division of constitutional norms according to their hierarchical value were related to canon law and European law. When establishing the limits of these two sets of norms when they merge with the Italian legal system, the Constitutional Court held that they could not violate certain constitutional principles (while they generally prevail over other provisions)[3].

Later, also recalling these previous judgments, the Court identified an unchangeable hard core, which is composed by both the explicit eternity clause of the constitution (Article 139, according to which the Republican form of State shall not be a matter for constitutional amendment) and other supreme principles that define its identity. Judgment n. 1146/1988 represented the point of departure of this doctrine. Replying to the question raised by the judge of the specific case, the Court stated that "the Italian constitution contains some supreme principles that cannot be subverted nor modified in their essential content, not even through constitutional amendments or other constitutional laws". These are the principles that the constitution itself explicitly fixes as limits to the amending power, such as the Republican form - Article 139 -, but also the principles that, despite not being expressly mentioned among those norms that are exempted from constitutional amendment procedures, belong to the essence of the supreme values on which the Italian constitution is based. Once clarified that certain elements cannot be eliminated, the Constitutional Court attributed to itself the task to verify the constitutionality of all sources of constitutional rank, because "if it were not so, the absurd consequence would be that the mechanisms of judicial protection of the constitution would be ineffective, precisely in relation to the norms with the higher rank" (which means, constitutional norms contained either in amendments or constitutional laws - i.e. laws that must be passed through the same procedure as amendments, but they do not directly change the text of the constitution).

The conclusion of the argument was clear-cut: if there were no supervisor of the amendments, precisely those norms potentially able to truly affect the fundamental values of the constitutional system would be exempt from any control. The first relevant element of this case law is that the express limit to the amendments (the Republic) is not the only one, as there are other irreformable principles, which are those that exemplify the supreme values of the system and also by fundamental rights, at least with reference to their essential content (see the evolution of the scholarship in Italy: Barile, 1967; Barile, De Siervo, 1968; Reposo, 1972; Mortati, 1952; Luciani, 1992; Ripepe, Romboli, 1995; Romboli, 1996; Ruggeri, 2000; Pegoraro, Ferioli, 2000; Guastini, 2003; Ruggeri, 2005; Gambino, 2007).

The Yardstick in Constitutional Adjudication on Constitutional Amendments: a Variously called "Basic Structure" – or "Identity"

There is an additional - and more relevant, in my opinion - objective aspect that proves the distinction with respect to constitutional adjudication on ordinary legislation, which is the yardstick (Ragone, 2012).

First, the yardstick used by Courts to check the constitutionality of amendments is necessarily "narrower". If it was not so, every amendment would be contrary to the constitution as long as it is changing it. This corollary may not be true exclusively for additions through amendments, but still the result would be absurd.

[3] On canon law, see judgments n. 30/1971, n. 12/1972, n. 175/1973 and n. 1/1977. On European law, see judgments n. 183/1973, n. 170/1984 and n. 232/1989.

As a consequence, Courts have to select which violations actually lead to a change of the basic structure of the constitution. This implies that the constitution cannot be represented (anymore) as a series of norms with the exact some value, as a necessity arises to distinguish between them in order to understand which ones are so fundamental that they cannot be subject to amendments (Ragone, 2012; Roznai, 2017).

From this perspective, constitutions carry principles and values, which altogether determine their "basic structure" or "identity". A reform, which, even qualifying as such, had an impact on these aspects, should be considered as the establishment of a new constitutional order, that is, a replacement of the constitution as the Colombian Constitutional Court would name it. The case law of this Court represents an excellent example of this doctrinal construction.

The Colombian constitution of 1991, in fact, provides the Constitutional Court with the power of adjudicating on the so-called legislative acts, which are constitutional amendments (Article 241). More in general, this Article states that the Constitutional Court is given the task of safeguarding the integrity and supremacy of the constitution, also through individual complaints brought against constitutional reforms by any citizen. Constitutional adjudication of the amendments can be performed, only on procedural grounds ("vices related to the formation" of the act), independently from the procedure adopted to pass them.

The same Article 241 also regulates the power of the Constitutional Court to adjudicate *a priori* on the constitutionality of the call for referendum or constituent Assembly, again only on procedural grounds. This power is exercised automatically, with no need for any specific complaint, and the judgment constitutes *res iudicata*. The mandate of the Court is further specified by Article 379.

In the first cases, decided in 1997, the Court affirmed that its check would only comprehend the verification of the respect of all the steps to be followed in the special amending procedure. Also, judgment C-543/1998 confirmed such position, because this kind of "constitutional adjudication affect[ed] the amending procedure and not on the substance of the amendment". The last judgment that consistently respected this reasoning was C-487/2002, in which the Court again declared lacking jurisdiction on potential substantial vices.

The judgment that inaugurated the new approach of the Court, which is relevant for this paper, was C-551/2003, in which law n. 796/2003 (calling for a referendum to amend the constitution) was challenged before the Court. That judgment is the leading case concerning the replacement doctrine as a consequence of the conception of the amending power as constituted - opposed to the original constituent power (see in particular Osuna Patiño, 2004; Morelli Rico, 2005; Vila Casado, 2007; Cepeda Espinosa, Landau, 2017).

With this judgment, the Court initiated a line of jurisprudence which remained consistent throughout the posterior activity. It is based on an interpretation of the procedure, so wide as to comprise even what has been denominated "*vice of competence*". Through creative hermeneutics, the Court argues that Article 241 enables it to verify whether the Congress, when amending the constitution, was acting within its powers (=competence) or not. In other words, when the Congress is not amending, but replacing the constitution, it is exercising a power that belongs exclusively to the original constituent power, that is, to the people.

In the words of the Court, the amending procedure entails the possibility of modifying certain aspects of the constitution, *but not its fundamental elements nor its basis, and consequently, it does not imply the possibility of replacing it*. Should the Congress go beyond the limits of the amending power, there would be a procedural vice even if the constitution of 1991 does not contain any explicit eternity clauses. In this respect, the Court ruled that the subsistence of the

competence of the body amending the constitution is a procedural matter, and therefore represents a potential yardstick for constitutional adjudication on amendments according to the aforementioned Article 241.

It was (and still is) not clear which the exact elements are that may lead to the replacement, as the Court just gave some examples in this first judgment, such as the hypothetical replacement of the democratic, republican and social form of State based on the rule of law with a dictatorship, a monarchy or a totalitarian State. Throughout its jurisprudence, the principles that have been considered essential span from truly paramount values, such as democracy, to relatively minor issues such as the requirements to become public officers.

The later judgment C-1200/2003, concerning legislative act n. 3/2002 (a reform of the criminal procedural code), was the first one in which the approach adopted in C-551/2003 was further pursued. Differently from the previous case, it was a case falling under Article 241 n. 1, and this proved that the Court would use the replacement doctrine for any kind of amendment independently from the procedure used to pass it. In point 3, the Court specified that the replacement cannot be understood as an amendment substituting the constitution from a strictly formal perspective; in fact, the change must be of such magnitude, that it transforms the constitution into a completely different one. This magnitude does not depend on the number of clauses affected but on the relevance of the part/parts amended.

Again and again, the Court denied performing a substantial control. In judgment C-668/2004, for instance, it stated that it would not evaluate a potential violation of the principle of equality, because that would result in a check on the merits of the amendment which is forbidden to the Court and would distort the logic of constitutional adjudication itself.

In two judgments of 2004 (C-970 and C-971) the Court partially clarified the method it would follow when adjudicating on constitutional reforms, elaborating on the substitution/replacement test divided into three steps. First, the essential element of the constitution which has been replaced needs to be identified, specifying its constitutional configuration through multiple clauses. In fact, to prove that the element is essential one shall preferably find it in several articles, as there are no eternity clauses. In the judgement of contrast or verification, the Court has to establish whether the essential element was replaced by another one and whether the new element is so distinct as to be incompatible with the constitutional identity (Ramírez Cleves, 2006; Quince Ramírez, 2006; Quince Ramírez, 2008; Bernal Pulido, 2013).

Later on, the replacement doctrine has been applied to highly politicized issues, from the reelection of the President[4] to the recent peace process[5]. This doctrine of the Colombian Constitutional Court has triggered any kind of reactions in scholarship and public opinion, spanning from endorsement and admiration to strong criticism toward the activism of the Court.

A few scholars have argued that the Court exercised a power that it did not have, abusing its role in the system and lacking democratic legitimacy, or have examined specific cases to prove a misuse of the replacement doctrine both as a too broad and (more rarely) too narrow concept. The main arguments brought about against the doctrine are textual and are based, on the one hand, on the absence of any eternity clause in the constitution and, on the other hand, on Article 241 and its express reference to procedural grounds. Also, the use of the doctrine by the Court has been considered as an example of judicial activism and (too) extensive interpretation of its

[4] Judgments C-1040/2005 to C-1057/2005 and then C-141/2010.
[5] For instance, Judgment C-332/2017 (on which see Ragone, 2017).

functions, particularly because it disposes of a notable margin of maneuver when deciding what is subject or not to constitutional change.

The main arguments in favor of the replacement doctrine are based on the needs for a common ethical ground; for the prevention of abuses by political power; for the protection of fundamental rights and basic principles - in particular, the separation of powers in the context of a hyperpresidentialism - that define the identity of the constitution and the violation of which would be a breach of the system itself (Ramírez Cleves, 2016; Guastini, 2017).

The Elaboration of the Yardstick for Adjudication on Constitutional Amendments

The yardstick comprises the norms on how to pass constitutional amendment (unless they are the object of the amendment, obviously), *plus* the eternity clauses included in the constitution (like in the German or Italian case, but also other cases).

The idea of the existence of an irreformable core has been supported by many authors over the decades: one can think of W.L. Marbury, who referred to the express prohibition of the reform of equal representation of the States in the Senate of the United States to endorse constitutional adjudication checking the fulfilment of the hard core of the constitution (Marbury, 1919-20); W.F. Murphy relied on the meaning of the verb "to amend", in which a total modification of the fundamental Charter could not be contained (Murphy, 1995). One can also recall M. de la Cueva, which referred to the supreme principles of legal certainty and judicial control of acts adopted by public authorities, alongside the necessary existence of individual complaints (de la Cueva, 1982). I. Burgoa Orihuela (1985) also argued that there are essential elements that represent the fundamental political decisions of the people. The Italian doctrine has widely endorsed the existence of substantial limits that are found in the supreme principles, and the Constitutional Court adopted this position, as outlined above. The same did the Peruvian Constitutional Court with reference to dignity, equality, right to life, popular sovereignty and the rule of law[6].

These theorists and Courts went in the same direction as the Indian and South African case law based on the idea of a complex of principles and values that determine the "basic structure" of the constitution and consequently are irreformable.

In South Africa, the first case decided with respect to this issue focused on the reform of the 1993 Transitional constitution, made through the Second Amendment Act, n. 44 of 1995 (the 1995 constitutional amendment), in relation to Articles 149, 182, 184 and 245 of the constitution. With that ruling, the Court clarified that a reform contrary to a constitutional clause represents a "physiological" hypothesis (otherwise it would not be a reform), provided that it is adopted respecting the necessary procedure[7]. Nevertheless, after dealing with the procedural requirements, the Court addressed a more complex issue, that is, the existence or not of a constitutional "spirit" to which reference should be made in order to assess the legitimacy of the reform, even in the absence of formal vices. The judges affirmed that an amendment, formally valid, that implied a radical restructuring of the fundamentals of the constitution, could not be

[6] Cases n. 014-2002-AI/TC; n. 0006-2003-AI/TC; n. 014-2003-AI/TC; n. 050-2004-AI/TC. On these cases, see Bernales Ballesteros (2005), García Belaunde (2006) Eto Cruz (2009).

[7] Judgment CCT 36/95: "it may perhaps be that a purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and re-organizing the fundamental premises of the Constitution, might not qualify as an 'amendment' at all". For a comprehensive introduction to constitutional interpretation in South Africa, see Fowkes (2016).

considered an amendment *stricto sensu*; in addition, the Court implicitly reserved for itself the power to assess when an amendment "abrogates or destroys the constitution" (Sarkin, 1997).

This position was confirmed and broadened in posterior jurisprudence, starting with CCT 23/02, in which the Court ratified two pillars of its own function: an amendment that would undermine the basic structure of the constitution could not be considered as a proper application of the amending power regulated by Article 74 of the constitution; similarly, a modification of founding values set out in section 1 could be done exclusively respecting the specific procedure established by the constitution (there are therefore no limits). Later on, the Court referred to the set of targets indicated in the preamble of the constitution, that is, the construction of a society based on democracy and social justice, as well as a system of government based on the popular will. In the same context, the Court explained some of the founding values: human dignity, party pluralism, alongside a democratic, representative and participative order that guarantees accountability, responsiveness and openness[8].

The denominations given to unamendable principles by Constitutional Courts, in addition to concepts like identity, basic structure and the supreme principles, also include the "spirit" of the constitution and the "fundamental political decisions".

The real issue becomes precisely the determination of the principles that reflect such fundamental decisions.

In the light of the comparative research I have carried out over the past decade, trying to extrapolate which elements compose the specific yardstick identifiable as identity or basic structure, a bottom-up perspective is to be preferred. The advantages of such perspective are twofold: on the one hand, this approach values the role of Constitutional Courts when they are obliged to use and/or create notions of general theory; and on the other hand, the basic structure determined in this way does not represent a pre-conception, but rather leads to phenomenological, empirical data.

It seems to me that all the limits to constitutional amendments, regardless of their denomination, somehow relate to the same concept, that is, the *form of State* in a broad sense: the value always referred to, as a matter of fact, is *democracy*, followed by its corollaries such as popular sovereignty, pluralism, separation of powers and fundamental rights. To these concepts, the legal systems add specifications connected with their own fundamental principles. In my opinion, all the various aspects at stake, that is, the guarantee of rights, popular sovereignty, pluralism and the separation of powers coagulate around democracy. However, for this construction to be maintained, a further corollary is necessary: constitutional supremacy (a principle mentioned to sustain its own role by a large part of jurisprudence[9]), which ensures continuity and stability in the system and is logically related to all elements already mentioned.

The Scope of the Principles of the "Basic Structure" of the Constitution: Comparative Conclusions

When it comes to the scope of the yardstick, recalling what Italian, German and Peruvian jurisprudence (but not only these ones) affirmed about rights, it seems necessary to recall and

[8] See Matatiele Municipality and others versus President of the Republic of South Africa and others (27th February 2006), so-called Matatiele I and also CCT 73/05, judgment Matatiele Municipality and others versus President of the Republic of South Africa and others (18th of August, 2006), so-called Matatiele II.

[9] One can find this reference in the Argentinian case Fayt (1999); as well as in judgment C-551/2003 of the Colombian Constitutional Court or 980-91 of the Costa Rican Court.

reiterate that all principles assumed as yardsticks of the constitutionality of amendments, as the *extrema ratio*, have to be interpreted restrictively, that is, in their essential content. In other words, what the amending power cannot do is to eliminate one element of the basic structure of the constitutional order, but it is not forbidden to perform certain "reasonable" variations. As a consequence, the norms to be looked at as yardsticks are restricted to the minimum content of the corresponding fundamental rights or basic principles.

Of course, these principles are broad enough to become at least partially unstable and undergo modifications, as they are applied in changing societies. In this context, the interpretation of every value performed by Constitutional Courts is essential. Such a function, of course, cannot be exercised with total discretion on the part of constitutional judges, who may create and adapt the yardstick, while being called to interpret the norms taking into account the principles already present in the constitution. This exegetical operation does not imply usurpation of political powers, but the exercise of the interpretational role of Courts, as long as it is performed with sufficient self-restraint.

As it was previously recalled, in my research I have taken into account the contribution that all "formants" give to the configuration of the yardstick. Basically, in all jurisdictions there is a prevalence of the case law, in many cases endorsed or preceded by consistent scholarship.

Such a result was foreseeable in those systems in which constitutional adjudication of amendments was claimed by the corresponding Court and not expressly allotted to it by the constitution; nevertheless, the same can be said about the other legal systems analyzed. Even in the presence of explicit norms, more or less specific and detailed, the greatest creator of the rules (especially in relation to the yardstick and its scope) are Constitutional/Supreme Courts.

Many Courts have tried (and still try) to defend the idea according to which the amending power given to the Parliament is a limited power, directed mainly to "constitutional maintenance". So did the Colombian Constitutional Court and the Italian one in the abovementioned case law. But also, in judgment *Fayt* (1999), the Argentinian Supreme Court further argued that in order to respect the separation of powers and the principle of supremacy of the constitution, each body has the obligation to act within its competence and not beyond. Consequently, the judiciary in general (and the Court itself in particular) must assess the limitations of the powers of such bodies. Judicial intervention becomes, therefore, essential to guarantee constitutional supremacy.

In fact, according to this case law, if there are limits to constitutional reforms, it is necessary that there is also a subject entitled to enforce them. If violations of the constitution were allowed and no remedy provided, legal certainty would be affected, precisely because the constitution is the source from which all other sources take their legitimation.

Limits to amendments, in fact, are directed in the first place to political actors, in particular the legislator and the government. Only secondarily they concern constitutional Courts. The first guarantee of respect for these limits needs to be the self-restraint of political forces, if a truly democratic and pluralist system must be based on a culture of constitutional ethics, oriented to sharing and spreading the founding values of the legal system. The intervention of Courts happens only at a later point, in those cases where there has been an abuse of power by the legislative and/or the executive.

In conclusion, Constitutional Courts' judgments are not placed in a legal and social vacuum. On the contrary, they can and should refer to local and foreign scholarship, as well as to the case law of other judicial bodies. Several major theses related to constitutional adjudication on constitutional amendments seem to be circulating in judgments of different jurisdictions, mostly

implicitly, but sometimes also expressly: from the idea of constitutional adjudication on constitutional amendments as the *extrema ratio* to the vice of competence, from the concept of fundamental political decisions to the abuse of power, among others. The idea itself of "basic structure" has been quoted in other jurisdictions explicitly (in the same continent but also further away, like in Colombia), and even when it is not the case, it is known. Circulation can be detected both within the same formant and throughout crossing formants, even if the sensitivity of the subject frequently leads Courts to a moderate (or null) use of foreign cases, especially those Courts that are usually reluctant to refer to comparative law.

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