

# **The Democratic Legitimacy of Strong Constitutional Entrenchment: The Cases of Turkey and India**

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Judicial review and constitutional entrenchment are often held to be illegitimate from the point of view of democratic theory (Waldron 2006; Bellamy 2007). This worry, it would appear, must intensify where judicial review is practised on the basis of strong constitutional entrenchment, i.e. by appeal to constitutional provisions that are altogether shielded from amendment. If it is democratically illegitimate for a court to strike down laws enacted by an ordinary parliamentary majority, by appeal to entrenched constitutional provisions, it must be even more illegitimate, or so it seems, for a court to overturn a decision supported by a legislative supermajority large enough to amend the constitution, on the ground that some provisions of the constitution cannot be changed at all (Schwartzberg 2007).

We aim to explore the hypothesis that strong constitutional entrenchment and judicial review can, in certain circumstances, serve to promote, protect and enhance democracy.

Delineation of these circumstances would contribute towards developing a normative account of the conditions of the democratic legitimacy of strong constitutional entrenchment. Although there have been some attempts to specify such conditions (Murphy 1979; Kelbley 2003-04), these attempts tend not to be based on comparative empirical research. To fill this gap, more comparative research on the effects of strong constitutional entrenchment in different constitutional contexts is needed. This paper begins that task, with a focus on the cases of Turkey and India.

Strong constitutional entrenchment is by now well established in both India and Turkey. However, the assessment of its democratic legitimacy tends to be very different for the two cases: While a recent report of the Venice Commission suggests that in Turkey ‘the scope of democratic politics is further eroded by the constitutional shielding of the first three articles of the constitution, in such a way as to prevent the emergence of political programs that question the principles laid down at the origin of the Turkish Republic, even if done in a peaceful and democratic manner’ (European Commission for Democracy Through Law 2009: 23), such concerns are not usually voiced with respect to the Indian case. Though the so-called ‘basic structure doctrine’ is the subject of lively discussion, it is widely perceived, both in and outside of India, to have been instrumental in warding off the danger of permanent authoritarian rule, and in protecting the rights of religious and ethnic minorities against the tyranny of a majority (Sathe 2002: 63-99; Jacobsohn 2010: 49-58; Krishnaswamy 2011).

Our paper will offer a comparative analysis of the constitutional history and of the political effects of strong constitutional entrenchment in India and Turkey, in order to identify the factors that are responsible for the marked divergence in the assessment of the democratic legitimacy of strong constitutional entrenchment in the two cases. By way of conclusion, we will offer a tentative account of the conditions that can make strong constitutional entrenchment democratically legitimate.

*The Genesis of Strong Constitutional Entrenchment – A Sceptical Hypothesis*

What are the typical causes of the adoption or introduction of strong constitutional entrenchment? This is of course an empirical question that can only be answered through comparative constitutional research. The answer to this empirical question, however, is likely to have a strong bearing on the normative question of the democratic legitimacy of strong constitutional entrenchment. Some possible answers to the question would clearly suggest that strong constitutional entrenchment is usually democratically illegitimate.

Consider, for instance, the hypothesis that strong constitutional entrenchment is typically the result of an imposition on the part of a social elite concerned to defend its privileged position, a claim that has recently been defended as a general account of constitutionalism (Hirschl 2007). This hypothesis draws plausibility from the fact that strong constitutional entrenchment, at first glance, seems to be a puzzling political strategy. In order to be able to strongly entrench certain constitutional provisions, would have to have control of the constitution-making process. But if a group has control of the constitution-making process, it must be a majority, at least if the constitution-making process is itself democratic. In that case, however, the group in question will have little reason to think that it will be unable to defend its interests in the context of ordinary democratic politics or through ordinary constitutional entrenchment. It is unclear, then, how there could ever be a perceived need, in the context of a democratic process of constitution-making, for strong constitutional entrenchment.

Imagine, however, that a group has control of the constitution-making process, but that it is not a majority and that the constitution-making process is not democratic. Such a situation could occur, for instance, where a small elite controls a society's means for exercising coercive force. The group in question may not be interested to exercise a

permanent and open dictatorship. But it may want to make sure that its own basic preferences for the ordering of society will not be overturned by future democratic majorities. Strong constitutional entrenchment might then be the method of choice for imposing antecedent limitations on a democratic system of government, so that it will not run counter to the preferences of the elite group.

This scenario has a judicial variant. Imagine that a group that once was a majority has turned into a small minority and lost control of and perhaps even influence on the democratic political process. In this case, it might have an incentive to raise the claim that the existing constitution contains provisions – provisions that protect its own interests – that are not at all subject to legislative change or to amendment. Such a claim might come to be made by a supreme or constitutional court whose members predominantly belong to the old elite that has now lost control over the democratic process. Here, limits to constitutional amendment could be read into the constitution even if they are not made explicit in the constitutional text.

It seems clear that if strong constitutional entrenchment is introduced in any of the ways just discussed, its democratic legitimacy must be highly suspect. Its purpose, in the scenarios outlined, is to make sure that the democratic process does not lead to the wrong results, where results are ‘wrong’ when they conflict with the preferences of the group that has had an opportunity to strongly entrench its preferences. If the only conceivable motivation for introducing strong constitutional entrenchment is to preserve elite-dominance, strong constitutional entrenchment would have to be regarded as democratically illegitimate.

*The Genesis of Strong Constitutional Entrenchment – Alternative Explanations?*

Our argument in this paper will be that the hypothesis presented above, that strong constitutional entrenchment invariably comes about as a means to protect an undemocratic form of elite dominance, and is thus to be regarded as democratically illegitimate, is false. Clearly, there are other conceivable explanations for the genesis of strong constitutional entrenchment.

A process of constitution-making may, if it is adequately inclusive, have normatively relevant characteristics that are typically absent from ordinary democratic legislation: It may involve a higher degree of political mobilization and a more principled form of deliberation and argument than we would ordinarily find in the give and take of democratic legislative bargaining (Ackerman 1993). As a result, its outcomes may be more reflective of the authentic and considered will of the people than ordinary democratic legislative decisions. The constituent power, knowing that future ordinary politics is less likely to be principled, would therefore have an incentive to shield some of its constitutional decisions from future legislative majorities or even from future super-majorities.

Another and very different alternative possibility might emphasize that the process of constitution making is often as focused on bargaining and finding compromises as ordinary democratic legislation. In making a constitution, different groups negotiate the conditions under which their members will be willing to live under a common law decided upon by future majorities (Kelsen 2010). The negotiating groups, in such a case, may have reason to resort to the strategy of strong constitutional entrenchment in order to reassure each other that the constitutional compromise is not going to be overturned by future majorities. Such assurance may be needed to make it rational for a group that must expect to be in the position of a small and isolated minority to submit itself to the constitutional pact.

Strong constitutional entrenchment might also result from the goal, on the part of makers of a constitution, to prevent authoritarian backsliding. This aim may have particular importance to constitution makers in polities that undergo a transition from authoritarianism to democracy, especially if the authoritarian past itself resulted from the disintegration of a democratic system that lacked the legal or constitutional means to defend itself against anti-democratic forces (Fox and Nolte 1995). A ‘militant democracy’ must be committed to the view that there are absolute limits on the power of amendment. It can only be justified in restricting the political rights of those who aim to win power democratically and then to use it to destroy democracy, if it commits to the view that the goal of destroying democracy is absolutely unconstitutional, even where it is supported by a majority of voters (Schmitt 2004).

A fourth alternative possible genesis of strong constitutional entrenchment might be its use as a strategy of resistance against an overbearing legislative majority that threatens to undermine the democratic process by abusing its power to permanently entrench itself in government. Supreme or constitutional courts have obvious incentives to champion the view that a constitution contains absolute limits of legislative power, to be guarded and enforced by the courts, and they might come to use that view to frustrate attempts of a temporary majority to erect a populist dictatorship. To be sure, judicial appeals to strong constitutional entrenchment may be part of a strategy to preserve elite-dominance. But whether that is indeed the case or not in some particular instance must surely depend on the concrete context in which the appeal is raised.

This list of alternatives to the skeptical hypothesis we started out from is not meant to be exhaustive. Our point is simply that the skeptical hypothesis does not win by default. It is not the case that the preservation of elite-dominance is the only conceivable rationale for the adoption of a strategy of strong constitutional entrenchment. There are other possible

explanations for the introduction of strong constitutional entrenchment that do not cast doubt on its democratic legitimacy. Comparative empirical research is needed to determine whether strong constitutional entrenchment is either invariably or typically the outcome of attempts to preserve elite-dominance.

### *Strong Constitutional Entrenchment in India*

The problem of strong constitutional entrenchment has taken a rather peculiar form in India. The Constitution of India does not contain any explicit provision that materially limits the power of amendment. Rather, the limits to the power of amendment were read into the constitution by the Supreme Court of India, in a series of decisions stretching from the 1960's into the present. The court has ruled that the power of constitutional amendment established by the constitution may not be used to damage or to destroy what it calls the 'basic structure' or the 'identity' of the constitution (See Sathe 2002: 63-99; Krishnaswamy 2011; Khosla 2012: 149-65). Though the doctrine of the basic structure was very controversial when it made its first appearance in decisions of the Supreme Court of India, and though the court has had to modify it in important ways throughout its development to keep it afloat, the doctrine, and the judicial powers that flow from it, now seem to be widely accepted as legitimate. It is even credited, by some influential commentators on the Constitution of India and its development, with having saved Indian democracy from autocratic tendencies emanating from the executive (Sathe 2002: 85).

This positive assessment, at first glance, appears surprising. In the light of standard criticisms of the judicialization of democratic politics, the basic structure doctrine would have to be regarded as a particularly egregious instance of democratically illegitimate judicial overreach. The Supreme Court of India, it might be argued, has simply invented absolute

counter-majoritarian constraints on the democratic (constitutional) legislator and held itself to have the authority to enforce those constraints; a clear-cut case of judicial self-empowerment if there ever was one (Ramachandran 2000). To make matters worse, the Supreme Court of India has, at least so far, not seen fit to offer an exhaustive list of features of the constitution that belong to its basic structure, and there is doctrinal disagreement concerning the question of what makes a constitutional feature part of the basic structure (Krishnaswamy 2011: 131-63). Finally, there are signs of an extension of the doctrine, from the judicial review of constitutional amendments, to the judicial review of ordinary legislation and executive action (Krishnaswamy 2011: 43-69). The democratically elected (constitutional) legislator as well as the executive, as a result, labor under an absolute constitutional constraint that has never been clearly spelled out but will be developed by the court from case to case.

In order to counter this charge, defenders of the basic structure doctrine argue that the doctrine flows from a compelling interpretation of the Constitution of India (Krishnaswamy 2011: 166-89). Since such an interpretation cannot point to an explicit textual basis for the basic structure doctrine, a constitutional interpretation that justifies the basic structure doctrine must go beyond a textualist approach. It is forced to enter the field of general constitutional theory and democratic political theory. The case of India, thus, throws into stark relief the theoretical question whether democratic constitutions can be said to contain implied limits of amendment that are grounded in the very nature of a democratic constitution. Or to put the point differently: If the basic structure doctrine turns out to be democratically justifiable, the argument is likely going to have implications that reach beyond the case of India to other democratic constitutions.

To enter more deeply into the debate on the democratic legitimacy of the basic structure doctrine it will be necessary to give a short overview of the constitutional



developments in India that led the Supreme Court of India to put forth the basic structure doctrine.

This development can be traced back to tensions between different aspects of the vision of postcolonial India that animated the constituent assembly that drafted and enacted the Constitution of India (Austin 1972: 63-144). On the one hand, the constitution's drafters were concerned, as a result of the experience of arbitrary treatment at the hands of the colonial government, to protect the individual against such arbitrary treatment at the hands of the government. Hence, they included a bill of rights in the constitution, and they explicitly made it enforceable through judicial review. On the other hand, the drafters of the constitution were committed to a project of thoroughgoing social reform that was to lift the standard of life of all Indians and to reduce economic inequalities and inequalities of social status. This aspiration found expression in a list of constitutional directives that, while not being judicially enforceable, are to commit the state to the pursuit of a number of progressive social goals.

The constitution's system for the protection of basic rights and the goal of progressive social reform came to conflict, in the early years of the Republic of India, in the field of land reform, as laws that were meant to implement a redistribution of land from large landholders to peasants were challenged in court, at times with success, as violations of basic rights (Austin 1999: 69-122). The government's reaction to these challenges exploited another important feature of the Constitution of India, the fact that the procedural hurdles for the amendment of the constitution are relatively low. The Constitution of India can be amended by a 2/3 majority of members of parliament present and voting, provided that this majority makes up more than 50% of all the members of parliament. Some constitutional amendments, those that concern the affairs of the several states, must in addition be approved by the legislatures of at least half the states. During the first decades of independence, this

requirement was very easy for the federal government to meet, as the Congress Party typically enjoyed a supermajority in the *Lok Sabha*, and in addition controlled the larger number of state governments. A practice quickly developed by which the government would use its control of the amendment power to block challenges in court to laws of property that were suspect of violating the constitution's rights-provisions. The laws in question were inserted, by the use of the amendment-procedure, into a special constitutional schedule that was declared off limits to judicial review.

This strategy indicates a second constitutional tension. Though the drafters of the Constitution of India were committed, with a view to distancing themselves from the practices of their British colonizers, to the ideal of constitutional government, they did not quite manage to leave behind the British tradition of parliamentary sovereignty. This was evident not just in the design of the constitution's amendment-clause and in the refusal to put any absolute limits on the power of amendment. It also manifested itself in a tendency to attribute constituent power to parliament, a clear nod to the British principle of parliamentary sovereignty (Austin 1999: 260-65; Sathe 2002: 69-70). The resulting constitutional situation might perhaps be compared to that of some contemporary countries – like Canada or New Zealand – whose constitutions contain a judicially enforceable bill of rights that is open to legislative override, with the crucial difference that the override was routinely used.

The Supreme Court of India tried to put a stop to this tendency towards *de facto* parliamentary sovereignty in the *Golaknath* case, in a first, failed attempt to establish a basic structure doctrine (Austin 1999: 196-208). The court ruled in *Golaknath* that constitutional amendments abridging basic rights are unconstitutional. This ruling was justified on the basis of a narrowly textualist argument: Article 13 of the Constitution of India provides that the state may not enact any 'law' that abridges fundamental rights. The majority in *Golaknath* held that constitutional amendments are laws and thus included in article 13's limitation on

legislative power. The decision, if it had stood, would have turned all basic rights into parts of a non-amendable basic structure and would thus have brought about a dramatic shift from great constitutional flexibility to great constitutional rigidity. Amendments, as much as ordinary laws, would have been altogether incapable of limiting basic rights, as interpreted by the Supreme Court. The court proceeded, in the wake of *Golaknath*, to void attempts on the part of government to nationalize India's banks and to abolish the privy purses of the former rulers of the princely states. At this juncture, the court's attempts to establish a basic structure doctrine were widely perceived as democratically illegitimate. The court appeared as an institution wedded to the defense of socially unjust conditions that had been rejected by the people (Sathe 2002: 67-8).

The basic structure doctrine of *Golaknath* did not, in the end, prevail. The government of Indira Gandhi, who had scored a lopsided victory in the elections of 1971 after having promised to change the constitution so as to stop the judiciary from blocking progressive social reform, eventually responded to *Golaknath* by using its supermajority in parliament to enact the 25<sup>th</sup> constitutional amendment, which explicitly declared parliament competent to change or to repeal all provisions of the constitution. It also explicitly exempted constitutional amendments from being challenged for violation of the constitution's fundamental rights (Austin 1999: 250-3).

The Supreme Court of India, in its turn, reaffirmed the basic structure doctrine, though not in the form it had taken in *Golaknath*, in the *Kesavananda* case (Austin 1999: 258-77). The majority in *Kesavananda* upheld the constitutionality of the 25<sup>th</sup> amendment, and explicitly overruled *Golaknath*. The court conceded, in other words, that fundamental rights were open to limitation by constitutional amendment. However, the judges at the same time reaffirmed the claim that parliament's power of amendment was nevertheless limited by the basic structure of the constitution. The power of constitutional amendment, the court held,

cannot validly be exercised in ways that would ‘damage or destroy’ certain fundamental features of the constitution, such as democracy, secularism, the rule of law, the separation of powers, or federalism.

Though the 25<sup>th</sup> amendment was upheld, the government apparently saw *Kesavananda* as a defeat. However, despite the fuzziness of the concept of a basic structure and the confusing multiplicity of opinions in *Kesavananda*, the court showed a way out of the standoff between what was in effect a doctrine of parliamentary sovereignty and an overly rigid constitutional framework that would have made fundamental rights into illimitable obstacles of social progress. Limitations imposed on ordinary legislation by fundamental constitutional rights could now be overridden, but not in such a way as to fundamentally change the identity of the constitution. The court had shown a way to mitigate the tensions between constitutionalism and parliamentary sovereignty and between rights and progressive social legislation.

What is more, the reasoning for the doctrine of the basic structure in the different opinions in *Kesavananda*, however conflicting in detail, did have a broader theoretical basis than the argument in *Golaknath* (Krishnaswamy 2011: 26-42). The basic structure doctrine now took the form of a doctrine of implied limitations to parliament’s power of amendment, though its basis was not developed all that clearly.

One prominent strand of argument related to the word ‘amendment’. It was argued that an amendment presupposes the continuing existence of a constitution that is to be amended or changed, but not to be abrogated altogether. Such an argument, however, suffers from the problem that there are theories of constitutional identity that can accommodate materially unlimited powers of amendment (Kelsen 2010). In the absence of a substantive

theory of constitutional identity, a textualist argument centering on the semantics of ‘amendment’ is therefore not very helpful.

A second argument that had been put forward by counsel for the petitioners was at least given serious consideration, though it was apparently not adopted by a majority of judges. Parliament’s power of amendment under the constitution, according to this argument, must not be confused with the constituent power of the people, i.e. the power of a self-governing people to give itself a completely novel constitution whenever it sees fit. The power of amendment is bound to respect certain fundamental decisions of the sovereign people as to how they wish to be governed; decisions that are given expression in the written constitution, and that impose limitations on the power of amendment as a constituted power, regardless of whether these limitations are explicitly laid down in the constitutional text (Conrad 1999).

This second argument sits rather comfortably with a third, which an insightful recent interpreter of *Kesavananda* holds to be the most important (Krishnaswamy 2011: 31-33). A number of judges claimed that elements of a basic structure shielded from amendment can be derived from a holistic interpretation of the constitution that focuses not on individual constitutional provisions in isolation but considers the interplay of a number of such provisions. If some constitutional principle of general import is expressed in several prominent constitutional provisions, it is at least a candidate for inclusion in the constitution’s basic structure. This does not rule out that some or all of the provisions that express the principle may be open to change. But this change must take place in a way that does not severely impair or even extinguish the expression of the principle in the operative rules of constitutional law.

That the basic structure doctrine as developed in *Kesavananda* came to be regarded as legitimate among legal scholars and the wider public in India in subsequent years has apparently had more to do with political developments than with legal argument (Austin 1999; Guha 2007: 491-518). When Indira Gandhi's election to the *Lok Sabha* in the election of 1971 was challenged for violation of the Election Law and ultimately set aside by the High Court of Allahabad in 1975, parliament enacted the 39<sup>th</sup> constitutional amendment that stripped the courts of the power to decide on electoral disputes concerning the election to parliament of persons holding the offices of Prime Minister and Speaker of parliament. The amendment also gave retroactive effect to this rule, in order to quash the challenge to Indira Gandhi's election in 1971. This move coincided with the declaration, in 1975, of an internal emergency that was to last until 1977. During this emergency, the government, supported by the sitting parliamentary majority, severely restricted the freedom of the press, imprisoned members of the opposition, including members of parliament, and repeatedly postponed elections. It was under these circumstances that the Supreme Court held, in *Indira Gandhi*, that the 39<sup>th</sup> amendment violated the basic structure of the constitution and was therefore void, even while it rejected the legal challenge to Indira Gandhi's election to the *Lok Sabha* in 1971 as unjustified.

Though the court decided the dispute at hand in the election case for the prime minister, the government now took one final stab at burying the basic structure doctrine for good (Austin 1999: 370-90). The 42<sup>nd</sup> amendment of 1976, enacted during the continuing emergency, determined that 'no amendment to the constitution...shall be called into question in any court on any ground.' It also included a direct repudiation of the basic structure doctrine: 'For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of the Constitution under this article'. The aim, then, was to reestablish

once more the *de facto* parliamentary sovereignty that had characterized the early years of independence.

Public opinion, at this point, had decisively turned against Indira Gandhi's government. The actions taken during the emergency were seen to pose a threat to Indian democracy. The Supreme Court's willingness to strike down the 39<sup>th</sup> amendment was thus perceived as an action taken in defense of democracy, and the basic structure doctrine became a rallying point not just for the political opponents of Indira Gandhi but also more generally for those concerned about the future of democracy and the rule of law in India (Sathe 2002: 75-7). For reasons that historians have not been able to explain in a fully satisfactory way, Indira Gandhi herself decided to end the emergency in 1977 and to call for fresh elections in which she was crushingly defeated (Guha 2007: 519-22). The elections, for the first time in the history of the Republic of India, brought to power a government not controlled by the Congress Party. What is more, the opposition had campaigned on the promise to repeal the 42<sup>nd</sup> amendment and to reinstall the basic structure doctrine. Though the new government quickly disintegrated due to internal squabbles, it managed to fulfill that promise at least in part and to repeal some of the most offending parts of the constitutional amendments that had been introduced during the emergency (Austin 1999: 409-30). The Supreme Court of India, in its turn, ruled in *Minerva Mills* that the 42<sup>nd</sup> amendment's provision that no constitutional amendment shall be called into question in a court was void as a violation of the basic structure of the constitution. It also held that parliament's power of amendment was unlimited only as long as it did not violate the constitution's basic structure (Austin 1999: 498-507). While Indira Gandhi took power again in 1980, she made no further attempt to dislodge the basic structure doctrine or to reestablish and unlimited power of amendment.

As a result of the role of the experience of the emergency, the basic structure doctrine, in the revised form it was given in *Kesavananda*, is now accepted as legitimate by the large

majority of Indian scholars and by the Indian public. To assess the question whether this perception of legitimacy should be accepted as sound from the point of view of a normative theory of democratic legitimacy, it will be helpful to focus on a number of salient features of the development, the practice, and the content of the basic structure doctrine as it stands now.

First, let us note that the content of the basic structure doctrine changed substantially from *Golaknath* to *Kesavananda*. In its earlier form, the basic structure doctrine aimed to defend individual rights, and in particular the right of property, against interferences or limitations imposed by very large parliamentary majorities; all this against the background of vast social inequality and underdevelopment. Clearly, the initial version of the doctrine highlighted and perhaps exacerbated the constitutional tension between rights and the goal of social progress. It implicitly took sides for a constitutionalism that sees itself as an external limitation on democracy and that is committed to the defense of the social *status quo*. The Supreme Court, in the face of strong public opposition, decided to turn the right of property into a stringent side-constraint on the achievement of social goals, on the basis of flimsy textualist arguments. General arguments against the legitimacy of constitutional entrenchment and judicial review are clearly strongest in a context like this: The democratic process must, if we are not to live in a 'juristocracy', have a say on how the balance is struck between individual rights and policy goals that are strongly supported by weighty moral reasons and backed up by a large majority of the electorate (Waldron 2006; Bellamy 2007).

In its modified form, however, the basic structure doctrine takes on quite a different character. It no longer centers exclusively on the protection of rights, and it no longer blocks legislative limitation of rights through the amendment process. The Supreme Court, thus, has ceded a substantial part the authority to negotiate the tension between fundamental rights and the goal of social progress to the legislature. But by maintaining that the constitution has a basic structure that must be preserved, it has given itself the opportunity to monitor the proper



functioning of the political process. An argument for strong constitutional entrenchment (or for implied limitations of amendment), in a democratic state, would seem to be strongest where the relevant limitations and entrenchments protect the democratic process itself (Ely 1981; Vinx 2007: 145-75). An unlimited power of amendment may give a strong parliamentary majority an opportunity to interrupt the democratic process and to entrench itself in power permanently. It may also give it the power to change the constitution in other fundamental ways, in the face of overwhelming public opposition, especially if the democratic process no longer works as a corrective. Insofar as a basic structure doctrine defends the proper functioning of the democratic process, it can hardly be called democratically illegitimate.

It might of course be objected to this observation, from a legal point of view, that the claim that a material limit on the power of amendment could not be regarded as democratically illegitimate if it helped to protect the functioning of democracy, as well as other key structural features of the constitution, does not answer the question whether the Constitution of India, or any other written constitution, in fact implies such a limit. Or to put the point slightly differently: It may be the case that observers of constitutional developments in India typically regard it as a good thing, in retrospect, that the doctrine of the basic structure came to be established. But does that show that the doctrine was there to be found in the constitution? Or would it be more appropriate to say that the Supreme Court acted as a constitutional legislator in introducing the doctrine? If so, how can it be said that the introduction of the basic structure doctrine was democratically legitimate?

Another dimension of the transformation of the basic structure doctrine from *Golaknath* to *Kesavananda* may be helpful to address this question. Recall that the shift in emphasis in the content of the basic structure doctrine was accompanied by a shift in the justifications offered for it. In its more recent guise, the basic structure doctrine no longer

opposes constitutionalism to democracy. Rather, it is at least open to the view that the basic structure is itself an expression of a popular sovereignty that ought to be distinguished from the constituted power of amendment (Conrad 1999). The drafting of a written constitution, in such a picture, could be regarded as the mere implementation of a number of basic decisions about the shape of the state taken by the people itself. And it would then make good sense to claim that these basic decisions may not be overridden by the constituent assembly or by later parliaments exercising the constituted power of constitutional amendment, especially where the procedural bar for exercising the power of amendment is low (Schmitt 2008). The fact that a structural or holistic interpretation of the constitutional text appears to show it to be committed to a number of general constitutional principles (Krishnaswamy 2011: 178-83) lends support to the view that the written constitutional text is more than just a contingent collection of particularly dignified statutes put in place by the first sovereign parliament. If the Constitution of India is to be regarded as the product of an exercise of popular sovereignty to which the constituent assembly merely gave voice and concretion, the basic structure must indeed have been implied by it from its beginning, though it took the courts some time to find it.

To be sure, the view that the Constitution of India ought to be interpreted as a product of the exercise of a constituent power of the people that is to be distinguished from parliament's powers of amendment would be difficult to defend on originalist grounds, since the members of the constituent assembly that enacted the Constitution of India, an assembly which also functioned as a provisional parliament, do not seem to have acknowledged any such distinction (Austin 1972: 1-32). But it might be argued that the Constitution of India, over time, has come to be understood, by the people of India, in terms of a notion of popular sovereignty that is not to be equated with the constitutionally defined legislative powers of parliament. In particular, the experience of the emergency made it clear that attempts to

equate a parliamentary majority strong enough to amend the constitution with the constituent power of the people are profoundly unconvincing. That the constitution could come to be so understood, of course, had a lot do with the fact that the framers of the constitution, though incapable to fully emancipate themselves from the British dogma of parliamentary sovereignty, did aspire to create a stable and enduring constitutional framework.

The elections of 1977, moreover, could be interpreted as a constitutional moment conferring popular validation on the basic structure doctrine. Arguably, the court changed the constitution by establishing the basic structure doctrine, but it clearly did not do so all by itself. The basic structure would likely not have survived if Indira Gandhi had won the post-emergency elections. In establishing the basic structure doctrine, and in working with it, the Supreme Court of India of course had to be willing to take decisions that some would describe as ‘political’. As S.P. Sathe points out, the development of the basic structure doctrine went along with increased ‘judicial activism’ and with a rejection of ‘positivist’ approaches to constitutional interpretation (Sathe 2006). In thus becoming an increasingly influential political actor an activist court, however, incurs political responsibilities and constraints that a formalist court would likely find it easier to brush off. An activist court must look to how its decisions play with the public and with how they will be perceived by other political institutions in the constitutional framework. Perhaps for this reason, the Supreme Court of India has so far used the basic structure doctrine in a very cautious and restrained manner (Sathe 2002: 87-8). Commentators frequently emphasize that this restraint is a condition of the legitimacy of the doctrine. It is a judicial weapon of last resort that must leave the legislator with considerable discretion as to how to interpret particular constitutional provisions.

The picture that emerges, then, is one of a constitutional tension gradually resolved through the judicial development and the eventual popular acceptance of the basic structure

doctrine. The initial question was whether the constitution had imposed any material limits on the power of the parliamentary legislator. The court strained to argue that it did, but failed to do much more than to claim, on the basis of the flimsiest of arguments, that constitutional rights are altogether shielded from restriction or limitation. The constitution, it seemed, was either to be the government's constitution or the court's. The way out of this impasse, opened by the modified basic structure doctrine, was to make it the people's constitution.

### *Strong Constitutional Entrenchment in Turkey*

Turkey provides a clear and extensively discussed, even if not quite systematically studied, case of strong constitutional entrenchment; by its incorporation of explicit eternity clauses in its constitutional structure from the very beginning of the Republic in 1923, their gradual expansion – both by direct increase in numbers of explicitly stated eternity clauses and by indirect, allegedly over-stretched acts of interpretation – and its almost all too regularly exercised practice of judicial review since the 1970s by the Constitutional Court.

The widely shared conviction regarding the democratic legitimacy of strong constitutional entrenchment and of the accompanying progressive expansion of judicial power in Turkey regards eternity clauses, judicial review and the Turkish Constitutional Court (TCC) as expressing the tutelary character of the state and the judiciary and as possessing weak political (democratic) legitimacy. In this understanding, these mechanisms not only do not protect and promote democracy, but inhibit its liberalization and consolidation, and hence are indefensible on the basis of militant democracy argument. The supporters of this perception suggest that Hirschl's hegemonic preservation thesis is a perfect fit to understand and explain the Turkish case (Arato 2010; Arslan 2002; 2007; Belge 2006;

Gunter 2012; Koacıoğlu 2003; 2004; Ozbudun 2012; 2011; 2005; 2006; Roznai and Yolcu 2012; Tezcur 2009).

There are various interrelated reasons invoked to support this judgement. The reasons are worked out on the basis of examination of conditions/criteria that are considered to lend democratic legitimacy to strong constitutional entrenchment and judicial review. These include above all: the origins of the constitutions and whether they can be said to represent the original or the primary constituent power; the content as well as the wording of the constitutional text and the entrenched clauses themselves, their interpretation and implementation by the Constitutional Court, the composition of the Court, its accessibility and so on. These are all judged on the basis of their representativeness and inclusivity of the populace at large and of the values and interests endorsed by individuals. Arguably, the Turkish example fails this test since the judges and the TCC are held to be an indispensable part of a hegemonic alliance whose interests lie in the preservation of a particular vision of society and of certain values and interests that are not only not widely shared, but also at times fiercely opposed.

The core idea behind the judiciary and the courts regarded either as guardians of particular ideological precepts and hegemonic interests is engrained into the Turkish constitutional structure from the very beginning of constitutional experience (Thiel 2009: 263; Bali 2012). It is grounded in the history of Turkey's transition from imperial collapse to republicanism and in the process of state formation, which was based on the core commitments of founding elites and centred on a particular modernizing ideology.

The modernizing ideology in the Turkish case came to be known as Kemalism, which provided the official ideology of the Turkish state both at its foundation and throughout its existence. Kemalism can best be described as an outlook with a short and a long term vision

and mission, rather than a full-fledged coherent ideology. While the short term goal was the establishment of the Republic as a secular and modern nation, the long term and permanent goal for all generations and adherents to the outlook is to reach the level of contemporary civilization (Hirsch 2012; Shambayati 2008: 288; Shambayati and Kirdis 2009). Both of these goals directed the process of transformation of the Republic in the immediate aftermath of the War of Independence through a series of reforms that were administered from above. These included the abolishment of the sultanate in 1922, the declaration of the Republic in 1923, the abolishment of the caliphate in 1924, the adoption of the Latin alphabet, of western attire, the modernization of laws, among many others. While the new regime succeeded in purging many of the remnants of the *ancien regime*, it retained its strong state tradition based on the absolute supremacy and sacredness of the state. The combination of the idea of a strong/supreme state and two of the most important achievements of the new regime, namely the abolition of the sultanate and caliphate and the abolition of religious rule and the adoption of a secular, republican state, as well as their protection from encroachment, guided much of the later course of the constitutional and political history of the Republic. These ideas came to be formulated as the principles of the indivisible integrity of the state and of secularism, and they are, to this date, considered as bedrocks of the Turkish Republic.

The Turkish modernization project, however, since it did not organically grow out of the society in contrast to many of its European counterparts, but was imposed on it from above, was not at all a smooth one. The carriers of the project, which were the same cadres as those who initiated and carried through the War of Independence, declared the Republic, created the new civil bureaucracy and formed the Republican People's Party, the first political party of the new regime, often found themselves at odds with powerful societal actors whose values and interests were threatened by the civilizing mission. Naturally it was religious and ethnic minorities that felt most threatened. They posed the most significant, if not at all times

actual, at least perceived, threat to the bedrocks of the new Republic. Repressed Muslim and Kurdish identities continue to haunt the republican elites to this very date. This has culminated in a widening rift between the state and the society, or between what is sometimes referred to as the forces of the centre and the periphery. The perceived threat from and distrust towards the peripheral forces put a continuous antidemocratic strain into Turkish political life, since the state responded by creating tutelary institutions like the military and the civil bureaucracy and entrusted them to ‘defend the civilizing mission against potential threats from society, even if at times that means acting against the will of the nation’ (Shambayati 2008: 288).

The introduction of multi-party politics in 1946 gradually led to a transposition of the earlier state-society cleavage into a division between the unelected institutions of the state (*devlet*) and the elected branches (*hukümet*), and between the state elites and political elites, who now came to be differentiated as the RPP (Republican People’s Party) ceased to be the sole representative of the state and the will of nation (Heper 1985; Ozbudun 1996; Bali 2012; Shambayati and Sutcu 2012). It was only then that the judiciary and the TCC became part of the tutelary state machinery and were given the role of guarding the state and the values and interests of the state elites against infringements by the political elites whom they regarded as opportunist representatives of the most local and parochial interests (Ozbudun 1983). The state elites resorted to various means to protect their achievements and further their interests, ranging from drastic measures such as military interventions to more moderate mechanisms of control. Controlling the composition process of the constitutional texts, their content, and interpretation by the TCC, strongly entrenching the constitutional clauses regulating their vision and ideals were among the major constitutional means employed.

There have been three constitutions in operation in Turkey since the proclamation of the Republic: the 1924, 1961 and 1982 constitutions. The practice of constitutional

entrenchment and judicial tutelage has not only progressively increased with each of these successive constitutions, but also reflected the changing relationships and alliances between the state and the society.

The very first constitution of the Republic was drafted by an ordinary legislative assembly composed of the very same cadres that fought the war of Independence and declared Turkey a Republic. Although it can easily be inferred that the cadres were composed mostly, if not exclusively, of bureaucratic and military elites, one cannot say that they were homogeneous. In fact, after the establishment of the Grand National Assembly in 1920, their heterogeneous character culminated in a split in the first legislative assembly between two groups: a first group led by Mustafa Kemal and a second group that acted as an opposition. However the first group, upon the initiative of Mustafa Kemal himself, through careful administration of the elections for the second legislative assembly, and by not granting the right to get re-elected to those who opposed him during the first legislative term from 1920 to 1923, managed to create a homogeneous legislative assembly that included people who wholly endorsed the Kemalist vision of society (Ozbudun and Genckaya 2009; Tuncay 1981). It was this second legislative assembly, almost solely composed of RPP members, except for several independents who later on joined the party, which drafted the 1924 constitution and not the original constituent assembly (Bali 2012: 255). The new constitution of the Republic, thus, exemplified their interests and aspirations much more than those of the opposition.

The constitution of 1924 was the culmination of a long struggle against the sultans. Reflecting the importance attached to the newly proclaimed Republic, the 1924 constitution declared the article stating the form of the state as Republic to be an irrevocable constitutional clause, aiming to protect popular sovereignty against the threat of relapsing into monarchy. However, it did not include any judicial means to enforce this clause. Instead, it made the legislative assembly itself the protector of the Republic. The primary reason for



this was the congruence between the state and the political elites under single-party rule and a resultant belief that harm to democracy and democratic government could only come from non-representative forces, such as the sultan, and not from the majority of the representatives of the people (Ozbudun 2000: 35).

The incidents in the multi-party period proved this assumption wrong. These years witnessed increasingly authoritarian, arbitrary and lawless practices of the Democrat Party especially against the opposition RPP. Lack of constitutional checks and balances on legislative acts which did not pose a major problem during the single-party years (1925–1946) meant that the society and the RPP had no choice but to wait for a hero to rescue them from an authoritarian regime. The military coup in 1960 was partly a result of these constitutional weaknesses of the previous period.

The 1961 and 1982 constitutions, although both were drafted by constituent assemblies formed after military interventions, are commonly argued to have failed to achieve broad representation and political legitimacy, primarily due to their composition. For one thing, the assemblies were convened by the military, which was not only a part of drafting process itself, but also controlled its outcome by directing the composition of the assemblies. This is one of the major reasons for the allegation that the constitutions in question act to preserve and promote the interests and values specified during and in the immediate aftermath of an authoritarian military regime(s). However, there are important differences between the two constitutions primarily due to relatively heavier involvement of the military in the latter, both in its composition and its continued role under it. Although the military was part of the constitution-making process after the 1960 coup, the process was led mostly by civilian actors and the political system created in its aftermath relied heavily on civilian institutions.

The 1980 military intervention, however, unleashed a very different process. The loss of faith by the military in all civil actors and its former allies (the Republican alliance or the state elites) culminated in a stricter control of the constitution-making and execution process. The new military regime, thus, wanted to do all on its own (Shambayati 2008: 293; Shambayati and Kiridis 2009: 773). This has changed the relationship between the state and the society or between the state and the political elites, which the 1961 constitution tried to re-establish/mend by introducing extensive checks and balances. In other words, while the 1961 constitution tried to re-establish the lost or broken identification between the state and the political elites, the 1982 constitution determined the fault of the 1961 constitution as the politicization of the state actors and aimed at establishing the hegemony and dominance of the state (elites) and institutions. As a result, it broke off the longstanding alliance between the RPP and the state institutions. Thus, while under the 1961 constitution the TCC acted as an ‘insurance agent’ that is, tried to achieve a concord between the state elites and the political elites, at least with the RPP, under the 1982 constitution the court acted as an ‘administrative attaché’ (Shambayati and Kiridis 2009: 770). This helps us explain the increasing judicial activism of the TCC under the 1982 constitution.

The 1961 Constitution, like its predecessor, contained a single eternity clause, Article 1 of the constitution that specified the form of the state as a Republic. However, unlike the previous constitution, it introduced various checks and balances to counteract the power of the legislative assembly. The most important of these was the introduction of judicial review and of a Constitutional Court as an institution to oversee the constitutionality of laws. In time, due to overstretched acts of interpretation, this single eternity clause came to include a number of substantial characteristics associated with the Turkish Republic that had been specified in the preamble to the constitution. In 1970 the TCC annulled a constitutional amendment on the grounds that it conflicted with Article 2 of the constitution qualifying the

nature of the Republic, and held that article 2 should be regarded as an integral, organic and inseparable part of unchangeable Article 1 of the constitution (Ozbudun 2007: 259). The court ruled that any constitutional amendment conflicting with the qualities of the Republic specified in Article 2 of the constitution – that ‘The Turkish Republic is a nationalistic, democratic, secular and social state, governed by the rule of law, based on human rights and fundamental tenets set forth in the preamble’ – would be in conflict with the Article 1 specifying the form of the state as a Republic. In its statement justifying its decision of annulment the Court suggested that Article 1 cannot be read in isolation from Article 2. The form of the state as Republic, hence, was taken to include substantive considerations that are associated with that form of the state and are stated in Article 2. In this manner the Constitutional Court greatly extended its powers of constitutional/judicial review. It claimed to be able to review almost all constitutional amendments and came to define ‘republic’ as a legal formulation of the Turkish revolution.

The contemporary Turkish constitution drafted in 1982 contains three explicit eternity clauses together with a fourth article designed to ensure the protection of these by prohibiting their amendment as well as any proposals for amendment. The first clause designates the form of the Turkish state as a republic. However, the republican form of state, with this constitution, for the first time explicitly ceases to be understood in a narrow sense as the opposite of monarchy and comes to include the whole republican philosophy, which cannot be understood in isolation from the history of Turkish republic. In fact, departing from the 1961 constitution, the 1982 constitution put the characteristics of the republic explicitly under protection of irrevocability with a second clause. Although differently worded, the 1982 constitution emphasizes more or less the same characteristics of the republic that had come to be preserved and protected under the 1961 constitution. These include its defining characteristics as a ‘democratic, secular, social state governed by rule of law’, giving primacy

to concepts of ‘public peace, national solidarity and justice’, and to be ‘based on the fundamental tenets set forth in the Preamble’, which refer to ‘Turkish national interests’, ‘Turkish historical and moral values’ and ‘nationalism, principles, reforms and modernism of Atatürk’ to cite a few.

The preamble explains the document's purpose and underlying philosophy, the legal and political inspirations of the constituent power, and the ideas and beliefs to be adhered to in constitutional interpretation. Two major problems that arise in relation to the eternity clauses in general and the preamble in particular concern its ideologically loaded formulation and the existence of broad and vague phrases that are open to plethora of different interpretations. These, in turn, give the courts a huge power of discretion (Gulener and Haslak 2011: 7-8; Ozbudun 2007: 259). Although that could well be stated as a problem in its own right, the real problem voiced by many is that the TCC in most cases has not used its power of interpretation and discretion to protect and consolidate democratic values and individual rights and liberties. Instead, endorsing Kemalism as its official ideology in its rulings, the Court elevated the State and its protection to a supreme position justified in terms of public reasons associated with the safeguarding of the state to the detriment of individual rights (Erdogan 2000: 128-129; Erdem 2005: 51-69; Turhan 2007: 385; Ozbudun 2005: 340-342). Ideological reflections in the preamble are seen as ‘politically favouring of the state’, which aims at establishing a state-mandated society and at enhancing socio-cultural as well as ideological homogeneity.

The Turkish Constitutional Court revealed its ideological leanings in more than one way and on more than one occasion. By gradually enlarging its scope of jurisdiction through overstretched acts of interpretation; by providing a very narrow and strict interpretation of certain clauses, especially eternity clauses; by *de facto* expanding its powers of judicial review to include substantial and not only procedural matters; and by employing what should

be exceptional, last resort judicial means quite routinely. The Court is argued to have acted not simply as a guardian of the regime, but as an agent itself, as ‘a proactive guardian’ or as an attaché of state elites (Hirschl 2012: 324; Shambayati and Kirdis 2009). Grounding its own outlook/philosophy on the Kemalist ideology, which deems protection of the State and its interests as the supreme goal, the Court did not use its powers of discretion in order to establish, further and consolidate democracy. Instead it has displayed its activism whenever the State and its interests were at stake, and not when it concerned those of the individuals. When the former were at stake, the Court interpreted the two pillars of the Kemalist vision, secularism and the indivisible integrity of the state, in the strictest possible way.

The large number of political party-dissolution cases is perhaps the best example for the ideologically activist leanings of the Court. The TCC’s extensive docket of party-dissolution cases has resulted in twenty-five party closures (six parties under the 1961 constitution and nineteen under the 1982 constitution) in the court’s history — generally against Kurdish and Islamist parties, along with some socialist, communist, and anarchist parties in an earlier period. Most party-dissolutions were based on the alleged violation of the constitutionally protected principles of the indivisibility and territorial integrity of the State and/or the principle of secularism. The last attempt to close a party took place in 2008 against the Justice and Development Party (JDP). The party was accused of violating the principle of secularism. The Court’s decision not to ban the party was considered by many as a victory for Turkish democracy.

However, the threat of closure was not the only constitutional problem for the religiously oriented JDP when it came to power in 2002. It also met with Court’s resistance over the question of the presidency, for instance, in 2007. At the end of President Sezer’s term of office, the governing JDP seemed to have enough votes in the parliament to elect its own candidate but with some legal manoeuvres regarding the quorum for the opening session and

the candidate selection, the Court managed to make sure that the JDP's candidate Abdullah Gul failed to get elected. As a result of the deadlock over the presidency, the Assembly decided unanimously to call new elections. The JDP expressed its desire to draft a new constitution in its election manifesto and started the process of drafting a new constitution just before the elections. The task was given to a group of professors of constitutional law. In general, the draft aimed to expand and protect civil rights and liberties, in line with the Universal Declaration of Human Rights and ECHR, while preserving the unamendable characteristics of the republic, such as the democratic, secular, and social state based on human rights and the rule of law (Ozbudun and Genckaya 2009: 103-104). However, these principles were not constitutionally entrenched or designated as unamendable in the new draft. In addition, the Preamble was kept very short and concise. The draft, however, was shelved after the headscarf amendment in 2008 and the ensuing constitutional threat of a closure of the JDP.

Having survived the threat of closure, the JDP, continued to voice a desire to change the constitution. The opposition parties expressed support on the condition that the drafting process would be an inclusive one, so as to encourage and ensure the participation of all political parties, NGO's, civil society organizations, professional and trade associations, bar associations, and so on. In the aftermath of the 2011 elections, a constitutional reconciliation committee was formed in an attempt to reach a 'common' constitutional text through debate. The committee was formed of three representatives from each of the four political parties represented in the parliament. After many meetings, debates and numerous drafts from all parts of society, the project was shelved because the political parties reached an impasse. Of the 172 total clauses in the last draft, only 60 were agreed upon. Major disputes related to the preamble and the main principles, the judicial function, and the legislative function. The disagreements were so sharp that they were irreconcilable. For instance, while the RPP and

the Nationalist Action Party (NAP) insisted on keeping the eternity clauses specified in the 1982 constitution, the Kurdish Peace and Democracy Party (PDP) strongly opposed the idea of ‘eternity clauses’ itself and JDP did not ‘suggest’ any eternity clauses.

As of today, the ruling JDP no longer seems committed to creating a new constitution. Due to the difficulties and resistance they encountered in two unsuccessful attempts, the members of the Party seem to have decided to change the system through a series of constitutional amendments which they pass through their parliamentary majority under the name of Democratization packages and Judiciary/Juridical packages. Five of the latter passed so far. These readjusted the workings of the Constitutional Court, the process of judicial review, the appointment procedures to higher Courts and many other aspects relating to the judiciary. Critics claim that these reforms aim to create a docile judiciary, by destroying its independence. The recent ban on Twitter and Youtube, the immediate rejection of the RPP mayoral candidate’s appeal for a vote recount in the capital Ankara, where the JDP candidate’s margin of victory was very small, are perceived as indications of a threat to the independence of the judiciary. Considered in conjunction with the still ongoing purge of the military which was initiated by the government in 2007, this might signify the end of state-tutelage and the beginning of JDP-tutelage in Turkey. However, the TCC has recently begun to push back against these developments, by overturning the ban on Twitter and by striking down parts of a law designed to give the government more control of the appointment of judges and prosecutors. The government has so far refrained from disregarding the Court’s decisions (See *New York Times*, April 12, 2014, p. A8).

## *Conclusions*

The two cases of strong constitutional entrenchment investigated clearly pull into different directions. Turkey appears to confirm the skeptical hypothesis that sees strong constitutional entrenchment as a means for the preservation of elite-dominance. An elite that held disproportionate social power attempted repeatedly to strongly entrench its vision of social order, so as to protect it from the future decisions of the majority. The case of India, on the other hand, seems to fit one or several of the other alternative explanations for the introduction of strong constitutional entrenchment better than the skeptical hypothesis. At least in its later incarnation, the basic structure doctrine seems to have been a strategy of resistance, and it received the implicit backing of the people in the election of 1977. We conclude that strong constitutional entrenchment can indeed be used for anti-democratic purposes. But it would be wrong to assume that its use must always be democratically illegitimate. As the example of India shows, strong constitutional entrenchment can help preserve democracy.

Of course, whether strong constitutional entrenchment is more likely to be protective of democracy or to illegitimately restrict it is a question that cannot be answered on the basis of just two examples. However, the two cases analyzed here can provide some pointers for future comparative research into the conditions under which strong democratic entrenchment might come to play a positive role in the preservation of democracy.

It is of course plausible to assume that the democratic legitimacy of strong constitutional entrenchment will at least in part depend on how strong entrenchments are established. Our two cases do not conflict with this assumption, but they suggest that it would be wrong to think about the relation between origins and legitimacy in too simple a way. The cases do not support the view, for instance, that it must always be illegitimate for strong



constitutional entrenchment to result from judicial activism. Such activism can become part of a constitutional dialogue, however tension-ridden, that leads to the common acceptance of some form of strong entrenchment. On the other hand, purported exercises of constituent power that strongly entrench some constitutional provisions may fail to do so legitimately if the constitution-making process is not properly inclusive and accommodating.

What seems to be more important than the precise way in which some constitutional provisions come to be strongly entrenched is the question whether entrenchment is the result of a unilateral imposition or of a compromise. The effect of strong constitutional entrenchment is to take some potentially controversial issue off the political table altogether, to prevent certain challenges to the existing constitutional system from being raised at all. The cases of Turkey and India suggest that such a strategy of de-politicization is unlikely to be legitimate (or, for that matter, successful) unless there is a broad social consensus that the issue in question should not be raised. The basic structure doctrine was unsuccessful in its first incarnation, which aimed to protect the rights of property of the propertied traditional elite against social reform in the face of overwhelming public approval for a policy of reform. It fared much better once it came to be focused on the common interest in the protection of the democratic process and the rule of law. The Turkish practice of strong entrenchment, by contrast, is characterized by attempts to enshrine not merely the form of a democratic constitution and of a state committed to the rule of law but a particular and contested substantive political identity that is resisted by significant parts of the population. These attempts, clearly, have not had the desired effect.

We conclude that strong constitutional entrenchment is more likely to be successful (and legitimate) if it is employed to protect the proper procedural functioning of the democratic process than if it is used to permanently enshrine specific material content. In the former case, strong constitutional entrenchment may have the effect of giving assurance that

the rules of the democratic game will be respected by temporary majorities and thus help to build trust in a constitutional compromise. If strong constitutional entrenchment is used to protect substantive, relatively specific, and contestable normative content that an elite or temporary majority wants to see insulated from future democratic change, it is likely to be perceived as an unjustified imposition and to be rejected by significant parts of a people.

One might reply to these suggestions that strong constitutional entrenchment will only be legitimate, then, in situations where it will tend to be unnecessary: Where there is a broad social consensus to observe the rules of the democratic game, it will not be necessary to protect those rules by strong constitutional entrenchment. Where there is no such consensus, on the other hand, strong constitutional entrenchment, it might be argued, must ultimately turn out to be futile. The case of India constitutes a clear counterexample to this assessment of strong constitutional entrenchment. A consensus on the rules of the democratic and constitutional game, in a relatively new democracy, will likely have to be worked out over time, and its implications may have to be clarified in the course of ongoing conflict that leads to eventual compromise. In India, this process would not likely have come to a successful conclusion if the Supreme Court had not raised the stakes by putting forward the view that some parts of the Indian Constitution cannot be amended at all. Turkey now faces a political situation that is, in some ways, comparable to India's under Indira Gandhi. It remains to be seen whether the practice of strong constitutional entrenchment may come to play a more democratically legitimate role in the constitutional future of the Republic of Turkey than it has played in its constitutional past, by being turned from a strategy of elite dominance into a strategy of resistance that may eventually lead to a stable constitutional compromise.

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