MAKALELER/*ARTICLES*

- Araştırma Makalesi -

[H] THE JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS - WITH FOCUS ON THE TURKISH CASE THROUGH THE LENS OF COMPARATIVE CONSTITUTIONAL LAW-[*]

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ABSTRACT

For the last two decades, there has been growing scholarly interest in the issue of judicial review of constitutional amendments and the limits of amending power. The case law provided by various jurisdictions, e.g. India, Germany, Colombia etc. has stimulated this interest. Accord-

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This article is drawn on my Phd thesis entitled Between Legality and Legitimacy: The Case of Judicial Review of Constitutional Amendments from a Comparative Law Perspective, (European University Institute, Florence/Italy, 2015). However, the arguments of the current article are significantly revised, re-organized, and updated. At the same time, the article also took into account the facts and case-law after 2015.

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ingly, the case law provided by these jurisdictions has been largely discussed by scholars. The Turkish example, however, has received less attention from the academic world even though it offers important data regarding the issue. In this paper, I analyse the Turkish example through the lens of comparative constitutional law. I mainly focus on the legality aspect of the issue of judicial review of constitutional amendments. In terms of legality, I present a general view on whether the judicial review of constitutional amendments can be considered legally possible and permissible. For the analysis of the legality aspect, I follow the footsteps of legal positivism—specifically Hart's concept of the rule of recognition.

Keywords: Basic Structure Doctrine, Constitutional Court of Turkey (CCT), The Headscarf Case, The Rule of Recognition, Unconstitutional Constitutional Amendments

ÖZ

Neredeyse çeyrek asırdan beri anayasa değişikliklerinin yargısal denetimi konusuna veya anayasayı değiştirme iktidarının sınırlarına yönelik yoğun bir akademik ilgi olduğu görülmektedir. Hindistan, Almanya, Kolombiya gibi çeşitli ülke mahkemeleri tarafından konuya dair verilen kararlar bu ilgiyi tetiklemektedir. Bu ülke mahkemelerinin verdiği kararlar, literatürde geniş ölçüde tartışılmıştır. Ancak bu akademik ilgi ne yazık ki Türkiye örneğine yeterli ölçüde yansımamıştır; oysa Türkiye örneği karşılaştırmalı anayasa hukuku için önemli bir veri sunmaktadır. Bu çalışmada, Türkiye örneğini karşılaştırmalı anayasa hukuku perspektifinden ele almaya çalışacağım. Konuya dair temel olarak hukukilik konusunu ele alacağım. Hukukilik meselesine ilişkin olarak, anayasa değişikliklerinin yargısal denetiminin hukuken mümkün ve izin verilir olup olmadığını tartışacağım. Hukukilik meselesinin analizine dair, özellikle Hart'ın tanıma kuralı çerçevesinde hukuki pozitivizmin izinden gideceğim.

Anahtar Kelimeler: *Temel Yapı Doktrini, Anayasa Mahkemesi, Başörtüsü Kararı, Tanıma Kuralı, Anayasaya Aykırı Anayasa Değişikliği*

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Introduction

As one scholar states, we are living in "an age of unconstitutional constitutional amendments."[1] The case law provided by various jurisdictions, e.g. India, Germany, Brazil, Colombia etc. has instigated this interest and accordingly has been largely addressed and considered in the literature. [2] Even though the Turkish case offers an important insight on the issue, it has, however, received less attention from the academic world. Therefore, my aim in this study is to contribute to this literature by presenting and discussing the Turkish case.

The history of judicial review of constitutional amendments in Turkey goes back to early 1970s.[3] The first decision, in which a substantive review of a constitutional amendment was not only realised but also that a constitutional amendment was struck down, was delivered by the Constitutional Court of Turkey (*hereinafter as* CCT) in the 1970s under

[1] Teresa Stanton Collett, "Judicial Independence and Accountability in an Age of Unconstitutional Constitutional Amendment," Loyala University of Chicago Law Journal 41, (2010): 327-349.

[2] For two recent books completely dedicated to the subject, see Yaniv Roznai, Unconstitutional Constitutional Amendments: The Limits of Amendment Powers (Oxford University Press, 2017); Sudhir Krishnaswamy, Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine (Oxford Universityt Press, 2009). For recent articles see Richard Albert, "Four Unconstitutional Constitutions and Their Democratic Foundations," Cornell International Law Journal 50, (2017): 169-198; Richard Albert, "The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada," Queen's Law Journal 41, (2016): 143-206; Gábor Halmai, "Judicial Review of Constitutional Amendments and New Constitutions in Comparative Perspective," Wake Forest Law Review 13, (2016): 101-135; Reijer Passchier and Maarten Stremler, "Unconstitutional Constitutional Amendments in European Union Law: Considering the Existence of Substantive Constraints on Treaty Revision," Cambridge Journal of International and Comparative Law 5, (2016): 337-362; Joel Colon-Rios, "The Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform," Osgoode Hall Law Journal 48, (2010): 199-245; Vincent J Samar, "Can a Constitutional Amendment Be Unconstitutional?" Oklahoma City University Law Review 33, (2008): 667-748; Gary Jeffrey Jacobsohn, "An Unconstitutional Constitution? A Comparative Perspective," International Journal of Constitutional Law 4, (2006): 460-487.

[3] The first decision in which the Constitutional Court of Turkey (hereinafter as CCT) annulled on procedural grounds a constitutional amendment was delivered in 1970. See AYM, E. 1970/1, K. 1970/31, Kt. 16/6/1970 and published in the Official Gazette on 16 June 1970.

the 1961 Constitution.[4] The 1961 Constitution was replaced by the 1982 Constitution, which is the product of the 1980 military coup d'état. Due to the CCT's substantial review of the constitutional amendments under the 1961 Constitution, the architects of the 1982 Constitution designed a specific provision, Article 148, to preclude the CCT from reviewing contents of constitutional amendments.[5] Article 148 stipulates that constitutional amendment can be challenged before the CCT only concerning whether they have met the procedural requirements. Reviewing the procedural requirements is also constrained to verification of whether, a) the requisite majorities were obtained for the proposal in the ballot; and b) the prohibition of debates under expedited procedure was observed.[6]

Although the substantive judicial review of constitutional amendments seemed to be prohibited by Article 148, the CCT has nevertheless reviewed the contents of a number of constitutional amendments and annulled them. Yet, the position of the CCT is not consistent, because the CCT have rejected to use this power in a number of other cases. Therefore, the way in which the CCT conducted this review, and also rejected its own precedents in other cases, constitutes the salient feature of the Turkish case, which I consider below.

Despite its long history, the Turkish case has not, however, gained enough attention in the comparative constitutional law literature. On the other hand, the existing literature on the Turkish case either only describes the case law[7] or they provide an analysis, but only from the legit-

[4] On the historical aspects of the issue see Kemal Gözler, Judicial Review of Constitutional Amendments: A Comparative Study (Bursa: Ekin Kitabevi, 2008), 40-47 (presenting the decisions of the CCT in which constitutional amendments were reviewed and annulled under the 1961 Constitution by the CCT). For another piece of work on the same subject see Ergun Özbudun, "Judicial Review of Constitutional Amendments in Turkey," European Public Law 15, (2009): 533, 536.

[5] In fact, the 1961 Constitutional was already amended in 1971 for the same reason—namely that the CCT should not have any competence to review the contents of amendments. This was a reaction to the decision of the CCT to annul a constitutional amendment in 1970. Özbudun, "Judicial Review," 537.

[6] For the English translation of the 1982 Constitution of Turkey which was used in this article see https://www.anayasa.gov.tr/en/legislation/turkish-constiution/.

[7] Only recently, a few articles have been published in order to fill this gap, see Gözler, Judicial Review; Özbudun, "Judicial Review," 533-538 ; İbrahim Ö. Kaboğlu, "Le Contrôle Juridictionnel des Amendements Constitutionnels en Turquie," Cahiers du

imacy point of view;[8] they overlook or ignore the legality matter. In this article, I shall provide an analysis on the legality aspect. In my view, the idiosyncrasies of the Turkish case can, however, be better grasped through the lens comparative constitutional law, because trying to analyse the issue only through the lens of domestic or national law perspective (i.e. what the law is in Turkey in this particular issue) has its limits - it does not provide much to understand the matter.

The paper is structured as follows: To begin with, I briefly introduce different interpretive strategies developed by various supreme and constitutional courts together with the scholarly views concerning the judicial review of constitutional amendments. This first part will pave the way for discussion concerning the legality aspect of the issue from the theoretical point of view. Next, I present the arguments and reasoning developed in the decisions by the CCT. In this part, I will describe the Turkish model of judicial review of constitutional amendments. What I mean in this study by the judicial review of constitutional amendments is the review of *contents* or *substances* of amendments. In this regard, the judicial review of forms or procedures of amendments causes no serious legal concern. Then, I examine the issue related to the Turkish case law, which takes me to my main question in this study: the legality of judicial review of constitutional amendments. To be more precise, I will address the following questions in this article: a) whether it is legally possible in a constitutional democracy for a constitutional (supreme) court to carry out a substantial review over constitutional amendments. If so, what kind of (legal) theory (or considerations) can account for the legality aspect of the issue? This question is analysed throughout the remainder of the paper. For the analysis, I follow the footsteps of legal positivism—specifically Hart's concept of the rule of recognition.

Conseil Constitutionnelle (Dossier:Contrôle de constitutionnalité des lois constitutionnelles) 27, (2009): 38-42 ; Levent Köker, "Turkey's Political-Constitutional Crisis: An Assessment of the Role of the Constitutional Court," Constellations 17, (2010): 328-344.

[8] Yaniv Roznai and Serkan Yolcu, "An Unconstitutional Constitutional Amendment-The Turkish Perspective: A Commnent on the Turkish Constitutional Court's Headscarf Decision," International Journal of Constitutional Law 10, (2012): 175-207.

Different Interpretive Strategies Developed by Various Courts on the Judicial Review of Constitutional Amendments

The following part presents different interpretative strategies developed by various Supreme and Constitutional Courts around the world to either to support the legality of substantial judicial review constitutional amendments or to reject such a review. The arguments of these Courts to be addressed in the following paragraphs shall be considered as a point of reference to compare and grasp the Turkish case more thoroughly. In this sense, the strategies of the Courts around the world can be divided into two main categories: They regard the judicial review of constitutional amendments either a matter of political question or accept it as justiciable matter.

a) Political Question Doctrine

i) The US Supreme Court

The US Supreme Court upholds the view that striking down a constitutional amendment is inconceivable in the US, because the issue itself is a political question rather than a legal or justiciable one. To put it in different terms, the power to amend the US Constitution is assumed to be (legally) limitless, except for the substantial limitation, and procedural ones, imposed by Article V. [9]

Political question doctrine implies that once adopted in accordance with the procedure, the substances of constitutional amendments cannot be legally challenged before the courts in the US. One of the prominent US scholars, Laurence Tribe's position concerning this issue makes the point clear: For him, the amending process cannot be subject to judicial review. Otherwise, such a review would be logically (as well as politically) detrimental to the entire constitutional structure. In his words, "these criteria of amendment appropriateness surely must not be elabo-

[9] Article V of the US Constitution reads: "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress."

rated or enforced by courts - not because they fail to sound in principle as opposed to mere policy or prudence, and not because courts are less adept than Congress at detecting the "consensus" that some observers believe an amendment should reflect, but because allowing the judiciary to pass on the merits of constitutional amendments would unequivocally subordinate the amendment process to the legal system it is intended to override and would thus gravely threaten the integrity of the entire structure. Such criteria must therefore be applied by Congress (or by a constitutional convention)... The merit of a suggested constitutional amendment is thus a true 'political question.'" [10]

The political question doctrine has been endorsed by various judgments of the US Supreme Court.[11] In this connection, Bruce Ackerman asserts that "… it would be absolutely right for the German Constitutional Court to issue an opinion, *absurd in the American context*, striking down an amendment…" (emphasis added).[12] Indeed, it is a general assumption that constitutional amendment is the ultimate tool to overturn an annulment by courts of a legislative act, or courts' unpleasant judicial interpretations of statutes and the Constitution. Samuel Freeman, who is a supporter of judicial review *qua* institution, states this very clearly: "[t]he [Supreme] Court's revocation of popularly enacted measures can be overridden only by *constitutional amendment*…" (emphasis added).[13] In a similar vein, the reason why judicial review is acceptable for the US scholars is the fact that it is possible to amend the constitution[14] and "[t]he *only* explicit constitutional limitation on the

[10] Laurence H. Tribe, "A Constitution We Are Amending: In Defense of a Restrained Judicial Role " Harvard Law Review 97, no. 2 (1983): 442-443.

[11] For these cases see Tara Leigh Grove, "The Lost History of The Political Question Doctrine", New York University Law Review, 90 (2015): 1932 particularly see footnotes 125 and 126.

[12] Bruce. A. Ackerman, We the People: Foundations Vol. I (Harvard University Press, 1991), 15. Also see Robert Post, "Democracy, Popular Sovereignty, and Judicial Review," California Law Review 86, (1998): 430-431.

[13] Samuel Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review," Law and Philosophy 9, (1990-1991): 334. It seems that Freeman also takes it for granted that constitutional amendment is the ultimate tool to overcome the so-called democratic-deficit claimed to be created by the existence of the institution of judicial review.

[14] John R. Vile, "Limitations on the Constitutional Amending Process," Constitutional Commentary 2, (1985): 382. For a similar view see Kent Greenawalt, "The Rule of

substance of amendments is the requirement of equal Senate representation in Article V." [15]

ii) The French Conseil Constitutionnel

A similar attitude is observed in the rulings of the Conseil Constitutionnel (*hereinafter as* CC), i.e. it is seen that there is no doubt or uncertainty concerning the French Parliament's power to amend the Constitution, nor is there any doubt concerning the CC's competences. To make the point clearer, let me give some details of one of the cases ruled by the CC.

In 2003, the French Parliament amended the Constitution, the main aim of which was to insert the principle of decentralisation into the Constitution. The said amendment contained, among others, a provision, which was added to Article 1 of the Constitution: *The organization of the state is decentralised*. This proposition, together with others, was challenged before the CC on the grounds that it was contrary to the republican form of the French State as determined in Article 1.[16] Since the republican form of the French State cannot be the object of an amendment as set out by Article 89/5, [17] the attempt to add the said decentralisation principle was claimed to be unconstitutional.

In its decision, the CC found itself to have *no competence* to decide on the matter. It confines its competence to the strict textual reading of the Constitution; more precisely, Article 61, which specifies what kind of legislation the CC can review.[18] The CC held that Article 61

Recognition and the U.S. Constitution," in Matthew. D. Adler and Kenneth Einar Himma (eds.), The Rule of Recognition and the U.S.Constitution (Oxford University Press 2009), 31.

[15] John R. Vile, "Judicial Review of the Amending Process: The Dellinger-Tribe Debate," Journal of Law & Politics 3, (1986-87): 24-25.

[16] The relevant part of Art. 1 of the French Constitution reads: France shall be an indivisible, secular, democratic and social Republic… The English translation of the French Constitution is available at https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct2009.pdf

[17] On Amendments to The Constitution- Article 89/5:……. The republican form of government shall not be the object of any amendment.

[18] One scholar said the Conseil Constitutionnel preferred a restrictive interpretation of Article 61, read together with article 89/5. Willy Zimmer, "Jurisprudence Du Conseil

does not count constitutional amendments among the pieces of legislation that can be reviewed by it, nor does it allow any other provision of the Constitution to rule on the constitutionality of amendments.[19]

This decision of the CC has been welcomed as well as criticised by scholars. It will suffice to refer to the basic arguments of two scholars on the debate.[20] The first scholar finds the decision to be, politically as well as legally, sensible – if decided otherwise, it would be contrary to *democracy* and the principle of rule of law and thus it would be disappointing.[21] Contrary to this, an opponent to the decision argues that: "…it is quite improper to limit this guarantee [of Article 89/5] to a prohibition of return to a monarchical government."[22] He maintains to this effect that the Constitution contains various values, which are subject to be ranked. And the republican form of the French state is among the higher values of the French Constitution. Therefore, judicial review must be possible to see if an amendment attempts to undermine this value or not. Based on this ruling, although it is mostly a literal interpretation of the French Constitutional, it *may* be considered that a similar position to the political question approach has been adopted by the CC.

b) The Justiciable Matter Doctrine

i) The Bundesverfassungsgericht: Assuming the Competence in Itself

The Bundesverfassungsgericht (the Federal Constitutional Court of Germany- *hereinafter as* BVerG) has assumed in itself the power to review the contents of constitutional amendments in various cases. The existence of the eternal clause in the German Basic Law, namely Article

Constitutionnel- 1er Janvier- 31 Mars 2003," Revue Française de Droit Constitutionnel 54, (2003): 383.

[19] Décision n° 2003-469 of 26 March 2003 (For the decision consult the Conseil Constitutionnel webpage at https://www.conseil-constitutionnel.fr/decision/2003/2003469DC.htm).

[20] For the views of other scholars see Olivier Gohin, "La Réforme Constitutionnelle de la Décentralisation : Épilogue et Retour à la Décision du Conseil Constitutionnel du 26 Mars 2003" Petites Affiches, no. 113 (2003).

[21] Marthe Fatin-Rouge Stéfanini, "Jurisprudence Du Conseil Constitutionnel- 1er Janvier- 31 Mars 2003" Revue française de droit constitutionnel 54 (2003): 375, 379.

[22] Zimmer, "Jurisprudence Du Conseil Constitutionnel- 1er Janvier- 31 Mars 2003", 385. For another supporter of this line of argument see Pfersmann, "Unconstitutional Constitutional Amendments: A Normativist Approach", 107-108.

79/3,[23] can be construed in a way that a possible textual source of the competence of the BVerG concerning the judicial review of constitutional amendments is found in the Basic Law. However, the exploitation of this power was, initially, built not upon the text of the Basic Law itself, but on a theory of (quasi-) natural law. The first decision of the BVerG – even though no constitutional amendment was involved – was the *Southwest* case. The decision of the BVerG in this case made it theoretically possible that a provision of the Basic Law or an amendment could be held unconstitutional.[24] According to this decision, there are supra-positive laws. Or to put it more precisely, the textual reference to inalienable basic rights in the Basic Law (Art. 1/2) is interpreted by the Court very broadly.

Following this reasoning, the BVerG ended up with the review of constitutional amendments as of the 1970s. In this respect, the first case to be mentioned was the so-called *Klass Case*.[25] This time, however, the argument invoked for the claim of unconstitutionality of constitutional amendments did not stem from (a quasi-) natural-law theory, but, mainly, Article 1 and Article 20 by the reference of the eternal clause (Art. 79/3). The legal question in the *Klass Case* was whether the Seventeenth Amendment inserted, *inter alia*, a new paragraph into Article 10 and the Act of 13 August 1968 on Restrictions on the Secrecy of the Mail, Post and Telecommunications were constitutional or not. The BVerG considered two issues in this case. The first was whether the first part of the said amendment, that is, not disclosing to a suspect the fact that he is under surveillance, is compatible with human dignity (Art. 1). And the sec-

[23] [Amendment of the Basic Law]- Article 79/3: Amendments to this Basic Law affecting the division of the Federation into Länder, their participation in principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible. The English translation of the German Constitution is available at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0415.

[24] Arthur T. von Mehren, "Constitutionalism in Germany- The First Decision of the New Constitutional Court," American Journal of Comperative Law 1, (1952): 70-94.

[25] 30 BVerfGE 1 (1970). Extracts from the decision can be found in Walter F. Murphy and Joseph Tanenhaus, Comparative Constitutional Law: Cases and Commentaries, (Palgrave, 1977): 659-666. This case was later referred to the European Court of Human Rights (Case of Klass and Others v. Germany, (Application no. 5029/71, 6 September 1978)), which is why it is called Klass Case. The ECtHR in its decision held that there was no breach of the Convention.

ond issue was whether preventing citizens from recourse to the courts (and providing instead an administrative control) can be regarded as compatible with the principle of rule of law in light of the indirect reference of Article 79 (3) to that principle. With regard to the second issue, the BVerG held that Article 79 (3) does not clearly give reference to the principle of rule of law and it concluded that that principle was not unamendable, but that only certain elements might be so. Several other cases followed this judgment, the last of which was *the Case of Acoustic Surveillance of Homes* of March 3, 2004.[26]

It is observed in *the Case of Acoustic Surveillance of Homes* that the BVerG, when interpreting the unamendable constitutional provisions, developed a doctrine that seems to call for a restrictive interpretation of Article 79 (3) and Articles 1 and 20. Even though the majority held that the constitutional amendment fell within this constraint, thus it was not unconstitutional;[27] the Court also tends to interpret restrictively the scope of the amendment; especially when the constitutional amendments impose restrictions on any basic rights protected by the Basic Law. The BVerG tries to interpret amendments in a way in which the essence of the constitutional protection of human dignity would not be violated. Namely, the BVerG realises *Verfassungskonforme Auslegung*, that is, constitution-conforming (constitution-compatible) interpretation.[28] However, we can go one step further in this determination by saying that so long as the basic rights are not gravely or unbearably[29] affected by a constitutional amendment, the BVerG seems to accept the power of parliament to amend the constitution. On the opposite scenario, it is quite possible that it may strike down an amendment.

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[26] 1 BvR 2378/98, 1 BvR 1084/99.

[27] Two judges (Jaeger and Hohmann-Dennhardt), even though they agreed with the ruling of the Court declaring certain provisions of the Law of Criminal Procedure unconstitutional, did not agree with the ruling that Article 13 (3) was not unconstitutional. They held that Article 13 (3) itself was unconstitutional, as it contravenes human dignity. 1 BvR 2378/98, parag. 355.

[28] According to the constitution-compatible-interpretation, a law would not be in contradiction to the Basic Law, if it can be interpreted in conformity with it. If, among other possible alternatives, the law cannot be interpreted in conformity with the Constitution, then it would be (declared) unconstitutional.

[29] See Robert Alexy, The Argument from Injustice: A Reply to Legal Positivism trans. B. L. Paulson and S. L. Paulson (Oxford: Oxford University Press, 2002).

ii) The Supreme Court of India: Basic Structure Doctrine

The Supreme Court of India (*hereinafter as* SCI) has, as of *Kesavananda Bharati v. State of Kerala*,[30] been employing the basic structure doctrine to review the contents of constitutional amendments and annul them. In its long and somewhat tedious decision, the Supreme Court judges sometimes struggled in constructing and justifying their ruling. In fact, it was one of the reasons why the decision was held by a bare majority of seven to six. The result of the decision was that the Court did not invalidate the Amendment under consideration, except for one of the provisions of the Twenty-Fifth Amendment, which (second sentence of Article 31C) was found to be unconstitutional by the majority. The majority relied on a number of arguments while declaring unconstitutional the said provision. What follows is the illustration of the Court's main arguments and reasoning.

The Chief Justice Sikri considered that the SCI had to decide on the scope of amending power conferred on Parliament by Article 368. As a result of the examination, the SCI reached the conclusion that Parliament has power to amend the constitution. This meant the overruling of the decision delivered in the *Golaknath* case. The consequence is that "every provision is prima facie amendable…"[31] under the amending power. Furthermore, the SCI held that the amending power can be exercised by Parliament, even upon Part III (fundamental rights)[32] by way of "reasonable abridgements of fundamental rights."[33] However, any amendment to be made Part III could not destroy fundamental rights.

According to the SCI, the prima facie character of the amending power is subject to a restriction, that is, the power to amend the constitution is limited to the extent that it affects *the basic structure* of the constitution. When this power reaches the limit of the basic structure, it would be *ultra vires*. Accordingly, Parliament does not have power to destroy the Constitution as opposed to the claim raised by the Advocate General in the petition submitted in the *Kesavananda* case that Parliament can even "abrogate fundamental rights such as freedom of speech

[30] AIR 1973 SC 146.

[31] Kesavananda Bharati v. State of Kerala, parag. 77.

[32] Yet, the Chief Justice Sikri noted that the rights specifically granted to minorities in Part III cannot be abrogated. Ibid., parag. 193.

[33] Ibid. parag. 311

and expression, freedom to form associations and unions, and freedom or religion… that democracy can even be replaced and one-party rule established."[34]

In constructing and justifying the basic structure doctrine, the Chief Justice Sikri moved from the literal interpretation of the term 'power to amend', 'amend' or 'amendment – for which he documented all usages of the terms as seen in the Constitution to show in what sense the terms are used-[35] to a structural interpretation of the Constitution.[36] He then made an extensive reference to comparative law and cases from the commonwealth countries, such as Canada, Australia, and Ceylon (Sri Lanka) with a view to finding implied limitation concerning amending power in those countries' constitutional law and case law.[37] He finally held that the term 'amendment' as used in Article 368 of the Constitution of India has a limited meaning, in that implied limitation upon amending power can be imposed.[38]

Justice Sikri then moved from this determination to the basic structure doctrine, which was taken as the basis for the implied limitation to be imposed upon the amending power of Parliament in India. To put it differently, the argument of implied limitation was accompanied by the structural interpretation. He ruled that the Constitution of India is based on a certain structure and in order to find the implied limitation, this structure should be discovered and explored. The structure of the Constitution was said to be inferred from the Preamble, which reflected the fundamental features on which the Constitution was built. Each Justice constituting the majority believed that the basic structure of the Constitution is crystallised in the Preamble. However, they formulated the elements of the basic structure slightly differently.[39]

As it was noted above, the determination of Justice Sikri does not suggest that fundamental rights cannot be amended; quite the opposite that fundamental rights can be amended, they can even be abridged *rea-*

[34] Ibid, parag. 10, see also parag. 309.

[35] Sathe, "India: From Positivism to Structuralism" See in the judgment of the Supreme Court Kesavananda Bharati v. State of Kerala, parag. 64- 88.

[36] Kesavananda Bharati v. State of Kerala, parag. 92.

[37] Ibid. see particularly parag. 227-273.

[38] Ibid. see particularly parag. 307-308.

[39] Shelat and Grover, parag. 511, 517; Hedge and Mukherja, parag. 681, 700; Jaganmohan, parag. 1198; Khanna, parag. 1526 of Kesavananda Bharati v. State of Kerala case.

sonably for public interest, but *they cannot be destroyed*.[40] In this connection, he counted six features as the fundamental features or the basic structure of the Constitution of India. These are: "(1) Supremacy of the Constitution; (2) Republican and Democratic form of Government; (3) Secular Character of the Constitution; (4) Separation of powers between the Legislature, the executive and the judiciary; (5) Federal character of the Constitution; [and] [6] the dignity and freedom of the individual."[41] The last point needs to be highlighted and drawn attention to in Sikri's argument. According to this point, the fundamental rights are part of the basic structure of the Constitution; therefore, destruction of the fundamental rights would not be accepted under the Constitution, more precisely under Article 368 as it was interpreted in a structural manner by the Court.

As it is pointed out above, the precise target of the majority Justice in *Kesavananda Bharati* was Article 31C as inserted by the Twenty-Fifth Amendment. Concerning the second sentence of Article 31, the majority (the Chief Justice Sikri with six other judges – Shelat, Grover, Hegde, Mukherjea, Reddy Jaganmohan, Khanna) argued that "the sky is the limit because it leaves each State to adopt measures towards securing the principles specified in Clauses (b) and (c) of Article 39."[42] If this proviso was allowed, then nothing could preclude state legislatures from merely inserting into any act the wording that 'this act is to give effect to directive principles of state as specified in clauses (b) and (c) of Article 39.'

According to the majority of Justices, the relevant second sentence of Article 31C (as inserted by the Twenty-Fifth Amendment) would enable each state legislature to amend *indirectly* the Constitution, as they see fit.[43] Any law to be adopted in this manner, namely declaring that 'this law is adopted to give effect to 'Directive Principles of State Policy' would not be able to be called into question as envisioned by Article

[40] This aspect of the case was aptly noted by K. Subba Rao (Ex-Chied Justice of the Supreme Court of India) in K. Subba Rao, "The Two Judgments: Golaknath and Kesavananda Bharati" (1973) 2 SCC (Jour) 1 (1973), can be found at http://www.ebc-india.com/lawyer/articles/73v2a1.htm#NOTE.

[41] Kesavananda Bharati v. State of Kerala, particularly see parag. 316-317.

[42] Ibid. parag. 459.

[43] Ibid. parag. 462.

31C. In this sense, if a law abrogates or takes away fundamental rights, there would be no legal protection. This would be, however, contrary to what the Constitution intended to do under its basic structure. According to the majority of the Justices, the result of this determination would make meaningless the protection of fundamental rights as laid down in Part III and mainly in articles 14, 19, and 31. In other words, as the Court put it, "(1) There is no equality… (2) There need not be any freedom of speech, (3) There need be no personal liberty which is covered by Article 19 (1) (b), and (4) The property will be at mercy of the State. In other words, confiscation of property of an individual would be permissible."[44] This would amount to the amendment of the Constitution *indirectly*, which is not permissible under Article 368. According to the majority, even though legislative power can be delegated,[45] amending power cannot under Article 368.[46] So, Article 31C was declared void. To conclude, the SCI held that Parliament can amend the constitution so long as it is within the basic structure of the Constitution.

iii) The Colombian Constitutional Court: The Replacement Doctrine

The Colombian Constitutional Court (*hereinafter as* CCC) developed the *replacement doctrine* to review contents of amendments and to invalidate them as of 2003. The doctrine suggests "the power to amend the constitution does not imply the power to replace it, but only to modify it." [47] In one of the case in which the CCC annulled an amendment "seking to allow the incumbent [president] to run for a third term"[48] in the presidential elections. The CCC found the said article to amount to a destruction of the implicit features of the Colombian Constitution, or in

[44] Kesavananda Bharati v. State of Kerala, parag. 461.

[45] Ibid. parag. 462.

[46] Ibid. parag. 466.

[47] Carlos Bernal, "Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine," International Journal of Constitutional Law 11, Issue 2, (2013): 340.

[48] Vicente F.Venítez-Rojas, "Beyond Invalidation: Unorthodox Forms of Judicial Review of Constitutional Amendments and Constitution-amending Case Law in Colombia", Revista de Investigações Constitucionais, Curitiba, Vol. 9, n. 2, 281 (illuminating the case law of the CCC concerning judicial review of constitutional amendments).

other worlds it seeks for a replacement of the constitution. And , if the content of an amendment mean or aim not a simple change in the Constitution, but its replacement with something totally new to the Constitution, that amendment can be declared unconstitutional. Although the Colombian Constitutions sets down (Art. 241 and 379) that the CCC competence to review constitutional amendments is restricted with the control of the procedural elements, it has nevertheless held this important and controversial power in itself. [49] Even more so, as one Colombian scholar put it, in that the CCC position vis-à-vis the judicial review of constitutional amendments is found "more assertive" or "nontraditional" in the following four ways: "[The CCC] (i) has determined that Congress is obliged to *introduce* an amendment with the content the CCC has previously indicated; (ii) has *established authoritative interpretations* of certain amendments; (iii) has *rewritten* constitutional rules and defined what the text of an amendment should look like; and (iv) has ordered Congress to *promulgate* an amendment bill the legislature had already shelved." [50]

Based on the CCC's rulings, Carlos Bernal, who later became Justice in the CCC, relies on two arguments to justify this doctrine: the first one is conceptual, while the second is normative. According to Bernal's conceptual argument, the constitution has a specific conceptual meaning, which he seems to build, again, on the history of constitutionalism. In his view, the constitution, as of the French Revolution, implies certain features and characteristics, without which an entity called a constitution, cannot be so called. Thus, he determines three essential features or principles that a constitution must contain: 1) the protection of fundamental rights and freedoms; 2) the principle of separation of powers; and 3) the rule of law.

Building on this argument, Bernal argues that any constitutional amendments in Colombian jurisdiction trying to undermine or derogate

[49] For a historical account of the Colombian case concerning judicial review of constitutional amendments see Mario Alberto Cajas-Sarria, "Judicial Review of Constitutional Amendments in Colombia: A Political and Historical Perspective, 1955–2016" The Theory and Practice of Legislation, (2017): 1-31 (explaining the historical and political background of what made the CCC to review the contents of constitutional amendments by way developing the replacement doctrines).

[50] Vicente F.Venítez-Rojas, "Beyond Invalidation", 270.

these three features can be held unconstitutional by the CCC because it would mean replacing the Constitution, which is, however, not allowed. Then, the exploitation of such an important power by the CCC is justified, in Bernal's view, on this basis, even if such a power cannot be regarded as in conformity with the basic tenet of democracy, that is, the basis of legitimacy in democracy relies on representation. As the conceptual argument is not persuasive enough to overcome the counter-majoritarian difficulty, he introduces a normative argument to overcome this weakness. He claims that constitutionalism, not only in Colombia but also all around the world, evolves to strengthen the deliberative democracy; thus, any amendment undermining or curbing deliberative democracy can be held unconstitutional by the CCC by relying on the replacement theory. Furthermore, the Colombian style of presidentialism – which he calls hyper-presidentialism, and which leads to the concentration of power in a very small circle or in one hand – supports and justifies the very idea that some constitutional amendments can be declared unconstitutional by the CCC when the hyper-presidentialism exceeds the limits of core values of constitutionalism or when it undermines them.[51]

The Constitutional Court of Turkey: A Pendulum between justiciable matter and political question doctrines

The CCT's position vis-à-vis the issue can be better described as the following way. The CCT seems to hang on a pendulum string: on the one end of the string there is the political question doctrine while on the

[51] Carlos Bernal, "Unconstitutional Constitutional Amendments in the Case Study of Colombia…, 350 ff. John Rawls raised a similar argument, yet from a different perspective. He touches upon and discusses, albeit hypothetically, the issue of unconstitutionality of amendments in one of his masterpieces Political Liberalism. Rawls poses the following hypothetical question: What would happen if there were an amendment repealing the First Amendment? His answer is that such an amendment cannot be allowed, John Rawls, Political Liberalism, (expanded ed.), (Columbia University Press, 2005), 238-239. Bruce Ackerman, another US scholar, argues that a constitutional amendment, which reads "Christianity is established as the state religion of the American people, and the public worship of other gods is hereby forbidden" might be very well accepted by the US Supreme Court, even by himself, if he were sitting as a Judge in the US Supreme Court Bruce Ackerman, We the People, 14.

other the justiciable matter. The case law of the CCT will make this point clearer.

The first case that dealt with the judicial review of constitutional amendment under the 1982 Constitution was related to the abrogation of Provisional Article 4. As a product of the 1980 coup d'état, the 1982 Constitution contained, expectedly, some undemocratic provisions. One of these provisions, Provisional Article 4, imposed bans on some political leaders and political parties to pursue political activities for a period of five to ten years-long. By abrogating Provisional Article 4 by an amendment, the political bans on persons and political parties would be eliminated; thus, the Constitution would be liberalised, at least to some degree. So the amendment was made to the Constitution. The odd point with this Amendment was that it required an obligatory referendum in order for it to become valid and effective. However, the Amendment Clause as it stood then (Article 175) did not set out or require an obligatory referendum for amendments to become effective.[52] The Amendment Clause at the time stipulated that an amendment passed through the Grand National Assembly of Turkey (Parliament) should either be signed into law by the President of the Republic or vetoed by him and sent back to the Parliament to be debated once again. If the Parliament accepted the same amendment in the second round without any change, the President could sign the bill into law or send it to be decided by (optional) referendum. This was the only referendum requirement in the Amendment Clause at that time. For this reason, the Amendment abrogating Provisional Article 4 was challenged before the CCT on the basis that by having called for an obligatory referendum, the Amendment did not satisfy the procedural requirement set out in the Amendment Clause. The CCT did not take this argument seriously and rejected the application. The CCT held that once an amendment satisfied the procedural requirements, and according to the Court this was the case with the

[52] The Amendment Clause (Article 175) was amended by the same 1987 Amendment, which changed the requirement of qualified majority votes and introduced the obligatory as well as optional referendum requirements. According to the Amendment Clause of the Constitution (Article 175) today, if a constitutional amendment is adopted by at least two-thirds (400 of 600) of the MPs, it is not obligatory to submit that amendment to a referendum, while the referendum is obligatory if the Bill gains the support of less than two-thirds of MPs.

Amendment in question, reviewing its content would not be within the CCT's competence.[53]

In the second case in 2007,[54] the CCT had to handle the challenge of the constitutionality of an amendment that changed the way the President of the Republic of Turkey would be elected. According to that Amendment, the President is envisaged to be elected by popular votes based on universal suffrage. This altered the previous method of electing the President, which was a-four-round election by a qualified majority of the Parliament. The Amendment, which resulted from the crisis of election of the eleventh President,[55] required a referendum for it to become valid. However, before the referendum took place, the then President and the main opposition party, the Republican People's Party, brought a case before the CCT on the grounds that the Amendment was not adopted in accordance with the procedure laid down in Article 175. The CCT examined the amendment and deliberation process to find out whether the required procedures (the qualified majority and the two debates requirements) were followed and observed. The CCT declared that the Amendment was properly passed through the Parliament; thus, it was constitutional. The CCT checked only the procedural requirements—not the substance of the Amendment.

The third case[56] was related to the second one mentioned above. The Amendment of 2007, which changed (and repealed the four-round-election by the qualified majority of the Parliament) how the president would be elected, and which would be, as mentioned above, submitted to referendum to become effective. However, according to Article 6 of the Amendment, it was explicitly stipulated that the *eleventh* President should be elected using the new method, i.e. by election based on popular votes. Before the said referendum, the Parliament repealed Article 6, because the new parliamentary composition following the parliamentary

[53] AYM, E. 1987/9, K. 1987/15, Kt. 18/6/1987 and published in the Official Gazette on 4 September 1987.

[54] AYM, E. 2007/72, K. 2007/68, Kt. 5.7.2007 and published in the Official Gazette on 7 August 2007.

[55] On the constitutional crisis of 2007 in Turkey see Köker, "Turkey's Political-Constitutional Crisis," 332-33.

[56] AYM, E. 2007/99, K. 2007/86, Kt. 27.11.2007 and published in the Official Gazette on 27 November 2007.

election of July 22, 2007 made it possible to elect the *eleventh* President through the four-round-election by the qualified majority of the Parliament. Thus, if Article 6, concerning the election of the eleventh President, had been submitted to referendum, and if the electorates had approved that provision, there would have been a legal uncertainty concerning the legal status of the already-elected eleventh President. Again, the (tenth) President and the Republican People's Party applied to the CCT for the abolition of the provision, which repealed Article 6 of the 2007 Amendment. This time, the grounds for the claim of unconstitutionality of the amendment was that the Parliament had no power to rescind a constitutional amendment that would be submitted to referendum. In its decision, the CCT once again confined itself to solely reviewing the procedural requirements and in the end held that the said amendment was duly adopted by the Parliament; thus it was constitutional.

When the matter came to the fourth, so-called Headscarf Case in 2008,[57] the CCT suddenly changed its position in the opposite direction by finding itself competent to review the substance of the so-called Headscarf Amendment. With the Headscarf Case, the CCT overturned its precedents developed and maintained by the three previous cases summarised above. The Headscarf Amendment was very short;[58] it contained only two substantial articles. The first Article of the Amendment contained the following emphasised proposition in the fourth paragraph of Article 10 (equality before the law), which reads: "State organs and administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings *and in utilization of all forms of public services."* The second Article was intended to be an insertion into Article 42 (the Right and Duty of Education) and was formulated as follows: *No one should be deprived of the right to higher education due to any reason not explicitly written in the law. Limitations on the exercise of this right shall be determined by the law.*

[57] AYM, E. 2008/16, K. 2008/116, Kt. 5.6.2008 and published in the Official Gazette on 22 October 2008.

[58] For more details on the background of the case see Roznai and Yolcu, "An Unconstitutional Constitutional Amendment," and Ali Acar, "Tension in the Turkish Constitutional Democracy-Legal Theory, Constitutional Review and Democracy," Ankara Law Review 6, no. 2, (2012): 141-173.

The CCT struck down these two provisions by getting rid of the literal reading of Article 148. The CCT did so even though the very wording of the Amendment Act was questionable in terms of whether it could serve the aim it intended to achieve. There was nothing in the provisions of the Amendment to infer that it allowed wearing headscarves. Only the intention of the Parliament, as reflected on the *travaux préparatoires*,[59] made it explicit that the aim of the Amendment was to allow students to wear headscarves.

The CCT based its decision on the argument that the proposed amendments would undermine the principle of laicité enshrined in Article 2 of the 1982 Constitution, which reads:

(*Characteristics of the Republic):* The Republic of Turkey is a democratic, laïque and social state governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the Preamble.

The principle of laicité is an unamendable constitutional principle as specified by Article 4 of the 1982 Constitution, which reads:

The provision of Article 1 regarding the form of the State being a Republic, the characteristics of the Republic in Article 2, and the provisions of Article 3 shall not be amended, *nor shall their amendment be proposed* (emphasis added).

The CCT tried to give reasoning for its decision by constructing the following argument: Since Article 4 stipulates that there shall be no *proposal to amend* the first three articles of the Constitution; it would be possible to find out whether the Parliament had adopted an amendment that is allowed by the Constitution, i.e. by Article 4. Accordingly, any proposal in that line would enable the CCT to review such an amendment. In other words, what is stipulated in Article 4, the CCT argued, constitutes a requirement of *form* that constitutional amendments shall meet.[60] In short, according to the CCT, the review it conducted was formal rather than substantive.

[59] See Justification for the Constitutional Amendment Act at <http://www2.tbmm.gov.tr/d23/2/2-0141.pdf>, visited on 15 February 2020.

[60] For a larger context of the Headscarf Case and an assessment of it see Roznai and Yolcu, "An Unconstitutional Constitutional Amendment."

The assertion that the CCT has the competence to review substances of constitutional amendments was reiterated in the 2010 Amendment Case.[61] In the 2010 Amendment Case, the constitutionality of some of the provisions of the 2010 Amendment were claimed to be unconstitutional as they did not conform to the unamendable rules of the Constitution. The Amendment of 2010 had a wide scope—it changed and affected many articles of the 1982 Constitution. The Amendment was submitted to a referendum and was approved by 58% of the electorate. However, before the referendum took place, the CCT declared some of the provisions of the Amendment unconstitutional.

The provisions found unconstitutional by the CCT concerned two issues. The first was the composition of the HSYK (*hereinafter as* HSYK) and the election procedures of some of its members. Similar to the first issue, the second one was related the election procedure of some of the members of the CCT itself. As they are similar, reviewing the arguments concerning the first one will also illuminate the second. The Amendment aimed, among other things, to change the composition of the High Council of Judges and Prosecutors. Pursuant to the 2010 Amendment, the President of the Republic would appoint four members of the HSYK among academics from the fields of law, economics, and political science, and senior public officials and attorneys. The CCT declared that members of the HSYK could not be appointed among academics in the field of *economics, political science* or *senior public officials*. The CCT's rationale was that the HSYK has to function under the principle of independence and impartiality of the judiciary—a requirement of the rule of law. For the CCT, the existence of senior public officials and academics from the fields of economics and political sciences in the HSYK would jeopardise, and thus be incompatible with, the rule of law. And since the rule of law is among the unamendable constitutional provisions (Article 2), the Amendment in question was unacceptable. Thus, the CCT declared these two provisions unconstitutional. The CCT repeated its argument developed in the Headscarf Case: what is stipulated in Article 4 is a requirement of *form* that constitutional amendments shall meet.

[61] AYM, E. 2010/49, K. 2010/87, Kt. 7.7.2010 and published in the Official Gazette on 30 December 2010.

The CCT further declared unconstitutional the election *method* of some members of the HSYK and the CCT. The relevant provisions of the Amendment regarding this point stipulated that the general assemblies of the Court of Cassation, the Conseil d'État, the Military Court of Cassation, the Court of Accounts, the Justice Academy, the Higher Education Council, and the Head of Bar Associations should either directly elect as members or should designate as candidates to the President, who should then appoint one of the candidates to the HSYK and the CCT respectively. The Amendment further stipulated that in these elections, each member of the general assemblies of high courts and institutions could cast *only one vote* for candidates. The CCT found this election method unconstitutional because one candidate might sweep all the votes cast, which would not be a true democratic reflection of the electoral choices of those electorates. Given the democratic nature of the Republic is among the unamendable constitutional norms, the amendment was unacceptable.

The Headscarf and 2010 Amendment Decisions brought about serious criticisms regarding the CCT's legitimacy. The Headscarf Decision led to the change of composition of the CCT introduced by the 2010 Amendment, some parts of which had been annulled by the CCT, as presented above.

With the new composition of the CCT following the 2010 Amendment, it now seems that the CCT has once again reversed its position concerning the judicial review of constitutional amendments in a sixth, the so-called Immunity Case, the detail of which is as follows. On May 20, 2016 the Parliament passed an Amendment which contained one substantive article only. The Amendment lifted the parliamentary immunity of lawmakers (Immunity Amendment), but deprived only some lawmakers of their parliamentary immunities, and it did so only temporarily, i.e. for *one time only*, because the Amendment was provisional or *ad hoc*. This meant that if there was any occasion in the future, after the date the Amendment entered into force, that a deputy was alleged to commit a crime, s/he would have immunity. Lifting it would be subject to the regular procedure set out in the Constitution and the Rules

of Procedure of the Parliament. As the Venice Commission aptly described it, the Amendment in question was a "one-shot exception." [62]

In the Immunity Case, seventy MPs lodged their applications requesting the annulment of the Immunity Amendment. The Court rejected the application mainly on the grounds that the application did not satisfy a procedural requirement. More importantly, however, the CCT held as *obiter dictum* that "*[a]n amendment adopted through this procedure cannot be at all the subject of judicial review in terms of its content;* the procedural review is possible only within the framework specified by Article 148 (emphasis added)."[63]

Although it is an *obiter dictum*, it gives the impression that the new composition of the CCT will, most probably, not conduct a substantive judicial review of constitutional amendments in the near future. However, this statement holds only conditionally, meaning that it holds only if the current government remains in power and if the composition of the CCT determined by this government continues. In the case of a change in power, the CCT may still invoke its doctrine and practice of declaring amendments unconstitutional, when an amendment is found to be politically sensitive and thus, unacceptable by the CCT.[64]

Questions Arising from the Courts' Case-law

The case law of those Courts, in which some constitutional amendments have been annulled, has given rise to a number of legal and political controversies and challenges. Even though the issue in question

[62] European Council for Democracy through Law (Venice Commission), Turkey: Opinion on the Suspension of the Second Paragraph of Article 83 of the Constitution (Parliamentary Inviolability), CDL-AD (2016) 027, Opinion No. 858 / 2016, 14 October 2016).

[63] AYM, E. 2016/54, K. 2016/117, Kt. 3.6.2016 and published in the Official Gazette on 3 June 2016. On the Immunity Case see Richard Albert, Constitutional Amendments: Making, Breaking, and Changing Constitutions (Oxford University Press, 2019), 27-29; see also Richard Albert, "Constitutional Amendment and Dismemberment," The Yale Journal of International Law 43, no. 1, (2018): 27-28.

[64] For an analysis based on the Immunity Amendment on the future of judicial review of constitutional amendments in Turkey see Ali Acar, "A View on the Future of Judicial Review of Constitutional Amendments in Turkey- An Invitation to Judicial Dialogue," European Journal of Law Reform 21, no 3, (2019): 291-312.

seems to be primarily related to the matter of constitutional interpretation,[65] there are further perplexing legal and political questions. As Richard Albert said: "[t]he concept of an unconstitutional constitutional amendment raises important questions about constitutionalism, constitutional legitimacy and judicial function."[66] In my view, the challenges the issue leads to require answers from different perspectives, but mainly from constitutional law and legal theory. I will focus on the legal theory here.

The first challenge that comes to mind is the counter-majoritarian difficulty. According to Alexander Bickel's famous argument, 'counter-majoritarian difficulty' emerges "…when the Supreme Court declares unconstitutional a legislative act"… [because] "it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it."[67] When the type of legislation reviewed by a supreme (or constitutional) court is not an *ordinary legislative act*, but a constitutional amendment, the counter-majoritarian difficulty, as in the Headscarf Case and the 2010 Amendment Case, poses a stronger challenge to a democratic regime and the source of legitimacy becomes of greater cause for concern.

As for those jurisdictions considered above, the following questions must be addressed: to what extent and under what conditions can the amending power be limited? Is judicial review of constitutional amendments on substantive grounds legally possible? If so, what kind of legal theory can account for this? In addition to these questions, one must also take into account another important point, and this involves the source of the legality of unamendable constitutional norms and their legal endurance. This last aspect is important mainly because it is the basis of the decision of the CCT under consideration.

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[65] Otto Pfersmann raises an argument along this line that constitutional interpretation matters significantly regarding the issue of unconstitutional constitutional amendments. O. Pfersmann, "Unconstitutional Constitutional Amendments: A Normativist Approach," Zeitschrift für öffentliches Recht 67, Issue 1, (2012): 101-103.

[66] Richard Albert, "Nonconstitutional Amendments," XXII Canadian Journal of Law and Jurisprudence XXII, Issue 1, (2009): 8.

[67] Alexander Bickel, The Least Dangerous Branch, 2nd edn. (Yale University Press, 1986), 16-17

I will restrict my answers to the Turkish case, assuming though the arguments in the answers, in their essence can be extended to other jurisdictions where the courts reviewed the contents of constitutional amendments and in some of them also invalidated. My answers to the questions are more descriptive, in the sense that I try to illuminate the facts. Of course on must keep in mind that claiming to be descriptive is not always clear-cut determination, i.e. it is not without problems or concerns. However, one thing is clear that descriptive arguments can be (by way of their linguistic formulations) clearly differentiated from normative ones. It would be sufficient to understand the descriptive-normative distinction by considering Carlos Bernal's normative argument presented above.

In the questions posed above, legitimacy (normative) and legality (descriptive) aspects of the issue seem to intersect. As correctly argued by Sudhir Krishnaswamy, "[w]hat is at stake here is whether an interpretation of the Constitution which limits Parliamentary amending power is valid and legitimate?"[68] Yet, in order to avoid any conceptual confusion,[69] a boundary should be drawn between these concepts,[70] although it is not my general stance that these two should (and could) always be

[68] Krishnaswamy Democracy and Constitutionalism in India, 25.

[69] This kind of confusion, or rather the interchangeable use of legality and legitimacy, can be found in Max Weber's writings. For Weber, legality is one of the three grounds of legitimacy (the rational ground) and the legitimacy based on legality is (believed) to be effective in a modern state. According to Weber, once legality is established, legitimacy would automatically follow and be bestowed on the authority using rational-legal power. Max Weber, Economy and Society, G. Roth and C. Wittich (eds.), trans. E. Fischoff, et al. (University of California Press, 1978): 215, 217 ff. As revealed by Alexander D'Entrèves, there is an attempt to attribute the same meaning to the concepts of legality and legitimacy in the work of Max Weber, see Alexander P. D"Entréves, "Legality and Legitimacy," The Review of Metaphysics 16, Issue 4, (1963): 689-691. For more on Max Weber's concept of legality and legitimacy see Jurgen Habermas, "Law and Morality," in The Tanner Lectures on Human Values (The University of Utah Press, 1988): 219 stating that "Max Weber regarded the political system of modern Western societies as a form of "legal domination." Their legitimacy [of the political systems] is based upon a belief in the legality of their exercise of political power.[…] It is the rationality intrinsic to the form of law itself that secures the legitimacy of power exercised in legal forms."

[70] For example, see David Dyzenhaus, "The Legitimacy of Legality," The University of Toronto Law Journal 46, Issue 1, (1996): 129-80.

separated. The boundary I have in mind comes from, or is offered by legal positivism, which separates law (or legality) from politics (or legitimacy). Thus, it seems unconvincing to assert that "the perspective of legal positivism identifies legality with legitimacy."[71]

The Question of Legality

I begin my analysis of the issue of legality with the question of the source of legal validity of unamendable (or eternal) constitutional rules, as these norms are the basis of the interpretation on which the CCT relied when annulling the constitutional amendments. In jurisdiction where there are unamendable constitutional rules, the implicit limitations (the basic structure or the replacement doctrine) can replace with the unamendable rules. I will also try to present an argument based on Hart's theory concerning the legality of courts' competence to conduct substantial judicial review; an issue to which is paid almost no attention in the literature.

As far as I can identify, there are two competing views concerning the legal validity of unamendable constitutional rules, which is considered as the basis of judicial review of constitutional amendments. The first relies on the distinction between the concept of constituent and amending power. The second answer would come from Hart's concept of the rule of recognition.

a) Unamendable Constitutional Rules

In the existing literature, the source of validity of unamendable constitutional rules is generally built on the classical distinction between the concepts of constituent power and constituted (or amending) power. In this distinction, the concept of constituent power is treated as the source of all limitations to be imposed on the state powers established by it. Accordingly, in this view, the unamendable constitutional rules take their legality from the constituent power.

The definition of constituent power resides in the idea that it is this power that creates a new political and legal order by introducing a constitution 'from scratch'. The concept is said to be invented more than

[71] Köker, "Turkey's Political-Constitutional Crisis," 331.

two hundred years ago by Sieyès, a French thinker, [72] as: "[T]he constituent power can do everything in relation to constitutional making. It is not subordinated to a previous constitution. The nation that exercises the greatest, the most important of its powers, must be, while carrying out this function, free from all constraints, from any form, except the one that it deems better to adopt."[73]

Thus, the concept of constituent power stands for the legally-decorated version of the concept of sovereignty.[74] It is not coincidental that one scholar suggests "the sovereign is the bearer of constituent… power." [75] Or, one can say that the concept of sovereignty is employed interchangeably, from the French and American Revolution onwards, with the concept of constituent power, but the latter is used for a specific purpose, i.e. to locate "ultimate normative authority in a political order"[76] to make "the fundamental political decision"[77], or to found "the basis of legitimacy."[78] As Ulrich Preuss puts it, "[t]he constituent power

[72] Carl Schmitt, Constitutional Theory, trans. Jeffrey Seitzer (Duke University Press, 2008), 126-127; K. Gözler, Kurucu İktidar [Constituent Power] (Bursa: Ekin Kitabevi 1998), 101-139. However, Richard Kay suggests that the idea that the concept of constituent power denotes might be found in the works of the English thinkers George Lawson and John Locke, who raised similar arguments earlier than Abbé Sieyès. On this see Richard S. Kay, "Constituent Authority," The American Journal of Comperative Law 59, (2011): 717.

[73] Quoted from Andreas Kalyvas, "Popular Sovereignty, Democracy, and the Constituent Power," Constellations 12, Issue 2, (2005): 227.

[74] Renato Cristi, "Carl Schmitt on Sovereignty and Constituent Power," Canadian Journal of Law and Jurisprudence 10, (1997): 195. Some scholars use the two concepts interchangeably, for example, see Andreas Kalyvas, who even uses the concept of a constituent sovereign, Kalyvas, "Popular Sovereignty," 225 ; Lior Barshack, "Constituent Power as Body: Outline of a Constitutional Theology," University of Toronto Law Journal 56, Issue 3, (2006): 186.

[75] David Dyzenhaus, "The Politics of the Question of Constituent Power," in The Paradox of Constitutionalism: Constituent Power and Constitutional Form, Martin Loughlin and Neil Walker (eds.) (Oxford Universityt Press, 2008), 130.

[76] Ibid., 143-144.

[77] Schmitt, Constitutional Theory, 125 ff.

[78] Lucien Jaume, "Constituent Power in France: The Revolution and Its Consequences," in The Paradox of Constitutionalism: Constituent Power and Constitutional Form, Martin Loughlin and Neil Walker (eds.) (Oxford Universityt Press, 2008), 69.

is the secularised version of the divine power to create the world *ex nihilo*—to create an order without being subject to it."[79] Because of the unlimited capacity constituent power assumes in itself, Carl Schmitt associates the very nature of constituent power with (a sovereign) *dictatorship*.[80] Thus, the constituent power can determine or impose any limit on all other powers in the legal and political system it creates.

The distinction between constituent and constituted power is believed, it seems, to establish whether or not amending power can be limited. Supporters of this distinction suggest that if the constituent power adopted unamendable constitutional rules, the amending power would necessarily be limited. In his recent book, Yaniv Roznai has mainly relied on this distinction when constructing the theory of *substantive unamendability*. Roznai maintains this view not only for the legal validity of eternal constitutional norms but also for the implicit limitations on amending power. [81]

Roznai and Yolcu[82] endorse this view of unamendability based on constituent power with respect to Turkey. They argue that in order to determine whether the Turkish Parliament's amending power is limited; one needs to unravel its conceptualization and construction in the Turkish Constitution. They treat the amending power which, according to them, is disclosed in the amendment clause of a constitution together with the unamendable norms[83], as a special one. They believe it is distinct both from original constituent and constituted legislative powers. For them, "the constitutional amendment power is neither an expression of the original constituent power nor a legislative power. It is a special

[79] Ulrich K. Preuss, "Constitutional Powermaking for the New Polity: Some Deliberations on the Relations between Constituent Power and the Constitution," Cardozo Law Review 14, (1992-1993): 640. Indeed, Carl Schmitt points out that "[a]ll significant concepts of the modern theory of the state are secularized theological concepts…." Carl Schmitt, Political Theology, Thomas McCarthy (ed.), trans. George Schwab, from 2nd revised edn. (The MIT Press, 1985), 36.

[80] Schmitt, Constitutional Theory, 110.

[81] Roznai, Unconstitutional Constitutional Amendments.

[82] Roznai and Yolcu, "An Unconstitutional Constitutional Amendment".

[83] "This position may be vindicated by the fact that most constitutions provide procedures for adopting constitutional amendments that differ from the procedures for enacting ordinary legislation." Ibid., 192.

power, weaker than the former, but greater than the latter."[84] The two scholars seem to agree with the CCT under the Headscarf and the 2010 Amendment Decisions that the Turkish Parliament's power to amend the Constitution is limited and this limited nature is derived from the existence of the unamendable constitutional norms. In short, this view claims that the validity of unamendable constitutional rules depends on their adoption by the original constituent power.

I reject this view by standing with Richard Kay. He aptly argues that the concept of constituent power cannot explain even the effective continuity of a (written) constitution because "the classic invocations of 'constituent power' stress that it requires no justification, legal or moral… But for a successful constitution to endure for an extended period, there must be something about it that persuades (or at least permits) its subjects to submit to it. Such a "reflective critical attitude," moreover, will always derive, at least in part, from some regard for the circumstances of its creation."[85] Therefore, he suggests an alternative term: *the constituent authority,* which he defines in the following way: "Constituent authority […], refers to the things that a given people in a given time and place understand as competent to make a binding constitution. As such, it is, definitionally, an artefact of and generalization from actual practice and experience."[86] At the same time, building the legality of unamendable constitutional rules on the concept of constituent power does not and cannot offer a plausible and legitimate explanation in a democratic system, because accepting that view would amount to admitting that dead hands have more power than living ones. This would then be contrary to the basic democratic (procedural) principle as suggested by Thomas Jefferson's famous statement: "*the earth belongs in usufruct to the living*; … the dead have neither powers nor rights over it."[87] Furthermore, the Turkish case would be even more problematic given that the current Turkish 1982 Constitution, and of course its unamendable rules (Articles 1, 2, 3, and 4) is a product of the military coup d'état of

[84] Ibid., 193.

[85] Kay, "Constituent Authority," 721.

[86] Ibid., 716.

[87] <https://jeffersonpapers.princeton.edu/selected-documents/thomas-jefferson-james-madison> visited on 21 February 2022).

1980. Therefore, it is necessary to find a different and more credible and justifiable basis to explain the legality of unamendable constitutional rules.

In this respect, legal theories can be relevant because they attempt to explain the (extra-legal) foundations of (modern) legal systems in which constitutions are usually acknowledged as the ultimate positive source of the legal systems. If a constitutional amendment, which is adopted in accordance with the amendment clause, can be declared unconstitutional by a court (let us assume for now that this amendment does not touch *directly* the unamendable rules in the Constitution), this would amount to claim that there are some (extra-legal) rules, principles or standards beyond the ultimate positive source of the modern legal systems, i.e. the constitution. Thus, a theory attempting to explain the extra-legal foundation must be able to provide some sort of explanation to this legal phenomenon.[88]

[88] There are indeed, different theories that explain the extra-legal foundations of legal systems. Natural law is one of them. For a strong supporter of the view that constitutional amendments can be declared null and void on substantive grounds (a view based on a sort of natural law theory) in particular see Walter F. Murphy, "An Ordering of Constitutional Values," Southern California Law Review 53, (1979-80): 758. Mesmin Saint Hubert argues that appealing to higher constitutional values or supra-constitutionality makes reference to natural law, Mesmin Saint-Hubert, "La Cour Supreme de l'Inde, Garantie de la Structure Fondamentale de la Constitution," Revue Internationale de Droit Comparé 52, Issue 3, (2000): 631-632. Natural law theories may be considered, as put aptly by Scott Shapiro, as providing arguments and elements for ultra- or extra-legal criteria for the validity of law. Scott J. Shapiro, "Law, Plans, and Practical Reason," Legal Theory 8, (2002): 388. This point is also clearly stated by George Wright: "at least some versions of natural law thinking hold that an inviolable "higher law" restricts the substance of constitutional amendments." R. George Wright, "Could a Constitutional Amendment Be Unconstitutional?" Loyala University of Chicago Law Journal 22, (1990-91): 756. In a similar vein, Walter Murphy claims that the interpreters of the constitutions in Ireland, France, and the United States can invoke natural law or natural rights "to judge the validity of constitutional changes" since the Constitutions of these countries, in some way, embrace or make reference to natural law, see Walter F. Murphy, "Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity," in Reponding to Imperfection: The Theory and Practice of Constitutional Amendment, ed. Sanford Levinson (Princeton University,1995): 181. If one is to invoke a contemporary natural law theory to analyse the subject matter in question, Robert Alexy's sophisticated version of natural law would be a promising candidate. According to Alexy's version of natural law, any law, including constitutional amendments, would not be counted

As suggested by Kay's definition of constituent authority, it resembles, in many aspects, Hart's rule of recognition.[89] Thus, I will offer below, in detail, various aspects of Hart's rule of recognition, as I believe that the rule of recognition is rich enough to provide a convincing account to elucidate the legality of eternal constitutional rules, and also the validity of a substantive judicial review of constitutional amendments.

b) The Rule of Recognition as the Basis of Legal Validity of Unamendable Constitutional Rules

In his masterpiece, *The Concept of Law*, Hart attacks various legal theories—mainly Austin's command theory of law, but also Kelsen's concept of Grundnorm, legal realism, and natural law. He criticises these theories and uncovers their shortcomings, and then constructs his own theory.[90] His main concept to explain the existence of modern legal sys-

as law so long as they are extremely, unbearably or intolerably unjust. See Robert Alexy, The Argument from Injustice; also see Yaniv Roznai, "The Theory and Practice of "Supra-Constitutional" Limits on Constitutional Amendments," International and Comparative Law Quarterly 62, Issue 3, (2013): 560-572.

[89] Ibid., 721 ff. For a response to Richard Kay, see David Dyzenhaus, who suggests the complete abandonment of the use of the concept of constituent power in liberal rule of law see David Dyzenhaus, "The Politics of the Question of Constituent Power," 129-130. Along the same line of argument, also see David Dyzenhaus, "Constitutionalism in an Old Key: Legality and Constituent Power," Global Constitutionalism 1, Issue 2, (2012): 9-260. As suggested by Frederick Schauer, "[Kelsen's] views on the extra-legal foundations of a legal system are suggestive of an approach to the problem of [constitutional] amendment." Frederick Schauer, "Amending the Presupposition of a Constitution," in Responding to Imperfection: The Theory and Practice of Constitutional Amendment ed. Sanford Levinson (Princeton University, 1995), 146. Therefore, one might be inclined to invoke Kelsen's Grundnorm to analyse the issue at hand, yet Kelsen's Grundnorm has some limits to the analysis of the legality of unamendable constitutional norms and especially the substantive judicial review of constitutional amendment. Although this statement requires further deliberation and justification, I can simply state that as the Grundnorm is devoid of any content, it cannot be of use here.

[90] Dennis Patterson indicates that the first six chapters of *The Concept of Law* are dedicated to the "demolition" of Austin's command theory and also to the construction of Hart's own theory. And according to him, in chapter seven Hart presents his theory of adjudication. Dennis Patterson, "Explicating the Internal Point of View," Southern Methodist University Law Review 52, (1999): 68

tems is *th*e *rule of recognition*. The simple definition of the rule of recognition is that it is this rule that sets the *constituents* of legal rules and specifies the criteria or the 'test'[91] that a rule must meet in order to be identified or qualified as a legal rule of the system. To be precise, the rule of recognition provides a kind of tool by means of which the *validity* of all legal rules is assessed.

Hart admits that the rule of recognition of a modern legal system cannot be easily determined; but its existence can be found in the way legal rules are identified and applied by courts and other officials. He further points out that "the criteria for identifying the law are multiple and commonly include a written constitution, enactment by a legislature, and judicial precedents"[92] and, where applicable, customary norms. Accordingly, in a modern legal system, the rule of recognition is a complex matter because of the multitude of sources of law. For Hart, this produces some conflicts between legal rules. Therefore, an arrangement may be required so that it is possible to determine which rule will prevail in a given case, and this requires having some criteria. Thus, these criteria or sources may be subject to a hierarchical order.[93] For example, Hart argues that the legal status of customary law or precedent (in the common law system) does not result from a legislative or judicial act (even tacitly), but from their *acceptance* as such, they may nevertheless subordinate to legislation.[94]

One aspect of the possible ranking of the various sources of law involves Hart's differentiation between '*supreme'* and '*ultimate*' notions, the clarification of which will take us to the heart of the concept of the rule of recognition. What Hart has in mind with the *supreme* notion is that there might be different criteria with regard to what counts as

[91] Kent Greenawalt, "The Rule of Recognition and the Constitution," Michigan Law Review 85, Issue 4, (1987): 621.

[92] H. L. A. Hart, The Concept of Law With a Postscript, eds. P. A. Bulloch and J. Raz, 2nd edn. (Clarendon Press, 1994), 101.

[93] However, this hierarchy must not be confused with the one suggested by Kelsen. In Kelsen's view, the hierarchy is the necessary element of a legal system (see Hans Kelsen, "The Pure Theory of Law and Analytical Jurisprudence," Harvard Law Review 55, Issue 1, (1941): 62. That is to say, by hierarchy, Hart does not make a suggestion of derivation of one law from another (higher) law.

[94] Hart, The Concept of Law, 101.

law,[95] and among these criteria, one may prevail over others, which is the *supreme* (criterion).[96] To find the supreme criterion, it is enough for Hart to pursue a chain of legal reasoning to identify the reason for the validity of a legal rule.

The supreme criterion may be different in different legal systems because of the particularities of a given legal system. For example, in Turkey, when someone questions why a Ministry of Justice's regulation is valid, the answer would be that it is valid because the Ministry is empowered by a legislative act that determines its duties and powers. When that answer is pursued further, the question becomes: why is the legislative act valid? The response would be that it is valid because the parliament has enacted the Act. The next step on the inquiry of the legal validity of Parliament's competence would take us to the Turkish Constitution, which confers legal power on the Parliament to enact such an Act. So, in this case, the Constitution would be considered the supreme criterion of legal validity in Turkey.[97]

However, in this inquiry, there is one further step to be taken, as the chain of legal reasoning brings us to the unavoidable question 'why is the (Turkish) Constitution valid?' or 'what makes the Constitution valid?' This point carries us to the very heart of the rule of recognition; the *ultimate* notion to which Hart attaches the real meaning of the concept. For Hart, the ultimacy of the rule of recognition is reached when there is no longer any *legal rule* or *legal reason* to determine the validity of a legal rule or a source of law; namely, when the chain of legal reasoning is exhausted, someone would face 'the ultimate rule of recognition.'[98] This is why the rule of recognition is called 'nonderivable.'[99] As a result of

[95] Hart counts several: "an authoritative text, legislative enactment, customary practice, general declarations of specified persons, or past judicial decisions in particular cases" Ibid., 97.

[96] Ibid., 102.

[97] I avoid international law in this consideration even though it plays an important role in determining what counts as law in the Turkish legal system, especially in the field of human rights.

[98] Hart, The Concept of Law, 107.

[99] Richard H. Fallon, Jr., "Precedent-Based Constitutional Adjudication, Acceptance, and the Rule of Recognition," in The Rule of Recognition and the U.S. Constitution, eds. Matthew D. Adler and Kenneth. Einar Himma, (Oxford University Press, 2009): 51

this, any standard or rule that can be derivable from another rule cannot be (a part of) the ultimate rule of recognition. To put it another way, the ultimate rule of recognition in a legal system is not derivable from another legal rule, since it is a *fact*.

At this point, Hart's criticism of Kelsen makes the notion of '*ultimacy'* more explicit. Hart remarks that "some writers, who have emphasised the legal ultimacy of the rule of recognition, have expressed this by saying that, whereas the legal validity of other rules of the system can be demonstrated by reference to it, its own validity cannot be demonstrated but is 'assumed' or 'postulated' or is a 'hypothesis.'"[100] It is clear that Hart wants to distinguish the rule of recognition from Kelsen's (presupposed) Grundnorm. To this effect, Hart underlines the empirical nature of the rule of recognition; [101] thus, it is not a presupposition or a hypothesis.[102]

Consistent with its empirical or factual character, the existence of the rule of recognition in a legal system, Hart argues, can be depicted by reference to the practices of officials—mainly of courts—in identifying the validity of other rules. He further states in this regard "… the rule of recognition exists only as a complex, but normally concordant, practice of courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact."[103] As a result of this statement, there can be no separate question as to whether the rule of recognition is valid or invalid. It can only exist or not.[104] Hart's famous example that 'whatever the Queen-in-Parliament enacts is law in England' proves his view, in that it is observable that the courts, the officials

[100] Ibid., 108.

[101] Ibid., 292-293, endnote 100. Indeed, as Kenneth Einar Himma puts it, the content of the rule of recognition can be discovered by the empirical tools sociologists have been using. Kenneth Einar Himma, "The U.S. Constitution and the Conventional Rule of Recognition," in The Rule of Recognition and the U.S. Constitution, eds. Matthew D. Adler and Kenneth Einar Himma, (Oxford University Press, 2009), 99.

[102] "[The Grundnorm] must be presupposed, because it cannot be "posited," that is to say: created, by an authority whose competence would have to rest on a still higher norm." Hans Kelsen, Pure Theory of Law, trans. Max Knight, 2nd edn. (University of California Press, 1967), 194-95.

[103] Hart, The Concept of Law, 110.

[104] That is why, "it is not itself meaningfully called "valid" or "invalid" Neil MacCormick, H.L.A. Hart, 1st edn. (Edward Arnold, 1981), 109.

and the citizens in England accept, treat, and apply as law whatever the Queen-in-Parliament enacts as law.[105] In this sense, the existence of the ultimate rule of recognition is *a matter of fact*. There still remains one question: what does it mean to say that 'the rule of recognition is a matter of fact?

This question, Hart notes, can be answered by inquiring whether or not the rule of recognition is accepted and practised, mainly by judges and other officials[106] using the legal powers in the system.[107] So, the most important aspect of the complexity of the rule of recognition revolves around the fact that the ultimate rule of recognition cannot be

[105] Of course, Hart was writing at a time when the UK was not yet a member of the European Union.

[106] Arising from different references and statements made by Hart in *The Concept of Law*, scholars tend to hold different views regarding "whose acceptance" it is that grounds the existence of the rule of recognition in Hart's theory. Furthermore, whose acceptance of what also constitutes a cause for concern for some scholars. For example, Jules Coleman states that "[l]ike Hart, I further maintain that the possibility of legal authority is to be explained in terms of a conventional social practice, namely the adherence by officials to rule of recognition…" (emphasis added), Jules L. Coleman, The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory, (Oxford University Press, 2001), 77. Andrei Marmor also sticks to the view that it is all officials" acceptance and practice of a conventional rule of recognition, Andrei Marmor, Positive Law and Objective Value, (Oxford University Press, 2001), 33. On the other hand, according to Joseph Raz, "it can be said that a momentary legal system contains all, and only all, the laws recognized by a primary law-applying organ which it institutes," Joseph Raz, The Concept of a Legal System: An Introduction to the Theory of Legal System 2nd edn. (Oxford University Press, 1980), 192. Christopher Kutz holds the view that what counts as law depends on what social facts (behaviour, beliefs, dispositions, and attitudes) judges hold. Therefore, he claims that it is courts, thus judges, whose acceptance and practice grounds law. Christopher Kutz, "The Judicial Community," Philosophical Issues 11, (2001): 442-43. Still others argue that officials, as well as citizens, shall accept the rule of recognition. For an account claiming that citizens, too, accept the rule of recognition and adopt the internal point of view towards it see W. Bradley Wendel, "Lawyers, Citizens, and the Internal Point of View," Fordham Law Review 75, Issue 3, (2006-2007): 1486 ("… for a citizen, it is … incoherent to regard the rule of recognition as imposing no obligation, at least insofar as the citizen purports to be acting lawfully").

[107] Hart defines in the Postscript what he means by "acceptance": "[it] consists in the standing disposition of individuals to take such pattern of conduct both as guides to their own future conduct and as standards of criticism which may legitimate demands and various forms of pressure for conformity," Hart, The Concept of Law, 255.

questioned as to whether it is (legally) valid or invalid; it can only be *accepted* and *practised* or not.[108] And by looking into the standards and practices of the officials, it is clear what ultimately does and does not count as law in the system. [109]

Based on the definition of the rule of recognition offered by Hart, it is not wrong to suggest that the immediate implication of the rule of recognition can be observed, not exhaustively, but primarily, in the field of constitutional law where the main concern is mostly the (ultimate) validity criteria of law. This is clearly noticeable especially in Supreme Courts' or Constitutional Courts' exercise of judicial review, in which these courts try to find the validity criteria of law by interpreting the constitution. In this sense, Hart's following statement can be taken to suggest that the exercise of legislative power and its limits, which are determined by courts, revolves around the concept of the rule of recognition: "Once we abandon the view that the foundations of a legal system consist in a habit of obedience to a legally unlimited sovereign and substitute for this the conception of an ultimate rule of recognition which provides a system of rules with its criteria of validity, a range of fascinating and important questions confronts us." [110] Although the addressee of this statement is Austin and his command theory of law, I take it to imply a couple of (other) things.

The first point is that Hart's statement seems to suggest that whatever it is that is accepted and practised within a legal system as the (ultimate) rule of recognition with all its validity criteria, that acceptance and practice will illuminate the place of sovereignty within that sys-

[108] Ibid., 109.

[109] Hart, after a number of criticisms, especially those directed by Dworkin, reformulates the rule of recognition in the Postscript as the following: "the rule of recognition…is in effect a form of judicial customary rule existing only if it is accepted and practised in the law-identifying and law-applying operations of the courts" (emphasis added). Ibid., 256. This, however, does not change the original account significantly. For a discussion on what Hart's formulation of the rule of recognition in the Postscript amounts to, see Julie Dickson, "Is the Rule of Recognition Really a Conventional Rule?," Oxford Journal of Legal Studies 27, Issue 3, (2007): 373-402, (arguing that Hart's later turn in the Postscript to a conventional account of the rule of recognition did not change his original formulation at all, or at least it is not a consistent turn).

[110] Hart, The Concept of Law, 110.

tem.[111] To put it differently, in order to find out what type of sovereignty runs in a system, one needs to scrutinise the (ultimate) rule of recognition. In this regard, a sort of connection can be seen between that acceptance/practice and the value patterns existing in the (political and legal) system. Following this, I suggest that the locus of sovereignty in a legal system can be considered as one of the elements of the rule of recognition. The second and closely connected with the first is that Hart's above-quoted statement seems to imply that all other related aspects of a political entity, like democracy, can be considered in view of the practice theory of law. [112]

In light of these remarks, I pursue my investigation by following Hart's further related views. Hart adheres to the view that an ultimate sovereign of a modern state may be restricted by a constitution on condition that the restriction is *accepted* in the system (primarily) by the officials, as the rule of recognition implies. For example, Hart questions whether the English Parliament has the competence to enact everything and whether it can limit irrevocably the legislative competence of its successors. His answer to the first part of the question is affirmative, while to the second part negative. He replies that the *present* rule of recognition (of his time) provides that even though the English Parliament has the competence to legislate on everything, this competence does not allow it to restrict the legislative power of its successors.[113] However, Hart's statement should be understood only empirically,[114] which is consistent with the factual or empirical character of the rule of recognition. That is to say, the case might be different in a different time

[111] Or it can be said that in Hart's view, it is the rule of recognition that makes the sovereign, Goran Dajovic, "The Rule of Recognition and the Written Constitution," Belgrade Law Review LVIII, Issue 3, (2010): 249.

[112] For a similar point, see Kalyvas, "Popular Sovereignty," 238. On the practice theory of law, see Veronica Rodriguez-Blanco, "From Shared Agency to the Normativity of Law: Shapiro's and Coleman's Defence of Hart's Practice Theory of Rules Reconsidered," Law and Philosophy 28, no. 1 (Jan., 2009): 59-100; George Pavlakos, "Practice, Reasons, and the Agent's Point of View," Ratio Juris 22, no. 1, (March 2009): 74-94.

[113] Hart, The Concept of Law, 150.

[114] Ibid., 150.

in England- as was the case under the EU membership, [115] and as is the case after the Human Rights Act, and after the Brexit. In each of these cases, the rule of recognition was / has been changed into something new; i.e. different from Hart's original formulation. For example in becoming an EU member, Hart's original rule of recognition (the Queen-in-Parliament or sovereignty of the parliament) endorsed the idea that it can be limited, while the EU directives would be higher than (and binding on) the UK parliament (the Queen-in-the-Parliament). With the Human Rights Act the same argument applies. Namely, with the introduction of the Human Rights Act, the discussion of the UK constitutional scholarship was if the sovereignty of the parliament was restricted, and some said so.[116] And yet, with the Brexit, the original rule of recognition has been restored. All of these only prove the empirical or factual nature of the rule of recognition. Therefore, the rule of recognition of another legal system may be different.

In fact, Hart upholds in *The Concept of Law* the view that a written constitution may restrict the competence of a legislature not merely in terms of form and procedure, but also *substantially*, that is, by excluding certain subject matters from the scope of legislative (amending power) competence. One can conclude two things from Hart's view. The first conclusion is that it has something to do with a charter of fundamental rights and freedoms enshrined in a constitution or annexed to it, because this type of charter may limit the parliament's legislative competence. However, in this case, the parliament will not be considered as limited in the sense Hart conceives, because the parliament can, ultimately and legally, amend the Charter (unless it is laid down otherwise in the Constitution or Charter). Therefore, it seems that Hart refers to unamendable constitutional rules by his view of the restricted legislature since those impose the real *legal* limits on a parliament.

Hart has indeed unamendable constitutional rules in mind, and this is evident in the part in which he conceives of the possibility of the existence of unamendable constitutional norms; thus, a limited sovereign.

[115] For a view claiming that parliamentary sovereignty was no longer the case in England after the Factortame see Nicholas W. Barber, "The Afterlife of Parliamentary Sovereignty," 9 International Journal of Constitutional Law 9, Issue 1, (2011): 144-154.

[116] For this discussion, see Alison L. Young, "Sovereignty: Demise, Afterlife, or Partial Resurrection," International Journal of Constitutional Law 9, Issue 1, (2011): 163-171.

This is found in Chapter VII of *The Concept of Law*, where he claims that a sovereign authority may have a self-limiting power, which can be used only *once* in its history.[117] Admittedly, the (persistence of) validity of these rules will depend on their *acceptance* as such. On this matter, surprisingly enough, Hart gives – though not in the main body of the text of *The Concept of Law*, but in the endnotes – the examples of unamendable constitutional rules of the Turkish Constitution of 1924 (Article 1 with reference to Article 102) and the Basic Law of the German Federal Republic (Article 79/3).[118] His another example is Article V of the US Constitution, which is invoked by him to disprove Austin's view that law is the command of a *legally unlimited* sovereign.

Following this path, the issue can be put in the following way: if certain issues, not in form but in substance, are excluded from the parliament's power to regulate or amend by some constitutional rules, these rules constitute, but do not exhaust, the ultimate criteria for identifying the law; i.e. the rule of recognition. However, in fact not the rules *per se*, but the acceptance and practice of them as such are part of the rule of recognition.

In order to vindicate the view that the validity of unamendable constitutional rules consists in the acceptance and practice of them as such, one of Hart's examples can be recalled here. In the example, Hart tries to prove that there may be a legally limited sovereign or supreme legislature, as opposed to Austin's claim that the sovereign is legally unlimited. His example is the following: "in the simple society of Rex, it may be an *accepted rule* … that no law of Rex shall be valid if it excludes native inhabitants from the territory or provides for their imprisonment without trial, and that any enactment contrary to these provisions shall be void and so treated by all" (emphasis added).[119] The *accepted rule* Hart refers to in this example is "part of the rule conferring authority to legislate"; [120] namely, it is part of the rule of recognition. Therefore,

[117] Hart, The Concept of Law, 149.

[118] Ibid., 290, endnote 78.

[119] Hart, The Concept of Law, 68-69.

[120] Ibid., 69. It seems that Hart's claim is pure sociology, in that behind the acceptance of the rule may lie different grounds/reasons. Thus, acceptance does not necessarily suggest volunteerism or acceptance of the moral value of the rule.

it is clear that the existence of this rule depends on the acceptance of it as such – primarily, but not necessarily merely – by the officials. In the case where Rex tries to abolish *no imprisonment without trial* rule, the acceptance will come into play and will not allow the attempt made by Rex by nullifying the rule. Following this, it can be argued that even though the validity of the unamendable rules and their legal continuation rely on the acceptance of these rules as such.[121]

As I have noted above, Roznai and Yolcu claim that the validity of the unamendable constitutional rules lies ultimately in the constituent power's enactment. I argue that if this is the case, then it would amount to say that the dead hands have more power than the living ones. This would be, however, contrary to the basic democratic principle. Therefore, I suggest that without admitting that the existence of those unamendable rules relies on the acceptance of them as such, primarily by the officials, but also by the (majority of) citizens, no explanation of the validity of those would be plausible and convincing in a system subscribing to constitutional democracy. In other words, unless someone admits that the validity of unamendable rules and their current legal force emanates from their acceptance by the officials in the system in the first place and by (the majority of) citizens, their introduction by undemocratic constituent power cannot account for their endurance without adhering to naked power.

After determining the validity of unamendable constitutional rules, I can now turn to other aspect of the issue: the legality of judicial review of constitutional amendments.

[121] In this respect, Kelsen's attempt to argue that désuétude may render unamendable rules invalid makes sense only when it is located in Hart's conception. In an important article entitled "Désuétude," Kelsen questions whether there might exist legal norms which cannot be derogated (or repealed) by another norm. Kelsen admits that the existence of such norms is possible. Hans Kelsen, "Derogation," in Hans Kelsen, Essays in Legal and Moral Philosophy, ed. Ota Weinberger (D. Reidel 1973), 261-275. However, Kelsen's main concern in that article is not whether such norms are possible (valid), but rather if those norms can lose their validity through désuétude, Ibid., 264.

c) The Basis of Legality of Courts' Competence to Conduct Substantial Review over Constitutional Amendments

In the literature, it is suggested that the existence of unamendable constitutional norms is one thing and the judicial review of constitutional amendments is another. The former does not necessarily follow or require the latter.[122] When the supporters of this view are asked how then unamendable constitutional norms can make sense, the Norwegian example is often invoked.[123] Article 112 of the Norwegian Constitution stipulates that a constitutional amendment "must never contradict the *principles* embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the *spirit* of the Constitution" (emphasis added). This norm is taken as an example that (allegedly) proves that without judicial enforcement, any unamendable constitutional norms can make sense in the political realm; i.e. it can be "a directive for the parliament."[124]

I think that as long as this claim remains empirical, that is, as long as the statement is made by taking merely the Norwegian case into account, it poses no challenge. It is proven by the very practice in Norway that it is the Norwegian Parliament that has the final authority to determine what those '*principles*' and '*spirit'* are. A constitutional amendment has never been challenged before any court in Norway, nor has any

[122] This is indeed the suggestion made by the Venice Commission. The Venice Commission comments that there is no correlation between the existence of unamendable constitutional norms (substantive limitations) and judicial review of constitutional amendments. European Commission for Democracy Through Law (Venice Commission), "Report on Constitutional Amendment (Cdl-Ad(2010)001)," (Strasbourg: Council of Europe, 2010). para 226. found at < https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)001-e > visited on 15 February 2020)

[123] More on the Norwegian case see Torkel Opsahl, "Limitation of Sovereignty under the Norwegian Constitution," Scandinavian Studies in Law 13, (1969): 153-177, and Bjørn Erik Rasch and Roger D. Congleton, "Amendment Procedures and Constitutional Stability," in Democratic Constitutional Design and Public Policy: Analysis and Evidence eds. R. D. Congleton and B. Swedenborg, (The MIT Press 2006), 319-342.

[124] Roznai and Yolcu, "An Unconstitutional Constitutional Amendment," 199.

court taken a step in that regard.[125] However, if this view is taken as a conceptual claim to be applicable to other cases, such as Turkey, the weakness of the argument would come into play, because the particularity of legality in each system requires a different analysis due to the empirical character of the (ultimate) rule of recognition. Therefore, in my view, the Norwegian case cannot be applied to Turkey; thus a further analysis is required.

What is claimed concerning the Headscarf Case is that the CCT's annulment decision is ill-founded. From a normative point of view taking the procedural understanding of democracy as a point of measure, this claim might be true. However, this normative viewpoint offers no further explanation about the legal phenomenon at stake, in that it does not give any clarification for how the exploitation of such a crucial power may be considered as legally possible. It begs an explanation because the CCT's decision in the Headscarf (and the 2010 Amendment) Cases has neither been discarded nor rejected by any individual officials or state institutions in the Turkey. It does not mean the decision was politically uncontested; quite the opposite, but the legality of the decision was at the end accepted. Namely, the relevant authorities did not say that the decision of the CCT was legally invalid or void. [126]

Furthermore, despite the view that substantive judicial review of constitutional amendments will enhance counter-majoritarian difficulty,[127] an argument is made to support that such a review may be favoured in some cases. The only situation in which the substantive review of constitutional amendments to be conducted by the CCT is favoured is concerned with the protection of minority rights and preventing human

[125] Gábor Halmai, "Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution," Constellations 19, Issue 2, (2012):200 endnote 4.

[126] In fact, the suggestion made by the rapporteur (Osman Can) then of the CCT in the 2010 Amendment Case that if the Court decided in favour of the applicants, i.e. if the Court invalidated the amendments, such ruling must be deemed null and void, and thus rejected by the Council of Ministers and other relevant state authorities, was not given any credit. See for Rapporteur's statement https://www.gazetevatan.com/gundem/yoka-destek-yok-311651

[127] Roznai and Yolcu, "An Unconstitutional Constitutional Amendment," 200.

rights abuses.[128] Here, in my view the legality and legitimacy are mixed or confused. These two points, the protection of minority and human rights, can only be the basis of the legitimacy of judicial review of constitutional amendments. But even if this view is admitted, how the judicial review of constitutional amendments on substantive grounds is legally possible on the basis of the Turkish Constitution needs to be uncovered, if this view would be consistent. Besides, for a theory to account for other relevant cases, it must be also applicable to them. In this sense, if there is no explicit provision on unamendability (as is the case for the case of India), and yet judicial review of constitutional amendment is carried out, the theory relying on the distinction between the constituent and amending power would not be very convincing.

At this point, let me recall one of the important issues of Hart's rule of recognition. Hart argues that there might be uncertainty *in* the rule of recognition. Uncertainty *in* the rule of recognition is different from uncertainty *of* the rule of recognition; the latter is not the case in Hart's view. Uncertainty *in* the rule of recognition exists when *some* cases emerge in which the content of the rule of recognition may not be precisely determined or where it may not provide a clear-cut test to determine what counts (ultimately) as law in some cases. For example, Hart states that even though the rule of recognition of the English law that 'whatever the Queen-in-Parliament enacts is law' may seem to be simple and unproblematic, it may be uncertain at certain points, and thus it may give rise to ambiguity. More precisely, Hart identifies that the rule of recognition providing the ultimate criteria for identifying the law in a legal system can be uncertain *at some points* or *at a given time*.[129]

[128] "… [E]ndowing courts with competence to review constitutional amendments may be a useful tool for protecting minorities" rights and preventing human rights abuses." Ibid., 201.

[129] But it should be kept in mind that in Hart's view, these cases, regardless of the importance of the subject, are not the entire truth about law or are not representative of the operation of law itself. These cases are just the fringes. Hart, The Concept of Law, 133. This distances Hart from the legal realism's premise that law is what the judges say it is.

Hart argues that when some unclear issue or uncertain issue *in* the rule of recognition breaks out,[130] which may, he says, even lead the society to a sort of division around the issue,[131] that uncertainty needs to be settled by *the courts* to remove the doubts surrounding it, thus around the rule of recognition.[132] Even though Hart is quick to argue that the doubts around the rule of recognition must be settled by *the courts*, in my view that very particular aspect, that is whether the final decision-making power on that subject consists in courts or parliament, may be considered as part of the problem to determine the rule of recognition. What I mean by this is the following. Whether the uncertainty would be removed by courts or by any other state organ (parliament) may change from one legal system to another. This suggests that (some parts of) the ultimate rule of recognition may change from one system to another depending on the particularities (or empirical features) of the rule of recognition. It is clear though that some sort of interpretation, regardless of who will do it, will be involved. The validity of interpretation employed by an authority will depend on its acceptance by other officials.[133] In this connection, the Norwegian case referred to above may be taken as an example, in that in Norway (part of) the rule of recognition requires that it is the Parliament that has the final authority to determine what is the law on that particular constitutional matter, i.e. *spirit* of the Constitution. The case may be and is similar or different in other jurisdictions.

[130] Ibid., 150.

[131] As was the case, Hart mentions, in 1909 in South Africa Ibid., 153. But, certainly, this is an issue that modern societies, especially those that have a written constitution, confront very frequently.

[132] Ibid., 148, 152.

[133] In this sense, if I try to formulate the ultimate rule of recognition, I can say, by following Kent Greenawalt that "all or part of the ultimate rule of recognition is whatever a constitution contains, the present legal authority of which does not depend on enactment by a procedure prescribed in the constitution…" Kent Greenawalt, "The Rule of Recognition," 21. And when there are unclear points in the constitution, "prevailing [interpretive] standards employed by the Supreme Court determine what the constitution means." Greenawalt "The Rule of Recognition," 36. See also Kent Greenawalt, "Hart's Rule of Recognition and the United States," Ratio Juris 1, Issue 1, (1988): 50.

Conclusion

As said by Justice Sikri in the *Kesavananda* judgment of the Supreme Court of India, "in a written constitution, it is rare that everything is said expressly."[134] Therefore, among the scripts of the constitutional texts, discovering the conditions that account for the legality aspect of the substantive judicial review of constitutional amendments is very important. That condition, I argue, can be found in Hart's concept of the rule of recognition and the importance of *acceptance* and *practice* in that concept. The rule of recognition may bring some uncertainties over the course of time. Thus, I argue that a determination of uncertainty in the rule of recognition, and removal of that uncertainty by a (supreme or constitutional) court takes its legality from the (subsequent) acceptance of it by other officials (and citizens) in the system as suggested by the general framework of Hart's concept of the rule of recognition. For example, if such an acceptance was lacking following *Marbury v. Madison*, there would probably be no *judicial review qua institution* in the American legal system. The acceptance can be explicit or implicit. In this sense, the pursuit of that very practice, which may be based on an interpretive strategy, can be taken as an acceptance.

A few words also need to be said about the legitimacy aspect of the issue. I think that how (popular) sovereignty and democracy are conceived and put into practice in Turkey (and other jurisdictions briefly considered here) would be very illuminating about the practice of substantive judicial review of constitutional amendments. The history of democracy –here in the sense of procedural democracy – which is said to start with Turkey's passing into a multi-party political system in 1946,[135] is a history of the *suspension* of popular sovereignty at various times by military coup-d'états or interventions in politics; first in 1960, then 1971, and 1980. This implies that popular sovereignty has never been put into practice in the history of Turkish democracy. People were rarely the final decision-making authority; the parliament and people could almost

[134] Quoted from Krishnaswamy Democracy and Constitutionalism in India, 32.

[135] On Turkey's passing to the multi-political party system see M. J. Patton, "Constitutionalism and Political Culture in Turkey," in Political Culture and Constitutionalism- A Comparative Approach, eds. D. P. Franklin and M. J. Baun (M.E. Sharpe, 1995),138-183; Kemal H. Karpat, "Political Development in Turkey, 1950-1970," Middle Eastern Studies 8, Issue 3, (1972): 349.

never make and mandate its document of reference, i.e. the Constitution, for final decision-making. In this picture, the different segments of people within Turkish society see for themselves different reference points for (final) decision-making.

As for the Constitutional Court's role and place in the Turkish political and legal system, it is important to offer some ideas about how this Court is seen in Turkey. The CCT is not an institution that was deliberately demanded nor has its importance been discussed within the history of Turkish democracy. It was introduced into the system by the 1961 Constitution – the product of the 1960 coup d'état – to be "the guardian of an absolute constitution in the Schmittian sense."[136] Turkish society did not question the place of the CCT until 2007, following the constitutional crisis of the election of the eleventh President.[137]

However, the CCT has been regarded as the final decision-making authority by some segments of society. The value patterns maintained under the assertive understanding of laicité – and it is shared by the secular section of the society – proves this.[138] It remained in force until recently when the deviation from this value pattern occurred under the pro-Islamic party government, which has been in power for since 2002. Now, different value patterns have been inserted into the political and legal systems, which might result in different reference points for legitimacy and final decision-making power. Whether the process, as of 2002, will firmly result in different value patters is the whole political (and legal) debate in Turkey right now. Whether the new (value) pattern would be regarded as something positive or negative depends on one's moral and political preferences.

At this point, let me share a brief observation that under the emerging value patterns, the CCT does not seem to enjoy a significant degree of legitimacy concerning its power of reviewing constitutional amendments on substantive grounds. The observation is made on the basis of the fact that the decisions of the Court concerning constitutional amendments in 2008 and 2010 have been challenged by the (parliamentary) political power through various attempts of constitutional amendments. For example, as mentioned above, the composition and organisa-

[136] Köker, "Turkey's Political-Constitutional Crisis," 333.

[137] Ibid., 329.

[138] Ibid., 338.

tion of the CCT has changed following the Headscarf Case to prevent it from any crucial, undesirable decision in the future. And later the CCT itself has been packed. How successful that move was, has been vehemently discussed in today's Turkey. This conclusion clearly suggest that whether Turkey is undergoing a change in the rule of recognition or not, and whether (if the provisional answer to this question is affirmative) this change will be solid and firm or not would be subject to the test of the great masters: time and experience.

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