TENSION IN THE TURKISH CONSTITUTIONAL DEMOCRACY: LEGAL THEORY, CONSTITUTIONAL REVIEW AND DEMOCRACY

Ali Acar*

Abstract

This article analyzes a very recent decision of the Turkish Constitutional Court that struck down the constitutional amendment adopted to allow women students to wear headscarves in higher education institutions. For the analysis of the decision, two concepts from the positivist legal theory are invoked, that is, the Grundnorm of Hans Kelsen and the Rule of Recognition of Hart, which seem— in a way— to be related to the decision. At the same time, the concept of constituent power, which is appealed to in the reasoning of the Court, is also dealt with briefly. As a result of the analysis, the conclusion is that the two concepts in legal theory lead to two different results, in that while the Grundnorm of Kelsen and his theory at large seem to support the idea that the decision of the Court is incompatible with his pure theory of law, Hart’s concept of the Rule of Recognition, on the other hand, seems to suggest that it is compatible with the decision. At the same time, the decision also poses some important problems from the perspective of the theory of constitutional democracy, which is, to some degree, examined in the article.

Özet

Bu makalede, Anayasa Mahkemesinin, yüksek öğretim kurumlarında öğrencilerin yükseköğretim kurumlarında öğrenci türban takmaya izin vermeyi amaçlayan anayasa değişikliklerini iptal eden kararı incelenmiştir. Kararın incelenmesi bakımından, kararla bir biçimde ilgili olduğu görülen pozitivist hukuk felsefesi alanındaki iki kavrama, Hans Kelsen’in temel normu ve Hart’in tanımı kuralı, karar analiz etmek için başvurulmuştur. Aynı zamanda, Mahkeme gerekçesinde kullanulan kurucu iktidar kavramı da kısaca ele alınmıştır. İnceleme sonucu, hukuk teorisi...
alanındaki iki kavramın iki farklı sonuca ulaşmaya izin verdiği görülmüştür. Yani, Kelsen'in temel norm kavramının ve genel olarak onun teorisinin, Mahkeme kararının sah hükm teorisiyle uyumdağı fikrini; öte yandan Hart'in tanıma kurallı kavramının ise, Mahkeme kararının bu kavramla uyumlu olduğu fikriini desteklediği sonucuna ulaşılmıştır. Bununla birlikte, karar, anayasal demokrasi teorisi bakımından bazı önemli sorunlar doğurmaktadır ve bu sorunlar makale içinde belirli ölçüde incelenmektedir.

Keywords: Hans Kelsen, Grundnorm, Hart, Rule of Recognition, constitutional democracy, headscarf, constituent power


I. INTRODUCTION

On February 9, 2008, the Turkish Grand National Assembly (TGNA) enacted a law (hereinafter ‘the constitutional amendment’ or ‘the amendment’), which amended two articles of the Constitution. The amendment was signed into law by the President and promulgated in the Official Gazette. The main purpose of the amendment was to allow women students in institutions of higher education to wear headscarves, which they had not been allowed to do before, at least legally. During the enactment process, there were heated public debates and demonstrations in favor of and against the constitutional amendment. Following this, the main opposition party – the Republican People’s Party (CHP in Turkish) – brought a case concerning the amendment before the Constitutional Court (hereinafter “the Court”) to be annulled. The Court, in its decision, found the constitutional amendment unconstitutional in terms of its substance.
Following this decision, the discussion on ‘can a constitution be unconstitutional’ or, more precisely, ‘can a constitutional amendment be struck down by a constitutional court in terms of its substance in a constitutional democracy’ has become an important and controversial legal and political question in Turkey. While the idea and practice of striking down (ordinary) statutes have been also considered to be controversial and has been discussed extensively in the legal and political literature, this decision of the Court has exacerbated the discussion and taken it in another direction. This paper will thus analyze the Court’s decision in order to contribute to this discussion.

The discussion that the Court’s decision has triggered is important to scrutinize from the perspectives of legal, more precisely from the viewpoint of legal positivism, as well as of political theory. For the issue at stake, these two fields seem to be inseparable from each other in analyzing the decision, and therefore pose certain questions. From the perspective of political theory, the decision presents some challenges in a constitutional democracy. At first glance, it poses the question of who has the ultimate ‘say’ on the political choices of the political entity at the constitutional level. Other questions follow: what shall the limits of the jurisdiction of a constitutional court and a parliament be? To what extent can representatives amend a constitution, and so on?

Questions related to legal theory are intertwined with those posed by political theory. A few examples are: what are the limits of judicial interpretation on constitutional amendments in a democratic system? More importantly, what is the ultimate source of a legal system and who decides what it ‘is’ or ‘ought to be’? What are the sources of legal validity, and so on? These questions are just a few important examples, and therefore, the list is not exhaustive. Despite the importance of these questions, it is, however, not possible to provide answers to all of them comprehensively in one paper. Yet, an attempt to answer some of them, concerning mostly with the legal theory, will be provided below.

regarding decisions of the Turkish Constitutional Court in which constitutional amendments have been annulled, see Kemal Gözler, JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS - A COMPARATIVE STUDY 40-47 (Ekin Press, Bursa, 2008).


Although the Court’s decision can be simply considered and analyzed from the perspective of legal or constitutional interpretation, the goal, and thus the approach, of this paper will be, however, different. When considered merely from the constitutional interpretation perspective, the Court decision seems to approve of the idea that in plural societies, the issue of constitutional interpretation is very vital for society. Hence, as Michel Rosenfeld argues in his book Just Interpretations, that in modern polities (and plural societies), the conflict concerning (just) legal interpretation would be encountered primarily in the field of constitutional adjudication. Although Professor Rosenfeld focuses mainly on US jurisprudence (and thus a post-modern society with his term), this determination is aptly applicable to the Turkish jurisprudence as proven by this decision of the Turkish Constitutional Court. This is but another issue. So, it should be noted at the outset that the chief concern of this paper will not be the aspect of (constitutional) interpretation, even though the decision of the Court is important to analyze from that perspective as well.

In the following part, the contents of the constitutional amendment, and then the decision of the Court, will be presented after giving a short historical narrative on why the enactment of the constitutional amendment was deemed necessary. Next the reasoning of the Court behind the decision will be summarized and then will be examined in the second part. To do this, the analysis will first focus on the concept of constituent power, since it was invoked in the reasoning of the Court as the point of departure. Following this, the decision will be again examined under the concepts of the Grundnorm of Hans Kelsen and the ‘Rule of Recognition’ of H. L. A. Hart. Both of these concepts are considered to be within the positivist legal theory, which provide some guiding thoughts concerning the Court’s decision, in which the Court relied on the principle of secularism as its main reason when annulling the constitutional amendment. Invoking the principle of secularism, as seen in the

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7 Michel Rosenfeld, JUST INTERPRETATIONS: LAW BETWEEN ETHICS AND POLITICS 3 (University of California Press, 1998).
9 The perception of secularism in Turkey is a rigid one, which could be conceived as the equivalent of the France’s laïcité. In fact, in Turkey, instead of using the word ‘secularism’ or
decision, makes it relevant to use these two concepts together to seek whether the ultimate source of the legal system in Turkey originates from the principle of secularism, since, according to the decision, the principle of secularism is considered to be superior to the other constitutional norms. Finally, in the last part, remarks by a few scholars involved in the matter of unconstitutionality of constitutional norms/amendments will be presented briefly in order to bring a comparative aspect to this issue, which will be followed by brief concluding remarks.

II. THE CONSTITUTIONAL AMENDMENT AND THE DECISION OF THE COURT

A. Background to the Constitutional Amendment

In order to properly understand why the TGNA passed this constitutional amendment, it is necessary to give a brief overview on its background. The amendment was enacted because a number of unsuccessful attempts had been made by previous governments to bring a solution to the headscarf challenge by different (ordinary) parliamentary statutes. One of the previous attempts resulted in the annulment by the Court of the statute enacted for this purpose. The Court’s reasoning, in this decision of invalidation, then, had focused on the importance of the principle of secularism for the Turkish legal system and used it as the basis for the annulment. In that decision, the Court found the text in question then to be unconstitutional, and annulled it accordingly. The Court found another enacted statute to be constitutional but reached the conclusion that the statute under consideration then did not allow women students to wear headscarves.

Following these decisions by the Court, the practice favored banning the headscarf from the universities, and subsequently, the Higher Education

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"secular", the French word ‘laïcité’ or ‘lait’ seems more appropriate to use as the concept itself was also inspired from France. For a comparison between these words, see Gérard Bouchard and Charles Taylor, BUILDING FOR THE FUTURE – A TIME FOR RECONCILIATION (Quebec Commission for Accommodation Practices Relative to Cultural Differences, 2008), available at http://www.accommodations.qc.ca/ documentation/rapports/rapport-final-abrege-en.pdf (last visited Mar. 31, 2010).

10 Turkish Constitutional Court, File 1989/1, Decision 1989/12, Mar. 7, 1989.

11 “Modern dress and appearance shall be compulsory in the rooms and corridors of institutions of higher education, preparatory schools, laboratories, clinics and polyclinics. Covering the neck and hair with a veil or headscarf due to religious conviction is free.” Law 3511, published in Official Gazette 20672, Dec. 27, 1988.


Council of Turkey issued a circular in 1997 that reinforced the prohibition of headscarves in higher education. After these events, a case was brought before the European Court of Human Rights (ECHR) by a Turkish woman student, Leyla Şahin, in 1998, in which she claimed that prohibiting the headscarf was contrary to her freedom of religion and of expression and the right to education as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention). The ECHR (the Grand Chamber) decided the case in 2005, holding that the banning of the headscarf in Turkey was not contrary to the rights and freedoms protected by the Convention. As a result of all of these events, the pro-Islamic political party in power (the Justice and Development Party, AKP in Turkish) at that time concluded that the only way to resolve the problem was to amend the Constitution. Accordingly, it drafted the needed constitutional amendment and submitted it to the TGNA to be adopted.

B. Content of the Constitutional Amendment

The constitutional amendment under consideration was very short; it contained only two substantial articles. But before presenting their contents, let us refer to the relevant constitutional articles, which are important to understand the significance of (and also some challenges arisen from) the decision. The first relevant article, which regulates the functions and power of the Court, is Article 148 of the Turkish Constitution. From the wording of Article 148, it is clear that the Constitution does not confer the power on the Constitutional Court to review a constitutional amendment regarding its substance. Article 148 sets forth that a constitutional amendment can be reviewed only concerning the procedure and form requirements as stipulated in Article 175.

The ECHR referred to the theory of margin of appreciation in its decision. Therefore, as opposed to the common misunderstanding of the Leyla Şahin decision that the ECHR banned the headscarf in Turkey, the legally more appropriate understanding and interpretation of the decision is that the ban on wearing headscarf in Turkey was not deemed by the ECHR to be a breach of the rights and freedoms protected by the Convention. Thus, its allowance requires making another evaluation from the perspective of the Convention. Leyla Şahin v. Turkey, App. 44774/98, Nov. 10 (2005) (Grand Chamber) For recent discussion on the theory of margin of appreciation in Turkey, see Murat Tümay, The Margin of Appreciation Doctrine Developed by the Case Law of the European Court of Human Rights, 5 Ankara L. Rev. 201 (2008).

The constitutions of psychology, in respect of both form and substance, of laws, decrees having the force of law, and the Rules of Procedure of the Turkish Grand National Assembly. Constitutional amendments shall be examined and verified only with regard to their form. The official text of the Turkish Constitution in English can be found at http://www.byegm.gov.tr/mevzuat/anayasa/anayasa-ing.htm (last visited Mar. 28 2010).

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15 Article 148. The Constitutional Court shall examine the constitutionality, in respect of both form and substance, of laws, decrees having the force of law, and the Rules of Procedure of the Turkish Grand National Assembly. Constitutional amendments shall be examined and verified only with regard to their form. The official text of the Turkish Constitution in English can be found at http://www.byegm.gov.tr/mevzuat/anayasa/anayasa-ing.htm (last visited Mar. 28 2010).

16 Article 175. Constitutional amendments shall be proposed in writing by at least one-third of the total number of members of the Turkish Grand National Assembly. Proposals to amend the
The provision of the first article of the constitutional amendment, which was intended to be added after the term ‘proceedings’ in the fourth paragraph of Article 10, was proposed to read “and in utilization of all forms of public services.” The second article of the amendment was intended to be an insertion into Article 42, dealing with the right and duty of training and, which was proposed to read: “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.”

C. Decision of the Court and its Reasoning

The Court found the constitutional amendment to be contrary to the principle of secularism enshrined in Article 2 of the Turkish Constitution, with reference to Article 4 that lays down the unamendable constitutional provisions, of which Article 2 is one. Article 2 of the Constitution determines the characteristics of the Republic and reads:

The Republic of Turkey is a democratic, secular 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. [emphasis added]

In its decision, the Court examined, first, whether or not the constitutional amendment met the formal and procedural requirements laid down in Article 175 of the Constitution, and decided that the constitutional amendment met them. It then moved to scrutinize the substance of the amendment.

Although reviewing the substance of a constitutional amendment is not, according to very wording of Article 148 of the Constitution, within the Court's jurisdiction, the Court did so in this case and justified it in a controversial way in the decision. The controversial aspect of the justification to note at this point is that the Court – when it decided to examine the substances of the constitutional amendment, therefore found doing so to be within its jurisdiction – remarked that since Article 4 stipulates that Articles 1, 2, and 3 cannot be amended nor their amendment be proposed, it is this latter provision on which the Court based its reasoning in reviewing the substances of the amendment. In other words, according to the Court, in order to find out whether or not the substance of the adopted amendment aimed at changing (undermining) the contents of unamendable provisions of the Constitution, it was necessary to examine the substance of the amendment.

In annulling the constitutional amendment, the Court established a number of key points of reasoning. First of all, the Court made a distinction between the constituent power and the constituted power and determined that the latter has a limited capacity; namely, that the latter is bound to the framework and boundaries drawn by the former. This reasoning refers to the idea that the constituted power cannot amend the unamendable provisions determined by the constituent power. This is not an odd determination, which means that if the Parliament attempts at changing an unamendable provision directly, it will go beyond its competence, and therefore, that constitutional amendment will be subject to annulment by the Court. However, what was more striking and controversial in the Court's decision was that the constituted power – meaning the Parliament – is also prohibited from amending other provisions of the Constitution as a result of which is that the unamendable provisions would be, indirectly, affected or changed as is the case for the Court in the present decision.

20 Christoph Möllers points out the same issue for Germany. He says that the constituent power is present in the very nature of 'the eternity clause' of the constitution, which is Article 79/3 and accordingly, Article 20 and Article 1 cannot be amended. Christoph Möllers, We Are (Afraid of) the People: Constituent Power in German Constitutionalism, in THE PARADOX OF CONSTITUTIONALISM – CONSTITUENT POWER AND CONSTITUTIONAL FORM 97 (Martin Loughlin and Neil Walker, eds., Oxford University Press, 2007).
The second and presumably the most important reasoning of the Court rested on the principle of secularism set forth in Article 2 of the Constitution. On this issue, the Court emphasized that a secular state, like Turkey, cannot invoke religious conviction when performing its legislative function, namely, the source of the legal rules cannot stem from a religion in a secular state. Therefore, it found that the substance of the amendment - but in fact the motivation or intention of the Parliament, i.e. allowing women students to wear headscarves, to be contrary to the principle of secularism.

The third reasoning is based on a hypothetical assumption that if women students were allowed to wear headscarves, then public order could be destroyed, because the wearing of headscarf could be used as a tool to pressure those (students) who do not wear it. As a consequence of this third reasoning, the right of education of others would be negatively affected or restrained, and this would thus be contrary to the democratic nature of the Republic of Turkey and the principle of respect for human rights as enshrined in Article 2. This reasoning is obviously open to empirical investigation; it seems that this last reasoning was influenced by the decision of the ECHR, which was used as a reference in the Court's decision. It should be, however, noted that this last reasoning of the Court is beyond the scope of this article, although its analysis is also important from, inter alia, the perspective of the constitutional interpretation.21

III. ANALYSIS OF THE DECISION

The challenges arising from the Court's decision center on two points that will be analyzed in this part. The first challenge concerns political theory and it revolves around the concept of constitutional democracy.22 In the classical doctrine of constitutional democracy,23 the ultimate source of sovereignty is

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21 As a critique of this reasoning, it can be stated that this determination of the Court that the wearing of the headscarf will be a tool for pressure is a matter of empirical question, which was put aside by the Court. The ECHR appealed to a similar reasoning in the Leyla Şahin decision. On this issue, see Kerem Altmpamak and Onur Karahanogullari, After Sahin: The Debate on Headscarves is not Over, Leyla Sahin v. Turkey, Grand Chamber Judgment of 10 November 2005, Application No. 44774/98, 2 EUR. CONST. L. REV. 268 (2006).
23 Constitutional democracy usually refers to a set of political institutions. A regime is called democratic if members of the legislature are selected through periodically held elections, if the vast majority of the nation's adult population has the right to vote as well as to run for offices, if the electorate may choose between a number of competing candidates, if lawmaking is the prerogative of elected representatives, and so on. In a constitutional regime, the provisions regulating the legislative process itself cannot be amended through the normal procedures of the legislation but certain special procedural requirements must be satisfied. Thus, 'democracy,' when combined with the adjective 'constitutional,' refers to a specific arrangement of political
thought of as being vested in the people and the (popular) sovereignty of a given society is considered to be reflected in the constitution as the ultimate and legitimate source for using the power, which, in theory, is believed to be exercised by the institutions established by that constitution. The representatives of the people create institutions, (e.g. parliament and congress) which have legislative power that includes the authority to amend the constitution within limits laid down by that constitution. Here therefore arises a dilemma -- how can the decision of the Court that is in question be considered as consistent with the sovereignty of the people and the legislative power derived therefrom when exercised by those representatives – in our case, the representatives that made the constitutional amendment in question. Having said this, it should be reminded and kept in mind that the Turkish Constitution does not vest the Court with the jurisdiction to review any constitutional amendment in terms of its substance, at least textually. The second challenge can be reduced to a simple but a crucial question: what is the ultimate source of the Turkish legal system; what makes a norm valid? 

While the first challenge can be analyzed with the concept of constituent power as it was applied in the Court’s decision, the latter can be considered by reference to the concepts of the Kelsen’s Grundnorm and Hart’s Rule of Recognition.

A. Constituent Power

According to the Court, constituent power is the power that determines the foundational nature and principles of a polity and a legal order as results from the combination of a number of historical events and political factors in a given country. The concept itself, however, goes beyond the legal framework of that legal order; therefore it is unconstrained according to the Court. In a participatory and a deliberative democratic regime, the Court goes on, constituent power is formed by the people of that society.

This definition by the Court is not novel, but is echoed in the words of the French thinker Sieyes, who was claimed to have been the first thinker to raise the concept of constituent power more than two hundred years ago.
The 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, be free from all constraints, from any form, except the one it deems better to adopt.\footnote{27}

A number of questions and challenges arise from the concept of constituent power in the way that it was perceived by the Court. The first and most simple of these is that what constitutes the meaning of ‘people’ as referred to in the decision: the people as they exist at the present time or the people and their willpower at the time of constitution-making? Or does the idea of people employed in the decision go beyond all generations; is it somewhat a mystic or transcendental notion of people? The second question is, as pointed out by Lucien Jaume, a result of the tension between the concept of constituent power and popular sovereignty; namely, “the conflict between the sovereignty of (present) people and representation.”\footnote{28} As mentioned above, the conflict can be deduced from the question of how the Court’s decision can be reconciled with the idea of constitutional democracy, or more precisely with a representative democracy. In response to this challenge, Lucien Jaume demonstrates that, according to Sieyes, constituent power could be attained through the representation of people, which would be exercised through a body dedicated exclusively to carrying out the task of creating the ‘Constitution and Declaration of the Rights of Man’. Only then would “the supremacy of this founding text over all later laws... be solemnly affirmed.”\footnote{29} Yet, this determination does not solve the possible objections and controversies.

As to the constituent power of the current Turkish constitution, it will be seen that like other countries’ constitutions, the Turkish constitution also came into existence as a consequence of a founding act – an historical event\footnote{30} -- which was the coup d’état of 1980. The constitution was prepared by university professors working under the authority of the military rulers who carried out the coup; this constitution was later ratified in a referendum by the people, but still

\footnote{27} Andreas Kalyvas, Popular Sovereignty, Democracy, and the Constituent Power, 12 Constellations 223, 227 (2005).
\footnote{29} Id. at 69.
\footnote{30} Neil Walker and Martin Loughlin, Introduction, in The Paradox of Constitutionalism – Constituent Power and Constitutional Form 3 (Martin Loughlin and Neil Walker, eds., Oxford University Press, 2007). For the historical events which are thought of being the constituent power of Germany and France, respectively, see Möllers, supra note 20, at 87-106 and Jaume, supra note 28, at 67-86.
under the military regime. The only participatory aspect of the people in this constitution-making process that showed the participation of the people was this referendum, but the people did not have any say concerning the wording of the constitution – the referendum was just an ‘up or down’ vote. It should be added, however, that although the 1980 coup was the underpinning of the 1982 constitution, the real constituent power in Turkey is considered to result from the war of independence of Turkey. In this sense, the thoughts or principles of Mustafa Kemal Atatürk, the founder of the Republic, are believed to be the real constituent power of the political entity and the series of constitutions since then have been written for the Republic of Turkey. The importance of the Atatürk’s principles was confirmed by the Court, and it was this confirmation that played an important role in the decision annulling the amendment.

Among the principles of Atatürk, known as the six arrows in referring to the six principles of his thinking – secularism, republicanism, nationalism, popularism, etatism, and revolutionism – the principle of secularism is regarded as the most important and prevailing one. This was echoed in the Court’s decision under consideration: the principle of secularism, which has an important and distinctive place among the Atatürk’s principles, shall be understood within the context of the 1989 and 1991 decisions of the Court mentioned above. Therefore, the principle of secularism, as one of the unamendable constitutional provisions, is considered to be the reflection of the constituent power on which the legal system is based and from which it takes its legitimacy; therefore the supremacy of secularism cannot be amended either directly or indirectly according to the Court.

However, the notion of constituent power invoked in the decision and the way in which the Court interpreted the irrevocability of the principle of secularism, has been found to be incompatible with the theory of constitutional democracy. This is noted by one of leading constitutional scholars in Turkey – Professor Ergun Özbudun – and also by the Rapporteur of the Court – Dr. Osman Can – in that it was said that vis-à-vis the clear constitutional provisions of Article 148, the Court does not have the jurisdiction to review constitutional decisions.

31 According to the 1989 decision, “Secularism is the civil organizer of political, social and cultural life, based on national sovereignty, democracy, freedom and science. Secularism is the principle which offers the individual the possibility to affirm his or her own personality through freedom of thought and which, by the distinction it makes between politics and religious beliefs, renders freedom of conscience and religion effective. In societies based on religion, which function with religious thought and religious rules, political organization is religious in character. In a secular regime, religion is shielded from a political role. It is not a tool of the authorities and remains in its respectable place, to be determined by the conscience of each and everyone...” Turkish Constitutional Court, File 1989/1, Decision 1989/12, Mar. 7, 1989.
amendments in terms of their substances. Therefore, the Court was deemed to have exceeded its limit and power.

So far, the focus has been on the tension arising from the Court's reasoning between constitutional democracy and the idea of constituent power and the use of the principle of secularism. Having made these remarks on the concept of the constituent power and the principle of secularism, we can now consider the second important reasoning of the decision: does the principle of secularism constitute the ultimate source of the legal system in Turkey?

B. The Principle of Secularism vis-à-vis the Concepts of the 'Grundnorm' and the 'Rule of Recognition'

This part deals with two important concepts proposed by two legal theorists: Hans Kelsen's Grundnorm and H. L. A. Hart's 'Rule of Recognition', both of which are associated with legal positivism; their concepts are thought to be comparable to some extent for the theme of this article. In support of the comparability of these concepts, Neil MacCormick remarked that "The Concept of Law can keep company even with the massively erudite and acutely perceptive works of the great Austrian jurist Hans Kelsen, among the great works of twentieth-century jurisprudence."

As mentioned above, the relevance of these two concepts to the issue at hand emanates from the question: what is the ultimate source for law or a legal system (in a democratic regime)? As a quick answer to this question, it is widely accepted that constitutions are traditionally endorsed as the supreme body of law (let us put aside the international and human rights law debate here), which confers validity on other lower-level legal rules. However, for the purpose of this article, the question of what makes a constitution and thus a constitutional amendment superior to other legal rules is of greater importance. In this sense, the two theorists' concepts are extremely significant in terms of determining the ultimate source of a legal system, because they both provide an answer to this question or at least shed light on the issue, albeit in different terms, even if there are some obscurities in these concepts, as will be seen

32 Özbudun, supra note 4; see also Yeni Anayasa Şart Oldu [A New Constitution is a Must], DAILY ZAMAN, Oct. 23, 2008; Anayasa’nın Değiştirilemez Hükümlerinin Bağlayıcılığı (1) and (2) [The Bindingness of the Unamendable Constitutional Provisions], DAILY ZAMAN, Dec. 15-16, 2008. For the rapporteur’s opinion, see Can, supra note 8, at 138-139; see also Osman Can, Le roi est Immortal, Vive le Roi – I- II (The King is Immortal. Long Live the King), RADIKAL, Sunday Addition, Nov. 23, 2008 and Nov. 30, 2008.


below. However, as correctly put forward by Frederick Schauer, “their views on the extralegal foundations of a legal system are suggestive of an approach to the problem of [constitutional] amendment.” Thus, these two concepts can, for the purposes of this article, play a role in clarifying the issue and analyzing the Court’s decision.

However, it should be noted at the beginning that in this article, the attempt to employ these two concepts must not be understood as a defense of either of them, but rather and better understood as an attempt to use them as analytical tools to illustrate their possible implications in the Court’s decision.

1. Kelsen’s Grundnorm

In his magnum opus The Pure Theory of Law, Kelsen starts defining the Grundnorm by asking a question: “why is a norm valid, what is the reason for its validity?” He answers this question by saying that the validity of a legal norm depends on a higher norm that has been established by a proper authority. However, the question of what makes the latter higher law valid needs to be posed unavoidably. He notes that the latter higher law is valid because it is generated from another higher law. At this point, Kelsen aptly determines that this hierarchy must stop somewhere, and the existence of a highest (supreme) norm must be taken for granted. In fact, his point of departure is that in order for the normative interpretation of legal rules to be possible, a highest norm, which is not within the positive law, must be presupposed. He claims that “it 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.” It is this highest norm – called the Grundnorm or the basic norm – which ascertains the unity of norms and makes them valid, thus makes up a legal system.

Kelsen clearly uses the Grundnorm to explain the validity of the constitution of a legal system, but he does not mean that the Grundnorm per se is a

35 Id. at 146.
36 Hans Kelsen, PURE THEORY OF LAW 193 (Max Knight, trans., Peter Smith Publisher, Gloucester, Mass, 1989).
37 Id. at 195.
38 Kelsen’s specific example helps us understand the nature of Grundnorm. He states that if we ask the reason for the validity of a statute, we will find that it is valid because it is created by the legislature and the legislature, in turn, is authorized by the constitution, and the constitution might be generated from another (first) constitution by means of constitutional amendment, but in the end we will find the first constitution whose existence cannot be traced back any other positive law any further, so its existence and validity must be presupposed to stem from the Grundnorm. Id. at 200. For a more concise explanation on this account, see Hans Kelsen, The Function of a Constitution, in ESSAYS ON KELSEN 111-120 (Richard Tur and William Twinning, eds., Clarendon Press, 1986).
39 Kelsen, supra note 36, at 202; see also Schauer, supra note 34, at 149.
constitution, although the basic norm refers directly to the validity-condition of a constitution in the positive-legal sense.\textsuperscript{40} He further explains that “the function of the basic norm becomes particularly apparent if the constitution is not changed by constitutional means, but by revolution.”\textsuperscript{41} Through revolution, if it is successful, a new legal system is created, thus it is established on a new Grundnorm, but neither the legitimacy of that Grundnorm nor its validity is a matter of (legal) question; it is valid and legitimate as long as the legal system, to which it gives the validity, is, by and large, effective.\textsuperscript{42}

By the same token, according to Kelsen, the Grundnorm is free of content. This means that it does not require any specific content that the legal rules must have. Hence, he proposes that any kind of content can be law.\textsuperscript{43} However, in another piece of writing, he determines that there are some constraints which are binding on a legislature when it changes the constitution:

the aim of such constraint is to lend the greatest possible stability to the authorization to create general legal norms; i.e., to the form of the state. Occasionally a constitution — that is, the document so named — constrains the provision that the norms regulating the procedure of legislation must not be altered at all, or not in such a way as to alter the form of the state.\textsuperscript{44}

In stating this, he implicitly refers to the unamendable constitutional provisions. Yet, there is no incoherence between these two positions, because in the last analysis, Kelsen acknowledges the idea that the Grundnorm does not require a specific content that legal rules must have “unless the positive law itself delegates some meta-legal norms,”\textsuperscript{45} all depends on the positive law of the system.

As can be seen, the concept of the Grundnorm is problematic, and it contains some obscurities. It is, in a sense, a mysterious concept or ‘a symbol’\textsuperscript{46} or as described by Frederick Schauer, it “functions as sort of a Kantian transcendental understanding,”\textsuperscript{47} because it is presupposed or hypothesized; therefore it is not subject to empirical investigation and this is one of the aspects which makes the Grundnorm different from the concept of Hart’s rule of recognition. For this reason, our analysis cannot go any further in scrutinizing whether or not the

\textsuperscript{40} Kelsen, supra note 36 at 226.
\textsuperscript{41} Id. at 208.
\textsuperscript{42} Id. at 210-12.
\textsuperscript{43} Id. at 198 and 217.
\textsuperscript{44} Kelsen, supra note 38, at 114.
\textsuperscript{45} Kelsen, supra note 36, at 354. Today, this is the view advanced by the inclusive legal positivist.
\textsuperscript{46} Lon. L. Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 Harv. L. Rev. 630, 641 (1958).
\textsuperscript{47} Schauer, supra note 34, at 149-50.
principle of secularism constitutes the Grundnorm of the Turkish legal system, since the existence of the Grundnorm is taken for granted by the Pure Theory of Law, and since the Grundnorm is "a symbol not a fact," it is not subject to empirical investigation. In fact, according to Kelsen's account, once a legal system established and commenced functioning effectively, not only the principle of secularism, but any other principle or pronouncement of the legal realm would not be considered as to whether it belonged to the domain of the Grundnorm or not. The concept of Grundnorm exists only in the juristic-thinking, without which it is impossible to conceive of a positive law system.

Nevertheless, there are still some words to be said with regard to the Kelsenian notion of Grundnorm and some other aspects of his pure theory of law, which may shed light on our subject here. In this respect, through focusing on a number of claims concerning the concept of Grundnorm made by Kelsen, it is not wrong to conclude that the decision of the Court is incompatible with Kelsen's theory, especially when the idea that 'the Grundnorm does not hold any specific content' is taken into consideration.

In order to support this observation, Kelsen's theory on the Grundnorm must be considered along with his statements on legal interpretation, for which he determines that the interpretation made by courts must be general in nature; it must have a rule-nature or it must be rule-like. It thus implicitly embraces the view that legal interpretation must be coherent and consistent. When that court is the country's constitutional court empowered to annul the statutes, the coherency and consistency of legal interpretation is highly vital.

We can therefore come to the conclusion that the Court's decision is incompatible with Kelsen's theory. To support this view, it must be stated that the Turkish Constitutional Court – in a 2007 case similar to the headscarf decision – regarding the claim of unconstitutionality of another constitutional amendment, rejected the claim of the unconstitutionality of the constitutional amendment on the grounds that it did not have jurisdiction to decide the case, as enshrined in Article 148 of the Constitution. In that decision, the Court, unlike the headscarf decision, did not examine the content of that constitutional amendment.
amendment to determine whether it changed or not the unamendable constitutional provisions directly or indirectly, which obviously must have taken place in that decision as well for the sake of coherency and consistency. Therefore, under the Kelsen's theory, it can be remarked again that the Court fails to be consistent in its interpretation of the constitution, and therefore goes beyond the positive.

2. Hart's Rule of Recognition

The very simple definition of the rule of recognition resides in the idea that it is this rule that stipulates the constituents of legal rules and specifies the elements, criteria and requirements (or the "test") that legal rules shall meet in order to be identified and qualified as the legal rules of a legal system. In other words, the rule of recognition provides a kind of tool by means of which the existence or validity of a legal rule is assessed or tested. In the words of Hart, "it is like the scoring rule of a game."

In a modern legal system, the existence of the rule of recognition – as a secondary, power-conferring rule as opposed to primary rules that determine obligations and duties on people – is complex. Hart admits that in a modern legal system, the rule of recognition is multiple and more complex, which includes a written constitution, enactment by a legislature, and judicial precedents. However, he also advances the idea that the rule of recognition of a legal order cannot be simply found but rather its existence can be discovered in the way the rules are described and applied by either court or other officials.

51 Although there have been a great deal of literature concerning the Hart's concept of the rule of recognition, it is however not free from controversy. The discussion centered on the question of whether it is possible for that concept to include the morality or reference to morality so that law can be considered compatible with the requirements of morality. Ronald Dworkin has attacked the rule of recognition strongly and refused to acknowledge its existence. See The Model of Rules, 35 U. CHI. L. REV. (1967); see also Ronald Dworkin, LAW'S EMPIRE (Fontana Press, London, 1986). On the other hand, that concept led to split the legal positivism into two branches: exclusive legal positivism (led by Joseph Raz) and inclusive legal positivism (led by Jules Coleman, see Jules Coleman, Negative and Positive Positivism, 11 J. LEGAL STUD. (1982). In the distinction between exclusive and inclusive legal positivism, the inclusive legal positivism accepts the idea that rule of recognition, thus law, may include reference to morality, but it is not necessarily so, while the exclusive legal positivism rejects that view claiming that there must be no reference to morality in order for law to claim the authority. See Joseph Raz, THE AUTHORITY OF LAW (Clarendon Pres, 1979).


54 Id. at 98.
or the citizens. Therefore it is, in fact, a complex and difficult endeavor to identify the rule of recognition of a legal system.  

Hart, in principle, does not reject the idea that legislatures in many modern states are restricted by their constitutions. He points out in his *magnum opus*, *The Concept of Law*, that a written constitution may restrict the authority of the legislature, not merely by specifying the form and manner of legislation, but by excluding altogether certain matters from the scope of its legislative authorities, thus imposing limitations on substance as well. Similar to Kelsen, Hart here seems to refer to, among other things, unamendable constitutional norms.

To shed further light on the concept of rule of recognition and in order to understand it thoroughly, it is helpful to identify a number of its salient elements and traits. The first crucial element is that there must be a uniform or commonly agreed official acknowledgment of the rule of recognition, including the legal system’s criteria of validity. Secondly, the rule of recognition can be observed from two points: the first is external and the second one is internal observation, or statement. External observation refers to those which are made by external agents who do not have to obey the rules of the legal system, but simply observes them in a society in order to find out whether or not the legal rules are implemented and obeyed in practice by the people of that society (like the position of an anthropologist or a sociologist). Internal observation, on the other hand, refers to those statements or observations that are made by internal agents of that legal system, who themselves (have to) use and obey the rules. More clearly, internal agents mean officials of that legal system who identify the validity of the rules, and then apply them. As a third trait, Hart associates the concept of a rule of recognition with the (mature) modern legal system, and in fact, he determines that it is the rule of recognition which, along with other secondary rules, makes a legal system modern (mature) or different from a premature legal system.

Finally, regarding the concept of the rule of recognition, he specifies in *The Concept of Law* that “there are ... two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, the rules of behavior which are valid according to the system’s ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity... must be effectively accepted as common public standards of official behavior by its officials.”

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56 Hart, supra note 53, at 111.
57 Id. at 108.
58 Id. at 113.
As can be seen above, the concept of the rule of recognition is complex and in order be precise about and overcome its complexity, Hart’s differentiation between ‘supreme’ and ‘ultimate’ can assist. What Hart has in mind with the supreme is that there might be different criteria or forms of the rule of recognition and among them one prevails or is superior to the others, which is named the supreme (criterion). In order to make the notion of the supreme clearer, the comparison between the statutes and the constitution of a legal system may be used as an example. In this example, Hart would agree that the constitution is the supreme criterion of the rule of recognition, but it is not per se the rule of recognition. So, the problem of from where the validity of the rule of recognition is derived remains unsolved.

This point brings us to the ultimate character of the concept. At this point, Hart’s critique of Kelsen can make the notion of the ‘ultimate’ more explicit. In his critique of Kelsen, Hart states that

some writers, who have emphasized 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’. This may, however, be seriously misleading.

From this critique, it is expected that Hart would provide something more certain, concrete and convincing for the account of the rule of recognition, but he did not. What he says on the validity and source of the rule of recognition is that “... 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.” It must be stressed here however that the rule of recognition in this latter usage means the ultimate criterion of a legal system, which is different from, but includes the supreme character of the concept. In that sense, the existence and validity of

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59 See also Greenawalt (1987), supra note 52, at 621.
60 Hart counts several: ‘an authoritative text, legislative enactment, customary practice, general declarations of specified persons, or past judicial decisions in particular cases,’ see Hart, supra note 31, at 97.
61 Id. at 102.
62 Id. at 98.
63 Id. at 105.
64 Id. at 107.
65 Greenawalt (1987), supra note 52, at 625.
66 The validity here is not referring to the idea of validity in legal sense. That is why, “it is not itself meaningfully called ‘valid’ or ‘invalid.’” MacCormick, supra note 33 at 109.
the rule of recognition is a matter of fact, and this fact can be observed (empirically) whether it is endorsed or not by judges and other officials using the powers in the system. MacCormick's comment on this point is of importance to refer to. He states that in a just society, the rule of recognition can be accepted and approved by all citizens and officials all together, however the acceptance of it by the latter is required and enough for its existence.

Since Hart refers to (social) facts for the existence of the (ultimate) rule of recognition, it is said that the rule of recognition is a social fact or convention, and that Hart is a conventionalist. Hart's later statement made in the Postscript to The Concept of Law in line with this account, in which he concedes that the rule of recognition is a judicial practice or custom and it exists as long as it is endorsed and employed 'in the law-identifying and law-applying operations of the courts.' Therefore, the rule of recognition is a matter of social convention.

As an advocate of the conventionality account, Andrei Marmor defines social rules or conventions as "the rules we follow in numerous contexts that have no particular origin in the enactment of an individual or an institution." According to him, conventions do not rest on a mutual agreement, but on the contrary tend to appear exactly in the cases on which it is difficult or impossible to reach an agreement. Therefore, a question arises here: can the conventional nature of the rule of recognition create a judicial obligation to follow or obey it? In answering to this question, Marmor explains that the rule of recognition, as social convention, is not, of course, legally binding on judges, while it is this very conventional nature that actually makes the rule of recognition binding on judges. That means that if one deals with legal practice, acting as a judge, then the social rules - i.e. conventions - of that role will force the judge to observe them.

67 That is why it has been noted that the rule of recognition does not deserve to be called as such, since it is not a genuine (legal) rule. See Uta Bindreiter, Why GRUNDNORM?: A TREATISE ON THE IMPLICATIONS OF KELSEN’S DOCTRINE 49 (Springer, 2002).
68 MacCormick, supra note 33, at 109.
69 Id. at 109; see also Schauer, supra note 34, at 151.
71 Greenawalt (1987), supra note 52, at 626.
73 Marmor, supra note 70, at 194.
74 Id. at 198.
75 Id. at 215.
Another important aspect of the conventional nature of the rule of recognition is spelled out again by Marmor, in which he stresses the historical characteristic of conventions: “in order to explain a conventionally established social practice... one must always consult history.” These remarks are extremely important in order to evaluate the Court’s headscarf decision under the light of Hart’s rule of recognition. Thus, following these remarks by Marmor, if we apply Hart’s concept of rule of recognition to the Turkish Constitutional Court’s headscarf decision, one question shall be posed: as a social fact or convention, can the principle of secularism be thought to be the ultimate source of the legal system or to be within the boundaries of the rule of recognition of the Turkish legal system, given that it is treated as superior (here superior is used in the sense of Hartian ‘ultimate’) to the constitution?

It is essential to understand that answering this question requires making an empirical investigation and this empirical investigation entails giving an historical account, because, as remarked by Andrei Marmor, a social convention inherently requires considering historicism. In this respect, it is argued that the principle of secularism has historical importance in Turkey, since it has provided a different legal system from that of the Ottoman Empire where the legal system was motivated by the religion.

Following these points, it can be noticed that in the practice of the Turkish judiciary, especially concerning the headscarf issue, the courts in Turkey including the Constitutional Court and the Danıştay have invoked the principle of secularism to decide several cases – whether to refuse claims, to annul statutes or to confirm the legality of administrative acts and deeds that approves the prohibition of the wearing headscarves. Therefore, based on this

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76 *fc. at 213.
77 In a strong statement, Professor Hafizogullari states that “[s]ecularism does not need a definition. It is the core and spirit of the legal system that it belongs.” Zeki Hafizogullari, *Türkiye Cumhuriyeti Devletinin Meşruiyet Temeli Olarak Laiklik* [Secularism as a Legitimate Base of Turkish Republic], 57 ANKARA ÜNİVERSİTESİ HUKUK FAKÜLTESİ DERGISI [JOURNAL OF ANKARA UNIVERSITY SCHOOL OF LAW] 315, 317 (2008); see also Zeki Hafizogullari, *Bir Kültür Ürünü Olarak Hukuk Düzeni* [Legal System as a Product of Culture], 46 ANKARA ÜNİVERSİTESİ HUKUK FAKÜLTESİ DERGISI [JOURNAL OF ANKARA UNIVERSITY SCHOOL OF LAW] 3 (1996).
78 In two different cases before the Constitutional Court on the Dissolution of Pro-Islamic Political Parties, the Court used the principle of secularism to dissolve the political parties that tried among other things, to allow wearing headscarf. The Welfare Party Closure Case, Turkish Constitutional Court, File 1997/1, Decision 1998/1, Jan. 16, 1998; The Virtue Party Closure Case, Turkish Constitutional Court, File 1999/2, Decision 2001/2, Jun. 22, 2001.
practice of the courts, it is claimed that the legal system in Turkey is particularly based on the principle of secularism, and it is, therefore, gives the legitimacy to the legal system. In that sense, if it is enough to discern the rule of recognition by focusing on whether it is endorsed and implemented by the officials of the system (or even only on judges) as stated by Hart, then it will be seen that the principle of secularism, as perceived by the Turkish Constitutional Court in the headscarf decision, has been treated and endorsed as the ultimate source of the Turkish legal system by the judges of the Court, at least by the majority of them. In this respect, it will be not wrong to claim that the Court’s decision is in line with the concept of the rule of recognition in the Hartian sense, thus it is within the legal sphere.

One of the Hart’s claims will support the above-mentioned inference, according to which he claims that a court’s decision cannot be sanctioned with nullity, “even if it is plainly one outside the jurisdiction of the court to make” that decision." So, even if the Turkish Constitutional Court is deemed to have exceeded its limits. Hart’s theory would probably claim that the decision could not be declared null and void.

As can be seen, the implication (or hesitant application by the author of this article) of the two concepts to the Court’s headscarf decision leads us to reach two different conclusions as to the compatibility or incompatibility of the decision with these concepts, although it cannot be certainly asserted that the two theorists themselves would agree with this conclusion.

The conclusions are also important to show how the application of the two concepts to the decision matters from the perspective of political theory. In that sense, Hart’s concept of the rule of recognition, are crucial to highlight a contradiction between the theory of political and legal philosophy. In other words, while the constitutional democracy theory, at the political level, will refuse the decision of the court, Hart’s rule of recognition seem to support the view that it is within the legal sphere.

What follows is an illustration of the literature and the practice on the issue of the unconstitutionality of constitutional amendments as this should be useful to cover the totality of the subject and bring more insight from a comparative perspective.

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80 It must be kept in mind that this determination needs to be supported by a wide empirical investigation, so it is only a rough conclusion. On the other hand, as remarked by MacCormick, although the acceptance of the rule of recognition only by officials is enough for its validity, whether that system is ‘just’ or not is another matter. MacCormick, supra note 33 at 109.

81 Hart, supra note 53, at 30. This statement shall be considered as referring to the final binding judicial decision of the courts, so the regular appeal procedure, by means of which a court’s decision might be reversed, shall be excluded from the meaning of this statement.
C. Comparative Account on the Issue of the Unconstitutionality of Constitutional Amendments

The literature on the unconstitutionality of constitutional amendments suggests that it is necessary to make distinction between the unconstitutionality of a constitutional amendment concerning its substantive and its procedural elements. In this way, the problem under consideration can be understood better.

It is the fact that almost every (if not every) constitution contains special procedures including but not limited to "super-majority voting requirements, the convening of a special constituent assembly with the specific mandate of amendment, the need for ratification by states/provinces (in a federal system), or by the general populace (in the form of a referendum), and/or temporal delays in the passage of an amendment" in order for constitutions to be amended by proper authority (usually a parliament). Therefore, it is clear that the claim of unconstitutionality of a constitutional amendment on the ground that it does not meet procedural requirements is neither bizarre nor uncommon.

In the US legal literature, the discussion centers on the challenge discussed by the scholars as to whether judicial review is necessary for the procedural requirements of a constitutional amendment. The question posed by scholars is whether the US Congress has the sole authority to promulgate a constitutional amendment and to determine the validity of ratifications and rescissions by the states with regard to a constitutional amendment or whether the US Supreme Court shall (have the jurisdiction to) decide on these aspects. In contrast, the view that the constitutional amendments must be subject to judicial review concerning their substances seems to be unacceptable, if not inconceivable, to US scholars. This account is clearly defended by Professor Tribe stating that:

82 Brooke, supra note 22, at 53-54.
83 For a supportive account on judicial review of a constitutional amendment in terms of its procedural elements, see Walter Dellinger, The Legitimacy of Constitutional Change: Rethinking the Amendment Process, 97 HARV. L. REV. 386 (1983); cf. Laurence H. Tribe, A Constitution We Are Amending: In Defense of a Restrained Judicial Role, 97 HARV. L. REV. 433 (1983). However, Tribe also touches the issue of judicial review of a constitution concerning its substance. Id. at 438.
84 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. U.S. CONST. art. V.
85 Jacobsohn, supra note 5, at 461.

On the case law concerning the unconstitutionality of constitutional amendments before the US Supreme Court, see Gözler, supra note 4, at 29-34.
Yet these criteria of amendment appropriateness surely must not be elaborated 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'. [emphasis added]

Beyond the above-mentioned US literature, there are contrasting views concerning the idea of the unconstitutionality of constitutional amendments in terms of their merit. For example, Frederick Schauer remarks that there is nothing which "makes a constitution constitutional nor can anything make a constitution unconstitutional," and thus to him, the idea of the constitutionality (or unconstitutionality) of a constitution or a constitutional amendment) is illogical. On the other hand, Gary Jacobsohn is in favor of the idea that constitutional amendments can be unconstitutional, and can therefore be annulled with regard to their merit. Walter F. Murphy holds the same opinion; to him, the idea that a constitutional provision might be declared as null and void is neither bizarre nor theoretically impossible. He claims that in constitutions, there are fundamental principles which go beyond the constitution itself. He more strikingly asserts that the other provisions of the constitution, which are not fundamental, might be declared as null and void if they contravene the fundamental one.

Professor Kemal Gözler, who approaches the issue from a positivistic perspective, says that if a constitution includes unamendable provisions, review of the substance of constitutional amendments must thereupon be possible. However, if that constitution does not contain any unamendable provisions, then a constitutional court does not have the jurisdiction to review the substance of constitutional amendments. In any case, however, Gözler states that there

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80 Tribe, supra note 83, at 442-43.
81 Schauer, supra note 34, at 145.
82 Id.
83 Jacobsohn, supra note 5, at 460.
85 Gözler, supra note 4, at 54. However, he notes that in the case of Turkey, where the Constitutional Court is not conferred the jurisdiction to review the substance of constitutional
must be a clear power-conferring provision in order for a constitutional court to review the substance of constitutional amendments.

Very surprisingly, the great liberal political philosopher John Rawls also discusses this issue in one of his masterpieces, Political Liberalism, in which he (maybe unexpectedly) approves of the idea that there can be unconstitutional constitutional amendments, and they can be invalidated by (the US) Supreme Court.\footnote{Rawls, \textit{Political Liberalism} 238-39 (Columbia University Press, 1993). One will, however, not find the purpose of the Rawls statement unacceptable, if one goes a little further into his theory, because the purpose Rawls has by acknowledging this idea, is that he wants to stay in line with the liberal ideal. That is to say that Rawls, when admitting this, has in mind the American constitutional tradition, which to him, has shown that the constitutional amendments have been mostly made in order to remove the weakness of, or to entrench, the liberal ideas, such as equal voting rights for women, abolishing slavery and so on.}

In line with the above mentioned literature, there is case law, besides the headscarf decision of the Turkish Constitutional Court, on the topic, which discusses and somehow endorses the possibility of striking down unconstitutional constitutional amendments, at least theoretically. For example, it is reported that in its first decision, the German Federal Constitutional Court endorsed the idea that the constitution could be unconstitutional,\footnote{Brooke, \textit{ supra} note 22, at 58.} at least in theory.

In Germany, the discussion on the subject took place before the courts in the middle of the twentieth century, just after the Nazi regime had been broken up. In that context, the question started with the controversy on the judicial review of statutes in general, and then moved to unconstitutional constitutional provisions in particular. The German courts (administrative, supreme, and constitutional), in a number of decisions on the constitutionality of statutes, declared a number of statutes to be null and void basing their decisions on the theory of natural law. Obviously, those cases originated from the particular historical past of Germany namely the aftermath of the Holocaust. For example, a decision by Amtsgericht Wiesbaden declared a provision of a statute concerning the confiscating of Jews’ property to be incompatible with natural law, and thus declared it void in 1945.\footnote{Dietze, \textit{Unconstitutional Constitutional Norms? Constitutional Development in Postwar Germany}, 42 Va. L. Rev. 1 (1956).}

This decision, along with others, shows that there could be higher supra(natural) laws, which are not included in the regulations (positivistic system), and therefore the lower-level regulation might be incompatible (or...
must be compatible) with these supra-laws. The debate on the issue continued for a while; there has been acceptance as well as rejection of the application of natural law theory by the court.

Later on, the discussion moved to the question of whether there could be supra-laws above the constitution and then the question arose whether there might be an unconstitutional constitutional provision? It is said that a few decision, made during 1950s, made it theoretically possible that a provision of the constitution could be unconstitutional, since, according to these decisions, there are supra-positive law, or in other words, inalienable and immune rights exist. A decision of the German Federal Constitutional Court shows this theoretical possibility clearly as follows:

Legal Security is one of the essential elements of the Rechtsstaat. Therefore, even the constitution-maker can be permitted only to a certain degree to neglect legal security. If a norm should deny, falsify, or disregard to an unbearable degree the function of preserving peace, which emanates from the law, it could, even if it was an original constitutional norm, be void.95

Although the German Federal Constitutional Court has paved the way for the idea of the unconstitutionality of constitutional provisions or amendments, it has not yet annulled any provisions of or amendments to the constitution thus far,96 but the Indian Supreme Court did so under the guidance and persuasiveness of the German Constitutional Court.97 It is documented by Jacobsohn that the Indian Supreme Court98 annulled a constitutional amendment, and has developed the doctrine of 'basic structure' or 'fundamental principles,' which refers to the idea that some rights and principles are so fundamental or basic in the constitution. As a result, they cannot be amended, and any constitutional amendment that is intended to undermine these fundamental principles can be annulled by the Indian Supreme Court. It is reported by Jacobsohn that the Indian Court too, interestingly, considered secularism as the basic or fundamental principle of the constitution in its decision annulling the constitutional amendment.99

95 Id. at 17-18. The German Constitutional Court abandoned this doctrine after 1970. Gözler, supra note 4, at 83.
96 Five constitutional amendments have been brought before the German Constitutional Courts for the claim of annulment. Gözler, supra note 4, at 56-64.
97 Jacobsohn, supra note 5, at 477.
98 Minerva Mills Ltd. v. Union of India, 1980 AIR 1789 1981 SCR (1) 206 1980 SCC (3) 625; see also Gözler, supra note 4, at 9.
99 Jacobsohn, supra note 5, at 480.
IV. CONCLUSION

In this article, an attempt has been made to analyze the Turkish Constitutional Court’s recent decision in which the Court annulled two constitutional amendments. For the analysis, the Court’s own reasoning was used to scrutinize the decision. To this end, the concept of the constituent power was briefly explained and following this, the concepts of the Grundnorm of Kelsen and the Rule of Recognition of Hart were illustrated in order to analyze the decision with reference to these concepts. It has been concluded that the two concepts would allow reaching different conclusions on the issue. That is to say, while Kelsen’s theory of Grundnorm seems to suggest that the decision of the Court is inconsistent with his conception of positive law or the pure theory of law, (and as a result, with constitutional democracy), Hart’s Rule of Recognition Theory seems to acknowledge that the decision is compatible with his theory as long as the principle of secularism is accepted and applied by the officials (judges) as the rule of recognition of the Turkish legal system. Therefore, the two different conclusions bring us to two different outcomes for the practice and the theory of the constitutional democracy.

On the other hand, there are some questions concerning the decision under discussion, which have not been posed yet, but which are extremely important to think about for the future possible implications of the Court’s decision. One of these questions is that are the people bound or not to the will of the old generations, and if so, to what extent? To what extent is this will of the old generation applicable to today’s developments and needs? What happens when the society develops and changes? Is the constitution static or dynamic, and to what extent? Who has authority to determine the (real or actual) will of the old generation that formed the constitutional order, and how? Which institution can secure legal stability and predictability in a rule of law for the citizens?

In addition to these political questions there are also questions which more directly relate to the legal sphere, and which the Turkish Constitutional Court might have to face following this decision. To mention a few: what would the Court say if any other article, which is currently in force, of the Constitution was brought before the Court with the claim that that article is contrary to those unamendable provisions? More specifically, what would be the position of the Court, if Article 136 of the Constitution, which establishes the Presidency of Religious Affairs, had been brought before the Court on a claim of unconstitutionality of it, as it might seem to be contrary to the principle of secularism? Or the same question is applicable to Article 24, which stipulates
the compulsory religious education in the curricula of primary and secondary education curricula.\textsuperscript{100}

On Turkey’s specific situation, there are two possible and seemingly more important questions to be posed: what are the limits of the constituent power in Turkey in the process of EU accession, and what happens if some contradictions emerge during the accession process? Namely, what will be the solution if the constitutional norms and EU acquis communautaire collide? Last but not least: what will happen if it is to allow minority groups not covered by the Treaty of Lausanne to have education in their own languages in the public schools? As this seems to require amending the constitution (Article 42), would that be understood – if it is changed of course – as contravening Article 2 of the constitution, which is among the unamendable provisions and in which, it is enshrined that the language of the state (not the official language) is Turkish.

Let us conclude with the last remark: as stated by Stephen Griffin that İfa constitution is easily amended, it may cause an ordinary political fight to be turned into a constitutional crisis.\textsuperscript{101} This is exactly what happened in Turkey during the years of 2007 and 2008, in that the mere political problems turned into the constitutional crises, which the Constitutional Court was asked to resolve.

POSTSCRIPT

During the review and the editing processes of this article, a new event, the new draft constitutional propositions submitted to the Parliament on March 30, 2010 has arisen. The discussion around these proposed amendments is very closely linked with the issue under consideration in this article. As seen in these discussions around the proposed amendments, a number of lawyers and politicians have been arguing that the TGNA cannot pass a constitutional amendment, by means of which unamendable constitutional provisions might be undermined. In this, they try to justify their claims by the headscarf decision of the Turkish Constitutional Court; therefore they assert that any constitutional proposition that will undermine the unamendable constitutional provisions will be annulled by the Constitutional Court.

\textsuperscript{100} It must be noted that the ECHR has found the practice of the compulsory religious curricula in Turkey to be contrary to the European Convention of Human Rights. See Hasan and Eyelêm Zengin v. Turkey. App. 1448/04, Jan. 08, 2008.
Moreover, this time, the argument has been broadened to such an extent that even the principles enshrined in the Preamble of the Constitution cannot be challenged by amending the relevant articles of the Constitution, because the Preamble and the principles therein are under the protection of unamendable Article 2. For example, in this line, it is alleged that the principle of separation of powers stipulated in the Preamble and the principle of rule of law stipulated in Article 2 cannot be changed by means of constitutional amendment, as it is considered that the main target of the submitted constitutional propositions is to change these principles, since a number of provisions of the draft amendment aims to change the structure, the functioning and the composition of the Constitutional Court and the Supreme Council of Judges and Public Prosecutors. Hence, this draft is deemed by the opponents as being contrary to the principle of separation of powers and of the rule of law. Therefore, the decision of the Constitutional Court that has been analyzed in this article has paved the way for what seems to be a much more striking tension in the very near time to come.

What kind of approach must be accepted by the Constitutional Court is very much important for the future of the Turkish political system as well as the legal system. However, it should be noted that while there has been a kind of established, yet contestable, understanding of the principle of secularism by the Turkish judiciary, it seems that there is less (judicial) practice which will lead to accept a kind of judicial convention on the nature of other principles enshrined in the unamendable constitutional provisions.
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