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The basic-structure doctrine and its German and French origins: a tale of migration, integration, invention and forgetting

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ABSTRACT

One fascinating aspect of the Indian basic-structure doctrine for a German lawyer is that its origin and development were influenced by the German scholar, Dietrich Conrad. This paper therefore focuses on Conrad's work and his French and German sources for the argument that there are implied limits on the amending power. It describes the journey of this idea to India and specifies which parts of these prior theoretical works were lost in time and space, which survived, and which were developed further.Finally, there is acomparison between the justification for the basic-structure in the Kesavanada judgment and the earlier German and French theoretical works. The main thesis is that the Indian basic-structure doctrine is a powerful example of how to justify implied limits on constitutional amendment based on a rule-of-law approach that is firmly rooted in the idea of a democratic and constitutional state.

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Introduction

One fascinating aspect for a German constitutional lawyer of the Indian basic-structure doctrine that was set out in the groundbreaking judgement, *Kesavananda Bharati v. Kerala*,[1] is that it is said to have been influenced by the works of the German scholar, Dietrich Conrad.[2] I will therefore focus on Conrad's work and his sources for the argument that there are implied limits on the amending power. I will describe the journey of this idea to India and try to discern whether and, if so, which parts of the prior theoretical works were lost in time and space, which survived and which were developed further. This is a cautionary tale of migration, integration, invention and forgetting.

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[1] *Kesavananda Bharati v. State of Kerala* AIR 1973 SC 1461, 1480, Indian Kanoon – < http://indiankanoon.org/doc/257876/> accessed 3 March 2020.

[2] A.G. Noorani, "Behind the 'basic structure' doctrine" (2001) 18 (19) Frontline – https://frontline.thehindu.com/other/article30159673.ece > accessed 3 December 2020; Sudhir Krishaswamy, *Democracy and Constitutionalism in India* (OUP 2010) xvi-i. The article of the German scholar Dietrich Conrad, "Limitations of Amendment Procedures and the Constituent Power" (1970) The Indian Yearbook of International Affairs 375 was cited several times by the Indian Supreme Court in Kesavanada Bharati v. State of Kerala (n 1) paras. 979, 982, 1485, 2069 and 2151. See in more detail below.

The tale begins in Germany and France at the start of the 20th Century (see I. below). During this period, the German constitutional lawyer, Carl Schmitt,[3] and the French constitutional lawyer, Maurice Hauriou,[4] wrote theoretical works that argued for implied constitutional limits on constitutional amendment. Both works are highly significant, as they established the two principal lines of argument that can be used at a theoretical level to justify implied limits on constitutional amendment.

The tale proceeds with the work of the German lawyer, Dietrich Conrad, who influenced the Indian basic-structure doctrine. It will describe Conrad's work and how he used the work of Schmitt and Hauriou to defend the idea of implied limits on the amending power and its application to the Indian Constitution (see II. below).

Next, the tale explains the justification for the Indian basic-structure doctrine and how it can be distinguished from the earlier theoretical works (see III. below). Finally, the tale ends on a cautionary note (see IV. below).

I. The French and German theoretical works: Carl Schmitt and Maurice Hauriou

The German and French constitutional lawyers, Carl Schmitt and Maurice Hauriou, developed the idea of implied constitutional limits on constitutional amendment at the start of the 20th Century with two very different theoretical approaches. Schmitt's theory of implied limits on constitutional amendment was based on a certain mystical concept of the constituent power[5] (see 1. below). By contrast, Hauriou[6] argued in the tradition of the French philosopher, Abbé Emmanuel Joseph Sieyès, and relied on the procedural approach that the constituent power was to be exercised by a constituent assembly, and on the idea that certain fundamental principles were higher (natural) law and therefore constituted a limitation on amending (and possibly also framing) a constitution (see 2. below).

A. Carl Schmitt's work: constituent power as the ultimate power

Carl Schmitt (1888–1985), the most renowned theorist on implied constitutional amendment, developed his theory in the book, "*Verfassungslehre*," published in 1928. He did so within the framework of the then German Constitution of 1919. The so-called Weimar Constitution did not contain any material limits on constitutional amendment. The relevant article (Article 76) stated only that:

> The Constitution can be amended by legislation. However, a decision of the Reichstag [the then German parliament] regarding the amendment of the Constitution only takes effect when two-thirds of those present consent. Decisions of the Reichsrat [the organ representing the governments of the German Länder] regarding amendment of the Constitution also require a two-thirds majority of the votes cast. If a constitutional amendment is concluded by initiative in response to a referendum, then the consent of the majority of enfranchised

[3]Carl Schmitt, *Verfassungslehre* (Dunker & Humblot 1928).
[4]Maurice Hauriou, *Précis de Droit Constitutionnel* (2nd edn, Recueil Sirey 1929); Maurice Hauriou, *Précis Élémentaire de Droit Constitutionnel* (2nd edn, Recueil Sirey1930).
[5]Schmitt, *Verfassungslehre* (n 3) 77.
[6]Hauriou, *Précis de Droit Constitutionnel* (n 4) 276; Hauriou, *Précis Élémentaire de Droit Constitutionnel* (n 4) 81–2.

> voters is required. If the Reichstag passes a constitutional change against the objection of the Reichsrat, the President is not permitted to promulgate this statute if the Reichsrat demands a referendum within two weeks. [7]

Schmitt derived his theory of implied limits on constitutional amendment from the idea that the constituent power was the basis for all powers ('Grundlage aller Gewalten'[8]). He argued that the constituent power was a legal entity that existed outside, alternatively alongside, a constitution. The will of this almighty constituent power (which could either be the people or the monarch[9]) was the reason for the existence and validity of a constitution.[10] Only the constituent power itself was able to decide on fundamental questions relating to the "manner and form of its own political existence" ("Art und Form der eigenen politischen Existenz").[11] These fundamental decisions (such as the form of government, the introduction of fundamental rights, the separation of powers, etc.) formed the "constitution in its positive sense" ("Verfassung im positiven Sinn"), which had to be distinguished from the written constitution.[12] According to this distinction, the then German constitution of 1919 (the so-called Weimar constitution) consisted of norms that incorporated fundamental decisions, and therefore made up the real constitution, and further, less important norms that were not part of the real constitution, and that could be described as being only "constitutional laws" ("Verfassungsgesetze").[13]

Accordingly, Schmitt applied an understanding of the notion of the constitution that was widespread at this time. He distinguished between the essential norms of a constitution, which formed part of the material constitution, and other provisions which did not have the value of a constitutional norm.[14] Schmitt then tied this view to the idea of a constituent power that existed outside and alongside a constitution. He argued that, under the amendment provision (Article 76)[15] of the Weimar Constitution, only such provisions as constituted constitutional laws could be amended by the amending power as a constituted power ("pouvoir constitué").[16] The amending power was not permitted to change those norms that made up the constitution in the material sense. Those provisions could only be amended or altered by the constituent power. In relation to the Weimar Constitution, this constituent power was the people.[17] Schmitt wrote:

> The limits for constitutional amendment follow from the rightly-understood notion of constitutional change. A competence given only by a constitutional law to amend the constitution means that one or several constitutional laws can be changed, but only on the condition that the identity and continuity of the constitution as a whole are preserved. [18]

[7] An English translation of the Weimar Constitution can be found in: Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer tr, Duke University Press 2008) 421.
[8] Schmitt, *Verfassungslehre* (n 3) 77.
[9] ibid 23, 75 seq.
[10] ibid e.g. 9, 75–6.
[11] ibid 76.
[12] ibid 21.
[13] ibid. 20 et seq. 76 and 104.
[14] Carl Schmitt, *Die Diktatur* (3rd edn, Dunker & Humblot 1964) IX.
[15] See above n. 7.
[16] Schmitt, *Verfassungslehre* (n 3) 101–2.
[17] ibid. 27, 105 and 177–8.
[18] ibid. 103. The German original text reads as follows: ‚Die Grenzen der Befugnis zur Verfassungsänderungen ergeben sich aus dem richtig erkannten Begriff der Verfassungsänderung. Eine durch verfassungsgesetzliche Normierung erteilte Befugnis, die ‚Verfassung zu ändern', bedeutet, daß einzelne oder mehrere verfassungsgesetzliche Regelungen ersetzt werden können, aber nur unter der Voraussetzung, daß Identität und Kontinuität der Verfassung als eines Ganzen gewahrt bleiben.' Translation by the author.

At the same time, he argued expressly against precisely specifying and enumerating the unamendable parts of the Weimar Constitution.[19]Schmitt also did not specify how the people could act as the constituent power. The use of the constituent power was not and could not be subject to a legal process.[20] Neither a real constitution nor a constitutional law could regulate the use of the people's constituent power as the basis for all powers.[21] The people could instead use this constituent power "through any recognizable or visible expression of direct will that is directed towards deciding on the manner and form of existence of a political union."[22]

Schmitt developed his ideas of a constituent power by isolating Abbé Emmanuel Joseph Sieyès' idea[23] from the French revolution[24] (that the *pouvoir constitué* was to be separated from the constituent power) from its historical context and applying it within an existing democratic constitution. In doing so, Schmitt absolutized and falsified the work of Sieyés.[25] Schmitt established an absolute figure of the *pouvoir constiuant*, which was also a (natural-law-based) legal entity that always existed above and alongside a constitution.[26] Where Schmitt differed was that this entity only existed within the framework of an already-existing democratic constitution and not within a monarchy. Within a monarchy, the constituent power lay with the monarch.[27] This is an important difference from Sieyés' work. Sieyés regarded the constituent power of the people as existing natural law that included the right of a nation to give itself a constitution within the framework of an existing monarchic order.

In addition, Schmitt generalized and absolutized Sieyès idea that only the will of a nation was necessary to frame and enforce a constitution[28] (which originally had the purpose of excluding the king from the constitution-making process). Schmitt argued that the constituent power of the people remained the right to decide on all basic political matters, even within an existing democratic constitution. Schmitt disqualified Sieyès idea, that a special constituent assembly should have the authority to elaborate and amend a constitution,[29] as anti-democratic.[30] He replaced this idea with his own idea of a mythical will of the people not subject to control.

In line with this mystical approach, Schmitt was opposed to judicial oversight and ascribed the role of the "guardian of the Constitution" in the Weimar Constitution to the executive branch, namely the President of the Reich.[31]

[19]Carl Schmitt, 'Zehn Jahre Reichsverfassung ' (1929) 58 JW 2313, reprinted: *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954* (3rd edn, Dunker & Humblot 1957) 40.
[20]Schmitt, *Verfassungslehre* (n 3) 82 and 84.
[21]ibid 79.
[22]ibid 82. The German original text reads as follows: ‚durch irgendeinen erkennbaren Ausdruck seines unmittelbaren Gesamtwillens, der auf eine Entscheidung über Art und Form der Existenz der politischen Einheit gerichtet ist.' Translation by the author.
[23]Emmanuel Joseph Sieyès, *Qu'est-ce que le Tiers-Etat?* (Éditions du Boucher 1789, repr 2002).
[24]The famous passage reads as follows: 'Dans chaque partie la constitution n'est pas l'ouvrage du pouvoir constitué, mais du pouvoir constituant.' (Sieyès (n 23) 53).
[25]See also Joel Colón-Ríos, 'Five Conceptions of Constituent Power' (2014) 130 L.Q.R. 306, 329: "No constitutional theorist has taken Sieyès further than Carl Schmitt."
[26]Particularly clear: Schmitt, *Verfassungslehre* (n 3) 91.
[27]ibid 103–4.
[28]Sieyès (n 23) 54 et seq.
[29]ibid 60.
[30]Schmitt, *Verfassungslehre* (n 3) 80.
[31]Carl Schmitt, *Der Hüter der Verfassung* (Dunker& Humblot 1931) in particular 70, 156, 158–9 (1931).

To reiterate, Schmitt's theory on unconstitutional constitutional amendment rested on two main pillars and one auxiliary argument. The first pillar was a material understanding of the constitution. The second was the idea of an almighty and mystical extra-constitutional constituent power. The auxiliary argument was that amendment did not mean the annihilation ("Vernichtung") or abolition ("Beiseitigung") of a constitution.[32] During the Weimar period, Schmitt's theory was unique and differed fundamentally from the approach of his fellow jurists, who were mainly legal positivists. Schmitt's theory can in particular be clearly distinguished from the work of Hans Kelsen.[33] Kelsen, along with the majority of German constitutional lawyers at that time, did not recognize the idea of an almighty constituent power outside the constitution. Instead, they regarded the constituent power, in contrast to the ordinary legislative branch, as a special constitutional organ (for example, a special constituent assembly) that had the authority to amend the constitution. Kelsen wrote, in accordance with Sieyès' approach, that some constitutions distinguished between the legislative and the constituent power.

This was the case if constitutional laws could only be amended by a special constitutional organ (such as a special assembly) and not by the ordinary legislative branch.[34] According to Kelsen, the doctrine of constituent power consisted of situations where positive law demanded special i.e. more elaborate procedures for amending certain norms (either by a special majority of the legislative organ, approval by a special organ – such as a constitutional assembly – or by referendum).[35] Kelsen emphasized that the idea that certain norms could exclusively be amended by the will of the people could only be derived from natural law.[36] In line with this positivist view, Kelsen concluded that a constitutional norm was not capable of amendment if a constitution contained an express provision declaring the whole constitution or certain norms eternal.[37] Kelsen's approach also corresponded with the view of the majority of constitutional lawyers during Weimar. Based on Article 76 of the Weimar Constitution,[38] the majority (e.g. Anschütz[39] and Thoma[40])[41] argued that there were no material limits on constitutional amendment. They based their arguments on the wording of Article 76 itself, and on the theoretical assumption that the Reichstag (the then parliamentary

[32]Schmitt, *Verfassungslehre* (n 3) 104.

[33]See also Claude Klein, The Eternal Constitution – Contrasting Hans Kelsen and Carl Schmitt: Hans Kelsen and Carl Schmitt A Juxtaposition (Dan Dinner & Michael Stolleis (eds), Bleicher Verlag 1999) 61–70.

[34]Hans Kelsen, *Allgemeine Staatslehre* (Springer 1925) [253]

[35]ibid [253]. The German original reads as follows: ‚Es kann sich bei der Lehre von dem pouvoir constituant nur um einen der positivrechtlich zu begründenden Fälle erschwerter Normänderung handeln.' Translation by the author.

[36]ibid.

[37]ibid [254].

[38]See above note 7.

[39]Gerhard Anschütz, *Die Verfassung des Deutschen Reiches, Kommentar für Wissenschaft und Praxis* (Verlag von Georg Stilker 1932) 401–06; see in more detail Monika Polzin, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power' (2016) 14 Int'l J. Const. L. 411, 415–21.

[40]See e.g. Richard Thoma, Das Reich als Demokratie Handbuch des deutschen Staatsrechts 1 (Richard Thoma & Gerhard Anschütz (eds), Mohr Siebeck 1930) § 16, 186, 199. Thoma regarded public international law as the only limit on constitutional amendments. However, as Thoma argued that only international tribunals are competent to decide whether national constitutional law violates public international law, his argument had no further relevance during the Weimar Constitution (Thoma, Die juristische Bedeutung der grundrechtlichen Sätze der deutschen Reichsverfassung im Allgemeinen: Die Grundrechte und Grundpflichten der Reichsverfassung, Kommentar zum zweiten Teil der Reichsverfassung 1 (Hans C. Nipperdey (ed), Hobbing 1929) 42–43).

[41]Other proponents of this view were, *inter alia*, Sigmund Jeselsohn, *Begriff, Arten und Grenzen der Verfassungsänderung* (Winter 1929) 62–64 (especially at 62); Margit Kraft Fuchs, ‚Prinzipielle Bemerkungen zu Carl Schmitts Verfassungslehre' (1930) 12 Zeitschrift für Öffentliches Recht 511 532; *cf.* also Hans Nawiasky, *Die Grundprobleme der Reichsverfassung, Erster Teil* (Springer 1929) 25–26.

assembly) was both the legislature and constitution-making body.[42] The reason for this assumption was that the Weimar Constitution did not provide for a special body (such as a constitutional assembly) for constitutional amendment and there was, therefore, no *constituent power*.[43]

Nevertheless, Schmitt's theory is still significant in German constitutional thought today. The eternity clause (Art. 79, para. 3[44] of the current German constitution (the Basic Law)), which contains explicit constitutional limits on constitutional amendment, is partly interpreted through the lens of his theoretical works. Schmitt's theory was reintroduced into German constitutional law, in particular through the vocabulary of "constitutional identity."[45] Art. 79, para. 3 GBL is and was interpreted by many writers[46] in light of Schmitt's doctrine. Art. 79, para. 3 GBL is understood as an expression of the general idea that constitutional amendment should not touch upon "the basic choices of the constituent power, the identity, [and] the core of the constitution."[47][48] In addition, referring to Schmitt's ideas, Art. 79, para. 3 GBL is seen as an expression of the distinction between *constituent power* and *constituted power*.[49] This distinction has led to the argument that only constituted powers are bound by Art. 79, para. 3 GBL, whereas the constituent power has reserved its right to decide on the eternity clause and its substance and, therefore, continues to have power over the eternity clause. In 2009, this approach was adopted to some extent by the German constitutional court in its landmark *Lisbon* judgement. In this judgement, the German Constitutional Court made the connection between constitutional identity (Art. 79, para. 3 GBL) and the distinction between constituent power and constituted powers derived from the democratic principle.[50] The German Constitutional Court held:

> From the perspective of the principle of democracy, the violation of the constitutional identity codified in Article 79.3 of the Basic Law is at the same time an encroachment upon the constituent power of the people. In this respect, the constituent power has not granted the representatives and bodies of the people a mandate to dispose of the identity of the constitution. No constitutional body has been granted the power to amend the constitutional principles which are essential pursuant to Article 79.3 of the Basic Law. The Federal Constitutional Court monitors this.[51]

[42] Anschütz (n 39) 401.

[43] See e.g., Richard Thoma, Grundbegriffe und Grundsätze: Handbuch des Deutschen Staatsrechts 2 (Richard Thoma & Gerhard Anschütz (eds),Mohr Siebeck 1931) §71, 108, 153.

[44] Article 79 para. 3 reads as follows: "Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible."

[45] See in more detail Polzin (n 39) 421–433.

[46] However, other authors (correctly, in my view) do not understand article 79 para. 3 GBL as a codification of Schmitt's doctrine (*see, e.g.*, Hans-Ulrich Evers, Bonner Kommentar, art. 79 para. 3 (Wolfgang Kahl, Christian Waldhoff & Christian Walter (eds),45th. suppl C.F. Müller 1982) para. 66; Tobias Herbst, *Legitimation durch Verfassungsgesetzgebung* (Nomos 2003) 29–30; Hans Nawiasky, *Die Grundgedanken des Grundgesetzes für die Bundesrepublik Deutschland* (Kohlhammer 1950)123.

[47] Dietrich Murswiek, *Die verfassunggebende Gewalt nach dem Grundgesetz für die Bundesrepublik Deutschland* (Dunker & Humblot 1978) 172. Translation provided by the author.

[48] See also Otto Bachhof, *Verfassungswidrige Verfassungsnormen* (Mohr Siebeck 1951) 35; Christian Tomuschat, *Verfassungsgewohnheitsrecht* (Winter 1972) 100; Udo di Fabio, ‚Der neue Art. 23 des Grundgesetzes' (1993) 32 Der Staat 191, 211 note 71; Claude Klein, *Théorie et pratique du pouvoir constituant* (PUF 1996) 108; Karl-E. Hain, *Die Grundsätze des Grundgesetzes* (Nomos 1999) 46.

[49] See Dietrich Murswiek, ‚Maastricht und der Pouvoir Constituant' (1993) 32 Der Staat 161, 171; Peter M. Huber, ‚Die Anforderungen der Europäischen Union an die Reform des Grundgesetzes' (1994) Thüringer Verwaltungsblätter 1, 2.

[50] BVerfGE 123, 267 (343–44) – *Lisbon*.

[51] ibid. 344 [218].

Thus, Schmitt's distinction between constituent power and constituted powers is still alive in German constitutional thought. However, in contrast to Schmitt, the German constitutional court regards the constituent power as a legally-entrenched power that might also be limited by principles of natural law.[52]

B. Maurice Hauriou and the concept of constitutional legitimacy

Maurice Hauriou (1856–1929), a "classic" among the French lawyers of the 20th Century,[53] was a professor of administrative law (from 1888) and constitutional law (from 1920) at the University of Toulouse in France.[54] At about the same time as Schmitt, Hauriou developed implied limits on constitutional amendment. Hauriou, who is accurately described by Arato as being "simultaneously a realist and normativist",[55] is not well known outside France.[56] Unlike Schmitt's mystical ideas, Hauriou developed a structured and rule-of-law-based unconstitutional amendment theory rooted in a commitment to democracy[57] in his constitutional law treatises, "*Précis de Droit Constitutionnel*"[58] and "*Précis Elémentaire de Droit Constitutional*,"[59] first published in 1923.

The first strand of Hauriou's theory is an understanding of the concept of constituent power in the same line as Sieyès' work.[60] For Hauriou, the constituent power was the founding legislative power that acted in the name of a sovereign nation.[61] In addition, the constituent power was not completely unbound, but subject to certain rules of law.[62] It should be exercised by an organ that was close to the nation itself. Therefore, the genuine constituent organ was a national assembly expressly elected to elaborate the constitution.[63] The process could be complemented by submitting the constitution to a national referendum.[64]

Regarding the power to amend, Hauriou implied firstly that, due to the special nature of a constitution as the highest law, an amendment should be made by a special procedure that could be distinguished from ordinary legislation.[65] He then distinguished between a partial and total revision of a constitution. A total revision of a constitution could – like the enactment of the constitution – only be done by a national assembly specifically elected for this purpose. For Hauriou, "the right institution for a total revision is a national convention expressly elected for this purpose."[66] Consequently, he regarded the amending power as a limited power bound by the relevant amendment provisions,

[52]ibid 343 [217].
[53]Norbert Foulquier, "Maurice Hauriou, constitutionaliste (1856–1929)" (2009) 2 Jus Publicum, Revue internationale de droit publique, 1.
[54]ibid. 4–5, note 18.
[55]Andrew Arato, *Post Sovereign Constitution Making* (Oxford University Press 2016) 37.
[56]ibid.
[57]See clearly Hauriou, *Précis de Droit Constitutionnel* (n 4) 143–5.
[58]Maurice Hauriou, *Précis de Droit Constitutionnel* (1st edn, Recueil Sirey1923).
[59]Maurice Hauriou, *Précis Elementaire de Droit Constitutionnel* (1st edn, Recueil Sirey1923).
[60]See in detail above under 1.
[61]Hauriou, *Précis de Droit Constitutionnel* (n 4) 248. The original French text reads as follows: "Le pouvoir constituant est un pouvoir législatif fondateur agissant au nom de la nation souveraine."
[62]ibid 258.
[63]Hauriou, *Précis Élémentaire de Droit Constitutionnel* (n 4) 79.
[64]ibid.
[65]ibid.
[66]ibid113. The French original text reads as follows: "l'organe d'une révision totale est un Convention nationale élue specialement pour cet object." Translation by the author.

unless it was composed like a national assembly.[67] In addition, Hauriou even argued that ideally even a constitutional assembly should be bound by the relevant constitutional limits during the amendment process.[68]

In addition to this rule-of-law based approach to the concept of constituent power, Hauriou argued that certain principles were so essential that they had a higher rank or legitimacy than the written constitution itself, irrespective of whether those principles were contained in the constitution. He described them as "principles that have a higher legitimacy than the text of the written constitution and that do not have to be expressly embodied in the constitution."[69] Those principles could be derived from the fact that the law itself was an organized system ("système organisé").[70] They expressed the most important content of the relevant (constitutional) legal system ("expriment ce qu'il y a de plus essential dans la loi").[71] Those core principles had the highest legitimacy and therefore constituted the constitutional legitimacy ("légitimité constitutionnelle").[72] Clear examples of such principles in French constitutional law were the core content of the fundamental rights[73] and the Republican principle.[74] Possible further principles were equality, the separation of powers between the administration and the judiciary, and the publication of tax regulations.[75] Hauriou implied that a constitutional amendment has to be in conformity with those principles.[76]

However, Hauriou's work is ambiguous on whether those principles were natural-law principles[77] or whether they could be deduced from the relevant legal and/or constitutional system itself. On the one hand, he wrote that these were the most important principles of the social order of justice that had established society.[78] On the other hand, Hauriou argued that their superior constitutional legitimacy could be found in the fact that every system of law was an organized system.[79] He then described the specific constitutional-legitimacy principles of French Constitutional law and argued that the constitutional control of ordinary laws in the United States was derived from the absolute legitimacy of individual principles contained in the old Anglo-Saxon common law.[80] Nevertheless, Hauriou's theory is fundamentally different from Schmitt's approach, as the constituent power is regarded as a potentially legally limited power of a specifically elected constituent assembly. The limited amending powers of a revision organ that is not a constituent assembly are justified by higher constitutional principles and the idea that the right of a total revision of constitution lies in the hands of a specifically elected national assembly. This difference seems to have been be ignored by Schmitt,[81] who

[67] ibid 82–3.
[68] Hauriou, *Précis de Droit Constitutionnel* (n 4) 258–9.
[69] ibid 81. The French original text reads as follows: "La superlégalité constitutionelle contient des principes dont la légitimité est supérieure au texte même de la constitution écrite et qui n'ont pas besoin d'y être exprimés". Translation by the author.
[70] ibid 81.
[71] ibid.
[72] ibid.
[73] ibid 81, 114 and 243.
[74] ibid 81.
[75] ibid 82.
[76] Hauriou, *Précis Élémentaire de Droit Constitutionnel* (n 4) 304.
[77] In this sense ibid 304 and *Précis de Droit Constitutionnel* (n 4) 276.
[78] Hauriou, *Précis de Droit Constitutionnel* (n 4) 239.
[79] Hauriou, *Précis Élémentaire de Droit Constitutionnel* (n 4) 81.
[80] ibid.
[81] See also Andrew Arato, "Multi-Track Constitutionalism Beyond Carl Schmitt" (2011) 18 Constellations 324, 325.

admired Hauriou and referred to him for the justification of implied limits on constitutional amendment.[82]

Hauriou also addressed (albeit quite briefly) the judicial oversight of constitutional amendments.[83] He argued for judicial oversight and implied that a constitutional judge should have the right to annul unconstitutional amendments. He wrote: "Going even further: Even constitutions should not be deprived of constitutional control. There exist also situations where judicial oversight should also cover constitutional laws."[84] Unconsti tutional constitutional amendment could arise if the prescribed amendment procedure were not observed[85] or if the amendment violated constitutional legitimacy ("legitimité constitutionnelle").[86] He also based his idea on the constitutional law of the United States of America. Hauriou argued that the idea that the content of an amendment could be unconstitutional was not expressly rejected by the Supreme Court of the United States.[87] He referred in particular to the Supreme Court's decision in *State of Rhode Island v. Palmer* of 7 June 1920.[88] This decision dealt with the Eighteenth Amendment to the U.S. Constitution, which the American Congress proposed in 1917 and ratified in 1919.[89] This Amendment contained the prohibition against intoxicating liquor in the United States. The Supreme Court held its brief judgement that the Amendment had become part of the U.S. Constitution, as it was made in observance of the prescribed constitutional procedure,[90] without dealing with the question of whether the content of the Amendment itself could be unconstitutional.

To conclude, Hauriou recognized a limited amending power if the relevant amending organ was not a constituent assembly, and pointed to certain higher principles that limited the power to amend and possibly also to make a constitution. However, in French doctrine and jurisprudence, Hauriou's position is and was rather exceptional. His contemporaries, like Carre de Malberg (1861–1935) and Léon Duguit (1859–1928), adopted somehow different approaches. Malberg's ideal was that the power to amend the constitution should be clearly distinguished from the legislative power, and should lay in the hands of a different constitutional organ (such as a specially-elected constitutional assembly) in order to protect the constitution.[91] Duguit seems somewhat closer to Hauriou, as he argued that the French declaration of Human Rights of 1789 ("*la Déclaration des droits de 1789*") was also binding on a constituent assembly due to its special character as the fundamental law of the French nation and all other nations.[92] However, Duguit also argued in his *oeuvre* (without cross-referencing the supra-constitutional nature of the French Declaration of Human Rights)

[82]Carl Schmitt, *Legalität und Legitimität* (2nd edn, Dunker & Humblot 1968) 61; Carl Schmitt, "Die legale Weltrevolution" (1978) 17 Der Staat 321, 324.
[83]Hauriou's modern approach to jurisdictional control can already be found in his article "An Interpretation of the Principles of Public Law" (1918) 31 Harvard Law Review 813–821, where he also justified the power of the judicial authority to declare statutes unconstitutional.
[84]Hauriou, *Précis de Droit Constitutionnel* (n 4) 269. The French original reads as follows: "Allons plus loin: la loi constitutionnelle elle-même ne doit pas échapper au contrôle du juge, il y a des occassions où le contrôle pourrait s'exercer sur elle." Translation by the author.
[85]ibid 260.
[86]ibid 269.
[87]ibid 239 note 7 and 276; Hauriou, *Précis Élémentaire de Droit Constitutionnel* (n 4) 304.
[88]Hauriou, *Précis de Droit Constitutionnel* (n 4) 277.
[89]*State of Rhode Island v. Palmer* (1920) 253 U.S. 350 (United States Supreme Court).
[90]ibid No. 1–5.
[91]Carre de Malberg, *Contribution à la théorie générale de l'Etat: spécialement d'après les données fournies par le droit constitutionnel français Tome 2* (Recueil Sirrey 1922) 583–624.
[92]Léon Duguit, *Traité de droit constitutionnel Tome III* (2nd edn, E. de Boccard 1923) 564–7.

that a special constituent assembly, irrespective of whether its authority was to frame or a revise a constitution, was unbound and that even constitutional provisions on material limits to constitutional amendment could be overruled by a constituent assembly.[93] This latter line of thinking prevailed and corresponds with current French doctrine and jurisprudence.[94] The French Constitutional Council[95] and the majority view of French doctrine equalize the amending and constituent powers. A legally-relevant constituent power outside the constitution is not recognized. One of the most famous opponents of this approach is George Vedel, who wrote:

> The derived constituent power has the same nature as the initial constituent power: the constitution prescribes only a procedure (which can by the way be revised [...]), it cannot limit its exercise (since even the prohibition relating to the republican form of government in article 89, last paragraph, loses its validity if revised).[96]

Consequently, it is argued that the French eternity clause (Art. 89, para. 5) can be abolished by the amending power[97] and merely has moral value.[98]

II. Migration, integration and forgetting: Dietrich Conrad's work

Schmitt's theoretical works[99] were mainly used by Dietrich Conrad, a German lawyer from the University of Heidelberg, to argue for implied limits on amending the Indian Constitution. Hauriou's work played only a limited role for Conrad, in particular when writing about the nature of the constituent power.[100] Conrad touched very briefly on Hauriou's approach, but did not elaborate further on his idea that there might be certain absolute limits on constitutional amendment.[101]

In 1965, Conrad gave a lecture on "Implied Limitations of the Amending Power" at the Law Faculty of the Banaras Hindu University,[102] and afterwards wrote significant articles in Indian law journals on implied limits on constitutional amendment. The first and most important article was titled, "Limitations of Amendment Procedures and the Constituent Power" and was published in the Indian Yearbook of International Affairs in 1970. This article was also cited in the

[93]Léon Duguit, *Traité de droit constitutionnel Tome IV* (2nd edn, E. de Boccard 1923) 538–544.
[94]See in detail Polzin (n 39) 433–6.
[95]Constitutional Council: CC decision 2006–540DC, 27.01.2006, [19]; CC decision 2006–543DC, 20.06.2006, [6]; CC decision 2008–564DC, 19.06. 2008, [44]; CC decision 2010–605DC, 12.5.2010, [18]; CC decision 2014–694DC, 28.05. 2014, [4]; *see* also *Commentaire de la décision no. 2003–469 DC du 26 mars 2003. Les Cahiers du Conseil Constitutionnel, Cahier No. 15*, 4 < https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/commentaires/cahier15/ccc_469dc.pdf > accessed 3 March 2020.
[96]George Vedel, "Schengen et Maastricht" (1992) 8 R.F.D.A. 173, 179 [Translation provided by the author]; see also, *e.g.*, Jacques Robert, "La forme républicaine du gouvernement" (2003) 119 REV. DR. PUB. SCI. POL. 359, 362.
[97]See also e.g. Robert Badinter, Le conseil constitutionnel et le pouvoir constituant: Mèlanges Jacques Robert (Georges Vedel et al (eds), LGDJ 1998) 217, 219. However, some authors argue that art. 89 para. 5 could only be altered by a referendum Olivier Jouanjan, "Le forme republicaine de gouvernement, norme supraconstitutionnelle?" in: Mathieu Bertrand & Michel Verpeaux (ed), La République en Droit Français (Economica 1996) 267, 285–6.
[98]Francis Hamon & Michel Troper, *Droit Constitutionnel* (35th. edn LGDJ 2014) 46–7.
[99]See e.g. Conrad, "Limitations of Amendment Procedures and the Constituent Power" (n 2) 388. See in more detail below.
[100]Dietrich Conrad, "Constituent Power, Amendment and Basic Structure of the Constitution: A Critical Reconsideration" (1978) 6 &7 Delhi Law Review 1 12 note 45, 14 note 53 and 20, note 75; Conrad, "Limitations of Amendment Procedures and the Constituent Power" (n 2) 409 note 85 and 87.
[101]Conrad, 'Constituent Power, Amendment and Basic Structure of the Constitution (n 98) 16 note 60. Conrad also argues like Schmitt himself that Schmitt was influenced by Hauriou without elaborating on the differences. See also note 79.
[102]A.G. Noorani, "Behind the 'basic structure' doctrine" (n 2).

Kesavananda judgement.[103] The second publication appeared in the Delhi Law Review in 1978 and was titled, "Constituent Power, Amendment and Basic Structure of the Constitution: A Critical Reconsideration".

In his lecture, which is said to have influenced Indian constitutional doctrine strongly,[104] Conrad used extreme examples of constitutional amendments to draw attention to the idea of implied limits on constitutional amendments. He stated:

> Perhaps the position of the Supreme Court is influenced by the fact that it has not so far been confronted with any extreme type of constitutional amendments. It is the duty of the jurist, though, to anticipate extreme cases of conflict, and sometimes only extreme tests reveal the true nature of a legal concept. So, if for the purpose of legal discussion, I may propose some fictive amendment laws to you, could it still be considered a valid exercise of the amendment power conferred by Article 368 if a two-thirds majority changed Article I by dividing India into two states of Tamilnad and Hind proper? Could a constitutional amendment abolish Article 21, to the effect that forthwith a person could be deprived of his life or personal liberty without authorization by law? Could the ruling party, if it sees its majority shrinking, amend Article 368 to the effect that the amending power, from thereon, would rest with the President acting on the advice of the Prime Minister? Could the amending power be used to abolish the Constitution, and reintroduce, let's say, the rule of a Moghul emperor or the Crown of England?[105]

In his first article written after the Indian Supreme Court's decision in *Golak Nath v. State of Punjab*,[106] Conrad referred in particular to the German Weimar Constitution, its Article 76 (which also contained only formal limits on constitutional amendment)[107] and Schmitt's works. Conrad described the key contents of Schmitt's theory with the following words: "that an amendment could not change the basic structure of the Constitution."[108] He emphasized that this view "should engage our attention here" as he perceived Schmitt's idea as appropriate to the Indian constitution ("relevance for any constitution of the rigid type.").[109] He described Schmitt as "one of the leading constitutional writers in the Weimar era".[110] However, Conrad did not refer to Schmitt's role during the Nazi era in Germany. He ignored those aspects of Schmitt's work that referred to the constitution-destroying nature of his idea of constituent power[111] and his work after 1933, in which he applied his idea of constituent power to justify the rise to power of the National Socialists in Germany and the "Führerprinzip".[112]

Even though Conrad remained silent on this part of Schmitt's work, he did not adopt Schmitt's mystical idea of an almighty constituent power not subject to control.[113] What makes Conrad's article unique is that he introduced, and worked with, Schmitt's theory to justify implied limits on constitutional amendments, but recreated Schmitt's understanding of constituent power. Conrad argued for a rule-of-law based understanding of constituent

[103]See note 2.
[104]Saya Prateek, "Today's Promise, Tomorrow's Constitution: Basic Structure, Constitutional Transformations and the Future of Political Progress in India" (2008) 1 NUJS L REV 417, 444.
[105]The text of the speech is reprinted in: Prateek (n 104) 445.
[106]1967 AIR 1643.
[107]See above under I.1.
[108]Conrad, "Limitations of Amendment Procedures and the Constituent Power" (n 2) 388 note 86.
[109]ibid 388.
[110]ibid.
[111]Carl Schmitt, *Die Diktatur* (n 14) 137.
[112]Carl Schmitt, ‚Der Führer schützt das Recht' (1934) DJZ 946, 947.
[113]Conrad, "Limitations of Amendment Procedures and the Constituent Power" (n 2) 396 et seq.

power. For Conrad: "constituent power signified a distinct and more directly creative influence in the institution of all other authority."[114] He also pointed out that: "Constituent power therefore is not sovereignty, but is only part of it."[115] In addition, Conrad argued that the constituent power should speak through constituent assemblies.[116] However, in his later article, he seemed to tend towards a more mystical understanding of the concept of constituent power.[117]Conrad then used Schmitt's distinction between constituent and amending power as an interpretive device for Article 368 of the Indian Constitution,[118] and concluded:

> Turning our attention towards the particular type of amendment procedures which have prompted our discussion in the first instance, i.e. provisions like Art. 76 Weimar Constitution or Art. 368 Indian Constitution, we shall hardly escape the conclusion that these provisions do not embody the constituent power but are special legislative procedures of a more technical and limited application. (. . .) No precaution is taken to bring out a direct and specific constituent will of the nation against the daily considerations of political routine.

He argued for a limited amending power due to the danger of a 'legal revolution'[119] and pointed out this issue in Schmitt.[120] Conrad also stressed that the doctrine of implied limitation was "a doctrine of last resort" that should only apply to prevent the abuse of power and be limited to cases that are absolutely clear.[121] He described the limits on the amending power as follows:

> The functional limitations implied in the grant of amending power to Parliament may then be summarized thus: No amendment may abrogate the constitution. No amendment may effect changes which amount to a practical abrogation or total revision of the constitution. Even partial alterations are beyond the scope of amendment if their repercussions on the organic context of the whole are so deep and far reaching that the fundamental identity of the constitution is no longer apparent.[122]

III. Migration, invention, integration and forgetting: The Indian basic-structure doctrine

A. The Kesavananda judgement and the invention of the basic-structure doctrine

The Indian basic-structure doctrine was developed by a very narrow majority (7:6) in the landmark *Kesavananda* judgement in 1973. The narrow majority of judges (namely, Sikri

[114]ibid 403.
[115]ibid 405.
[116]ibid 424 et seq. He also sees the problem that a constituent assembly may decide by simple majority and not as the legislator by a qualified majority.
[117]He writes: "The very essence of the concept is that an exercise of the constituent power does not depend for its validity either on its legality or illegality in terms of the pre-existing order, but entirely on the positive character as an act of self-determination, i.e. a decision that can be attributed to the authorship of the citizenry as a whole." (Conrad, 'Constituent Power, Amendment and Basic Structure of the Constitution (n 98) 9).
[118]Conrad, "Limitations of Amendment Procedures and the Constituent Power" (n 2) 411; reaffirmed: 'Constitutent Power, Amendment and Basic Structure of the Constitution (n 100) 14.
[119]Even clearer in his second article Conrad, 'Constituent Power, Amendment and Basic Structure of the Constitution (n 100) 16: "The limited amendment power should prevent a Putsch of the legislature."
[120]Conrad, "Limitations of Amendment Procedures and the Constituent Power" (n 2) 415.
[121]ibid 417.
[122]ibid 420.

C. J. Hegde and Mukherjea, JJ.; Shelat and Grover, JJ.; Jaganmohan Reddy, J.; and Khanna, J.) reasoned that Article 368 of the Indian Constitution did not enable parliament to alter the basic structure or framework of the Constitution. In the later *Minerva Mills* judgement, this reasoning was correctly summarized by way of the famous expression:

> The theme song of the majority decision in Kesavananda Bharati (Supra) is: 'Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But the Constitution is a precious heritage; therefore, you cannot destroy its identity.[123]

The *Kesavananda* judgement is unique for a variety of reasons, which notably include its length, depth of analysis, very rich comparative work, and the difficulty of understanding its reasoning, as it is more a compilation of different judicial opinions than one unified judgement.

In the absence of a uniform theoretical and interpretive approach, the limited amending power of parliament was justified using a variety of arguments and different, sometimes even contradictory, interpretive approaches to Article 368 of the Indian Constitution.

However, what the majority arguments have in common, apart from the assumption that the Court was empowered to decide on the legality of unconstitutional amendments,[124] is that all the judges adopted an approach rooted in the rule of law clearly distinguishable from Schmitt's mystical ideas. The works of Schmitt and Hauriou were not explicitly mentioned; only Conrad's work was sometimes cited, as it was also relied upon by the Applicant.[125] Conrad's contention that the amending power was limited was expressly embraced by Judge Khanna[126] and expressly rejected by Judge Chandrachud.[127] The key argument in favour of implied limits on constitutional amendment was the word "amendment" itself (see (a) below). Further arguments were the will of the founding fathers, eternal principles and the nature of the constitution (see (b) below), the distinction between constituent power and the power to amend (see (c) below) and preventing the abuse of parliamentary power (see (d) below).

(a) ***The meaning of amendment.*** The core textual argument[128] was that the word "amendment" in Article 368 of the Indian Constitution did not include the right to repeal, alternatively to destroy the Constitution. This notion was, in particular relied upon by Judge Sikri,[129] Judges Shelat and Grover,[130] Judge Reddy,[131] and Judge Khanna. Judge Khanna wrote:

[123] *Minerva Mills Ltd. v. Ors vs Union of India* AIR 1980 SC 1789.
[124] Krishnaswamy (n 2) 28.
[125] See above note 2.
[126] *Kesavananda Bharati v. State of Kerala* (n 1) [1485] [Khanna].
[127] ibid [2069] and [2151] [Chandrachud].
[128] Krishnaswamy (n 2) 29–31.
[129] *Kesavananda Bharati v. State of Kerala* (n 1) paras. 91, 225–6, 311 [Sikri].
[130] ibid. [580] [Shelat and Grover].
[131] ibid. [1196–7] and [1260] [Reddy].

> The word "amendment" postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations. As a result of the amendment, the old Constitution cannot be destroyed and done away with; it is retained though in the amended form. What then is meant by the retention of the old Constitution? It means the retention of the basic structure or framework of the old Constitution.[132]

(a) ***Eternal principles, the founding fathers' will and the nature of the Constitution.*** Another line of reasoning was the idea that certain principles contained in the Constitution were eternal; this was however expressly rejected by Judge Khanna.[133] This 'structural interpretation'[134] of the Indian Constitution by Judge Sikri was particularly close to Hauriou's ideas. Like Hauriou, Sikri relied on the assumption that the content of a constitution could also be derived from the "scheme of the Constitution" itself.[135] He then justified the limited scope of parliament's amending power on the basis of the structure and content of the Indian Constitution. He notably drew on its preamble,[136] its "basic structure" built on the "basic foundation, i.e., the dignity and freedom of the individual,"[137] and the idea that those core principles were eternal. He wrote that it was commonly understood "that fundamental rights would remain in substance as they are and they would not be amended out of existence. It seems also to have been a common understanding that the fundamental features of the Constitution, namely, secularism, democracy and the freedom of the individual would always subsist in the welfare state."[138]

A related argument was made by Judges Hedge and Mukherjea. They stressed that it was difficult to accept that Constitution's framers had provided for the destruction of their ideals in the Constitution itself,[139] and also justified implied limits on constitutional amendment on the basis of the nature of the constitution itself:

> Our Constitution is not a mere political document. It is essentially a social document. It is based on a social philosophy and every social philosophy like every religion has two main features, namely, basic and circumstantial. The former remains constant but the latter is subject to change. The core of a religion always remains constant but the practices associated with it may change. Likewise, a Constitution like ours contains certain features which are so essential that they cannot be changed or destroyed. In any event it cannot be destroyed from within. In other words, one cannot legally use the Constitution to destroy itself. Under Article 368 the amended Constitution must remain 'the Constitution' which means the original Constitution. (…)The personality of the Constitution must remain unchanged.[140]

(i) ***Distinguishing between constituent and amending power.*** A further argument was the distinction between the constituent power (understood in the tradition of

[132]ibid. [1480] [Khanna].
[133]ibid [1509–1514] and [1599 (ix)] [Khanna].
[134]Krishnaswamy (n 2) 33.
[135]*Kesavananda Bharati v. State of Kerala* (n 1) [226].
[136]ibid [124] [Sikri].
[137]Particularly clear ibid [317].
[138]ibid [309] [Sikri]
[139]ibid [690] [Sikri]: "We find it difficult to accept the contention that our Constitution-makers after making immense sacrifices for achieving certain ideals made provision in the Constitution itself for the destruction of those ideals." A similar argument was also raised by the Judges Shelat and Grover, ibid. para. 619.
[140]ibid [690].

Sieyès and Hauriou as a special organ, namely a constituent assembly) and the amending power that is vested in parliament. Judges Shelat and Grover wrote:

> Indisputably, a Constituent Assembly specially convened for the purpose would have the power to completely revise, repeal or abrogate the Constitution. This shows that the amending body under Article 368 cannot have the same powers as a Constituent Assembly. (…) If the Constitution makers were inclined to confer the full power of a Constituent Assembly, it could have been easily provided in suitable terms. (…).[141]

(i) ***Preventing the abuse of power***. Finally, another underlying argument for implied limits on constitutional amendment was to prevent an abuse of parliamentary power.[142] This was made particularly clear by Judge Sikri, who wrote:

> Article 368 can itself be amended to make the Constitution completely flexible or extremely rigid and unamendable. If this is so, a political party with a two-third majority in Parliament for a few years could so amend the Constitution as to debar any other party from functioning, establish totalitarianism, enslave the people, and after having effected these purposes make the Constitution unamendable or extremely rigid. This would no doubt invite extra-Constitutional revolution.[143]

B. Migration, invention, integration and forgetting

The justification for the basic-structure doctrine can therefore be clearly distinguished from Schmitt's problematic theory. The idea of an almighty constituent power not subject to control has not successfully migrated into the Indian basic-structure doctrine and will hopefully remain forgotten. Only the general idea that the amending power is a limited power and Schmitt's auxiliary argument (not his own invention, but found in U.S. legal doctrine),[144] that amendment does not include destruction,[145] have survived.

The crucial difference between Schmitt's perspective and the Indian basic-structure doctrine is that the latter is clearly founded on the rule of law. The rationale of the basic-structure doctrine seems to protect the core or identity of the Indian Constitution as a value in and of itself, as it guarantees democracy and individual freedom. This idea is plainly rooted in the idea of a constitutional and democratic state. It therefore bears a higher degree of similarity to the theoretical approach of Hauriou, who also wanted to protect certain principles because of the structure of the constitutional and democratic system.[146] The similarity to Hauriou's thinking is also apparent in the way that Judges Shelat and Grover understand the constituent power. All three understand the constituent power as an instituted power, which should be exercised by a specifically-elected constitutional assembly.

[141] ibid [570–71].
[142] See in this sense the argumentation of Judge Reddy at ibid [1190] and the argumentation of Judges Hedge and Mukherjea ibid [689] and [705]. However, Judge Khanna rejected this idea, ibid [1599 (vi)].
[143] ibid. [309]. See also the related argument by Judges Hegde and Mukherjea ibid [692].
[144] Schmitt refers to the article of William L Marbury, "Limitations upon the Amending Power" (1919–1920) 33 Harv L Rev 223. See Schmitt, *Verfassungslehre* (n 3) 106. Marbury wrote: "It may be safely premised that the power to 'amend' the Constitution was not intended to include the power to destroy it." (ibid 225).
[145] See above under I.1.
[146] See above under I.2.

They do not share Schmitt's idea of an almighty constituent power not subject to control. However, Judges Shelat and Grover do not discuss any limitation on such an instituted constituent power, although we can clearly identify here Hauriou's idea that an amending power that is not organized as a constitutional assembly should only have a limited right to amend the constitution.[147]

IV. The end

The development of the Indian basic-structure doctrine is a powerful example of how to justify implied limits on constitutional amendments without relying on Schmitt's false and dangerous doctrine. Even though the general notions, that there should be implied limits on constitutional amendment and that the amending power is a limited power, migrated to the Indian Supreme Court and became part of the basic-structure doctrine, the dangerous and illegitimate parts of this theory are currently lost in space and time. However, it would be remiss to let this tale end with the famous saying, "*And they all lived happily ever after*." Rather, the tale must end with a word of caution concerning Schmitt's theory and his idea of a constituent power looming behind the idea of implied limits on constitutional amendment.[148] It is important to bear in mind the dubious origins of the idea of implied limits on the amending power to ensure that Schmitt's ghost does not destroy the basic-structure doctrine. Schmitt's theory, together with other theories that recognize a legally-relevant (primary) constituent power (that is unbound),[149] can always be used to overcome express or implied limits on constitutional amendment.[150] Schmitt's theory is particularly prone to use in destroying a democratic constitution altogether. His theory of an almighty and constituent power not subject to control[151] can easily be used to overcome any legal and constitutional forms.[152]

The idea of implied constitutional limits on constitutional amendment is indeed a constitutional concept that has two sides: a bright side that protects the fundamental democratic core of a constitution, and a dark one (inspired by Schmitt) that could well result in the destruction of a democratic constitutional state. It must, therefore, be handled with the utmost care.

[147] See above under I.2.

[148] See regarding for an approach to the concept of constituent power closer to Schmitt in India Upendra Baxi, "Some Reflections on the Nature of Constituent Power". < http://14.139.60.114:8080/jspui/bitstream/123456789/735/15/Some%20Reflections%20on%20the%20Nature%20of%20Constituent%20Power.pdf > accessed 3 March 2020.

[149] See regarding the French approach above under I 2.

[150] Yaniv Roznai, *Unconstitutional Constitutional Amendments* (Oxford University Press 2017) 230; cf. David Landau, 'Should the Unconstitutional Constitutional Amendments Doctrine be Part of the Canon?" (Int'l J. Const. L. Blog, 10 June 2013). < http://www.iconnectblog.com/2013/06/should-the-unconstitutional-constitutional-amendments-doctrine-be-part-of-the-canon > accessed 3 March 2020. See regarding the German eternity clause: Polzin (n 39).

[151] Roznai (n 150) 230 therefore rightly argues that constitutional theory should advance an understanding of what is a "genuine" resp. "legitimate" exercise of the primary constituent power.

[152] Cf. in the Schmittian sense the argumentation of Mr. A. Ken, learned Counsel for the original respondent in the famous Indira Gandhi v. Raj Narain 1975 AIR 2299 < https://indiankanoon.org/doc/936707/> accessed 3 March 2020, para. 519: "The constituent power springs as the fountainhead and partakes of sovereignty and is the power which creates the organ and distributes the powers. Therefore, in a sense the constituent power is all-embracing and is at once judicial, executive and legislative, or in a sense super power." See also the counter arguments raised by Justice Beg, ibid. paras 520 et. seq.

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