



# Between Legality and Legitimacy: The Case of Judicial Review of Constitutional Amendments from a Comparative Law Perspective

Ali Acar

Thesis submitted for assessment with a view to obtaining  
the degree of Doctor of Laws of the European University Institute

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European University Institute  
**Department of Law**

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## **Abstract**

There is a growing scholarly interest in the issue of unconstitutional constitutional amendments. Generally speaking, this issue concerns whether there should be some limits to constitutional amendments and whether courts should control those limits. In this sense, unconstitutional constitutional amendment exacerbates the debate concerning the legitimacy of judicial review *qua* institution, and moves the discussion one step further.

The rise in interest among scholars of the issue of unconstitutional constitutional amendments derives from the fact that constitutional amendments are sometimes used as an instrument by authoritarian governments to achieve their aims. The judiciary in various jurisdictions gives negative or affirmative responses to this instrumentalization of constitutional amendments by reviewing the contents of amendments. Thus, judicial review of constitutional amendments on substantive grounds has become a new legal phenomenon, which deserves close consideration. The purpose of this thesis is to contribute to this literature.

How is it possible for a court to declare an amendment unconstitutional? Under what conditions can the legality of an amendment be questioned? What substantive considerations outweigh the formal value of a duly adopted constitutional amendment, which is normally regarded as the highest legal source in modern legal systems? What kind of legal theory can explain this practice? These are some of the guiding questions, the analysis of which constitutes the main goal of our work. The analysis is based on the distinction between the aspects of legality and of legitimacy.

The legality of a constitutional amendment concerns two considerations. The first is whether the amendment is legally valid in terms of the constitutional norms. The constitutional norms here refer mainly to the procedural requirements or amendment mechanism, which the constitutional amendments have to meet. The second consideration is whether the amendment must conform to some (superior) principles, values etc. Depending on how one conceives of those superior principles, one may approach the issue at hand from the natural law perspective or legal positivism. In the present work, we stick to the legal positivism in accounting for the legality of unconstitutional constitutional amendments.

The legitimacy of a constitutional amendment concerns the merit of the amendment according to political morality, namely, whether it is a good or a bad thing, with regard to the value that the constitutional amendment should pursue. Equally, the legitimacy of the substantive

judicial review of constitutional amendments concerns whether it is a bad or good thing to confer on a court of an extra-ordinary power in a system, which is subscribed to constitutional democracy. This is a normative account of legitimacy, but it is not the only one. Legitimacy may also be approached sociologically, i.e. descriptively. In the latter account, legitimacy is examined on the basis of the political morality, which a legal and political order *actually* aims to achieve and pursue. These actual aims might be ideal or not (from an outsider and/or insider point of view). We will follow this sociological account in our analysis of the legitimacy of the judicial review of constitutional amendments.

The analysis of the issue is carried out through a comparative law perspective. In this respect, three jurisdictions are examined: Germany, India, and Turkey, which provide the most prominent examples of case law concerning the judicial review of constitutional amendments on substantive grounds.

## **Acknowledgments**

A doctoral thesis is a product of a long, stressful and laborious process. In any case however, it is not a product of a single person. In order to complete the present work, many people contributed in various degrees.

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## INTRODUCTION

In order to gain a rough idea about what *ultimately* counts as law in a country with a written constitution (which is interpreted by a judicial organ – i.e. a Constitutional or Supreme Court) and with a commitment to democracy, such as Turkey,<sup>1</sup> it is necessary to examine the constitution of the country.<sup>2</sup> For democratic countries with a written constitution, like Turkey, the result of this enquiry might look something like the following:<sup>3</sup>

- (1) The law (in Turkey) is whatever Parliament enacts following the procedure established by the Constitution.
- (2) However, any ordinary law enacted by Parliament following the process established by the Constitution can be annulled by the Constitutional Court for violating the Constitution.<sup>4</sup>
- (3) A decision of annulment or an interpretation concerning an *ordinary* law by the Constitutional Court can be overturned by Parliament by adopting a new law.<sup>5</sup>

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<sup>1</sup> Turkey is an easy starting-point for me, because it is the country that I am from, and the legal system that I know best. However, this does not undermine the generalizability of the remarks that are made in the following paragraphs. It should be mentioned though that Turkey might not be considered a perfect example of constitutional democracy. Nevertheless, the institutional structure and the constitutional design together with the legal and political system of Turkey make it possible for us to take it as such.

<sup>2</sup> Generally speaking, enquiring into what counts as law is closely linked with the validity criteria that legal rules must satisfy in order to be counted as such. Kenneth Einar Himma, “The U.S. Constitution and the Conventional Rule of Recognition” in *The Rule of Recognition and the U.S. Constitution*, ed. Matthew D. Adler and Kenneth Einar Himma (Oxford ; New York: Oxford University Press, 2009), p. 96.

<sup>3</sup> This is a very simple outline. It reflects, in some sense, an ideal understanding of constitutional democracy, but it also reflects an empirical observation of constitutional practice in democratic countries with written constitutions. It is especially true that this outline is based on the textual reading of the Turkish Constitution. What is more, this picture reflects the so-called “source thesis”, which claims that the validity of a legal rule is established and ascertained on the basis of whether it meets all source-based criteria or not. As we will see later, this scheme will need some improvements or refinements – deriving from the practice of constitutional law and a number of decisions of the Constitutional Court of Turkey. A further refinement to this scheme is also needed on the basis of the idea that morality might play a role in determining the validity of legal rules. For a very good illustration on this latter point, see Matthew H. Kramer, “Moral Principles and Legal Validity” *Ratio Juris* 22, no. 1 (2009), pp. 44-61; Wilfrid J. Waluchow, “Four Concepts of Validity” in *The Rule of Recognition and the U.S. Constitution*, ed. Matthew D. Adler and Kenneth Einar Himma (Oxford ; New York: Oxford University Press, 2009), pp. 122-144.

<sup>4</sup> This can be formulated in the following way: whatever is enacted by Parliament is law in Turkey *until* it is annulled by the Constitutional Court. Here we are referring to the contingent character of judicial review of laws, in that if no constitutional challenge concerning a law is brought before the Constitutional Court of Turkey, that law will still be counted as law, even if it may be regarded by the general populace (or by lawyers) as contrary to the Constitution. For this line of argument see Otto Pfersmann, “Unconstitutional Constitutional Amendments: A Normativist Approach” *Zeitschrift für öffentliches Recht* 67, no. 1 (2012), p. 91 *footnote* 12. On the discussion of this issue see also Carlos Santiago Nino, “A Philosophical Reconstruction of Judicial Review” *Cardozo Law Review* 14 (1993), pp. 805-811.

<sup>5</sup> Here the claim is only theoretical, that is to say, it might make no sense for Parliament to adopt a new law with the same content as the annulled one. However, if there is a compromise in Parliament between political parties and other relevant political actors, any such (new) law can be passed, which may not be brought before the

(4) A decision of annulment of an ordinary law by the Constitutional Court <sup>6</sup> can be overturned by Parliament by amending the Constitution according to the procedure for constitutional amendment, and that counts as law.

(5) A constitutional amendment can be annulled by the Constitutional Court *only* on *procedural* grounds.<sup>7</sup>

This scheme allows us to suggest that, in theory, Parliament in Turkey has the final say when determining what ultimately counts as law provided that it conforms to the procedural requirements for passing laws and constitutional amendments. In the case of a conflict over a constitutional matter with the Constitutional Court, Parliament in Turkey can amend the constitution, regardless of how difficult it might be, in practice, to make a constitutional amendment.<sup>8</sup> In general, the same conclusion can be assumed applicable to other constitutional democracies. Therefore, on the basis of this scheme, it is possible to make a general argument that

(6) Any constitutional amendment adopted in accordance with the (procedural) requirements laid down in a constitution will triumph over earlier constitutional provisions (and all other legal sources on that issue, including courts' decisions on that matter) and this counts *ultimately* as law in the constitutional democracies.<sup>9</sup>

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Constitutional Court, and which then become a valid law. Here again the contingent nature of judicial review is in play.

<sup>6</sup> This also includes any disagreeable interpretation of the constitution by the Constitutional Court or other higher courts. In this respect, for example, the Constitutional Court of Turkey has very recently annulled (File No: 2010/61, Decision No: 2011/7 published in the Official Gazette on February 26, 2011) an ordinary Parliamentary Act, which was conferring an exclusive competence of trial with regard to the issues of football games on the Arbitration Council of the Turkish Football Federation. Following the decision by the Constitutional Court, the Turkish Grand National Assembly amended the Constitution (on March 17, 2011, Act no 6214) to overrule the Court's decision by conferring, again an exclusive jurisdiction on the Arbitration Council.

<sup>7</sup> For the sake of the simplicity of the argument, we refrain from dealing with the status of international law or supranational law, like the EU law, which could be applicable to the EU member countries. And if Turkey becomes a member of the EU in the future, the scheme would also change accordingly. Certainly, these two types of law (supranational and international) would affect and change the scheme we have just drawn. As we shall see, there are scholars who claim that international or transnational law, which has constitutional value, may be invoked to argue for the unconstitutionality of (some) constitutional amendments. On this issue, especially see Vicki C. Jackson, "Unconstitutional Constitutional Amendments: A Window into Constitutional Theory and Transnational Constitutionalism" in *Demokratische- Perspektiven- Festschrift Für Brun-Otto Bryde Zum 70. Geburtstag*, ed. Michael Bäuerle, Philipp Dann, and Astrid Wallrabenstein (Tübingen: Mohr Siebeck, 2013).

<sup>8</sup> Due to the significant political importance of constitutional rules and depending on the political atmosphere or culture of a country, it may turn out (in practice) to be very difficult or sometimes politically risky, to attempt to amend a constitution – but this is another matter.

<sup>9</sup> However, this statement does not suggest that the parliamentary supremacy described above is equal to that of the parliamentary sovereignty of the English Parliament. According to Dicey, the traditional view concerning parliamentary sovereignty in England "... means... that Parliament ... has, under the English Constitution, the right to make or unmake any law whatever; and further, that no person or body is recognized by the law of



The scheme outlined above (hereafter referred to as the *scheme with six items* or the *scheme* alone) can be construed, so to speak, as *the rules of the game*<sup>10</sup> of the legality in constitutional democracies. According to this *scheme*, it is unexpected and unusual that in a constitutional system within a democracy, the constitutional text allows for substantive (judicial) review of constitutional amendments to be carried out by courts<sup>11</sup> (for the time being, let us leave the eternal constitutional norms outside of this statement). The reverse of this would simply be incompatible with the democratic principle understood, for the moment, in purely procedural terms, that is, the majority decision-making procedure.

Therefore, we argue that our *scheme*, as it stands, might be applied to democratic countries such as the US, France, and Italy, to mention just a few.<sup>12</sup> On the basis of the written constitutions of these countries, it is possible to argue that the representative institutions determined in and authorized by their respective constitutions (usually institutions composed of representatives of people, or those institutions together with the people themselves by a referendum, or, in a federal state, representative institutions of federal and federated states

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England as having a right to override or set aside the legislation of Parliament" A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 5 ed. (London: Macmillan and Co. 1897), p. 38. For more on the traditional view of parliamentary democracy see Hamish R. Gray, "The Sovereignty of Parliament Today" *The University of Toronto Law Journal* 10, no. 1 (1953), pp. 54-72 ; H. W. R. Wade, "The Basis of Legal Sovereignty" *The Cambridge Law Journal* 13, no. 2 (1955), pp. 172-197.

<sup>10</sup> The rules of the game of (constitutional) democracy or what we call *the scheme with six items* described mostly by legal terms is expressed by Kim Lane Scheppele in a more political terms, see Kim Lane Scheppele, "Democracy by Judiciary- (or Why Courts Can Sometimes Be More Democratic Than Parliaments)" in *Constitutional Courts Conference (1-3 November, 2001)* (Washington University: 2001). In Scheppele's initial formulation it was not very clear as to whether the rules of the game of democracy (or what she called *the standard democratic story*) allows for substantive (judicial) review of constitutional amendments to be realised by courts. Scheppele later advocates this possibility clearly, on the basis of the Hungarian case; see the next footnote 11. For the use of the term '*the rules of the game*' in a different context, see Andrew Arato, "Forms of Constitution Making and Theories of Democracy" *Cardozo Law Review* 17 (1995-1996), p. 191.

<sup>11</sup> For more on this issue, see Kemal Gözler, *Judicial Review of Constitutional Amendments- a Comparative Study* (Bursa: Ekin Press, 2008), pp. 3-20. Probably the only exception to the Item (5) would be the South African Interim Constitution, which authorized the Constitutional Court to control the outcome of the constitution-making process; i.e. whether the final adopted constitutional text conformed to 34 constitutional principles determined by the Interim Constitution. The current South African Constitution also authorizes the Constitutional Court (Art. 167 (4)) to decide on the constitutionality of amendments.. For a normative view suggesting that (the Hungarian) constitutional court should have this competence i.e. the review of the substance of constitutional amendments, see Kim Lane Scheppele, "The Fog of Amendment" (2013), <http://krugman.blogs.nytimes.com/2013/03/12/guest-post-the-fog-of-amendment/>. Scheppele seems to suggest this view due to an authoritarian political turn observed in Hungary, and constitutional amendment mechanism that has apparently been used to this end. For more on the Hungarian constitutional crisis see Kim Lane Scheppele, "How to Evade the Constitution: The Case of the Hungarian Constitutional Court's Decision on the Judicial Retirement Age 1-2" (Berlin: 2012). In fact, Scheppele earlier advocated a view which gives great importance (and competences) to constitutional courts with the belief that constitutional courts can *sometimes* be better than parliaments at protecting and promoting substantive understanding of democracy. For this line of thought see Scheppele, "Democracy by Judiciary- (or Why Courts Can Sometimes Be More Democratic Than Parliaments)" available at <http://law.wustl.edu/harris/conferences/constitutionalconf/ScheppelePaper.pdf>

<sup>12</sup> On the constitutional amendment procedures of these countries see Dawn Oliver and Carlo Fusaro, eds., *How Constitutions Change: A Comparative Study* (Oxford: Hart Publishing, 2011).

together) can amend the constitution, even though different methods and mechanisms of amendment, and also different political factors, are at play.<sup>13</sup> The *scheme* (including items (4) and (5))<sup>14</sup> can be applied to them.

Although, here, the scheme is called *the rules of the game* of the legality in constitutional democracies, it can also be called the *conventional* (or, in some senses, the ideal) *account* of constitutional amendment theory. For Richard Albert, the conventional account of constitutional amendment is formulated in the literature as follows: in order for a constitutional amendment to be validly adopted, it is sufficient to conform to entrenched or rigid processes set out in constitutions. This process requires, among other things, extraordinary or supermajority decisions for an amendment to be adopted. This description is consistent with our scheme.

However, our *scheme with six items*, which is drawn by relying strictly on written constitutions of constitutional democracies, needs to be adapted to the practice of constitutional law of different countries. In this respect, Albert classifies those countries' amendment practices under different names. He argues that the practice of constitutional amendments in some leading constitutional states departs from the above-mentioned conventional account. In this regard, he mentions and analyses four examples: the United States, Germany, South Africa, and India. In his classification, Albert focuses on various aspects of the constitutional amendment practice of these countries.

The practice Richard Albert focuses on goes from judicial review of constitutional amendments to the so-called available amendment mechanism outside the constitutional text. On the former account, Albert analyses the practice of judicial review of constitutional amendments carried out in Germany, India and South Africa by the respective highest courts of these three countries. Based on this analysis, he argues that Germany, South Africa and India have different amendment practices from that offered by the conventional account. According to this view, since substantive judicial review of constitutional amendments are

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<sup>13</sup> It may be argued that there are as many different amendment mechanisms as the number of constitutions in the world. For a brief survey of the different constitutional amendment mechanisms see Elai Katz, "On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment" *Columbia Journal of Law and Social Problems* 29 (1995-96), pp. 256-263 (showing three different methods of constitutional amendment: the British method (the simplest one), the Japanese model (legislature plus people), and finally the (federal) US model.

<sup>14</sup> This *scheme* can be applicable to other jurisdictions as well, and a clear statement in this regard is made by Robert Post with regard to the US: "Constitutional interpretation is always subject to revision by the arbitrary will of the people as measured by the procedure-dependent standards of Article V" Robert Post, "Democracy, Popular Sovereignty, and Judicial Review" *California Law Review* 86 (1998), p. 440.

possible in these countries, their practice of constitutional amendment departs from that of the United States (and perhaps France, although he does not mention it), the amendment practice of the latter again departs from the conventional account, but on different grounds. According to Albert, the reason the US departs from the conventional account is that it is possible in the US to amend the Constitution in an extra-constitutional way. Thus, Albert dubs the US model of constitutional amendment “the political model.”<sup>15</sup> In his view, the reason the conventional account is not applicable to Germany, South Africa and India, is simply because in these countries the judicial review of constitutional amendments and sometimes even their annulment are possible. That is why this model is called “the substantive model.”<sup>16</sup>

Judicial review of constitutional amendments leads Albert to classify (some of) those countries with regard to the amendment practice differently. In other words, in Albert’s classification, the judicial review of constitutional amendments seems to pose a serious challenge. In this regard, when one takes into account the challenging, or at least debated, character of judicial review in general, it seems that there is a more imminent problem concerning judicial review of constitutional amendments. Therefore, item (5) of our *scheme* does not reveal (or at least it does not represent) the whole picture for some countries; thus it must be revised for those countries. Yet, this does not change the importance of our *scheme*.

Even though the debate that whether constitutional amendments can be unconstitutional or not is not new, the practice of their annulment is relatively so, thus it calls for increasing attention. In two well-known examples, the claim that certain substantive limits can be imposed on constitutional amendments, and thus constitutional amendments can be held as unconstitutional by courts, was vindicated. These examples are India and Turkey, which will be analysed in this work. In Germany, the same claim has been made – the review of constitutional amendments has been realised by the Federal Constitutional Court – but thus far it has not resulted in the annulment of any constitutional amendment.<sup>17</sup> The German example too will be analysed in this study.

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<sup>15</sup> Richard Albert, “Nonconstitutional Amendments” *Canadian Journal of Law and Jurisprudence* XXII, no. 1 (2009), p. 5. For more on amending the US Constitution outside the constitutionally-envisaged mechanism see Akhil Reed Amar, “Philadelphia Revisited: Amending the Constitution Outside Article V” *The University of Chicago Law Review* 55, no. 4 (1988). Albert, “Nonconstitutional Amendments”, p.12

<sup>16</sup> Albert, “Nonconstitutional Amendments”, p.12. Yet, Albert points out that the states given as examples may fall in more than one model, with the third (textualist) model in mind.

<sup>17</sup> In other less well-known examples, such as Sri Lanka, Brazil, South Africa, Nepal, Mexico, Colombia etc., the respective courts of these countries challenged some of the constitutional amendments, and some amendments were annulled by the courts. And it is no coincidence that the International Association of Constitutional Law dedicated one of its Round Table discussions held in 2010, in Israel, to this issue. On the Brazilian case see

Generally speaking, in this study we will deal with a relatively new and very specific legal phenomenon: the issue of the unconstitutionality of constitutional amendment and the judicial review of amendments on *substantive* grounds. The following questions will guide our research.

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Canrado Hübner Mendes, “Judicial Review of Constitutional Amendments in the Brazilian Supreme Court” *Florida Journal of International Law* 17, no. 3 (2005). On the experience of South Africa *see* Albert, “Nonconstitutional Amendments” pp. 25-28 and Richard S. Kay, “Constituent Authority” *The American Journal of Comparative Law* 59 (2011), pp. 753- 755.

## 1. RESEARCH QUESTIONS AND AIMS

The judicial review of constitutional amendments can be considered only from the perspective of constitutional interpretation, namely to assess whether or not the interpretative methods employed by the Courts of three jurisdictions, and the legal arguments used by them are plausible, acceptable, and coherent within their respective legal systems.<sup>18</sup> However, there are further issues involved in judicial review of constitutional amendments, involving ethical and political factors. Therefore, the goal and approach of this study will be different. Richard Albert rightly notes this by stating that “[t]he concept of an unconstitutional constitutional amendment raises important questions about constitutionalism, constitutional legitimacy and judicial function.”<sup>19</sup> Therefore, we argue that there are legally and politically perplexing questions brought about by the substantive judicial review of constitutional amendments beyond the issue of constitutional interpretation.

We will not address the issue of how the constitutions of the three jurisdictions we are considering should be interpreted with regard to substantive review of constitutional amendments. We will, rather, provide a general theoretical reflection, which will be interdisciplinary since the unconstitutionality of constitutional amendments raises a number of puzzling questions that beg answers from different disciplines: i.e. political theory, legal theory, and constitutional law. As Sudhir Krishnaswamy correctly highlights: “[w]hat is at stake ... [concerning the matter of judicial review of constitutional amendments] is whether an interpretation of the Constitution which limits Parliamentary amending power is valid and legitimate?”<sup>20</sup>

Some of the questions we will address are normative, while others concern the empirical aspect of the jurisdictions to be analysed in this study. The following questions are the most important ones, but the list is not exhaustive.

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<sup>18</sup> In this respect, Otto Pfersmann argues that constitutional interpretation matters significantly for the issue of unconstitutional constitutional amendments. Pfersmann, “Unconstitutional Constitutional Amendments: A Normativist Approach”, pp. 101-103.

<sup>19</sup> Albert, “Nonconstitutional Amendments”, p.8.

<sup>20</sup> Sudhir Krishnaswamy, *Democracy and Constitutionalism in India- a Study of the Basic Structure Doctrine*, Law in India (New Delhi: Oxford University Press, 2009), p. 25. Otto Pfersmann suggests a slightly different scheme to analyse the issue. In his view, the issue of ‘unconstitutional constitutional amendments’ raises three main concerns: *conceptual*, *theoretical*, and *legal*. In other words, for Pfersmann, the issue of unconstitutional constitutional amendments should be analysed from these three perspectives: *conceptual*, *legal theory* and *positive constitutional law*, see Pfersmann, “Unconstitutional Constitutional Amendments: A Normativist Approach”, p.85.

First, there are a few questions related to political theory and/or political philosophy: who ought to have the ultimate authority on the political choices of a society at the constitutional level? In other words, who ought to hold the final decision-making power in a system of constitutional democracy? Other questions follow: who ought to be the guarantor of a constitution? What limits should constrain the competence of a constitutional court and a parliament in a constitutional democracy? To what extent can representatives of the people amend the constitution? For the focus of our study, a more important question is: to what extent can a decision of a supreme or constitutional court annulling a constitutional amendment be thought of as compatible with the idea of democracy? Can it be seen as legitimate?

Second, there are questions concerning constitutional law that intersect with those concerning political theory.<sup>21</sup> What can outweigh a duly adopted constitutional amendment? Or to put it another way: what can invalidate a duly adopted constitutional amendment? How should the amending power be limited in a constitutional democracy? Should the judicial review of constitutional amendments be confined to review the *requirements of forms and procedures* as laid down in a constitution (amending clause) of a modern democratic state or can it also include a review of the *substance* of the amendments?

The core questions with regard to legal theory involve the following considerations: Generally speaking, constitutional review deals directly with the identification of the criteria for legal validity in a given legal system. It directly concerns what counts as law in a given case under a legal system. Here, we should pay attention to the fact that the question concerning what is *the law* in a particular legal system (and in a particular case) is distinct from, but related to, the question '*what is law*'.<sup>22</sup> The former question is empirical, while the latter is theoretical or conceptual. Nevertheless, even though answering these questions requires different sorts of arguments and explanations, there is, or must be, a nexus between the two in the sense that it must be possible to apply the conceptual answer to the empirical cases. In this connection, a related question concerning legal theory arises: what is the ultimate source of legal validity? This latter question is among the core questions of jurisprudence, which legal scholars have

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<sup>21</sup> Indeed, as stated by Mark Tushnet, any issue in the field of constitutional law concerns law and politics at the same time and distinguishing one from the other is difficult, if not impossible. Mark Tushnet, "Comparative Constitutional Law" in *Comparative Law*, ed. Mathias Reimann and Reinhard Zimmermann (Oxford ; New York: Oxford University Press, 2006), p. 1228.

<sup>22</sup> For an article clearly articulating this distinction see John Gardner, "The Legality of Law" *Ratio Juris* 17, no. 2 (2004), p. 174 etc.

studied for a long time and to which they have offered different answers. Their answers are related to different conceptions concerning the *foundation* or the so-called *essence* of the law (if one exists at all).

The questions outlined above can be narrowed and made more precise with regard to the specific subject of this thesis: If some principles or precepts are considered and treated, by way of (constitutional) interpretation, as superior to a constitution, then what makes those principles and precepts as “above” the constitution? The question of *what makes the constitution valid* inevitably follows. Can a constitutional amendment be substantively invalid or invalidated by a court, and if so, what theory explains the legality of the courts’ decision? Given that the constitutions of the three countries to be examined here do not confer the competence on the Constitutional Courts (Germany and Turkey) and the Supreme Court (India) to review substances of constitutional amendments, the latter question deserves special attention because it involves the question of what can account for the legality of the employment of an *ultimate* law-identification power.

Consistent with the research questions, the primary aim is to discover what kind of legal theory accounts for the legality of the substantive judicial review of constitutional amendments. The second aim is to apply the theory to be discovered to the empirical cases: Germany, India, and Turkey. Thus, this attempt will mainly involve a descriptive approach.<sup>23</sup> In this respect, one of the immediate aims is to find and/or construct a legal theory, which will enable to account for the legality of the empirical cases. Following this we will try to deal with the legitimacy of the judicial review of constitutional amendments, again empirically, on the basis of the three jurisdictions.

Concerning the legality aspect, it seems that this point primarily requires the identification of the ultimate foundation of a legal system. This is because attacking an amendment on substantive grounds seems to assume that there are *norms, principles, and values* etc., which are superior to the constitution, treated normally as the highest or ultimate *positive* legal

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<sup>23</sup> For more on the descriptive and normative approaches in jurisprudence see Veronica Rodriguez-Blanco, “The Methodological Problem in Legal Theory: Normative and Descriptive Jurisprudence Revisited” *Ratio Juris* 19, no. 1 (2006), (showing some of the difficulties of distinguishing between the two approaches, and the difficulties in classifying the legal philosophers within a particular approach. For example, she argues that some of the advocates of the natural law tradition cannot easily be associated with the normative approach. In this sense, she classifies Michael Moore within the descriptive approach, while John Finnis falls into the normative category), *Ibid.* p. 28.

source in constitutional democracies.<sup>24</sup> Hence, the issue of unconstitutional constitutional amendments urges us to consider the ultimate foundation of a legal system.

As to the legitimacy aspect, we will seek to analyse how democracy and sovereignty in the sense of final-decision making authority are understood and applied in the three countries, as this is the main issue for scholars when making their case for and against judicial review in general. What the empirical experiences of the three countries show us in this regard will be identified and analysed. These points will become clearer in the following sections.

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<sup>24</sup> Otto Pfersmann argues that seeking a higher element above the constitution can be identified only from a moral perspective or according to legal realism. Pfersmann, “Unconstitutional Constitutional Amendments: A Normativist Approach”, p.82.



## **2. REASONS FOR SELECTING THE THREE COUNTRIES FOR COMPARISON**

The main reason for selecting Germany, India, and Turkey lies primarily in the fact that they offer the most prominent examples of substantive judicial review of constitutional amendments. The experiences of those three countries make it possible for us to compare them meaningfully. Even though there are other examples of judicial review of constitutional amendments – in the jurisdictions of the US and France, for example, in none of these has the review of the substance of the challenged constitutional amendments been realised by the US Supreme Court and the Conseil Constitutionnel.<sup>25</sup> However, we will try to benefit from these latter two legal systems in our comparison, even though we will not provide a systematic and complete analysis of them. Therefore, although the focus of the comparison will be on Germany, India and Turkey, we will use some comparative information provided by other jurisdictions to the extent that it is useful and relevant to this study.

The second reason for selecting Germany, India, and Turkey is that the respective political and legal systems of these countries enable a meaningful comparison of the legal phenomenon of unconstitutional constitutional amendments. In particular, while Turkey and Germany are within the European (continental) legal system, India belongs to common-law. The different models of judicial review applied in these countries also makes it possible to see how different models may converge with or depart from each other with regard to the issue in question.

Finally, there is a historical dimension that also seems to make the comparison worthwhile: India and Germany adopted their constitutions in the same year – in 1949, India after British colonialism, and Germany in the aftermath of the Holocaust. The two constitutions are also committed to democracy as a fundamental principle. As for Turkey, even though it adopted its first constitution under the republican regime in 1921, and then revised it significantly in 1924, this constitution was run under the one party regime. Thus, the regime Turkey followed was not a democracy. Passing to multi-party system, and thus to democracy (at least procedurally) in Turkey coincides with almost the same years when India and Germany adopted their constitutions, thus passed to democracy. Turkey, however, passed to a multi-

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<sup>25</sup> Some of the examples provided by France and the US will be used in the following sections and chapters. In other existing examples, such as Brazil and South Africa, where the substance of some constitutional amendments was reviewed by the courts, and some were even invalidated, there was not enough literature available to make the comparison. However, it is likely that these two examples would provide enough data (if it is made accessible) for a meaningful comparison.

political party system in 1946. The fact that the three countries became democracies at approximately the same time allows us to take into account the differences and similarities of the political structures and cultures when making our comparison.

On the basis of each country there are further reasons for selecting them as cases. For example, Germany's Federal Constitutional Court paved the way for the first judicial review of constitutional amendments. Or to put it differently, if we talk about the era of unconstitutional constitutional amendments today,<sup>26</sup> the German Federal Constitutional Court's experience is of special importance. In fact, it is not coincidental that the existing literature concerning the issue at hand includes, almost inevitably, Germany in the analysis or comparison. Indeed it is the German experience that is said to have affected that of India.<sup>27</sup>

As for Turkey, given that it is a country with strong links to the European legal system and it is in the process of EU accession, the question we are addressing is important. Turkey is under significant EU pressure to meet the membership criteria and in order to accomplish this Turkey is required to amend its constitution. Thus, the question we are dealing with has (and may have in the near future) certain practical implications. In this context, the issues taken up in this study are ongoing in Turkey, and it will be under debate in the middle and long term, thus, this study is a timely one.

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<sup>26</sup> Teresa Stanton Collett, "Judicial Independence and Accountability in an Age of Unconstitutional Constitutional Amendment" *Loyola University of Chicago Law Journal* 41 (2010).

<sup>27</sup> Krishnaswamy, *A Study of the Basic Structure Doctrine*, p. xxvii.

### 3. OUTLINE OF THE CHAPTERS

In the light of the explanations made in the preceding paragraphs, this study is composed of four main chapters. In the first chapter, the “Introduction” to the thesis will be elaborated in more detail, and answers to some of the research questions will be sought. The chapter will provide a brief overview of judicial review *qua* institution, since it is one of the important elements of our enquiry. Next, the literature on the issue of unconstitutional constitutional amendments will be discussed and the arguments for and against the issue, as employed by various scholars, will be introduced. The summary will be followed by a brief assessment of the literature.

In the second chapter, the debate on the ultimate criteria of the validity of law (and of a constitution) will be addressed from the perspective of legal positivism; as the employment by a court of an extraordinary legal power (which is not conferred by a constitution, and indeed which is not expected to be conferred in a democratic regime as our *scheme with six items* has suggested above) to determine what ultimately counts as law in a legal system closely involves the issue of ultimate legal validity. As far as this latter issue is concerned, two main concepts immediately come to the fore within the positivistic theory of law: H. L. A. Hart’s *rule of recognition* and Hans Kelsen’s *Grundnorm*. These two concepts are perhaps the best candidates to account for the *scheme with six items* of the rules of the legality in a constitutional democracy. Therefore, these concepts will be explained in order to have an analytical framework to examine and discuss the empirical cases provided by the three jurisdictions: Germany, India, and Turkey.

The reason for focusing on and employing the two concepts stems from the simple fact that these are the concepts that can shed light, albeit sometimes not a great deal, on the idea of the extra- or supra-legal foundation of a modern legal system. We consider that the two concepts are closely connected to the issue of the unconstitutionality of a constitutional amendment, because in modern legal systems, constitutions are recognised as the superior or ultimate positive source of law. Thus, what makes a duly adopted constitutional amendment unconstitutional/invalid seems to be closely related to the issue of the ultimate criterion of the validity of constitutions. This has indeed been aptly stated by Frederick Schauer: “... if we are searching for the foundation of law, we might then go one step further, and ask what it is that makes the Constitution valid? It is at this point that some of the most enduring questions of

jurisprudence are engaged, and it is here that those questions are directly relevant to the question of constitutional amendment.”<sup>28</sup> Hence, those two concepts will be elaborated and discussed in the second chapter.

The third chapter will present a comparative account, providing detailed information on the landmark case law on substantive judicial review of constitutional amendments realised by the respective highest courts of Germany, India and Turkey. This chapter will also attempt to apply the analytical framework discovered in the second chapter to explain the legality aspect of the issue under investigation. To this effect, we will seek to identify if some values or principles employed by these three courts in reviewing the constitutional amendments on substantive grounds are part of the ultimate criteria of their respective legal systems.

In the last, fourth chapter, we will address another important aspect of the issue: how can the substantive judicial review of constitutional amendments be treated as legitimate vis-à-vis the ideal of (constitutional) democracy? In this chapter, our analysis will be mainly descriptive in the sense that it will discuss whether or not the level of democracy attained by these countries has something to do with the substantive judicial review of constitutional amendments. In this respect, there seems to be two connected issues. The first involves the legitimacy of judicial review in general, as this issue will be useful for us in the discussion of the unconstitutionality of constitutional amendments. The second issue concerns the two concepts: constituent and amending/constituted power. It appears that these two concepts have something to do with the issue in question in the sense that the literature argues that they are linked to the power to create and/or amend a constitution. It is obvious that behind these two concepts lies an idea that is linked to democracy.

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<sup>28</sup> Frederick Schauer, “Amending the Presupposition of a Constitution” in *Responding to Imperfection : The Theory and Practice of Constitutional Amendment* ed. Sanford Levinson (Princeton: Princeton University, 1995), p. 149.





## **CHAPTER 1**

### **LITERATURE REVIEW ON THE UNCONSTITUTIONALITY OF CONSTITUTIONAL AMENDMENTS**

The literature concerning the unconstitutionality of constitutional amendments has focused on various aspects of the issue. Some scholars are interested in the legitimacy aspect,<sup>29</sup> while others have concentrated on the interpretive strategies developed by courts when reviewing constitutional amendments.<sup>30</sup> Here, we will first present the literature dealing with these aspects and then move on to analyse the subject in question. However, before presenting and reviewing the literature, it will be useful to provide a general overview of judicial review *qua* institution as this is the main basis for all further discussions of the issue at hand. Following this, we will move on to the literature regarding the issue of the unconstitutionality of constitutional amendments.

#### **1.1. JUDICIAL REVIEW *QUA* INSTITUTION**

Concerning judicial review, one main issue occupies the literature: the legitimacy or illegitimacy of judicial review, that is, its compatibility or incompatibility with the idea of democracy. Since this pertains to the legitimacy aspect of judicial review, we will address it in the final chapter. Here, we will provide a brief historical overview on the institution of judicial review, which will be useful to make some further points concerning the issue under consideration in this study. Following this, our focus in this section will be on the literature concerning the unconstitutionality of constitutional amendments.

What is meant by a judicial (or constitutional) review is the competence of courts, or of a specialized court, to review (including but not limited to) the constitutionality of parliamentary acts and decrees enacted by legislative branches or by executive branches authorized by legislative branch, and to declare these unconstitutional if they violate the constitution. In the literature, constitutional review and judicial review are sometimes used

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<sup>29</sup> Joel Colon-Rios, "The Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform" *Osgoode Hall Law Journal* 48 (2010) ; Vincent J. Samar, "Can a Constitutional Amendment Be Unconstitutional?" *Oklahoma City University Law Review* 33, no. 3 (2008) ; Yaniv Roznai and Serkan Yolcu, "An Unconstitutional Constitutional Amendment- the Turkish Perspective: A Comment on the Turkish Constitutional Court's Headscarf Decision" *International Journal of Constitutional Law* 10, no. 1 (2012) ; 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, no. 2 (2013).

<sup>30</sup> William L. Marbury, "The Limitations Upon the Amending Power" *Harvard Law Review* 33 (1919-20) ; Pfersmann, "Unconstitutional Constitutional Amendments: A Normativist Approach".

interchangeably. However, judicial review is sometimes also used to encompass review of administrative deeds and acts. Thus, it should be underlined that what is meant by judicial review in this thesis refers to constitutional review of parliamentary acts.

The origin of judicial review as an institution has been highly contested and discussed extensively in the literature, especially in the United States – the first country in which this institution emerged. One of the reasons for this is the lack of clear power granted to the courts, including the US Supreme Court, by the Federal Constitution of the US. However, in spite of the continuing debate over the actual origin of judicial review,<sup>31</sup> the US Supreme Court's landmark decision in *Marbury v. Madison* is widely acknowledged to have paved the way for judicial review as an institution.<sup>32</sup>

In Europe, it was more than a century after the United States that the judicial review was accepted. The Austrian Constitution of 1920<sup>33</sup> and the Weimar Constitution of 1919<sup>34</sup> introduced the judicial review, which was later adopted by and expanded to other countries. However, in contrast to the United States' experience, there is no dispute in the Austrian case that the Austrian Constitution clearly conferred the authority to review the constitutionality of acts and ordinances to a specialized and centralized court, the Constitutional Court. It has been widely acknowledged that under the influence of Kelsen's doctrine,<sup>35</sup> the Austrian

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<sup>31</sup> One scholar argues that the explanation of the origin of judicial review by reference to the decision of the Supreme Court in *Marbury v. Madison* is insufficient. For her, it is not this case that paved the way for judicial review in the US but the colonial practice of declaring null and void the "bylaws of corporations for repugnancy to the laws of England". Mary Sarah Bilder, "Idea or Practice? A Brief Historiography of Judicial Review" *Boston College Law School Legal Studies Research Paper Series* Research Paper 156 (2008), <http://ssrn.com/abstract=1134831>, p. 2. Bilder argues that this practice affected the minds of post-Revolutionary lawyers after 1776 in the US. On the history of the different views of lawyers concerning the origin of judicial review see the rest of Mary Sarah Bilder's article.

<sup>32</sup> 5 US (1 Cranch) 137 (1803). For a good summary of the context from which the case arose, see William W. Van Alstyne, "A Critical Guide to *Marbury V. Madison*" *Duke Law Journal*, no. 1 (1969), see pp. 3-6.

<sup>33</sup> Article 140 of the Austrian Constitution of 1920. For more on the judicial review introduced by the Austrian Constitution of 1920 see J. A. C. Grant, "Judicial Review of Legislation under the Austrian Constitution of 1920" *The American Political Science Review* 28, no. 4 (1934), pp. 670-76; and on its history see Theo Öhlinger, "The Genesis of the Austrian Model of Constitutional Review of Legislation" *Ratio Juris* 16, no. 2 (2003), pp. 206-222.

<sup>34</sup> The judicial or constitutional review under the Weimar Constitution of 1919 was not as clear as that of the Austrian Constitution of 1920. Article 108 of the Weimar Constitution envisioned the establishment of a Constitutional Tribunal (a Constitutional Tribunal for the German Reich), and this court was granted some jurisdiction similar to constitutional review. For the historical background and experience of judicial review under the Weimar Constitution, see Michael Stolleis, "Judicial Review, Administrative Review, and Constitutional Review in the Weimar Republic" *Ratio Juris* 16, no. 2 (2003).

<sup>35</sup> Sandrine Baume, « Introduction » in Hans Kelsen, *Qui Doit Être Le Gardien De La Constitution?*, trans. Sandrine Baume (Paris: Michel Houdiar 2006), p. 9. Yet Kelsen states that the American experience of judicial review influenced (mostly through its disadvantages) the Austrian model accepted by the 1920 Constitution. Hans Kelsen, "Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution" *The Journal of Politics* 4, no. 2 (1942), pp. 194-195.



model of judicial review was endorsed in the European region, especially after the Second World War.

There are two main models of judicial review: the American and European. Before giving the details of these models, one point must be stressed: even though there is a common rationale in adopting the judicial review in Europe and the US – which is the idea that the constitution is a supreme body in a legal system and in order to ensure its supremacy, judicial review is necessary – a further rationale seems to be peculiar to Europe. In Europe, judicial review was acknowledged, in addition to the idea of supremacy of constitution, to protect human and/or minority rights against political powers. This last point was not so clear in the United States’, at least at the inception of the institution of judicial review, as invoked by Justice John Marshall in *Marbury v. Madison*.<sup>36</sup>

The American model of judicial review is described as a dispersed one. This implies that in the American model, all courts, no matter at what level, are authorized to resolve constitutional questions presented in the case to be decided by them. One of the reasons for this is that Justice John Marshall, when he inferred the power of judicial review in *Marbury v. Madison*, relied on two factors: the supremacy of the constitution and on the ordinary function of courts. He stated this in the decision as: “[i]t is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each. So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty”<sup>37</sup>

According to Marshall, the claim that the Constitution is the superior body of law in the United States entails that every court has a duty (and is authorized) to review the conformity of legislative acts to the Constitution.<sup>38</sup>

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<sup>36</sup> “The most famous judicial defence of judicial review, *Marbury v. Madison*, had nothing to do with individual rights” Jeremy Waldron, “The Core of the Case against Judicial Review” *The Yale Law Journal* 115 (2005-2006), footnote 35 at 1357.

<sup>37</sup> *Marbury v. Madison*, 5 US (1 Cranch) 177-178 (1803).

<sup>38</sup> “If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply” *Marbury v. Madison*, 5 US (1 Cranch) 178 (1803). Peter E. Quint, “The Most Extraordinarily Powerful Court of

In the American model, the resolution of the question of constitutionality of a piece of legislation by courts in the United States is secured through non-application of the law declared unconstitutional by a particular court in a given case.<sup>39</sup> In other words, when a court declares a law unconstitutional or a provision of a law, the court shall not apply such law or provision in the case; yet, that law or provision will remain valid.<sup>40</sup> Namely, invalidation of a law by a court in the United States implies only that the invalidated law will not be applied to the concrete case.

According to the American model, the question of the unconstitutionality of a statute or a provision thereof can only be initiated within the process of a lawsuit; in which the question of the constitutionality of a law, to be applied in a case, is disputed by one party. Therefore, the primary aim of the case is not to settle the constitutionality or unconstitutionality of the law, but just to settle the dispute. There is no separate and specific procedure through which the question of the constitutionality of laws can be resolved.<sup>41</sup>

Kelsen, who is accepted as the architect of the European model, argued that the American model had some disadvantages. The first disadvantage is the different interpretation of the same law with regard to its constitutionality by different courts.<sup>42</sup> In this situation, the supremacy of the constitution would be jeopardized because of the different interpretation of the constitution. Furthermore, a court without the final authority to interpret the constitution would have less importance and power. Therefore, Kelsen reveals that the disadvantages of the American model of judicial review were taken into account in Austria when the new Austrian constitution (of 1920) was being drafted. As a result, it was decided that the Austrian constitution should embrace a centralized model of judicial review.

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Law the World Has Ever Known”- Judicial Review in the United States and Germany” *Maryland Law Review* 65 (2006), p. 154 and 157.

<sup>39</sup> Kelsen, “Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution”, p.185.

<sup>40</sup> However, the matter is not so clear, as revealed by Jeremy Waldron. Waldron calls attention to the fact that whether a piece of legislation declared unconstitutional would remain in force in further cases or whether it would be considered as struck out of the statute-book altogether is not a settled matter in the US practice of judicial review. Waldron, “The Core of the Case against Judicial Review” Especially *see* footnote 24, p. 1355.

<sup>41</sup> This is the reason Michel Rosenfeld calls the US model of judicial review less political, as it is *concrete* and *a posteriori* in contrast to the *abstract* and *ex ante* character of the European model. Michel Rosenfeld, “Constitutional Adjudication in Europe and in the United States: Paradoxes and Contrast” *International Journal of Constitutional Law* 2, no. 4, p. 638. However, despite these dispersal characteristics of the American model, it is centralized, of course, concerning the federal law, in other words through the jurisdiction granted to the Supreme Court. Tushnet, “Comparative Constitutional Law”, p.1243.

<sup>42</sup> Kelsen, “Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution”, p.185.

In the Austrian (and thus the European) model, a constitutional court is granted the final and centralized authority to interpret the constitution, that is, to decide on the constitutionality of laws. When the constitutional court declares a law unconstitutional, that law would be removed from the text of the statutes altogether. Kelsen highlighted that “[t]he decision of the Constitutional Court by which a statute was annulled had the same character as a statute which abrogated another statute”<sup>43</sup> This decision of the Court’s would bind any administrative and judicial organs in the legal system.

To sum up, the differences between the American and the European models are as follows: In the European model, which is based on the Austrian model, a centralized court is given the final authority to settle the issues of the constitutionality of laws. In addition to this, there is a specific procedure (abstract judicial review) to settle the claim of the unconstitutionality of laws alongside the concrete judicial review. Thus the European model is a centralized one in the real sense of the term. Because, where there is a question of constitutionality of laws in cases before courts, only a centralized and specialized, constitutional court is authorized to decide on such questions. Other courts have to suspend the proceeding and await the decision of the constitutional court (and obey what the constitutional court decides) on that question.

This framework will be of particular use in the third chapter, when we will address the issue of the unconstitutionality of constitutional amendments in the three jurisdictions. To recapitulate briefly, these two models are used in our three jurisdictions. The European model is in force in Germany and Turkey, and the US model is used in India. We can now move to the literature review.

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<sup>43</sup> Ibid. p. 187.



## 1.2. THE LITERATURE ON THE UNCONSTITUTIONALITY OF CONSTITUTIONAL AMENDMENTS

The following section offers an overview of the scholarship from various legal systems on the issue of judicial review of constitutional amendments or unconstitutionality of amendments. The literature review allows us to see the different arguments that either support or reject the idea that there can be unconstitutional constitutional amendments. As we will see later, some of these views sound proper when talking about the legality and legitimacy of the judicial review of constitutional amendments, though they will need some improvement and/or refinements. On the other hand, most of the views to be presented in this section seem to deal with the legitimacy rather than the legality aspect of the issue, thus there is, somehow, a niche in the literature. Presenting these is crucial in order to draw a line between legality and legitimacy. What we mean by these terms will become clearer later in the work.

Some scholars support the idea that (some) constitutional amendments can be unconstitutional. Other scholars reject this idea, i.e. unconstitutional constitutional amendments, claiming that it is bizarre or impossible. Below we will distinguish those scholars dealing with unconstitutional constitutional amendments according to whether they accept or reject the idea that there may be unconstitutional amendments to the constitution. However, we can also divide those that accept this idea into two camps. In the first camp, there are those that accept only a procedural review of constitutional amendments, while in the second camp are those that also accept a substantive review.

### 1.2.1. Procedural vs. Substantive Judicial Review of Constitutional Amendment

The literature suggests first that it is necessary to make a distinction between *substantive* and *procedural* grounds in the judicial review of constitutional amendments. In this way, it is argued, the problem under consideration can be better grasped. In fact, almost every (if not all) written constitutions contains special (rigid) procedures for constitutional amendment,<sup>44</sup> 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

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<sup>44</sup> And, in fact, this is one of the main features that make it possible to call a written document containing some rules a (formal) *constitution*. For this view, especially, see Carl Schmitt, *Constitutional Theory*, trans. Jeffrey Seitzer (Durham ; London: Duke University Press, 2008), pp. 71-74. On the different forms or procedures of constitutional amendment, see *Ibid.* pp. 148-149.

referendum), and/or temporal delays in the passage of an amendment”<sup>45</sup> It thus seems that the claim that a constitutional amendment can be held unconstitutional on procedural grounds may be accepted without issue.<sup>46</sup> However, some authors have also rejected the review of constitutional amendments on procedural grounds.

In fact, the debate concerning judicial review of constitutional amendments on procedural grounds is not new.<sup>47</sup> The judicial review of constitutional amendments started earlier than that of ordinary laws with the latter being initiated and acknowledged in the US by the *Marbury v. Madison* case in 1803, while the former was brought before the US Supreme Court in the *Hollingsworth v. State of Virginia* case,<sup>48</sup> which was decided in 1798.<sup>49</sup> However, while the idea and practice of judicial review of ordinary (parliamentary) statutes is controversial and has been debated in the literature extensively,<sup>50</sup> to date there has been little

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<sup>45</sup> Sam Brooke, “Constitution Making and Immutable Principles” (Tufts University, 2005), pp. 53-54.

<sup>46</sup> This is indeed compatible with the conventional account of judicial review, and it is unsurprising that the US literature has focused on whether the procedural requirement is justiciable or not. The substance of an amendment is regarded mainly as a political question. Marty Haddad, “Substantive Content of Constitutional Amendments: Political Question or Justiciable Concern?” *The Wayne Law Review* 42 (1995-96), pp. 1686-1687.

<sup>47</sup> See among others, Arthur W. Machen, Jr, “Is the Fifteenth Amendment Void?” *Harvard Law Review* 23 (1909-10) ; Marbury, “The Limitations Upon the Amending Power” ; Douglas Linder, “What in the Constitutional Cannot Be Amended?” *Arizona Law Review* 23 (1981) ; John R. Vile, “Limitations on the Constitutional Amending Process” *Constitutional Commentary* 2 (1985) ; George R. Wright, “Could a Constitutional Amendment Be Unconstitutional?” *Loyola University of Chicago Law Journal* 22 (1990-91). On this case, see Rory O’Connell, “Guardians of Constitutions: Unconstitutional Constitutional Norms” *Journal of Civil Liberties* 4, no. 48-75 (1999).

<sup>48</sup> 3 US 378 (1798). There are other cases from the US Supreme Court, such as *Dodge v. Woolsey*, 59 US 331 (1855), *National Prohibition Cases*, 253 U. S. 350 (1920), *Dillon v. Gloss*, 256 U. S. 368 (1921), *Leser v. Garnett*, 258 U. S. 130 (1922), *United States v. Sprague*, 282 US 716 (1931), *Coleman v. Miller*, 307 U. S. 433 (1939).

<sup>49</sup> In this case, the ground for the claim of the unconstitutionality of the 11th Amendment to the US Constitution was that as the 11th Amendment was not submitted to the President for his approval, it is void. The claim was dismissed by the Court. For a concise summary of other case law of the US Supreme Court on the matter of the unconstitutionality of constitutional amendments on procedural grounds see Vicki C. Jackson, “Unconstitutional Constitutional Amendments: A Window into Constitutional Theory and Transnational Constitutionalism” in *Demokratische- Perspektiven- Festschrift Für Brun-Otto Bryde Zum 70. Geburtstag*, ed. Michael Bäuerle, Philipp Dann, and Astrid Wallrabenstein (Tübingen: Mohr Siebeck, 2013), p. 56 footnote 32. Another earlier case in which the unconstitutionality of an amendment was challenged is provided by the Irish Supreme Court; *State (Ryan) v. Lennon* [1935] IR 170. In this case, the 17th amendment to the Irish Constitution was challenged; it was however dismissed by the Irish Supreme Court. On *State (Ryan) v. Lennon* case, see O’Connell, “Guardians of Constitutions: Unconstitutional Constitutional Norms”

<sup>50</sup> For the discussion of judicial review in general see Robert Dahl, *Democracy and Its Critics* (New Heaven: Yale University Press, 1989), pp. 187-91. For a slightly different discussion on the same topic see Wojciech Sadurski, “Judicial Review and the Protection of Constitutional Rights” *Oxford Journal of Legal Studies* 22, no. 2 (2002), pp. 275-99. For a discussion of the view that judicial review is not undemocratic see Ronald Dworkin, “Equality, Democracy, and Constitution: We the People in Court” *Alberta Law Review* 28, no. 2 (1989-90). For a strong objection to judicial review see Waldron, “The Core of the Case against Judicial Review”, pp. 1346-1407, 2005-06. For a view that supports the institution of judicial review see Samuel Freeman, “Constitutional Democracy and the Legitimacy of Judicial Review” *Law and Philosophy* 9, no. 4 (1990-1991), pp. 327-70. For a contra view see Leslie F. Goldstein, “Judicial Review and Democratic Theory: Guardian Democracy Vs. Representative Democracy” *The Western Political Quarterly* 40, no. 3 (1987), pp. 391-412. For related points see also Dennis J. Goldford, “The Political Character of Constitutional Interpretation” *Polity* 23, no. 2 (1990),

debate on the review of constitutional amendments. An important exception is represented by the famous Dellinger-Tribe debate on the review of amendments on procedural grounds.<sup>51</sup> This debate focuses on whether the procedural requirements required by the amendment mechanism of the US Constitution, Article V,<sup>52</sup> can even be reviewed by the US Supreme Court. More precisely, the question addressed by the two scholars is whether only the US Congress has the authority to determine the validity of states' ratification and rescissions to an amendment, or whether the Supreme Court shall decide on these matters.

Laurence Tribe's position is that the amending process cannot be subjected to judicial review. For him, such a review would be logically (as well as politically) detrimental to the entire constitutional structure. In his words: "[T]hese 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.'"<sup>53</sup>

Walter Dellinger, on the other hand, argues that a constitutional amendment may be subject to the judicial review in terms of procedural requirements, since the constitution provides the reference point to determine whether the amendment is procedurally correct. Furthermore, he argues that judicial review of constitutional amendments is necessary to determine legal certainty and to evaluate the legitimacy of the government and its actions. In this respect, he

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pp. 245-61; Osman Can, "Anayasayı De i tirme Ve Denetim Sorunu (the Questions of Amending the Constitution and the Constitutional Review)" *Ankara Üniversitesi SBF Dergisi* 62, no. 3 (2007), pp. 101-139, at pp. 129-136.

<sup>51</sup> Before Dellinger and Tribe there were scholars who raised the same issue. For example, Homer Clark, "The Supreme Court and the Amending Process" *Virginia Law Review* 39, no. 5 (1953), pp. 621-652. For more on the debate between Dellinger and Tribe see John R. Vile, "Judicial Review of the Amending Process: The Dellinger-Tribe Debate" *Journal of Law & Politics* 23 (1986-87), pp. 21-50.

<sup>52</sup> Article V of the US Constitution reads as follows: "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"

<sup>53</sup> Laurence H. Tribe, "A Constitution We Are Amending: In Defense of a Restrained Judicial Role" *Harvard Law Review* 97, no. 2 (1983), pp. 442-443.

notes that “[d]uring the past decade of debate over the equal rights amendment..., we have learned how much we do not know about the process of amending the Constitution. We do not know, for example, the answers to questions as basic as whether Congress, having established a time limit for ratification, can extend that limit, and, if so, whether such an extension can be accomplished by the vote of a simple majority. And we have no definitive answer as to a question as crucial as whether a state legislature that has voted to ratify can subsequently rescind its action”<sup>54</sup>

Given that the Congress’ intervention in the amending process after the adoption of the text of an amendment is *ad hoc*, arbitrary, and uncontrolled, Dellinger argues that judiciary, operating in a principled manner, as opposed the *ad hoc* manner of the Congress, should determine such matters in the amending process.<sup>55</sup>

As opposed to the US jurisdictions, the control by the judiciary of the amendment process in terms of procedural matters in other jurisdiction seems not to pose a serious problem. For this reason, we can move to the literature concerning the substantive review of constitutional amendments.

### **1.2.2. On the Substantive Judicial Review of Constitutional Amendments: Normative Arguments**

On the issue of substantive judicial review of constitutional amendments, there are various and contested views in different jurisdictions. For example, in the US literature the supporters of the judicial review of constitutional amendments on substantive grounds seem to suggest that the existence of some substantive limitations on amending power goes hand in hand with the claim that judicial review is possible on such grounds.<sup>56</sup>

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<sup>54</sup> Walter Dellinger, “The Legitimacy of Constitutional Change: Rethinking the Amendment Process” *Harvard Law Review* 97, no. 2 (1983), p. 387. He gives the example of the long-run and the then uncompleted amending process of the Child Labor Amendment of 1924, which, even though adopted by the Congress and sent to the states for ratification, has not come into force due to the lack of the necessary number of ratifications by the states. For a similar view to that advocated by Dellinger, Marty Haddad claims that it must be the Supreme Court’s responsibility to reflect upon the constitutionality of amendments, otherwise “it would effectively become stripped of its ability to protect perceived essential elements of the doctrine from legislative encroachment. Haddad, “Substantive Content of Constitutional Amendments: Political Question or Justiciable Concern?”, p.1718.

<sup>55</sup> Dellinger, “The Legitimacy of Constitutional Change: Rethinking the Amendment Process”, p. 389.

<sup>56</sup> Contrary to this view, the Venice Commission suggests 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



Some authors base the claim that a constitutional amendment can be (held) unconstitutional on the fact that some constitutions explicitly declare that certain rules cannot be amended;<sup>57</sup> such rules are eternal. For example, this is the case for the following norms: Article V of the US Constitution; Articles, 1, 20 and 79/3 of the German Basic Law; Article 89/5 of the French Constitution; Articles 1, 2 and 3 of the Turkish Constitution, to mention a few. The supporters of this view argue that the existence of eternal clauses in a constitution implies that any attempt to amend *directly* those unamendable constitutional rules is unconstitutional.<sup>58</sup> For example, paragraph 5 of Article 89 of the French Constitution stipulates that the republican form of the French state cannot be the object of any amendment. Thus, any attempt to turn the Republic of France into a monarchical state will clearly be contrary to the constitution. Thus, the Constitutional Council (Conseil Constitutionnel) should enforce this prohibition by annulling such a constitutional amendment.

However, other scholars claim that eternal clauses can also be used to void constitutional amendments that do not *directly* concern the eternal clauses, but which undermine the values protected by the eternal clauses. In this view, any amendment can be challenged as unconstitutional, by claiming that it undermines the values protected by the eternal clause(s).

For example, Andrew Arato (acknowledged as one of the leading scholars on the theory and practice of constitution-making and -changing) argues that the existence of the eternal clauses in the Turkish constitution makes it possible for the Constitutional Court to review the substance of amendments.<sup>59</sup> However, as we shall see later, this argument is weak given that the Turkish Constitution contains a specific provision (Art. 148) stipulating that the Constitutional Court's competence with regard to the review of amendments is strictly and exclusively limited to the review of procedural matters. Thus, Arato's argument falls short in accounting for the legal basis of judicial review of constitutional amendments (on the basis of the Turkish constitution).<sup>60</sup> Hence, his effort seems to provide a legitimacy basis for annulling

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Amendment (CdI-Ad(2010)001)" (Strasbourg: Council of Europe, 2010), parag. 225. Accessed at [http://www.venice.coe.int/docs/2010/CDL-AD\(2010\)001-e.pdf](http://www.venice.coe.int/docs/2010/CDL-AD(2010)001-e.pdf) (last visited on 15th February, 2012)

<sup>57</sup> For the support of this view see Gözler, *Judicial Review of Constitutional Amendments- a Comparative Study*, pp. 52-66.

<sup>58</sup> For the support of this view see *Ibid.* pp. 52-66.

<sup>59</sup> Andrew Arato, "The Constitutional Reform Proposal of the Turkish Government: The Return of Majority Imposition" *Constellations* 17, no. 2 (2010), p. 348; Andrew Arato, "Democratic Constitution-Making and Unfreezing the Turkish Process" *Philosophy & Social Criticism* 36, no. 3-4 (2010), pp. 479-483.

<sup>60</sup> Arato is indeed aware of this matter, Arato, "Democratic Constitution-Making and Unfreezing the Turkish Process", p.480.

a constitutional amendment, which aims to deteriorate the values protected by the eternal clause existing in the Turkish constitution.

Another basis for claiming the unconstitutionality of constitutional amendments refers to so-called implied limitations. The advocates of this view argue that even if a constitution does not contain an eternal clause, judicial review of amendment may still be possible since there are implicit limitations to the amending power. In the literature, the existence of the implicit limitations has been supported by two distinct strategies. First, the so-called implicit limitations may be based on the text of a constitution taken and interpreted as a whole. Thus the limitations will be constructed by the judiciary, by applying various interpretative techniques.

The second strategy involves natural law or natural-law-like considerations.<sup>61</sup> The idea of natural law may be invoked, as Scott Shapiro has aptly stated,<sup>62</sup> as providing the arguments and elements for ultra-legal criteria for validity of law, which is clearly and closely related to the theme of this study.<sup>63</sup> This point is clearly stated by another author: “at least some versions of natural law thinking hold that an inviolable “higher law” restricts the substance of

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<sup>61</sup> It is true that there is not one natural law theory but many. In Blackstone’s classic definition, natural law means “[t]his law of nature being coeval with mankind and dictated by God himself is of course *superior* in obligation to any other. It is binding over the whole globe, in all countries and at all times. *No human laws* are of any validity if contrary to this, and such of them as are valid derive their force and all their authority, mediately or immediately, from this original” (emphasis added). William Blackstone, *The Commentaries on the Laws of England* Fourth Edition (adapted to the present state of the law by Robert Malcolm Kerr) ed., vol. 1 (Of the Rights of Persons) (London: John Murray, 1876), p. 23. If one were to invoke a contemporary natural law theory to analyse the subject matter in question, Ronald Dworkin’s sophisticated version (quasi-natural law theory) is a good candidate. According to Dworkin’s theory, law is in general an interpretive practice, which inevitably requires giving place to principles, which may be considered – when the cases, at least in hard cases, emerge – *above* positive legal rules. Namely, the principles can stand above legal rules. That legal rule can be an act amending the constitution. The result is that if a constitutional amendment is contrary to the principles Dworkin contemplates, then that amendment may be held unconstitutional. It must be noted however that whether Dworkin would agree with this evaluation is not clear. We just provide a possible, not necessarily, certain outcome of Dworkin’s theory. For Dworkin’s concept of law see Ronald Dworkin, “The Model of Rules” *The University of Chicago Law Review* 35, no. 1 (1967 (hereafter as *The Model of Rules*)), pp. 14-46. ; Ronald M Dworkin, *Law’s Empire* (Oxford Hart Publishing, 1998 (hereafter as *Law’s Empire*)) ; Ronald M. Dworkin, *Taking Rights Seriously* New impression, With a Reply to Critics ed. (London Duckworth, 2009 (hereafter as *Taking Rights Seriously*)). In addition to Dworkin’s theory, Robert Alexy’s version of natural law might also be a promising candidate to analyse the subject of unconstitutionality of constitutional amendments. According to Alexy’s version of natural law, any law including constitutional amendments shall not be counted as law so long as it is *extremely, unbearably* or intolerably unjust. See Robert Alexy, *The Argument from Injustice : A Reply to Legal Positivism* trans. Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford: Clarendon Press, 2002).

<sup>62</sup> Scott J. Shapiro, “Law, Plans, and Practical Reason” *Legal Theory* 8 (2002), p. 388.

<sup>63</sup> More on the relation between natural law and (unconstitutional) constitutional amendments see Yaniv Roznai, “The Theory and Practice of ‘Supra-Constitutional’ Limits on Constitutional Amendments” *Internationall and Comparative Law Quarterly*, Vol. 62, July 2013, pp. 560-572.

constitutional amendments”<sup>64</sup> Namely, natural law, as norms of reference, may be invoked to uphold the idea of unconstitutionality of an amendment as argued by Walter F. Murphy.<sup>65</sup>

According to Murphy, the view that a constitutional provision might be declared null and void, is neither strange nor theoretically impossible. In this regard, he addresses two arguments. First, he claims that in a constitution, there are some fundamental principles that go beyond the constitutional text. To this effect, he suggests a sort of ranking of constitutional norms, or as he calls them: constitutional values.<sup>66</sup> Murphy describes human dignity as the core fundamental value, not only of the US constitution, but also of constitutionalism in general.<sup>67</sup> Thus, any constitutional amendment attempting to undermine this fundamental value may be held unconstitutional. However, more striking than this, Murphy asserts further that the already-existing provisions of the constitution that are not fundamental might be declared null and void if they (their implementation/practice) contravene the fundamental value.<sup>68</sup>

In order to substantiate his arguments, Murphy imagines a hypothetical situation. He assumes the following scenario, in the United States: “[b]ecause of social and economic upheavals, a political ideology of repressive racism sweeps the country. A two-thirds majority of each

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<sup>64</sup> Wright, “Could a Constitutional Amendment Be Unconstitutional?”, p.756.

<sup>65</sup> In a similar vein, Walter Murphy claims that the interpreters of the constitutions in Ireland, France, and the United States can invoke the 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. Walter F. Murphy, “Merlin’s Memory: The Past and Future Imperfect of the Once and Future Polity” in *Responding to Imperfection: the Theory and Practice of Constitutional Amendment*, ed. Sanford Levinson (Princeton: Princeton University, 1995), p. 181. In fact, Justice Roderick O’Hanlon of the Irish High Court invited the Supreme Court Judges to invoke the natural law in the case ([1995] IESC 9, [1995] 1 IR 1 or Abortion Information Case) brought before the Supreme Court. In this case, the validity of article 26 of the Information Bill Act and the 13<sup>th</sup> and 14<sup>th</sup> amendments granting rights to obtain information about abortion services abroad and right to travel for this purpose were challenged. Justice Roderick O’Hanlon claimed that the right to life of the unborn child (which is protected by the Irish Constitution under article 40.3.3) is above any positive laws, thus he invited the Irish Supreme Court to annul those amendments. Roderick J. O’Hanlon, “Natural Rights and the Irish Constitution” *Irish Law Times* 11 (1993), p. 8. The counsel, in the case, took the same stance. However, the Court rejected the claim. The decision of the Irish Supreme Court and the related part of the counsel’s invocation of the natural law can be found at <http://www.bailii.org/ie/cases/IESC/1995/9.html> (last visited on 24th, May, 2010). For more on the natural law concerning the Irish constitutional jurisprudence see James Jeffers, “Dead or Alive?: The Fate of Natural Law in Irish Constitutional Jurisprudence” *Galway Student Law Review* 2 (2003).

<sup>66</sup> From the point of view of legal theory, this is a sort of natural law which, as clearly stated by Mesmin Saint Hubert, through 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, no. 3 (2000), pp. 631-632.

<sup>67</sup> Walter F. Murphy, “An Ordering of Constitutional Values” *Southern California Law Review* 53 (1979-80), p. 758 (offering primarily an approach to constitutional interpretation, Murphy illustrates that one of the main tasks of constitutional interpretation is to determine a set of jurisprudential values and principles from the constitutional document and rank them according to their importance for the political system. Ibid. p. 706).

<sup>68</sup> Walter F. Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order* (Baltimore: John Hopkins University Press, 2007), pp. 502-508.

house of Congress quickly proposes and thirty-three states rapidly ratify, by means of popularly chosen conventions, a constitutional amendment whose opening sentence reads: "Members of the various colored races are inferior to Caucasians in moral worth." The amendment goes on to limit the franchise to whites, to require state and federal governments to segregate public institutions, and to authorize other legal disabilities that clearly offend, even deny, the human dignity of noncaucasians”<sup>69</sup>

Under this hypothetical situation, Murphy asks what the courts’ response would be to the claim of the unconstitutionality of that amendment. His answer is straightforward: there is no reason *not* to declare this amendment *invalid/unconstitutional*. This conclusion could predicate according to the ranking of the constitutional values, at the top of which, he believes, is human dignity.

Another argument Murphy offers to support his idea of unconstitutional constitutional amendments seems to follow a more textual interpretation of the term ‘amend’, which he seems to make use of as compatible with this first argument. For Murphy, ‘to amend’ means to correct or improve; it does not mean ‘to destroy’ or ‘to reconstitute’ or ‘to replace’ one constitutional system with another etc.<sup>70</sup> In fact, he is not alone in this argument. William Marbury also raised the same point far earlier than Murphy; thus Murphy probably follows Marbury on this. According to Marbury, “the power to “amend” the Constitution was not intended to include the power to destroy it” and he approves of the view developed in the case-law that any amendment purported to be made to the constitution must be something “an improvement or better to carry out the purpose for which it was framed”<sup>71</sup> As the argument goes, if an amendment is contrary to this understanding of the term ‘amendment’, or if it purports to destroy a constitution, rather than to improve it, then it may be deemed unconstitutional.

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<sup>69</sup> Murphy, “An Ordering of Constitutional Values”, p.754-756.

<sup>70</sup> Murphy, “Merlin’s Memory: The Past and Future Imperfect of the Once and Future Polity”, p.177. Marbury, “The Limitations Upon the Amending Power”, p.225.

<sup>71</sup> Here a sort of originalist account is at play. Indeed, according to Marbury, this was indeed what the framers had in mind when drafting the Constitution: that “[t]he term *Amendment* implied such an addition or change within the lines of the original instrument as will effect an improvement, or *better carry out the purpose for which it was framed*” Marbury, “The Limitations Upon the Amending Power”, p.225. Vincent Samar shares a similar view, albeit from a different perspective. According him, the very meaning of amendment (a modification, alteration, or addition to some text to correct it or improve it) would disapprove of an amendment, which aims “to change the US Constitution to establish a monarchy” Samar, “Can a Constitutional Amendment Be Unconstitutional?”, p.671, 681.

Surprisingly, the great philosopher of the 20th century John Rawls raised a similar argument. He touches upon and discusses, albeit hypothetically, the issue of unconstitutionality of amendments in one of his masterpieces, *Political Liberalism*. Like Murphy, he also poses a hypothetical question: what would happen if there was an amendment repealing the First Amendment. Rawls subscribes to the idea that this kind of amendment would be unconstitutional and that the US Supreme Court could invalidate it. The main rationale he offers for this view is that the tradition of constitutional amendments in the US proves that they have been made mainly to correct or improve what is already established in a liberal democratic state. That is to say, the amendments made to the US constitution, so far, have always sought to ameliorate.<sup>72</sup>

More precisely, when approving this idea, Rawls bears in mind the tradition (or practice) of constitutional amendments of the US, which, to him, shows that the constitutional amendments have been mostly used to promote liberal ideals, such as equal voting rights for women, abolishing slavery, and so on.<sup>73</sup> Thus, an amendment purporting to repeal the First Amendment, for example in order to establish a state religion, would violate this practice. Moreover, it would be contrary to the idea of a free competition of comprehensive doctrines.<sup>74</sup>

The difference between Rawls' view and Murphy is that while Murphy seems to deal with the legality aspect of the unconstitutionality of amendment (relying on a sort of natural law theory, because nothing proves that constitutional rules/values are hierarchical), Rawls seems to address the legitimacy aspect, in that he considers that a constitutional amendment taken into account in his hypothetical case would be illegitimate, as it would be contrary to the liberal US practice. He does not explicitly address the issue of the legal validity of such an amendment. Thus, Rawls takes a normative stance at this point.

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<sup>72</sup> John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), pp. 238-239.

<sup>73</sup> This is in fact what Akhil Reed Amar calls a trend line of democracy (of the US constitutional amendment practice). In this regard, he states: "[h]ad Americans opted to rewrite the Founding text rather than adding amendments to the end in chronological order, the pattern and direction of textual change would have been less visible. It would have been harder to see at a glance that, for example, over the years We, the People, have embraced increasingly strong claims of civil and political equality even as We have scaled back protections for the rich. We freed slaves without compensating slaveholders in the 1860s; embraced a predictably progressive income tax in the 1910s; and banned various poll taxes in the 1960s. And "the people" who did all this were more representative in key ways than the more exclusionary "people" of the Founding" Akhil Reed Amar, "Architexture" *Indiana Law Journal* 77 (2002), p. 686.

<sup>74</sup> For a more detailed explanation and analysis of Rawls's view concerning the issue of unconstitutionality of constitutional amendments see Charles A. Kelbley, "Are There Limits to Constitutional Change? Rawls on Comprehensive Doctrines, Unconstitutional Amendments, and the Basis of Equality" *Fordham Law Review* 72 (2004), pp. 1503-1506.

The tradition of amendment practice of a different jurisdiction is invoked by Andrew Arato to maintain the idea that an amendment contrary to that tradition can be held unconstitutional. When questioned about his views on the Turkish Constitutional Court's decision, which annulled a constitutional amendment (discussed in Chapter III), Arato welcomed the Court's decision.<sup>75</sup> He highlighted that the decision was incredibly important to Turkish democracy as the Court averted the pro-Islamic Justice and Development Party's unilateral and undemocratic enterprise of constitutional revision.

In this regard, Arato relied on the theory of democracy in his approval of the Court's decision of annulment. More precisely, he made the argument that the Turkish tradition of amendment practice has required a consensual mechanism to pass constitutional amendments. This is to suggest that an amendment passed contrary to this tradition (as is claimed to have been done by the Justice and Development Party in the annulled headscarf amendment act) can be declared unconstitutional by the Constitutional Court.<sup>76</sup>

However, in both Rawls' and Arato's views, it is unclear why a particular tradition of amendment practice makes it necessary for the courts to declare a constitutional amendment that is contrary to that tradition unconstitutional. Can that tradition itself create, in Arato's terms, "a normative (legal) requirement"<sup>77</sup> for the courts to declare a constitutional amendment unconstitutional? Neither view explains what makes that tradition legally binding. Thus, they fail to address the legality of the issue, i.e. judicial review/annulment of constitutional amendments, and focus instead on its legitimacy.

The idea that constitutional amendments may be unconstitutional on substantive grounds has also been supported by appealing to international or transnational rules with constitutional value.<sup>78</sup> For example, in Vicki Jackson's opinion, transnational law has a status of "overlapping principles or shared values", which can be invoked to evaluate the claim that a constitutional amendment may be unconstitutional. Jackson's theory seems primarily to concern legitimacy rather than legal validity. If we understand her position as concerning

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<sup>75</sup> Devrim Sevimay, "Akp Artık Kapatılmayabilir [the Justice and Development Party May Not Be Dissolved Anymore] Interview with Andrew Arato" *Daily Milliyet* 2008. <http://siyaset.milliyet.com.tr/akp-artik-kapatilmayabilir/siyaset/siyasetdetay/12.06.2008/875523/default.htm>.

<sup>76</sup> Arato, "The Constitutional Reform Proposal of the Turkish Government: The Return of Majority Imposition", p.345. Also see Arato, "Democratic Constitution-Making and Unfreezing the Turkish Process", pp. 476-478.

<sup>77</sup> Arato, "Democratic Constitution-Making and Unfreezing the Turkish Process", p.484.

<sup>78</sup> Vicki C. Jackson, "Unconstitutional Constitutional Amendments: A Window into Constitutional Theory and Transnational Constitutionalism" in *Demokratische- Perspektiven- Festschrift Für Brun-Otto Bryde Zum 70. Geburtstag*, ed. Michael Bäuerle, Philipp Dann, and Astrid Wallrabenstein (Tübingen: Mohr Siebeck, 2013).

legal validity, we must establish what makes transnational norms or values legally binding in municipal legal systems. In fact, she admits that the transnational rules and the views of the international community with regard to a national constitution, and thus a constitutional amendment (purported to be against internationally-, or transnationally-shared constitutional values), are the basis for the evaluation of *legitimacy*.<sup>79</sup>

Constitutionalism as a normative concept is invoked by Dante Gatmaytan to justify the view that there are, or must be, some limits to constitutional amendments. He conceives of the very concept of constitutionalism through the way that it entails, at the very minimum, a set of core values and certain limitations to be imposed on a state's powers, including its amending power. He determines a number of core elements of constitutionalism, such as the recognition and protection of fundamental rights and freedoms; the separation of powers; an independent judiciary; and the review of the constitutionality of laws.<sup>80</sup> Therefore, if a constitutional amendment seeks to undermine or impair the core features of constitutionalism then a (supreme) court may annul it.<sup>81</sup> In his view, there is no need to discuss whether the annulment of unconstitutional amendments is contrary to the idea of democracy, because he believes that the very idea of constitutionalism is already in tension with democracy. Following this, he concludes that another core feature of the idea of constitutionalism must be added: 'The control of the amendment of the constitution by courts.' This view seems, again, to justify the possibility of striking down a constitutional amendment. However, Gatmaytan does not clarify whether the violation of the idea of constitutionalism would affect only the legitimacy or also the legality of constitutional amendments.<sup>82</sup>

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<sup>79</sup> Jackson, "Unconstitutional Constitutional Amendments", p.66.

<sup>80</sup> Dante B. Gatmaytan, "Can Constitutionalism Constrain Constitutional Change" *Northwestern Interdisciplinary Law Review* 3 (2010), pp. 30-32. On the other hand, Mark Tushnet, who also believes that the concept of constitutionalism is a normative one, counts three minimum requirements of constitutionalism. According to his account, the idea of constitutionalism requires: first, "a commitment to the rule of law....; second, a reasonably independent judiciary; and, third, reasonably regular free and open elections, with a reasonably widespread franchise" Tushnet, "Comparative Constitutional Law", p.1230. However, nothing in the latter account suggests the possibility of the review, let alone the annulment, of constitutional amendments on substantive grounds.

<sup>81</sup> Gatmaytan, "Can Constitutionalism Constrain Constitutional Change", p.35.

<sup>82</sup> Carlos Bernal offers, on the basis of the Colombian example, similar but more subtle views to Gatmaytan's. In his article trying to justify the replacement doctrine, which the Colombian Constitutional Court has developed to strike down constitutional amendments on substantive grounds, Bernal appeals to a conceptual understanding of 'constitution'. In his view, a conceptual understanding of constitution encompasses at least three main features/principles, which are drawn from the French Declaration of the Man of the Citizen. These three principles that a constitution, in its conceptual meaning, must contain are: 1) the protection of constitutional/human rights, 2) the rule of law, and 3) the principle of separation of powers. Without them, a constitution would not be, in the conceptual sense, a constitution at all; thus the (Colombian) Constitutional Court, in his view, can declare a constitutional amendment, which attempts to curb or undermine these three main principles, unconstitutional; and this is justified. However, Bernal does admit that the strength of this

Similar to the view of constitutionalism treated as a normative concept, some scholars use *constitutional identity* to justify the idea that courts should assess the constitutionality of amendments. Constitutional identity is construed and used, not only as a normative concept, but also as an interpretive tool, to determine what (ultimately) counts as a valid law in a given legal system.<sup>83</sup> When that law is a constitutional amendment, the concept of ‘constitutional identity’ is of particular importance. Carl Schmitt was probably the first lawyer to use the term ‘constitutional identity’ as a normative tool, and he developed it to argue for the limited (nature of) amending power, and thus (albeit implicitly) for the possibility of the annulment of constitutional amendments. According to Schmitt, constitutional amendment can be neither the *annihilation* nor the *elimination* of a constitution. For Schmitt, constitutional amendment can be carried out provided that “the identity and continuity of the constitution as entirety is preserved”<sup>84</sup> The amending power, in Schmitt’s view, is limited; thus it cannot make *fundamental political decisions*, which, in his understanding, seems to be equivalent to constitutional identity.<sup>85</sup>

However, Schmitt’s remarks are not clear about what exactly those elements of constitutional identity are. But he does provide some examples. According to one of his examples, an existing amendment mechanism of a constitution (his example is the Weimar constitution) cannot be amended to allow for a less strict amendment mechanism – e.g. changing the qualified majority necessary for amending the (Weimar) constitution to the simple majority. In another example, Schmitt also argues that a monarchical constitution cannot be amended to make the state be ruled democratically.<sup>86</sup> Schmitt’s elaboration of constitutional identity seems to be a normative concept serving to prove the limited nature of amending power. But it is not clear in Schmitt’s view whether a court can review and thus declare unconstitutional

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argument is very limited. Thus, he supports it with a normative argument, according to which “[e]very constitution implies a decision about the adoption of a specific kind of political system that implies a particular way in which the[...] basic coordination and moral problems [of the political entity] can be solved. This specific kind of political system confers each historical constitution its *differentia specifica*” This *differentia specifica* cannot be subject to amendment by the amending power. Bernal, “Unconstitutional Constitutional Amendments in the Case Study of Colombia” especially pp. 353-357.

<sup>83</sup> We will see this clearly later in the basic structure doctrine of the Supreme Court of India. It is worth mentioning at this point that the basic structure doctrine can be replaced, easily and without any hesitation, by the concept of constitutional identity.

<sup>84</sup> Schmitt, *Constitutional Theory*, p. 150.

<sup>85</sup> For the historical, political and legal environment in which Carl Schmitt developed this view see Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law- the Theory & Practice of Weimar Constitutionalism* (Durham ; London: Duke University, 1997), pp. 6-7.

<sup>86</sup> Schmitt, *Constitutional Theory*. pp. 150-151. However, Schmitt *does* support the view that whatever the amending power cannot do through amendment mechanism can be made by the constituent power. Thus, a monarchical state can be turned into a democratic one, but it can be done so by exercising the constituent power, not the amending one.



an amendment purported to be against the constitutional identity.<sup>87</sup> In this regard, Schmitt seems to justify the idea that the unconstitutionality of constitutional amendments is theoretically possible.

George Fletcher offered a more relevant use of the concept of constitutional identity when arguing that constitutional identity is a concept that can be appealed to by judges, when the constitutional language is vague in cases concerning basic issues of constitutional law.<sup>88</sup> And, in fact, as demonstrated aptly by Wojciech Sadurski, the ultimate pragmatic goal of dealing with constitutional identity (or constitutional tradition) is to advise “the authoritative institutions about what are the sources of law are in a given constitutional system”<sup>89</sup> However, appealing to the constitutional identity by judges is not always obvious in their decisions, it is mostly implicit. Thus, the implicitness renders the matter a little blurry in the sense that one needs to understand the national identity<sup>90</sup> (or constitutional culture,<sup>91</sup> as the constitutional identity is associated with the constitutional culture or the national identity) of a given country. This, in turn, causes further ambiguity, and a vicious circle appears.

On the other hand, it is not clear in Fletcher’s reflection whether constitutional identity can be invoked to strike down a constitutional amendment. Gary Jacobsohn believes this to be the case. In his view, constitutional identity is a justiciable principle. According to him, the concept of constitutional identity has (or should have) some bearing on the validity of constitutional amendments.<sup>92</sup>

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<sup>87</sup> As David Dyzenhaus illustrates perfectly, it is possible to imagine that Schmitt may hold the view that the matter is not justiciable, but rather a political question. On Schmitt’s view of legality concerning the 20 July 1932 coup carried out by the conservative-nationalist federal German government against the social-democrat government of the Prussian state, see David Dyzenhaus, “Legal Theory in the Collapse of Weimar: Contemporary Lessons?” *The American Political Science Review* 91, no. 1 (1997), pp. 125-127.

<sup>88</sup> George P. Fletcher, “Constitutional Identity” *Cardozo Law Review* 12 (1992-93), p. 737.

<sup>89</sup> Wojciech Sadurski, “European Constitutional Identity?” *EUI Working Papers*, no. Law No. 2006/33 (2006), <http://cadmus.eui.eu> p. 5.

<sup>90</sup> Ruti G. Teitel, “Reactionary Constitutional Identity” *Cardozo Law Review* 14 (1992-93), p. 748. Although Teitel agrees with George Fletcher on the point that “[n]ational identity operates as a justification for, or reactionary argument against progress in constitutional theory”, she departs from Fletcher on certain aspects, for example, on what she calls reactionary constitutional identity, which she seems to equate with majoritarian democracy or conservatism.

<sup>91</sup> As correctly defined by Robin West, George Fletcher’s “‘constitutional identity’ refer[s] to ... our collective and individual self-conception which we owe to our shared constitutional heritage, and which at least on occasion determines outcomes in close constitutional cases in ways that ‘overarching principles of political morality’ do not” Robin West, “Toward a First Amendment Jurisprudence of Respect: A Comment on George Fletcher’s *Constitutional Identity*” *Cardozo Law Review* 14 (1992-93), p. 759.

<sup>92</sup> Gary J. Jacobsohn, “Constitutional Identity” *The Review of Politics* 68 (2006), p. 375. Jacobsohn understands the basic structure doctrine developed by the Supreme Court of India as more expressive of the constitutional identity of India. Jacobsohn, “Constitutional Identity”, pp. 378-379.

The concept of constitutional identity can be invoked normatively to assert that constitutional amendments should be declared unconstitutional, since it infringes a particular identity.<sup>93</sup> The normative usage of constitutional identity seems to be used as an interpretive tool. However, the idea of constitutional identity, being vague, does clearly specify the conditions under which an amendment should be declared unconstitutional.

On the other hand, when constitutional identity is invoked as a conceptual notion, this use should be considered within the legitimacy aspect of the issue at hand. We will offer the details of this usage in the final, fourth, chapter and then adapt it to examine the legitimacy aspect of the judicial review of constitutional amendments.

### **1.2.3. Rejection of the Idea of Unconstitutional Constitutional Amendments**

Let us now consider the authors who reject the idea of a substantive review of constitutional amendments. First of all, some authors suggest that the existence of unamendable constitutional norms does not necessarily entail the judicial review of constitutional amendments. This is indeed the view of the Venice Commission, according to which there is no correlation between the existence of unamendable constitutional norms (substantial limitations) and judicial review of constitutional amendments.<sup>94</sup> The former does not necessarily follow, or require, the latter. The unconstitutionality of amendments is one thing; their annulment by a court is another.<sup>95</sup>

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<sup>93</sup> The explicit normative invocation of the concept of constitutional identity is made by the Federal Constitutional Court of Germany in its decision with regard to the Lisbon Treaty. The Court ruled that if a European Union law contravenes the constitutional identity of Germany codified in Article 79 (3) of the Basic Law, that law may be declared inapplicable in Germany, *see* BVerfG, 2 BvE 2/08 (30 June 2009) parag. 241, the English translation of the judgment can be found at [http://www.bundesverfassungsgericht.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html)). A similar attempt was made by the Constitutional Tribunal of Poland in its decision regarding the Lisbon Treaty, Judgment of 24 December, 2010 Ref. No. K 32/09. The full text of the decision of the Constitutional Tribunal of Poland with regard to the Lisbon Treaty can be found at [http://www.trybunal.gov.pl/eng/summaries/documents/K\\_32\\_09\\_EN.pdf](http://www.trybunal.gov.pl/eng/summaries/documents/K_32_09_EN.pdf). Furthermore, it is reported that the French Conseil Constitutionnel also invoked the concept of constitutional identity in the decision dated 27 July, 2006 (2006-540 DC), in which it decided that transposition of an EU directive to the French legal system could not be contrary to a principle that is inherent to the constitutional identity of France. On this *see* Edouard Dubout, “Les Règles Ou Principes Inhérent À L’identité Constitutionnelle De La France: Une Supra-Constitutionnalité” *Revue Française de Droit Constitutionnel* 83 (2010), p. 452, footnote 5.

<sup>94</sup> (Venice Commission), “Report on Constitutional Amendment”, parag. 225. found at [http://www.venice.coe.int/docs/2010/CDL-AD\(2010\)001-e.pdf](http://www.venice.coe.int/docs/2010/CDL-AD(2010)001-e.pdf) (last visited on 15th February, 2012).

<sup>95</sup> Jackson, “Unconstitutional Constitutional Amendments”, pp. 74-76.

Some authors also argue that the extra-ordinary competence of a court to review constitutional amendments on substantive grounds will exacerbate the counter-majoritarian difficulty,<sup>96</sup> which the judicial review in general brings about in a democratic system. When asked how unamendable constitutional norms make sense, these authors invoke the Norwegian example. 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” They take this as an example that proves that without judicial enforcement, any unamendable constitutional norms can make sense in a political realm; it can be “a directive for the parliament”<sup>97</sup>

Professor Kemal Gözler – an expert on constitutional law in Turkey, who approaches the issue from a very formalist perspective – takes a middle way. In his view, if a constitution includes unamendable provisions, reviewing the substance of constitutional amendments may be considered possible. In that case, however, there must be a clear power-conferring rule in the constitution in order for the court to be able to perform a substantive review of amendments. If the constitution does not contain any unamendable clauses, the existence of power to review constitutional amendments on procedural grounds cannot be construed as bestowing competence on the constitutional court to review amendments on substantive grounds.<sup>98</sup>

The US scholarship overwhelmingly rejects the idea that a constitutional amendment can be unconstitutional. Thus, the declaration of a constitutional amendment as unconstitutional by a court would be bizarre,<sup>99</sup> or, as one author suggests: an “abstract and apparently

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<sup>96</sup> According to Alexander Bickel’s famous term ‘countermajoritarian 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” Alexander Bickel, *The Least Dangerous Branch*, Second ed. (New Haven; London: Yale University Press, 1986), pp. 16-17

<sup>97</sup> Roznai and Yolcu, “An Unconstitutional Constitutional Amendment- the Turkish Perspective: A Comment on the Turkish Constitutional Court’s Headscarf Decision”, p.199.

<sup>98</sup> Gözler, *Judicial Review of Constitutional Amendments- a Comparative Study*, p. 54. But he notes that in the case of Turkey, where the Constitutional Court is not conferred the competence of review of the substance of constitutional amendments, “only amending power has the authority to determine the meaning of limits”; limits arising from unamendable provisions (articles, 1, 2 and 3) of the Turkish Constitution. Gözler, *Judicial Review of Constitutional Amendments- a Comparative Study*, p. 54.

<sup>99</sup> However, there are adherents to the view that some constitutional amendments could be unconstitutional. For example, Jeff Rosen states that if the flag burning amendment had been adopted by the Congress it would be unconstitutional on the basis of the First Amendment’s mandatory prohibition of any abridgement of the freedom of speech. Jeff Rosen, “Was the Flag Burning Amendment Unconstitutional?” *The Yale Law Journal* 100, no. 4 (1991), pp. 1073-1074. However, we do not agree with this statement regarding Germany.

inconsequential matter”<sup>100</sup> The main reason for this seems to stem from the conventional account of constitutional amendments that we sketched at the beginning, as well as from “democratic and rule of law considerations”<sup>101</sup> To put it more clearly, the adherence to the conventional account of constitutional amendment seems to make it incomprehensible for those scholars to contemplate that a constitutional amendment can be unconstitutional on substantive grounds. As one constitutional law professor put it, it would akin to asking: “can the Bible be unbiblical”<sup>102</sup>

For example, Bruce Ackerman states “... 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).<sup>103</sup> Ackerman goes even further by stating that if part of the First Amendment were repealed and replaced by a new provision making Christianity the state religion, that amendment – however terrible and wrong it would be – would still be counted as part of the US constitution. If a lawsuit were brought before the Supreme Court seeking the declaration of the amendment’s unconstitutionality, the Supreme Court should reject such a demand.<sup>104</sup> Here, Ackerman, as the title of his article suggests, makes a distinction between the legality and the legitimacy of the issue. As to the legality aspect, he sticks to the text and practice of the US constitutional law, while he suggests that such an amendment would be, from a political/legitimacy point of view, a mistaken and terrible choice for the American people.

Similar to Ackerman, Robert Post upholds the view that a constitutional amendment cannot be unconstitutional. He offers the clearest example of the inconceivability of an unconstitutional amendment on substantive grounds. In this regard, his lengthy argument deserves to be quoted: “[i]magine ... that an amendment to the United States Constitution were to be properly and duly proposed by two-thirds of both houses of Congress, and properly and duly ratified by the legislatures of three-fourths of the States. Imagine that the amendment repeals the Twenty-Sixth Amendment and unambiguously provides that no one who is not yet

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<sup>100</sup> George Wright states that even though the issue of unconstitutionality is abstract, obscure, and inconsequential, it may provide a better appreciation of the US Constitution. Wright, “Could a Constitutional Amendment Be Unconstitutional?”, p.741.

<sup>101</sup> Jackson, “Unconstitutional Constitutional Amendments”, p.54.

<sup>102</sup> Gary Jeffrey Jacobsohn, “An Unconstitutional Constitution? A Comparative Perspective” *International Journal of Constitutional Law* 4, no. 3 (2006), p. 460.

<sup>103</sup> Bruce A. Ackerman, *We the People: Foundations* (Cambridge, Massachusetts: Belknap Press of Harvard University Press, 1991), p. 15.

<sup>104</sup> Bruce A Ackerman, “Constitutional Politics/Constitutional Law” *The Yale Law Journal* 99, no. 3 (1989), p. 470 reprinted in Ackerman, *We the People: Foundations*, p. 14.

21 years of age can vote for any federal official. Suppose... that a citizen of the United States who is eighteen years of age and who wishes to vote in an upcoming Presidential election brings suit in federal court for the right to vote. I take this to be *paradigmatically easy case*, meaning that any judge who would decide for the plaintiff could be said not quite to understand the practice of constitutional adjudication. [The judge] would ... rule against the plaintiff on the grounds that the new amendment reflects the popular will of the people as measured by the procedural standards of Article V, and that the amendment is therefore properly enforceable as constitutional law” (emphasis added)<sup>105</sup>

Indeed, it is a general assumption that constitutional amendment is the ultimate tool to overturn an annulment by courts of a legislative act, or to overturn a court’s unpleasant or ex-judicial interpretation of statutes and constitution.<sup>106</sup> Samuel Freeman, who is a strong supporter of the institution of judicial review, states that “[t]he [Supreme] Court’s revocation of popularly enacted measures can be overridden only by constitutional amendment...”<sup>107</sup> In a similar vein, the reason John Vile finds judicial review acceptable is the possibility of *amending the constitution*.<sup>108</sup> For Vile, “[t]he only explicit constitutional limitation on the substance of amendments is the requirement of equal Senate representation in article V”<sup>109</sup> To offer another example: “... to prevent a willing and fully informed citizenry from voluntarily choosing to confer rights or obligations upon itself, others or the state, or to foreclose a people from structuring the apparatus of the state as it deems proper seems not only undemocratic in the basic procedural meaning of the term but more precisely tyrannical in its metaphorical sense”<sup>110</sup>

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<sup>105</sup> Post, “Democracy, Popular Sovereignty, and Judicial Review”, pp. 430-431.

<sup>106</sup> Michael Stokes Paulsen, “Can a Constitutional Amendment Overrule a Supreme Court Decision?” *Constitutional Commentary* 24 (2007), p. 285-290

<sup>107</sup> Freeman, “Constitutional Democracy and the Legitimacy of Judicial Review”, p. 334. It seems that Freeman also takes 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.

<sup>108</sup> Vile, “Limitations on the Constitutional Amending Process”, p.382. For a similar view see Kent Greenawalt, “The Rule of Recognition and the U.S. Constitution” in *The Rule of Recognition and the U.S. Constitution*, ed. Matthew D. Adler and Kenneth Einar Himma (Oxford; New York: Oxford University Press, 2009), p. 31.

<sup>109</sup> Vile, “Judicial Review of the Amending Process: The Dellinger-Tribe Debate”, pp. 24-25. Or see the following quotation from Charles L. Black, Jr.’s book entitled *The People and the Court*: “[T]he people and Congress always have in their hands the means (*not only through constitutional amendment* but through the abundant power over the jurisdiction of all the federal courts) ... to remove the Court from the function of guarding the Bill of Rights...” (emphasis added). Taken from Amar, “Philadelphia Revisited: Amending the Constitution Outside Article V”, p.1088.

<sup>110</sup> Albert, “Nonconstitutional Amendments”, p.9

Even though the US literature vigorously advocates the impossibility and undesirability of the judicial review of constitutional amendments on substantive grounds,<sup>111</sup> the French scholarship does not seem to agree on this. The French scholarship on this question is split. On the one hand, there are adherents to the view arguing for the impossibility of judicial review of the constitutionality of constitutional amendments by the Constitutional Council. On the other hand, there are adherents to the view supporting judicial review of constitutional amendments on substantive grounds by the Constitutional Council. And this division is observed and assessed in a real constitutional case brought before the Constitutional Council in 2003.<sup>112</sup>

In 2003, the French Parliament amended the Constitution, the main aim of which was to decentralize the organization of the French Republic. The amendment contained, among others, a provision, which added (to Article 1 of the Constitution) the following disposition: “the organization of the state is decentralized” This disposition, together with others, was challenged before the Constitutional Council by the Senators on the grounds that it is contrary to the republican form of the French State as stipulated in Article 1, and since this provision cannot be the object of an amendment as set out by Article 89/5, the attempt to add the said decentralization-disposition is unconstitutional.

In its decision, the Constitutional Council ruled that it had no competence to decide on the matter. Its competence is confined to the strict textual reading of the Constitution,<sup>113</sup> more precisely, to Article 61 which specifies what kind of legislation the Council can review. The Council held that Article 61 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.<sup>114</sup>

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<sup>111</sup> One scholar goes even further, claiming that “[i]t would be a *violation* of the Constitution, of their sworn oaths to be bound by it, for the Justices to “strike down” the plain text of a constitutional amendment” Paulsen, “Can a Constitutional Amendment Overrule a Supreme Court Decision?”, p. 288.

<sup>112</sup> But, in fact, it is said to go back to the earlier decisions of the Constitutional Council, such as *Décision*, n° 20, 1962 DC and also the decision of the Council with regard to the Maastricht Treaty in 1992. In the so-called Maastricht II decision, the Constitutional Council held that article 7, 16, 89/4-5 cannot be subjected to constitutional amendment. Yet, it maintained that the constituent power can abrogate, modify or complete the nature of constitutional values in a form it deems appropriate, *Décision*, n° 92-312 DC du 02 Septembre 1992), paragraph 19.

<sup>113</sup> One scholar said the Conseil Constitutionnel preferred a restrictive interpretation of Article 61, read together with article 89/5. Willy Zimmer, “Jurisprudence Du Conseil Constitutionnel- 1er Janvier- 31 Mars 2003” *Revue française de droit constitutionnel* 54 (2003), p. 383.

<sup>114</sup> *Décision* n° 2003-469 of 26 March, 2003.

This decision of the Constitutional Council has been welcomed as well as criticized by scholars. It will suffice to refer to the basic arguments of two scholars on the debate.<sup>115</sup> 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.<sup>116</sup> 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”<sup>117</sup> 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.

As mentioned by one lawyer, the disagreement in France also stems from the different understanding of *pouvoir constituant originaire* and *pouvoir constituant dérivé*.<sup>118</sup> As these two concepts will be discussed in more detail in the final chapter, we shall confine ourselves to refer to this debate here.

To sum up, the question of whether constitutional amendments can be unconstitutional on non-procedural grounds will, as supported by the dominant US literature and the practice of French Constitutional Council, most probably be answered negatively at first glance in these two well-functioning democratic countries. The question of the unconstitutionality of amendments is sometimes framed as a moral-political issue of the justice or appropriateness of the amendment, and sometimes it is simply taken for granted that no such question can arise. In fact, as we have revealed, the practice supports this view in that, thus far, there have been few examples in which constitutional amendments were challenged on substantive grounds before a supreme or constitutional court in developed democratic countries. And, in the existing examples, no such challenges have ever been successful in Western democratic countries (for instance in Germany, France, and the US).<sup>119</sup>

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<sup>115</sup> 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).

<sup>116</sup> Marthe Fatin-Rouge Stéfanini, “Jurisprudence Du Conseil Constitutionnel- 1er Janvier- 31 Mars 2003” *Revue française de droit constitutionnel* 54 (2003), p. 375, 379.

<sup>117</sup> Zimmer, “Jurisprudence Du Conseil Constitutionnel- 1er Janvier- 31 Mars 2003”, p.385. For another supporter of this line of argument see Pfersmann, “Unconstitutional Constitutional Amendments: A Normativist Approach”, pp. 107-108.

<sup>118</sup> Pascal Jan, “L’immunité Juridictionnelle Des Lois De Révision Constitutionnelle” *Petites Affiches*, no. 218 (2003).

<sup>119</sup> For the examples, see footnotes 48 and 49.

#### **1.2.4. A Brief Assessment of the Literature and the Boundary between Legality and Legitimacy**

From the literature, developed either for the support or the rejection of the idea of substantive judicial review of constitutional amendments, we can see that scholars overwhelmingly focus on the legitimacy aspect of the issue. It seems that they have developed normative arguments as to whether judicial review of constitutional amendments on substantive grounds is legitimate or not – for example, in Dante Gattmaytan’s invocation of constitutionalism. It is not only in Gattmaytan’s conception of constitutionalism, but also the concept of constitutional identity that is addressed along the lines of the legitimacy concern. For example, Bruce Ackerman and Robert Post are also concerned with the legitimacy aspect, in that they seem to argue that the substantive judicial review of constitutional amendment would be incompatible with the idea of (procedural) democracy.

There seems to be no separate concern or account regarding whether judicial review of constitutional amendments on substantive grounds can be accounted for in terms of its legality. For this reason, we argue that even though the legitimacy aspect of the issue of the unconstitutionality of constitutional amendments springs to mind and thus is a cause for immediate concern, the legality aspect cannot be ignored. Quite the opposite, the legality aspect deserves particular (and separate) attention. Although it might not be possible to draw a *solid* line between the two aspects, its practical implications and importance should not be denied. The distinction between the two aspects is also significant, as they require different modes of argument and different type of analysis.

Furthermore, it is highly unlikely that any theory of law attempting to account for the legality of judicial review of constitutional amendments on substantive grounds can defeat democratic challenges. The democratic challenge, as developed by Carlos Bernal on the basis of the Colombian example of judicial review of constitutional amendments on substantive grounds, refers to the fact that “given that the constitution was created by the people, the people themselves, and not the Court, should have the authority to determine what the essential elements of the constitution are. If the people themselves, directly or through their representatives, have agreed to pass a constitutional amendment, it is because they have decided that the amended element is not an essential element. This decision should be final”<sup>120</sup>

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<sup>120</sup> Bernal, “Unconstitutional Constitutional Amendments in the Case Study of Colombia”, p.347.



For these reasons the legality and legitimacy of the issue must be separated, and examined independently. “Theories of legal validity concern the existence conditions for valid law, for legal systems, and consequently for the criteria of applicability of legal systems”<sup>121</sup> However, the concern here is with the legality (or legal validity) of judicial decisions on the particular subject of judicial review of constitutional amendments on substantive grounds.

The legality of a constitutional amendment, and its judicial review, involves two issues. For the first, establishing whether the amendment is legally valid requires examining if it is adopted in accordance with the constitution’s amendment clause. This is a procedural examination of the legal validity of an amendment. Concerning the second issue, the legality of an amendment can be scrutinized in terms of whether it conforms or must conform to some superior constitutional norms, principles, or values. This suggestion might appear to be contrary to our *scheme with six items*. Yet, determining whether there is a contradiction or not depends on how one conceives of and conceptualizes those superior norms. If those norms do not stem from natural law theory, then it makes sense to talk about superior principles or values. In this case, when there is no conformity with such superior constitutional norms – let us assume for the time being that there are such principles/values – the legality of an amendment can be questioned.

The legitimacy of a constitutional amendment, and equally the judicial review of constitutional amendments, concerns the merit of the amendment according to political morality. Namely, whether it is a good or a bad thing with regard to the value that the constitutional amendment should pursue (or the value which is pursued by the judicial review of constitutional amendment on substantive grounds). This is a normative account of legitimacy, but it is not the only one.

Legitimacy can also be approached sociologically, i.e. descriptively. In the latter account, legitimacy is examined on the basis of some politico-moral values, which *an actual* legal and political order aims to achieve and pursue. We will follow the sociological account in our analysis of legitimacy of judicial review of constitutional amendments.

In order to provide a clearer reason for making the distinction between legality and legitimacy, we can address the following question: does legitimacy depend merely on legality, or can legality prove and exhaust legitimacy? We observe this kind of interchangeable use of

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<sup>121</sup> John Bogart, “Adjudication, Validity, and Theories of Law” *Canadian Journal of Law and Jurisprudence* 2, no. 2 (1989), p. 163.

legality and legitimacy in Max Weber. For Weber, legality is one of the three grounds for legitimacy (the rational-ground), and the legitimacy based on legality is (believed) to prevail in a modern state. Namely, Weber defends “legality as a form of legitimacy”<sup>122</sup> He does not address how legality will be established.

According to Weber, once legality is established, legitimacy would automatically follow and be bestowed on the authority using rational-legal power.<sup>123</sup> Discussing Weber’s view, Habermas remarks that: “Max Weber regarded the political system of modern Western societies as forms of “legal domination” Their legitimacy 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”<sup>124</sup> It seems that Weber focuses on the legality of legislation. We, rather, focus on the legality of judicial decisions. Thus, our departure from Weber’s framework makes sense as we deal with how legality will be established and analysed.

Furthermore, it will be argued that legitimacy cannot be proved exhaustively simply by building it on legality. That is to say, when legality is obtained, legitimacy does not necessarily follow. As far as the subject of this study is concerned, i.e. judicial review of constitutional amendments, due to the democratic challenge, it cannot be argued that the legitimacy of judicial review of constitutional amendment would be obtained once the legality is attained.

On the other hand, defining and determining legality is a complex endeavour; an issue on which Weber remains silent or disinterested. In this respect, it should be mentioned that when we refer to legality we mean the same thing as legal validity. We will trace the legality of judicial review of constitutional amendments in the legal theory, as the issue in question immediately brings to mind a closely related subject: the ultimate source of validity of legal rules.

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<sup>122</sup> John P. MacCormick’s *Introduction* to Carl Schmitt, *Legality and Legitimacy*, trans. Jeffrey Seitzer (Durham; London: Duke University Press, 2004), p. xxiv.

<sup>123</sup> Max Weber, *Economy and Society*, ed. Guenther Roth and Claus Wittich, trans. Ephraim Fischhoff, et al. (Berkeley; Los Angeles; London: University of California Press, 1978; reprint, 1968 Badminter Press), p. 215, 217 etc.

<sup>124</sup> For more on Max Weber’s concept of legality and legitimacy see Jurgen Habermas, “Law and Morality” in *The Tanner Lectures on Human Values* (Salt Lake City: The University of Utah Press, 1988), p. 219. Also see Alexander P. D’entrèves, “Legality and Legitimacy” *The Review of Metaphysics* 16, no. 4 (1963), pp. 689-691.

In a modern legal system, a constitution is treated as the ultimate positive source. Thus, something that is superior to a constitution (since by means of which substantive control of a duly adopted constitutional amendment is realised) is, in some way, related to the issue of ultimate source or criteria of validity of legal rules.

Another reason for focusing on legal theory is that in our examples, the highest courts of Germany, India, and Turkey have all employed a competence which is not conferred on them – and which is not expected to be conferred in a democratic regime – by their respective constitutions. In this sense, what our *scheme with six items* is unable to explain can be enlightened by two theories of positive law.

So, it must be underlined that one of our aims is to discover the conditions under which the employment of an extraordinary power of judicial review of constitutional amendments can be thought legal or legally valid. To this end, we shall find a general theoretical framework through which we can analyse the empirical cases concerning judicial review of constitutional amendments offered by the highest courts of Germany, India, and Turkey.

Despite the apparent simplicity of the question, the theoretical question of ‘what is legality or legal validity’ is not easy to answer. Unsurprisingly there are many different approaches to answering this question; among them, however, we can identify two major contenders that have been widely debated and elaborated in the literature. It should be noted, however, that our elaboration reflects only the common features of many different and sophisticated approaches within the two major approaches.<sup>125</sup>

According to the first approach, legal validity is determined in accordance with conformity of legal norms to some sort of social or institutional fact, such as being enacted by Parliament, practiced as a custom, efficacious enforcement, desuetude, etc. In the absence of one of these facts, depending on a given approach, a legal rule may be called invalid. This approach is generally called legal positivism.<sup>126</sup> In the second approach, legality is defined, to put more

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<sup>125</sup> For a concise summary of the different grounds of legality or legal validity see Giovanni Sartor, “Legal Validity: An Inferential Analysis” *Ratio Juris* 21, no. 2 (2008), p. 230; and Giovanni Sartor, “Legality Policies and Theories of Legality: From Bananas to Radbruch’s Formula” *Ratio Juris* 22, no. 2 (2009), pp. 218-243.

<sup>126</sup> Legal positivism implies different things. For a comprehensive catalogue of what legal positivism might mean see, especially, Richard A. Falk and Samuel I. Shuman, “The Bellagio Conference on Legal Positivism” *Journal of Legal Education* 14 (1961-62), pp. 219-221 (designating eight meanings of legal positivism).

roughly, as the conformity of legal rules to morality (including justice or so-called principles). This approach is mostly associated with natural law theory (or theories).<sup>127</sup>

To put it another way, the definition of legal validity is established by these two approaches through focusing on the form or content of legal rules. As argued by Frederick Schauer, legality with respect to the aspect of form concerns “the fact of law just because it is the law, and not because of the substantive content of the law”<sup>128</sup> But of course, there are also various combinations of these two approaches.<sup>129</sup>

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<sup>127</sup> On natural law theory in general see Mark C. Murphy, “Natural Law Theory” in *The Blackwell Guide to the Philosophy of Law and Legal Theory*, ed. Martin P. Golding and William A. Edmundson (Malden ; Oxford: Blackwell Publishing, 2005), pp. 13-28. And on the different phases of and approaches within natural law theory see John M. Finnis, “Natural Law: Classical Tradition” in *The Oxford Handbook of Jurisprudence and the Philosophy of Law*, ed. Jules L. Coleman, Scott Shapiro, and Kenneth Einar (Associater Editor) Himma (Oxford ; New York: Oxford University Press, 2002), pp. 1-60 ; Brian H. Bix, “Natural Law: The Modern Tradition” in *The Oxford Handbook of Jurisprudence and the Philosophy of Law*, ed. Jules L. Coleman, Scott Shapiro, and Kenneth Einar (Associater Editor) Himma (Oxford ; New York: Oxford University Press, 2002), pp. 61-103.

<sup>128</sup> Frederick Schauer, “Is Legality Political “ *William and Mary Law Review* 53 (2011), p. 483. For a strong emphasis on the formal character of law see Robert S. Summers, “The Formal Character of Law” *Cambridge Law Journal* 51, no. 2 (1992), pp. 242-262; Robert S. Summers, “How Law Is Formal and Why It Matters” *Cornell Law Review* 82 (1996-97), pp. 1165-1229. In this approach, legality would be understood as the equivalent of certainty of law.

<sup>129</sup> Another approach seeks to merge somehow (not as a matter of necessity but contingency) the two approaches, that is, legal positivism and natural law. This is the approach advanced by the so-called inclusive legal positivism, the basic claim of which is that law may, but need not, include moral norms or make reference to moral norms as a condition of legality. On inclusive legal positivism and the role of morality in determining legal validity, among others, see Jules Coleman, “Negative and Positive Positivism” *The Journal of Legal Studies* 11 (1982), p. 148-149 ; Matthew H. Kramer, “On Morality as a Necessary or Sufficient Condition for Legality” *The American Journal of Jurisprudence* 48 (2003), pp. 53-82; Kramer, “Moral Principles and Legal Validity”, pp. 44-61.





## CHAPTER 2

### THE QUESTION OF THE LEGALITY OF JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS ON SUBSTANTIVE GROUNDS: TWO THEORIES ON THE ULTIMATE CRITERIA OF VALIDITY OF LAW

In this chapter, we will linger on the concept of legal validity in accordance with the first approach: that is, the answers provided by legal positivism. To this end, we will consider and explain more thoroughly two potent representatives of legal positivism: the theories of H. L. A. Hart and Hans Kelsen. We will use their theories and concepts to obtain a general framework to analyse the legality aspect of the judicial review of constitutional amendments.

The relevance to our investigation of these two theories derives, as mentioned earlier, from the question: what is the ultimate criterion of law or legal systems? The short (and widely accepted) answer to this question is that the constitution of a modern legal system is the superior body of law, which establishes the criteria of legal validity (and bindingness)<sup>130</sup> of other low-level legal rules. However, for the topic of our study the question of what makes a constitution superior, or equally, what makes a duly adopted constitutional amendment valid or invalid is of greater importance. What are those higher rules, facts, or values of a constitution that invalidate a duly adopted constitutional amendment? Recalling that we have discarded the natural law theory to answer this question, where then do we look to find an answer?

We argue that the issue of unconstitutional constitutional amendments is a borderline case allowing us to explore the implications of two potent and renowned concepts of legal positivism: *the Grundnorm* of Kelsen and *the rule of recognition* of H. L. A. Hart. Kelsen's *Grundnorm* and Hart's *rule of recognition* both attempt to explain the ultimate validity criterion of the law. Their theories seek to shed light on the so-called *foundation* or *essence* of law. Both of them aim to account for what makes (at the last resort) legal rules valid. And both of them, as we will later see, pay considerable attention to constitutional structure in their analyses. What is more relevant, as Frederick Schauer rightly suggests, is that Kelsen's and Hart's "views on the extra-legal foundations of a legal system are suggestive of an

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<sup>130</sup> Giovanni Sartor argues that legal bindingness is the consequential side of legal validity. Even though determining legal validity might be descriptive, legal bindingness requires (moral) evaluative consideration. Sartor, "Legal Validity: An Inferential Analysis", p.216, 219, (holding the view that all legally valid laws are legally binding, but the reverse might not be the case. Ibid. pp. 224-229).

approach to the problem of [constitutional] amendment”<sup>131</sup> As far as constitutional amendments are concerned, Schauer is among the few scholars to have raised the relevance of Hart’s and Kelsen’s theories with regard to the question of validity of amendments. We will pursue his suggestion and attempt to move it forward.

Our attempt to use these two concepts is, to some extent, similar to what Neil MacCormick suggested in his analysis of the *Factortame* case. To describe it very briefly, the case dealt with a matter arising from the conflicting rules of the (British) Merchant Shipping Act 1988 (restricting fishing against EC fishing quotas in UK waters to boats substantially owned by persons principally resident in the UK) and the European Communities Act 1972. In the case, the House of Lords issued an injunction preventing the application of the English Act, which gave rise to a question about the ultimate test of validity criteria of law in the UK. On this question, MacCormick suggested that this kind of “... question can be followed up as to the idea of a *Grundnorm*, or that of a rule of recognition...”<sup>132</sup> Here, we stick to MacCormick’s argument and believe that the question of unconstitutional constitutional amendments in a democratic regime renders the test of Grundnorm or rule of recognition both possible and important.

The respective approaches of Kelsen and Hart to the issue of the source of validity of law, and their conclusions, are significantly different. Yet, their concepts and theories are comparable to a great extent given that they both attempt to accomplish a similar goal. In fact, as stated by Graham Hughes, Hart owes much to Kelsen in terms of his concept of the rule of recognition.<sup>133</sup> The accuracy of this statement is observable in Hart’s masterpiece *The Concept of Law*. Yet, Hart does also criticize Kelsen’s theory.

On the other hand, it is not unusual to find these two concepts in the literature analyzing a legal issue, like ours,<sup>134</sup> or simply offering a theoretical point of view on the question of what is law.<sup>135</sup> In support of the comparability of these concepts, we can recall Neil MacCormick’s remark that “*The Concept of Law* can keep company even with the massively erudite and

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<sup>131</sup> Schauer, “Amending the Presupposition of a Constitution”, p.146.

<sup>132</sup> Neil MacCormick, “Beyond the Sovereign State” *The Modern Law Review* 56, no. 1 (1993), p. 3.

<sup>133</sup> Graham Hughes, “Validity and the Basic Norm” *California Law Review* 59 (1971), p. 695.

<sup>134</sup> For a recent study that employs Hart’s and Kelsen’s concepts see, Uta Bindreiter, *Why Grundnorm? : A Treatise on the Implications of Kelsen’s Doctrine* vol. 20 (The Hague ; London; New York Kluwer Law International, 2002).

<sup>135</sup> Andrei Marmor, “How Is Law Like Chess” *USC Legal Studies Research Papers*, no. 06-7 (2006), <http://ssrn.com/abstract=897313>.



acutely perceptive works of the great Austrian jurist Hans Kelsen, among the great works of twentieth-century jurisprudence”<sup>136</sup>

Kelsen’s theory, as aptly mentioned by William Ebenstein, is a kind of starting point for legal science in the new era. Therefore, any enquiry into legal theory needs to deal (‘critically or affirmatively’) with Kelsen’s work.<sup>137</sup> On the other hand, the literature concerning Hart’s rule of recognition has been centred on the question, after Ronald Dworkin’s strong attack,<sup>138</sup> of whether it is possible for that concept to incorporate morality or reference to morality.<sup>139</sup> Although there has been an enormous amount of literature concerning the two theories, they are not free from controversy or debate.

It seems that it is only very recently that the relation between the rule of recognition and constitutional theory has gained more attention, with the publication of the book *‘The Rule of Recognition and the US Constitution’* (2009).<sup>140</sup> The fact that there is little scholarship that seeks to appeal to the rule of recognition in the constitutional theory is clearly indicated by Matthew Adler and Kenneth Einar Himma.<sup>141</sup> Therefore, this study will offer, in some way, a contribution to this discussion on the close relation between the rule of recognition and constitution.

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<sup>136</sup> Neil MacCormick, *H.L.A. Hart*, 1 ed. (London: Edward Arnold, 1981), p. 3. Kent Greenawalt also notes that much of what can be said about Hart’s account of law, and particularly the rule of recognition “has obvious importance for Hans Kelsen’s” Kent Greenawalt, “Hart’s Rule of Recognition and the United States” *Ratio Juris* 1, no. 1 (1988), p. 41.

<sup>137</sup> William Ebenstein, “The Pure Theory of Law: Demythologizing Legal Thought” *California Law Review* 59 (1971), p. 652.

<sup>138</sup> Ronald M. Dworkin, “The Model of Rules” *The University of Chicago Law Review* 35, no. 1 (1967). reprinted in Ronald M. Dworkin ———, *Taking Rights Seriously* ; Dworkin, *Law’s Empire*. For a comprehensive explanation of the debate between Dworkin and Hart, see Scott J. Shapiro, “The “Hart-Dworkin” Debate: A Short Guide for Perplexed” *Public Law and Legal Theory Working Paper Series* ( The University of Michigan Law School) (2007), <http://ssrn.com/abstract=968657>. ; Brain Leiter, “Beyond the Hart/Dworkin Debate:The Methodology Problem in Jurisprudence” *American Journal of Jurisprudence* 48 (2003), pp. 17-51.

<sup>139</sup> In this discussion, the concept of rule of recognition led the legal positivism to split into two branches: exclusive and inclusive legal positivism. In the distinction between exclusive and inclusive legal positivism, the adherents of the former, as pointed out in footnote 129, endorse the idea that the rule of recognition, and thus law, may, but need not, incorporate morality or reference to morality, while the adherents of the latter rejects this view. For the arguments of inclusive legal positivists see Jules L. Coleman, “Negative and Positive Positivism” *Journal of Legal Studies* 11 (1982) ; Kenneth Einar Himma, “Inclusive Legal Positivism” in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules L. Coleman and Scott Shapiro (Oxford; New York: Oxford University Press, 2002), pp. 125-166. One key figure on the side of the exclusive branch is Joseph Raz, *The Authority of Law- Essays on Law and Morality* (Oxford: Clarendon Press, 1979).

<sup>140</sup> Matthew D. Adler and Kenneth Einar Himma, eds., *The Rule of Recognition and the U.S. Constitution* (Oxford ; New York.: Oxford University Press, 2009). On this point, Kent Greenawalt’s article published in 1987 must be noted, see Kent Greenawalt, “The Rule of Recognition and the Constitution” *Michigan Law Review* 85, no. 4 (1987), pp. 621-671, reprinted in Adler and Himma, eds., *The Rule of Recognition and the U.S. Constitution* pp. 1-47.

<sup>141</sup> Adler and Himma, eds., *The Rule of Recognition and the U.S. Constitution*, p. xiv.



## 2.1 Kelsen's GRUNDNORM

Kelsen determines that one of the main goals of his 'pure theory of law' (here he does not directly refer to title of his book, but to his theory as a whole) is the attempt to discover the nature of law. For Kelsen, to discover the nature of law means: "to determine its structure and its typical forms, independent of the changing content which it exhibits at different times and among different peoples"<sup>142</sup> The methodology he employs to this end is to purify law, i.e. to make it purely scientific (value-neutral) by eliminating all those factors that are deemed to be foreign to law, such as politics, morals, sociology, and psychology and so on.

With the aim of discovering the nature of law by purifying it, Kelsen starts by differentiating law from all other normative (social) orders. He considers that *norms*, as the subject-matter of legal science, do not exclusively belong to law. Other social orders too, which Kelsen collectively calls *morality*,<sup>143</sup> prescribe norms to regulate human behaviour. Therefore, what distinguishes one type from the others, or what constitute their common elements, must be described and demonstrated clearly.

One of the similarities or common elements of law and morality that Kelsen identifies is that moral norms are made valid through their creation by custom, or by religion,<sup>144</sup> thus moral norms are positive or posited in a similar way in which legal norms are created or posited. In this sense, as legal norms reflect acts of a will - an assembly, or a king - moral norms, too, reflect acts of a will (a prophet, or God).<sup>145</sup> Another feature that law and morality share is the aim to regulate human behaviour. On this point, Kelsen is aware that what different social orders regulate might coincide with each other, that is, they may regulate the same human behaviour. As he puts, "[s]uicide can be forbidden, not only by morality, but also by law; courage and chastity can be not only moral duties, but also legal ones"<sup>146</sup> From this comparison, Kelsen concludes that nothing can make law and morals radically different in terms of *what* they order or command; the difference can be seen only in *how* they do so.

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<sup>142</sup> Hans Kelsen, "The Pure Theory of Law and Analytical Jurisprudence" *Harvard Law Review* 55, no. 1 (1941). On the theme of the nature of law, see Andrei Marmor, "The Nature of Law" in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (Stanford: Stanford University, 2007). <http://plato.stanford.edu/entries/lawphil-nature/> (last visited on 26th October, 2011).

<sup>143</sup> Hans Kelsen, *Essays in Legal and Moral Philosophy* ed. Ota (Selected and Introduced by) Weinberger, trans. Peter Heath (Dordrecht; Boston: D. Reidel Publishing Company, 1973), p. 83.

<sup>144</sup> Ibid. p. 83

<sup>145</sup> Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (Russell&Russell, 1945), p. 26; Hans Kelsen, *Pure Theory of Law* trans. Max Knight, 2 ed. (Gloucester, Mass: Peter Smith, 1989 (hereafter as *Pure Theory of Law*); reprint, Translation from: *Reine Rechtslehre*. 2nd rev. and enl. ed. Vienna: Deuticke 1960; First published 1967), p. 62.

<sup>146</sup> Kelsen, *Essays in Legal and Moral Philosophy*, p. 84.

This point brings us to a concept that constitutes another similarity, and at the same time a difference, between law and morality: coercion, which is one of the key concepts of Kelsen's theory of law. For Kelsen, a legal norm is an order,<sup>147</sup> on the one hand, and it (and law in general) is a coercive order, on the other. These two elements form the essential components of a legal norm.<sup>148</sup> However, the concept of coercion is not peculiar to law; it represents the similar character of all social orders – morals, law, religion etc. Yet, Kelsen refers to and highlights the distinction between the coercion of morality and that of law. In this distinction, he points out that what makes the two different is the type of coercion or sanction they prescribe.<sup>149</sup> The major difference stems from the fact that the sanctions that law prescribes are *socially immanent* and *institutionally organized*, which is distinct from the transcendental character of religions' sanctions, or the mere approval or disapproval of morality.<sup>150</sup>

A further difference between morality (including justice) and law stems from the conviction Kelsen holds that absolute values are scientifically unintelligible.<sup>151</sup> He thinks that whereas morality claims to prescribe absolute values, the values that legal norms impose are, and can only be, relative values.<sup>152</sup> In this sense, Kelsen is a moral relativist.<sup>153</sup> By the same token, Kelsen suggests that the basic enterprise of natural law theory,<sup>154</sup> which is to explain the existence (or the validity) of law with reference to natural rights or principles must be

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<sup>147</sup> Kelsen argues that legal norms are not only 'ordering' or 'commanding', but they are also authorizing, permitting or derogating. Hans Kelsen, "On the Basis of Legal Validity" *American Journal of Jurisprudence* 26 (1981), translated by Stanley L. Paulson pp. 178-180. Also see Kelsen, *Essays in Legal and Moral Philosophy*, p. 216.

<sup>148</sup> Kelsen, *Pure Theory of Law*, p. 33.

<sup>149</sup> Ibid. p. 28.

<sup>150</sup> Ibid. p. 33.

<sup>151</sup> Ibid. p.18; Kelsen, *Essays in Legal and Moral Philosophy*, p. 87. For a detailed discussion and analysis on this issue see Hans Kelsen, "Absolutism and Relativism in Philosophy and Politics" *The American Political Science Review* 42, no. 5 (1948), pp. 906-914.

<sup>152</sup> Kelsen, *Essays in Legal and Moral Philosophy* pp. 276-282. Yet, one important aspect that must be noted at this point is that Kelsen claims that even though law and morality shall be separated there may be references in law to morality. These references, however, are not the *necessary* conditions in order for legal norms to be called 'laws'. Therefore, if there is a connection or relation between the two, it may be only *contingently*, not *necessarily*, so. Thus, according to Kelsen, there is nothing that casts doubt on considering a norm that is incompatible with morality as a legal norm. Kelsen, *Pure Theory of Law*, p. 63. This is in fact the distinction between inclusive and exclusive legal positivism; a distinction we drew attention to earlier in this study.

<sup>153</sup> Joseph Raz, "Kelsen's Theory of the Basic Norm" *American Journal of Jurisprudence* 19 (1974), p. 101. Also see Kelsen, *Pure Theory of Law*. pp. 63-65. Closely related to this, Kelsen denies that legal science can answer what justice is, even though he regards it as 'the eternal question of mankind.' This is simply because, according to him, what justice *is* cannot be comprehended and explained scientifically at all, since there cannot be anything which makes different perceptions and different propositions of good and bad (that is, justice) objectively intelligible and explicable; they might all be (equally) valuable. Kelsen, *Essays in Legal and Moral Philosophy*, p. 1. For Kelsen's detailed account of justice "What is Justice?" in Kelsen, *Essays in Legal and Moral Philosophy* pp. 1-26.

<sup>154</sup> For Kelsen's view on the natural law see Kelsen, *General Theory of Law and State*. pp. 391- 444; and also Kelsen, *Essays in Legal and Moral Philosophy* pp. 27-60, and pp. 114-153

rejected. Those natural rights or principles are claimed to exist naturally – that is, without any need to posit them – and to prevail over all posited legal norms, including a constitution, and thus they are claimed to constitute the condition of existence of (positive) law.

By distinguishing law from morality (and justice) Kelsen comes up with the view that morality shall be separated from law, because they are two different categories. Accordingly, Kelsen believes that the only task of jurisprudence is to describe the condition of objective validity of law – its grounds of normativity.<sup>155</sup> However, the task to ‘describe’ should not be confused with the aim that the sociology of law holds, which is also to ‘describe’. They are different in the sense that while the latter aims to describe merely the factual reality of law (how law functions or how individuals behave in relation to law, or why law is not functioning properly and so on),<sup>156</sup> the former aims to describe the normativity of law.<sup>157</sup> In this line, Kelsen seeks to find a purely scientific (and convincing) answer to the question of what renders the *objective* interpretation of law possible,<sup>158</sup> and this is the decisive question of his theory.<sup>159</sup>

Kelsen conceives of norms as the subjective meaning of an act of a will,<sup>160</sup> the term ‘objective’ is the key to understanding his endeavour, and this term (objective) is consistent with his entire project for the pure scientific understanding and explanation of law. He thinks that *norms*, as ought-statements, are subjective meanings of acts of a will until something makes them objectively valid. Kelsen’s distinction between the command of a gangster and an order of law makes the point clearer. In the former case, there is nothing that makes the command of a gangster objectively valid, whereas for the law’s command there is *something* (presupposed) that makes it objectively valid and binding.<sup>161</sup> This *something* is, as Kelsen calls it, the *Grundnorm* or the *basic norm*. It serves as a kind of scheme of interpretation, which makes it possible to interpret a constitution and all norms created according to it as objectively valid.<sup>162</sup> Therefore, not any command of an authority is considered as law, but

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<sup>155</sup> Kelsen, “The Pure Theory of Law and Analytical Jurisprudence”, p. 49; also see Kelsen, *Pure Theory of Law*, p. 68. Also see Bindreiter, *Why Grundnorm? : A Treatise on the Implications of Kelsen’s Doctrine*, p. 43.

<sup>156</sup> Kelsen, “The Pure Theory of Law and Analytical Jurisprudence”, p.52; Kelsen, *Pure Theory of Law*, p. 202.

<sup>157</sup> For further discussion on this issue, see Kelsen, *General Theory of Law and State*, pp. 162-164.

<sup>158</sup> Kelsen, *Pure Theory of Law*, p. 45, 51-52, 202, and 218-219. Also see Kelsen, *General Theory of Law and State*, p. 120.

<sup>159</sup> Kelsen, *Pure Theory of Law*, p. 45.

<sup>160</sup> Ibid. p. 10. Also see Kelsen, “On the Basis of Legal Validity”, p. 181. In the first edition of his *Pure Theory of Law*, Kelsen previously held that norms in general and legal norms in particular are the ‘will’ or ‘command’ of the legislator or state. He abandoned this view or modified it in the way mentioned.

<sup>161</sup> Kelsen, *Pure Theory of Law*, pp. 47-48.

<sup>162</sup> Kelsen, *General Theory of Law and State*, p. 41

only those that are created in a manner determined by the ultimate criterion of validity, that is, the Grundnorm.<sup>163</sup>

As pointed out by Joseph Raz, Kelsen views the Grundnorm as an essential tool to explain not only law, but also normative systems in general.<sup>164</sup> Indeed, Kelsen claims that religion also has a basic norm. To this effect, he gives the following example: if a father orders his child to go to school, and that child asks “why?” the answer is that according to the Christian belief system, a child ought to obey his/her father’s commands. And when the child asks why s/he ought to obey his/her father’s commands, s/he will encounter a presupposed highest norm, which is that if one is Christian s/he ought to obey what God orders, and God orders that you must ‘obey your fathers’. For Kelsen, ‘one ought to obey what God orders’ is the basic norm of the Christian religion, the validity of which cannot be questioned, if one is to be a Christian.<sup>165</sup> As is clear from the example, the Grundnorm status of ‘one ought to obey what God orders’ is conditional upon the child being Christian. This will have a similar character for the Grundnorm of a legal system; we will see this below.

Similarly, Kelsen considers that in natural law theory there also is a basic norm, which, in a similar manner, supplies the validity criteria to a positive legal system. The main difference between the basic law of the pure theory of law and that of natural law derives from the fact that “the content of the positive legal order is completely independent of the basic norm [of the pure theory of law] ...[,] whereas according to the natural-law doctrine a positive legal order is valid only if and insofar as its content corresponds to the natural law”<sup>166</sup> Following this, the nature of the basic norm leads Kelsen to identify two different normative systems: static and dynamic.

Kelsen regards a positive legal order as a dynamic one, as opposed to static normative systems, which he attributes to a moral order.<sup>167</sup> Following this characterization, the static and dynamic principles of the basic norms refer to the idea that in the former, the basic norm determines both the *validity* (of forms) and the *content* of the lower-level norm. This type of

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<sup>163</sup> On the point of the command of a gangster and of the law, particularly, see Kelsen, *Pure Theory of Law*. (The Law as a Normative Coercive Order; Legal Community and Gang of Robbers) pp. 44-50.

<sup>164</sup> Raz, “Kelsen’s Theory of the Basic Norm”, p.94

<sup>165</sup> Kelsen, *Pure Theory of Law*, p. 197.

<sup>166</sup> Hans Kelsen, “Professor Stone and the Pure Theory of Law” *Stanford Law Review* 17, no. 6 (1965), pp. 1141-1142. Also see Hans Kelsen, *Introduction to the Problems of Legal Theory- a Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law* trans. Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford ; New York Oxford University Press, 1992 (hereafter as *Introduction to the Problems of Legal Theory*), p. 56.

<sup>167</sup> Kelsen, *General Theory of Law and State*, p. 113.

normative system can be conceived only for moral order. In the second, dynamic, type the basic norm can only be *presupposed*, which only determines the validity (of forms), not *contents* of legal norms. Thus, the Grundnorm of a legal system is devoid of any content, and this point deserves more attention since it is important to our enquiry here and also because Kelsen's different statements on this issue have led to a sort of confusion, which needs further clarification.

From what has been said so far, it is clear that the *Grundnorm* or *the basic norm* is the core concept to accomplish Kelsen's goal of offering a purely scientific explanation of law. In this sense, he considered the Grundnorm as a kind of tool that makes it possible to conceive of the existence of a positivistic legal order. In order to put the Grundnorm into a context by means of which we can trace our enquiry, we must uncover and elaborate it in more detail.

### **2.1.1. The Grundnorm: The Reason for Validity of a Legal System and the Hierarchical Structure of Legal Norms**

Kelsen is of the opinion that the science of law must cognize its object – a multitude of legal norms – as a meaningful whole, and in this sense the legal science has a constitutive character, but this “has [a] purely epistemological character”.<sup>168</sup> Namely, the science of law *per se*, by its cognition and systematization of legal norms cannot posit or create a legal obligation or right; unlike a legislator, it cannot create normativity. Following this consideration, Kelsen conceives of the law, which consists of legal norms, as a meaningful and coherent legal system.<sup>169</sup> Here, the question is what makes it possible to conceive of the multitude of legal norms as a legal system. And the answer Kelsen provides us is again the Grundnorm. Because, according to him, every single legal norm takes its validity ultimately from the Grundnorm. And when one traces back the validity of a legal norm, the Grundnorm of the system will be found;<sup>170</sup> the Grundnorm forms the unity of the legal norms, and thus makes up the legal system.

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<sup>168</sup> Kelsen, *Pure Theory of Law*, p. 72 and p. 206. In order for legal norms to be cognized as a meaningful whole, they must themselves be so under the basic norm Kelsen, *General Theory of Law and State*, p. 401 etc.

<sup>169</sup> Baume « Introduction » in Kelsen, *Qui Doit Être Le Gardien De La Consitution?*, p. 14.

<sup>170</sup> Kelsen, *General Theory of Law and State*, p. 111; Kelsen, *Introduction to the Problems of Legal Theory*, p. 55.

Clearly inferable from the preceding paragraph is that a legal system, which consists of legal norms, is built on a hierarchical structure, because the enquiry of tracing back the reason for validity of legal norms, and their respective dependence on the Grundnorm of the system leads us to conceive of the legal system as composed of norms which are created hierarchically.

This determination also helps to explain the very nature of a modern legal (positive) system, which is characterized by Kelsen as a dynamic one, that is, a modern legal system incorporates and consists of, in principle, *constantly changing and changeable* legal norms.<sup>171</sup> As a result of this dynamic nature, a modern legal system needs to be built on a hierarchical system of norms.<sup>172</sup> This implies that a modern legal system consists of rules that are created, changed, repealed, and reproduced. Hence, Kelsen thinks that a positivistic theory of law must be able to explain how legal rules change constantly.<sup>173</sup> And the account he provides on the nature of constantly changing legal norms is that it must be built on the idea of hierarchical forms of rules. From this determination follows the explanation of what one of the functions of the Grundnorm is: the unifying function. It is this highest norm – called the *Grundnorm* or Ursprungsnorm (origin-norm)<sup>174</sup> – which ascertains the unity of norms and makes them valid; this is its first function. At the same time, it makes up a legal system by establishing a hierarchy of legal rules.<sup>175</sup> Should this basic norm not exist or is not presupposed to exist, it would be impossible to conceive of any norm as legally and objectively valid, according to Kelsen.

In his *magnum opus*, *Pure Theory of Law*, Kelsen poses a question: “why is a norm valid, what is the reason for its validity?”<sup>176</sup> He answers this question by stating that the reason for the validity of a legal norm cannot depend on a *fact*, but on a *norm*, a higher norm, that is established by an authority. However, inevitably the question of what makes that higher norm valid needs to be addressed. He notes that the latter higher norm is valid because it is generated from another higher norm. At this point, Kelsen aptly notes that this hierarchy has

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<sup>171</sup> This is an important aspect of Kelsen’s theory that needs to be kept in mind as it is directly related to our enquiry i.e. the question of the position of unamendable constitutional provisions in a legal system.

<sup>172</sup> Kelsen, “The Pure Theory of Law and Analytical Jurisprudence”, p.62.

<sup>173</sup> Kelsen, *Pure Theory of Law*, p. 57-58.

<sup>174</sup> For different terms used by Kelsen to refer the idea implied by the Grundnorm see Julius Stone, “Mystery and Mystique in the Basic Norm” *Modern Law Review* 26 (1963), p 36; also see Bindreiter, *Why Grundnorm? : A Treatise on the Implications of Kelsen’s Doctrine* pp. 16-19.

<sup>175</sup> Kelsen, *Pure Theory of Law*, p. 200. For a more concise explanation on this account, see Hans Kelsen, “The Function of a Constitution” in *Essays on Kelsen*, ed. Richard Tur and William Twining (Oxford- New York: Oxford: Clarendon Press, 1986), pp. 111-120.

<sup>176</sup> Kelsen, *Pure Theory of Law*, p. 193.



to end somewhere – it cannot go indefinitely<sup>177</sup> and the existence of a highest norm must be *presupposed* or *taken for granted*. He states 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”<sup>178</sup>

To put the general framework concerning the Grundnorm into an example, when we look for the reason for the validity of a parliamentary statute, we will find that it is valid because it is created by a legislature. And we will find that the legislature, in turn, is authorized by the constitution. Yet, a crucial question arises: what makes the constitution, which authorizes the legislature to enact the statute in question, legally objectively valid? The answer is (or would be) that the constitution is derived from another constitution by means of constitutional amendment. At the end of this enquiry, we will find a historically-first constitution (if there is one) whose existence (validity) cannot be traced back any further to any other positive constitutional law. Therefore, the reason for the legal validity of the historically-first constitution becomes the ultimate point in this quest for the reason of legal validity.<sup>179</sup> And Kelsen maintains that the existence and validity of the historically-first constitution stems from the (presupposed) Grundnorm.

At this point, Kelsen asks what is the reason for *the validity of the Grundnorm*. He claims that the existence of the Grundnorm must be taken for granted or *presupposed* if the legal system is to be regarded as objectively valid. It is at this point that the Grundnorm involves and performs another function. To make this point clearer, let us recall the Christian child example. There, we had mentioned that the Grundnorm status of ‘one ought to obey what God orders’ is conditioned upon the child’s being a Christian. Similarly, the Grundnorm of a legal system is conditional. The condition is whether one is to regard juridical meaning of legal norms as objectively valid. If not, then all that is said to be law would only mean power relations. That means, without the Grundnorm, that all that was believed to be law would be nothing more than mere power relations ‘or subjective oughts.’<sup>180</sup>

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<sup>177</sup> Ibid. p. 194.

<sup>178</sup> Ibid. p. 195.

<sup>179</sup> Ibid. p. 200.

<sup>180</sup> Sylvie Delacroix, “Hart’s and Kelsen’s Concepts of Normativity Contrasted” *Ratio Juris* 17, no. 4 (2004), p. 514.

In this sense the Grundnorm may, but need not, be presupposed. The necessity of its presupposition stems from a significant, a probably an inevitable condition. The Grundnorm needs to be presupposed *so long as* one is to interpret the subjective meaning of an act of a will as objectively normative.<sup>181</sup> Thus, the Grundnorm accounts for a kind of legitimizing of the validity of a constitution in particular and a legal system in general (this is its second function), yet it does not provide an “ethical-political justification”<sup>182</sup> It only provides epistemological (function) tools to understand the possibility of the objectivity of legal norms (this is its third function). Therefore, the Grundnorm only involves formal or procedural considerations.<sup>183</sup>

Consistent with this, Kelsen claims that the Grundnorm does not take its validity (here validity is not used in the sense of legal validity, thus the validity used here can be replaced by ‘existence’) from a fact, but from the idea of a norm, which is transcendental, meta-physical, hypothesized or presupposed. Otherwise, the theory will not be pure, because the existence, i.e. the validity, of legal norms would be consisted in a fact, which will require someone to make an empirical (sociological), political or moral enquiry in order to discover the reason for the validity (normativity) of the legal norms. However, Kelsen strictly rejects this idea.

He further points out and clarifies some other aspects of the Grundnorm. For example, he states that the Grundnorm *directly* refers to a specific (historically-first) constitution and only *indirectly* to a legal system, which is established according to the historically-first constitution. In addition to this, he argues that in order to conceive of a legal system under the Grundnorm, in particular the constitution to which the Grundnorm refers, the legal order shall be *by and large effective*. Thus, the Grundnorm entails two conditions: an actual constitution shall be in force (valid), and that constitution and the legal system it creates shall be *by and*

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<sup>181</sup> Kelsen, *Pure Theory of Law*, p. 218.

<sup>182</sup> Ibid.

<sup>183</sup> Bindreiter, *Why Grundnorm? : A Treatise on the Implications of Kelsen's Doctrine*, p. 16. However, Raz argues that the normativity that Kelsen aims to explain is *justified normativity*, which he associates with the natural law theories. See Raz, “Kelsen’s Theory of the Basic Norm”, p.103 reprinted in Raz, *The Authority of Law*, p. 135. In contrast to Raz, Sylvie Delacroix argues that Kelsen’s conception of normativity is not that which is similar to natural law, but it is the normativity (of law) which Kelsen aims to provide *from-within* the legal sphere. Therefore, she opposes Raz’s characterization of Kelsen’s conception of normativity. Indeed, Kelsen’s concept of norms – as mere ‘ought-statements’, which are distinct and totally independent from *is-statements* – is consistent with Sylvie Delacroix’s view. And Kelsen tries to make possible a *from-within* type of normativity through a merely presupposed concept of the Grundnorm. For a detailed discussion see Delacroix, “Hart’s and Kelsen’s Concepts of Normativity Contrasted”, pp. 506-510.

large effective.<sup>184</sup> These two conditions will be explained in the following parts. But, first, let us turn to the relationship between effectiveness (fact) and validity (ought).

### 2.1.2. The Grundnorm and the Relationship between Effectiveness and Validity

It has been demonstrated in the preceding paragraphs that according to Kelsen, the reason for the validity of legal norms derives from a higher norm, and ultimately – in the case of constitutional norms, which are the highest positive norms of a legal system – from the presupposed or hypothesized Grundnorm. In this respect, Kelsen, following Hume's philosophy,<sup>185</sup> adheres strongly to the idea that an 'ought-statement' is separated from an *is-statement*.<sup>186</sup> Therefore "the reason for the validity of a norm is always a norm, not a fact. The quest for the reason of validity of a norm leads back, not to reality, but to another norm from which the first norm is derivable..."<sup>187</sup> Consistent with this view, he states that "...the *efficacy* of the normative order must be distinguished from its *validity*"<sup>188</sup>

However, Kelsen concedes that there are, at certain points, inevitable connections between *is* (fact) and *ought* (normativity-validity). Concerning this connection, the term 'effectiveness' (or efficacy) is the most important to be taken into account. As Kelsen argues: "[v]alidity and efficacy are two completely distinct qualities; and yet there is a certain connection between the two"<sup>189</sup> The following statement reveals what Kelsen believes this connection is: "[j]urisprudence regards a legal norm as valid only if it belongs to a legal order that is by and large efficacious.." <sup>190</sup> Therefore, in order for a constitution to be considered as valid, the legal system established in accordance with it must be, by and large, effective. The effectiveness of a legal order can be obtained in two ways: i) either the people bound by that legal order obey or conform with their actual behaviour to the legal norms by and large, ii) or, in case of disobedience, the sanctions prescribed by the legal norms are applied by the officials by and

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<sup>184</sup> Kelsen, *Pure Theory of Law*, p. 201.

<sup>185</sup> Andrei Marmor, *Social Conventions : From Language to Law* (Princeton, N.J. : Princeton University Press, 2009 (hereafter as *Social Conventions*)), p. 158.

<sup>186</sup> "The reason for the validity of a norm is not, like the test of the truth of an "is" statement, its conformity to reality. [A] norm is not valid because it is efficacious. The question why something ought to occur can never be answered by an assertion to the effect that something occurs, but only by an assertion that something ought to occur" Kelsen, *General Theory of Law and State*, p. 110.

<sup>187</sup> Ibid. p. 111.

<sup>188</sup> Kelsen, "On the Basis of Legal Validity", p.181-182.

<sup>189</sup> Kelsen, "The Pure Theory of Law and Analytical Jurisprudence", p.50

<sup>190</sup> Ibid. p. 50.

large. In contrast to effectiveness, ineffectiveness of a legal norm, which sometimes arises from *desuetude*, i.e. non-use of legal norms, will cause the invalidity of that legal norm.<sup>191</sup>

Following these statements by Kelsen, the fact that the ‘efficacy’ as an *is*-form belongs to the category of facts inevitably raises the question (even though the answer might seem to be clear), pp. does the efficacy form a validity criterion of a legal norm in general and of a constitution in particular? Kelsen’s answer to this question is negative and the following statement deserves to be quoted in full to show the rationale behind his rejection: “The solution proposed by the Pure Theory of Law is this: Just as the norm (according to which something *ought* to be) as the meaning of an act is not identical with the act (which actually *is*), in the same way is the validity of a legal norm not identical with its effectiveness; the effectiveness of a legal order as a whole and the effectiveness of a single legal norm – just as the norm-creating act – the condition for the validity; effectiveness is the condition in the sense that a legal order as a whole, and a single legal norm, can no longer be regarded as valid when they cease to be effective. Nor is the effectiveness of a legal order, any more than the fact of its creation, the reason for its validity. The reason for the validity – that is, the answer to the question why the norms of this legal order ought to be obeyed and applied – is the presupposed basic norm, according to which one ought to comply with an actually established, by and large effective, constitution, and therefore with the by and large effective norms, actually created in conformity with that constitution”<sup>192</sup>

Even if this solution proposed by Kelsen might seem to be acceptable, there remains a point that needs to be considered: in order for a constitution to be accepted as efficacious, first, there must be a constitution which is already in force, i.e. already valid. In order for a person to obey the legal norms, that constitution must also be by and large effective. At this point, Kelsen seems to assume an overlap of the coming into force of a constitution and its acquiring of efficacy. However, there might be a period, a transition, during which the status of the constitution in terms of its effectiveness might be doubtful. Thus, the taken-for-granted effectiveness of the constitution might not in fact be the case. There is another point, which

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<sup>191</sup> Kelsen determines that a legal order in which a few legal norms are not efficacious in some instances will not lead the entire legal order to be considered as inefficacious, and thus invalid. “...for it is possible that in a legal order which is on the whole efficacious, and hence regarded as valid, a single legal norm may be valid but not efficacious in a concrete instance, because as a matter of fact, it was not obeyed or applied although it ought to have been” Ibid. p. 51.

<sup>192</sup> Kelsen, *Pure Theory of Law*, p. 212.

concerns the issue of when exactly the Grundnorm shall be presupposed. Therefore, the question of which comes first – the effectiveness of the constitution or the presupposing of the Grundnorm – remains to be resolved in Kelsen's theory, but he does not provide a solution.

Furthermore, even though Kelsen stresses the idea that being by and large effective is not the reason for the validity of a legal system, but rather the condition of its validity, in the last resort, it constitutes a slight difference at the practical level. For the position of the effectiveness as a condition of the validity of a legal order in his theory does not change its practical implication. So, the refusal of the idea that no *ought* (normativity) can be derived from *is* (facticity) seems to lead Kelsen to an impasse, because, ultimately the fact, i.e. being by and large effective, determines or affects strictly, the normativity.

As to the meaning of the term effectiveness, it seems that Kelsen sometimes uses it as equivalent to legitimacy in the sociological and political sense of the word, while sometimes 'effectiveness' evokes the term 'power', even though Kelsen strictly opposes the use of the latter term with regard to the reason for validity of a legal norm. In an example he gives concerning the gangster situation, the term effectiveness is used in the sense of (legal and political) legitimacy. When he asks why a gangster's command cannot be accepted as objectively valid, and thus does not have to be obeyed, he states that it is because the command of a gangster does not stem from *a lasting effective order* (and at the same time because no basic norm is presupposed that would yield the objective validity to the gangster's command).<sup>193</sup>

The significance of the term 'effectiveness' and its use by Kelsen become clearer in his attempt to explain the change of the Grundnorm of a legal system by a revolution.

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<sup>193</sup> Ibid. pp. 47-48.

### 2.1.3. Change of the Grundnorm

In Kelsen's view, the change of the Grundnorm refers to "the change of the facts that are interpreted as creating and applying valid legal norms"<sup>194</sup> Once a constitution comes into existence or is put into effect by whatever means, the legal system starts functioning in the way prescribed by the constitution, i.e. in its own way. In this way, Kelsen holds the view that the law determines its own creation;<sup>195</sup> general norms are enacted by the authority established by the constitution and they are amended, replaced or repealed.

One of the exceptions to this regular functioning of a legal system, Kelsen argues, is a revolution: "the function of the basic norm becomes particularly apparent if the constitution is not changed by constitutional means, but by revolution"<sup>196</sup> He conceives of a revolution in a broad sense, in that every means of changing a constitution that is not prescribed by that constitution is regarded as a revolution. "A revolution in the broader sense of the word (that includes a coup d'état) is every not legitimate change of this constitution or its replacement by another constitution. From the point of view of legal science it is irrelevant whether this change of the legal situation has been brought about by the application of force against the legitimate government or by the members of that government themselves, whether by a mass movement of the population or by a small group of individuals. Decisive is only that the valid constitution has been changed or replaced in a manner not prescribed by the constitution valid until then"<sup>197</sup>

After a revolution (or an attempt to begin a revolution) takes place, there are two possible results: i) in the first, the revolution may be successful and a new constitution may be adopted and put into effect by the revolutionaries. In this case, the previous constitution ceases to be valid and a new legal order, under the new constitution begins. In the second possible result, the revolutionaries may not be successful and they may be tried in a criminal case on the grounds that they have committed treason, if there is such a crime in the penal code of the legal system.

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<sup>194</sup> Ibid. p. 210. As we see, Kelsen could not overcome the paradox between fact (is) and norm (ought).

<sup>195</sup> Ibid. p. 71; Kelsen, *General Theory of Law and State*, p. 124; Kelsen, *Introduction to the Problems of Legal Theory*, p. 63.

<sup>196</sup> Kelsen, *Pure Theory of Law*, p. 208.

<sup>197</sup> Ibid. p. 209.

In Kelsen's understanding, through revolution, if it is successful, i.e. if it gains effectiveness, a new legal system is created, thus it is established on a new *Grundnorm*.<sup>198</sup> In order to accept that a revolution is successful, the order it wishes to impose must be effective, but neither the legitimacy of that *Grundnorm* nor its validity is a matter of question; it is valid and legitimate as long as the legal system, to which it gives the validity, is by and large effective.<sup>199</sup> The effectiveness implies a couple of things here. It may, again, refer to acceptance by the people that are bound by the legal order. And that acceptance may derive from different motivations, which is irrelevant and needs a sociological account to be explained. On the other hand, the effectiveness may imply or refer to power relations, that is, the new order may depend on a naked power.

Following Kelsen's conception of revolution, we may address the following question, which, to some extent, concerns our enquiry: is it possible that a constitution may be amended through the interpretation by a court in a way that is not prescribed by the constitution? To put the question another way, can a court make a revolution in a similar sense understood by Kelsen by not allowing the specified authority to amend the constitution in the way prescribed by the constitution? Does this amount to a change of the *Grundnorm* of the system? Unfortunately, Kelsen provides no answers to such questions, nor does he offer any hints in this regard. He seems to contemplate the whole change of a constitution by way of revolution, not a partial one. In fact this seems to be coherent with his theory in the sense that the *Grundnorm* cannot be changed partially, as it plays a unifying function in the legal system. In the same way, there is no question as to whether the *Grundnorm* may be uncertain at some points. It can be pointed out at this stage that what is lacking in Kelsen's *Grundnorm* on this issue can be found in Hart's rule of recognition.

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<sup>198</sup> "It is just the phenomenon of revolution which clearly shows the significance of the basic norm. Suppose that a group of individuals attempt to seize power by force, in order to remove the legitimate government in a hitherto monarchic State, and to introduce a republican form of government. If they succeed, if the old order ceases, and the new order begins to be efficacious, because the individuals whose behaviour the new order regulates actually behave, by and large, in conformity with the new order, then this order is considered as a valid order. It is now according to this new order that the actual behaviour of individuals is interpreted as legal or illegal. But this means that a new basic norm is presupposed. It is no longer the norm according to which the old monarchical constitution is valid, but a norm according to which the new republican constitution is valid, a norm endowing the revolutionary government with legal authority. If the revolutionaries fail, if the order they have tried to establish remains inefficacious, then, on the other hand, their undertaking is interpreted, not as a legal, a law-creating act, as the establishment of a constitution, but as an illegal act, as the crime of treason, and this according to the old monarchic constitution and its specific basic norm" Kelsen, *General Theory of Law and State*, p. 118.

<sup>199</sup> Kelsen, *Pure Theory of Law*, p. 210, 212.

#### 2.1.4. Is the Grundnorm Devoid of Content?

It may be useful to stress once again that according to Kelsen, the *Grundnorm* is free of content. This means that it does not require any specific content that the legal rules must hold. He claims that any kind of content can be law.<sup>200</sup> However, some of Kelsen's statements urge us to consider whether the Grundnorm is indeed a content-independent or non-factual concept. He has made different, confusing, and conflicting statements in his various works and during the course of developing his pure theory of law.

For example, in the first edition of the *Pure Theory of Law*, Kelsen asks: "... what accounts for the content of the basic norm of a certain legal system? Analysing the ultimate presupposition of legal judgments shows that the content of the basic norm depends on a certain material fact, namely, the material fact creating that system to which actual behaviour (of the human beings addressed by the system) corresponds to a certain degree"<sup>201</sup> Elsewhere, he made the following statement: "since different legal orders are based on different constitutions, different basic norms are to be presupposed"<sup>202</sup>

Another argument made by Kelsen in 1946, which leads to similar confusion, is that the Grundnorm "[...] is not the arbitrary product of juristic imagination. *Its content is determined by facts.* ... [T]he content of a basic norm is determined by the *facts* through which an order is created and applied, to which the behaviour of the individuals regulated by this order, by and large, conforms. The basic norm of any positive legal order confers legal authority only upon *facts* by which an order is created and applied which is on the whole effective. It is not required that the actual behaviour of individuals be in absolute conformity with the other"<sup>203</sup> (emphasis added) His example of revolution in the change of the Grundnorm clearly fits this framework. Namely, a social fact, a revolution, is capable of changing the Grundnorm.

These remarks give rise to the idea that the Grundnorm has, in fact, a content. However, if it is devoid of content, it must be the same for all legal systems, because at the end it can be

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<sup>200</sup> Ibid. p. 198 and p. 217.

<sup>201</sup> Kelsen, *Introduction to the Problems of Legal Theory*, p. 59.

<sup>202</sup> "Each of these different basic norms refers to a different positive constitution. What is common to all these basic norms is that they refer to a positive legal constitution on the basis of which a positive normative coercive order is established which is by and large effective" Kelsen, "Professor Stone and the Pure Theory of Law", p.1149.

<sup>203</sup> Kelsen, *General Theory of Law and State*, p. 120.



nothing else than a mere procedural norm, which can be formulated as: “[c]oercion of man against man ought to be exercised in the manner and under the conditions determined by the historically first constitution”<sup>204</sup> Therefore, the following question arises: does this not undermine Kelsen’s pure theory of law in the sense that an ‘ought’ derives from an ‘is’?

Kelsen’s last statement on the nature of the Grundnorm tries to avoid these controversies, but in fact it urges us to stop asking questions on this matter, because he admits in his *General Theory of Norms* that the Grundnorm is a fictitious norm; it is not real.<sup>205</sup> Therefore, the search for the question of whether it is factual or non-factual or devoid of content has no meaning in Kelsen’s theory. Nonetheless, it is crucial for our purposes here, as the scrutiny of a norm higher than the constitution itself leads us to consider that higher norm as above the constitution or a duly adopted constitutional amendment.

Now we can address the connection between the Grundnorm and the constitution of a legal order and also Kelsen’s thoughts on the unamendable constitutional provisions.

#### **2.1.5. The Relationship between Grundnorm, Constitution and Unamendable Constitutional Norms**

In various contexts, it is determined that Kelsen uses the *Grundnorm* to explain the validity of a constitution.<sup>206</sup> However, he does not mean that the Grundnorm *per se* is a constitution itself; even though the concept refers directly to a constitution, and more precisely to the validity-condition of a (historically-first) constitution.<sup>207</sup>

Kelsen states that the constitution of a legal system, which is valid under the presupposed Grundnorm, can be amended in the way determined by the constitution. Even though the constitutional norms may be subject to strict and difficult amendment procedures, as opposed to ordinary statutes, the constitution can be amended by the competent authority and,

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<sup>204</sup> Kelsen, *Pure Theory of Law*, p. 50. Or “... the basic norm prescribes: “Force ought to be exerted under the condition and in the manner prescribed by the by and large effective constitution and by the by and large effective general and effective individual norms created according to the constitution” “ Kelsen, *Pure Theory of Law*, p. 208.

<sup>205</sup> Hans Kelsen, *General Theory of Norms*, trans. Michael Hartney (Oxford ; New York: Oxford University Press, 1991), p. 256.

<sup>206</sup> Kelsen, *Pure Theory of Law*, p. 202. Also see Schauer, “Amending the Presupposition of a Constitution”, p.149.

<sup>207</sup> Kelsen, *Pure Theory of Law*, p. 226.

theoretically, there is no limit to amend it.<sup>208</sup> Yet, in another work Kelsen states that there are some constraints that are binding on legislature when it wishes to change the constitution. As he explains: “the aim of such constraints is to lend the greatest possible stability to the authorization to create general legal norms; i.e., to the form of the state”<sup>209</sup> In stating this he, implicitly, refers to unamendable constitutional provisions. Thus, it is important to reveal what Kelsen thinks about unamendable constitutional provisions, which were, at the time of publishing the second edition of *Pure Theory of Law* (1960), at his disposal, because the German Basic Law adopted in 1949 incorporated such norms.

Kelsen discusses this issue in his famous article ‘*Derogation*’. In that article, he questions whether there might be legal norms that cannot be derogated (derogation here means ‘repeal’) by another norm. And he concedes that the existence of such norms is possible.<sup>210</sup> However, he points out that such norms may lose their validity by losing their efficacy.<sup>211</sup> He explain the situation by the following example: “If a norm *A* is valid stipulating that its validity cannot be repealed and if nevertheless a norm *B* is established stipulating that the validity of norm *A* is terminated, and a norm *C* regulating the subject matter regulated by norm *A* in another way, norm *A* remains valid. Consequently, there exists a conflict between the provision of norm *A* concerning the unrepealability of its validity and the provision of norm *B* concerning the repeal of its validity, and in addition a conflict between norm *A* with respect to its other provisions and norm *C*. These conflicts can be solved only in the way of norm *A* losing its efficacy and therefore its validity as the result of norm *C* becoming effective”<sup>212</sup>

This conclusion tells us nothing about the nature of those irrevocable or unamendable constitutional provisions. Besides, even if the loss of validity through inefficacy is possible for ordinary legislative acts, the conclusion that unamendable constitutional norms may lose their validity through inefficacy is hardly conceivable due to the high importance and actuality of constitutional norms. Furthermore, by accepting the existence of unamendable constitutional provisions, Kelsen, sees no contradiction in his dynamic conception of law in a

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<sup>208</sup> “The purpose of the regulations which render more difficult the abolition or amendment of the content of the constitution in a formal sense is primarily to stabilize the norms designated here as “material constitution” and which are the positive-legal basis of the entire national legal order” Ibid. p. 222.

<sup>209</sup> Kelsen, “The Function of a Constitution”, p.114.

<sup>210</sup> “In contradiction of a wide-spread opinion in the field of jurisprudence, the question whether norms exist which cannot be derogated must be answered in the positive...” (*the reference is omitted*) Hans Kelsen “Derogation” in *Essays in Honour of Roscoe Pound*, 1962, Bobbs Merrill Co. reprinted in Kelsen, *Essays in Legal and Moral Philosophy* (hereafter as *Essays in Legal and Moral Theory*) pp. 261-275, p. 264.

<sup>211</sup> Ibid. p. 264.

<sup>212</sup> Ibid. p. 265.

modern legal system. Nor does he discuss what the content of such provisions incorporated by a constitution might amount to. That means that the existence of such provisions may lead them to be regarded as equivalent to the principles and rights claimed to exist by the natural law, which Kelsen denies. For if there is no legally available way to change some of the norms within a legal system, as long as that system remains valid, these norm would be considered, in the last analysis, as part of the basis of that legal system. And the scope of these unamendable norms – if it is too large to encompass fundamental rights, as is the case for the German Basic Law and the Turkish Constitution – will entrench the strength of such considerations. Nothing can prevent one from considering those norms as equivalent to the rights or principles claimed by the natural law theory.

### 2.1.6. Conclusion

Because of the initial hope that we might find some answers to our enquiry into the legal validity of the employment of extra-ordinary power of judicial review of constitutional amendments, we perhaps gave too much prominence to Kelsen's theory. However, Kelsen's Grundnorm does not provide us with the tools to analyse this, since no relevance between the Grundnorm and the review of constitutional amendments can be established.

As demonstrated, the concept of *Grundnorm* itself causes more problems than its promises to solve. It contains some obscurities, even though Kelsen wishes to explain the extra-legal foundation of law through it. As pointed out by Joseph Raz, this is the reason why “[b]oth admirers and critics owe much to the obscure way in which Kelsen explains his theory”<sup>213</sup> It is, in a sense, a mysterious concept, or ‘a symbol’,<sup>214</sup> or as described by Frederick Schauer, it “functions as sort of a Kantian transcendental understanding,”<sup>215</sup> because it is presupposed or hypothesized. Therefore, it is not subject to empirical investigation, and this is one of the aspects that makes the *Grundnorm* different from the concept of Hart's *rule of recognition*.<sup>216</sup>

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<sup>213</sup> Raz, “Kelsen's Theory of the Basic Norm”, p.94.

<sup>214</sup> Lon. L. Fuller, “Positivism and Fidelity to Law- a Reply to Professor Hart” *Harvard Law Review* 71 (1958), p. 641.

<sup>215</sup> Schauer, “Amending the Presupposition of a Constitution”, pp. 149-150 ; Leslie Green, “Positivism and Conventionalism” *Canadian Journal of Law and Jurisprudence* 12, no. 1 (1999), p. 36.

<sup>216</sup> Hart underlines this aspect. H. L. A. Hart, *The Concept of Law- with a Postscript* ed. Penelope A. Bulloch and Joseph Raz, 2nd ed. (Oxford: Clarendon Press, 1994 (hereafter as *The Concept of Law*)), p. 292, endnote 100. On this point see Jeremy Waldron, “Who Needs the Rule of Recognition” in *The Rule of Recognition and the U.S. Constitution*, ed. Matthew D. Adler and Kenneth Einar Himma (Oxford ; New York: Oxford University Press, 2009), p. 332.

In fact, according to Kelsen's account, once a legal system is established and functioning, any consideration, principle, precept, etc., within the legal realm would not be considered – whether it belongs to the domain of the Grundnorm or not. In this sense, it is not wrong to note that the Grundnorm performs its function during the process when a constitution is (being) established and gaining effectiveness. And if the constitution is put into force, and subsequently, if it becomes effective, there is no longer any need to depend on the Grundnorm to determine the normativity – the validity – of any prospective legal norms including a constitutional amendment. In this way H.L.A Hart's criticism of Kelsen's Grundnorm seems to be correct. Hart notes that “[i]f a constitution specifying the various sources of law is a living reality in the sense that the courts and officials of the system actually identify the law in accordance with the criteria it provides, then the constitution is accepted and actually exists. It seems a needless reduplication to suggest that there is a further rule to the effect that the constitution (or those who 'laid it down') are to be obeyed”<sup>217</sup>

Therefore, it appears that Kelsen's theory of Grundnorm, and his particular statements on the position of unamendable constitutional provision, does not provide us with much to analyse the case of judicial review of constitutional amendments. As the Grundnorm is not related to any content, the invocation by the courts of any superior norm to review and annul a constitutional amendment would not be relevant to our case either. The following observation sums up the problems with his theory: “Kelsen's presentation... of the basic norm is in the end either unintelligible or unacceptable. It may be unintelligible because the only meaning to which it seems susceptible is in the sense of a verifiable assumption or a moral maxim, both of which are apparently repudiated by Kelsen himself... Such an approach leads into the kind of analysis offered by H.L.A Hart, and along a different route”.<sup>218</sup> However, in spite of all its flaws, there is something to gain from Kelsen's theory (albeit largely from its failings).

The failing of Kelsen's Grundnorm concerning our subject here is, to certain extent, overcome by Hart with his concept of *rule of recognition*. Thus, we will now look at the details of Hart's concept of rule of recognition.

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<sup>217</sup> Hart, *The Concept of Law*. endnote 3, p. 293.

<sup>218</sup> Hughes, “Validity and the Basic Norm”, p.703.

## 2.2. HART'S RULE OF RECOGNITION

Before proceeding to the analysis of Hart's concept of the rule of recognition, let us recall our purpose for dealing with it once again. In the 'Introduction' to this study several questions were posed, among them: 'what does outweigh a duly adopted constitutional amendment?' This question is the most decisive for the purposes of this study. We have dealt with Kelsen's concept of *Grundnorm* since it was initially thought that it might provide us with answers, or the tools to resolve that question. But we could not find much in Kelsen's *Grundnorm* to adapt it to analyse our case. Yet, following Kelsen's *Grundnorm* and its failure to provide a tool, we will now trace Hart's theory in general and his concept of the rule of recognition in particular for the same purpose. Thereby, we will be able to see a close connection between the two theorist's concepts.<sup>219</sup>

Like Kelsen, Hart seeks to answer, among others, the questions 'what is law?' and 'what is the non- or extra-legal foundation of a legal system?' To this end, in his masterpiece *The Concept of Law*, he attacks various legal theories, mainly Austin's command theory of law, but also Kelsen's concept of *Grundnorm*, legal realism, and natural law theory. He criticizes these theories and uncovers their defects<sup>220</sup> or failures, and then constructs his own.<sup>221</sup>

The important conclusion Hart reaches after he attacks those theories is that the key to understanding the foundation of law (or a modern legal system) consists in comprehending the existence and functions of two types of rule: primary and secondary. The first type of rule refers to those that require people to do or abstain from doing certain things; they impose duties, therefore they are called the duty-imposing rules or the primary rules of obligation (but they also grant rights). Even though the duty-imposing rules represent an important aspect of the idea of *law* (that is, whenever someone refers to the fact that there is law in a society, it

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<sup>219</sup> As stated by David Dyzenhaus, "Kelsen's legal philosophy has had an immense indirect effect on Anglo-American legal philosophy, however, through the work of H. L. A. Hart... and Joseph Raz" Dyzenhaus, "Legal Theory in the Collapse of Weimar: Contemporary Lessons?", p.122 footnote 8.

<sup>220</sup> Hart identifies various defects concerning Austin's command theory, the most important are as follows: 1) Austin's theory does not distinguish different forms of law (duty-imposing and power-conferring rules as well as customary rules; 2) it cannot account for the continuity of law as well as its persistence; 3) nor can it account for a sovereign with a legally limited power; 4) similarly, it does not explain how a sovereign may be bound by its own rules. Hart dedicates a special section to analyse each of these in the first four chapters of *The Concept of Law*. A similar attempt, with some differences, to reveal the defects or shortcomings of Bentham's theory of law can be found in H. L. A. Hart, *Essays on Bentham- Studies in Jurisprudence and Political Theory* (London; New York: Clarendon Press- Oxford University 1982).

<sup>221</sup> Dennis Patterson suggests that the first six chapters of *The Concept of Law* are dedicated to the 'demolition' of Austin's command theory and 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), p. 68.

implies that some human behaviours are no longer optional, but in some sense obligatory), this feature is not sufficient to exhibit the facts of a modern legal system. For Hart, a modern legal system can be better understood by showing that it is the union of the primary and secondary rules. This is Hart's starting point in attempting to construct his own theory.<sup>222</sup>

He maintains that in order to explicate the existence of a modern legal system, the duty-imposing rules must be supplemented with and accompanied by the second type of rules, which are called the secondary rules. These secondary rules do not impose duties, but confer powers on officials and private persons.<sup>223</sup> When they confer powers on officials, it is conferred to create, alter, or repeal the primary rules or determine their operations etc.<sup>224</sup> In other words, the secondary rules are 'parasitic'<sup>225</sup> upon the former; they are "rules about rules".<sup>226</sup>

A society in which only the primary rules of obligation exist has only a preliminary form of law or a pre-legal form.<sup>227</sup> However, this form of law, which can exist only in a small community,<sup>228</sup> would produce certain defects in a modern society given its complexity and large population. These defects are *uncertainty*, *inefficiency*, and *static character of rules*.<sup>229</sup> The reason for introducing the secondary rules by Hart then is mainly to overcome these defects, and to explain the existence of a modern legal system in light of the remedy proposed by him. The remedies for each defect that Hart describes are, respectively: *the rule of recognition*, *the rule of adjudication*, and *the rule of change*.<sup>230</sup> For Hart the rule of recognition is the most important secondary rule. He notes that the other secondary rules, the rule of change and the rule of adjudication, are also closely connected with the rule of recognition.

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<sup>222</sup> Hart, *The Concept of Law*, p. 82.

<sup>223</sup> Even though Hart states that "rules of the second type confer powers, public or private" (Ibid. p. 81), this point is not so clear given the discussions among the scholars about whether the rule of recognition as a social rule imposes duty or confers power. This point will be made clearer in the following sections.

<sup>224</sup> Ibid. p. 94.

<sup>225</sup> Ibid. p. 81.

<sup>226</sup> Scott J. Shapiro, *Legality* (Cambridge, Massachusetts, London: Harvard University Press, 2011), p. 79.

<sup>227</sup> In fact, Hart mentions that in this type of (primitive) society no distinction can be made between the legal rules and other type of social rules, especially moral rules. Hart, *The Concept of Law*, p. 169.

<sup>228</sup> Ibid. p. 92.

<sup>229</sup> The three defects of a primitive form of law basically entail the following: The uncertainty implies that in the preliminary form of law there is neither criterion to determine what the rules are, nor is there, in case of disagreement, any procedure to determine the scope of any rule. The inefficiency means that in case of disobedience or rule breaking, the lack of monopoly of sanctions will lead to undesirable and uncontrollable results, like vigilantism. Lastly, the static character of rules refers to the fact that in this primitive society, rules are changed or new ones are introduced only by a slow process of growth. For these see Ibid. pp. 92-93.

<sup>230</sup> Ibid. pp. 92-93.

As mentioned, Hart introduces the rule of recognition to overcome the defect of *uncertainty*. Uncertainty means that in the transition to a modern type of law, or to put it better, in the course of the development of society, when people are unsure about the rules or their scope, they cannot know or cannot be sure what counts as law in their community, because there is neither guidance nor an authoritative text to remove those doubts. Consistent with its role, the simple definition of the rule of recognition is a rule that sets the constituents of legal rules and specifies the elements or criteria (or the “test” <sup>231</sup>) that a rule must meet in order to be identified or qualified as a legal rule of the system. As Jules Coleman puts it, the rule of recognition is “the standard ... by which a community’s legal norms were made determinate”<sup>232</sup> To be more precise, the rule of recognition provides a kind of tool to assess or test the existence or *validity* of a legal rule. In Hart’s own words, “it is like the scoring rule of a game”.<sup>233</sup>

Even though this description might seem simple, to gain a full and precise understanding of the rule of recognition in a modern legal system calls for a more complex endeavour.

### **2.2.1. The Complexity of the Rule of Recognition**

Hart indicates that the rule of recognition of a modern legal system has various aspects, which makes it complex. It is, therefore, important to consider these in order to grasp comprehensively its significance for the existence of a legal system.

First, Hart admits that the rule of recognition of a modern legal system cannot be found easily and clearly; its existence is discovered 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” <sup>234</sup> and, where applicable, customary norms. Accordingly, in a modern legal system, the multiplicity of sources of law makes the rule of recognition complex. Thus, the

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<sup>231</sup> Greenawalt, “The Rule of Recognition and the Constitution”, p.621. Also *see*, Kent Greenawalt, “Hart’s Rule of Recognition and the United States” *Ratio Juris* 1, no. 1 (1998), pp. 40-57.

<sup>232</sup> Coleman, “Negative and Positive Positivism”, p.139.

<sup>233</sup> Hart, *The Concept of Law*, p. 101-102.

<sup>234</sup> *Ibid.* p. 101.

endeavour to understand and explain it is not straightforward.<sup>235</sup>

The second reason for its complexity stems from the former, namely that the multitude of sources of law in a modern legal system may produce certain conflicts between legal rules. Therefore, they may need to be arranged, in order to determine which rule will prevail and be applied in a given case. Thus, those criteria or sources may be subject to a hierarchical order. However, this hierarchy must not be confused with that suggested by Kelsen. In Kelsen's view the hierarchy, as we have revealed, is the necessary element of a legal system, but for Hart this is not the case. That is to say that by hierarchy Hart does not suggest the derivation of one law from another (higher) law. As a clear example of this view, 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 the *acceptance* of them as such. Nevertheless, the former two may be subordinated to legislation, for the consideration mentioned above.<sup>236</sup>

One aspect of the possible ranking of the various criteria or 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* is that there may be different criteria with regard to what counts as law,<sup>237</sup> and among them one may prevail over the others, which is called the *supreme* (criterion).<sup>238</sup> 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. As a result of pursuing the chain of legal reasoning, it will be found that "a criterion of legal validity or source of law is supreme if rules identified by reference to it are still recognized as rules of the system, even if they conflict with rules identified by reference to the other criteria, whereas rules identified by reference to the latter are not so recognized if they conflict with the rules identified by reference to the supreme criterion"<sup>239</sup>

Depending on the particularities of different legal systems, the supreme criterion may be

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<sup>235</sup> "No doubt the practice of judges, officials, and others, in which the actual existence of a rule of recognition consists, is a complex matter" Ibid. p. 109.

<sup>236</sup> Ibid. p. 101.

<sup>237</sup> Hart counts several: 'an authoritative text, legislative enactment, customary practice, general declarations of specified persons, or past judicial decisions in particular cases' Ibid. p. 97.

<sup>238</sup> Ibid. p. 102.

<sup>239</sup> Ibid. p. 106.



different. For example, in Turkey, when someone asks why a regulation of the Ministry of Justice is valid, the answer would be that it is valid because the Ministry is empowered by a parliamentary act determining its duties and powers, and also the criteria to be met by Ministry's regulations in order to be counted as valid regulation (by-laws etc.) When a further question is asked, for example why is the Parliamentary Act valid, the answer will be that it is valid because parliament has enacted the Act. The last 'step in the chain of legal reasoning will be the Turkish Constitution, which confers legal power on the Parliament to enact such an Act. So, in this case the Constitution will be regarded as the supreme criterion of legal validity in Turkey.<sup>240</sup>

However, in this enquiry there is one further step to be taken, as the chain of legal reasoning brings us to the unavoidable question of 'why the (Turkish) Constitution is valid.' This point carries us to heart of the rule of recognition, to its *ultimate* notion; the notion to which Hart attaches the real meaning of the rule of recognition. For Hart, the ultimacy of the rule of recognition is reached when there is no other *legal rule* or *legal reason* to determine the validity of a legal rule or of a source of law. This is the why the rule of recognition is described as 'nonderivable'.<sup>241</sup> Namely, when the chain of legal reasoning is exhausted we will face the ultimate rule of recognition.<sup>242</sup>

At this point, Hart's critique of Kelsen makes the notion of the '*ultimate*' more explicit. In his criticism of Kelsen, he remarks 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'" <sup>243</sup> It is clear that Hart wants to differentiate the rule of recognition from Kelsen's Grundnorm. To this effect, he

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<sup>240</sup> But is it enough to say that the constitution as a whole is the supreme criterion? Do we need to be more specific? For the purposes of this section, it is enough to describe the Turkish constitution (or any written constitution in a modern democratic regime) as the supreme criterion. Yet, it shall be kept in mind that this is not unproblematic, as the role of principles or morality in the rule of recognition suggests, as Hart considers. We will make further clarifications in one of the following sections on this point.

<sup>241</sup> Richard H. Fallon, Jr., "Precedent-Based Constitutional Adjudication, Acceptance, and the Rule of Recognition" in *The Rule of Recognition and the Us Constitution*, ed. Matthew D. Adler and Kenneth Einar Himma (New York; Oxford: Oxford University Press, 2009), p. 51.

<sup>242</sup> Hart, *The Concept of Law*, p. 107.

<sup>243</sup> Ibid. p. 108.

highlights the empirical nature of the rule of recognition;<sup>244</sup> thus, it is not presupposition or a hypothesis.

Consistent with its empirical character, Hart argues that the existence of the rule of recognition of a legal system can be depicted by reference to the practices of officials – mainly of courts – in identifying the validity of other rules. In this regard, he argues 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”<sup>245</sup>

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.<sup>246</sup> His famous example that in England ‘whatever the Queen-in-Parliament enacts is law’ proves this view, in that it is observable that the courts, officials and citizens of England accept, treat and apply as law whatever the Queen-in-Parliament enacts as law. In this sense, the existence of the ultimate rule of recognition is a matter of fact. But we will not stop at this point, and neither did Hart.

What does it mean when we say that ‘it is a matter of fact’? This fact, Hart notes, can be discovered whether or not it is endorsed or accepted, mainly by judges and other officials exploiting the legal powers in the system.<sup>247</sup> So, the third and most important aspect of the complexity of the rule of recognition centres on the fact that we cannot ask if the ultimate rule of recognition is (legally) valid or invalid; it can only be *accepted* and practiced or not.<sup>248</sup> As a result, we can suggest that any standard or rule that is derivable from another rule cannot be (a part of) the ultimate rule of recognition, since the rule of recognition is a fact. To put it another way, the ultimate rule of recognition in a legal system is not derivable from another legal rule; it is intelligible by looking into standards and practices concerning what is ultimately *accepted* and practiced by officials as to what counts as law in the system.

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<sup>244</sup> Ibid. pp. 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 utilizing. Himma, “The U.S. Constitution and the Conventional Rule of Recognition”, p.99.

<sup>245</sup> Hart, *The Concept of Law*, p. 110.

<sup>246</sup> That is why, “it is not itself meaningfully called ‘valid’ or ‘invalid’ MacCormick, *H.L.A. Hart*, p. 109.

<sup>247</sup> 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*, p. 255.

<sup>248</sup> Ibid. p. 109.

But whose acceptance or practice is it? Whose acceptance is the grounds for or constitutes the existence of the rule of recognition, and thus of a legal system? We have seen some answers to these questions in Hart's statements, but we need to place emphasis on this point and uncover it systematically. Particularly because Hart's other statements are sometimes vague, if not contradictory, on this matter. Besides the question above, we still need to consider what 'acceptance' means and entails. What kind of arguments does Hart employ to prove the existence of acceptance? These are the questions that we will address and attempt to answer in the following sections.

To this end, it needs to be highlighted that the idea of acceptance is not simple; indeed, it poses many challenges. And to grasp exactly what significance 'acceptance' has in Hart's theory, we must dwell on two related issues: 1) Hart's theory of social rules or *the practice theory of rules*<sup>249</sup> (as it is called), and, 2) the concept of *the internal point of view*. These two together help explain the significance of the rule of recognition and the role of acceptance in it, as well as Hart's concept of law.

## **2.2.2. The Rule of Recognition as a Social Rule**

### *2.2.3.1. Hart's Account of Social Rules*

Hart constructs his account of social rules or his practice theory of rules<sup>250</sup> partly to identify the defects in or disprove of Austin's command theory of law.<sup>251</sup> In particular, Hart's account aims to reveal the difference between social rules and habits (habitual obedience), which Austin claims explains and grounds the existence of law. The other part of the theory serves to explain legal obligation and for grounding the normativity of the rule of recognition, thus law.

Before getting into the details, one point must be emphasised: Hart's account of social rules is

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<sup>249</sup> Ibid. p. 254.

<sup>250</sup> Joseph Raz, *Practical Reason and Norms*, 2 ed. (Princeton ; New Jersey: Princeton University Press, 1990; reprint, revised edition of 1975 by Hutchinson Press), p. 49 etc.

<sup>251</sup> See footnote 220.

general in nature,<sup>252</sup> “at least it was meant to capture the essence of them all”<sup>253</sup> It later turns out to be applicable to law through the concept of rule of recognition. So, what is revealed below concerning his account of social rules is applicable to his concept of rule of recognition, albeit with the need of further clarifications and refinement.

Hart begins his account of social rules by identifying the differences between social rules and habits. According to this, there are some distinct features,<sup>254</sup> which social rules carry, and which can be invoked to differentiate them from habits. But, there is also a similarity. The similarity is that social rules, like habits, require an observable regularity of behaviour among the majority of the members of a society. Although this is the necessary and sufficient condition for habits to exist, it is not so for social rules. Thus, unlike habits, any deviation from a social rule, which a minority may perform, engenders criticism, which further leads to social pressure being inflicted on the minority, by the majority, to conform to the rule. Yet, this alone is not sufficient for social rules to exist. Another (second) feature must be added.<sup>255</sup>

The second feature is that in case of deviation from a social rule, criticism or pressure demanded by majority is *justified* by the very existence of the social rule. Or, criticism made in case of deviation from the social rule is accepted, in Hart’s words “as a *good reason* for making it”<sup>256</sup> Namely, in Hart’s understanding social rules constitute reasons for action for people. Following such a social rule *per se* renders it legitimate and justified for the majority to demand that the minority conform to the social rule. In case of deviation, the existence of the social rule is the grounds for, and justifies, the criticism and social pressure. This is what is called the internal aspect or *reflective critical attitude* of social rules.<sup>257</sup>

This last characterization goes hand in hand with the distinction Hart makes between the internal and external aspects of a social rule, and which is directly linked with the internal and

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<sup>252</sup> In fact, as mentioned by Margaret Gilbert, Hart’s account of social rules is an influential account of social rules in general. Margaret Gilbert, “Social Rules: Some Problems for Hart’s Account, and an Alternative Proposal” *Law and Philosophy* 18 (1999), p. 141. Yet, she finds Hart’s account problematic on certain grounds that do not concern us here.

<sup>253</sup> Raz, *Practical Reason and Norms*, p. 53 etc.

<sup>254</sup> Andrei Marmor, *Positive Law and Objective Values* (Oxford ; New York Clarendon Press ; Oxford University Press, 2001), p. 2.

<sup>255</sup> Margaret Gilbert analyses the features of Hart’s account of social rules by dividing them into eight sub-features and based on this, she criticises his account. For these eight sub-features *see* Gilbert, “Social Rules”, pp. 144-145.

<sup>256</sup> For the explanation on Hart’s theory of social rule *see* Hart, *The Concept of Law*. pp. 55-56.

<sup>257</sup> *Ibid.* p. 55. (Hart’s emphasis)

<sup>258</sup> *Ibid.* p. 57; also *see* Jules L. Coleman, “Incorporationism, Conventionality, and the Practical Difference Thesis” *Legal Theory* 4 (1998), p. 396 ; E. Philip Soper, “Legal Theory and the Obligations of a Judge: The Hart/Dworkin Dispute” *Michigan Law Review* 75 (1976-77), p. 480.

external points of view; a distinction remarked upon by Scott Shapiro<sup>258</sup> and Jules Coleman,<sup>259</sup> as one of the important contributions Hart made to legal theory. We will come to this point shortly. First, we should draw attention to a challenge in Hart's account of social rules, the answer to which is relevant at this point.

This challenge involves the following: moving from Hart's general account of social rules to the rule of recognition raises the following consideration: even though Hart's general theory of social rules accounts for duty-imposing rules,<sup>260</sup> as will become clear below, he sees no problem in applying this framework to the rule of recognition, which he seems to envisage, albeit vaguely and at least in the initial formulation, as a power-conferring rule.<sup>261</sup> For example, Hart stated that "[r]ules of the first type impose duties; rules of the second type [among them is the rule of recognition] confer powers, public or private".<sup>262</sup> In spite of this, Joseph Raz argues that Hart's intention in introducing the rule of recognition is not to refer to a power-conferring rule, but rather to a duty-imposing rule.<sup>263</sup> Neil MacCormick shares this view, arguing that "whereas the secondary rules of adjudication and change are power-conferring, the rule of recognition lays down duties..."<sup>264</sup> Therefore, whether the rule of recognition as a secondary rule is in fact a power-conferring or a duty-imposing rule needs clarification.

In order to remove doubt we can make use of the two examples Hart gives, albeit in a different context. In the first example – offered by Hart in the part of *The Concept of Law* dealing with the finality and fallibility of judicial decisions – he draws a kind of analogy between games and law. He points out that in an uninstitutionalized game, for example cricket, players can follow and employ an accepted scoring rule without the need for an

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<sup>258</sup> Scott J. Shapiro, "What Is the Internal Point of View?" *Fordham Law Review* 75, no. 3 (2006), p. 1157.

<sup>259</sup> Jules L. Coleman, *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* (Oxford ; New York: Oxford University Press, 2001), p. 81.

<sup>260</sup> Margaret Gilbert clearly notes this point that [Hart's account of social rules] are basic or primary at least in the sense that they do not exist by virtue of the operation of any rule-generating rules..." Gilbert, "Social Rules", p.143.

<sup>261</sup> Joseph Raz goes further by claiming that the rule of recognition can be only a duty-imposing rule. Joseph Raz, *The Concept of a Legal System : An Introduction to the Theory of Legal System* 2ed. (Oxford : New York Clarendon Press; Oxford University Press, 1980), pp. 92-93.

<sup>262</sup> Hart, *The Concept of Law*, p. 81.

<sup>263</sup> He points out that Hart confirmed this point to him personally. Raz, *The Concept of a Legal System*, p. 199.

<sup>264</sup> Neil MacCormick, *H.L.A. Hart*, 2 ed. (Stanford ; California: Stanford University Press, 2008), p. 33. Scott Shapiro holds the same view that the rule of recognition is a duty-imposing rule. Shapiro, *Legality*, p. 85. On the other hand, Kenneth Himma determines two schemas in the rule of recognition. The first, criteria of validity schema, is not deontic – it is purely descriptive, whereas the second, the recognition rule schema is deontic, thus it defines and express duties. Himma, "The U.S. Constitution and the Conventional Rule of Recognition", pp. 98-99.

official umpire; the players themselves can use the rules to determine the score. And yet, as in law, indeterminate or uncertain cases can arise, and disagreements between players about the rules can occur, and this may require the introduction to the game of an official scorer. The official scorer, who is bestowed with a final decision-making power on scoring, would only play the role of delivering a final, but not infallible decision. In this example, Hart clearly states that “it is the scorer’s duty to apply [the scoring rule]”

We can assume that the accepted rules in a given game are equal to the rule of recognition in a legal system; or, at least, it may be considered as a part of it.<sup>265</sup> By following Hart’s example, it would not be wrong to suggest that it is the duty of the courts to apply the rule of recognition. Thus, this would imply that, for Hart, the rule of recognition is indeed a duty-imposing rule. If we identify the official scorer in the game with the courts and judges in a legal system the problem would seem to be solved; but what about the position of legislature vis-à-vis the rule of recognition?

This brings us to the second example. In this example – again offered in a different context – 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 a simple society Rex, it may be the *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” <sup>266</sup> (emphasis added). According to Hart, this *accepted rule* is “part of the rule *conferring authority* to legislate” <sup>267</sup> (emphasis added); namely, it is part of the rule of recognition. Therefore this accepted rule cannot be construed as it imposes *duty* on the part of sovereign or supreme legislature. It can be only construed in such a way that when the sovereign exceeds the limit the accepted rule imposes, his act will be declared null and void. This declaration will be made by other actors of the system (mainly by the courts). And for the courts, *this accepted rule* would be construed as a duty to enforce the limitation imposed by *the accepted rule*. Therefore, this treatment would logically imply that the accepted rule is

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<sup>265</sup> Hart, *The Concept of Law*, p. 142.

<sup>266</sup> Ibid. pp. 68-69.

<sup>267</sup> Ibid. p. 69.

a duty-imposing rule on the part of the courts. Imagining otherwise would make it impossible to conceive of a rule imposing limitation on the legislative power to prohibit him (Rex) from excluding native inhabitants from the territory or from ordering their imprisonment without trial.

Following the two examples, it might be the case that there are various rules of recognition, some of which can be construed as power-conferring rules, and some as duty-imposing rules to be directed to different officials in a legal system. It is inferable from the second example that the duty-imposing rule of recognition is capable of determining the scope of the power-conferring rule of recognition. We can conclude this part by stating that the understanding or interpretation of the rule of recognition as a duty-imposing rule on the part of courts seems to be a more accurate one.<sup>268</sup> Now, we can proceed to the internal point of view.

#### 2.2.3.2. *Significance of the Internal Point of View*

Even though the internal point of view is inherent in the second feature of Hart's account of social rules, its significance must be re-emphasised because it plays such an important role in his general theory and for his concept of the rule of recognition. He invokes the internal point of view to explicate, among other things, how legal obligation<sup>269</sup> (and thus the normativity of law) is generated.<sup>270</sup>

To grasp fully what the internal point of view is, it is necessary to recall the second distinction – i.e. the internal aspect of social rules – that Hart made between habits and social rules. As we may recall, the internal aspect of a social rule essentially implies that under a social rule not only will the behaviour of the majority of members of a society converge, but there will also be members who consider the rule as a general standard to be followed by the entire society.<sup>271</sup> They believe themselves, and the rest of the society, to be bound by that social rule

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<sup>268</sup> In fact in the *Postscript*, Hart once again admits this when he responds to Dworkin's criticisms by saying that "... my doctrine that developed municipal legal systems contain a rule of recognition specifying the criteria for the identification of the laws *which courts have to apply*..." (emphasis added), *Ibid.* p. 246.

<sup>269</sup> For an evaluation and criticism of Hart's account see "H. L. A. Hart on Legal and Moral Obligation" *Michigan Law Review* 73, no. 2 (1974), pp. 443-458.

<sup>270</sup> His aim is very clear, in that he invokes the internal point of view mainly under the title of "The Idea on Obligation". ———, *The Concept of Law*. pp. 82-91

<sup>271</sup> Hart, *The Concept of Law*, p. 56.

and thus follow it.<sup>272</sup> For Hart, behind the idea of merely complying with the rule and being guided by it lies the significance of the internal point of view.

Consistent with the distinction made between the external (regularities) and the internal aspect of rules, there are two points of view that can be taken towards social rules by members of the society. The first is the internal point of view and the second is the external one. According to Hart's explanation, under the external point of view, an individual (such as an observer or a sociologist) is interested in the external aspect of social (or legal) rules. S/he records only observable external behaviour of the members of society observed, in that s/he observes whether the members *obey* the rules, or in case of disobedience whether social pressure or legal sanctions are imposed upon them. After a period of observation<sup>273</sup> it may be possible for him/her to predict what will result from behaviour that does not conform to the rules. By this observation, the observer puts him/herself in a position to determine or *predict* what (legal) obligation the members of society have under the (legal) rule concerned.<sup>274</sup> So, it will follow that the legal obligation under the rule x is y, because if someone acts contrary to x, there is sanction y, to be inflicted upon him/her. In other words, according to the external point of view (in a similar way claimed by the predictive theories of law) the reason for having a legal obligation by the members of the society is considered to consist in the legal sanction attached to the rule and its execution in practice.<sup>275</sup>

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<sup>272</sup> Taking into account the features of Hart's social rule account, Scott Shapiro considers that they are the conditions for the existence of social rules; social rules exist when: 1) the majority of people show an attitude towards those rules from the internal point of view, and 2) they practice them. Shapiro, "What Is the Internal Point of View?", p.1165. He further specifies four roles the rule of recognition plays in Hart's theory, which deserves to be quoted in full: "[1] It specifies a particular type of motivation that someone may take towards the law; [2] it constitutes one of the main existence conditions for social and legal rules; [3] it accounts for the intelligibility of legal practice and discourse; [4] it provides the basis for a naturalistically acceptable semantics for legal statements" Ibid. pp. 1157-58

<sup>273</sup> Hart, *The Concept of Law*, p. 89.

<sup>274</sup> Hart attacks various scholars' views through his account of prediction, but mainly Wendell Holmes – for whom prediction plays an important role to explain legal obligation. For a more detailed analysis on Bentham's view provided by Hart see Hart, *Essays on Bentham*. pp. 132-138.

<sup>275</sup> Although Hart opposes Holmes' characterization of the Bad Man whose main interest is to predict sanctions attached to legal rules, Stephen Perry criticizes Hart's view on the grounds that the Bad Man's view, contrary to Hart's characterization of it as external points of view, is a participant's view. Stephen R. Perry, "Holmes Versus Hart: The Bad Man in Legal Theory" in *The Path of the Law and Its Influence- the Legacy of Oliver Wendell Holmes, Jr.*, ed. Steven J. Burton (Cambridge: Cambridge University Press, 2000), p. 165. However, Coleman criticizes Perry by stating that Perry misunderstands Hart's internal point of view. Coleman argues that Hart's internal point of view is not attributed only to the participants, in that "the internal point of view is one kind of insider's perspective" Coleman, "Incorporationism, Conventionality, and the Practical Difference Thesis", p.392, footnote 23. On this discussion also see Benjamin C. Zipursky, "Legal Obligations and the Internal Aspect of Rules" *Fordham Law Review* 75 (2006-07) ; and Matthew D. Adler, "Social Facts, Constitutional Interpretation, and the Rule of Recognition" in *The Rule of Recognition and the U.S. Constitution*, ed. Matthew D. Adler and Kenneth Einar Himma (Oxford ; New York: Oxford University Press, 2009), p. 196.



Even though Hart does not deny that living with the legal rules in a society may help provide predictions on the possible future actions of the officials he finds the external points of view to be inadequate as it does not explain “the rule-dependent notion of [legal] obligation”<sup>276</sup> To be more precise, the internal point of view, which is what Jules Coleman calls the *prescriptive* or *reason-giving dimension*<sup>277</sup> and “existence condition of the rule [of recognition]”,<sup>278</sup> accounts for the normativity of social rules and, thus law.<sup>279</sup>

In this regard, the important aspect of the internal point of view is that it explains how the members of a society perceive their *own behaviour* under the existence of a legal rule. For society, the reason for having legal obligations would not be the sanctions (social pressure) attached to rules, but the idea that the majority of society treats the rules as standards or guidance for their own conduct. And in case of deviation, the demand for compliance or criticism to be made thereupon is *justified* by the very existence of such a rule. To put it another way, the *practice* of such a social rule is the very reason why they have the rule, thus its existence or its practice makes the criticism (pressure or sanction) *justified*. Therefore, legal obligations<sup>280</sup> consist primarily in the internal aspect of rules, not in the sanctions attached to them. The sanction has, for Hart, only a secondary importance; it is “not a necessary condition of ...having a legal obligation”<sup>281</sup> In short, there must some participants who are approaching the rule from the internal point of view.

To treat the difference between the two points of view in Hart’s account more thoroughly, it is important to take into account the social life of a society; indeed, it will be shown that it is not possible to explain the existence of rules if they are explained only through the sanctions attached to them. For, in that case, nothing makes the rules obligatory for the members of the society if at least a part of that society endorses at least some of the rules. To put it more clearly, without acceptance, at least by officials of a legal system, there is no way a legal obligation can emerge. Hart makes the point explicit: “[w]hat the external point of view, which limits itself to the observable regularities of behaviour, cannot reproduce is the way in which the rules function as rules in the lives of those who normally are the majority of

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<sup>276</sup> Hart, *The Concept of Law*, p. 89.

<sup>277</sup> Jules L. Coleman, “Rules and Social Facts” *Harvard Journal of Law & Public Policy* 14 (1991), p. 705.

<sup>278</sup> Coleman, *The Practice of Principle*, p. 83.

<sup>279</sup> Hart, *Essays on Bentham*. pp. 145-146. Also see Patterson, “1999”, p.69 and 70.

<sup>280</sup> Hart also adds legal rights to that scheme. Hart, *Essays on Bentham*. pp. 144-145.

<sup>281</sup> *Ibid.* p. 135.

society. These are the officials, lawyers, or private persons who use them, in one situation after another, as guides to the conduct of social life, as the basis for claims, demands, admissions, criticism, or punishment, viz., in all the familiar transactions of life according to rules. For them the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a reason for hostility”<sup>282</sup>

By applying this framework to the rule of recognition, which is conceived as by Hart as a social rule,<sup>283</sup> the internal point of view is the view held, mainly, by officials who *accept* and use (practice) the rule of recognition and consider that all rules identified with reference to it are the rules of the system, thus valid and binding for all members of the society. To reverse the statement, the rule of recognition exists as long as the officials of the system *accept* and *use* it to identify the legal rules. The acceptance from the internal point of view is the existence condition of the rule of recognition.<sup>284</sup>

In Hart’s view, the merit of the rule of recognition does not matter for its existence and when someone questions its merit, i.e. whether it is a good or bad rule of recognition etc., s/he will move from the existence of the rule of recognition to its value, and thus to morality. As the famous positivistic assertion goes: ‘its existence is one thing, its merit and demerit another.’<sup>285</sup> For Hart, what matters is the acceptance and practice of the rule of recognition by the officials of a system. Thereby, all other rules identified in accordance with it make it justified for officials to apply the legal sanctions.<sup>286</sup>

However, Hart regards both points of view as relevant to reveal different aspects of the rule of recognition. For Hart, the difference can be clearly seen in the *statements* of those who hold either the internal or external points of view concerning law. In those statements he maintains that whereas the existence of the rule of recognition as *a fact* can be depicted by the external point of view, treating it as *law* (as reason giving) would require taking the internal point of view.<sup>287</sup> Once the internal point of view is regarded as reason-giving, then the idea that law is ‘sanction-threatening’ will (have to) be abandoned.<sup>288</sup>

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<sup>282</sup> ———, *The Concept of Law*, p. 90.

<sup>283</sup> For the statement in which Hart treats the rule of recognition as a social rule, particularly see Hart, *The Concept of Law*. pp. 109-110.

<sup>284</sup> Coleman, “Incorporationism, Conventionality, and the Practical Difference Thesis”, p.391.

<sup>285</sup> Hart, *The Concept of Law*. pp. 107-108

<sup>286</sup> Ibid. p. 102. On this theme and its criticism see Ronald M. Dworkin, *Taking Rights Seriously*, p. 50-51.

<sup>287</sup> Hart, *The Concept of Law*, pp. 111-112

<sup>288</sup> Hart thinks that the acceptance of a social rule (or law) does not imply that people necessarily accept the morality lay behind it, and this is clearer, than any other example, in the case of the rule of recognition accepted

One point concerning the rule of recognition stands in need of clarification, which is that even though Hart's main goal for his theory of social rules is to account for the concept of rule of recognition, he builds this concept on the acceptance of social rules, which can be easily associated with the primary rules of obligation. Perhaps because of this,<sup>289</sup> Hart felt a need to make an explicit clarification of his intention regarding the social rules account. In the *Postscript* he states that "[e]nacted legal rules may exist as legal rules from the moment of their enactment before any occasion for their practice has arisen and the practice theory is not applicable to them"<sup>290</sup> In this regard, the normativity of subordinate or enacted legal rules originates not from his practice theory of social rules, but from the rule of recognition.

Therefore, even though there is controversy about the idea that the internal point of view gives credit to the existence of legal obligation at the level of primary rules of obligation

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by the officials and mainly by the judges of the system. They only accept to control and evaluate their conduct with the guidance of the rule of recognition as a social rule. But, in accepting the guidance, they do not have to believe in (although they may) the moral force of the rule. On this view *see* Shapiro, "What Is the Internal Point of View?", p.1157. Joseph Raz objected to this by saying that to accept a social rule, in the way advanced by Hart, entails, at the last resort, believing its moral truth or, at least, pretending to do so. However, Hart rejects this view and maintains that the acceptance of the rule of recognition by judges does not have to lead to the acceptance of its moral truth. Thus, we need go a little further into Hart's view on legal obligation, because, even though it seems to be clear at first glance, it is controversial on various points, which has led to a number of criticisms. Hart, when attempting to disprove Austin's and also Bentham's positivist theories cannot account for legal duties, due, mainly, to the view they both hold that commands backed by threats are the reasons for having a legal duty. By contrast, he argues that threats or sanctions can only be a partial reason for having a legal duty; they cannot explain the whole picture. A sanction can only explain the fact of 'being obliged', not 'having an obligation'; these are different issues. He further states that 'having a duty' must consist in the idea that an addressee of a legal duty must act, not be forced to act. Hart constructs, through the complex arguments of philosophy of language, his account of authoritative legal reasons by relying on the criticism of Bentham's conception of command and one of Hobbes' statements. He concludes that the reason for action on the part of addressees of a legal rule is the rule itself, not the threats of sanction attached to it. So, by way of introducing a legal rule, the sovereign intends "to preclude or cut off any independent deliberation" which can be accepted or not by the addressees of the legal obligation. Hart, *Essays on Bentham*, p. 253. He describes the reason for having a legal obligation as a 'peremptory' reason, that is to say, no reason other than a peremptory reason is necessary to establish a legal obligation. However, as mentioned, the addressees of a legal obligation may not accept the peremptory reason, and in that case the sanction attached to the rule may function as a 'secondary provision' to act in the direction of the sovereign's intention. On the other hand, it may be the case, Hart argues, that the addressees may accept the rule "as such a peremptory reason" without any deliberation of its pros and cons. Equally, he considers that legal obligations can be explained by the positivist legal theory in a way in which the positivists' main idea that there is no conceptual (necessary) connection between law and morality (or between legal and moral duties) does not have to be surrendered. That is to say that in his account of legal obligation Hart tries to illuminate two ideas. The first is that legal obligation can be explained without invoking commands backed by threats. And the second idea is that legal obligations can be accounted for without appealing to morality. In other words, he tries to explain legal duties while remaining faithful to the important thesis of legal positivism; the separability thesis. For Hart's view on legal obligations *see* Hart, *Essays on Bentham*. pp. 125-161.

<sup>289</sup> Though he offers, in the original text of *The Concept of Law*, some thoughts as to whether legal obligations under the primary rule originates from his practice theory of rules. For example, he states "[w]here ... we have a system of rules, which includes a rule of recognition so that the status of a rule as a member of the system now depends on whether it satisfies certain criteria provided by the rule of recognition..." Hart, *The Concept of Law*, p. 110.

<sup>290</sup> *Ibid.* p. 256.

(there is in fact a scholarly debate, mainly between Scott Shapiro<sup>291</sup> and Stephen Perry<sup>292</sup> and Benjamin Zipursky<sup>293</sup>), this problematic aspect is less important for us. For, Hart maintains that his account of social rules remains intact, since it primarily accounts for the normativity (or authority as it sometimes called) of the rule of recognition as a social rule.<sup>294</sup>

Now let us return to our question: ‘whose acceptance is it that offers the grounds for the existence of the rule of recognition. Even though we have already supplied some answers, we need to be more specific for the reason given below.

#### 2.2.3.3. *Whose Acceptance or Internal Point of View?*

Although we have given some hints above concerning whose acceptance or internal point of view is the basis for the rule of recognition, it must be taken up separately here, because of Hart’s different, sometimes ambiguous, statements on the subject. Hart, in the original text of *The Concept of Law*, sometimes refers to *officials’* acceptance and practice. However, his statements are not very clear and sometimes give rise to different, if not contradictory, conclusions.

For example, in one place he states that: “... there should be a unified or shared *official* acceptance of the rule of recognition containing the system’s criteria of validity (emphasis added)”<sup>295</sup> Similarly, when trying to describe the minimum conditions for the existence of a legal system, he suggests that “[the] rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its *officials*” (emphasis added) <sup>296</sup>.

On the other hand, he sometimes refers to both courts and officials. For example, when criticizing Kelsen’s Grundnorm, he points out that “if challenged, what is thus presupposed but left unstated could be established by appeal to the facts, i.e. to the actual practice of the *courts* and *officials* of the system when identifying the law which they are to apply” (emphasis added).<sup>297</sup> Still, on some other occasions, he adds citizens to his formulation, which

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<sup>291</sup> Scott J. Shapiro, “Bad Man and the Internal Point of View” in *The Path of the Law and Its Influence- the Legacy of Oliver Wendell Holmes, Jr.*, ed. Steven J. Burton (Cambridge: Cambridge University Press, 2000).

<sup>292</sup> Perry, “Holmes Versus Hart: The Bad Man in Legal Theory”

<sup>293</sup> Zipursky, “Legal Obligations and the Internal Aspect of Rules”

<sup>294</sup> On this account see Coleman, “Rules and Social Facts”, pp. 707- 708.

<sup>295</sup> Hart, *The Concept of Law*, p. 115.

<sup>296</sup> Ibid. p. 116.

<sup>297</sup> Ibid. p. 293 Endnote 100.

we have quoted earlier: “[...]the rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and *private persons* in identifying the law by reference to certain criteria” (emphasis added).<sup>298</sup> Yet again, in the *Postscript* he refers exclusively to courts’, thus judges’ acceptance and practice concerning the rule of recognition, in that he expresses that “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).<sup>299</sup>

Arising from these different references and statements made by Hart, scholars tend to hold different views concerning whose acceptance it is that grounds or constitutes the existence of the rule of recognition in Hart’s theory. Furthermore, whose acceptance of what is also a cause for concern for some scholars. For example, Jules Coleman and<sup>300</sup> Andrei Marmor<sup>301</sup> stick to the view that it is all officials’ acceptance and practice. On the other hand, Joseph Raz<sup>302</sup> and Christopher Kutz<sup>303</sup> claim that it is the courts, and thus judges, whose acceptance and practice is taken as the basis of the rule of recognition, thus of law.<sup>304</sup> Still others argue that officials as well as citizens shall accept the rule of recognition.<sup>305</sup>

In this sense, the problem that remains to be solved and that we need to take into account is how it is possible that all officials, including judges, legislators and all other subordinate officials (and citizens), accept and practice the same social fact that constitutes the rule of recognition in their law-applying and law-identifying operations. May it be the same for a constitutional court judge and a Member of Parliament even if, for example, the latter votes in favour of a law that is annulled by former? Given that this kind of situation is not rare but

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<sup>298</sup> Ibid. p. 110. He made a similar statement elsewhere: “[w]herever such a rule of recognition is accepted, both private persons and officials are provided with authoritative criteria for identifying primary rules of obligation. —, *The Concept of Law*, p. 100.

<sup>299</sup> Ibid. p. 256.

<sup>300</sup> “Like 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) Coleman, *The Practice of Principle*, p. 77.

<sup>301</sup> Marmor, *Positive Law and Objective Values*, p. 17, 33.

<sup>302</sup> “Accordingly, it can be said that a momentary legal system contains all, and only all, the laws recognized by a primary law-applying organs which it institutes” Raz, *The Concept of a Legal System*, p. 192. A similar remark is made by Raz, *The Authority of Law*, p. 92.

<sup>303</sup> Christopher Kutz, “The Judicial Community” *Philosophical Issues* 11 (2001). What counts as law depends on what social facts (behaviour, beliefs, dispositions, and attitudes) judges hold. pp. 442-443.

<sup>304</sup> Furthermore, Hart states that in order for a legal system to exist, citizens must, at the minim level, *obey* the rules identified in reference to the rule of recognition. They do not have to accept the rule of recognition. Hart, *The Concept of Law*, p. 116.

<sup>305</sup> For an account claiming that the citizens, too, accept the rule of recognition and adopt the internal point of view see Bradley W. Wendel, “Lawyers, Citizens, and the Internal Point of View” *Fordham Law Review* 75, no. 3 (2006-2007). (“... 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”), p. 1486.

frequent, how can we make sense of Hart's rule of recognition coherently? Can we solve this problem?

The possible (and consistent) solution to this problem may be that Hart's attempt by these different statements – when associating the rule of recognition with the acceptance of all officials (including judges) and citizens – can be construed as him having in mind that the rule of recognition here implies the social facts concerning what counts, ultimately, as '*sources of law*'. Thus, he may be referring to a *law-identifying* dimension of the rule of recognition. And we can present as evidence his example of the rule of recognition of England, that 'whatever the Queen-in-Parliament enacts is law' is accepted and recognised by all officials, and the officials' acceptance of this rule of recognition is generally accepted or shared by the citizens. Similarly, as he refers to the US constitution, the same conclusion holds true that the US constitution *qua* ultimate positive *source* of law is accepted by all officials and (at least the majority of) citizens, albeit with some problematic and controversial points at the adjudicative level.

These examples can be understood only as an empirical and not a conceptual matter in Hart's formulation of the rule of recognition. As even though it is a conceptual requirement for all officials (or for judges only) to accept and practice the rule of recognition, citizens may (as is the case in the UK and the US), but do not have to, accept it, as a conceptual requirement. Although, as Coleman rightly argues, citizens' acceptance of the rule of recognition "may be desirable on efficiency grounds that a population treat law as legitimate or obligation-imposing",<sup>306</sup> As Hart notes, what citizens accept is the acceptance and the use of the rule of recognition by the officials.

Yet, Hart seems to warn us on this issue. He states that in order for a society to have a legal system it is enough if only the officials of the system accept and use the system's ultimate rule of recognition. However, the kind of society in which only the official accepts the system's ultimate rule of recognition might be "sheep-like" Even though "the sheep might

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<sup>306</sup> Coleman, "Incorporationism, Conventionality, and the Practical Difference Thesis", p.396.

end in the slaughter-house,...there is little reason for thinking that it could not exist or for denying it the title of a legal system”<sup>307</sup> MacCormick’s comment on this point is of importance. He states that in a *just* society, the rule of recognition can be accepted and approved by all citizens and officials together; however its acceptance by the latter is *required* and *enough* for its existence.<sup>308</sup>

In addition to the initial problem of *whose* acceptance (of the rule of recognition), acceptance of *what* also seems to need clarification due to the different opinions in the literature. For example, Leslie Green claims that the rule of recognition is concerned only with the sources of law, not with the application of law. He mentions that “[the rule of recognition] purported only to identify which of various social standards are legally relevant - which are sources of law”<sup>309</sup> Conversely, Gerald Postema distinguishes the law-interpreting<sup>310</sup> dimension from the law-identifying aspect of the rule of recognition.

It seems, indeed, that Hart has in mind not only the law-identifying, but also the law-applying or law-interpreting dimension as well. The clearest evidence of this can be found in Hart’s reply to Dworkin’s criticism of the rule of recognition. Hart underlines that “the function of the rule [of recognition] is to determine only the general conditions which correct legal decisions must satisfy in modern systems of law”<sup>311</sup> The other evidence to support this can be observed in Hart’s exploration of open texture of, or the uncertainty in, the rule of recognition, which is directly concerned with the law-applying and law-interpreting dimension.

As a result, we can conclude that the rule of recognition suggests that the authority of a legal source, say a constitution, must not be controversial; it shall be accepted at the more general level, primarily (and conceptually) by judges, but also (ideally) by citizens. However, even if it might be the case (concerning the level of sources of law) that there is general acceptance (or overlapping acceptance) of the same social facts as sources of law by officials, the case might be (and usually is) different, i.e. more controversial than overlapping at the law-

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<sup>307</sup> Hart, *The Concept of Law*, p. 117.

<sup>308</sup> MacCormick, *H.L.A. Hart*, p. 109, Also see Schauer, “Amending the Presupposition of a Constitution”, p.151.

<sup>309</sup> ), p. 1697.

<sup>310</sup> Gerald J. Postema, “Coordination and Convention at the Foundation of Law” *Journal of Legal Studies* 11 (1982), p. 166.

<sup>311</sup> Hart, *The Concept of Law*, p. 258.

applying or law-interpreting level. At this level, the problem regarding the fact that it is not possible for all officials and judges to accept and practice the same social fact as (part of) the rule of recognition remains unsolved. Thus, the theory requires some further clarification.

Joseph Raz provides this clarification, that there might be different rules of recognition for different officials.<sup>312</sup> We can adopt Raz's clarification here and argue that insofar as the law-applying dimension of the rule of recognition is concerned, the rule of recognition for a constitutional court might be different to that for a member of parliament or for a low-level court. When that constitutional court is granted the final authority to interpret the constitution, all other subordinate officials will presumably follow what the court decides. But, of course, this observation needs some refinement and supplementation, as the court's final authority to decide some points may be contingent, at the empirical level, on other officials' (and citizens') attitudes toward the court and its decisions. Therefore, this consideration may play a role in what the court will ultimately decide on the rule of recognition. This may require an empirical analysis, since it will be different in different legal systems.

Unfortunately, not all controversies and doubts concerning the rule of recognition are removed. There are further issues that need to be investigated. In this respect, whether the rule of recognition is a conventional rule needs to be highlighted – as this has attracted significant attention among scholars. Those who attempt to defend Hart's concept of the rule of recognition – following Dworkin's attack and Hart's approval of some of these criticisms – have been inclined to treat the rule of recognition as a conventional rule.

In the following section, we will deal with this issue, namely, whether the rule of recognition is in fact a conventional rule and what Hart's modification amounts to (if anything).

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<sup>312</sup> Raz argues that there may be more than one rule of recognition; each addressed to different kind of officials. Raz, *The Concept of a Legal System*, p. 200. For the same remarks see Raz, *The Authority of Law*, pp. 95-97. Kent Greenawalt shares this view, Greenawalt, "The Rule of Recognition and the U.S. Constitution", p.15.



### 2.2.3. Is the Rule of Recognition a Conventional Rule?

Let us first recall Dworkin's criticisms. Dworkin claimed that Hart is confusing when he talks about the social rules as reason-giving. He indicates that there are some social rules, which are only concurrent practices of a group, that are followed irrespective of whether others follow them too (in the views of the group members). Quite the opposite, they may have many reasons to follow the rules or to use them as a code of conduct. However, the rule of recognition as a social rule, and thus as a reason-giving rule, must reflect the idea that members of the group follow it *because* the other members of the group follow it too.<sup>313</sup> This suggests that the rule of recognition can only be a conventional rule.<sup>314</sup>

Hart accepts this criticism in the *Postscript*. He concedes that in his original account this part is misled. As a result, he admits that his original account of the rule of recognition ignored the difference between conventional social rules and concurrent practices such as shared morality (or another generally accepted reason). Consequently, he tries to address this criticism by modifying his original account and admitting that the rule of recognition is a conventional rule. In Hart's view, what a conventional rule implies is the following: "Rules are conventional social practices if the general conformity of a group to them is part of the reasons which its individual members have for acceptance..."<sup>315</sup> In spite of Dworkin's criticism of Hart's practice theory of rule, Hart believes that his original account of social rules remains intact by conceding that the rule of recognition is a conventional rule.<sup>316</sup>

But is this really so? Can we say that Hart successfully rescued his theory with this modification? What does it mean to say that the rule of recognition is indeed a conventional

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<sup>313</sup> Dworkin, *Law's Empire*, p. 136 etc.

<sup>314</sup> Yet, Dworkin rejects altogether the existence of any type of, including conventional, rule of recognition. In his view, even this most promising conventional account of the rule of recognition cannot account for the (judicial) duty and also such a rule would give rise to controversy at some point, which is, however, not acceptable given the function the rule of recognition would serve, that is, the removal of uncertainty or controversy. Coleman answers the challenged raised by Dworkin in Coleman, "Negative and Positive Positivism", pp. 150-154.

<sup>315</sup> Hart, *The Concept of Law*, p. 255.

<sup>316</sup> However, Dworkin goes on asserting that the rule of recognition as a conventional rule cannot exist at all. He denies the existence of the rule of recognition by pointing out the occurrence of disagreement about the ultimate criteria for the validity of legal rules. He argues that the inexistence of the rule of recognition can be easily proved when we look at appellate high courts' decisions (particularly in hard cases), in which we *see* that most of the time there are dissenting opinions, which proves the (theoretical) disagreement about the ultimate criteria of law. If the rule of recognition relies on the shared and concordant acceptance of judges, that is, if it is a conventional rule, the clear implication of which would be consensual agreement of its content, thus it should be incontestable, but it is not the case. Thus, Dworkin firmly asserts that the rule of recognition as a conventional rule cannot exist, as the existence of disagreement between judges concerning its content has proven this. Dworkin, *Taking Rights Seriously*, p. 62.

rule, rather than a social rule? What does the rule of recognition *qua* conventional rule provide ultimately, and how does it provide a different sense? Does Hart offer a consistent account of social conventions? What theories do we have to explain social conventions? What kind of conventional rule is Hart's rule of recognition? Is it really a conventional rule? If not, can we simply stick to Hart's original account of the rule of recognition *qua* social rule? The following paragraphs are devoted to addressing these questions.

As seen in the literature, some legal theorists like Gerald Postema and Andrei Marmor have developed a particular theory of convention, through which they attempt to save Hart's rule of recognition from Dworkin's criticisms.<sup>317</sup> They believe the conventional account of the rule of recognition will also provide the grounds for the normativity of the rule of recognition. Since both authors seem to be affected by David Lewis' theory of coordination problem, it might be useful to begin with a brief account of that theory.<sup>318</sup>

#### 2.2.3.1. David Lewis' Theory of Convention

David Lewis develops an account of convention that is based on the idea of solving recurrent coordination problems, thus his concept of convention is called *coordination convention*. According to Lewis, conventions come about to solve recurring coordination problems. He describes coordination problems as "situations in which several agents try to achieve uniformity of action by each doing whatever the others will do"<sup>319</sup> This suggests the sort of situations in which *rational* agents want to reach the same end. And in order to achieve this, they all seek to accord their respective behaviours based on the expectations that the other(s)

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<sup>317</sup> Yet, some others have rejected the theory of the rule of recognition based on coordination convention. The most prominent representative of this is Leslie Green. In a number of articles he has expressed his view against (coordination) conventional theory of law. See Leslie Green, "Law, Co-Ordination and the Common Good" *Oxford Journal of Legal Studies* 3, no. 3 (1983), pp. 299-324; Leslie Green, "Authority and Convention" *The Philosophical Quarterly* 35, no. 141 (Special Issue: Philosophy of the Law) (1985), pp. 329-346. One of his arguments is that the conventional account does not explain the legal obligations, because even though some conventions requires obligation, not all conventions (like men do not wear skirts or speaking a certain language in a community) impose obligations. Green, "Positivism and Conventionalism", p.43.

<sup>318</sup> On the other hand, Jules Coleman also develops, in a number of articles, a sort of conventional account of law built on Hart's concept of the rule of recognition. However, Coleman does not develop a specific account of conventionalism. Moreover, he seems to use 'conventional rule' and 'social rule' interchangeably. For example, see his statements: "[l]aw-as-convention positivism is the view that, in every community, the rule of recognition is a social rule" Coleman, "Negative and Positive Positivism", p.152. Or take another one: "Roughly, the Conventionality Thesis is the claim that law is made possible by an interdependent convergence of behaviour and attitude what we might think of as an 'agreement' among individuals expressed in a *social* or *conventional* rule" (emphasis added), Coleman, "Incorporationism, Conventionality, and the Practical Difference Thesis", pp. 382-383. Yet he does accept that the rule of recognition is a coordination convention in the sense of David Lewis and most properly in the sense of Gerald Postema, on both of which we will elaborate below. Ibid. p. 398. Therefore, we are not elaborating on Jules Coleman's account of conventional rule of recognition.

<sup>319</sup> David K. Lewis, *Convention : A Philosophical Study* (Oxford Basil Blackwell, 1986; reprint, 1969), p. 12.

will do the same.<sup>320</sup> Since they are rational and wish to obtain the same end, they converge on a behaviour, which is called coordination equilibrium, even though they may have various preferences.

One of Lewis' examples, among the eleven that are given at the beginning of his book, *Convention*, shows what kind of situations he refers to: two people are talking on the telephone and suddenly, for an unknown reason, the phone line is cut off. What emerges from this situation is a coordination problem involving who is supposed to call back. If this kind of situation occurs recurrently in a group of people, then the coordination problem is a recurring one.<sup>321</sup> So, in order for people affected by this situation to obtain the (same) aim – continuing their conversation – they need to accord their respective behaviours. Thus one person must call back, while the other waits; no matter at this stage who must call back, given that their common aim is to have the connection restored. The examples range from language (example 11) to setting a market price by oligopolists (example 7), to driving on the left or right side of the road (example 4) and (conventionally) dressing up for a party (example 6) and so on. Namely, coordination problems occur in a wide range of situations, which may include the behaviours of just two people, as well as of a large group.<sup>322</sup>

In each of Lewis' examples, the agents involved in the situations have more than one choice of actions (a combination of actions), but since they prefer to coordinate their respective actions, the outcome action, which Lewis calls *coordination equilibrium*,<sup>323</sup> is the one that is determined *jointly* with one's expectation of other's action. Of course, one way of reaching a solution and establishing a convention is to make an agreement concerning a coordination problem.<sup>324</sup> But, since the kind of coordination problems he considers must have more than one (proper) coordination equilibrium<sup>325</sup> – otherwise the situation will be a trivial one<sup>326</sup> – the

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<sup>320</sup> Gerald Postema's three properties make the description clearer" [i] *Rough Coincidence of Interests*: Each party is likely to benefit more by cooperation than by noncooperation; [ii] *Mutually Conditional Preferences*: Certain actions are preferred to others if, but only if, other parties also prefer them (or appropriately corresponding actions); [iii] *Ambiguity*: There are at least two combinations of the actions of all the agents which each agent would count as "successful coordination", postema, "Coordination and Convention at the Foundation of Law", p. 174.

<sup>321</sup> Lewis later explains that this was the situation in his hometown of Oberlin (Ohio) where all local phone calls were cut off, without warning, after three minutes. Thus, it became the convention in Oberlin that when the phone line was cut off, whoever the original caller was would conventionally be required to call back.

<sup>322</sup> For the examples see Lewis, *Convention*. pp. 5-8.

<sup>323</sup> Coordination equilibrium is "a combination in which no one would be better off had *any one* agent alone acted otherwise" Ibid. p. 14.

<sup>324</sup> Agreement is only one way of establishing a convention. Ibid. pp. 83-88.

<sup>325</sup> "Proper equilibrium is the one if each agent likes it *better than* any other combination he could have reached, given others' choices" Ibid. p. 22

kind of conventions he has in mind emerge not from agreement but from the way he envisages; due to the large number of people involved, and the fact that agreement is difficult to obtain.<sup>327</sup> However, for Lewis this does not suggest that the agents involved in a coordination problem are to be indifferent to various coordination equilibria. The adopted coordination equilibrium must be the (salient) one, which is mutually beneficial to the agents, preferred by them, but it does not need to be (necessarily) *equally* beneficial to each of them.

But how and by virtue of what can be a coordination problem solved? The answer is that people conform to follow a (pattern of) behaviour (coordination equilibrium) – since they prefer to coordinate their behaviours to non-coordination with a view to solving a recurrent coordination problem – and expect the other(s) will conform to it too. Yet, under what conditions can we imagine that agents will expect that the other(s) will expect (to do) the same thing? Lewis answers this by saying that each agent must be able to exploit the other agents' (mutual) nesting expectations “through the agency of a system of suitably concordant expectations”<sup>328</sup> By this he refers to the condition that the (mutual) expectations of the agents must be firmly settled or justified. He goes on to explain that in order to do the action required on their part, the agent must be sufficiently confident in his expectation that the other will do their part in the given coordination problem. How the mutual (nesting) expectations of the agents can be secured depends on a shared or overlapping experience or common knowledge.<sup>329</sup> By means of the shared or overlapping experience or common knowledge, the agents are able to discover or predict other agents' expectations and respective behaviours. Thereby they will be able to choose the coordination equilibrium, which will stand out due to its salient feature known by the agents.

From this Lewis reaches the description of conventions. He argues that if the agents follow or conform to the same (proper) coordination equilibrium *regularly* under the analogous *recurring coordination problem*, and if they have common knowledge and sufficiently confident expectations that everyone will perform the actions required of them, this will lead to establishing a convention. With his formulation: “A regularity of *R* in the behaviour of

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<sup>326</sup> Gerald Postema calls this type of situation a genuine coordination problem. Postema, “Coordination and Convention at the Foundation of Law”, p.174.

<sup>327</sup> Even though this is implicitly seen in Lewis, the clarification to this regard is made by Andrei Marmor. See Marmor, *Positive Law and Objective Values* pp. 7-8.

<sup>328</sup> Lewis, *Convention*, p. 25.

<sup>329</sup> Ibid. p. 56.

members of a population *P* when they are agents in a recurrent situation *S* is a *convention* if and only if it is true that, and it is common knowledge in *P* that, in any instance of *S* among members,

- (1) everyone conforms to *R*;
- (2) everyone expects that everyone else to conform to *R*;
- (3) everyone prefers to conform to *R* on condition that the others do, since *S* is a coordination problem and uniform conformity to *R* is a coordination equilibrium in *S*,<sup>330</sup>

But, how can we apply this framework to law? The answer is provided by Gerald Postema's and Andrei Marmor's respective accounts of convention.

#### 2.2.3.2. *Gerald Postema's Coordination-Conventional Theory of Law*

Considering the rule of recognition as a conventional rule, Postema argues that even though Hart's theory of law is a good example of an attempt to accommodate both the normativity (practical reasoning) and the social fact thesis of law, his theory needs reconstruction, because at some points there is a normativity gap in his theory. The only thing to be done is to construct a bridge, and for Postema the bridge is established by Lewis' theory of coordination convention.<sup>331</sup> The description of the coordination problem, which we have given above, suggests imagining the sorts of situations in which *rational* agents want to reach the same end, and to this very same end they all prefer to accord their respective behaviours according to their expectations that other will do the same.

But what constitutes the recurring coordination problem(s) in law? Postema determines three levels of coordination problems, and law can be considered as their solution.<sup>332</sup> For us, his second and third levels are more important, thus we can go directly to them. At the second level, coordination problems in law arise between officials and citizens. At the third level

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<sup>330</sup> Ibid. p. 58.

<sup>331</sup> Ibid. p. 12. Postema points out that his account borrows elements from David Lewis, David Gauthier, and David Hume. Postema, "Coordination and Convention at the Foundation of Law" Endnote 21, p. 176.

<sup>332</sup> At the first level, the logic of the coordination theory is in play. According to Postema, coordination problems already exist in the social life of a society, the solution to which may be reached by the adjudicative process appealing to the logic of coordination theory to solve the problem. Or given that it may be difficult to establish a convention under a coordination problem, the problem can be solved or facilitated by introducing a legislative solution. For this kind of coordination problem, Postema uses the example of driving on the right or left side of the road under no convention. Postema, "Coordination and Convention at the Foundation of Law", pp. 183-186.

coordination problems occur among officials themselves. Let us look at more closely at these two levels.

At the second level, coordination problems in law take place between officials and citizens, which can be explained as follows: Hart has tried to show with his theory of social rules (especially with the internal aspects of rules and the internal point of view) that law claims to be capable of guiding the behaviour (of at least some) of those law-subjects (officials). According to Postema officials, who take the internal point of view, guide their conduct in accordance with law, that is, rules take part in their practical reasoning. But law achieves this end within a social or public context, that is to say “law exists only insofar as it is realized in the actions, beliefs, and attitudes of members of the community”<sup>333</sup> The outcome of this statement is that law-subjects other than officials (citizens), who may or may not take the internal point of view, need to know what the law-applying officials believe law to be in order to accord their behaviours with the law.<sup>334</sup> To put it differently, they may need to predict the behaviour of law-applying officials when faced with a decision about what to do under the existence of general rules of law.

At the same time, when officials apply legal rules, they mediate between legal sources and the lay persons’ understanding of the law, because law as a social institute or public practice requires this. Namely, their respective positions vis-à-vis the law are interdependent.<sup>335</sup> Furthermore, as legal rules are formulated and communicated in general terms, the understanding of them by officials, as well as by laypersons, rests on the expectations and the understanding of each others’. From this, the first coordination problem emerges. With Postema’s words: “... what law-subjects choose to do given the existence of general rules of law depends on how they understand what the law expects of them and how it will direct or impinge on their activities, but this depends on how they expect officials to interpret the relevant laws. Similarly, judges, in order to communicate and articulate the law effectively, must seek to understand and interpret it against the background of the patterns of application and understanding of the law of those subject to the law”<sup>336</sup>

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<sup>333</sup> Ibid. p. 188.

<sup>334</sup> Postema notes that “Bentham insists that public expectations are determined and guided not, usually, by the decisions and activities of individual judges, but rather the judiciary collectively” Gerald J. Postema, “Bentham and Dworkin on Positivism and Adjudication” *Social Theory and Practice* 5, no. 3-4 (1979), p. 352.

<sup>335</sup> “Not only are the official and unofficial person engaged in some parallel activity, but the activity of the official *depends crucially* on the activity of the unofficial and that of the unofficial on the official”, postema, “Coordination and Convention at the Foundation of Law”, p.192.

<sup>336</sup> Ibid. p. 189.

And this feature, for Postema, represents the important characteristic of genuine coordination problems, because respective behaviours of both citizens and officials concerning the law involve a recurring coordination problem, the solution of which depends on their nesting mutual expectations.<sup>337</sup> However, Postema's conception of the exact nature of the coordination problem, which seems to stem from the necessity of the shared understanding, and thus shared interpretation of law, poses a problem. For him, when a legal material is in need of interpretation, the officials and citizens want to cooperate their respective understanding of the material. He claims that the reason for this, on the part of citizens, is that they want to live by the law; they want to achieve their personal aims with the assistance of law. On the other hand, the reason on the part of officials (more precisely judges) is that they are charged with the effective application of law. In order for both sides to achieve their respective aims, they wish to converge, he asserts, on the same understanding of the law. This determination brings about further controversy, as discussed below.

In Lewis' theory, on which Postema's theory rests, agents involved in a coordination problem (must) have the same aim to achieve. But in Postema's understanding, officials and citizens have different aims, which, he thinks, will lead them to converge on the same understanding of legal material.<sup>338</sup> Admittedly, the second level coordination problem (and the solution to it that Postema offers) seems to be problematic due to the divergent aims of the agents. It is almost impossible to assume this kind of solution, since the kind of coordination problem, which Postema contemplates, will come about in almost every piece of legislation. Furthermore, even if we accept Postema's argument, it is not impossible to imagine a legal system in which judges, who are charged with the effective implementation of the law, might not care if or how citizens understand the law. Yet, their decisions can be effectively and systematically enforced by the state power. Although the merit and stability of such a system would be contestable, it would be another issue.

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<sup>337</sup> Ibid. p. 187.

<sup>338</sup> We must draw attention to one point that Postema seems to take seriously. He develops his second level coordination problem through an assumption that as long as those law subjects other than officials (wish to) take the internal point of view, that is, as long as they want to live by the guidance of law, it will be necessarily the case that officials (must) take their positions, understanding etc. of law, seriously too. However, this can be understood only as a normative, and at best a conditional, proposal, since in reality, lay persons, most of the time, do not have a (committed) internal point of view concerning the law. Jeremy Waldron claims that Postema's position is a normative one. Jeremy Waldron, "Normative (or Ethical) Positivism" in *Hart's Postscript: Essays on the Postscript to the Concept of Law* ed. Jules Coleman (Oxford; New York: Oxford University Press, 2001), p. 412.

Regardless of the problematic nature of the solution Postema provides at the second level, the coordination problem at the third level can be regarded as more illuminating for the conventional nature of the rule of recognition. Now, consider that similar (recurring) coordination problems, which Postema revealed at the second level, occur between the officials (mainly judges) of a legal system. Namely, the coordination problem emerges from the law-applying and law-interpreting activities of the officials. At this level, Postema argues, the officials of the system will cooperate in their law-applying, law-interpreting and law-identifying activities to solve the coordination problem (different understanding and application of law) by following a pattern of behaviour, because they need to have the same understanding for effective implementation of law. At the same time, they will also converge for the sake of (institutional) coherence,<sup>339</sup> to which, they expect, the other will adhere too. Here, the aim of the officials is to achieve the effective (and coherent) implementation of rules. In this way, when such a pattern of behaviour is persistently, i.e. regularly, followed and when such a pattern of behaviour is built on mutual expectations of officials, it will lead to conventional rule(s) of recognition. This might be considered as an important insight to understand the (function of) rule of recognition.

However, a further statement of Postema is cause for another concern. For example, he states that the existence of the rule of recognition consists in its success in solving the recurrent coordination problems in the law-applying and law-identifying activities of officials. In this respect it is understandable, in his view, that the rule of recognition may be subject to change if it fails to be a successful convention due to “change of circumstance of widely held preferences or disruption of the fabric of shared experience on which the convention rests”.<sup>340</sup> However, it is not very clear in Postema’s account whether the success of the rule of recognition as a solution to so-called coordination problems would lead one to think that the solution is a convention or if it is the outcome of successful practice, say a judicial decision employing an interpretive tool about an important legal question. If it is the latter, then the rule of recognition as a convention will be determined retrospectively rather than

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<sup>339</sup> Postema, “Coordination and Convention at the Foundation of Law”, p.193.

<sup>340</sup> Ibid. p. 178.



prospectively or concurrently. It will suffice to recall *Marbury v. Madison*. Did the judicial review as an institution consist in a conventional rule that already existed prior to *Marbury v. Madison*? Or was it established after that decision, as it was such a successful decision that it was later accepted by the officials in the American legal system? As will be discussed later, this is indeed an argument invoked by Hart, in his original account of the rule of recognition *qua* social rules, that the success of a court's decision and its further acceptance by other officials (and the populace at large) will determine the scope of the rule of recognition and/or any change *in* it. Thus, Postema's conventional account does offer something new or different to Hart's original position.

Perhaps due to the shortcomings of Postema's account, Andrei Marmor tries to build another conventional account of the rule of recognition. Marmor points out that coordination conventions do not create (in themselves) the reasons for action, because they emerge if, and only if, there is a dominant preference of the agents concerned in a coordination convention. Therefore, the underlying reason (or the primary reason) for them to follow the convention is not convention itself. Thus, Marmor maintains that coordination conventions can only provide an auxiliary reason.<sup>341</sup> Now we proceed to Marmor's theory of convention.

### 2.2.3.3. Andrei Marmor's Theory of Constitutive Conventions

Unlike some legal theorists, such as Leslie Green, that deny that conventions can provide (complete or primary) reasons for actions (or normativity),<sup>342</sup> Andrei Marmor, like Postema, is of the opinion that conventions can have a normative character, in that they can provide reasons for actions, but only in a certain context and under certain conditions.<sup>343</sup>

As an advocate of the conventionality of the rule of recognition, Marmor departs from (or adds to)<sup>344</sup> Lewis' and Postema's theory of coordination conventions, and he casts doubts on its adaptation to law. He thinks that the rationale behind the theory of coordination convention

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<sup>341</sup> Marmor, *Positive Law and Objective Values*, p. 26.

<sup>342</sup> Green, "Positivism and Conventionalism", p.38. Though he does not deny that from the descriptive point of view, the conventional account of law offers a plausible insight. Green, "Authority and Convention", p.345.

<sup>343</sup> "[L]ike all other normative rules, [conventions] explicitly guide actions, serve as standards of evaluation, play explanatory rules in rendering actions intelligible, play a crucial rule in instructing learners how to engage in the pertinent activity etc" Andrei Marmor, "On Convention" *Synthese* 107, no. 3 (1996), p. 354.

<sup>344</sup> Marmor, *Social Conventions*, p. 2.

does not correspond to the whole (true) picture concerning conventions,<sup>345</sup> and thus to the rule of recognition. Hence, with his account of convention, Marmor wants to achieve two things: The first is to make an addition to the theory of coordination convention. The second is to try to explain, more coherently, the autonomous character of law *qua* authority.

Even though Marmor comes up with a different theory of convention, he takes some insights from Lewis' theory of coordination convention. One of the insights is the 'arbitrary' character of conventional rules, which, he thinks, is crucial to the understanding of conventions.<sup>346</sup> But what does arbitrariness imply? At this point, let us recall one aspect of Lewis' theory (also used by Postema), pp. Lewis argued, as we have seen, that in a genuine coordination problem there would be at least two proper coordination equilibria.<sup>347</sup> When one of them is chosen, the other will be logically discarded. That is to say, in the emergence of a convention there would be at least two equally possible alternative responses to the coordination problem. Why one is chosen and the other is discarded is because the chosen equilibrium is the salient one or the dominant *common* preference of the agents involved.<sup>348</sup> This is what Marmor conceives of as arbitrariness. He states: "Given that *A* is the main reason for members of a population, *P*, for following a rule, *R*, in circumstances *C*, *R* is an arbitrary rule if and only if – there is at least one other rule, *R'*, so that if most members of *P* in circumstances *C*, were complying with *R'*, then for a all members of *P*, *A* would be a sufficient reason to follow *R'* instead of *R*. The rules *R* and *R'* are such that it is normally impossible to comply with them concomitantly in circumstance *C*,"<sup>349</sup>

However, up to this point, Lewis' account remains intact. What Marmor adds to Lewis' account is that people involved in a convention do not have to be aware of alternative choices; they do not have to have a common knowledge about the conventions they follow. But in a coordination convention, the convention exists and continues to exist only if it is practiced,

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<sup>345</sup> Ibid. p. 30.

<sup>346</sup> In fact, it is not only a crucial feature but also a defining feature of conventions in general. Marmor, "On Convention", p. 353. The other feature of conventions is that they are compliance dependent rules, that is, part of the reason why one should follow a convention is tied to the fact that others follow it too).

<sup>347</sup> Postema calls this feature *ambiguity*. Postema, "Coordination and Convention at the Foundation of Law", p.174.

<sup>348</sup> The condition of arbitrariness is satisfied when two agents (*X* and *Y*) wishing to act in concert with each other, have different dominant preferences (*Q* and *P*) in a situation. As long as they want to act in concert with each other, it does not matter which alternative they choose in the context of arbitrariness. The condition of arbitrariness will be satisfied in this sense. Marmor, *Social Conventions*, p. 8. For Marmor, in order to discover why the chosen one prevailed over the other calls for another consideration.

<sup>349</sup> Marmor, "On Convention", p.352. 'The argument of 'the main reason' turns to be "a sufficient reason" in Marmor's latter work. Marmor, *Social Conventions*, p. 2

that is, if people are aware of the convention and the coordination problem.<sup>350</sup> More crucially however, what results from Lewis' theory of coordination convention, Marmor maintains, is that there must first be coordination problems, the convention comes later. Namely, the coordination problem is the existence condition of a convention in Lewis' account.

Therefore, according to Marmor, not all conventions emerge from coordination problems;<sup>351</sup> some emerge for other reasons yet to be described. The conventions Marmor has in mind come about not after the social practice to which they are attached, but concomitantly with that social practice. Put another way, some conventions are the result of the way a social practice is formed; they constitute the social practice and they go hand in hand with it. In short, there are some conventions that cannot be explained independently and antecedently of the conventions themselves.

For example, there are no coordination problems in many rules of etiquette, which are clearly conventions, like holding the fork in the left hand. Similarly, the rules of sports or games do not offer solutions to coordination problems.<sup>352</sup> He gives the following example to this effect: before the conventional rules constituting the game of chess there was no game of chess at all.<sup>353</sup> Nor do the rules of chess have any meaning without the game. In this example, it is clear to Marmor that there is no coordination problem among chess players, so the theory of coordination convention cannot be applied to this kind of example. "Consequently, in these cases it is the practice itself which provides its own point, as it were, and its own standards of evaluation"<sup>354</sup>

When a social practice is constituted in the way described by Marmor, the value of that practice and the accompanying socio-historical reasons leading to its constitution, whatever they are, have a crucial role and meaning for the conventions. He seems to claim in his earlier work that some values attached to social practices are constituted by the conventions. But in

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<sup>350</sup> Marmor, *Positive Law and Objective Values* pp. 17-18.

<sup>351</sup> Some do arise from coordination problems, and it also serves as a reason for complying with existent ones. Marmor, "On Convention", p.366.

<sup>352</sup> Ibid. pp. 364-365.

<sup>353</sup> Marmor determines that conventional rules are not the only rules that constitute social practices. The other kind are institutionally enacted rules. Therefore, social practices can be called conventional and institutional social practices Marmor, *Social Conventions*. p. 35. Once conventional rules are legislatively or institutionally codified, the social practice becomes an institutional practice. Marmor, *Social Conventions*, p. 50.

<sup>354</sup> Marmor, "On Convention", p.366. However, Marmor does not suggest that "autonomous practices are constituted by conventions... On the contrary, it is the main reason for having such conventions that they establish the practices they do, since the existence of such practices is held to be intrinsically valuable. Hence, the validity of such conventions derives from the values which are inherent in the practice they constitute. Marmor, "On Convention", p.367.

his latest work '*Social Convention*' he abandons this position and argues that "a rule cannot constitute a value... It is the practice of following the rules that has value for those who engage in it"<sup>355</sup> For instance, there is no sense (value) of moving the bishop diagonally without thinking of it within the game of chess.<sup>356</sup> However, social practice, once it is constituted, can evolve and may produce further values.<sup>357</sup>

Marmor uses the verb 'constitute' as equivalent to 'define', in that constitutive conventions define the grammar of the social practice to which they are attached. "What seems to be constituted ... is not the agents' actions or behaviour, but the particular social meaning or significance of the action ..."<sup>358</sup> Therefore, using the adjective 'constitutive' does not imply that constitutive conventions are the reasons to have social practices in the first place. Nor do they prescribe why someone should engage in a social practice. In this respect, their normative force is only conditional.<sup>359</sup> The condition is that when someone engages in a social practice, whatever (primary) reason s/he may have to engage in it, s/he ought to follow the conventional rules of that social practice. For example, someone does not have to play chess, but when s/he does (wish to) play, s/he ought to move bishop diagonally. The reason for the existence of the game of chess depends on completely different considerations: values, needs, pleasure, etc. Therefore, Marmor's entire endeavour is to show the explanatory force of conventions that constitute or define a social practice, such as the game of chess.

Marmor further notes that constitutive conventions have some crucial features. For our purposes, a few of these should be considered. First of all, constitutive conventions call for the division of labour, in that in order to find out whose conventions and what exactly they are, people in the outer circle of a social practice must consult the core practitioners, whose practices determine, to an important degree, what the conventions really are. In this regard, constitutive conventions require expert knowledge.<sup>360</sup> Yet, this does not imply that outsiders have no bearing on social practices and conventions. They certainly have, but only to a

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<sup>355</sup> Marmor, *Social Conventions*, p. 38.

<sup>356</sup> Ibid. p. 39.

<sup>357</sup> However, Marmor does not claim that in order to recognize the values of a social practice, one has to engage in the practice; it is enough that the practice and the conventional rules are there to recognize the values associated with it. Ibid. p. 41.

<sup>358</sup> Ibid. p. 34.

<sup>359</sup> Ibid. p. 161.

<sup>360</sup> Marmor, *Positive Law and Objective Values* pp. 16-17. Also see Marmor, *Social Conventions*. pp. 47-47. Another feature is that social practices constituted by conventions are only partially autonomous, in that they are ultimately related to general human concerns of one kind or another. That is to say, in order to talk about chess, there must be general human concern about winning and losing. Of course, some practices are more autonomous than others, or some are less autonomous than others. Law is the latter type, since it is much more closely connected to practical human concerns. Marmor, *Positive Law and Objective Values* p. 23.

limited extent: determining the boundary that specific features of each social practice depend on. Here, we can recall what we have discussed under the sub-title ‘Whose Acceptance or Internal Point of View’.

Secondly, unlike coordination conventions (which will persist for as long as they represent efficient solutions to coordination problems) constitutive conventions have a dual function: they define a social practice and they prescribe modes of behaviour *within* that social practice.<sup>361</sup> Another important aspect of constitutive conventions is related to the historical background of social practices. Marmor argues that to understand “a conventionally established social practice”, and its significance for the population, “one must always consult history”.<sup>362</sup> Because they emerge over a long period of time, the history behind them may be significant for the present.<sup>363</sup> Yet, this significance changes from one social practice to another. For example, it is not especially significant for chess players to consult the history of chess. But it is certainly important for law.

Now, let us turn to the rule of recognition. Marmor points out that the rule of recognition Hart conceives of is not a solution to coordination problems, at least that is not its major function. If this were the case then it would not be possible to explain, for example, why the common law system has developed a different precedent practice from that of the continental legal system;<sup>364</sup> or why judges and officials in the US have opted for the supremacy of the US constitution in the way it is today - it must have had some political importance to them.<sup>365</sup> It is not an arbitrary (in the sense of indifference) choice among alternatives of the judiciary in the United States. At this point we can refer to the salient feature of one alternative, in the sense understood by Marmor. Considering the arbitrary nature of conventions, the necessity to consult history can help shed some light on why one alternative is preferred to other.

From the above-mentioned determination it follows that “[t]he rules of recognition<sup>366</sup> are (by and large) constitutive conventions, establishing partly autonomous practices of identifying the source of law”<sup>367</sup> And like any other constitutive convention, the rule of recognition has a

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<sup>361</sup> Marmor, *Positive Law and Objective Values* pp. 29-30.

<sup>362</sup> Andrei Marmor, “Legal Conventionalism” in *Hart’s Postscript- Essays on the Postscript to the Concept of Law*, ed. Jules Coleman (New York: Oxford University, 2001), p. 213.

<sup>363</sup> Marmor, *Social Conventions*, p. 49.

<sup>364</sup> Marmor, *Positive Law and Objective Values* p. 20.

<sup>365</sup> *Ibid.* p. 9.

<sup>366</sup> Marmor uses the plural form of the term, but offers no specific explanation concerning this use.

<sup>367</sup> Marmor, *Positive Law and Objective Values*, p. 19.

dual function. The first is to define or constitute what the law in a given society is, and the second is to prescribe the modes of law-creating, law-modifying and law-identifying activities *within* that society.<sup>368</sup>

This ‘*within*’ implies that the rule of recognition does not explain, like other constitutive conventions, why we have laws or legal systems in the first place. It only tells us what counts as law in a society. But from this last point a question arises: can the conventional nature of the rule of recognition create a judicial obligation to obey it? Marmor suggests not. The rule of recognition as a constitutive convention does not tell us why someone (even a judge) should follow legal rules.<sup>369</sup> Like coordination conventions, constitutive conventions do not, in themselves, create obligations. But, this statement must be understood in a certain sense. The fact that the rule of recognition as a constitutive convention does not create reasons for action means that it cannot create *primary* and *complete reasons* for action.<sup>370</sup> It can only provide *auxiliary* reasons,<sup>371</sup> in that it only tells people *how* to engage in law, but not *why*.

To make the point clearer, we can argue that what Marmor’s account of convention offers is that when someone chooses to engage in a social practice, say law, constituted by a conventional rule, it is this very conventional nature which forces him/her to follow the convention,<sup>372</sup> even if *conditionally mandatorily*.<sup>373</sup> This means that if one participates in law, by acting as a judge for example, the conventions of that role will force the judge to follow them.<sup>374</sup>

Namely, as long as the judge plays by those rules, s/he assumes, but only for the purposes of the game, that those rules are obligatory.<sup>375</sup> In this sense, the rule of recognition does not say anything about why law ought to be obeyed or why a judge, so to speak, ought to play the game (of law) to begin with.<sup>376</sup> Such reasons derive from moral or political considerations.<sup>377</sup>

Herein lies the problem that Marmor could not solve. Remembering that he started his construction of constitutive conventional theory of law to overcome the lack of the

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<sup>368</sup> Marmor, *Social Conventions*, pp. 160-161.

<sup>369</sup> Marmor, *Positive Law and Objective Values*, p. 32.

<sup>370</sup> This term is used and elaborated by Joseph Raz, *Practical Reason and Norms*, pp. 22-25.

<sup>371</sup> Ibid. p. 34-35.

<sup>372</sup> Marmor, *Positive Law and Objective Values*, p. 26-27.

<sup>373</sup> Ibid. p. 30.

<sup>374</sup> Marmor, “Legal Conventionalism”, p.215.

<sup>375</sup> Marmor, *Positive Law and Objective Values* p. 33 ; Marmor, *Social Conventions*, p. 168.

<sup>376</sup> Marmor, *Positive Law and Objective Values* p. 33.

<sup>377</sup> Marmor, *Social Conventions*. p. 168.

explanation of normativity in Hart's theory of the rule of recognition, Marmor could not go beyond what Hart ultimately said. Likewise, Marmor seems to stop at the point that the rule of recognition concerns only sources of law. However, Hart explains that even if the rule of recognition's primary function is to determine the sources of law, it is not the only one, as we have seen above. Hart seems to relate it to the law-interpreting dimension as well, and the importance of this law-interpreting dimension of the rule of recognition is clear in Hart's attempt to answer Dworkin's criticism in the Postscript.<sup>378</sup>

What we can gain from Marmor's account is the relevance of the necessity of consulting history when trying to understand the rule of recognition. This has some importance and bearing on our concern in the present study. We will try to make use of some of the implications of this suggestion, however, not by following Marmor's theory, but Hart's original one.

To conclude, Hart's original account of the rule of recognition *qua* social rule can be said to remain intact, but we need to sustain this argument and confirm its credibility. In this connection, we will invoke, to a large extent, Julie Dickinson's<sup>379</sup> strong arguments for the view that the rule of recognition is, indeed, not a conventional rule.

#### *2.2.3.4. The Rule of Recognition is not a Conventional Rule*

Julie Dickinson argues that Hart's turn to a conventionalist account of the rule of recognition is neither successful nor consistent. In this regard, she points out that after conceding to Dworkin's criticisms that the rule of recognition can be only a conventional rule, Hart's further explanations do not consistently match what it might mean to suppose that the rule of recognition is indeed a conventional rule.

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<sup>378</sup> Furthermore, Marmor attempts to answer Dworkin's criticisms of Hart's rule of recognition, but he, also, could not manage this. As we have seen earlier, Dworkin, in one of his criticisms of Hart, claimed that the rule of recognition does not exist due to the fact that there are disagreement among judges as to what counts as law. Marmor replies to this by saying that in order for Dworkin's criticism to be right, he must show that disagreement is not just on the margins but widespread in the legal system. If all officials disagree about the fact that the acts of the Congress in the United States count as law, then Dworkin may have been right, but this is not the case. Marmor, following Lewis' account, shows that conventions do not emerge from agreement. "On the contrary, conventions tend to emerge precisely when an agreement is difficult or impossible to reach". Ibid. p. 162. Marmor, *Positive Law and Objective Values* p. 6. But does this solve all the points? It seems not. Marmor, *Social Conventions*, p. 162. Marmor, *Positive Law and Objective Values* p. 6.

<sup>379</sup> Julie Dickson, "Is the Rule of Recognition Really a Conventional Rule?" *Oxford Journal of Legal Studies* 27, no. 3 (2007).

Her argument runs along the following lines: In the original account of the rule of recognition, Hart stated that *the existence condition* of the rule of recognition depends on the common practice of officials (judges). According to Dickinson, this common practice does not give any *legal reason* for accepting the rule of recognition. She quotes the relevant parts from *The Concept of Law*, where Hart deals with whether the validity of the rule of recognition can be questioned or not. Even though we have addressed these points above, they can be revisited for the sake of the arguments of this section.

For example, Hart states, (Dickinson quotes), “[the] rule [of recognition] provides criteria for the assessment of the validity of other rules; but it is also unlike them in that there is no rule providing criteria for the assessment of its own legal validity”<sup>380</sup> Together with this, Hart’s similar statement that “[n]o such question can arise as to the validity of the very rule of recognition which provides the criteria; it can neither be valid nor invalid but is simply accepted as appropriate for use in this way”<sup>381</sup> makes it explicit that he did not contemplate any *legal reason* for the existence of the rule of recognition.<sup>382</sup> Equally importantly, he provides no *non-legal reasons* for the necessary existence condition of the rule of recognition. He simply expressed that the rule of recognition can be accepted for whatever reason – moral, prudence, interest, traditional attitude etc.,<sup>383</sup> these are not important for the existence of the rule of recognition.<sup>384</sup>

Now, given that the conventional account of the rule of recognition asserts, as Hart did in the *Postscript*, that the existence or perhaps the validity of the rule of recognition depends on a conventional social rule, and this conventional social rule exists “if the general conformity of a group to it is part of the reason which its individual members have for acceptance”,<sup>385</sup> there seems to be a mismatch, if not a contradiction, between what the conventionality requires and what the rule of recognition amounts to.

Hart’s conventionalist turn seems to destruct the original account of the rule of recognition, or is this really the case? Dickinson argues not, and further maintains that Hart’s turn is not

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<sup>380</sup> Hart, *The Concept of Law*, p. 107

<sup>381</sup> Ibid. p. 109.

<sup>382</sup> Dickson, “Is the Rule of Recognition Really a Conventional Rule?”, pp. 376-379.

<sup>383</sup> Hart, *The Concept of Law*, p. 203.

<sup>384</sup> Dickson, “Is the Rule of Recognition Really a Conventional Rule?”, pp. 379-382

<sup>385</sup> Hart, *The Concept of Law*, p. 255.



successful, because just after the statement in the *Postscript* concerning the conventionality of the rule of recognition, he makes the inconsistent argument that “[the rule of recognition] is in effect a form of judicial customary rule existing only if it is accepted and practiced in the law-identifying and law-applying operations of the court”<sup>386</sup> Next to this line, Hart mentions that enacted legal rules are identifiable as valid rules if they are enacted in accordance with the criteria provided by the rule of recognition. They exist from the moment of their enactment; so there is no need of practice for their existence. Reading this statement suggests, as Dickinson notes, that the existence of the rule of recognition depends on common official practice, and this is enough.

Dickinson shows further that (for Hart) the existence of the rule of recognition, as a common practice, is one thing, its acceptance by an official, for whatever reason, is another. As we have seen above, Marmor’s theory of the rule of recognition was the same, in that he does not present anything as the primary reason for accepting and following the rule of recognition. Stating that the reason for accepting the rule of recognition by officials lies in the fact that others accept and follow it too could only be understood now that the common practice of officials is necessary, but not sufficient reason to follow the rule of recognition. However, Hart did not say anything about what these sufficient reasons might be, apart from indicating the conventional account in the *Postscript*.<sup>387</sup>

In a nutshell, in a legal system, the minimum conditions of which are the effective acceptance and practice of the rule of recognition by the officials and the obedience of the majority of the society of the primary rules,<sup>388</sup> the primary reason for acceptance of the rule of recognition is not a cause for serious concern, even though its determination might be politically and morally important. For Hart, what is important is the explanatory force of this effectively-practiced rule of recognition. When its content is ambiguous, it could be determined by looking into that practice.<sup>389</sup>

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<sup>386</sup> Ibid. 256. Dickson, “Is the Rule of Recognition Really a Conventional Rule?”, p.383.

<sup>387</sup> Dickson, “Is the Rule of Recognition Really a Conventional Rule?”, p.385.

<sup>388</sup> “There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behaviour 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 and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials” Hart, *The Concept of Law*, p. 116. The former is the sufficient condition for law, whereas the latter – the rule of recognition – is the necessary one, Coleman, “Incorporationism, Conventionality, and the Practical Difference Thesis”, p.396.

<sup>389</sup> “If the truth of this presupposition were doubted, it could be established by reference to actual practice: to the way in which courts identify what is to count as law, and to the general acceptance of or acquiescence in these identifications” Hart, *The Concept of Law*, p. 108.

This point brings us inevitably to the core of this practice, which is interpretation. However, before getting into this issue – that is, the relation between the rule of recognition and interpretive techniques – it may be better to elaborate on the uncertainty in the rule of recognition; since it will shed further light on the interpretation, as well on the uncertainty of the content of the rule of recognition, the interpretive standards could be considered as a remedy.

#### 2.2.4. Uncertainty *in* the Rule of Recognition

One of Hart's theses in *The Concept of Law*, which partly constitutes his views vis-à-vis legal realism (or rule-scepticism) and formalism, is that legal rules are open texture.<sup>390</sup> This implies that legal rules may be indeterminate in settling particular (borderline) cases. The rule of recognition, as a rule providing ultimate criteria of validity for legal rules, is not excluded from this.<sup>391</sup> Before attempting to analyse the uncertainty *in* the rule of recognition, it is crucial to look at Hart's general account of open texture since it is applicable to uncertainty in the rule of recognition, albeit in need of clarification.

An explanation of Hart's view on the open texture is also necessary, because it might seem, at first, to be somewhat paradoxical when it is applied to the rule of recognition. The paradox stems from the fact that even though the rule of recognition, as a social rule, is introduced by Hart as a remedy to the problem of *uncertainty* produced by a pre-legal form, he now argues that the rule of recognition itself may be uncertain at some points. A brief answer to this paradox, though it will be elaborated, can be given by exploring the difference between *uncertainty of* the rule of recognition (which is not the case in Hart's view) and *uncertainty in* the rule of recognition (which is indeed the title he gives to his sub-section analysing the issue in *The Concept of Law*).<sup>392</sup>

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<sup>390</sup> For Hart, statutes as well as well precedents are open texture. For a more detailed explanation of Hart's account of open texture and on its roots see Brian Bix, "H. L. A. Hart and the "Open Texture" of Language" *Law and Philosophy* 10, no. 1 (1991), pp. 51-72. On the other hand, as mentioned earlier, David Patterson claims that in Chapter VII of *The Concept of Law*, where Hart elaborates his theory of open texture, his theory of adjudication is reflected, which is a position between formalism and rule-scepticism.

<sup>391</sup> Hart, *The Concept of Law*, p. 109, 148.

<sup>392</sup> Ibid. p. 147.

#### 2.2.4.1. Uncertainty or Open Texture of Law in General

Hart seems to think that the open texture of legal rules originates from the nature of language.<sup>393</sup> There is something peculiar to law in this consideration. He mentions that the law of a modern legal system consists of rules that are formulated in *general* terms. This makes it possible for laws to exist and provides standards of conduct for its addressees without the need of further direction. If this were not possible, legal rules would need to be formulated in an extremely detailed manner or would be required to enumerate all possible future instances, which would not be an easy accomplishment; since “we are men, not gods”<sup>394</sup> In Hart’s famous example, it is possible to guide people’s conduct by introducing a rule that is formulated as *no vehicle is allowed in a public park*.<sup>395</sup>

Which of the two alternatives (enumeration of all possible future instances by legal rules or formulating them in general terms and thus leaving some points open) is advanced by a legal system represents a *choice* to be made. By such a choice, the system makes a preference between two social needs: ‘certainty’ and ‘reasonable official application of rules’. Or the system may try to reach a compromise or balance between the two by their variation, which is Hart’s position. The first alternative is the position advocated by legal formalism, which opts to leave almost nothing open – or offers no room for such choices (interpretation) as Hart contemplates. By contrast, when a legal system opts for the second alternative it may be criticized by rule-sceptics, who claims that there are no legal rules at all before their application by a judge. Hart, refusing both (extreme) views, believes that the truth lies somewhere in the middle,<sup>396</sup> and he builds his view on this basis.

By formulating legal rules with general terms, what people must do in order to be guided by these rules is (be able) “to recognize instances of clear verbal terms, to ‘subsume’ particular facts under general classificatory heads and draw a simple syllogistic conclusion”<sup>397</sup> However, there may be some instances in which people are unsure if their case falls within

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<sup>393</sup> Hart claims: “In all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance which general language can provide” Ibid. p. 126. However Brian Bix opposes this and claims that it is not the language that leads Hart to reach the open texture doctrine, but the “view of how people create and think about rules” Bix, “H. L. A. Hart and the “Open Texture” of Language”, p. 66. He further points out that Hart’s main concern is about the way legal rules are applied, or should be applied, not the linguistic structure of legal rules. Even though what Brian Bix shows seems to be accurate, for our purpose here it does not make a big difference.

<sup>394</sup> Hart, *The Concept of Law*. p. 128.

<sup>395</sup> This example was introduced by Hart first in H. L. A. Hart, “Positivism and the Separation of Law and Morals” *Harvard Law Review* 71, no. 4 (1958), p. 607, and elaborated in further detail in *The Concept of Law*.

<sup>396</sup> Hart, *The Concept of Law*, p. 147.

<sup>397</sup> Ibid. p. 125.

the scope of a rule that is supposed to guide their conduct. Namely, uncertain instances may occur. For example, again in Hart's example, people may not be sure whether or not the term 'vehicle' includes bicycles.

Let us elaborate on these points a little further. The two features of legal rules – namely being general and communicating through language to make legal rules – makes those rules *on some occasions* indeterminate. Hart adds two more factors, which make the open-textured character of legal rules irreducible. The first is that since the modern world is so complex, new facts may be brought into existence by technological, social, political, economic, or natural causes, which cannot be foreseen. Hart calls this the 'relative ignorance of fact'. Secondly, legal rules cannot be formulated in a way in which all possible future facts can be envisaged in advance; he calls this the 'relative ignorance of aims'.<sup>398</sup> In sum, in guiding the conduct of people, legal rules (may) have some limits that arise from the nature of language and its particular employment in law; from the unpredictable features and complexities of the modern world to the indeterminacy of the aim of the authors (of rules).

Hart does not claim, however, that legal rules are indeterminate in all situations. He maintains that in any event the indeterminacy of legal rules must not be exaggerated or overestimated, as has been done by legal realists, because in those unclear cases the open texture of legal rules is only peripheral,<sup>399</sup> it is not the entire story of law or "the representative of the operation of law itself".<sup>400</sup> Not all cases are penumbral cases; they are only a part (and a small part) of the reality of law. Officials and individuals can be perfectly guided by determinate rules, which do not require any interpretation 'from case to case'.<sup>401</sup> In fact, for Hart, law exists and can only exist in this way.

Therefore, the truth is quite the opposite: legal rules have, as Hart continues, a core of plain (determinate) meanings<sup>402</sup> about "which no doubts are felt about [rules'] application".<sup>403</sup> This aspect renders it possible for legal rules to be applied to plain (or paradigm) cases without issue or without any recourse to interpretation. So, if we recall Hart's 'no vehicles in the park'

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<sup>398</sup> Ibid. p. 128.

<sup>399</sup> Ibid. p. 133.

<sup>400</sup> Frederick Schauer, "A Critical Guide to Vehicles in the Park" *New York University Law Review* 83 (2008), p. 1110.

<sup>401</sup> Hart, *The Concept of Law*, p. 135.

<sup>402</sup> Ibid. p. 131. As stated by Frederick Schauer, even though Hart does not refer to a particular linguistic community (judges, lawyers, or the legal community in general), among which a meaning can be core, his thoughts on the general points is capable of inferring this result. Schauer, "A Critical Guide to Vehicles in the Park", p.1122.

<sup>403</sup> Hart, "Positivism and the Separation of Law and Morals", p.607.

example, the term vehicle here is obviously applicable to ‘an automobile’.<sup>404</sup> By the same token, there will be cases that are evidently outside the scope of this rule. Yet, there are penumbral cases “in which words are neither obviously applicable nor obviously ruled out”<sup>405</sup> For example, whether the term vehicle includes bicycles is unclear.<sup>406</sup> And in these cases the meanings of legal rules would be indeterminate.<sup>407</sup> Thus, it may be unclear whether or not rules can be applied to those cases. In this sense, interpretation is necessary to settle these borderline or penumbral cases.<sup>408</sup>

In penumbral cases, a judge exercises a kind of legislative or rule-producing function.<sup>409</sup> This function is mostly associated by Hart with the term ‘discretion’. In this kind of case, what a judge can do is to make a *choice*, since there is not “one unique correct answer”<sup>410</sup> to be given by the judge. S/he can only make a choice between *possible* alternatives, because “there are reasons both for and against..., and no firm convention or general agreement dictates”<sup>411</sup> either alternative.<sup>412</sup> Nevertheless, in Hart’s account a judge is not completely free when deciding a penumbral case.<sup>413</sup> His decision (or his choice) is restricted by various considerations. First of all, s/he needs to consider “whether the present case resembles the plain case ‘sufficiently’ in ‘relevant’ respect”<sup>414</sup> Thus, the judge expands the core meaning of a rule to the cases that are not plainly covered by it. Furthermore, Hart suggests that the judge’s decision is also restricted by judicial virtues, such as “impartiality and neutrality in

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<sup>404</sup> ———, *The Concept of Law*, p. 126.

<sup>405</sup> Hart, “Positivism and the Separation of Law and Morals”, p.607.

<sup>406</sup> Hart, *The Concept of Law*.

<sup>407</sup> Hart, *The Concept of Law*, p. 134.

<sup>408</sup> Hart, *The Concept of Law*. pp. 126-127. In fact, this is why Brian Bix describes Hart’s theory of open texture as ‘partial indeterminacy’. Bix, “H. L. A. Hart and the “Open Texture” of Language”, p.65.

<sup>409</sup> On the interpretation aspect of the open texture thesis, see David Lyons, “Open Texture and the Possibility of Legal Interpretation” *Law and Philosophy* 18, no. 3 (1999). He contests that under Hart’s thesis of open texture some points are unclear, which may lead one to think that interpretation of the law is not necessary, especially for the restrictive rules because in these rules, even though the rule may be open texture, the legal system as a whole may provide some answers without any recourse to interpretation, p. 300. He further claims that his own position is like that of Dworkin. If this is the case, then Hart’s answer to Dworkin (provided in the *Postscript*) concerning the status of principles in a legal system may be applied to his contention as well.

<sup>410</sup> Hart, *The Concept of Law*, p. 132.

<sup>411</sup> Ibid. p. 127.

<sup>412</sup> Ibid. p. 135.

<sup>413</sup> Whether this leads one to think that in penumbral cases Hart seems to consider that morality is (necessarily) incorporated by law, i.e. by judges application of the rule is not true. For a detailed discussion on the debate between Hart and Fuller, which focuses on whether Hart’s theory of open texture gives rise to incorporating morality by law see Schauer, “A Critical Guide to Vehicles in the Park”

<sup>414</sup> Hart, *The Concept of Law*, p. 127.

surveying the alternatives; consideration for the interest of all who will be affected; and concern to deploy some acceptable general principle as a reasoned basis for decision”<sup>415</sup>

Yet, a question remains: might there be cases in which a judge may not have followed these restrictions? Hart is reasonable on this point. He offers, albeit not very explicitly, some answers to this kind of situation in which a judge may decide a penumbral case by departing entirely from the core meaning of a rule. Another point, which Hart does not clearly determine but is deducible, or so we argue, is that that interpretative standards (not exclusively, but especially concerning constitutional aspects) may also constitute constraints on judges. We will even go one step further by arguing that these standards may play a role in discovering the (part of the) content of the rule of recognition of a legal system. This is significantly relevant to a legal system with a written constitution and constitutional court with a final authority to interpret it. We will deal with these points below in more detail. Now, let us move to the specific aspect of uncertainty in the rule of recognition.

#### *2.2.4.2. Uncertainty in the Rule of Recognition*

According to Hart, as with statutes and precedents, there may emerge some cases in which the content of the rule of recognition may not be determined precisely, or it may not provide any clear-cut test to determine what counts 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, thus it may give rise to vagueness or ambiguity.<sup>416</sup> 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* and/or *at a given time*.<sup>417</sup>

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<sup>415</sup> Ibid. p. 205. In line with the argument just mentioned, Hart further argues that a judge or an authority needs to interpret (or make choices) when a case arises, which is not clearly covered by the scope of the rule. In these situations, namely when a judge exercises discretion, the judge may be the final authority in settling that issue, so his decision will be final, but not infallible. As Mr. Justice Jackson put it: “we are not final because we are infallible, but we are infallible only because we are final” Quoted from Alstyre, “A Critical Guide to Marbury V. Madison”, p.2. Therefore, contrary to what is argued by the rule-sceptics that the law is what judges says it is, the case is that there is rule which confers on the judge a power to settle disputes arisen, and this power may have left certain points to the discretion of the judge, but it would not mean that the rule is whatever the judge decides, because it is fallible, that is, it may be still changed by the legislature. Hart, *The Concept of Law*, p. 144.

<sup>416</sup> Hart, *The Concept of Law*, p. 148.

<sup>417</sup> Ibid. p. 150.

In this statement, there are two important issues worth noticing. The first is that only some, *not all*, points of the rule of recognition may be uncertain. So, it is consistent with the views specified in his general account of open texture. Namely, there is always a core or settled scope, which is indisputable and which cannot be departed from if we are to speak about the existence of a legal system. Secondly, the rule of recognition may be uncertain at a given time. Accordingly, there must be course of time or relatively unproblematic duration of time during which we can speak about the existence of the rule of recognition, and of a (stable) legal system.

Consistent with this, the rule of recognition of a legal system may *change* or evolve over the course of time. We can reach this conclusion by considering Hart's reference to the factual or empirical character of the rule of recognition as well.<sup>418</sup> As does Joseph Raz, by stating that "[t]he rule of recognition, being a customary rule, is constantly open to change"<sup>419</sup> And what is said so far is succinctly expressed by Neil MacCormick: "[s]ince it is a rule which depends on deliberative practice and emergent custom, it can evolve and develop over time, and can be controversial or unclear on some points so long as it is not so on all"<sup>420</sup>

Bearing these two aspects in mind and all that has been said on the open texture of law in general, we can start to trace the issue of uncertainty in the rule of recognition. To this end, we will follow the path prompted by Hart's example, in which he mainly focuses on the area of constitutional law, more precisely on the concept of sovereignty (in English law) or the legal competence of the supreme legislature. He points out that in the legal competence of a supreme legislature,<sup>421</sup> which he conceives of as a parliament; we can trace and observe the uncertainty in the rule of recognition. In other words, under a (written or unwritten) constitution, the ultimate criteria for validity of legal rules would be closely, but not

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<sup>418</sup> Adam Tucker correctly identifies a flaw in Hart's account of open texture of law. He jumps on this flaw claiming that Hart does not offer an account of indeterminacy of social rules including the rule of recognition; social rules exist by virtue of their being practiced – they do not have to be expressed in language. He further maintains that if the attitudinal competent of social rules in Hart's account is analysed, the indeterminacy aspect will be clear. At this point, people practicing a social rule may have different opinions with regard to the attitudinal aspect of the social rule. However, as the content of the rule of recognition calls for a kind of sociological enquiry, we can take Adam Tucker's criticism as a clarification. And with this clarification, we can say that Hart's account of indeterminacy of the rule of recognition remains intact. Adam Tucker, "Uncertainty in the Rule of Recognition and in the Doctrine of Parliamentary Sovereignty" *Oxford Journal of Legal Studies* 31, no. 1 (2011), pp. 70-71.

<sup>419</sup> Raz, *The Concept of a Legal System*, p. 94.

<sup>420</sup> MacCormick, "Beyond the Sovereign State", p.5. For a similar remark see Fallon, "Precedent-Based Constitutional Adjudication, Acceptance, and the Rule of Recognition", pp. 66-67.

<sup>421</sup> Hart, *The Concept of Law*, p. 148.

exhaustively, concerned with the rules determining the legal powers of the supreme legislature – for example a parliament in a constitutional democracy.

In this respect, Hart questions whether the English parliament has the competence to enact everything, and whether it can irrevocably limit the legislative competence of its successors. His answer to the first part of the question is positive, and 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.<sup>422</sup> However, this is only an empirical matter.<sup>423</sup> That is to say, the case might be different in a different time (in England).<sup>424</sup> Or it may be different in a different legal system, as is the case for several countries, such the US, Germany and Turkey, where the legislative competence of a successor may be limited. Hart states that the power to restrict the legislative power of a successor parliament can be exercised only once in history. It is clearly the case when a legal system has a written constitution containing unamendable provisions.

Hart, in principle, adheres to the view that an ultimate sovereign of a modern state may be restricted by a constitution. In *The Concept of Law* he maintains that a written constitution may restrict the competence of a legislature not merely in terms of form and procedure, but also substantively by excluding certain subject matter from the scope of legislative competence. We can infer two things from Hart's view on this.

The first 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 kind of charter may limit parliament's legislative competence. However, in this case the parliament will not be considered as limited in the sense Hart conceives, because parliament can, ultimately, legally amend the charter, unless it is laid down otherwise in the constitution. Therefore, he refers to unamendable constitutional rules, since they impose the real legal limits of a parliament.

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<sup>422</sup> Ibid. p. 150. Of course, Hart was writing at a time when the UK was not yet a member of the European Community.

<sup>423</sup> Ibid. p. 150.

<sup>424</sup> For a recent view claiming that parliamentary sovereignty is no longer the case in England after the Factortame, which we have summarised earlier, see N. W. Barber, "The Afterlife of Parliamentary Sovereignty" *International Journal of Constitutional Law* 9, no. 1 (2011), pp. 144-154. For a slightly different view see Allison L. Young, "Sovereignty: Demise, Afterlife, or Partial Resurrection" *International Journal of Constitutional Law* 9, no. 1 (2011), pp. 163-171.



Indeed, what he has in mind are the unamendable constitutional rules. The most obvious place in which Hart conceives of the possibility of the existence of unamendable constitutional norms, thus a limited sovereign, is in Chapter VII, where he claims that a sovereign authority may have a self-limiting power, which can be used only once in its history.<sup>425</sup> Admittedly, the persistence of these rules will depend on their acceptance as such. On this matter, surprisingly enough, Hart gives (although only in the endnotes to *The Concept of Law*) the examples of unamendable constitutional rules of the Turkish Constitution of 1924 (Art. 1 with reference to art. 102), and the Basic Law of the German Federal Republic (Art. 79/3).<sup>426</sup> His main example, however, 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.<sup>427</sup>

Following this path, we can put the matter in this way: if a parliament's power under a written constitution is a legally limited one, that is to say if certain issues, not in form but in substance, are excluded from the parliament's competence to regulate or amend, these rules (indeed the acceptance of them as such) constitute, but do not exhaust, the ultimate criteria for identifying the law; they are part of the rule of recognition. And when some unclear (constitutional) issue emerges, which may, Hart says, even lead the society to become divided over the issue,<sup>428</sup> that issue needs to be settled by the courts in order to remove the doubts around it, and thus around the rule of recognition.<sup>429</sup>

To continue with our enquiry into unamendable constitutional rules, we argue that the uncertainty in the rule recognition can be traced, among other things, to those rules. So, when any doubt arises concerning those rules as part of the (ultimate) rule of recognition, the doubt can be removed – let us assume for the time being, by following Hart – by courts, for example by a supreme or constitutional court. At this point, we should discuss one aspect of this

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<sup>425</sup> Hart, *The Concept of Law*, p. 149.

<sup>426</sup> Ibid. p. 290, endnote 78. Hart's point is not only empirical. He seems to believe that if the rule of recognition brings some limits on a sovereign, then it may be limited.

<sup>427</sup> Austin believes that there can be no limits to a sovereign's law-making power, which he regards as necessary for his command theory of law. In order to disprove this claim, Hart rightly shows that it is very possible that several constitutions, such as the US, the German Federal Constitution, and the Turkish Constitution of 1924, contain such provisions – which are outside the scope of the amending power of the respective legislatures of those countries, but they are perfectly entitled to be called sovereign powers. Moreover, Hart also rejects Austin's attribution of ultimate sovereignty to the electorate, in that he claims that it is unacceptable to think of a sovereign with an electorate. Austin's sovereign is the one who is habitually obeyed, and obeys no one. And in this way it is possible for the sovereign to command. However, Hart suggests that if we think of a sovereign with an electorate we will see that the sovereign commands itself and habitually obeys itself, which is, however, an incoherent way of conceptualizing the sovereign in the Austinian sense.

<sup>428</sup> As was the case, Hart mentions, in 1909 in South Africa, Hart, *The Concept of Law*, p. 153. But this is certainly an issue that modern societies, especially those with a written constitution, confront very frequently.

<sup>429</sup> Ibid. p. 148 and 152.

determination. This involves the fact that although Hart seems to take this aspect for granted, it may not be clear in all legal systems. That is to say, whether or not any such uncertainty will be finally settled by the courts might depend on the particularity of a legal system. For example, as we have revealed above, it is questionable if the US Supreme Court is authorized to settle uncertainty concerning the procedural matters regarding the adoption of a constitutional amendment. Therefore, even though Hart did not discuss this point, this may also be a cause for concern for discovering the rule of recognition. In fact, to verify our argument, we will endeavour to show in our empirical cases whether the removal of the doubts concerning the uncertainty *in* the rule of recognition *per se* might involve detecting the very rule of recognition or not. To be precise, whether the final authority to remove the uncertainty is conferred on courts or other institutions will be handled in the empirical cases.

At this point, some further questions arise. For example: what are the limits of a (supreme or constitutional) court in deciding such a matter (uncertainty in the rule of recognition)? When the court removes the doubts with regard to that uncertainty in the rule of recognition, how can officials other than judges sitting in that court and citizens living under that constitution be sure that the court has remained within the boundaries of the rule of recognition? On this question Hart does not seem to have a clear answer. In fact, it may be one of the reasons why Dworkin claims that if we follow Hart's theory of judicial discretion, we will face an undemocratic and unjust legislative power conferred on courts by the discretion.<sup>430</sup> Hart replies to this, in the *Postscript*, by pointing out that even if the discretion conferred on judges seems to be undemocratic; it is no more risky than delegating it to an executive branch.

However, Hart remarks in this line that in a modern legal system, even though there must be one final authority to decide on constitutional legal questions,<sup>431</sup> and even though he suggests that this final authority must be a court (such as a supreme court), the decisions of that court on that constitutional matter, like the one we are considering in the present study, can be deprived of its legal effect and status by the legislature. If the legislature is not content with what the courts has decided, in modern democracies, such as the US, there is an ultimate tool

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<sup>430</sup> This criticism of Dworkin seems to contradict his position concerning judicial review, which we will come to later.

<sup>431</sup> Hart, *The Concept of Law*, p. 143.

that the legislature can employ, and this tool is to amend the constitution.<sup>432</sup> In short, even though those decisions of the courts are final, they are not infallible.<sup>433</sup> We can infer from Hart's statement that in a democratic system, he seems to give more value to a democratically elected legislative body in determining the *final* authority and what ultimately is counted as law; the final authority here refers to the competence to amend constitution.

From Hart's last point, along with his views on unamendable constitutional rules, emerges a question: what if a legislature, as a result of a court's decision and unamendable constitutional rules, cannot amend the constitution? At this point, there seems to be a clash between two ideas: On the one hand, if we follow the framework of the rule of recognition drawn by Hart, as it stands in theory, no serious problem arises, because it perfectly accounts for such a situation that the highest court of a legal system may challenge the legislature's competence by following the ultimate rule of recognition. On the other hand, if this is the case, then the problem concerning Hart's view on democracy arises. Can we compromise the two views? We leave this question unanswered as it will be the subject of the last chapters.

All we can say in this part concerning the question of the legality aspect of the matter in hand is that we can attempt to find answers to this kind of question by looking into the conditions through which we can find a conclusion that the rule of recognition of a system has changed or not. Because by posing such questions we will either conclude that the rule of recognition has changed in a way ruled by the constitutional court in constitutional cases such as ours in this study or we will conclude that it persists without any change.

### **2.2.5. The Rule of Recognition, Constitution and Constitutional Interpretive Standards**

Even though we have discussed and analysed the rule of recognition at some length, in this section we will go into more detail concerning its relation with a constitution, and more precisely with constitutional interpretive standards.<sup>434</sup> As Hart himself states, the complexity

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<sup>432</sup> Ibid. pp. 275-276.

<sup>433</sup> Ibid. p. 141.

<sup>434</sup> What we have in mind by constitutional interpretative techniques, standards etc. includes, but is not limited to, originalism, evolutionism, textualism, non-textualism and all other variants of this type, such as original-intent or original-meaning, living-constitution, which advocate different theories concerning how a constitution should be interpreted. Matthew D. Adler provides a long list of examples of constitutional interpretation methods, see Adler, "Social Facts, Constitutional Interpretation, and the Rule of Recognition", pp. 204-205. For more examples of constitutional interpretation methods, among others, see Sotirios A. Barber and James E. Fleming, *Constitutional Interpretation: The Basic Questions* (New York: Oxford University Press, 2007). Also see John B. Gates and Glenn A. Phelps, "Intentionalism in Constitutional Opinions" *Political Research Quarterly* 49, no. 2 (1996) ; Thomas C. Grey, "Do We Have an Unwritten Constitution?" *Stanford Law Review*

of the rule of recognition requires the “grasp of some fundamental issues of constitutional law”<sup>435</sup> in that the question is “how can we show that the fundamental provisions of a constitution which are surely law are really law?”<sup>436</sup>

We have demonstrated in the previous sections that a constitution may be the supreme criterion for identifying the law in a given country. However, determining that the supreme criterion is the constitution itself does not offer many clear insights. Besides, it is far from grasping the complex issues, such as the one under investigation in this study. Furthermore, in some countries, sometimes the written text of the constitution does not reflect the whole reality of constitutional law or constitutionalism. For example, as aptly pointed out by Richard Albert, “[m]uch of American constitutionalism is absent from the United States Constitution”<sup>437</sup> Of course, the US experience is not the only example. The same may also be assumed for India. The following statement of the Chief Justice (Sikri) of the time of the Supreme Court of India supports this view: “In a written constitution it is rarely that everything is said expressly”<sup>438</sup> Therefore, it can be said that the relation of the rule of recognition with a constitution is complex, and it requires, as aptly highlighted by Kent Greenawalt, taking into account the interpretation practices.<sup>439</sup> Thus, we need to elaborate it further.

We have demonstrated in the preceding section that the ultimate rule of recognition can be perfectly, though not exclusively, discerned at the constitutional limits of legal competence of an ultimate sovereign. However, constraining the ultimate rule of recognition to the legal limits of a parliament, and in our case to unamendable constitutional rules, will not reveal the whole picture. Furthermore, when an unamendable constitutional provision as part of the rule of recognition (since its status can be grounded on nothing other than acceptance) is formulated with general terms it is difficult to grasp what that provision exactly implies. In this sense, such general terms require, when the case arises, interpretation. Therefore, we need to look more closely at these aspects, i.e. supreme and ultimate notions and interpretative

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27 (1974) ; Ronald J. Fiscus, “Of Constitutions & Constitutional Interpretation “ *Polity* 24, no. 2 (1991), pp. 313-22;

<sup>435</sup> Hart, *The Concept of Law*, p. 110.

<sup>436</sup> Ibid. p. 111.

<sup>437</sup> Albert, “Nonconstitutional Amendments”, p. 16.

<sup>438</sup> Quoted from Krishnaswamy, *A Study of the Basic Structure Doctrine*, p. 32. Ahron Barak offers the same kind of argument, saying that: “the language of the constitution does not only include its express language but also its implicit language. It could be said that the implicit language is written in invisible ink” Ahron Barak, “Unconstitutional Constitutional Amendments” *Israel Law Review* 44 (2011), p. 337.

<sup>439</sup> Greenawalt, “The Rule of Recognition and the U.S. Constitution”, p.2.

practices of a highest court. In this regard, three issues deserve a detailed explanation: 1) the supreme criterion, 2) the ultimate rule of recognition, 3) methods of constitutional interpretation.

#### *2.2.5.1. The Rule of Recognition and Constitution*

Kent Greenawalt argues that the amending clause is the supreme criterion in the US, because any rule adopted by reference to it is over any other legal rule (state or federal), the original Constitution, previous amendments, and federal judicial decision.<sup>440</sup> Hence, in order for any constitutional amendment to count as law there is no necessity to invoke any official acceptance,<sup>441</sup> which is the *sine qua non* for the existence of the ultimate rule of recognition. Kent Greenawalt further argues that even though it might have been the case at the time of the ratification of the US Constitution, the ratification clause plays no role *today* in identifying what counts as law in the US; it was “a one-time-only matter”.<sup>442</sup> Therefore no such question as to whether the ratification clause is, today, part of the ultimate rule of recognition arises.

But what about the ultimate rule of recognition? We have noted earlier that any standard or rule that can be derivable from another rule cannot be (part of) the ultimate rule of recognition. Therefore, we can acknowledge that the ultimacy of the rule of recognition, in the Hartian sense, stems from the officials’ acceptance of those rules as such. Again, we have previously determined, following Hart’s example, that unamendable constitutional rules (or, the acceptance of them as such) found in some constitutions are part of the ultimate rule of recognition. This point requires some clarification, in that we should determine that the unamendable status of some constitutional rules cannot rely on anything other than acceptance.

It seems that this picture also holds true for other constitutions and this will be demonstrated through our three examples of Germany, India, and Turkey, in the following chapter.

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<sup>440</sup> Ibid. p. 11. This is in line with Hart’s argument that the supreme criterion of a legal system is found in the clauses of its constitution. Hart, *The Concept of Law*, p. 106.

<sup>441</sup> Greenawalt, “The Rule of Recognition and the U.S. Constitution”, p.16.

<sup>442</sup> Ibid. p. 17. Also see Greenawalt, “Hart’s Rule of Recognition and the United States”, p.44.

#### 2.2.5.2. *The Rule of Recognition and Constitutional Interpretative Standards*

The ultimate rule of recognition (and unamendable constitutional rules as part of the rule of recognition) consists in acceptance, but this, again, does not reveal the whole picture, because in a constitutional case what is ultimately required from a judge is to decide what the law is in a particular case. The judges need to appeal to interpretation in such instances, when the case requires it; and most of the time it does require interpretation. In this sense, if we try to formulate the ultimate rule of recognition, we 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...”<sup>443</sup> And when there are unclear points in the constitution, “prevailing standards employed by the Supreme Court determine what the constitution means”<sup>444</sup>

Before getting into details we should mention that our goal in this sub-section is not about how a constitution should be interpreted; rather we intend to identify some implications of constitutional interpretative standards and, more importantly, the conditions under which we can establish the connection between the ultimate rule of recognition and interpretive standards. With the present attempt in this sub-section, we hope that it will be possible to follow up the preceding section, where we finished with the question of what reveals if the rule of recognition of a legal system has considered as it has changed or not.

In fact, as Hart himself admits – when he is replying to Dworkin’s criticism that legal principles cannot be identified by the criteria provided by the rule of recognition – the rule of recognition, sometimes, calls for interpretation. Put briefly, the focus of Dworkin’s criticisms is on the failure of the rule of recognition in accommodating the legal principles. In his *Model of Rules* (I), Dworkin claims that Hart’s version of legal positivism cannot account for some extra-legal standards (or legal principles as he mostly uses) that are appealed to by judges in deciding cases, and especially in hard cases, in which no applicable legal rules lead to a result that judges should reach.<sup>445</sup> Hart’s rule of recognition does not, Dworkin claims, offer any

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<sup>443</sup> Greenawalt, “The Rule of Recognition and the U.S. Constitution”, p.21.

<sup>444</sup> Ibid. p. 36 . Also see Greenawalt, “Hart’s Rule of Recognition and the United States”, p. 50

<sup>445</sup> Dworkin, “The Model of Rules”, p.22.

explanation for the application by the judges of these principles, which are not legal rules.<sup>446</sup> Furthermore, as we have pointed out earlier, Dworkin claims that the lack of consensus among judges over the content of the rule of recognition disapproves its existence.

However, even though Hart admits that he did not pay enough attention to the place of principles in his rule of recognition, his concept of the rule of recognition can, and without any modification, certainly incorporate principles or standards other than rules.<sup>447</sup> He makes this clear by replying to Dworkin in the *Postscript*: “[i]t is true that a rule of recognition containing ... an interpretive criterion could not ... secure the degree of certainty in identifying the law which according to Dworkin a positivist would wish. None the less, to show that the interpretive test criterion was part of a conventional pattern of law-recognition would still be a good theoretical explanation of its legal status.”<sup>448</sup>

The preceding paragraphs make it necessary for us to dwell on (constitutional) interpretive standards to shed light on the rule of recognition.

First of all, constitutional cases (particularly hard cases) are the perfect examples to trace the ultimacy of the rule of recognition, and constitutional interpretive methods are decisive for this endeavour. From another perspective, in order to see whether officials’ acceptance of the rule of recognition amounts to something more than a mere acceptance of a constitution at large, we need to scrutinize more specific points, for which constitutional interpretation methods or standards are the best candidates. Secondly, and more importantly, since the rule of recognition may be *uncertain* on some points at a given time, it is open to interpretation, as we have shown in the preceding section. Connected with this, thirdly, the rule of recognition

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<sup>446</sup> Ibid. p. 40. In his favourite example, Dworkin invokes the case of *Riggs v. Palmer*, in which the legal question was whether an heir (Elmer E. Palmer) could inherit under the will of his grandfather, even though he killed his grandfather. In this case, Dworkin shows that under the applicable legal rules, the will of the grandfather would be valid and the grandson (Elmer, who killed his grandfather) would be entitled to receive his inheritance, if the relevant rules of the Will Act had been applied as such. However, as the court noted that above the applicable legal rules there is a principle that ‘no one can make profits from his own fraud/wrong’, the judges decided the case against the grandson, and thus deprived him of his inheritance by depending on that principle. That principle was not contained by any law and yet it was appealed to by the judges. Ibid. p. 23. Following this example (and that of *Henningsen v. Bloomfield*), Dworkin concludes that there are some principles invoked by the judges, but which are not legal rules. Thus, Hart’s rule of recognition, which provides the test to determine valid legal rules, does not account for these kinds of principles. In his Model of Rules II, even though he remains faithful to his original theory, Dworkin concedes that he does not deny that there are fundamental tests in every legal system to determine what counts as law; but he claims that the version Hart provides does not account for all the complex possibilities, referring to his criticism that legal principles are not identified as law by the rule of recognition. Therefore, he revises his original account presented in the Model of Rules (I). For this see Dworkin, *Taking Rights Seriously* pp. 58-64.

<sup>447</sup> Hart, *The Concept of Law*, p. 266.

<sup>448</sup> Ibid. pp. 265-66.

as a social rule requires a *common practice* of officials as to what counts as law and since some of the officials may not converge (lack of consensus) in certain interpretive practices, delving into interpretive standards is important. In this sense, how the social fact in the context of constitutional interpretive standards, which are accepted by judges while interpreting a constitution, plays a role in determining the ultimate rule of recognition is crucial to explore.<sup>449</sup>

Yet, we should mention (once again) that interpretation, even of a constitution, is not a foundational matter in Hart's account; it makes sense to deal with it only in borderline or penumbral cases. Consistent with this, we can assert that as a matter of empirical fact a supreme or constitutional court's legal authority, however significant on some issues, is limited and its practice does not cover the entire legal enterprise.

As to the relation between the rule of recognition and constitutional interpretative standards, we need to make a number of observations. First of all, whether a standard is legal or not,<sup>450</sup> that standard needs to be accorded some place in the analysis of the ultimate rule of recognition so long as we can establish that the standard is employed by judges to identify as to what ultimately count as law. And also to the extent that we can confirm that these standards have a bearing on judge's reasoning since they are accepted as such by them (at least by majority of them).<sup>451</sup>

Of course, it is an empirical question whether an interpretive standard as a social fact is binding on judges within the context of the ultimate rule of recognition. For example, based on this view Matthew D. Adler claims that even though there are such standards<sup>452</sup> of constitutional interpretation in the US constitutional practice supported by various scholars

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<sup>449</sup> Greenawalt, "Hart's Rule of Recognition and the United States", p.41. Put somewhat differently, Matthew Adler argues that "[a]t the bottom, it is judicial views and practices that determine what techniques should be employed to interpret the text of the Constitution and who is authoritative in settling controversies about the application of these techniques" Matthew D. Adler, "Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?" *Northwestern University Law Review* 100, no. 2 (2006), p. 725.

<sup>450</sup> Sometimes what draws the line between legal and non-legal with regard to the rule of recognition may be vague or difficult to distinguish. For example, Mathew D. Adler argues that invoking the American constitutional culture as a social fact by scholars (like Dworkin, Richard Fallon, John Ely etc.) in their attempts to find a best constitutional interpretation can be regarded as *legal* standards. Adler, "Social Facts, Constitutional Interpretation, and the Rule of Recognition", p.207. "To argue that some interpretive method is the best understanding of our legal practice... is surely to argue that the method is legally favored" Adler, "Social Facts, Constitutional Interpretation, and the Rule of Recognition", p.208.

<sup>451</sup> Greenawalt, "The Rule of Recognition and the U.S. Constitution", p.33.

<sup>452</sup> He counts three categories of social facts, which are invoked by what he calls the Constitutional Interpretation Discourse – the discourse that seeks for or offers arguments for the best method of constitutional interpretation. The three categories of social facts are judicial precedent, Framers' intent and constitutional culture/tradition. Adler, "Social Facts, Constitutional Interpretation, and the Rule of Recognition", p.194.



and officials, there is, as yet, no consensus,<sup>453</sup> as a matter of empirical social fact, either among the Supreme Court Justices or among other officials, or among the legal scholarship concerning them and their status. Thus, he argues, Hart's rule of recognition does not provide an accurate framework to situate all interpretive standards as social facts within it.<sup>454</sup> Even though, this may be empirically true, it is only empirical. For example, Richard H. Fallon argues, against originalists, that one of the reasons why precedents are binding law in the US constitutional practice – because, following Hart's account, he holds that law ultimately depends on social facts i.e. acceptance by the majority. Therefore, as long as precedents are recognised as law by the majority in the US (which is the case) there is no reason why they should not be recognised as law; an idea supported by originalists.<sup>455</sup>

Secondly, some standards that constrain judges might be external or internal, both deserve attention in analyzing the interpretive standards with regard to the rule of recognition. Internal standards refer to what judges accept and follow concerning how the constitution they have in their hand should be interpreted; whether it is originalism or textualism etc. On the other hand, external standards or constraints may emerge from other (non-judicial) officials' attitudes (a point we have mentioned earlier) towards a supreme or constitutional court's power, in that, the attitudes of other officials might be that decisions of a highest (constitutional) court are accepted and enforced by them so long as they meet certain standards, such as reasonable interpretation, acceptable logical and justified interpretation etc. To put it differently, the power of a constitutional court, even though this may be conferred on it by the constitution, may rest on the acceptance of other officials over the way constitutional interpretative standards are used by the constitutional court.<sup>456</sup> As we have demonstrated earlier, various officials may accept and use different rule of recognition.

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<sup>453</sup> Mitchell Berman claims that because of the lack of consensus of the constitutional interpretation standards among judges and other officials, the rule of recognition as a social rule does not provide an accurate account of law. Even though he does not reject that "legal norms and propositions are ultimately traceable to social practice", he advanced his own (fourth) theory of law: law-as-argumentative-practice, which roughly holds that "... legal norms are the product of the identification, evaluation, and acceptance or endorsement of *argument* by participants within a structured practice " (emphasis added) Mitchell N. Berman, "Constitutional Theory and the Rule of Recognition- toward a Fourth Theory of Law" in *The Rule of Recognition and the U.S. Constitution*, ed. Matthew D. Adler and Kenneth Einar Himma (Oxford ; New York: Oxford University Press, 2009), p. 285.

<sup>454</sup> Adler, "Social Facts, Constitutional Interpretation, and the Rule of Recognition", p.220-224.

<sup>455</sup> Fallon, "Precedent-Based Constitutional Adjudication, Acceptance, and the Rule of Recognition", p.52, 55. A similar view is held by Greenawalt, "The Rule of Recognition and the U.S. Constitution", p.31.

<sup>456</sup> It is even possible to claim, considering Gerald Postema's position, that non-officials' or citizens' attitudes and understanding of those interpretive standards can also impinge on the way they are employed by the court. Postema, "Coordination and Convention at the Foundation of Law", p.192.

In this regard, for example, Kenneth Einar Himma refers to the constraints<sup>457</sup> (which he believes supreme courts' judges take into account while deciding important constitutional cases) that the acceptance of officials other than supreme courts' judges plays role on those judges' decisions, because the officials other than the judges are authorized to enforce the decision to be made by those judges.<sup>458</sup> Similarly, Kent Greenawalt talks about the *expectations* of citizens, which arise out of a shared practice and which, he believes, are taken into account by judges when deciding a vital constitutional case.<sup>459</sup> Postema's argument concerning the necessity of common practice of law by citizens and officials may be also recalled at this point, but not to approve of this idea on convention, but rather the functional importance of his consideration in this regard.

Thirdly, in order for those standards to be regarded in relation to the ultimate rule of recognition, or to be considered as part of it, they must be endorsed and used, at least, by the *majority* of judges sitting in a constitutional or a supreme court. This can be described as those judges' adherence to prevailing interpretive standards.<sup>460</sup> Fourthly, prevailing interpretive standards in relation to the rule of recognition refer to a *contemporary* or present situation. Thus, we are referring, once again, to the changeable nature of the rule of recognition. So, the prevailing interpretive standards of yesterday, may not be so today, and may be different tomorrow.

However, this description does not imply that law is subject to constant and radical changes. Some radical changes may occur though over the course of time in some cases. And depending on the nature of the legal issues involved in those cases, any decision arising out those cases can be considered, insofar as they are endorsed following the decision by officials, as within the "widely-tolerable range"<sup>461</sup> of legal materials available. To put it other way, in order for such radical changes to be recognised as within the law, they must be accepted by the public and other officials as "minimally lawful and practically tolerable"<sup>462</sup> or

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<sup>457</sup> He calls these constraints "the second-order requirements" Himma, "The U.S. Constitution and the Conventional Rule of Recognition", p.106. In fact, these requirements (or as Himma calls them, second-order duties) are also binding for other officials, vis-à-vis their positions to the Supreme Court. Ibid. p. 111.

<sup>458</sup> Ibid. p. 98.

<sup>459</sup> Greenawalt, "The Rule of Recognition and the U.S. Constitution", p. 6, 9, 39.

<sup>460</sup> Ibid. p. 35. Even though Kenneth Einar Himma advocates a more complex account concerning the relation between interpretive standards and the ultimate rule of recognition, he ultimately admits that it is the majority of judges' interpretations that concern the ultimate rule of recognition. Himma, "The U.S. Constitution and the Conventional Rule of Recognition", p.120.

<sup>461</sup> Greenawalt, "The Rule of Recognition and the U.S. Constitution" 38.

<sup>462</sup> Fallon, "Precedent-Based Constitutional Adjudication, Acceptance, and the Rule of Recognition", p. 61.

“pragmatically acceptable”.<sup>463</sup> This point brings us to the change *of* and *in* the rule of recognition.

### 2.2.6. The Change *of* and *in* the Rule of Recognition

Like Kelsen, Hart, also takes into account a number of situations in which the rule of recognition of a legal system may be thought of as it has changed. Hart considers situations, like a revolution, or an ex-colonial country retaining its independence etc., in all of which the rule of recognition, which existed before the mentioned situations occurred, ceased to exist. Therefore, a new rule of recognition replaced the old one.<sup>464</sup> However, for our concern here, this is a less problematic aspect. What is more important for us is to examine under what conditions (the part of) the rule of recognition of a stable legal system is thought to be changed. Namely, it is more crucial for us to take up the change *in* the rule of recognition instead of the change *of* the rule of recognition.

In this regard, Hart’s example from South Africa may be of use. In the example, the officials in South Africa (parliament, the special appellate courts created by the parliament and an ordinary court) disagreed on what counts as law as to the power of the legislature. The problem was initiated by adopting a politically problematic law attempting to disenfranchise non-white voters, but it was declared null and void by the Court of Appeal,<sup>465</sup> and then a series of political and legal contestations followed. The Parliament adopted another act, by means of which it created a special appellate court, which would decide the first case again. But this act was also declared null and void by the court. It was a dramatic, albeit short-lived, breakdown among the officials on the issue of legal power of the legislature of the time.

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<sup>463</sup> Himma, “The U.S. Constitution and the Conventional Rule of Recognition”, p.111.

<sup>464</sup> Hart, *The Concept of Law*. pp. 118-122.

<sup>465</sup> Ibid. p. 122. The case Hart refers to is *Harris v. Dönges*, which concerned the South African Act 46 of 1951 (known as the Separate Representation of Voters Act) that attempted to disenfranchise non-white voters, but it was declared null of void by the South African Court of Appeal of the time. The reason for declaring the Act null and void stemmed from an attempt to repeal by an ordinary parliamentary act of an entrenched provision of the South African Constitution, which reads: *Parliament may by law repeal or alter any of the provisions of this Act ... provided ... that no repeal or alteration of the provisions contained in this section 5 or in sections 35 or 137 shall be valid unless the Bill embodying such repeal or alteration shall be passed by both Houses of Parliament sitting together and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses*. For the quotation of this provision and on the case see H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (London ; New York: Clarendon Press- Oxford, 1983), p. 174. For further detail of the case see D. V. Cowen, “Legislature and Judiciary. Reflections on the Constitutional Issues in South Africa: Part I” *The Modern Law Review* 15, no. 3 (1952), pp. 282-296

It seems to Hart avoids the question of whether this might lead one to think that the rule of recognition has (partly) changed or not. He prefers to treat this kind of situation, not the change *in* the rule of recognition, as pathology of legal systems. Nonetheless, we shall go one step further and undertake such an analysis.

The reason for such a consideration may be the result of significant disagreement (or a breakdown) among officials as to what counts as law in a highly significant constitutional question. It might be possible to consider such a situation as a change in the rule of recognition of the system – but under what conditions? Let us pose a question: might there be any case that would be interpreted as a change in the rule of recognition of a given legal system? If so, then, how?

The most relevant part in *The Concept of Law* is found in Chapter VII, where Hart makes an analogy between games and law. That analogy deserves to be given in full: “Up to certain point, the fact that some rulings given by a scorer are plainly wrong is not inconsistent with the game continuing: they count as much as rulings which are obviously correct; but there is a limit to the extent to which tolerance of incorrect decisions is compatible with the continued existence of the same game, and this has an important legal analogue. The fact that isolated or exceptional official aberrations are tolerated does not mean that the game of cricket or baseball is no longer being played. On the other hand, if these aberrations are frequent, or if the scorer repudiates the scoring rule, there must be come a point when either the players no longer accept the scorer’s aberrant rulings, or, if they do, the game has changed”<sup>466</sup>

So at a given time, if we are to make sense of talking about the existence of the rule of recognition, and thus of a legal system, there must be no persistent departure from its core meaning. If there is, then we move to the idea that the game, the rule of recognition, is in transition or change. If the departure is persistent – or even if it is not persistent but it gains acceptance by officials (and maybe citizens), then we can make sense of talking about the change in the rule of recognition. In a penumbral case, the consideration and acknowledgment

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<sup>466</sup> Hart, *The Concept of Law*, p. 144.

that the decision in that case is within the tolerable scope of the rule of recognition depends on its success, that is, its acceptance and accompanying practice by officials.<sup>467</sup>

In fact, the legal history, from different jurisdictions, is full of examples that can be interpreted in the ways Hart conceives.<sup>468</sup> Suffice to recall the *Marbury v. Madison* case and its subsequent endorsement and the effect of this endorsement on the US constitutional law. From this unique case the institution of judicial review of legislative acts emerged, which was not (and is not), however, enshrined in the written text of the US constitution. Nevertheless, the practice is endorsed within the course of time and now it can be asserted that it is a consensually accepted practice in American constitutional law,<sup>469</sup> or as put by Samuel Freeman, it is taken for granted in the US legal system.<sup>470</sup> So, without any further detail, we can say that the US Supreme Court decision in *Marbury v. Madison* has created an institution, which was originally not contemplated by the legal system, thus it was (considered to be) within the tolerable limits by the officials as well as by citizens of the US. In this respect, that decision has changed (part of) the rule of recognition.

We will recall Hart's analogy between games and law when we analyse the judicial review of the unconstitutional constitutional amendment in three jurisdictions – Germany, India, and Turkey. It will make sense at that point to consider whether the game of constitutional democracy and its accompanying rule of recognition, which we have demonstrated at the beginning of this study as a *scheme with six items*, has changed or not.

Now that we have everything at our disposal concerning the theoretical framework, we can apply this to our three cases: Germany, India, and Turkey.

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<sup>467</sup> As we may recall, Gerald Postema had thought that the change of a convention might be construed in the same way. He thinks that as long as a present convention *succeeds* in solving the recurrent coordination problem, that convention survives or persists. But, if it fails to provide a solution to a novel coordination problem, which is within the range of the convention concerned, then eventual breakdown as well as a radical shift may be considered. Postema, "Coordination and Convention at the Foundation of Law", p.179.

<sup>468</sup> This line of argument can even explain the establishment of the US (federal) legal system. According to this, the US federal system was built on the acceptance of the illegal legal design of the US Constitution of today. The illegality here refers to Bruce Ackerman's argument that "...the Founders [of the US Constitution] were designing a higher lawmaking procedure [Article VII of the US Constitution] that was plainly illegal under the Articles of Confederation [Article XIII]". Bruce A Ackerman, "The Storrs Lectures: Discovering the Constitution" *The Yale Law Journal* 93, no. 6 (1984), p. 1058. Apparently, even if this argument is accepted, it would mean that the mere acceptance of this illegality renders the current US federal system legal. For the same view see Albert, "Nonconstitutional Amendments", p.8. For a similar argument, see Kay, "Constituent Authority", p.728.

<sup>469</sup> In this line of argument see Greenawalt, "The Rule of Recognition and the U.S. Constitution", p.31.

<sup>470</sup> Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review", p. 329.



### **CHAPTER 3**

## **COMPARATIVE CASE LAW CONCERNING JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS ON SUBSTANTIVE GROUNDS IN GERMANY, INDIA, AND TURKEY**

In order to provide a comparative account, we will consider three countries. Through such a comparison, it is hoped to offer more insight into the legal phenomenon of the judicial review of constitutional amendments. We also hope to show and prove that the theoretical framework illustrated in the previous chapter can be applicable to different jurisdictions. These three countries are Germany, India, and Turkey.

The chapter begins by offering some information on the constitutional amendment mechanisms and judicial review, and the relevant case law concerning judicial review of constitutional amendments, and proceeds with the analysis of the legality of judicial review of constitutional amendments in light of the rule of recognition, with the above-drawn theoretical framework in mind.

### **3.1.THE CASE LAW OF THE FEDERAL CONSTITUTIONAL COURT OF GERMANY**

The prominent case law with regard to the issue of unconstitutionality of amendments is provided by Germany. Therefore, in debates (and case law) concerning the issue of unconstitutional constitutional amendments, the contribution of the Federal Constitutional Court of Germany cannot be avoided. The case law of the Federal Constitutional Court of Germany paved the way for endorsing the possibility of the idea that constitutional amendments may be (held) unconstitutional on substantive grounds, hence they can be annulled; even though that Court has yet to annul any amendments, thus far.

#### **3.1.1. The Amendment Mechanism and Judicial Review in Germany**

The Basic Law specifies in Article 79 that it can be amended by a law to be adopted by two thirds of both the Bundestag (parliament composed of citizens' representatives) and

Bundesrat (the Federal Council, composed of representatives of Länder).<sup>471</sup> The first paragraph of Article 79 requires that there must a law, which must explicitly amend or supplement the Basic Law. This specification implies that an act amending the Basic Law has a different status from ordinary parliamentary acts. It has, like all other provisions of the Basic Law, supremacy over other parliamentary acts.

The procedure of amendment the Basic Law foresees can be considered, on the one hand, to be a rigid one, and on the other hand, a simple one. It is textually rigid in the sense that it requires a qualified two-thirds majority for an amendment to be passed. But since no further requirement, such as popular referendum or approval by the Länder, is laid down it is simple in this sense. The amendment mechanism is also simple in another sense, in that depending on the political composition of the Bundestag and Bundesrat, the mechanism can be easily applied to pass amendment. That is to say, if a political party gains a required majority in the two houses, then it is easy to amend the Basic Law. Indeed, the fact that the German political regime was bipolar until 1980s has proved that the amendment mechanism was not too rigid to pass amendments.<sup>472</sup>

The existence of the eternity clause may be thought of as a remedy to this simplicity. Article 79/3 designates some provisions of the Basic Law as unamendable. In this respect, it is an example of the constitutions that impose explicit substantive limitations on amending power. The eternity clause of the Basic Law (Art. 79/3) stipulates:

Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

It is clear that this clause is adopted under the experience drawn from the austerity of the Nazi regime. It is true that the Weimar Constitution had been abused by the Nazis in their path to power. In fact it is even more that after they had the power, the Nazis undermined and sometimes did not take it into account the Weimar Constitution when passing laws.<sup>473</sup>

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<sup>471</sup> It is in some way similar to the Weimar Constitution (Art. 76). The Weimar Constitution specified in article 76 that in order to amend the constitution a two-thirds quorum is required and two-thirds of the votes in favour of the amendment must be obtained. A plebiscite may be required under some conditions.

<sup>472</sup> Jens Woelk, "Germany" in *How Constitutions Change- a Comparative Study*, ed. Dawn Oliver and Carlo Fusaro (Oxford; Portland; Oregon: Hart Publishing, 2011), p. 147.

<sup>473</sup> Michel Fromont, "La Révision De La Constitution Et Les Règles Constitutionnelles Intangibles En Droit Allemand" *Revue du droit public et de la science politique en France et à l'Etranger*, no. 1 (2007), <http://www.lextenso.fr>.



Therefore, the kind of legal protection laid down by the eternal clause was deemed necessary by the founders of the Basic Law. As said by one scholar, the fathers of the Basic Law aimed to prevent “revolutions under the mask of legality”<sup>474</sup>

With Article 79/3, the Basic Law intends to protect four core principles and render them unamendable.<sup>475</sup> According to this, the federal state form of the Republic of Germany cannot be changed into, say, a unitary state. However, this proviso per se does not make it impossible to change the current federal system; the number of Länder, or their territorial size, etc.<sup>476</sup> The second principle that is protected by Article 79/3 is the participation of the Länder in the legislative process at the federal level. But the very wording of Article 79/3 does not itself require a certain type of participation or particular institution, such as the Federal Council. In addition to direct regulation of the previous two principles, Article 79/3 makes reference to Article 1 and Article 20. Thus, other unamendable principles are inviolable human dignity, and inalienable human rights protected by the Basic law. Article 20 determines the democratic nature of the German state, the sovereignty of people, the principle of separation of power and makes reference to the rule of law. In short, the Basic Law prohibits any amendment which will affect, with human dignity, democracy, federalism, fundamental rights and freedoms, and some principles of the rule of law.<sup>477</sup>

Even though the wording of Article 79/3 clearly indicates the prohibition of “affecting”, a question remains as to whether this proviso aims to prevent; a) any initiative of mere and direct repealing of those principles, which will culminate in the establishment of totalitarianism, or b) any initiative that may (indirectly) affect these principles. This is the question that can be answered by looking into the case law of the Federal Constitutional Court.<sup>478</sup> We can now move on to the judicial review being practiced under the German constitutionalism.

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<sup>474</sup> Woelk, “Germany”, p.144.

<sup>475</sup> See Ibid. pp. 149-151.

<sup>476</sup> Article 29 of the Basic Law explicitly regulates these issues; territories’ size, capacity etc. But in the case of change in these matters to be mandated by a federal law, a referendum shall be held in the Länder to be affected by such a law.

<sup>477</sup> The rule of law can be added to these three, but there is no direct reference to that principle. Only some of its elements, such as the separation of powers, can be found in certain articles, like Article 20, paragraph 2.

<sup>478</sup> For example, the Venice Commission Report, adopts the first understanding and underlines it (Venice Commission), “Report on Constitutional Amendment”, parag. 212.

As to the judicial review, the Basic Law of 1949 of the Federal Republic of Germany, as opposed to the Weimar Constitution,<sup>479</sup> confers the constitutional judicial power on *one* court, which is the Federal Constitutional Court (Art. 93 of the Basic Law). The Federal Constitutional Court has sweeping powers, among which is the judicial review. With the Court's self-definition of its function: "The Federal Constitutional Court's task is to ensure that all institutions of the state obey the constitution of the Federal Republic of Germany (Basic Law)"<sup>480</sup>

The power of judicial review conferred on the Federal Constitutional Court is the one that falls into the European model of judicial review, as described earlier. The Court is authorized and charged with the duty to decide on the compatibility of federal and state (Land) laws to the Basic Law. There are two ways of doing so: The concrete judicial review, which means that if a court deems that a federal or Land law to be applied in the case before the Court is contrary to the Basic Law, that court shall suspend the case to decide and forward the issue of constitutionality of the law in question to the Federal Constitutional Court. The abstract judicial review, on the other hand, refers to the judicial review, which is carried out by the Federal Constitutional Court on an abstract base concerning a federal or Land law to seek whether that law is, in substance and/or in form, compatible with the Basic Law. This power is exercised by the Court upon the application of the Federal government or a Land government or one fourth of the members of the Bundestag (Art. 93 (paragraph 1, sub-clause 1)).

As we have said, in addition to the jurisdiction of the abstract (Art. 93/2) and the concrete (Art. 100) judicial review, the Federal Constitutional Court of Germany has several other important powers, such as the power to settle constitutional complaints which can be brought before the Court by any person on the grounds that his/her basic rights protected by the Basic Law are infringed. Moreover, the Court is also authorized to settle disputes between constitutional organs: to decide whether a political party seeks to undermine or abolish free

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<sup>479</sup> Under the Weimar Constitution, there were two judicial organs; der Staatsgerichtshofs (the Constitutional Tribunal, articles, 15, 19 108) and das Reichsgericht (the Supreme Court, article 13). These two courts were conferred judicial review in different matters. For more on the constitutional review under the Weimar Constitution *see* Stolleis, "Judicial Review, Administrative Review, and Constitutional Review in the Weimar Republic"

<sup>480</sup> <http://www.bundesverfassungsgericht.de/en/organization/task.html> (last visited on 13th February, 2012)

democratic basic order (Art. 21) or to decide on the impeachment of the President claimed by the Bundestag or the Bundesrat (Art. 61) etc.<sup>481</sup>

With all these powers, the Federal Constitutional Court of Germany is said to be one of the “most extraordinarily powerful courts of law the world has ever known”<sup>482</sup> Let us add to these powers another one, which was created by the Court itself; no textual reference to such a jurisdiction exists in the Basic Law. This is the review of the constitutionality of constitutional amendments.

### **3.1.2. The Case Law**

The existence of the eternal clause (Art. 79/3) may be construed in a way that a possible textual source of the competence of the Federal Constitutional Court concerning the judicial review of constitutional amendments can be found in the Basic Law. However, the exploitation of this power is built not upon the text of the Basic Law itself, but on a theory of (quasi-) natural law.

The discussions on this subject took place before the German courts, in the middle of the twentieth century, after the Nazi regime had been dissolved. 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 (administrative, supreme, and Länder (state) constitutional) courts, in a number of decisions on the constitutionality of statutes, declared a number of statutes null and void, and they based their decisions principally on natural law theory.

For example, in a decision of Amtsgericht Wiesbaden, the court found a provision of a statute allowing the seizing of Jew's property to be incompatible with natural law, and thus declared it void in 1945. Similar decisions were made by various German states' courts concerning

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<sup>481</sup> Other powers of the Federal Constitutional Court are counted in Article 93 of the Basic Law. For more on the specific aspects of the Federal Constitutional Court's powers see Donald P. Kommers, *Constitutional Jurisprudence of the Federal Republic of Germany*, Second ed. (Durham ; London: Duke University Press, 1997), pp. 10-15 ; and H. Schlüter, “The German Constitutional Court” *Journal of South African Law* 2 (1998), pp. 284-291

<sup>482</sup> Quint, “The Most Extraordinarily Powerful Court of Law the World Has Ever Known”?- Judicial Review in the United States and Germany”, p.153

comparable issues.<sup>483</sup> All those judgments showed that there could be higher supra (natural) laws which are not included in the enacted norms, and therefore the lower-level regulations might be (found) incompatible (or must be compatible) with the said supra-laws.

The debate on the issue continued for a while, and there was acceptance as well as rejection of the application of natural law theory by the German courts. Later on, the discussion moved to the question of whether there could be supra-laws over the Basic Law and then another question arose: might there be an unconstitutional constitutional provision/amendment? In a number of cases the Court dealt with this issue, the unconstitutionality of constitutional amendments.<sup>484</sup>

The first decision of the Federal Constitutional Court – even though no constitutional amendment was involved – was the *Southwest* case, which can be taken as the starting point for our purpose in this study. For the decision of the Federal Constitutional Court in that case made it theoretically possible that a provision of the Basic Law or an amendment could be held unconstitutional.<sup>485</sup> 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.

The *Southwest* case was brought before the Federal Constitutional Court in 1951. The facts of the case were as follows: The two States of Württemberg and Baden was divided into three states by the occupying powers in 1945 “for purposes of military and political administration”<sup>486</sup> These three states were Württemberg-Baden, Baden, and Württemberg-Hohenzollern; each had different parts of the old two states’ territories. The Basic Law, receiving this legacy, had to deal with this difficult problem. So, a particular Article (118) of the Basic Law is dedicated to deal with it. Under the Basic Law, the three became Länder in the Federal Republic of Germany, each with their own constitutions.

Article 118 lays down that the division of the territories between those three states can be revised and settled by the agreement the three states would reach. If there is no such

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<sup>483</sup> For a detailed explanation of the cases, see Gottfried Dietze, “Unconstitutional Constitutional Norms? Constitutional Development in Postwar Germany” *Virginia Law Review* 42, no. 1 (1956), pp. 4-6

<sup>484</sup> For these cases, see Fromont, “La Révision De La Constitution Et Les Règles Constitutionnelles Intangibles En Droit Allemand”

<sup>485</sup> Arthur T. Von Mehren, “Constitutionalism in Germany- the First Decision of the New Constitutional Court” *American Journal of Comparative Law* 1 (1952), pp. 70-94.

<sup>486</sup> *Southwest Case*, 1 BVerfGE 14 (1951) extracts from the decision can be found in Walter F. Murphy and Joseph Tanenhaus, *Comparative Constitutional Law : Cases and Commentaries* (London: Macmillan, 1977), p. 208.

agreement, the federal government would intervene in the issue by introducing law and that law shall provide for an advisory referendum. Having the compulsory referendum requirement of Article 29/2 in mind in case of the reorganization of the size of Länder, Article 118 made an exception to this compulsory referendum.

Due to the fact that the three states could not reach an agreement, two federal laws (so-called Reorganization Laws) were adopted by the Bundestag and Bundesrat. The first law extended the term of office of the Land legislatures of Baden, and Württemberg-Hohenzollern. The second law set out the conditions for merging the three states into a single Land of Baden-Württemberg. However, the State of Baden, unsatisfied with the laws, brought a case before the Federal Constitutional Court on the grounds that those laws infringe the Basic Law, more precisely, the democratic nature of the state and right to vote of people.<sup>487</sup>

The Court held in the *Southwest* case that “... a constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate”. Therefore, “any constitutional provision must be interpreted in such a way that it is compatible with those elementary principles and with the basic decisions of the framers of the Constitution”<sup>488</sup> The Court goes on by declaring three principles as fundamental: the democratic nature of the German State, federalism, and (certain elements of) the rule of law. These were, according to Court, the fundamental principles referred to by Article 79, paragraph 3.<sup>489</sup> Following this, the Court found the first re-organization law to be unconstitutional. The arguments the Court invoked to annul the First Re-Organization Law run along the following lines. According to the Basic Law, democracy is among the elementary principles and it requires two major components: parliament controls the government and the right to vote of eligible voters cannot be removed and impaired by unconstitutional means. In a federal state, each state has sovereign power, which is not granted but only recognised by the federal constitution. In this sense, the extension (as well as shortening) of the Land legislatures’ terms of office amounted to impairment of the right to vote and it would be contrary to the democracy and sovereignty of each member state. As a result, the First Re-Organization Law was contrary to the Basic Law.

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<sup>487</sup> On the facts of the case, see Gerhard Leibholz, “The Federal Constitutional Court in Germany and the “Southwest Case”” *The American Political Science Review* 46, no. 3 (1952).

<sup>488</sup> Murphy and Tanenhaus, *Comparative Constitutional Law : Cases and Commentaries*, p. 209.

<sup>489</sup> As we shall see later, this kind of reasoning was invoked (even strongly) by the Supreme Court of India. In this sense, it is not wrong to claim that it is the Federal Constitutional Court of Germany, which guided the Supreme Court of India in invalidating constitutional amendments.

As we have said, the decision by the Federal Constitutional Court is of importance (even though it did not concern a constitutional amendment) because it paved the way for the possibility of unconstitutional constitutional amendments. In this connection, the Court's following a remarkable *obiter dictum*, agreeing with the Bavarian Constitutional Court's determination, is the most crucial part of the decision for our purposes: "That a constitutional provision itself may be null and void, is not conceptually impossible just because it is a part of the constitution. There are constitutional principles that are so fundamental and to such an extent an expression of a law that precedes even the constitution, and other constitutional provisions that don not rank so high may be null and void because they contravene these principles"<sup>490</sup>

The first case in which the constitutionality of (not amendment) an already-existing constitutional provision was challenged was the so-called Article 117 case. The legal question was to decide whether paragraph 1 of Article 117 of the Basic Law conflicted with paragraph 2 of Article 3. Paragraph 1 of Article 117 of the Basic Law stipulates that "*law which conflicts with Article 3, paragraph (2), shall remain in force until adapted to that provision, but not beyond 31 March 1953.*" Paragraph 2 of Article 3 regulates the equality of men and women before the law and its actual implementation in practice.

The challenge stemmed from the fact that there were no laws adapting the old laws to Article 3 of the Basic Law by 31 March 1953. Thus, it was claimed that paragraph 1 of Article 117 was no more valid, as otherwise a kind of legal insecurity would emerge, which would, however, be in conflict with the principles of the rule of law as enshrined in various articles of the Basic Law (such as articles 16, 20, 23 and 28). However, the Federal Constitutional Court denied this claim and held that Article 117 was valid. Nevertheless, as will be seen in the following excerpt from the Court's decision, it re-approved the possibility of the idea that unconstitutional constitutional norms are possible: "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".<sup>491</sup>

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<sup>490</sup> The Southwest Decision, October, 23, 1951, extracts from the decision can be found in Murphy and Tanenhaus, *Comparative Constitutional Law : Cases and Commentaries*, p. 209. For a detailed explanation on the facts of the case see Leibholz, "The Federal Constitutional Court in Germany and the "Southwest Case""

<sup>491</sup> Dietze, "1956", p.17-18. Kemal Gözler notes that the German Constitutional Court abandoned this doctrine after 1970, Gözler, *Judicial Review of Constitutional Amendments- a Comparative Study*, p. 83.

The Court was not concerned whether it had the jurisdiction to make a decision on the 117 Case, as it might have been required to do so, since there was no clear textual reference to the competence of the Court to review the constitutionality of an already-existing constitutional provision (or constitutional amendment). Having found itself to be competent however, the Court seemed to interpret the principle of the rule of law narrowly, even though it might have declared Article 117 null and void. Rather, what the Court attempted to do is to warn the legislature to take into account the importance of this principle, with the legal security in mind.

Moving from the review of already-existing constitutional provisions, the Court ended up with the review of constitutional amendments, as from the 1970s. In this connection, there were several cases in which some constitutional amendments to the Basic Law were challenged before the Court. 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).

In this respect the first case to be mentioned was the so-called *Klass Case*.<sup>492</sup> 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.

Article 10 of the Basic Law is related to the privacy of correspondence, post and telecommunications. Before the amendment, Article 10 envisaged: (1) The privacy of correspondence, post and telecommunication is inviolable. (2) Restrictions may be ordered only pursuant to law. The amendment<sup>493</sup> inserted a new paragraph into Article 10, which (3) stipulated that “If the restriction serves to protect the free democratic basic order or the existence or security of the Federation or of a Land, the law may provide that the person affected shall not be informed of the restriction and that recourse to the courts shall be

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<sup>492</sup> 30 BVerfGE 1 (1970). Extracts from the decision can be found in Murphy and Tanenhaus, *Comparative Constitutional Law : Cases and Commentaries*, pp. 659-666. This case was later referred to the European Court of Human Rights (*Case of Klass and Others v. Germany*), which is why it is called *Klass Case*. The ECtHR in its decision held that there was no breach of the Convention.

<sup>493</sup> The rationale behind the amendment was to terminate the Three Occupation Powers’ rights to undertake postal and telecommunications surveillance to protect their own security forces stationed in the Federal Republic, and also take the necessary measures to protect the democratic regime of the Federal Republic.

replaced by a review of the case by agencies and auxiliary agencies appointed by the legislature.<sup>494</sup>

The Amendment and the said Act was challenged before the Federal Constitutional Court on the grounds that the Amendment and the Act were against Article 19 (4) guaranteeing judicial review of administrative acts and deeds that infringe basic rights, and Article 79 (3), which forbids any amendment that violates the inalienable basic rights.

The Federal Constitutional Court considered two things 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 second 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 Court held that Article 79 (3) does not clearly give reference to the principle of rule of law. The Court concluded that that principle was not unamendable, but that only certain elements might be so.

While it is true that Article 79(3) only gives reference to some elements of the rule of law, such as the principle of separation of powers as laid down in Article 20, paragraph 2, the rule of law entails more than separation of power. For example, “prohibition of *ex post facto* laws, the rule of proportionateness, the principle of a maximum of legal protection”<sup>495</sup> etc. Yet, according to the Court, specifying an administrative body in order to provide a (semi-judicial) control for acts of surveillance of the government was not under the protection of the rule of law. As a result, that part of the amendment was not found to be contrary to the constitution.

As to the first part of the enquiry, the Court held that keeping it secret from a suspect the fact that he is under surveillance does not violate human dignity protected by Article 1, which is eternal. Accordingly, the constitutional amendment (and the Act adopted thereupon) was found to be constitutional by the (majority of the) Court,<sup>496</sup> with the exception of Article 1,

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<sup>494</sup> The same Seventeenth Amendment, in order to prevent the invocation of the right guaranteed by Article 19, which stipulates that in case of violation of one’s basic rights, s/he can recourse to the courts, added a proviso to Article 19 (4), which reads that “the second sentence of paragraph (2) of Article 10 shall not be affected by this paragraph”

<sup>495</sup> Murphy and Tanenhaus, *Comparative Constitutional Law : Cases and Commentaries*, p. 662.

<sup>496</sup> Three Judges dissented from the majority decision, in that Justices Geller, Schlabrendorff and Rupp held that there is no way to consider the said amendment as compatible with the Basic Law, more precisely with Article 19, paragraph 4, which stipulates that in case of a violation of one’s basic rights by public authorities, s/he may



paragraph 5, sub-paragraph 5 of the said Act, as it “excluded notification of the person concerned about the measures of surveillance even when such notification could be given without jeopardizing the purpose of the restriction”<sup>497</sup>

In the same case, the Court further gave an answer to the question of whether the eternal clause merely aims to prevent the repeal of core principles of the Basic Law or it also aims to prevent any initiative of amendment that would affect or undermine those principles. And the Court put this in the following way: Article 79 aims “to prevent both abolition of the substance or basis of the existing constitutional order, by formal legal means of amendment.... and abuse of the Constitution to legalize a totalitarian regime”<sup>498</sup> However, according to the Court this does not imply that the eternal clause would prevent amending power from *modifying* the core principles of the Basic Law *for proper reasons*.

Several other cases followed this judgment, in all of which the Federal Constitutional Court of Germany denied the claim of the unconstitutionality of constitutional amendments. Now, let us discuss a recent case that will shed more light on the issue and the attitude of the Court to the matter at hand. This is *the Case of Acoustic Surveillance of Homes* of March 3, 2004.

In the *Case of Acoustic Surveillance of Homes*,<sup>499</sup> the Federal Constitutional Court had to deal with the question of whether the Forty-Fifth Amendment to the Basic Law (and the law modified the Law of Criminal Procedure) was constitutional or not. The Forty-Fifth Amendment was adopted on 26 March 1998, and it amended Article 13 (guaranteeing the inviolability of the home) by inserting new paragraphs (3-6). These new paragraphs were inserted with the intention of allowing acoustic surveillance in people’s homes for the purpose of criminal prosecution.<sup>500</sup> Following this amendment, the Law of Criminal Procedure was also modified (by the Act to Improve of the Suppression of Organized Crime) to put the said constitutional amendment into practice. The main target of the amendment and the modification was to fight against organized crimes and terrorism. Given the context of

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recourse to the court. Three Justices held that the judicial protection of basic rights is entailed by the Basic Law and this is one of the constituent elements (or essential features) of the Constitution, and it is also an entailment of human dignity. Therefore, the constitutional amendment to Article 10, and the laws adopted thereupon concerning surveillance, are unconstitutional to these three judges. For the dissenting opinion *see* Ibid. pp. 663-665.

<sup>497</sup> Case of *Klass and Others v. Germany* by the ECtHR, parag. 11.

<sup>498</sup> The *Klass Case*, 30 BVerfGE 1 (1970), parag. 2 (a). Extracts from the decision can be found in Murphy and Tanenhaus, *Comparative Constitutional Law : Cases and Commentaries*, p. 661.

<sup>499</sup> 1 BvR 2378/98, 1 BvR 1084/99.

<sup>500</sup> Nicolas Nohlen, “Germany: The Electronic Eavesdropping Case” *International Journal of Constitutional Law* 3, no. 4 (2005), p. 680.

Germany, that is, the police state of the Nazi era and surveillance by Stasi in the German Democratic Republic, the amendment and the law was a cause for great political and legal concern.<sup>501</sup>

The said constitutional amendment and the law in question were challenged before the Federal Constitutional Court. The main challenged-provision of the amendment (Art. 13 (3)) stipulates that the order of surveillance has to be given by a panel of three judges, but when time is of the essence it can be given by a single judge.<sup>502</sup> It further lays down four conditions: a) surveillance can be carried out only when there are clear facts that justify the suspicion that the suspect has committed a serious crime to be defined by a law, b) the suspect is supposedly staying in the home which is to put under surveillance, c) there must be no other available option, which is not disproportionately difficult or unproductive, to investigate the matter, and d) surveillance shall be for a limited time.<sup>503</sup>

The petitioners claimed among other things that the said amendment and the modifications made to the Law of Criminal Procedure were incompatible with the inviolability of the home (Art. 13/1), the prohibition of restrictions that affect the essence of a basic right (Art. 19/2) and particularly with human dignity (Art. 1/1) as protected by the Basic Law as an unamendable constitutional provision. The Court held by a majority of six-to-two that the said constitutional amendment was not contrary to human dignity. Yet, the Court held that some of the challenged-provisions of the Law of Criminal Procedure did not satisfy the criteria required by the Basic Law, and thus invalidated them. We will deal only with the arguments of the Court on the constitutionality of the constitutional amendment.

The following were part of the reasoning of the Court: Human dignity is protected by the Basic Law to a great extent. As one of those unamendable principles it has a large protection

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<sup>501</sup> Ibid. The so-called “Der Grosser Lauschangriff” (The Great Eavesdropping).

<sup>502</sup> However, paragraphs 4 and 5 of the same Forty-Fifth Amendment rendered it possible that in certain cases acoustic surveillance or electronic eavesdropping can be carried out at the order of authorities designated by law when there is not enough time to obtain judicial order. But in such cases judicial approval has to be obtained without delay.

<sup>503</sup> To this end, it inserted a number of provisions to the Law of Criminal Procedure. One provision that was challenged before the Constitutional Court, § 100 c Abs. 1 Nr. 3 of the Law of Criminal Procedure, rendered it possible that the words of a person under suspicion, which are not publicly (or openly) spoken in a home, can be intercepted and recorded by technical means if certain facts justify the suspicion that a crime has been committed, specified in the Law as the so-called catalogue crimes. 1 BvR 2378/98, parag. 10. Those crimes mostly concern crimes against state security. The challenged provisions were: **1)** Article 100 (c), Paragraph 1, Sentence 3; **2)** Article 100 (d), Paragraph 3; **3)** Article 100 (d) Paragraph 5, Sentence 2; **4)** Article 100 (f), Paragraph 1; **5)** Article 101, Paragraph 1, Sentence 1 and 2; **6)** Article 101, Paragraph 1, Sentence 3; **7)** Article 100 (d) Paragraph 4, Sentence 3.

granted by the Basic Law. The inviolability of home is directly related to human dignity, because human dignity entails an intimate private sphere, which the state can by no means intervene. Accordingly, that private sphere requires that it shall not be violated by any means, including surveillance, by state authorities. Yet, not all acoustic surveillance of homes violates human dignity. Or as stated by the Federal Constitutional Court, acoustic surveillance of a home for the purpose of prosecution of a crime alone is not incompatible with human dignity, only the way the surveillance is carried out might be considered incompatible.<sup>504</sup>

As it can be observed in the arguments, the Federal Constitutional Court tries to interpret the said amendment in a way in which the essence of the constitutional protection of human dignity would not be violated. Namely, the Court realises *Verfassungskonforme Auslegung*, that is, constitution-conforming (constitution-compatible) interpretation.<sup>505</sup> As a result, the majority held that the constitutional amendment fell within this constraint, thus it was not unconstitutional.<sup>506</sup>

However, the Court further held that Article 79 (3) does not only aim to prevent the direct repeal of the articles referred to in that Article, but also any amendment which tries undermine or affects the principles that are under the protection of Article 79 (3). This interpretation, in a sense, changed the previous one made by the Court in *the Klass Case*. As we remember, the Court held in the *Klass Case* that Article 79 (3) prevents of mere repeal of the three core principles of the Basic Law.<sup>507</sup>

It is observed that the Federal Constitutional Court, 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. In the meantime, the Court also tends to interpret restrictively the scope of amendments or relevant laws, when the constitutional amendments or laws impose restrictions on any basic rights protected by the Basic Law. This is clearly noticed in the *Case of Acoustic Surveillance of Homes*. We can go one step further

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<sup>504</sup> 1 BvR 2378/98, parag. 114. Or in other words, “there are conversations..., which do not fall within the substantially intimate sphere of persons, for example, those concerning committed criminal offences” Jutta Stender-Vorwachs, “The Decision of the *Bundesverfassungsgericht* of March 3, 2004 Concerning Acoustic Surveillance of Housing Space” *German Law Journal* 5, no. 11 (2004), p. 1344.

<sup>505</sup> 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.

<sup>506</sup> 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.

<sup>507</sup> 1 BvR 2378/98, parag. 109.

in this determination by saying that so long as the basic rights are not gravely or unbearably affected by constitutional amendment, the Court seems to accept the power of parliament to amend the constitution.

### **3.1.3. Analysis of the Legality of Judicial Review of Constitutional Amendments**

Now, we proceed into the analysis of the case law in light of the rule of recognition. As a starting point, we will describe the rule of recognition as it was in practice until the first decision of the Federal Constitutional Court concerning the review of the substance of the constitutional amendment. Next, we need to question if the rule of recognition has changed after this case law, and if so, how?

We shall apply the theoretical framework that was drawn in the previous chapter. In this sense, let us briefly recall the definition and a few related aspects of the rule of recognition. The rule of recognition specifies the criteria that legal rules must meet in order to be qualified as such. The existence of the rule of recognition depends on its acceptance and practice by the judges (and by other officials). This rule may, however, become uncertain in some situations. In such cases, the uncertainty will be settled (in Hart's view) by judges. But we have regarded this last aspect as questionable, in that the removal of uncertainty *in* the rule of recognition by courts may itself be contestable or controversial depending on a legal system. For example, we see on the basis of the examples of the US and France that such uncertainty is not eliminated by the courts. Or to put it more precisely, there is in fact no such uncertainty in their respective legal system concerning such an aspect.

To start with, we must recall our *scheme with six items* of ultimate legality, which we have drawn at the beginning of this study. As it might be clear to the reader by now, we treat that scheme as the general framework of the rule of recognition in a constitutional democracy.<sup>508</sup> As we said at the beginning, we called that scheme *the rules of the game of constitutional democracy*. We described in that scheme that:

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<sup>508</sup> This does not suggest that the practice in every constitutional democracy is in line with this scheme. As we mentioned earlier the scheme is ideal as it represents some of the canons of constitutional democratic countries' practice.

- (1) The law is whatever Parliament enacts following the procedure established by the Constitution.
- (2) However, any ordinary law enacted by Parliament following the process established by the Constitution can be annulled by the Constitutional Court, for violating the Constitution.
- (3) A decision of annulment or an interpretation concerning an *ordinary* law by the Constitutional Court can be overturned by Parliament through adopting a new law.
- (4) If necessary, a decision of annulment of an ordinary law by the Constitutional Court can be overturned by Parliament by amending the Constitution according to the procedure for constitutional amendment, and that counts as law.
- (5) A constitutional amendment can be annulled by the Constitutional (or Supreme) Court *only on procedural* grounds, and that counts law in a constitutional democracy.

Now, let us try to apply this scheme to the German example in light of the case law concerning the review of constitutional amendments. It is clear that the *Southwest Case* does not pose any serious challenge to this framework, since this case involved the judicial review of an ordinary parliamentary act. The annulment of the Re-organizaition Act by the Federal Constitutional Court is compatible with our *scheme with six items*. Only the *obiter dictum* made in that case might be thought as posing some questions. Those questions can be analysed under the *Article 117 Case* as well. Thus, we argue that until the *Article 117 Case*, our scheme remained intact for Germany.

*Article 117 Case*, however, leads to posing the question of whether the rule of recognition has changed or not. This question is relevant given the fact that there was no explicit source in the Basic Law whether the Federal Constitutional Court of Germany could review a constitutional provision or a constitutional amendment on substantive grounds. By assuming the competence of review of the constitutional provision in the *Article 117 Case*, the Federal Constitutional Court made a break in the *scheme*. This leads to the consideration of how the *scheme* has changed. Now, this seems to add a new item to our scheme or to put it better, we

should replace our item (5) in the following way:

- (5) Constitutional provisions or amendment can be reviewed by the Federal Constitutional Court on substantive grounds, and if it is found to be unconstitutional, it can be annulled in Germany.

This new item (5) needs further qualification and adaptation to the specificity of the German case given that the review was realised, but no annulment followed. We can turn to Hart's framework for a further elaboration on the analysis of the German case. At this point, the first thing we must refer to is what Hart said about the uncertainty *in* the rule of recognition. The second is whether the rule of recognition has changed after the uncertainty removed by the Federal Constitutional Court.

We should take up first whether the Article 117 and the following case law we have presented above give rise to a consideration that the rule of recognition was uncertain concerning the competence of the Federal Constitutional Court concerning the review of constitutional amendment. However, it is not clear how to decide whether there was an uncertainty or not. For instance, the question would be even more unanswerable if the Court had said that it did not have a jurisdiction to review the constitutionality of Article 117. This would not lead us to think that there was no uncertainty at all. Indeed, remembering what the French Conseil Constitutionnel has done concerning the review of constitutional amendment to Article 1 in 2003 is of this type of example. There, as shown earlier, the Conseil Constitutionnel had held that it had no jurisdiction to decide on the case of the constitutionality of the amendment, so there was no uncertainty concerning its competence at all. Similar to the French Constitution, the Basic Law does not incorporate any textual reference to whether the Federal Constitutional Court can decide on a case involving the review of substance of a constitutional amendment.

Therefore, the very determination of whether there was an uncertainty in the rule of recognition or not offers some hints about how the rule of recognition is understood and how it functions in a legal system.<sup>509</sup> Following this, we can say that given the fact that the Federal Constitutional Court thought itself to be competent to decide on the constitutionality of a

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<sup>509</sup> Determining whether there exists an uncertainty in the rule of recognition involves using judicial discretion as well. Employing discretion on this point does not undermine the existence of the rule of recognition. *See* on this point Coleman, "Negative and Positive Positivism", pp. 153-54.

constitutional provision in the *Article 117 Case* and in the following cases that we presented above, we can conclude that the rule of recognition that existed until that decision was (considered) uncertain at that particular point in time. The removal of uncertainty by the Federal Constitutional Court has subsequently been accepted by other officials. The acceptance of officials other than judges sitting in the Federal Constitutional Court can be assumed to exist, either by implicit or explicit acceptance, as there was no rejection of the use of the power to review the substances of the constitutional norm and amendments by the Court.

Advancing on the analysis, we can move onto looking for some hints in Hart's theory concerning the aspects of uncertainty and change *in* the rule of recognition. Hart, when dealing with the uncertainty *in* and the change *in* the rule of recognition, stated that as long as any (so-called) wrong (legal) decision is within the wide-range of tolerance of the rule of recognition, that decision (or in other words, the departure from the rule of recognition existed until then) would not be inconsistent with it.<sup>510</sup> The subsequent acceptance by the other officials (and citizens) in the legal system would make the decision compatible with the general framework of rule of recognition, provided the departure remained at the fringe, and was not the entire story about the law. In this case, even though the content of the rule of recognition is uncertain, the following practice concerning the elimination of the uncertainty, and subsequent acceptance of that practice (which may make, in eliminating the uncertainty, reference to morality) will remove the doubts in the legal system concerning the rule of recognition.<sup>511</sup>

On the other hand, we must take into account and analyse another fact. This is the fact that even though the Court has reviewed the substance of a number of constitutional amendments, it has not annulled any of them so far. How must this be understood? Does this imply that the Federal Constitutional Court sticks to a democratic ideal in the sense of procedural democracy? That is to say, does the Court give more weight to the procedural moral-value of democracy than some of the substantial values, such as those protected broadly by the Basic

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<sup>510</sup> Hart, *The Concept of Law*, p. 144.

<sup>511</sup> Jules Coleman's approach is clear on this point. He points out that if there exists a controversy about the content of the rule of recognition, in that if the rule of recognition does not impose any duty on judges because of the nature of the controversy, a duty can still be assumed to exist on the condition that the very practice of resolving the controversial aspect of the rule of recognition is critically accepted by judges subsequent to the practice which is developed by judges by using, at least initially, discretion to resolve the controversy. The following practice (accepted by judges) then makes that practice a social one, which will be accordingly compatible with the rule of recognition as a social rule. Coleman, "Negative and Positive Positivism", p.160.

Law, like human dignity, inalienable basic rights, which the Court could perfectly invoke to annul the amendments, at least in the *Klass Case* and the *Accoustic Surveillance Case*? The Court's interpretation can be construed only in a way that the Court tried to reach a balance (it's one of the favourite interpretive techniques) between the two values: procedural democracy and substantial constitutional values. The Court has done this by warning the legislature to be cautious about restricting the basic rights and by not annulling the constitutional amendment. This issue involves the legitimacy aspect of the issue at hand more directly, thus we will say more on this in the last chapter.

The second aspect regarding whether the rule of recognition has changed in Germany after those cases poses no serious challenge. It seems that the Court's case law has granted it another important competence and this has been, it seems, endorsed by the officials in the German legal system. But the exploitation of this competence by the Court has not been made to invalidate any constitutional amendment as yet, no serious challenge has arisen. So, we can admit that the change in the rule of recognition in the German system remains within the margin. The real test would be observed if the Court in fact invalidates a constitutional amendment. Thus, it does not pose, at this stage, any serious challenge.

But before concluding, we can refer to another related *fact*. This is the fact that the Federal Constitutional Court of Germany, from its inception, has been entertaining a great moral, political as well as legal acknowledgment. Thus, when it is said that the rule of recognition is uncertain at certain points and when the Court is expected to remove that uncertainty, we could argue that the Court has a wide space for manoeuvre in its decision, which may sometimes be marked as beyond the borders of its competence. The lack of serious challenge – which may be directed by other institutions or officials, to the Court's extra-ordinary power, the exploitation of which might be seen to be, at some point, problematic – proves this view.<sup>512</sup> Its decision in *the Article 117* (and in fact in all the following relevant cases of review of unconstitutionality of amendments) received the same acceptance by the officials. In this regard, the Federal Constitutional Court of Germany's acceptance as the final dispute resolver constitutes, in fact, the part of the rule of recognition of the German legal system at the federal level (most probably at the Land legal system level too). Even the most

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<sup>512</sup> As we shall see later in the cases of India and Turkey, the lack of challenge of the competences of the respective highest courts is not always the case.



controversial judgment of the Court in a recent decision concerning the constitutionality of signing of the Lisbon Treaty proves this observation.<sup>513</sup> In this sense, once again, we can state that the border of the Federal Constitutional Court's powers can be tested when the Court annuls a constitutional amendment on the grounds of its substance.

### 3.2.THE CASE LAW OF THE SUPREME COURT OF INDIA

The Federal Constitutional Court of Germany has paved the way for the possibility of annulment of constitutional provisions or amendments. However, it has not yet annulled any amendments so far. The Supreme Court of India has done so, probably under the influence of the Federal Constitutional Court of Germany's experience.<sup>514</sup> The Indian Supreme Court annulled a number of constitutional amendments in a number of cases.<sup>515</sup> In these cases, except for one (*Golaknath v. State of Punjab*),<sup>516</sup> the Supreme Court of India has invoked the 'basic structure'<sup>517</sup> doctrine to declare the constitutional amendments unconstitutional.

The basic structure doctrine refers to the idea that there are some basic principles or features in the Constitution of India, as a result of which those principles cannot be amended by the amending power. So, any constitutional amendment that contravenes this basic structure – which is to be determined case by case by the Supreme Court – or intends to undermine these fundamental principles, can be annulled by the Supreme Court of India.<sup>518</sup>

In the next part, we will explain this doctrine more thoroughly. But before doing so, it may be useful to offer an overview concerning the amendment mechanism of the Constitution of India and the context from which the basic structure doctrine emerged in order to understand it better.

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<sup>513</sup> For more on the Federal Constitutional Court's decision concerning the Lisbon Treaty see Franz C. Mayer, "Rashomon in Karlsruhe: A Reflection on Democracy and Identity in the European Union" *International Journal of Constitutional Law* 9, no. 3-4 (2011), pp. 757-785

<sup>514</sup> Jacobsohn, "An Unconstitutional Constitution? A Comparative Perspective", p.477.

<sup>515</sup> 1) *Golaknath v. State of Punjab*, 1967 SCR (2) 762: 1967 AIR 1643, 2) *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225: AIR 1973 SC 146, 3) *Indira Gandhi v Rajnarain* 1976 2 SCR 347: AIR 1975 SC 2299, 4) *Minerva Mills Ltd. v. Union of India*, 1981 SCR (1) 206, 1980 SCC (3) 625: 1980 AIR 1789, 5) *P Sambamoorthy v. AP*, (1987) 1 SCC 124: AIR 1987 SC 663.

<sup>516</sup> *Golaknath v. State of Punjab*, 1967 SCR (2) 762: 1967 AIR 1643.

<sup>517</sup> The constitutional identity would be the equivalent of the basic structure and in fact it is not mere inference, the Supreme Court of India sometimes uses both terms interchangeably.

<sup>518</sup> Jacobsohn, "An Unconstitutional Constitution? A Comparative Perspective", p.480.

### 3.2.1. The Amendment Mechanism and Judicial Review in India

As noted by some scholars, there are various ways to change the Constitution of India. These include: “formal amendment mechanism[s], legislation, judicial interpretation, conventions, and international law”<sup>519</sup> Only the first one, that is the formal amendment mechanism, matters to us in this study. And how the Constitution can be formally amended is regulated in Article 368.

However, there are various articles in the Constitution that specify that the conditions or matters laid down in those articles stand until regulated differently by parliament through an ordinary parliamentary law. For example, Article 124 stipulates that the number of judges in the Supreme Court is seven, but parliament may, by an ordinary parliamentary law, prescribe a larger number of judges. The parliament did so in 1986 and now the number of judges in the Supreme Court is thirty-one. Another example is the following: Article 1 indicates that the states that constitute India and their territories shall be as specified in the First Schedule. This would imply that any change in the number of states or their territories would require the amendment of the Constitution, the First Schedule. However, Article 3 lays down that Parliament may by law form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State. In this case, what is further required is to obtain the recommendation of the President and the consultative opinion of the affected state.

Of more importance for our purposes is the formal amendment mechanism regulated in Article 368, which has to be followed to amend (except for a few articles) the constitution. This Article, as it originally stood, stipulates, under the original title of ‘*Procedure for the amendment of the Constitution*’ that an amendment to the Constitution of India can be initiated by a Bill which is to be introduced in either House of the Parliament. In order for a draft Bill of Amendment to be passed, that Bill shall be voted for by a majority of the total membership of each House and by a majority of not less than two-thirds of the members of each House present and voting.<sup>520</sup> As we shall see, Article 368 posed the question of whether

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<sup>519</sup> Mahendra Pal Singh, “India” in *How Constitutions Change- a Comparative Study*, ed. Dawn Oliver and Carlo Fusaro (Oxford ; Portland; Oregon: Hart Publishing, 2011), p. 172.

<sup>520</sup> Any Bill so passed would be submitted to the President for his assent, but his assent was not obligatory in the original version of Article 368. It became so by the Twenty-Fourth Amendment, 1971. For the amendment of certain provisions of the Constitution, which mostly deal with the federal structure of the Union, such as articles 54, 55, 73, 162, etc., Article 368 requires, in addition to majority requirement, that the Bill so proposed shall be ratified by not less than one half of the States.

this article prescribes the procedure for amendment of the Constitution or if it also confers power to amend it. This question was dealt with the *Golaknath* Case, which will be reviewed below.

In addition to above mentioned majority requirement, there is a further requirement in case of an attempt to amend some provisions or articles of the Constitution such as Articles 54 and 55 regulating respectively by whom the President shall be elected, and how (the procedures of election); and Articles 73 and 162 dealing, respectively, with the extent of the executive power of the federal state and of states. In case of amendment to these provisions, ratification by not less than one-half of the States of that amendment is required, in addition to the formal mechanism to be followed by Parliament.<sup>521</sup>

As to the judicial review, India falls under the American model, according to which there is no specific method for judicial review of parliamentary acts. Judicial review can be triggered and carried out only within the dispute resolution function of the courts. The Supreme Court of India in this respect is authorized to review constitutionality of federal state acts and state acts. High Courts of each state are also authorized to review the constitutionality of state acts concerned, but again within their dispute settlement function.

### **3.2.2. An Overview Concerning the Background of the Case Law**

The beginning of the basic structure doctrine goes back to a sequence of the Supreme Court's decisions and amendments of the constitution by parliament to overturn those Supreme Court decisions. As the basic structure doctrines stemmed from a certain context we shall investigate the Indian context in depth in order to fully grasp it.

As mentioned earlier, the Indian society (of which Hindus are the majority) was (and is still) based on the *caste system*, which is what the Constitution wanted to abolish.<sup>522</sup> The caste system is accompanied by large-scale poverty and backwardness, and especially a concentration of private property in the hands of a few. Considering how important

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<sup>521</sup> Article 368 specifies further that Article 241, Chapter IV of Part V, Chapter V of Part VI, Chapter I of Part XI, the Seventh Schedule, the representation of states in Parliament and this provision.

<sup>522</sup> Part III and especially Article 15 (2) (a) (Prohibition of discrimination to access to public restaurants, hotels, and places of public entertainment) and Article 17 (Abolition of Untouchability).

agricultural activities are in India,<sup>523</sup> land and tenure systems and the land reform legislation introduced thereupon are of special importance in order to understand the context, from which the basic structure doctrine emerged.

In this regard, the zamindari (meaning *landholder* in Persian) land and revenue system<sup>524</sup> together with other complex land and tenure systems, like the ryotwari (meaning *subject* or *cultivator* in Persian) system, were the targets to abolish. A significant number of land reform acts had been passed to abolish these systems even before the entry into force of the Constitution by many state legislatures. The zamindari system was introduced first by the Mongol emperors,<sup>525</sup> but was later recognised officially by the British colonial power with the Permanent Settlement Act in 1793<sup>526</sup> and inherited thenceforth. It became the tool for the concentration of large tracts of land in the hands of a few. This system is conceived as a form of feudalism. As it contributed to socio-economic inequalities, its abolishment became a goal for the Indian National Congress Party.

Under the Government of India Act, 1935, zamindari's rights were treated as vested rights.<sup>527</sup> Thus, no estate could be acquired compulsorily, even for public interest, by the (Indian) Federal and Provincial governments without providing compensation for such property.<sup>528</sup> However, when independence was achieved "it was felt that there was no need for protection of any vested rights"<sup>529</sup> under the (new) Constitution. In fact, paying compensation for compulsory acquisitions of property became one of the reasons for the division in the National Congress Party before and during the drafting period of the Constitution.<sup>530</sup> Article 31, which dealt with the compulsory acquisition of property and some exceptions for the

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<sup>523</sup> For example, at the beginning of its independence, the total population of India was reported as 356.8 million, 249.1 million of which "depend for their livelihood on farming" M. L. Dantwalla, "Land Reforms in India" *International Labour Review* 66 (1952), p. 420.

<sup>524</sup> "The basis of this system is that the State purported to fix in perpetuity the dues from the land. In addition, the zamindars, who were to a considerable extent revenue farmers, were declared to be the owners of the land" R. S. Gae, "Land Law in India: With Special Reference to the Constitution" *International and Comparative Law Quarterly* 22 (1973), p. 314 In other words, "Zamindari system refers to a superior form of interest in land, ... the holder of which in collected rents from those having subordinate interests and paid land revenue to the Government" Gae, "Land Law in India: With Special Reference to the Constitution", footnote 12 at p. 314.

<sup>525</sup> Konrad Bekker, "Land Reform Legislation in India" *Middle East Journal* 5, no. 3 (1951), p. 320.

<sup>526</sup> Dantwalla, "Land Reforms in India", p.421.

<sup>527</sup> The Government of Indian Act can be found at

[http://www.legislation.gov.uk/ukpga/1935/2/pdfs/ukpga\\_19350002\\_en.pdf](http://www.legislation.gov.uk/ukpga/1935/2/pdfs/ukpga_19350002_en.pdf)

<sup>528</sup> Article 299 of the Government of Indian Act, 1935.

<sup>529</sup> Gae, "Land Law in India: With Special Reference to the Constitution", p.315.

<sup>530</sup> Granville Austin, *The Indian Constitution- Cornerstone of a Nation* (New Delhi: Oxford University Press, 1966; reprint, Seventeenth impression (2012)), pp. 23-24 ; Gae, "Land Law in India: With Special Reference to the Constitution", p.316. Also see Gae, "Land Law in India: With Special Reference to the Constitution", p.316.

conditions of compensation, was a kind of compromise between the different views about this compensation.<sup>531</sup>

Before its total abolishment by the Forty-Fourth Amendment in 1978, Article 31 guaranteed right to property and laid down some principles for compulsory acquisition of private property. In Clause 2 of Article 31, some conditions were laid down in order for private properties to be acquired compulsorily by the State (state is used here in the large sense covering all state authorities, federal, local, etc.). According to this clause, a private property could be acquired by the state:

- a) only by the authority of law (thus not by an ordinance);
- b) for public purposes;
- c) by providing compensation. (although it did not mention just or equal compensation).<sup>532</sup>

However, some exceptions to these conditions were also introduced as part of the compromise between the National Congress Party and the communist-wing within the Constituent Assembly – in clauses 4, 6<sup>533</sup> (and also 5) of Article 31. While clause 4 intended to protect agrarian reform acts, clause 6 provided for the protection to the acts enacted not more than eighteen months before the commencement of the Constitution. Clause 5 (a) was designed to protect existing legislation which dealt with the compulsory acquisition of property and which did not provide for payment of full compensation.

Namely, the aim of these clauses was to specify that in some cases it might not be necessary that compensation be paid to the owners, and that when compensation is paid, *its amount*

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<sup>531</sup> There were different suggestions on the issue of compensation for compulsory acquisition of zamindars' rights: For example, some suggested 'equitable compensation', others no compensation at all. On this see K. C. Suri, "The Agrarian Question in India During the National Movement, 1885-1947" *Social Scientist* 15, no. 10 (1987), p. 34, 35 and 38.

<sup>532</sup> Clause 2 of Article 31, as it stood originally, read: *No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; and no such law shall be called in question in any court on the grounds that the compensation provided by law is not adequate.*

<sup>533</sup> Clause 4 reads: *If any Bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such Legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding anything in this Constitution, the law so assented to shall not be called in question in any court on the grounds that it contravenes the provision of Clause (2).*

Clause 6 reads: *Any law of the State enacted not more than eighteen months before the commencement of this Constitution may within three months from such commencement be submitted to the President for his certification; and thereupon, if the President by public notification so certifies, it shall not be called in question in any court on the grounds that it contravenes the provision of Clause (2) of this article...*

would not be called in question in any court on that ground. The goal of these two clauses (4 and 6) – even though they did not mention it explicitly – was to secure the Acts which aimed to abolish the zamindari system, and which were adopted earlier by the legislatures of various states before the entering into force of the Constitution.<sup>534</sup> In short, with Clauses 4 and 6, the framers of the Constitution tried to confer immunity of non-justiciability on some acts on the grounds of their violation to the general principle of clause 2.

The path these reform acts followed can be summarised as follows: “...the trend of land law and land reform in India, which initially commenced with the abolition of zamindari and the permanent settlement, subsequently extended in the first place to security of tenure to the tenant and thereafter to the fixation of limits on the rent payable by him. This virtually culminated in the fixation of ceilings on land-holding by a family. Land above the ceiling were acquired and distributed amongst the landless and other weaker sections of the community”<sup>535</sup> This must be borne in mind in the following parts, which will make easier to understand the complex context of land reform, which gave rise to complex case law.

However, in spite of the existence of clauses 4 and 6, some petitioners holding zamindari rights challenged before the high courts of their respective provinces and/or the Supreme Court the constitutionality of those acts abolishing the zamindari system. However, since the petitioners could not legally challenge the validity of such acts on the grounds of their (possible) violation of clause 2 of Article 31, they tried to rely on the fact that those acts were unconstitutional because they treated owners of land discriminatorily (unequally) in terms of the payment of compensation. In fact, in some land reform acts it was observed that when compensation was offered, it was provided that for bigger estates a lower rate of compensation would be paid than for smaller estates.<sup>536</sup> For example, the petitioners in *Kameshwar v. State Bihar*<sup>537</sup> challenged the Bihar Land Reform Act, 1950 before the Patna High Court on the grounds that it contravened the equal protection clause (Art. 14) of the Constitution. The petitioner succeeded in their challenge, i.e. the Patna High Court found the

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<sup>534</sup> The Agrarian Reform Legislations in India, which had been adopted by the legislatures of various states, were many (more than 30). For the full list of the legislations, which would be recognized within the scope of clauses 4 and 6 of Article 31, see Dantwalla, “Land Reforms in India”, pp. 442-443.

<sup>535</sup> Gae, “Land Law in India: With Special Reference to the Constitution”, p.326.

<sup>536</sup> S. P. Sathe, “India: From Positivism to Structuralism” in *Interpreting Constitutions, a Comparative Study*, ed. Jeffrey Goldsworthy (Oxford: Oxford University Press, 2007), p. 240.

<sup>537</sup> AIR 1951 Pat 91 quoted from Ibid. p. 240

Act to be unconstitutional on the basis of discriminatory treatment of owners, thus declared the Act null and void.<sup>538</sup>

Parliament, following this type of challenge before the High Courts and/or the Supreme Court, passed the First Amendment in 1951 to the Constitution with a view to securing the constitutional validity of the acts abolishing the zamindari system.<sup>539</sup> With the First Amendment, two new articles, among other things, were inserted into the Constitution: Article 31A<sup>540</sup> and 31B.<sup>541</sup> The former set general rules and aimed to entrench the constitutionality and non-justiciability of the acts abolishing the zamindari system. The latter, being a specific version of the former, created the Ninth Schedule, which listed all land reform acts and granted immunity on them from judicial challenge before any court on the grounds that those acts are inconsistent with, or take away, or abridge any of the rights conferred by any provisions of the Part III (Fundamental Rights).

However, the First Amendment could not stop judicial challenges of the land reform acts before the courts. This time, however, the target was inadequacy of compensation. The

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<sup>538</sup> Gae, “Land Law in India: With Special Reference to the Constitution”, p.319. During the appeal process of this case (together with the other two cases) before the Supreme Court, Parliament passed the First Amendment (in 1951). The Supreme Court reversed the Patna High Court decision in the appeal with the help of the First Amendment. *The State of Bihar vs Maharajadhiraja Sir Kameshwar*, 1952 1 SCR 889; 1975 AIR 1083. It can be found at <http://judis.nic.in/supremecourt/chejudis.asp>

<sup>539</sup> It was clearly stated in the ‘Statement of Objects and Reasons’ of the First Amendment that “[t]he validity of agrarian reform measures passed by the State Legislatures in the last three years has, in spite of the provisions of clause (4) and (6) of article 31, formed the subject-matter of dilatory litigation, as a result of which the implementation of these important measures, affecting a large number of people, has been held up” The Constitution (First) Amendment Act, 1951, Statement of Objects and Reasons can be found at <http://indiacode.nic.in/coiweb/amend/amend1.htm> last visited on 15th August, 2011.

<sup>540</sup> Section 4 of the Amendment Act reads: Insertion of new article 31A- After article 31 of the Constitution following article shall be inserted, and shall be deemed always have been inserted, namely:- Saving of laws providing for acquisition of estates, etc. (1) Notwithstanding anything in the foregoing provisions of this Part, no law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the grounds that it is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part.

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

(2) In this article,-

(a) the expression “estate” shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area, and shall also include any jagir, inam or muafi or other similar grant;

(b) the expression “rights”, in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder or other intermediary and any rights or privileges in respect of land revenue.

<sup>541</sup> Validation of certain Acts and Regulations.-Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the grounds that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.

famous case of this era was *State of West Bengal v Bela Banerjee*.<sup>542</sup> In this case, the West Bengal Land Development and Planning Act, 1948, was challenged on the grounds that the compensation the Act provided for compulsory acquisition of land was inconsistent with the right to property and the principles laid down in Article 31, clause 2. The provision of section 8 of the said Act provided that regardless of when land was acquired, the ceiling limit of any payable compensation to the owner would be the market value of the land on 31 December 1946. For example, if land were acquired in 1952, the ceiling of the compensation would be the market price as of December 1946

At the time when the *State of West Bengal v Bela Banerjee* case was pending, the said Act was not under the protection of clauses 4 or 6 of Article 31, since it was not submitted to the President for his assent (as these clauses required). Nor was it under the protection of Article 31B.<sup>543</sup> Therefore, it did not have specially-protected constitutional status and thus was open to judicial challenge on the grounds of contravening clause 2 of Article 31 and any other provision guaranteed under Part III (Fundamental Rights). For this reason, the Supreme Court held in *State of West Bengal v Bela Banerjee* case that “compensation, ... is... just equivalent of what the owner has been deprived of”<sup>544</sup> Therefore, the Act was declared unconstitutional on the grounds that it violated clause 2 of Article 31.<sup>545</sup>

The *State of West Bengal v Bela Banerjee* case and other cases of this kind<sup>546</sup> resulted in the adoption of the Fourth Amendment in 1955, which amended clause 2 of Article 31<sup>547</sup> and Article 31A, and also added a new clause (2A); seven more Acts were also added to the Ninth Schedule. By the amendment to clause 2 of Article 31, it was laid down that the adequacy of compensation to be paid for compulsory acquisition (and requisition) of estates shall not be called in question in any court. Article 31A<sup>548</sup> was also amended with a view to preventing

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<sup>542</sup> *West Bengal v Bela Banerjee*, 1954 AIR 170 ; 1954 SCR 558. The case can be found at <http://judis.nic.in/supremecourt/chejudis.asp>.

<sup>543</sup> It was only by the Fourth Amendment (1955) that the said Act was inserted into the Ninth Schedule.

<sup>544</sup> *West Bengal v Bela Banerjee*, 1954 SCR, parag. 563.

<sup>545</sup> Ibid. parag. 565.

<sup>546</sup> Other cases of this type were: *State of West Bengal v. Subodh Gopal Bose*, (1954) S.C.R 587, *Dwarkadas Srivinas v. Sholapur Spinning and Weaving Co. Ltd.* (1954) S.C.R. 674, *Saghir Ahmad v. State of Uttar Pradesh* (1955) 1 S.C.R 707. (321)

<sup>547</sup> It read: *No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; and no such law shall be called in question in any court on the grounds that the compensation provided by that law is not adequate.* (emphasis added)

<sup>548</sup> Section 3 of the Amendment Act: (a) for clause (1), the following clause shall be, and shall be deemed always to have been, substituted, namely:-  
(1) Notwithstanding anything contained in article 13, no law providing for-



the land reform acts from any challenge before courts on the grounds that they are inconsistent with, or take away from, or abridge any of the rights conferred by Article 14 (equal protection clause) Article 19 (including right to property) and Article 31 (protection of right to property and principles for compensation to be paid in case of compulsory acquisition of estates). Obviously, the aim of the amendment, which was indeed explicitly stated in the ‘Statement of Objects and Reasons’ of the Amendment Act, was to overturn the Supreme Court’s decisions on compensation.

However, the Fourth Amendment did not stop judicial challenges of the land reform acts. For example, the Kerala Agrarian Relations Act, 1961 was found to be unconstitutional by the Supreme Court in *Karimbil Kunhikoman v. State of Kerala*<sup>549</sup> with regard to its application to ryotwari lands, which were effective in the State of Madras at that time. The case was brought before the Supreme Court after its failure before the High Court of the State of Kerala. The petitioners, who were ryotwari tenants,<sup>550</sup> submitted six grounds for challenge in their appeal.<sup>551</sup> The Supreme Court accepted four grounds, but rejected the others. One of the accepted grounds was that the rights of ryotwari tenants were not within the meaning of “estate” as defined in sub-clause (a) of clause 2 of Article 31A, as inserted by the First

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(a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or

(b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or

(c) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or

(d) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or

(e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence,

shall be deemed to be void on the grounds that it is inconsistent with, or takes away or abridges any of the **rights conferred by article 14, article 19 or article 31 (emphasis added):**

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent”; and

(b) in clause (2),-

(i) in sub-clause (a), after the word “grant”, the words “and in the States of Madras and Travancore-Cochin, any janman right” shall be, and shall be deemed always to have been, inserted; and

(ii) in sub-clause (b), after the word “tenure-holder”, the words “raiyyat, under-raiyyat” shall be, and shall be deemed always to have been, inserted.

<sup>549</sup> *Karimbil Kunhikoman v. State of Kerala*, 1962 SCR Supl. (1) 829; 1962 AIR 723

<sup>550</sup> The ryotwari system was another system of land tenure, similar to zamindari system. But they differed in several respects: under the ryotwari system, the right holder – tenant of the Government – tills the soil leased to him for a certain period of time (usually 30 years). The ryotwari right could be terminated by the Government so long as the ryot pay the land-revenue fixed on that land. This right could be inherited, sublet and mortgaged. See for more on the ryotwari, *Karimbil Kunhikoman v. State of Kerala*, 1962 SCR Supl. (1) 847, 848.

<sup>551</sup> *Karimbil Kunhikoman v. State of Kerala*, 1962 SCR Supl. (1) 833, 834.

Amendment. Thus, the Kerala Agrarian Relations Act, 1961 was not protected from attack under Articles 14, 19 and 31 of the Constitution.<sup>552</sup>

Furthermore, the Supreme Court found the Act to be unconstitutional on the grounds that the Act treated tea, coffee, rubber, and cardamom plantations differently from areca and pepper plantations.<sup>553</sup> One other reason for the striking down of the Act was that the compensation provided for compulsory acquisition of land by the Act treated landowners discriminatorily. For larger land-holdings, there was a bigger financial loss in the compensation, while, in some cases the full amount of the market price might be paid to the owners.<sup>554</sup> Furthermore, the Supreme Court also struck down the Madras Land Reforms (Fixation the Ceiling on Land) Act 1961 on similar grounds as seen in the case of *Karimbil Kunhikoman v. State of Kerala*. This latter case was indeed used as a reference by the Court in striking down the Madras Land Reform Acts.

These cases culminated in the adoption of the Seventeenth Amendment in 1964, which aimed to reverse the Supreme Court's decisions in the said cases.<sup>555</sup> Again, this was clearly mentioned in the 'Statement of Objects and Reasons': The Amendment Act inserted a new proviso into Article 31A with the intention of overturning the Supreme Court's interpretation of the word "estate".<sup>556</sup> As we have seen, the Supreme Court had interpreted this term as not

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<sup>552</sup> Ibid. parag. 849.

<sup>553</sup> Section 3 of the Act was dealing with the acquisition of the interest of landowners by tenants. However, landowners who have more than thirty acres of land, with plantations, were excluded from this provision. Further, regardless of the extent of the land, landowners of estates with plantations of tea, coffee, rubber and cardamom were also excluded from the provision of Section 3 (Chapter II) of the Act. The petitioners – being the owners of land on which areca and pepper were being planted – claimed that this treatment was discriminatory and a violation of article 14 (equal protection) of the Constitution. The Supreme Court accepted this claim, and thus found that relevant section of the Act to be impugned to article 14 of the Constitution. *Karimbil Kunhikoman v. State of Kerala*, 1962 SCR Supl. (1) 850-861. And since without this Section, the legislature would not have passed the entire Act, the whole act must be struck down, so decided the Supreme Court. *Karimbil Kunhikoman v. State of Kerala*, 1962 SCR Supl. (1) 862.

<sup>554</sup> *Karimbil Kunhikoman v. State of Kerala*, 1962 SCR Supl. (1) 865-869. In this sense, the case was similar to *Kameshwar v. State Bihar*, in which, as we have seen, the Patna High Court invalidated the Bihar Land Reform Act, 1950 on the grounds of different rates of compensation for the lands. This aspect was indeed noted, and referred to in the judgment. See parag. 868 of the decision.

<sup>555</sup> Gae, "Land Law in India: With Special Reference to the Constitution", p.322.

<sup>556</sup> Amendment of article 31A.-In article 31A of the Constitution:

(i) in clause (1), after the existing proviso, the following proviso shall be inserted, namely:-

"Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof";

(ii) in clause (2), for sub-clause (a), the following sub-clause shall be substituted and shall be deemed always to have been substituted, namely:-

including the ryotwari settlements. The Seventeenth Amendment clearly added the ryotwari system to the meaning of estate. It further added forty-four more acts into the Ninth Schedule, some of which had been challenged before the Supreme Court, including the two acts (that is, the Kerala Land Reform Act and the Madras Land Reforms (Fixation of Ceiling on Land) Act), which had been challenged in the cases summarised above.

From this context the declaration of unconstitutionality of the First, Fourth and Seventeenth Amendments by the Supreme Court in the case of *Golaknath v. State of Punjab* resulted. Now, we come to the judicial challenge of the constitutional amendments.

### 3.2.3. The Case Law

To simplify things, let us start by noting that the emergence of the doctrine of basic structure started with the *Golaknath v. State of Punjab Case*; it was the first case in this regard. In this case, the Supreme Court decided that the First, Fourth and Seventeenth Amendments above-mentioned were unconstitutional.<sup>557</sup> The three Amendments dealt, among other things, with one particular issue, as we have mentioned: compulsory acquisition of private property and compensation to be paid thereupon.

However, this was not the case in which the basic structure doctrine was appealed to when annulling the said constitutional amendments; it only paved the way for that doctrine.<sup>558</sup> Nor was the *Golaknath* case the first one in which the constitutionality of amendments was challenged. The first case in this regard was *Sri Sankari v. Union of India*,<sup>559</sup> in which the constitutionality of the First Amendment was challenged. But the Supreme Court affirmed the Parliament's power to amend the constitution and further held that there were no limits to this

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‘(a) the expression “estate” shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include-

(i) any jagir, inam or muafi or other similar grant and in the States of Madras and Kerala, any janmam right;

**(ii) any land held under ryotwari settlement;** (emphasis added)

(iii) any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans.

<sup>557</sup> However the Court invoked the prospective overruling doctrine, thus the amendments remained in force. We will see this in more detailed later.

<sup>558</sup> This would come later by another decision, but the basic structure doctrine was one of the concurring opinions in the *Golaknath v. State of Punjab*, which was affirmed later by the majority of the Supreme Court judges.

<sup>559</sup> *Sri Sankari v. Union of India*, 1952 SCR 89; 1951 AIR 458.

power. The second case was the *Sajjan Sing v. State of Rajatsan*,<sup>560</sup> in which the Court, once again, held that parliament had the power to amend the constitution; the constitution does not impose any limit on parliament in this connection.

In the *Golaknath* case, the validity of 1) the Punjab Security of Land Tenures Act, 1953 (Act 10 of 1953), and 2) The Mysore Land Reforms Act (Act 10 of 1962) as amended by the Act of 14 of 1965, together with the three constitutional amendments were challenged by the petitioners on the grounds that they were discriminatory in the treatment of landowners and also in providing for compensation for surplus lands, which would be taken over by the governments. Therefore, they claimed that the Acts were in violation with Article 14, Article 31 (2) and Article 19 (f) of the Constitution. However, in order to base their argument on these articles, they had to challenge first the Seventeenth, Fourth and First Amendments for the following reasons. The two acts that were challenged were added to the Ninth Schedule by the Seventeenth Amendment, therefore 3) the validity of that Amendment should also be challenged before the Supreme Court. Yet, in order to challenge the Seventeenth Amendment, 4) the First Amendment should also be challenged, because it was this Amendment that created the Ninth Schedule. However, even if the Supreme Court might have challenged the First and Seventeenth Amendments, there was another Amendment that granted special-protected status to land reform acts, like two challenged acts, which was the Fourth Amendment. Having considered thus, the petitioners also challenged 5) the validity of the Fourth Amendment.<sup>561</sup>

Considering the length of the decision given in the *Golaknath v. State of Punjab* case, it is not possible to explore every aspect of the decision. The main argument of the petitioners and the Supreme Court's respective arguments are as follows:

- (1) The Constitution is intended to be permanent and, therefore, it cannot be amended in a way which would injure, maim or destroy its indestructible character.
- (2) The word "amendment" implies such an addition or change within the lines of the original instrument as will effect an improvement or better carry out the purpose for which it was framed and it cannot be so construed as to enable the Parliament to destroy the permanent character of the Constitution.

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<sup>560</sup> *Sajjan Sing v. State of Rajatsan*, 1965 SCR (1) 933; 1965 AIR 845.

<sup>561</sup> *Golaknath v. State of Punjab*, 1967 SCR (2), 780, 781.

(3) The fundamental rights are a part of the basic structure of the Constitution and, therefore, the said power can be exercised only to preserve rather than destroy the essence of those rights.

(4) The limits on the power to amend are implied in Art. 368, for the expression "amend" has a limited meaning. The wide phraseology used in the Constitution in other Articles, such as "repeal" and "re-enact" indicates that Art. 368 only enables a modification of the Articles within the framework of the Constitution and a destruction of them.

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(6) Part III of the Constitution is a self-contained Code and its provisions are elastic enough to meet all reasonable requirements of changing situations.

(7) The power to amend is sought to be derived from three sources, namely, (i) by implication under Art. 368 itself; the procedure to amend culminating in the amendment of the Constitution necessarily implies that power, (ii) the power and the limits of the power to amend are implied in the Articles sought to be amended, and (iii) Art. 368 only lays down the procedure to amend, but the power to amend is only the legislative power conferred on the Parliament under Arts. 245, 246 and 248 of the Constitution.

(8) The definition of "law" in Art. 13(2) of the Constitution includes every branch of law, statutory, constitutional, etc., and therefore, the power to amend in whichever branch it may be classified, if it takes away or abridges fundamental rights would be void thereunder.<sup>562</sup>

In accepting the appeal, the Court reached the decision by a majority of six to five and mainly relied on the latter two arguments of the petitioners above-quoted. According to the Supreme Court, Article 368 lays down only the procedure constitutional amendment acts shall follow and satisfy. In other words, the majority held in the decision that the power to amend the constitution resides in Article 245, 246 and 248 of the Constitution. Namely, constitutional amendments are passed through a legislative process. Therefore, the amending power is an ordinary legislative power; it is not a constituent power.

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<sup>562</sup> *Golaknath v. State of Punjab*, 1967 SCR (2), parag. 781-782.

The majority believed that the Constitution of India protects fundamental rights in a specific way. In other words, fundamental rights have special importance and meaning for the Constitution. In the decision, it was expressed by Justice Subra Rao (who delivered the decision on behalf of the majority) as that the Constitution preserves the basic rights, which is “the modern name for what have been traditionally known as natural rights”<sup>563</sup> against the State encroachment. In this line, the Supreme Court further held the view that an amendment act is ‘law’ within the meaning of clause 2 of Article 13, which reads: The State shall not make *any law* which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void. Reading the two articles (368 and 13(2)) together, the Court decided that the First, Fourth and Seventeenth Amendments were contrary to clause 2 of Article 13, thus declared them null and void.<sup>564</sup>

The Court, nevertheless, invoked the doctrine of *prospective overruling* in the *Golaknath* decision, which it thought to be better way to deal with the situation under consideration. The prospective overruling implies the following: “When a court prospectively overrules an earlier decision, it decides that the new rule of law - the law announced in the overruling decision - will be applied only in cases that arise in the future; other cases will continue to be decided under the rule of law enunciated in the decision that is being overruled”<sup>565</sup> Thus, the said amendments remained in force and the Court decision would make sense only for the future cases. In other words, “Parliament will have no power to amend Part III of the Constitution so as to take away or abridge the fundamental rights”<sup>566</sup> in the future. If Parliament does so, the Court will invalidate the amendment. The Supreme Court did not hear

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<sup>563</sup> Ibid. parag. 788. With the *Golaknath* case, the Supreme Court of India overruled its earlier decisions on the same subject, i.e. constitutionality of constitutional amendments. Namely, in *Sri Sankari v. Union of India* and *Sajjan Singh v. State of Rajastan* cases, the constitutionality of the First and Fourth Amendments had been challenged respectively and the Court rejected the claims of unconstitutionality; in the first case unanimously, while in the second by a majority of three to two. The Justice Mudholkar in *Sajjan Singh v. State of Rajastan* case, in his dissenting opinion, questioned if “(iv) Whether making a change in the basic features of the Constitution can be regarded merely as an amendment or would it be, in effect, rewriting a part of the Constitution, and if it is the latter, would it be within the purview of Art. 368?” He further elaborated on this aspect and dissented from the majority decision by relying on, among other things, that the basic features of the Constitution, the epitome of which can be found in the Preamble, cannot be amended. See *Sajjan Singh v. State of Rajastan*, 1965 SCR (1) 963-970. This argument would be made use of in another case to strike down a constitutional amendment; *Kesavananda Bharati v. State of Kerala*.

<sup>564</sup> For the results the Court reached see *Golaknath v. State of Punjab*, 1967 SCR (2), 815.

<sup>565</sup> William Michael Treanor and Gene B. Sperling, “Prospective Overruling and the Revival of “Unconstitutional” Statutes” *Columbia Law Review* 93 (1993), p. 1907. For a detailed analysis of the doctrine of prospective overruling see, particularly, Berly Harold Levy, “Realist Jurisprudence and Prospective Overruling” *University of Pennsylvania Law Review* 109, no. 1 (1960), pp. 1-30.

<sup>566</sup> *Golaknath v. State of Punjab*, 1967 SCR (2), 766.

two of the arguments of the petitioners (arguments (1) and (3), in which, as we quoted above, they had claimed that the said acts and amendments were contrary to the basic structure of the Constitution. But this argument would be of use in the *Kesavananda Bharati* case.

The landmark case with regard to judicial review of constitutional amendments in India was the *Kesavananda Bharati* case,<sup>567</sup> which was brought before the Supreme Court with the claims that 1) The Twenty-Fourth (1971), 2) The Twenty-Fifth (1971), 3) The Twenty-Ninth (1972) Amendments to the Constitution, together with 4) The Kerala Land Reforms Act, 1963, as amended by the Kerala Land Reforms (Amendment) Act, 1969, and with 5) The Kerala Land Reforms (Amendment) Act, 1971, were unconstitutional.

The latter two, the Kerala Land Reforms (Amendment) Acts of 1969 and 1971 were added to the Ninth Schedule by the Twenty-Ninth Amendment. Therefore, the Twenty-Ninth Amendment should be challenged in order for these Acts to be claimed unconstitutional. The three said amendments purported to put an end to the challenges of property owners (zamindars) and the Supreme Court's affirmative responses to these challenges. Another immediate aim was to restore Parliament's power to amend the Constitution, which it was deprived of by the Supreme Court in the *Golaknath* case.

Namley, following the *Golaknath* decision, some constitutional scholars in India suggested that in order for Parliament to amend the constitution with regard to the issue of property rights, which was debated then as an issue of the 1971 electoral campaign of Indira Gandhi, the Parliament's power to amend the constitution should be restored first. This would obviously eliminate the effect of the *Golaknath* judgment. Only after the first step, could the desired amendment be passed.<sup>568</sup> So, the Twenty-Fourth Amendment was mainly introduced for this latter purpose.

It inserted a new clause to Article 13, which stipulates that 'Nothing in this article shall apply to any amendment of this Constitution made under article 368.' And in order to remove any doubts concerning the amending power of Parliament as raised by *the Golaknath* decision, the Twenty-Fourth Amendment further amended the title of Article 368 as 'Power of Parliament to amend the Constitution and procedure therefore.' It further inserted a new clause into

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<sup>567</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225: AIR 1973 SC 146.

<sup>568</sup> S. P. Sathe, "Supreme Court, Parliament and Constitution- I" *Economic and Political Weekly* 6, no. 34 (Aug. 21, 1971) (1971), p. 1821

Article 368, which reads: (1) ‘Nothing in article 13 shall apply to any amendment made under this article.’... (3) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article. It further made the President’s assent upon a constitutional amendment obligatory, which was not the case before.<sup>569</sup>

The Twenty-Fifth and Twenty-Ninth Amendments, on the other hand, served the former aim, i.e. to stop judicial challenges of land reform acts and to overturn disagreeable judicial decisions. The Twenty-Fifth Amendment more specifically purported to stop the judicial challenges submitted on the grounds of the inadequacy of compensation. It amended clause 2 of Article 31 for this purpose by substituting the word ‘amount’ for the word ‘compensation’.<sup>570</sup> It further stipulated that the adequacy of the amount would not be called in question in any court. The Twenty-Fifth Amendment inserted a new Article (Art. 31C)<sup>571</sup> for the aim that any law, which aims to give effect to directive principles of state policy (as specified in clause (b) and (c) of Article 39 taking place in Part IV of the Constitution), shall not be deemed void by any court on the grounds that such law is inconsistent with or takes away or abridges any of the rights conferred by articles 14, 19 and 31. For us, the important provision was the second sentence of the inserted Article 31C: ‘no law containing a

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<sup>569</sup> (3) in clause (2) as so re-numbered, for the words “it shall be presented to the President for his assent and upon such assent being given to the Bill”, the words “it shall be presented to the President who shall give his assent to the Bill and thereupon” shall be substituted...

<sup>570</sup> It read: “(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for acquisition or requisitioning of the property for an amount which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law; and no such law shall be called in question in any court on the grounds that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash:

Provided that in making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1) of article 30, the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause”; (b) after clause (2A), the following clause shall be inserted, namely:- “(2B) Nothing in sub-clause (f) of clause (1) of article 19 shall affect any such law as is referred to in clause (2).

<sup>571</sup> The full text of the new Article 31C reads: “Saving of laws giving effect to certain directive principles.- Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy: Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent”



declaration that it is for giving effect to the directive principle of state policy shall be called in question in any court on the ground that it does not give effect to such policy.’

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. Each judge alone or in a pair (Shelat and Grover, Hegde and Mukherjea) delivered separate judgments. The result of the decision was that the Court did not invalidate the Twenty-Fourth or Twenty-Ninth Amendments. However, one of the provisions of the Twenty-Fifth Amendment (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 proviso. What follows is the illustration of the Court’s main arguments and reasoning.

The Chief Justice Sikri considered first the question of whether the *Golaknath* case was decided rightly or not. In other words, whether the Court in the *Golaknath* case decided rightly that constitutional bills are law within the meaning of clause 2 of Article 13. The Justice Sikri reached the conclusion that amendment acts or constitutional law are not equivalent of ‘law’ within the scope of the said clause.<sup>572</sup> He, however, agreed with six other judges in the *Golaknath* cases that fundamental rights cannot be abrogated or destroyed by using the amending power, but he relied on different reasoning.

Secondly and more importantly, Justice Sikri considered that the Court had to decide on the scope of amending power conferred on Parliament by Article 368. As a result of the examination, the Court reached the conclusion that Parliament has power to amend the constitution. This meant the overruling of the decision delivered in the *Golaknath* case. In other words, the amending power is conferred on Parliament by Article 368, not by articles 245, 246 and 248. The consequence is “every provision is prima facie amendable...”<sup>573</sup> under the amending power. Furthermore, the Court held that the amending power can be exercised by Parliament, even upon Part III (fundamental rights)<sup>574</sup> by way of “reasonable abridgements of fundamental rights”<sup>575</sup> However, as we saw above, any amendment to be made Part III could not destroy fundamental rights.

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<sup>572</sup> *Kesavananda Bharati v. State of Kerala*, parag. 20. (The paragraph number hereafter given refers to the number of paragraphs as seen in decision, which can be found at <http://judis.nic.in/supremecourt/chejudis.asp>)

<sup>573</sup> *Kesavananda Bharati v. State of Kerala*, parag. 77.

<sup>574</sup> Yet, the Chief Justice Sikri noted that the rights specifically granted to minorities in Part III cannot be abrogated. *Ibid.*, parag. 193.

<sup>575</sup> *Ibid.* parag. 311

According to the Supreme Court, 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 and expression, freedom to form associations and unions, and freedom of religion... that democracy can even be replaced and one-party rule established”<sup>576</sup>

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-<sup>577</sup> to a structural interpretation of the Constitution.<sup>578</sup> 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.<sup>579</sup> 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.<sup>580</sup>

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 crystallized in the Preamble. However, they formulated the elements of the basic structure slightly differently.<sup>581</sup>

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<sup>576</sup> *Kesavananda Bharati v. State of Kerala*, para. 10, see also para. 309.

<sup>577</sup> Sathe, “India: From Positivism to Structuralism” See in the judgment of the Supreme Court *Kesavananda Bharati v. State of Kerala*, para. 64- 88.

<sup>578</sup> *Kesavananda Bharati v. State of Kerala*, para. 92.

<sup>579</sup> *Ibid.* see particularly para. 227-273.

<sup>580</sup> *Ibid.* see particularly para. 307-308.

<sup>581</sup> Shelat and Grover, para. 511, 517; Hedge and Mukherja, para. 681, 700; Jaganmohan, para. 1198; Khanna, para. 1526 of *Kesavananda Bharati v. State of Kerala* case.

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 *reasonably* for public interest, but *they cannot be destroyed*.<sup>582</sup> 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”<sup>583</sup> 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”<sup>584</sup> 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.<sup>585</sup> 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 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 Justices, the result of this determination would make meaningless the protection of

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<sup>582</sup> This aspect of the case was aptly noted by K. Subba Rao (Ex-Chief 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\\*](http://www.ebc-india.com/lawyer/articles/73v2a1.htm#NOTE*)

<sup>583</sup> *Kesavananda Bharati v. State of Kerala*, particularly see parag. 316-317.

<sup>584</sup> Ibid. parag. 459.

<sup>585</sup> Ibid. parag. 462.

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”<sup>586</sup> 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,<sup>587</sup> amending power cannot under Article 368.<sup>588</sup> So, Article 31C was declared void. To conclude, the Court held that Parliament can amend the constitution so long as it is within the basic structure of the Constitution.

The basic structure doctrine was reinforced by the Supreme Court in some other cases: *Indira Gandhi v. Rajnarain*,<sup>589</sup> *Minerva Mills Ltd. v. Union of India*,<sup>590</sup> *P Sambamoorthy v. AP*.<sup>591</sup> Among them, a particular attention needs to be drawn to *Minerva Mills Ltd. v. Union of India*, because it follows up the *Kesavananda Bharati* case and attempts to complete and refine certain aspects of the judgment delivered in that case. The other two cases (*Indira Gandhi v. Rajnarain*, *Minerva Mills Ltd. v. Union of India*; *P Sambamoorthy v. AP*.) will not be dealt with because what we will examine below (together with other cases dealt with above) will shed enough light upon these two cases to understand the basic structure doctrine.

The *Minerva Mills Ltd. v. Union of India* case resulted from (again) the Parliament’s attempt to overrule the Supreme Court decision held by the *Kesavananda Bharati v. State of Punjab* case by passing the Forty-Second Amendment in 1976. The facts of the case were the following: Minerva Mills Ltd. was a privately owned textile company. The central government appointed a committee to investigate the affairs of the company on the basis of the opinion that the company’s production was in danger of dropping substantially. The committee’s investigation suggested (in its report submitted to the central government) that management of the company should be taken over in the public interest. The central/federal government then did so, under the section 18A of Industries (Development Regulations) Act, 1951. Later, the company was nationalized under the Sick Textile Undertakings (Nationalisation) Act, 1974. Upon this, the company challenged the action of the central

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<sup>586</sup> *Kesavananda Bharati v. State of Kerala*, parag. 461.

<sup>587</sup> *Ibid.* parag. 462.

<sup>588</sup> *Ibid.* parag. 466.

<sup>589</sup> *Gandhi v Rajnarain* 1976 2 SCR 347: AIR 1975 SC 2299.

<sup>590</sup> *Minerva Mills Ltd. v. Union of India*, 1981 SCR (1) 206, 1980 SCC (3) 625.

<sup>591</sup> *P Sambamoorthy v. AP*, (1987) 1 SCC 124: AIR 1987 SC 663.

government, and the relevant acts and constitutional amendments the government relied on. The two said acts – Industries (Development Regulations) Act, 1951 and the Sick Textile Undertakings (Nationalisation) Act, 1974 – were added to the Ninth Schedule by the Thirty-Ninth Amendment, 1975, with the aim of immunising these acts from challenge of constitutionality before any courts. The pieces of legislation challenged by the company were 1) the two said acts, 2) the Thirty-Ninth Amendments, 3) Article 31B of the Constitution which had created the Ninth Schedule, and finally, and more importantly, 4) the Forty-Second Amendment Act, more precisely Section 55 of the Amendment Act.

The Forty-Second amendment had a very wide scope. The Section 55 of this amendment are of particular importance, because these two sections was the one which should be challenged first in order for other mentioned Act (Sick Textile Undertakings Act, 1974) and Amendment Acts (the Thirty-Ninth and First)) to be challenged as unconstitutional. Section 4 of the Forty-Second Amendment, which amended Article 31C of the Constitution (the full text of which had been given above (see footnote 571) by adding the new wording “all or any of the principles laid down in Part IV” in place of the wording “the principles specified in clause (b) or clause (c) of Article 39” More importantly, however, section 55 of the Forty-Second Amendment amended Article 368 dealing with the amendment mechanism. It made explicit the fact that Parliament does not wish to face any judicial challenge of constitutional amendments before the Supreme Court. Section 55 of the said Amendment inserted two new clauses into Article 368, which read:

(4) No amendment of this Constitution (including the provisions of Part III; made for or purporting to have been made under this article (whether before or after the commencement of Section 55 of the Constitution (Forty-second Amendment) Act, 1976) shall be called in question in any court on any ground.

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

Composed of five judges, the Court held in the *Minerva Mills Ltd. v. Union of India* case by a

majority of four (Y.V. Chandrachud, A. Gupta, N.L. Untwalia, P.S. Kailasam) to one (P.N. Bhagwati) that the clause (4) of Section 55 was unconstitutional. The Court further declared the clause (5) of Section 55 unconstitutional, unanimously. In its reasoning the Court relied primarily on the basic structure doctrine of the Constitution. One judge (dissenting from the majority judgment with regard to clause (4))<sup>592</sup> concurring with the majority decision on section 55 also relied on the basic structure doctrine.<sup>593</sup> According to this, the Court, as completing or refining certain aspects of the *Kesavananda* case, held that the Constitution of India conferred only a limited amending power on Parliament, and this feature is among the basic structures of the constitution, thus it cannot be amended.<sup>594</sup>

In the precise construction of the judgment, the Court dealt with the scheme and structure of the Constitution. The Chief Justice Chandrachud, delivering the decision on behalf of the majority, held that the basic scheme of the Constitution is the one that is conveyed by its Preamble. The basic structure set out in the Preamble was transmitted into several parts and articles of the Constitution. In this sense, Part III (Fundamental Rights) and Part IV (Directive Principles of State Policy) are like Siamese twins, in that one cannot be separated from the other and similarly one cannot be contemplated without the other. By the same token, if one of them were destroyed, the other would cease to exist.

Even though Part IV would be regarded as an end the Constitution wants to achieve, it wants to achieve this end in a democratic way, which is reflected in and protected by Part III.<sup>595</sup>

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<sup>592</sup> In his dissenting opinion, Justice Bhagwati argued that the Fundamental Rights and Directive Principle of State Policy are of equal importance to the Constitution. Neither is superior nor subordinate to the other. Even though the Directive Principle of State Policy is an end the constitution wants to achieve, it can also be a tool to achieve the right to equality; a principle which takes part in the Fundamental Rights, but which is not a mere formal equality, but also real and substantive equality. Therefore, if acts *really and genuinely* aim to give effect to the Directive Principle of State Policy and if the constitution immunizes these kinds of acts from judicial challenge, that would not be against the constitution or the basic structure. For the Justice Bhagwati's arguments see *Minerva Mills Ltd. v. Union of India*, in particular see para. 220. 221. Despite the fact that the dissenting Justice Bhagwati did not find the amended article 31C to be unconstitutional, he concluded that the amended version of Article 31C would not prevent courts from judging any act which was purported to be enacted to give effect to Directive Principle of State Policy. In order for any act to be under the protection of the amended Article 31C, any such act must *genuinely and really* be enacted to give effect to Directive Principle of State Policy and there must be real and substantial connection between the act and the specific objective set out in Directive Principle. In this connection, in order to determine whether any such act is to be protected under the amended Article 31C, court should be able to judge the substance of the act. Unless any such connection is established, the act would not be protected by amended Article 31C. Therefore, the result that all judges reached in the decision is indeed almost the same. On Justice Bhagwati's opinion in this line, see *Minerva Mills Ltd. v. Union of India*, para. 224.

<sup>593</sup> *Minerva Mills Ltd. v. Union of India*, para. See particularly para. 214-233.

<sup>594</sup> In this connection, the Court held that "[t]he power to destroy is not a power to amend. *Minerva Mills Ltd. v. Union of India*, para. 207.

<sup>595</sup> At this point, let us note that the majority was holding a decision on the entire Article 31C, not only the amendment made by the Forty-Second Amendment.

Therefore, Part III is thought to be the means to achieve the end determined by Part IV. If the end is hoped to be achieved, it must be achieved without destroying the means, as the “deep understanding of the scheme of”<sup>596</sup> or the basic structure of the Constitution of India requires. Thus, if section 4 of the Forty-Second Amendment were to be allowed, then this basic structure of the constitution would be undermined, because there would be no protection of fundamental rights if Parliament was allowed to amend the constitution in the way it would like to do so by the Forty-Second Amendment. It is, however, not permissible under the basic structure of the Constitution, one of the implication of which is that the Constitution of India “is founded on a nice balance of power among three wings”<sup>597</sup>

As regards Section 55, the Court unanimously held that the Constitution of India conferred a limited amending power on Parliament and this is the reflection of the basic structure of the Constitution.<sup>598</sup> Therefore, it cannot be amended by *Parliament* in the way that was attempted by section 55 of the Forty-Second Amendment.<sup>599</sup> According to Court, an integral part of the protection of fundamental rights is the institution of judicial review as conferred upon the Supreme Court by Article 32 (2) and 226. Thus, judicial review as an institution and as an integral part of protection of fundamental rights, thus of the basic structure cannot be abrogated either. From this followed that section 55 of the Forty-Second Amendment was unconstitutional, since it aimed to destroy the basic structure.<sup>600</sup> As we have seen, what the Supreme Court tried to show in the *Kesavananda* case with difficulty – that there are implied limitations to be imposed on amending, thus it is limited – was clearly expressed and maintained in the *Minerva Mills* decision.

### 3.2.4. Analysis of Legality of Annulment of Constitutional Amendments

Even though there are further decisions in the same line by the Supreme Court to deal with, for our purposes in the present study this seems to be more than enough. We can now start to analyze the case law in light of Hart’s concept of the rule of recognition.

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<sup>596</sup> *Minerva Mills Ltd. v. Union of India*, para. 208.

<sup>597</sup> *Ibid.* para. 207.

<sup>598</sup> *Ibid.* para. 207, 216.

<sup>599</sup> Justice Bhagwati’s concurring opinion in this regard was: “Parliament cannot in exercise of this power so amend the Constitution so as to alter its basic structure or to change its identity” *Minerva Mills Ltd. v. Union of India*, para. 215.

<sup>600</sup> *Ibid.* para. 216.

To begin with, we shall, once again, recall our *scheme with six items*, which we treat as the conventional account of amendment or as a kind of general (conventional) scheme of the rule of recognition in a constitutional democracy. Now, we would suggest that item (5) of the scheme has to be changed in the Indian context. To recall our original item (5)

(5) A constitutional amendment can be annulled by the Constitutional (or Supreme) Court *only on procedural* grounds, and that counts law in a constitutional democracy.

In fact, we had already suggested a new item (5) when we dealt with the German case. The new item (5) we suggested there was: constitutional provisions or amendment can be reviewed by the Constitutional Court on substantive grounds (and if found unconstitutional, it can be annulled). And we had indicated that given the fact that the Federal Constitutional Court of Germany have realised the substantive review, but have not annulled any amendment as yet, this new item (5) needed to be adjusted in the German context, so this has been done.

We have now the Indian case in our hands, and this time the annulment of several constitutional amendments have been realised. How should we understand and adjust item (5) in light of the rule of recognition within the context of the Indian Supreme Court's case law. To recall, we are still dealing with the legality aspect of the annulment of constitutional amendment, that is whether the rule of recognition can account for exploiting an extraordinary power (annulment of constitutional amendments), which is not expected to be employed in a constitutional democracy.

We described the rule of recognition at some length, together with its various aspects, in the second chapter. To put it simply here, the rule of recognition means the ultimate rule in a legal system and it sets the validity criteria which legal rules must meet. The existence of the rule of recognition depends ultimately on its acceptance and practice by judges (and other officials).

We argue that the rule of recognition in India was, until the case of the *Kesavananda Bharati* decision of the Supreme Court, more or less identical to our *scheme with six items*. With the decision by the Supreme Court in the *Kesavananda Bharati* case, the question whether (part



of) the rule of recognition in India has (significantly) changed arose. Therefore, we find it to be more relevant to deal with this aspect of the rule of recognition, i.e. the change *in* the rule of recognition. As we have already suggested in the theoretical part, the kind of conditions we are dealing with are related more to the aspect of change in the rule of recognition, as Hart himself suggested. Thus, it would seem to be redundant to discuss again the uncertainty in the rule of recognition. What we said on this point when we dealt with the German case can be recalled here. So we will directly discuss the aspect of change in the rule of recognition.

We should point out that *the Golaknath* did not bring about the consideration whether the rule of recognition in India might have changed, although it paved the way for the that consideration. In the *Golaknath* case, the constitutional amendments were held unconstitutional by the Supreme Court – but by invoking the prospective overruling the amendments remained valid. In that case, the exploitation of this extra-ordinary power rested on a literal interpretation of Article 13, which prohibits Parliament from adopting *any law* taking away or abridging the fundamental rights protected by the Constitution, and in case of contravention that law will be void. The Court in the *Golaknath* case held that the term ‘*any law*’ also covers constitutional amendment acts. Thus, so long as any amendment act contravenes the fundamental rights, it can be annulled by the Court. Now, the rule of recognition of the Indian legal system, until this decision, was the identical to our scheme: *Parliament* was the final authority to determine what would ultimately count as law. By this case, the Parliament’s power to determine (i.e. amend the constitution) what ultimately counts as law was restricted by the Supreme Court. Thus, the Supreme Court had the final say to determine what ultimately counts as law. Yet, this determination also needs further refinement, which is provided below in light of the *Kesavananda Bharati* case.

The *Kesavananda Bharati* case was far more important in terms of its sweeping effects than the *Golaknath* case. In this case, the Court, once again, exploited a power that was not conferred on it by the text of the Constitution of India. But this time it went further by declaring a constitutional amendment unconstitutional with an immediate effect. In the *Kesavananda Bharati* case, the Court held that *Parliament* has power to amend the Constitution and this power resides in Article 368 of the Constitution, that is, the

interpretation of the Supreme Court in the *Golaknath* was overturned. However, the Court has developed another argument to annul a constitutional amendment, i.e. the basic structure doctrine.

Again, when both the rule of recognition framework drawn in the second chapter and the basic structure doctrine as part of the rule of recognition in the legal system of India are considered, we should take into account whether the basic structure doctrine is accepted and practiced by the official in India. It is certainly so on the part of the Supreme Court's judges. The idea that the basic structure doctrine is accepted and practiced by the Supreme Court is demonstrated in further post-Kesavananda Bharati cases, like *Minerva Mills*, *Indira Nehru Gandhi v. Raj Narain*.<sup>601</sup>

However, despite the fact that the basic structure doctrine, as part of the rule of recognition in India, is accepted and practiced by the Supreme Court judges, we cannot firmly settle the matter in a way that the basic structure doctrine is now part of the rule of recognition in India. In other words, the view that the basic structure doctrine has become an axiom in the Indian context is not without doubt. The hesitation derives from the following consideration.

Unlike the German case, there was no unchallenged acknowledgment of the Supreme Court's decisions having annulled several constitutional amendments on the side of other officials, and mainly Parliament. As we have demonstrated extensively above, almost all of the rulings of the Supreme Court striking down constitutional amendments were challenged by the Parliament by attempting to overturn what the Court ruled in those decisions. In this respect for example, even after the *Minerva Mills v. Union of India* case the two main provisions of the Constitution (the right to property, Article 19 (f) and some related aspects of that right, and expropriation of private property, Article 31) were abolished altogether from the Constitution by Parliament by the Forty-Fourth Amendment in 1978.<sup>602</sup> Furthermore, Parliament tried every possible manoeuvre to curb the Supreme Court's jurisdiction with a view to preventing the Court from annulling any further constitutional amendments.

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<sup>601</sup> Another case, in which the question was not related to the right to property or land reforms was *Indira Nehru Gandhi v. Raj Narain* [1975 Supp. (1) SCC 1], which annulled the Thirty Ninth Amendment (Art. 329(A), attempting to relieve the then Prime Minister Indira Gandhi from a possible Supreme Court guilty verdict for her alleged corruption.

<sup>602</sup> A new article regulating again the right to property was added to the end of the Constitution (Art. 300A) by the same amendment act. This would imply that even though there is a right to property in the Constitution of India, it is not among the basic ones that have a particular protection.

Against the Parliament's manoeuvre however, the Supreme Court continues to appeal to the basic structure doctrine and endeavours to have it accepted by Parliament. In a recent case, *I.R. Coelho vs. State of Tamil Nadu & Ors*,<sup>603</sup> delivered on 11th January, 2007, the Supreme Court questioned the constitutionality of the laws added to the Ninth Schedule. The Ninth Schedule was created by the First Amendment, initially to grant immunity on a restricted number of laws with certain content (land reform), but later its scope was extended to encompass any kind of law that Parliament wanted to exempt from judicial control. The Court inevitably regards it as relevant to question the constitutionality of the constitutional amendments, which added laws to the Ninth Schedule, after the *Kesavananda Bharati* case.

In the decision of the *I.R. Coelho vs. State of Tamil Nadu & Ors* case, the Court held that the laws added to the Ninth Schedule and the constitutional amendments made after 24 April, 1973 (the date of delivery of the *Kesavananda Bharati* judgment) to add the laws to the Ninth Schedule can be controlled by the Court with a view to ensuring the compatibility of the laws and amendments with the basic structure doctrine. In the Court's view, ruling otherwise would make the basic structure doctrine meaningless, and there would also be no judicial control of the laws (with whatever content) added (or to be added) to the Ninth Schedule.<sup>604</sup>

This decision offers clues about how the basic structure doctrine is treated in the Indian legal system. That is to say, the basic structure doctrine seems now (as of 2012) to have been endorsed firmly by the Supreme Court judges. In the last mentioned case of *I.R. Coelho vs. State of Tamil Nadu & Ors*, there are also hints about its acceptance by other officials. For example, the respondent State of Tamil Nadu has stated in its petition that "... the existence of judiciary is part of the basic framework of the Constitution and cannot be abrogated in exercise of constituent power of the Parliament under Article 368..."<sup>605</sup> Yet, he challenged the further aspect of the doctrine. Therefore, the acceptance by other official of the basic structure doctrine cannot be argued in a way it is as firm as its acceptance by the Supreme Court's judges.

Despite these doubts however, we can argue that the basic structure doctrine has partially, but probably not yet firmly enough, changed the rule of recognition in India. The scope of the

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<sup>603</sup> 2007 AIR 861, 2007(1) SCR 706, which can be found at <http://judis.nic.in/supremecourt/helddis.aspx>

<sup>604</sup> "The power to grant absolute immunity at will is not compatible with basic structure doctrine and, therefore, after 24th April, 1973 the laws included in the Ninth Schedule would not have absolute immunity" Ibid.

<sup>605</sup> *I.R. Coelho vs. State of Tamil Nadu & Ors* case 2007 AIR 861, 2007(1) SCR 706.

basic structure doctrine, apart from a strong commitment to the fundamental rights, needs to be determined in every case and this makes it controversial and challengeable. However, there is a growing signs of its acceptance. Though, its scope has not been settled firmly.

### 3.3. THE CASE LAW OF THE CONSTITUTIONAL COURT OF TURKEY

In this section we will analyse the case law of the Constitutional Court of Turkey, but in order to be consistent with the explanation of the previous parts on the German and Indian case law, we will also elaborate on the historical background, as, like the German and Indian cases, it is related to the aspect of legality (within the scope of the rule of recognition). We should mention first that the case law of the Constitutional Court of Turkey concerns the principle of laicism and its particular application to the headscarf controversy.

#### 3.3.1. The Amendment Mechanism and Judicial Review in Turkey

The Turkish Constitution of 1982 sets down in detail the amendment mechanism in Article 175.<sup>606</sup> According to this mechanism various actors are, or may, be involved in the procedure of amendment. These are the Parliament, the President, and citizens in a referendum. The current total of member of parliament in Turkey is 550. According to Article 175, an amendment to the Constitution can be proposed in writing by at least one-third (184) MPs. In order for the amendment proposal to be passed by the Parliament, it shall be voted for by at least three-fifths (330) MPs. Furthermore, the proposal shall be debated and voted twice in Parliament. The second debate cannot be carried out within 48 hours following the first.

Any adopted amendment act, like any other parliamentary act, shall be submitted to the President. The President may veto (partial veto power) the act and send it back to Parliament for further consideration. If the President does not veto the act, which is adopted by more than 330 but less than 367 MPs, that act shall be submitted to a referendum (compulsory referendum). In case the act is adopted in the first place by more than 367 MPs, the President may confirm or submit it to referendum. In case a vetoed act is adopted by Parliament by more than 367 MPs (two-thirds) for the second time, the President may not veto this act but s/he may submit it to referendum (optional referendum) or confirm it.

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<sup>606</sup> 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*. ... [emphasis added]. The whole text of Turkish Constitution in English can be found at <http://www.byegm.gov.tr/mevzuat/anayasa/anayasa-ing.htm> (last visited 28th March, 2010).

The Turkish Constitution of 1982 has been amended seventeen times (as of 2012). Three of these (in 1987, 2007, 2010) were submitted to referendum and accepted by the people in those referenda. The sweeping amendments were made in 1995, 2001 and 2010, which led to important changes in the legal, as well the political, system.

There is one further aspect concerning the amendment mechanism in Turkey that should be highlighted. This concerns the unamendable constitutional rules. Article 4 stipulates that the first three articles of the Constitution, which describes the fundamental characteristics of the Turkish state, cannot be amended nor can their amendment be proposed. The fundamental characteristics of the Turkish state are that it is a republic (Art. 1), democratic (Art. 2), laique (Art. 2), a social state governed by the rule of law (Art. 2), and respecting human rights (Art. 2). Its indivisible unitary character (Art. 3), its language as Turkish (Art. 3), and its capital as Ankara (Art. 3) are also unamendable.

As to the judicial review effective in Turkey, we can say that it is the true example of the European model. Thus, there is a specific and unique court charged with judicial review. There are abstract as well as concrete judicial review mechanisms. According to Article 148 of the Constitution, the Constitutional Court was initially composed of 11 members and one chamber. It is now, after the 2010 amendment, composed of 17 members and divided into two chambers.<sup>607</sup> The main function of the Court is to review the claims of unconstitutionality, both in respect of forms of substance, of laws, the Turkish Grand National Assembly's Rules of Procedure, degrees having force of law.<sup>608</sup> It is explicitly stipulated in the Constitution that the Court may review constitutional amendments, but only for procedural matters, which we have described above.

There are two methods by which the Court can carry out the review: through abstract and concrete judicial review. The abstract judicial review can be triggered by several political actors (Art. 150), such as the President, party in power, main opposition party, or by 1/5 of the total MPs. The concrete mechanism, on the other hand, can be triggered by a judge who has to apply, to a case to be decided by him/her, a rule or provision that s/he believes may be contrary to the Constitution. In this case, the judge shall suspend the case and refer the claim

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<sup>607</sup> By the 2010 constitutional amendments, the composition of the Constitutional Court had changed. Before, it was composed of 11 regular and 2 substitutive members, which were nominated by different organs and appointed by the President. Now, members of the Court are nominated by different organs, 14 of whom are appointed by the President and 3 by the Turkish Grand National Assembly

<sup>608</sup> The whole text of Turkish Constitution in English can be found at <http://www.byegm.gov.tr/mevzuat/anayasa/anayasa-ing.htm>

of unconstitutionality to the Constitutional Court. Before the 2010 amendment, individuals did not have power to trigger this mechanism. With the 2010 amendment, the individuals are also entitled to bring a case directly before the Court on the grounds that their rights and freedoms, guaranteed by the Constitution and the European Convention for the Protection of Human Rights, are violated by the state actors through laws and/or administrative deeds.

We can now move to the case law of the Court concerning judicial review of constitutional amendments.

### 3.3.2. The Case law<sup>609</sup>

This section summarises briefly the constitutional aspect of the headscarf controversy in Turkey. In doing so, it will, however, inevitably refer to the judgment of the ECtHR.<sup>610</sup> It should be mentioned at the outset that the headscarf debate mainly revolves around the higher education realm in Turkey. The debate was about whether wearing headscarves should be permitted among female students in higher education institutions.

The history of the headscarf controversy goes back to early 1980s. In fact, the controversy is a corollary of the Turkish *laïcité* as understood by the new republican elites, of which military and bureaucratic elites are representatives. In this sense, one of the effects of the Turkish *laïcité* can be seen more clearly in its approach towards women than towards any other group. Women are regarded and treated by the new republican elites as a backward segment of society. Therefore, they are seen to be in need of support and encouragement to become so-called republican women. In this regard, they have to be, as it were, progressed – even against their desire. The headscarf, in this picture, represented and symbolized the backwardness of

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<sup>609</sup> The first decision, in which a constitutional amendment was annulled in Turkey (on substantive ground), was delivered by the Constitutional Court of Turkey in the Case, File No: 1970/1, Decision No: 1970/31, published in the Official Gazette on June, 7, 1971. Therefore, the issue of unconstitutionality of constitutional amendments was not new to the Constitutional Court of Turkey. It had annulled a number of constitutional amendments under the 1961 Constitution. On the historical aspects of the issue, see Ergun Özbudun, “Anayasa Değişikliklerinin Yargısal Denetimi (Judicial Review of Constitutional Amendments)” *Daily Zaman*, May 8th, 2008.; Another work presenting the decisions of the Constitutional Court of Turkey in which constitutional amendments have been annulled is, Gözler, *Judicial Review of Constitutional Amendments- a Comparative Study*. pp. 40-47.

<sup>610</sup> The CEDAW Committee delivered a decision on this issue too. However, the Committee did not discuss the substance of the issue, since the application was deemed inadmissible due to the lack of exhaustion of the domestic remedies by the applicant. See *Rahime Kayhan v. Turkey*, Communication No: 8-2005, CEDAW/C/34/D/8/2005. [http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/8\\_2005.pdf](http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/8_2005.pdf)

women and was associated with the past; the past, as it was understood by the republican elites, was connected with the Islamic-Ottoman tradition. The reforms introduced at the earlier stage of the Republic concerning the daily life of people support this view. In this respect, the new elites of the Republic were adamant in their view that the headscarf should be banned, especially in the public sphere.

However, the headscarf controversy in Turkey was also affected by the influences of the Iranian Islamic revolution, which gave rise to the flourishing of Islamic political movements in Turkey. During this period, another important affair that also affected the issue was the military intervention of 1980 in the civil government. This intervention set up an authoritative Turkish state following the idea of republicanism and the principle of laicism. The influence of Islamic political movements and the pressure of the military have moved the headscarf controversy to the legal domain. At the end of 1980s, it became a legal question; although there were administrative practices favouring the prohibition of wearing the headscarf for some time.

The recent challenge directed by the ruling political party (AKP), which has a religious affiliation, and which has been in power since 2002, paved the way for the questioning of the position of the principle of laicism within the legal and political system. The headscarf controversy is only one aspect of the challenge between the secularists and Islamists.<sup>611</sup>

Below we will describe the earlier phases of this challenge as seen in the case law of the Constitutional Court.

### *3.3.1. The First Headscarf Decision of the Court*

The first constitutional case concerning headscarves was brought before the Court in 1989 by the President of the Republic (the Ex-Commander of the Turkish Armed Forces who led the *coup d'état* of 1980). In this case,<sup>612</sup> the statute, which would be Additional Article 16 of the Higher Education Act, no 2547, and which was subject to the review by the Constitutional Court, reads: Modern dress and appearance shall be compulsory in the rooms and corridors of

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<sup>611</sup> Binnaz Toprak, "Turkey: The Islamist-Secularist Divide" in *Secularism, Women & the State: The Mediterranean World in the 21st Century*, ed. Barry A. Kosmin and Ariela Keysar (Hartford: Institute for Study of Secularism in Society and Culture, Trinity College, 2009), pp. 57-66.

<sup>612</sup> File No: 1989/1, Decision No: 1989/12 published in the Official Gazette on July 5, 1989.



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.

In its judgment, the Court analysed the statute in two parts. Although the first sentence of the statute was not found to be problematic from the constitutional perspective, the second sentence that “covering the neck and hair with a veil or headscarf due to religious conviction is free, was found to be incompatible with the constitution. However, at the end of the final decision the entire statute was found to be unconstitutional, and thus it was annulled completely.

The Court based its judgment mainly on the principle of laicism, which the Court deemed to be intrinsic to the Turkish Republic. The Court discussed the place and significance of the principle of laicism from a historical perspective comparing the Ottoman period – a religious state – with the period of the Republic of Turkey – a *laïque* state, which is based on the rule of law and respect for human rights. In this sense, according to the Court, the principle of laicism constitutes one of the most important characteristics of the Turkish Republic and the ideals of Kemalism.

The Court interpreted the Preamble, which is part of the Constitution according to Article 176, in a way that it does not provide protection for any ideas, which is contrary to Atatürk’s principles including the principle of laicism. Therefore, all statutes have to comply with this requirement. Following this, the Court stressed several times in its judgement on the point that a *laïque* State, like Turkey, cannot invoke religious conviction when performing its legislative function, namely, the source of the legal rules cannot stem from the religious sources in a *laïque* state. In a connected sense, *laïcité* is the guarantee of human rights as well as the democratic, republican Turkish state.

Furthermore, the Court also noted that by allowing female students to wear headscarves might undermine the public order. That is to say, allowing female students to wear headscarves might provoke other students not wearing headscarf; and it might also give rise to provocations originating from the differences of sects. Therefore, the statute cannot be considered within the scope of Article 24 of the Constitution (freedom of religion and

conscience). Therefore, the statute exceeds the limits of Article 24, since it is contrary to the laïcité and it might cause social unrest among the university students and/or staff.

After the rejection by the Constitutional Court of the first attempt to allow the headscarf, there were further attempts, which gave rise to the second decision by the Constitutional Court.

### 3.3.2. *The Second Headscarf Decision of the Court*

The second case was brought before the Court by the main opposition party (the Social Democratic Populist Party). The statute, which would be Additional Article 17 of the Higher Education Act, no 2547, that was subject to reviewing by the Court, reads: Choice of dress shall be free in institutions of higher education, provided that it does not contravene the laws in force.

In this judgment,<sup>613</sup> the Court found the statute to be *compatible* with the Constitution, however it noted that the statute in question did not allow women students to wear headscarves in higher education institutions, because according to the Court, the way of formulating the statute, namely “*provided that it does not contravene the laws in force*”, compels citizens and state institutions to comply with the previous judgment of the Court summarised above. The proposition “provided that it does not contravene the laws in force” cannot be interpreted as it excludes the Constitution and the preceding judgments of the Court. The Court discussed once again the principle of laicism extensively and referred to its previous judgment of 1989. It further decided that standards of dress in higher education institutions need to meet the requirements arising from the ideas of Kemalism and the principle of laicism.

Following these judgments by the Constitutional Court of Turkey and the practices that favoured banning the headscarf, the Higher Education Council of Turkey issued in 1997 a circular that reinforced the prohibition. Subsequently, a case was brought before the European Court of Human Rights (ECtHR) in 1998, by a Turkish student, Leyla Şahin, in which she claimed that the prohibition of the headscarf was contrary to her freedom of religion and of

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<sup>613</sup> File No: 1990/36, Decision No: 1991/8, published in the Official Gazette on July 31, 1991.

expression and the right to education guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The ECtHR, the Grand Chamber, made its decision on the case in November 2005, upholding the Fourth Chamber's decision. The Grand Chamber ruled that the banning of headscarves in Turkey was not contrary to the rights and freedoms protected by the ECHR. The prohibition of wearing the headscarf was found to comply with the requirements of a democratic order and with the principle of proportionality. In fact, the ECtHR essentially repeated the Turkish Constitutional Court's reasoning in the 1989 decision and stated that the Contracting Party, Turkey, is entitled to use the margin of appreciation on this issue.

### *3.3.3. The Headscarf Decision of the Court Annulling the Constitutional Amendments*<sup>614</sup>

After the ECtHR's judgment, the pro-Islamic political party in power (the Justice and Development Party) at that time (and now) deemed that the only way to resolve the headscarf problem was to amend the Constitution. Accordingly, the Party drafted the said constitutional amendments and submitted them to the National Assembly to be adopted.

The constitutional amendment under consideration was very short; it contained only two substantial articles. The first Article of the constitutional amendment contained a proposition of "*and in utilization of all forms of public services*" which was intended to be added after the term 'proceedings' in the fourth paragraph of Article 10,<sup>615</sup> which reads: "State organs and administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings"

The second Article of the amendment was intended to be an insertion into Article 42,<sup>616</sup> dealing with '*the right and duty of education* and, which was formulated as follows: "No one

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<sup>614</sup> File No: 2008/16, Decision No: 2008/116, published in the Official Gazette on October, 22, 2008.

<sup>615</sup> Article 10 (Equality before the law). All individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations.

Men and women have equal rights. The State shall have the obligation to ensure that this equality exists in practice. No privilege shall be granted to any individual, family, group or class.

<sup>616</sup> Article 42. No one shall be deprived of the right of learning and education.

The scope of the right to education shall be defined and regulated by law.

Training and education shall be conducted along the lines of the principles and reforms of Atatürk, on the basis of contemporary science and educational methods, under the supervision and control of the state. Institutions of training and education contravening these provisions shall not be established.

The freedom of training and education does not relieve the individual from loyalty to the Constitution. ...

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”

As it was mentioned at the beginning, the Court struck down these provisions on *substantive grounds*,<sup>617</sup> even though Article 148 of the Turkish Constitution stipulates that the Court has jurisdiction to review constitutional amendments *solely* with regard to *their forms*, not their *substance*.

The main argument of the Court in annulling the amendment is that the amendment in question is contrary to the unamendable *principle of laicism* enshrined in Article 2 of the Constitution.<sup>618</sup> Based on this, the Court concluded that the proposed amendments would undermine the principle of laicism. However, as Article 4 determines it as unamendable, the Court held that the Parliament’s attempt to amend Article 10 and 42 was not allowed under the reading of Article 2. Now we can proceed to analyse the legality of judicial review of constitutional amendments in light of the rule of recognition.

### **3.3.3. Analysis of the Legality of Annulment of the Constitutional Amendment**

The legality of the exploitation of an extra-ordinary power by the Constitutional Court of Turkey will be analysed, again, in light of Hart’s concept of the rule of recognition. To start with, it may be useful to invoke the Constitutional Court’s case law, which concerns the review of constitutional amendments.

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<sup>617</sup> It must be noted that the Court invoked the argument in its decision that what it did in the case was the review of the requirements of forms and procedures that a constitutional amendment shall meet according to article 175 of the constitution. The court justified this argument by claiming that since article 4 stipulates that there shall be no *proposal* to amend the first three articles of the Constitution, any proposal to that effect enables the Court to review that kind of proposal of amendment to find out whether the Parliament adopted a proposal of amendment that is allowed by the Constitution, i.e. by article 4. In this sense, according to the Court, what is stipulated in article 4 constitutes a requirement of the form that a constitutional amendment shall meet. However, this argument does not prevent us from concluding that it was the review of the substance of the constitutional amendment in question. If the Court’s argument was to be accepted, it would not have been possible even for the Court itself, without examining the substance, to determine whether the adopted proposal was the one which was allowed by article 4 or not. In fact, the Court itself accepted this in the decision. According to it, in order to find out whether or not the substance of the adopted amendment aimed at changing (or undermining) the unamendable provisions of the Constitution, it was necessary to examine the substance of the amendment. In short, whatever the Court argument is, we can state without hesitation that it reviewed the *substance* of the constitutional amendment in question.

<sup>618</sup> Article 2 of the Turkish Constitution 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”

Under the 1982 Constitution<sup>619</sup> there have been five examples (to date), together with the one summarised above (the headscarf case), in which the Court has been asked to decide on the constitutionality of a number of constitutional amendments. The first case<sup>620</sup> concerned the following: The military elites who carried out the coup d'état of 1980 thought it necessary to ban certain politicians from politics. To this effect, they added a provisional Article to the Constitution. This provisional Article prohibited certain politicians from undertaking political activities for a certain period of time, ranging from five to ten years. This Article was repealed in 1987 by way of constitutional amendment in order to allow those individuals to be involved in politics once again. The amendment Act required, however, that in order for amendment to come into force, it should be submitted to a referendum. But, before the referendum took place, a case was brought before the Constitutional Court challenging the conformity of the amendment to the Constitution on the grounds that the requirement of referendum was inconsistent with the amendment mechanism (Art. 175). In its decision the Court held by a majority that the grounds of the challenge did not fall within the Court's competence laid down by the Constitution, thus it could not hear the case. In other words, the due to the fact that Court's jurisdiction over the review of constitutional amendment was restricted to reviewing the procedural requirements, the Court could not decide on the matter on substantive grounds.<sup>621</sup>

In the second case,<sup>622</sup> the Court reviewed the constitutionality of an amendment that changed the way of electing the President of the Republic. According to the Amendment Act, the President would be elected by popular votes. Before the Amendment Act, President was elected by Parliament. The Amendment Act affected various articles of the Constitution. The said amendment, which resulted from the crisis of the election of the eleventh President, required a referendum in order for it to be put into effect. However, before the referendum took place, the President of the time and the main opposition party (the Republican People's

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<sup>619</sup> During the period in which the 1961 Constitution was in force, the Constitutional Court reviewed the substance of several constitutional amendments and invalidated some of these, but we will not deal with these here. To summarise, some constitutional amendments were invalidated because they were found to be incompatible with the unamendable provision of the Constitution, which prohibits the amendment of the republican form of the Turkish state. For more on those invalidated constitutional amendments under the 1961 Constitution see Gözler, *Judicial Review of Constitutional Amendments- a Comparative Study*. pp. 40-47; Mehmet Turhan, "Halk Egemenli i Ve Anayasal De i ikliklerinin Yargısal Denetimi [Popular Sovereignty and Judicial Review of Constitutional Amedments]" *Liberal Dii ünçe* 15, no. 57-58 (2010), pp. 37-39. Consult also footnote 609.

<sup>620</sup> File no : 1987/9, Decision no: 1987/15, published in the Official Gazette on 04 September, 1987.

<sup>621</sup> Only one dissenting opinion was delivered, in which it is claimed that the Amendment Act was contrary to the Amendment mechanism.

<sup>622</sup> File no: 2007/72, Decision no: 2007/68, published in the Official Gazette on 7 August, 2007

Party) brought a case before the Constitutional Court on the grounds that the amendments were not adopted in accordance with the procedure laid down in Article 175. The Court examined the amendment process to find out whether the required procedures (the required majority and the twice debate requirements) were met. As a result, the Court declared that the Act was adopted in accordance with the procedure, thus it is constitutional. Again, the Court checked only the procedural requirement, not the substance of the Amendment Act.

The third case<sup>623</sup> was, in fact, related to the aforementioned example, in that the Amendment Act changing the process of electing the President would be submitted to a referendum to become effective. According to one provisional Article of the Act, it was explicitly set down that the eleventh President should be elected by citizens in an election based on universal suffrage. However, before the submission of the said amendment to the referendum, Parliament repealed this (provisional) article due to the fact that the eleventh President was already elected according to the previous method, which was the election of the President by Parliament. Thus, if the provisional article concerning the election of the eleventh President had submitted to referendum and if had been accepted by citizens, there would be a legal uncertainty concerning the legal status of the already elected eleventh President.

Again, the (tenth) President and the Republican People's Party challenged the abolition of this provision before the Constitutional Court. This time the ground of the claim of unconstitutionality was that Parliament had no power to abolish a provision of a constitutional amendment act that would be submitted to referendum. The Court in its decision confined itself once again to review of the procedure of amendment and declared that the said amendment had been duly adopted by Parliament, thus it was constitutional.

In all of the three decisions, the Constitutional Court confined itself to review the amendment procedure, which constitutional amendments shall satisfy. It did not examine the content of any amendment. However, when it came to the headscarf case, the Court suddenly changed its case law completely in the opposite direction by finding itself competent to review the substance of the constitutional amendment, as we have shown above. The Court did so despite the fact that even the content of the said articles in the headscarf case did not imply anything

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<sup>623</sup> File no: 2007/99, Decision no: 2007/86, published in the Official Gazette on 27 November, 2007.

to suggest the view that the headscarf would be allowed by the said amendment. In this sense, the very wording of the Amendment Act was questionable to the extent of whether it could serve the aim it intended to achieve. There was nothing to discern this. Only the intention of Parliament, as it reflected on the *travaux préparatoire*<sup>624</sup> made it explicit that the aim of the Amendment Act was to allow women student to wear headscarves.

With the latter's decision, it is clear now that the Court finds itself competent to review the substance of constitutional amendments and may declare a constitutional amendment unconstitutional. This fact might lead us to ask if the rule of recognition in Turkey has changed, and this is an appropriate question to ask.

Our task is relatively simple to answer this question since it will be enough to follow the *scheme* of ultimate legality that we have drawn from the Turkish legal system. Now, let us recall item (5) of the *scheme* drawn at the beginning. Item (5) reads: *A constitutional amendment can be annulled by the Constitutional (or Supreme) Court only on procedural grounds, and that counts law in a constitutional democracy*. In light of the case law just explored, this now stands in need of refinement.

Until the Constitutional Court's headscarf decision, in which a constitutional amendment was invalidated, our scheme of legality (the rule of recognition) still held true for Turkey. Namely, the rule of recognition in Turkey until the Headscarf Case implied that Parliament in Turkey had the final authority to define what ultimately counts as law. The decision has reversed this situation, in a limited, but an important way. That is to say, with the decision in the headscarf case, the Constitutional Court has discovered a limit to be imposed on the Parliament's power to amend the constitution.

When we go a little further into our analysis, it will be seen that the judiciary in Turkey has always treated the principle of laicism as a fundamental element of the Turkish Republic. Indeed it is this principle upon which the Republic is built. For example, as one scholar has emphasised: "laicism does not need a definition. It is the core and spirit of the legal system

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<sup>624</sup> See Justification for the Constitutional Amendment Act at <http://www.tbmm.gov.tr/d23/2/2-0141.pdf>  
See the minutes of the Parliament see at [http://www.tbmm.gov.tr/develop/owa/tutanak\\_g\\_sd.birlesim\\_baslangic?PAGE1=1&PAGE2=1&p4=20078&p5=B](http://www.tbmm.gov.tr/develop/owa/tutanak_g_sd.birlesim_baslangic?PAGE1=1&PAGE2=1&p4=20078&p5=B) see also the Report of the Sub-commission on the Constitution at <http://www.tbmm.gov.tr/sirasayi/donem23/yil01/ss101.pdf> (last visited 31st March, 2010).

that it belongs”<sup>625</sup> Consistent with this and with the case law of the Constitutional Court, it is not surprising that in a number of cases, the Council of State (Conseil d’État)<sup>626</sup> invoked the same principle to confirm the legality of administrative acts and deeds that approve the prohibition of headscarves. Therefore, based on this practice of the courts, it is claimed that the legal system in Turkey is especially based on the principle of laicism.

As in the Indian case, the Constitutional Court of Turkey holds the principle of laicism as an absolutely essential feature. This implies for the Court that this principle is not only unamendable, but also the constitutional order it aims to secure is also seen as vital, and thus unamendable. Therefore, the scope of the constitutional entrenchment of the principle of laicism as unamendable goes beyond the one foreseen by the designers of the constitution. That is to say, even though the invalidated constitutional amendments had nothing to do (at least as inferred from the literal interpretation) with the principle of laicism laid down in Article 2 as unamendable, the Constitutional Court saw the Amendment Act as an attempt to undermine the principle of laicism. In this sense, any attempt to undermine this order based on the principle of laicism will not be allowed by the Court unless the conditions, which led to acknowledge the legality of the decision, change. In this sense, the decision has changed the rule of recognition in Turkey.

Based on the framework of the rule of recognition described in the previous chapter, it can be further argued that the legal validity of the headscarf decision by the Constitutional Court has been accepted by other officials in Turkey, primarily by the Parliament. It should be mentioned though that the acceptance here does imply the acceptance of the politico-morally correctness of the decision. Some official may do so, but it is not necessary. The acceptance refers here to the framework developed by Hart.<sup>627</sup> To recall it here, Hart thinks the acceptance of a social rule (or law) does not imply that people necessarily accept the morality lay behind it. In accepting the rule of recognition, the official do not have to believe in

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<sup>625</sup>Zeki Hafizo ullahı, “Türkiye Cumhuriyetinin Devletin Me ruiyet Temeli Olarak Laiklik (*Secularism as a Legitimate Base of Turkish Republic*)” *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 57, no. 2 (2008), p. 317. Also see Zeki Hafizo ullahı, “Bir Kültür Ürünü Olarak Hukuk Düzeni (*Legal System as the Product of Culture*)” *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 46, no. 1-4 (1996), pp. 3-23.

<sup>626</sup> Some examples of cases concerning the headscarf before the Conseil d’Etat in which the Court has used the principle of secularism in order to dismiss the cases include: the Eighth Chamber: 1) E. 1987/178-K. 1988/512, T. 27.6.1988, 2) E. 1991/3480-K. 1993/1598- T. 7.4.1993, 3) E. 1994/5952- K. 1996/544-T. 6.3.1996, 4) E. 1995/271-K. 1997/402-T. 5.2.1997, 5) E. 1998/5912- K. 2000/4951-T. 27.6.2000, 6) E. 2004/2697-K. 2005/282-T. 28.1.2005; 1. Division, 1) E. 1999/98- K. 1999/116-T. 12.7.1999 ; the Second Chamber: 1) E. 1998/258-K. 1999/2847-T. 10.12.1999; the Twelfth Chamber: 1) E. 2002/1997-K. 2004/704-T. 9.3.2004; Plenary Session of the Administrative Law Divisions 1) E. 1993/161- K. 1994/327-T. 17.6.1994, 2)E. 2000/646-K. 2000/1119-T. 9.11.2000

<sup>627</sup> For more explanation concerning what the acceptance of the rule of recognition implies see footnote 288.



(although they may) the moral force of the rule. If accepting the rule of recognition by the officials intersects with believing its morality, then it can be argued that legality and legitimacy overlap.

The acceptance may be proved through the lack of challenge of the decision of the Constitutional Court; namely, the acceptance may be implicit. In the headscarf decision, this can be inferred from the fact that when the headscarf case was still pending before the Constitutional Court, there were some views in the public debate that suggested that if the Court invalidates the amendment, Parliament should not recognise the decision as legally valid. However, Parliament did not give any credit to such views and accepted the Court's decision afterwards. Yet, since this acceptance does not mean that the decision was politico-morally correct, there were very harsh critiques of the headscarf decision by the Constitutional Court. These criticisms make sense when making argument against the legitimacy, but not the legality, of the decision. In fact, the legitimacy of the decision has been questioned and its true implications can be observed in the Parliament's attempt to change the composition of the Constitutional Court, the number of judges, the method of nomination and election. All of these were made by a constitutional amendment adopted in 2010 following the headscarf decision in 2008.

The fact that Constitutional Court has the competence of review the substance of amendments has proved in the fifth case.<sup>628</sup> In this case, the constitutionality of some of the provisions of the 2010 Amendment Act was claimed unconstitutional on the grounds that they were inconformity with the essential features/unamendable articles of the Constitution. The Amendment Act had a wide scope; it changed and affected many articles of the Constitution. The Constitutional Court declared some of the provisions of the Amendment Act unconstitutional. Those provisions declared unconstitutional concerned the composition of *the High Council of Judges and Prosecutors* and the election procedures of its members to take part in this Council, and the election procedure of some members of the Constitutional Court.

The Amendment Act aimed to change the composition of *the High Council of Judges and Prosecutors*. The Act envisaged that President of the Republic shall appoint four members of

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<sup>628</sup> File no: 2010/49, Decision no: 2010/87, published in the Official Gazette on 30 December, 2010.

the Council among academicians from the fields of law, economics and political science, and among senior public officials and attorneys. The Court declared that members cannot be appointed from among academicians in the field of economics and political science and among senior public officials. The rationale of the Court was that *the High Council of Judges and Public Prosecutors* must function in accordance with the principle of independence and impartiality of judiciary, which is a requirement of the principle of rule of law. The existence of senior public officials and academicians from the fields of economics and political sciences would jeopardize, thus it would be incompatible, with the principle of rule of law. Since the principle of rule of law is among the unamendable constitutional provisions, such an amendment would be unacceptable as it would undermine it. Thus, the Court declared this provision of the Amendment Act unconstitutional.

The Court further declared unconstitutional of the election procedure of some members who of *the High Council of Judges and Prosecutors* and the Constitutional Court. The relevant provisions set down that the general assemblies of the Court of Cassation, the Conseil d'État, the Military Court of Cassation, the Turkish Court of Accounts, the Justice Academy of Turkey, the Higher Education Council, and the Head of Bar Associations would either directly elect as members or would designate as candidates to the President to be appointed as the members of the Council and the Constitutional Court. The Amendment Act set down that in these elections, each member of the general assemblies of those courts and institutions can cast *only one vote* for candidates. The Constitutional Court found this election procedure to be unconstitutional due to the fact that one candidate might sweep all the votes. Therefore, this procedure would not result in the true democratic reflection of the electoral choices.

Although this decision too brought about serious criticisms and a debate concerning the Court's legitimacy, the decision was accepted. Namely, those elections were made in accordance with the Constitutional Court's decision in that the members of the general assemblies of those courts and institutions casted votes for more than one candidate. The composition of the Council was realized in accordance with the Court's decision, i.e. without containing senior public officials and academicians from the fields of economics and political science.





## CHAPTER 4

### THE QUESTION OF THE LEGITIMACY OF JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS IN THREE JURISDICTIONS: GERMANY, INDIA, AND TURKEY

This chapter will analyse the legitimacy aspect of the issue at hand on the basis of the three empirical examples examined in the previous chapter: Germany, India, and Turkey. Let us consider first if an attempt to examine the legitimacy of judicial review of constitutional amendments on substantive grounds makes sense or not.

The hesitation or doubt stems from the on-going discussions about the legitimacy of judicial reviews in general. As this discussion has revealed, judicial review *qua* institution is, *per se*, highly controversial in a democratic regime. Many liberal theorists who attack judicial review *qua* institution have claimed that this institution is incompatible with the very basic idea of democracy. Therefore, moving one step further to attempt to analyse the legitimacy of the judicial review of constitutional amendments on substantive grounds may quickly prove to be futile in the view of this liberal approach. No doubt that the judicial review of constitutional amendments on substantive grounds will be considered illegitimate in this approach. However, this observation underlines one particularly important point for our study: the issue that settling the legality of the matter in question, i.e. judicial review of constitutional amendments on substantive grounds, cannot concomitantly account for its legitimacy. Thus, a different explanation and approach is required.

Our argument is that the supposed illegitimacy of judicial review, on the basis of some of the arguments drawn from a certain kind of liberal approach, holds true as long as one takes a *normative* point of view with regard to some relevant key concepts, such as democracy and (democratic) legitimacy etc. The concept of legitimacy, however, can be also approached descriptively or empirically. This might be done from a sociological as well as historical point of view. In either case, objectivity is not wholly guaranteed.

Trying to explain the legitimacy of the issue we have taken up depends on how someone conceives of three interrelated concepts: democracy, sovereignty, and legitimacy. The core concept is *democracy*. For the analysis of the legitimacy of an issue like ours, it matters how someone conceives of *democracy* in theory and to what extent the practice in a given country

conforms to that conception. The second related concept is (popular) *sovereignty*. This concept is regarded as an important element of democracy; therefore, it matters how (popular) sovereignty is formulated and practiced in a country. At least in the initial formation of the polity – in other words, in the constitutional-making process – the practice of popular sovereignty can, to an important degree, affect the future development of politics and law in that country. Finally, the concept of *legitimacy* itself is important for our analysis. How this concept is understood, formulated, and operationalised might closely affect the type and method of analysis. In this sense, Richard Albert is right to claim that “[a]mendment practices... give us a blueprint for uncovering fundamental principles about statehood, namely where the state situates the seat of sovereignty and where it locates the locus of legitimacy”<sup>629</sup>

Even though, for the purpose of this chapter, judicial review *qua* institution does not constitute a separate element or a variable, it should be added to our consideration because the discussion around it gives us a clue about how someone, who either opposes or supports judicial review, conceives of democracy. Therefore, we shall offer a general account of the debate concerning the democratic legitimacy of judicial review. In fact, as it will be made clear below, scholars discussing the legitimacy of judicial review focus on different conceptions of democracy. These different conceptions of democracy are in use either to support or to reject judicial review. Therefore, dealing with the discussions regarding the legitimacy of judicial review will also provide us with the different conceptions of democracy.<sup>630</sup>

The following sections will open up this outline. In this regard, we will elaborate first on those three concepts in general, then we will try to apply that general framework to our three countries. In this connection, how those conceptions actually operate in practice in the three countries may shed light, empirically, on the legitimacy of the issue under investigation. In this line, uncovering where the locus of the sovereignty in each state lies and what type of

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<sup>629</sup> Albert, “Nonconstitutional Amendments”, p.6.

<sup>630</sup> For us, the more important point is to take judicial review as a variable to discover the actual working character of democracy in our three countries. Arend Lijphart uses judicial review as a variable to measure the level of democracy in thirty-six countries in Arend Lijphart, *The Patterns of Democracy* (New Haven: Yale University Press, 1999), pp. 216-231. Lijphart takes into account the rigidity and flexibility of the amendment mechanisms and judicial review as a variable to correlate them with his two models of democracy: consensus and majoritarianism. Our approach, even though it is affected by the idea offered by Lijphart, will be somewhat different.

democracy exists in their political systems will illuminate the legitimacy aspect of judicial review of constitutional amendments.<sup>631</sup>

#### 4.1 FRAMEWORK FOR THE EVALUATION OF THE LEGITIMACY ASPECT

From the historical point of view, the idea of democracy emerged as a form of government: government by the people.<sup>632</sup> The modern idea of democracy is said to have been the result of two eighteenth-century revolutions: the American and the French. From this historical perspective, democracy is characterised as being against autocracy or monarchism. But what does democracy actually mean? Can democracy be “whatever we choose it to mean?”<sup>633</sup>

At first glance, defining democracy might be a simple endeavour. Delving into its details, however, proves the opposite. Even though democracy seems to be an overwhelmingly dominant ideal in today’s world<sup>634</sup> or as it is described by one scholar: “very nearly the only game in the town”,<sup>635</sup> there is nevertheless no unanimously accepted definition by scholars. Sometimes even those who are fighting for democracy might find it difficult to offer an exact definition of what they are fighting for.<sup>636</sup> Today, the literature on democracy offers innumerable definitions, which are accompanied by endless discussion. This is one of the reasons why scholars apply various adjectives to make clear what they have in mind when they talk about democracy, for example: *representative, liberal, illiberal, deliberative, participatory, parliamentary, direct, indirect, consensus, majoritarian*. These are just some of the adjectives that are widely used in the literature.<sup>637</sup>

Democracy as a form of government is widely acknowledged in today’s world mainly because this form of government is seen as the politico-morally best and most legitimate form

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<sup>631</sup> It should be stressed once again that we benefit a lot from the line of argument provided by Richard Albert, “Nonconstitutional Amendments”, p.11 etc.

<sup>632</sup> Of course, from the historical point of view the idea and practice of democracy goes back to Ancient Greece, to the *polis* of Athens. This historical aspect is, however, less important for our purposes here, and thus we can ignore that historical phase.

<sup>633</sup> David Beetham, *Democracy: A Beginner’s Guide* (Oxford: Oneworld, 2005), p. 1.

<sup>634</sup> Or as said by an eminent scholar, it is “close to nonnegotiable” Ian Shapiro, *The State of Democratic Theory* (Princeton; Oxford: Princeton University Press, 2003), p. 1.

<sup>635</sup> Scheppele, “Democracy by Judiciary- (or Why Courts Can Sometimes Be More Democratic Than Parliaments”

<sup>636</sup> The anecdote behind this statement comes from Frank Cunningham, *Theories of Democracy* (London ; New York: Routledge, 2002), p. 2.

<sup>637</sup> For some other adjectives used by scholars when discussing different type of regimes associated with democracy see David Collier and Steven Levitsky, “Democracy with Adjectives: Conceptual Innovation in Comparative Research” *World Politics* 49, no. 3 (1997).

of government possible.<sup>638</sup> The moral justification lies in the fact that people in a democratic government give their will to another, in the formation of the which the people's will plays a crucial role. Or to speak from the moral point of view, the formation of a political order to be governed by the people is said to originate from the aggregation of people's will, which, in turn, will be subject to the order thus established. Even though there is a slight distinction between suggesting that the morally best form of government is a democracy and that the representative form of democratic government is the best form of government, at the practical level the difference almost disappears.<sup>639</sup> Yet, the two converge around the notion that democracy is a clear contradistinction to an autocratic government, in which the people's will is subject to the will of a ruler, in the formation of which they have no role or say.<sup>640</sup>

The philosophical and political foundations of democracy are expressly formulated in Jean-Jacques Rousseau's *magnum opus*, *The Social Contract*.<sup>641</sup> In spite of the endless discussion concerning the concept of *general will*, which Rousseau formulated to account for and justify the democratic foundation of sovereignty (of state),<sup>642</sup> some sort of derivation or interpretation of the term *general will* has led scholars to accept and/or contest the concept of majority will.<sup>643</sup> The concept of majority will, in turn, finds its immediate implication, however contested it is, in the idea of representation<sup>644</sup> – since the representative form of

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<sup>638</sup> Allan Buchanan argues that only a democratically authorized political power can supply the conditions of political legitimacy. Allen Buchanan, "Political Legitimacy and Democracy" *Ethics* 112, no. 4 (2002), p. 693.

<sup>639</sup> The latter view is generally advocated by utilitarians, and clear-cut support for it was provided by John Stuart Mill. In Mill's view, "the ideally best form of government is that in which the sovereignty, or supreme controlling power in the last resort, is vested in the entire aggregate of the community; every citizen not only having a voice in the exercise of that ultimate sovereignty, but being, at least occasionally, called on to take an actual part in the government, by the personal discharge of some public function, local or general" John Stuart Mill, *Essays on Politics and Society (Considerations on Representative Governments)*, ed. J. M. Robson, *Collected Works of John Stuart Mill* (Toronto ; Buffalo: University of Toronto Press, 1977), pp. 403-404. Indeed, the very subtitle of the section of Mill's essay in which the excerpt appears is "That the Ideally Best Form of Government is Representative Government"

<sup>640</sup> For a more detailed discussion of philosophical foundations of democracy see Hans Kelsen, "Foundations of Democracy" *Ethics* 66, no. 1 (1955), pp. 1-28. Democracy is said to legitimate the use of political power better than any other possible forms of government see Giorgio Agamben, "Introductory Note on the Concept of Democracy" in *Democracy in What State?* (New York: Columbia University Press, 2011), (stating that "[d]emocracy is a form of government as well as a means through which political power is legitimated") p. 1. A somewhat more liberal view of this kind is offered by Ian Shapiro, as the following lines demonstrate: "... democracy is better thought of as a means of managing power relations so as to minimize domination" Shapiro, *The State of Democratic Theory*, p. 3

<sup>641</sup> Jean Jacques Rousseau, *The Social Contract and Discourses*, ed. Ernest Rhys, trans. G.D.H. Cole, Everyman's Library (London ; New York: J. M. Dent & Sons Ltd ; E. P. Dutton & Co., 1916; reprint, 1923).

<sup>642</sup> See Book II, Chapter I-IV *The Social Contract* in *Ibid*.

<sup>643</sup> For the discussion of the concept of general will see Christopher Bertram, *Routledge Philosophy Guidebook to Rousseau and the Social Contract* (London ; New York: Routledge, 2004), pp. 97-127 and Joshua Cohen, *Rousseau- a Free Community of Equals* (Oxford ; New York: Oxford University Press, 2010), pp. 23-59.

<sup>644</sup> But Rousseau is against the idea of representation of sovereignty. He states that [s]overeignty ... cannot be represented; it lies essentially in the general will, and will does not admit of representation: it is either the same,



government is regarded, at the practical level, as the most convenient, feasible and compatible with the idea of democracy.

Today's idea of democracy found its institutional design in the majority-decision making mechanism, which is institutionalized as comprising people's representatives elected by the universal, equal and free suffrage. In this sense, the essence of the exercise of democracy consists in competing for the majority's vote;<sup>645</sup> who will govern the state. This is what Ian Shapiro calls the aggregative tradition of democracy, and as opposed to the aggregative tradition, he puts the deliberative tradition of democracy, which values deliberation as a way to construct or manufacture the common good, which democracy is believed to serve.<sup>646</sup>

To cut a long (hi)story short, we can jump from these initial remarks to the issue of judicial review, which is regarded by some as a sort of constraint on the majority will, which is one of the main principles of democracy.

#### **4.1.1. Democracy and Legitimacy of Judicial Review**

Much of the theoretical debate concerning legitimacy of judicial review has been brought into light by the American context. This is no coincidence given that judicial review as an institution was born in this country.<sup>647</sup> In this discussion, particular and important attention has been directed to the question of whether it is legitimate to have this institution in a (representative) democratic regime. In this section, we will try to benefit from the American literature concerning the discussion on legitimacy of judicial review.

Although the debate itself has a long history, we will focus our attention only on the recent discussions, since they are, in some way, built upon the foundations of the background

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or other; there is no intermediate possibility. The deputies of the people, therefore, are not and cannot be its representatives: they are merely its stewards..." p. 82.

<sup>645</sup> This view that democracy is a competitive enterprise for majority's vote is associated with Joseph Schumpeter. Cunningham, *Theories of Democracy*, p. 9-10.

<sup>646</sup> Shapiro, *The State of Democratic Theory*. pp. 2-3.

<sup>647</sup> Though, as noted by Michel Rosenfeld, it is interesting to notice that even the European model of judicial review tends to be more political with its *ex ante* and abstract judicial review, there was little challenge about its legitimacy in Europe, as opposed to the case in the US. Rosenfeld, "Constitutional Adjudication in Europe and in the United States", p.635.

debate.<sup>648</sup> Prior to it, however, a brief summary will be given on the basic arguments of the cases for and against judicial review.

The opponents of judicial review argue that since judicial review is exercised by a court, which is composed of appointed rather than elected members, and thus since it is not accountable to people, it is inherently antidemocratic.<sup>649</sup> The supporters of this view seem to rely on a procedural understanding of democracy. On the contrary, the supporters of judicial review attempt to overcome such arguments by trying to identify democracy with some substantial values, and mainly with fundamental rights and freedoms. Yet, they do not necessarily oppose the procedural (majoritarian) premise of democracy.<sup>650</sup>

In this respect, the most comprehensive discussion takes place between Ronald Dworkin and Jeremy Waldron. While the former supports the judicial review and finds no incompatibility between democracy and judicial review, the latter raises various points against it.

Ronald Dworkin builds his case for judicial review on a results-driven notion. His approach to the issue is in some ways normative and in some ways descriptive. The descriptive sense sticks to the democracy running in the United States (and probably in Canada). Dworkin thinks that in order to assess the legitimacy of judicial review, it must be clear what one

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<sup>648</sup> For a background discussion *see*, among others, Freeman, “Constitutional Democracy and the Legitimacy of Judicial Review “. (Arguing that when democracy is conceived not as a form of government but as form of sovereignty, then judicial review, under some conditions, can be conceived as a contribution to maintaining the democratic ideal, which means the equal political rights and majority rule, but also as background conditions, protecting some basic rights).

<sup>649</sup> The most prominent adherent of this view is Alexander Bickel, who is famous for the term ‘counter-majoritarian difficulty’ and who states that “... when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, 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” *see* Bickel, *The Least Dangerous Branch*, pp. 16-17.

<sup>650</sup> The discussion is, in some sense, related to what some scholars mention as the paradox of constitutional democracy. For example, Jürgen Habermas states that while the classical principle of democracy meant the unrestricted realization of citizens’ will-formation to govern themselves, the modern understanding brings alongside the classical principle another one, which is the rule of law. The paradox stems from the fact that this latter principle may impose some limits on democracy. Habermas suggests that [i]f the normative justification of constitutional democracy is to be consistent, then it seems that one must rank the two principles, human rights and popular sovereignty” Jürgen Habermas, “Constitutional Democracy: A Paradoxical Union of Contradictory Principles?” *Political Theory* 26, no. 6 (2001), p. 767. What Habermas attempts is to reconcile the two principles, or in other words, to avoid the so-called paradox. Similarly, Frank Michelman – who seems, at the last resort, to hold an substantial understanding of democracy that springs, not from political morality, but from logic – points to this issue in a different way, in that he finds democracy and constitutionalism to be in conflict with each other and judicial review is the main aspect of this conflict. In his view, those who support judicial review seem to consider democracy in light of some substantial rights, whereas opponents rely on procedural understanding of democracy. Frank I. Michelman, “Brennan and Democracy” *California Law Review* 86 (1998), pp. 399-401, and p. 420.

conceives of democracy in the first place.<sup>651</sup> For him, judicial review is compatible with democracy, but he conceives democracy in a particular way. The decisive question for Dworkin is “[h]ow should a political community that aims at *democracy* decide whether the conditions democracy requires are met?”<sup>652</sup> In order to treat Dworkin’s argument fairly, we need to explain it in further details. His arguments for the legitimacy of judicial review are built on a particular (and for him the correct) understanding of (American and Canadian) democracy. Accordingly, for Dworkin democracy cannot *only* mean the majoritarian premise, which stresses and reproduces the procedural understanding of democracies, and which only means that a legitimate “[political] decision that is reached is the decision that a majority or plurality of citizens favors...”<sup>653</sup>

In his view, democracy “like... other forms of government involves collective action”<sup>654</sup> And there are two types of collective action that can be used to understand what type of democracy is in play in a given system. These are communal and statistical types of collective actions. In the latter type, a collective action amounts to coincidental aggregation of individual choice or preference. Namely, in the statistical type, each individual’s choice is taken into account for some statistical function – for example, to determine majority-vote, etc. The communal type, on the other hand, implies a collective action of a community *qua* community. In other words, the community is supposed to act collectively when the individuals within that community (or group) assume “the existence of the group as a separate entity”<sup>655</sup> In this regard, the best example Dworkin gives – in fact quoting from John Rawls– seems to be an orchestra playing a symphony. Each musician in the orchestra plays his/her own instrument to contribute to the performance of the group and each musician assumes the existence of the orchestra as a separate entity. In this respect, Dworkin’s account of democracy entails some substantial premises, such as equal treatment of all members of the community, which must be structured into the institutional design of the political entity.

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<sup>651</sup> Christopher Eisgruber, favouring judicial review as an institution, makes a similar point claiming that “[i]f we deepen our understanding of democracy, it becomes possible to understand the Supreme Court as a sophisticated kind of representative institutions”, p. 48. His conception of democracy, like others who favour judicial review, relies on a non-majoritarian understanding. Samuel Freeman raises the same issue pointing out that “... the case for or against judicial review comes down to the question of what is the most appropriate conception of a constitutional democracy” Freeman, “Constitutional Democracy and the Legitimacy of Judicial Review”, p. 331.

<sup>652</sup> Ronald M. Dworkin, *Freedom’s Law- the Moral Reading of the American Constitution* (Oxford ; New York: Oxford University Press, 1996; reprint, 2005), p. 33.

<sup>653</sup> Ibid. p. 16.

<sup>654</sup> Dworkin, “Equality, Democracy, and Constitution: We the People in Court”, p.329.

<sup>655</sup> Ibid. p. 329.

Following this premise, he further argues that the type of democracy someone conceives of will reveal his/her approach to judicial review. If it is the statistical type, then democracy will amount to no more than a majoritarian decision-making procedure. In this understanding each individual is accepted as acting on his/her own desire and interest and any non-majoritarian institutional design would be contrary to this type of democracy. However, if it is the communal type, then decisions are said to be taken by a distinct political entity, “the people as such”,<sup>656</sup> and this entity, in order to be qualified as a genuine entity, requires some conditions. He calls these *the relational* (in addition to *structural*) conditions of a genuine political community,<sup>657</sup> which can be considered as fitting to democracy.

A (moral) member of a genuine community can be thought as a member of the community only if the community “gives that person a *part* in any collective decision, a *stake* in it, and *independence* from it”<sup>658</sup> The corollary of these three conditions must be determined or guaranteed by the constitution of the community. So the system must be based on universal suffrage; each person should have a right to vote, and one vote only. In addition, some fundamental freedoms and rights, such as freedom of speech, assembly, demonstration, religion and conscience must be recognised and protected. Finally, each individual must be treated equally when participating in communal matters. Or to put it succinctly, no one should be excluded from communal affairs.<sup>659</sup>

Only under these conditions can talking about democracy (in the communal sense of the collective action) make sense. In this connection, democracy means that “the citizens of a political community govern themselves, in a special but valuable sense of self-government, when political action is appropriately seen as collective action by a partnership in which all citizens participate as free and equal partners, rather than as a contest for political power between groups of citizens”<sup>660</sup>

Consistent with his communal understanding of democracy, Dworkin argues that any constitutional constraints on a majority decision, which are the conditions of democracy and a genuine political community, should not be seen as inconsistent with the integrated communal

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<sup>656</sup> Ibid. p. 330.

<sup>657</sup> Like Jeremy Waldron and Richard Fallon, as we shall see later, Dworkin, too, makes his case rely on a number of conditions. Thus, it is sometimes unclear if he is making normative or empirical points.

<sup>658</sup> Dworkin, *Freedom's Law*, p. 24.

<sup>659</sup> Dworkin, “Equality, Democracy, and Constitution: We the People in Court”, p.337.

<sup>660</sup> Ronald M. Dworkin, “The Partnership Conception of Democracy” *California Law Review* 86 (1998), p. 453.

understanding of democracy.<sup>661</sup> Nor should an institution like a constitutional court, which, as historically shown, strengthens the capacity to improve the conditions of genuine democracy, be ruled out as undemocratic.<sup>662</sup> He suggests that a non-majoritarian procedure can be upheld “when this would better protect or enhance the equal status that it declares to be the essence of democracy”.<sup>663</sup> As a result, judicial review is a legitimate institution, since it protects and improves the requisites of (a genuine) democracy.

Closely connected with his idea of democracy, his theory of law, i.e. law based on interpretation, deserves further attention. Dworkin argues that a constitution of a democratic regime, which contains a bill of rights, necessarily and inevitably entails a moral reading of these rights.<sup>664</sup> Even though he argues that the moral reading of a constitution does not call for a particular institutional design – such as a constitutional court authorized to have the last word about the constitution,<sup>665</sup> this moral reading (interpretation of a constitution based on principles) would be better carried out by a court to protect democratic conditions, because a legislature composed of people’s representatives are open to political pressures, and thus it is not well designed to make deliberation based on principles.<sup>666</sup>

Contrary to Dworkin, Jeremy Waldron is strongly against the judicial review. His approach is also a normative one. For him, the strong model of<sup>667</sup> “judicial review of legislation is

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<sup>661</sup> Dworkin suggests that “[t]here is nothing of Hegel in the thought that leads most people to say, of some collective action, that “we” did it” Ibid. p. 455. He further argues that the communal type of collective action reminds us of Rousseau’s general will, but in order to prevent any totalitarian attribution or mystification in the communal understanding of democracy, he suggests *integrated* communal collective action, which gives importance to the individual. In the integrated communal collective action, each individual *qua* member of the community takes or feels the responsibility of the failure or the success of the action of the community as a whole. Suffice to refer to the position of a musician in the case of the failure or the success of an orchestra. Each musician performs his part, but takes the responsibility of the failure of other musicians. As opposed to integrated communal collective action stands the monolithic collective action, in which both the unit of judgment and responsibility is the community as a whole. In the integrated collective action, only the unit of responsibility remains in the community, but the unit of judgment remains in individuals. For Dworkin, the liberal ideal would be saved in this way. Dworkin, “Equality, Democracy, and Constitution: We the People in Court”, pp. 335-336.

<sup>662</sup> Dworkin, “The Partnership Conception of Democracy”, p.458.

<sup>663</sup> Dworkin, *Freedom’s Law*, p. 17. Finally, he supports the judicial review by arguing that “individual citizens may be able to exercise the moral responsibilities of citizenship better when final decisions are removed from ordinary politics and assigned to courts, whose decisions are meant to turn on principle, not on the weight of numbers or the balance of political influence” Dworkin, *Freedom’s Law*, p. 30.

<sup>664</sup> “According to the moral reading, these clauses [of the so-called Bill of Rights] must be understood in the way their language most naturally suggests: they refer to abstract moral principles and incorporate these by reference, as limits on government’s power” Dworkin, *Freedom’s Law*, p. 7.

<sup>665</sup> “The best institutional structure is the one best calculated to produce the best answers to the essentially moral question of what the democratic conditions actually are, and to secure stable compliance with those conditions” Ibid. p. 34.

<sup>666</sup> On the principles or rights thesis especially see *Hard Cases* in Dworkin, *Taking Rights Seriously*

<sup>667</sup> Strong model refers to the practice of judicial view in which a court is authorized to declare unconstitutional a piece of legislation, by means of which the said legislation may be struck out of the statute book, or equally they

inappropriate as a mode of final decision-making in a free and democratic society”<sup>668</sup> For Waldron, it is not only illegitimate in a democratic regime because “[b]y privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights”),<sup>669</sup> but also because it does not provide us with a better way to protect constitutional rights than a democratic legislature would.

Waldron relies on four assumption (or conditions) to make his argument convincing. The first assumption is that the society on which he builds his case for judicial review has well functioning democratic institutions, and includes a representative legislature elected on the basis of universal suffrage. The second condition is that the society has a healthy judicial system set up on a non-representative basis. The third is that most of the citizens and officials take the (individual and minority) rights seriously. Finally, regardless of the serious belief in rights, reasonable disagreement about rights exists.<sup>670</sup> In a nutshell, a liberal (value) system, with plural reference points about what is ‘good’ for each individual, must be widely in use in the society. When these four conditions are met in any society, judicial review cannot be accepted as a better or more legitimate way of protecting fundamental rights.

Waldron’s favourite country in this regard seems to be Britain (followed by New Zealand), where there is no (strong) judicial review of legislation. In his view, it was proven in Britain in the 1960s that the inexistence of judicial review of legislation does not mean weaker protection of individual rights; quite the opposite.<sup>671</sup> His process-based legitimacy – according to which, if everyone has a voice and vote in the process of decision-making, and if these voice and votes are taken seriously, then the outcome is legitimate for everyone<sup>672</sup> – provides the grounds to oppose the judicial review.<sup>673</sup> Apart from his ideal case, Waldron holds the

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may be authorized to decline to apply a statute in a particular case. Waldron, “The Core of the Case against Judicial Review”, p.1354.

<sup>668</sup> Ibid. p. 1348.

<sup>669</sup> Ibid. p. 1353.

<sup>670</sup> Ibid. p. 1360. For more on Waldron’s four assumptions see Waldron, “The Core of the Case against Judicial Review”, pp. 1359-1369.

<sup>671</sup> Waldron, “The Core of the Case against Judicial Review”, p.1349. According to Waldron, the debates in the House of Commons concerning a number of issues, such as the liberalization of abortion, the legalization of homosexual conduct between consenting adults, and the abolition of capital punishment, has proved that the legislature would not provide less protection of the individual rights than would be protected by the court. Furthermore, the protection by legislature of the rights would not undermine the liberal democratic principle of popular self-government.

<sup>672</sup> “Even though [one] disagrees with the outcome, she may be able to accept that it was arrived at fairly. The theory of such a process-based response is the theory of political legitimacy”. Ibid. p. 1387.

<sup>673</sup> Against Waldron’s argument, Richard Fallon offers further points that seem to deserve attention. For Fallon, Waldron’s arguments against the outcome-related reason and democratic legitimacy, and his argument that there

view that in other less liberal countries judicial review may be necessary to protect (constitutional) rights.<sup>674</sup>

As shown, the two scholars rely, in some way, on an ideal understanding of a democratic society. Based on the type of society they construct, they make their case for or against judicial review. Dworkin claims that the (true) meaning of democracy must be settled first, and then one can make a point about judicial review. Waldron takes an ideal society where liberal values are widely diffused. But, in one way or another, both views contain some ideal type.

To sum up, the debate concerning legitimacy of judicial review depends strictly on how one conceives of democracy. When the conception of democracy is procedural, judicial review is regarded as incompatible with democracy. When democracy is associated with some inherent or substantial values, their protection seems to provide a basis for the legitimacy of judicial review.<sup>675</sup>

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can be reasonable disagreement about the content of the rights, do not straightforwardly imply the refusal of the judicial review. For Fallon, “[i]f people can reasonably believe not only that there are truths about rights, but also that there are relatively epistemically reliable means of discovering those truths, then the fact of reasonable disagreement cannot, by itself, prove that one institution could not be better than another at reaching correct outcomes” Richard H. Fallon, Jr., “The Core of an Uneasy Case for Judicial Review” *Harvard Law Review* 121, no. 7 (2008), p. 1703. In Fallon’s view, the judicial review is not considered as legitimate on the basis of the idea that courts are better equipped for making correct decision about constitutional rights than legislature; this is the point, which seems to be directed against Dworkin. Rather, in Fallon’s view the legitimacy is based on the idea there are some more fundamental rights – such as free speech and right to vote, which ensure the “substantive consonance with democratic ideals” Fallon, “The Core of an Uneasy Case for Judicial Review”, p.1725, and which deserves over-enforcement rather than under-enforcement. Accordingly, both, legislature and courts, should be granted veto rights, because “a society might have good outcome-related reason to enlist both the legislature and the courts in protecting individual rights” Fallon, “The Core of an Uneasy Case for Judicial Review”, p.1705. Therefore, “a stronger case for judicial review in morally and politically non-pathological societies rests on the assumption that if either a court or the legislature believes that an action would infringe individual rights, the government should be barred from taking it” Fallon, “The Core of an Uneasy Case for Judicial Review”, p.1706.

<sup>674</sup> Waldron, “The Core of the Case against Judicial Review”, p.1352. This is the point that allows us to proceed into evaluating, empirically, the legitimacy aspect of judicial review in three jurisdictions, but this will be done later. We should mention, however, that even though Waldron does not count Germany as among his ideal (liberal democratic) models, we can suggest that Germany is close to his ideal model, yet this does not hinder us from evaluating empirically the legitimacy of judicial review of constitutional amendments in Germany. And obviously, we will suggest that Turkey and India are far from Waldron’s ideal cases; so the evaluation of legitimacy of judicial review in these two jurisdictions on the empirical basis will make much more sense. However, before proceeding to this, it might be useful to give some place to the arguments directed against that of Waldron.

<sup>675</sup> On the other hand, denying the dichotomy between procedural and substantial understanding of democracy, Walter Murphy emphasizes the importance of appealing to constitutional democracy, which, he believes, is the true nature of western political orders. In other words, using only democracy to determine the essential character of western political orders is misleading; one must appeal to the two different ideals of western democracy and constitutionalism. In his view these ideals are melded into one, which characterises the nature of today’s western political order. Murphy, “An Ordering of Constitutional Values”, p.707.

The substantial and procedural understanding of democracy can be a useful analytical tool with which to evaluate the legitimacy of judicial review of constitutional amendments on substantive grounds in the three jurisdictions. We will trace this line of argument when we examine our three countries in the following section.

Before proceeding, however, we will deal with the second concept that is crucial when talking about the legitimacy of judicial review of constitutional amendments: the concept of (popular) sovereignty. It seems that this concept is inevitably related with two other concepts: constituent and amending powers. We will dedicate a separate section to this below as they deserve detailed attention.

#### **4.1.2. (Popular) Sovereignty: Constituent Power vs. Amending Power**

On closer consideration, the issue we are dealing with seems to be strongly concerned with the concept of sovereignty, and more precisely with the concepts of constituent and amending power – and it has several aspects. The very immediate implications of our subject seem to involve the question of whether amending power can be limited or not in a democratic regime. It seems that together with the question of what kind of democracy runs in a system, the kind of understanding and practice of constituent and amending power that is in use (in a given legal and political system) will shed some further light on the issue of the legitimacy of judicial review of constitutional amendments.

Let us give a general definition of sovereignty before proceeding to elaborate further on the comparison between the two concepts – constituent power (*pouvoir constituant* or what Carl Schmitt calls ‘constitution making-power) and amending power (*pouvoir constitué*)<sup>676</sup>

The concept of sovereignty can be defined, generally, as the final decision-making power in a political regime. Of course, from the historical point of view, the use of the term ‘sovereignty’ usually corresponds to a specific period of time and specific historical circumstances. In this

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<sup>676</sup> In the literature, it is sometimes termed *pouvoir constituant originaire* (original constituent power), which creates a constitution *ex nihilo* and *pouvoir constituant dérivé* (derived constituent power), which is the power to amend the constitution. For more on this distinction see Kemal Gözler. “Pouvoir Constituant” (Place Published: Ekin Kitabevi, 1999), <http://www.anayasa.gen.tr/pconstituant.htm>. Another scholar rejects this distinction and states that there is only one *pouvoir constituant*; the so-called *pouvoir constituant dérivé* is the domesticated version of *pouvoir constituant* (*originaire*). Zimmer, “Jurisprudence Du Conseil Constitutionnel- 1er Janvier- 31 Mars 2003”, p.386. In this study we use the concepts of constituent power and amending power.



sense, the term sovereignty is the product of the modern (nation) state<sup>677</sup> and it is historically understood as the “ultimate territorial organ”<sup>678</sup> or what Jean Bodin calls “the greatest power to command”<sup>679</sup> which is absolute (unrestrained) and perpetual. In our explanation, we set aside the old discussion concerning whether sovereignty is, from the international law perspective, an indicator of an independent state or whether sovereignty consists of a pure and naked (violent) power of a nation to determine its future (the right to self-determination), thus it is, in any sense, limitless etc. Instead, we approach sovereignty from the constitutional law perspective, in that it implies the final decision-making body, organ, person etc.

For the reason just mentioned, the concept of constituent power would be a better term for the legally decorated version of the concept of sovereignty<sup>680</sup> since “the sovereign is the bearer of constituent... power”<sup>681</sup> Or, one can argue, the concept of sovereignty is used, from the French and American Revolution (written constitutional era) onwards, interchangeably with the concept of constituent power, but for specific purposes: i.e to locate “ultimate normative authority in a political order”<sup>682</sup>, to make “the fundamental political decision”<sup>683</sup>, or to found “the basis of legitimacy”<sup>684</sup> However, it should be noted that without putting it in a particular context, the concept of sovereignty cannot be reduced to (mean) the concept of constituent power.

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<sup>677</sup> “The unfolding of a complete theory [of sovereignty] awaited the development of the national State” Charles Edward Merriam, Jr., *History of the Theory of Sovereignty since Rousseau* (New York: The Columbia University Press, 1900), p. 13.

<sup>678</sup> Harold J. Laski, *The Foundations of Sovereignty and Other Essays* (New York: Harcourt, Brace and Company, 1921), p. 1. But of course the theoretical foundations of sovereignty, it is said, can be found in the classical writings of ancient Greek philosophers, more precisely in Aristotle’s *Politics*. Merriam, *History of the Theory of Sovereignty since Rousseau*, p. 11.

<sup>679</sup> Jean Bodin, *The Six Books of a Commonwealth*, trans. Richard Knolles (London: Impensis G. Bishop, 1606), p. 84.

<sup>680</sup> Renato Cristi, “Carl Schmitt on Sovereignty and Constituent Power” *Canadian Journal of Law and Jurisprudence* 10 (1997), p. 195. Some scholars use the two concepts interchangeably, for example see Andreas Kalyvas, who even uses the concept of constituent sovereign, Andreas Kalyvas, “Popular Sovereignty, Democracy, and the Constituent Power” *Constellations* 12, no. 2 (2005), p. 225; Lior Barshack, “Constituent Power as Body: Outline of a Constitutional Theology” *University of Toronto Law Journal* 56, no. 3 (2006), p. 186.

<sup>681</sup> David Dyzenhaus, “The Politics of the Question of Constituent Power” in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, ed. Martin Loughlin and Neil Walker (Oxford; New York: Oxford University Press, 2008), p. 130.

<sup>682</sup> *Ibid.* pp. 143-144.

<sup>683</sup> Schmitt, *Constitutional Theory*, p. 125 etc.

<sup>684</sup> Lucien Jaume, “Constituent Power in France: The Revolution and Its Consequences” in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, ed. Martin Loughlin and Neil Walker (Oxford - New York: Oxford University Press, 2008), p. 69.

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.<sup>685</sup> The definition of the constituent power is coined in the words of the French thinker Sièyes, who is said to have been the originator<sup>686</sup> of the concept more than two hundred years ago: “[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, be free from all constraints, from any form, except the one it deems better to adopt.”<sup>687</sup>

As said by a constitutional lawyer “[t]he constituent power is the secularized version of the divine power to create the world *ex nihilo*, to create an order without being subject to it”<sup>688</sup> Because of the unlimited capacity constituent power assumes in itself, Carl Schmitt associates the very nature of constituent power with (a sovereign) *dictatorship*.<sup>689</sup>

In connection with this definition, constituent power is generally said to have arisen from a combination of various historical events and political factors in a given country,<sup>690</sup> which is,

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<sup>685</sup> For a recent argument suggesting that the concept of constituent power cannot explain the effective continuity of a (written) constitution see Richard Kay, who suggests an alternative term: the constituent authority, which resembles, in many aspects, Hart’s rule of recognition. Richard S. Kay, “Constituent Authority” *The American Journal of Comparative Law* 59 (2011), pp. 721 etc. For a response to Richard Kay see David Dyzenhaus, who suggests the absolute abandonment of the use of the concept of constituent power in a liberal rule of law see Dyzenhaus, “The Politics of the Question of Constituent Power”, pp. 129-130. In the same line of argument see also David Dyzenhaus, “Constitutionalism in an Old Key: Legality and Constituent Power” *Global Constitutionalism* 1, no. 2 (2012).

<sup>686</sup> Schmitt, *Constitutional Theory*, pp. 126-127; Kemal Gözler, *Kurucu ktidar (Constituent Power)* (Ankara: Ekin Kitabevi, 1998), pp. 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 thoughts earlier than Abbé Sieyès. On this see Kay, “Constituent Authority”, p. 717

<sup>687</sup> Quoted from Kalyvas, “Popular Sovereignty, Democracy, and the Constituent Power”, p. 227

<sup>688</sup> 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), p. 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*, ed. Thomas McCarthy, trans. George Schwab (from second Revised Edition (1934)), Studies in Contemporary German Social Thought (Cambridge; Massachusetts, London: The MIT Press, 1985), p. 36.

<sup>689</sup> Schmitt, *Constitutional Theory*, p. 110.

<sup>690</sup> Neil Walker, and Martin Loughlin, “Introduction” in *The Paradox of Constitutionalism Constituent Power and Constitutional Form*, ed. Neil Walker and Martin Loughlin (Oxford - New York: Oxford University, 2007). For the historical events which are thought of having raised the constituent powers of Germany and France, respectively, see Christoph Möllers, “‘We Are (Afraid of) the People’: Constituent Power in German Constitutionalism” in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, ed. Martin Loughlin and Neil Walker (Oxford - New York: Oxford University Press, 2008), pp. 87-106; and Lucien Jaume, “Constituent Power in France: The Revolution and Its Consequences” in *The Paradox of Constitutionalism Constituent Power and Constitutional Form*, ed. Neil Walker and Martin Loughlin (Oxford - New York: Oxford University, 2007), pp. 67-86.

what Carl Schmitt calls, exceptions or exceptional circumstances.<sup>691</sup> The concept of constituent power, defined as the omnipotent lawgiver, goes beyond any legal framework; it is untrammelled.

Even though the definition seems to be simple, in that although its basic function – regardless of how it came about – is to *constitute* or *found* a political and legal order with all its foundational characteristics and principles,<sup>692</sup> the question of who holds or ought to hold constituent power seems to be problematic. For example, in order for constituent power to emerge, is it enough to admit that this power emerges, most of the time, of a violent or revolutionary moment in the history of a polity? Is this why Carl J. Friedrich states that “[t]he constituent power bears an intimate relation to revolution [?]”<sup>693</sup> If so, then how can we make sense of talking about democracy? To put it another way, in order to consider a political regime as a democracy, must the constituent power itself have developed out of a democratic process?<sup>694</sup> Or is it enough to approve the outcome document (constitution) by a plebiscite?<sup>695</sup>

From the description of constituent power, other questions arise. For example, what is the meaning of ‘people’ or ‘nation’ – as referred to in the definition: the people or the nation as

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<sup>691</sup> In Carl Schmitt’s view, the concept of constituent power, which is indeed another concept for sovereignty, is most visible in times of exception. Or to put it another way, sovereignty arrives from exceptional circumstances. With his famous formulation the “sovereign is he who decides on the exception” In times of exception, which cannot be codified by the legal system and which refers “to a danger to the existence of the state”, the true meaning of the sovereign can be grasped. Schmitt, *Political Theology*, p. 5, 6. And in times of an exception, the sovereign can exploit the power to suspend the present constitution or to introduce a new one. The latter example is what is commonly described as the constituent power, thus Carl Schmitt added another aspect to the commonly described version of the constituent power.

<sup>692</sup> Carl Schmitt describes the function of constituent power as the following: “The constitution-making power is the political will, whose power or authority is capable of making the concrete, comprehensive decision over the type and form of its own political existence” Schmitt, *Constitutional Theory*, p. 125.

<sup>693</sup> Carl Joachim Friedrich, *Constitutional Government and Politics* (New York ; London: Harper & Brothers, 1937), p. 113. But Carl J. Friedrich does not claim that revolution is the only way for constituent power to emerge. Quite the contrary, he argues that not all revolutions can be accepted as the way of holding or assuming the constituent power.

<sup>694</sup> One of the best theories that captures the logic of this view is probably Rousseau’s social contract theory. Rousseau states that “[e]ach of us put his person and all his power in common under the supreme direction of the general will and, in our corporate capacity, we receive each member as indivisible part of the whole” This whole Rousseau calls “Sovereign”. Rousseau, *The Social Contract and Discourses*. pp. 15-16. Thus defined, there is no method other than democracy to constitute the Sovereign.

<sup>695</sup> As an answer to this kind of questions, Andrew Arato discusses five possible models of constitution making and four corresponding models of democracy. In all of these models, the concept of constituent power is at play. He indicates the Constitution of the Fourth French Republic as an example of the democratically-created constituent assembly. For him, it is difficult to imagine a more procedurally democratic constituent power. Arato, “Forms of Constitution Making and Theories of Democracy”, p.192. Arato changes his view about the democratic constituent power. He now seems to believe that it is not the mode of constitution-making that secures democratic legitimacy of constitution-making, but rather other procedural and substantive mechanisms – such as pluralism, consensus, publicity, new elections, legality – that are better able to secure that legitimacy. Arato, “Democratic Constitution-Making and Unfreezing the Turkish Process”, pp. 474-476.

they exist at the present time? Or does the idea of people employed in the definition go beyond or transcend all generations? Is it somewhat a mystic or transcendental notion of people? On this issue, Ulrich Preuss suggests that the question “[w]hat is the substance of constituent power?” may be answered in various ways,<sup>696</sup> but chiefly in two ways: the *demos* and the *ethos*. Whether the *demos* or the *ethnos* model is accepted as the constituent power relies on the historical peculiarities of each state. In this regard, Preuss gives two major examples from Europe. He points out that the French system was affected by the *demos* model of constituent power, that is, the entire people constituting the nation; whereas the German system was influenced by the *ethnos* model, that is, the culturally – and linguistically – determined ethnic group. These different models of constituent power, according to him, determine the character of the constitution and even the way constitutionalism is understood and practiced. For example, equal citizenship is among the core of the French constitutionalism affected by the *demos* model of constituent power, whereas in Germany, even though the parliamentary democracy was endorsed, the *ethos* model of constituent power is accepted.<sup>697</sup>

Another question is 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”<sup>698</sup> How can the constituent power of people be capable of acting itself? Does it need representation by some organ or person? Even though Carl Schmitt himself seems to believe strongly that the constituent power of people cannot be represented, he does suggest that “the distinctiveness of the subject of [the] constitution-making power”<sup>699</sup> causes some difficulties, such as the unstable and disorganized characteristics of the people to act.<sup>700</sup> Thus, representation of any kind seems to be necessary, if not inevitable. In this sense, Lucien Jaume makes clear that according to Sièyes, constituent power could be attained through the

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<sup>696</sup> Preuss, “Constitutional Powermaking for the New Polity: Some Deliberations on the Relations between Constituent Power and the Constitution”, p.656.

<sup>697</sup> Ibid. pp. 644-650. For Carl Schmitt, “[d]emocracy ... requires first homogeneity and second – if the need arises – elimination and eradication of heterogeneity” Charles Barbour, “Exception and Event- Schmitt, Arendt and Badiou” in *After Sovereignty*, ed. Charles Barbour; George Pavlich (New York: Routledge, 2010), p. 85. For a similar line of remark see David Dyzenhaus, “The Legitimacy of Legality” *The University of Toronto Law Journal* 46, no. 1 (1996), p. 136. Thus it is not coincidental that Carl Schmitt always stresses the existence of (political) unity on which a constitution is built or erected; not vice versa. Schmitt, *Constitutional Theory*. pp. 75-82.

<sup>698</sup> Jaume, “Constituent Power in France: The Revolution and Its Consequences”

<sup>699</sup> Schmitt, *Constitutional Theory*, p. 131.

<sup>700</sup> Schmitt provides a kind of solution by saying that even though the direct constitution-making power of the people causes some difficulties, the people can at least express its will by a simple ‘yes or no’, by consent or rejection of a proposal. Ibid. Therefore, this suggestion does not discard, as Schmitt himself accepts and demonstrates the possibility of, at least, a commissioned (constitution-making) assembly either to adopt or to draft and propose a constitution to the consent or rejection of the people.

representation of people,<sup>701</sup> which would be exercised through a body dedicated exclusively to carrying out the task of creating the Constitution.<sup>702</sup> Richard Kay suggests a similar idea. He upholds the view that in order to attribute the constituent authority to *the* people, a reference to representatives is (almost) inevitable, because, he states “[t]he people... cannot exercise its will directly. References to *the people* as a constitution-maker must be to the “imaginary collective body of the group” capable of signifying the assent of the real human beings who are to be governed by the constituted power. We need, therefore, to identify some authentic representative of *the people* whose decisions may plausibly be attributed to that body”<sup>703</sup>

So much for the constituent power. We can now move on to the other, and for our study much more important, concept: amending power (or constituted power for constitutional amendment). The basic description of the concept of amending power is that this power functions within a given legal system established by the constituent power to amend constitutional provisions. It can amend one or more provisions of the constitution or it can make large-scale amendments, but in either case within the boundaries determined by the constituent power. What that boundary is, and who can decide what it is, needs to be answered in this enquiry.

Even though the competence the amending power holds in itself is an extraordinary one (that is to say, it is not like passing statutes), this power is nevertheless (assumed to be) limited. Namely, the amending power operates, in any circumstances, within the legal limits determined by the constituent power. This outlook does not change even when the amending power is exercised by an assembly convened particularly for this purpose. In short, as said by Schmitt, “[t]he organs authorized for a constitutional revision do not become sovereign at all as a result of this jurisdiction”<sup>704</sup>

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<sup>701</sup> It was Sièyes’ ambition, after having being elected to the National Assembly, to elaborate and substantiate his idea concerning the representation or representative government. In his view, representation is the core element, and maybe the necessity of modern society, which relies on division of labour. For more on Sièyes’ idea concerning representation *see* Pasquale Pasquino, “Emmanuel Sieyes, Benjamin Constant Et Le Gouvernement Des Modern. Contribution À L’histoire Du Concept De Représentation Politique” *Revue Française de Science Politique* 37, no. 2 (1987). On the other hand, Carl Schmitt does not deny representation as a means to establish a constituent power. But he does think that the constituent power either composed of representatives of people or one monarch truly implies the dictatorial or monarchical nature of the concept of sovereign either temporarily or continuously.

<sup>702</sup> Only then would “the supremacy of this founding text over all later laws... be solemnly affirmed” Jaume, “Constituent Power in France: The Revolution and Its Consequences”, p.69.

<sup>703</sup> Kay, “Constituent Authority”, p.743, (the reference is avoided).

<sup>704</sup> Schmitt, *Constitutional Theory*, p. 155.

There are adherents to the normative view that in a genuine democracy there can be no constraints upon people's amending power. However, constitutions of various states impose in practice (as we have seen earlier) some limits on amending power. Thus, except for the normative approach, our quest for an answer to the question of whether amending power can be limited or not entails an empirical analysis.

For example, it is commonly accepted that the UK parliament has ultimate and limitless power to determine what the law is on all levels – constitutional or statutory.<sup>705</sup> This does not imply that court cannot review the act of the UK parliament (it is difficult to maintain such a view especially after the Human Rights Act of 1998).<sup>706</sup> It rather suggests that whatever the courts decide in the UK, the Parliament can reverse any decisions or interpretations that it finds undesirable or unpleasant. But this is not the case in all countries.

In the three countries we are examining in this study, there are explicit (in Germany and Turkey) and implicit (in India) limitations imposed on the amending power. Though in the German case, no such limits have been imposed by the Federal Constitutional Court so far. In this sense, when we are analysing the legitimacy aspect on the basis of three countries, we will question and scrutinize this aspect empirically.

In order to achieve this, we will need a working framework of the concept of legitimacy. This needs to be suitable for an empirical analysis, in that it must provide a descriptive approach rather than normative one. The normative approach that we referred to above concerning the legitimacy of judicial review can be taken as reference within the scope of descriptive approach to legitimacy.

#### **4.1.3. The Concept of Legitimacy**

As revealed in the literature, the concept of legitimacy has various legal, sociological, moral<sup>707</sup> and political<sup>708</sup> dimensions. Yet when it is invoked, a moral-political, and thus a

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<sup>705</sup> Though "through a simple majority decision of Parliament, England could [not] be changed into a soviet republic" Ibid. p. 146.

<sup>706</sup> On this issue see Young, "Sovereignty: Demise, Afterlife, or Partial Resurrection"

<sup>707</sup> "Legitimacy depends on the values injected into the rules..." Dyzenhaus, "The Legitimacy of Legality", p.139.

<sup>708</sup> Richard H. Fallon, Jr., "Legitimacy and the Constitution" *Harvard Law Review* 118, no. 6 (2005). Though, 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. For Weber, legality is the same as legitimacy (or better, for the

normative, connotation quickly springs to mind. Thus, for a long time the leading question for political scientists and theorists has been: what gives some people the right/authority to rule over others? Or, what forces some people to obey laws that they disagree with or even hate? In short, what makes a government legitimate? These normative questions have been the pivotal issues in the modern era since Rousseau (or perhaps earlier) and still.<sup>709</sup>

The search for legitimacy seeks a holistic basis for the wielding of political power, but legitimacy can also be sought for institutional devices. That is to say, not only can the legitimacy of exploiting political power or foundation of the state at large be assessed, but the legitimacy of an institution within a political structure can also be evaluated. We have seen this kind of evaluation regarding judicial review as an institution.

In addition to the normative approach,<sup>710</sup> the concept of legitimacy can be approached from a descriptive perspective as well. The legitimacy of regime or an institution can be analysed or assessed by relying on a process – or outcome-based consideration. Namely, the way in which legitimacy is analysed can be based on the process of decision-making, or the outcome-based consideration of decision-making. As we have seen above in more detail concerning the legitimacy of judicial review, Jeremy Waldron's opposition to the judicial review focuses on the lack of process-related considerations, whereas Ronald Dworkin's case for judicial review emphasises the outcome-related considerations. This suggests that there is a reference/evaluation point, by means of which legitimacy is captured or measured.

However, a normative approach can pose the risk of bias, especially when the legitimacy of a certain outcome or institution is assessed. In order to reduce this as much as possible – although avoiding it completely may not be possible – a descriptive framework can be adopted. To this effect, some scholars have suggested various definitions of the concept of legitimacy. For example, according to Seymour Lipset, even though legitimacy is an evaluative concept, his definition might be turned into a descriptive one as well. According to Lipset, “[g]roups regard a political system as legitimate or illegitimate according to the way in

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rational legitimacy), which is to be used in the era of the modern state or under a modern state regime. According this attribution, legitimacy under a modern state would mean the rational exploitation of power, the exploitation of which is determined by the rational rules (legality). For more on Max Weber's concept of legality and legitimacy see D'Entrèves, “Legality and Legitimacy”, pp. 689-691 and Dyzenhaus, “The Legitimacy of Legality”, p.137.

<sup>709</sup> Peter G. Stillman, “The Concept of Legitimacy” *Polity* 7, no. 1 (1974), p. 33.

<sup>710</sup> According to Allen Buchanan's normative approach to political legitimacy, the concept implies that “an entity has political legitimacy if and only if it is morally justified in wielding political power, where to wield political power is to attempt to exercise a monopoly, within a jurisdiction, in the making, application, and enforcement of laws” Buchanan, “Political Legitimacy and Democracy”.

which its values fit with theirs”<sup>711</sup> Thus, we can suggest that as long as those values could be identified by a social scientist objectively (as far as possible), this would give a neutral outcome.

The problem in this definition, however, does not derive from its descriptive character, but rather from the difficulty of its operationalisation in practice. That is to say, it is very difficult to apply this definition empirically because of the plurality of value systems in a given society if legitimacy is understood as either present or absent. Thus, it would not be possible to come up with a convincing outcome on the basis of Lipset’s definition. This might lead someone to give up considering legitimacy. Therefore, we need to find another one, and we can find it in Peter Stillman’s elaboration of legitimacy.

Stillman offers a modified version of Lipset’s definition, which not only seems feasible, but can also provide us with a tool to analyse our case, although it too should be modified. According to Stillman, “legitimacy is the compatibility of the results of governmental output with the value patterns of the relevant systems”<sup>712</sup> He determines four relevant systems to decide on legitimacy: “the international system, the society, groups within the society, and individuals within the society”<sup>713</sup>

Before turning to the application of this simple definition to our cases, some other relevant and important aspects of Stillman’s conception of legitimacy must be uncovered and emphasised.

Stillman describes the value-patterns as “...the generalized criteria of desirability, the standards of evaluation, the normative priorities, for the society”<sup>714</sup> For him, this is to suggest that the value patterns of a society are similar to that of national character as used by

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<sup>711</sup> Seymour Martin Lipset, *Political Man- the Social Basis of Politics* (Garden City, New York: Doubleday&Company, 1960), p. 77.

<sup>712</sup> Stillman, “The Concept of Legitimacy”, p.42. As to values, Stillman refers to those identified by Harold Lasswell; thus he call them Lasswellean values. These are: power, respect, rectitude, affection, well-being, wealth, skill, enlightenment. Stillman, “The Concept of Legitimacy”, p.39 (footnote 20).

<sup>713</sup> Stillman, “The Concept of Legitimacy” Vicki Jackson, in a recent article argues that “ [t]he[...] transnational constitutional norms are an important resource for understanding the possibility of unconstitutional constitutional amendments... [T]he views of the international community might be understood as a fourth necessary source of legitimacy for national constitutions [and also for unconstitutional amendments.]” Jackson, “Unconstitutional Constitutional Amendments”, p.66. Vicki Jackson’s argument seems to be consistent with Stillman’s general conception of legitimacy, except for the fact the she makes the international community’s view necessary for measuring legitimacy.

<sup>714</sup> Stillman, “The Concept of Legitimacy”, p.40.



historians, or to civic or political culture as used by political scientists. He states that “the value pattern of a society is the character of the society”<sup>715</sup>

Stillman suggests that the compatibility of the governmental outcome with the value pattern must be understood as an assurance of the maintenance and continuation of the value pattern of the society in question (here that value pattern must be understood as a constitutional value pattern). This suggests that the outcome must not result in value ‘schizophrenia’ or self-destruction, but it does not imply that there must be no deviance at all. Quite the opposite: there might be some deviance from the existing value pattern.<sup>716</sup>

On the other hand, since it is almost impossible for a governmental output to be compatible with all value patterns of four systems Stillman concedes that “[l]egitimacy is a matter of degree”,<sup>717</sup> namely that there would inevitably be some degree of illegitimacy given the plurality of value patterns of different groups in a given society, or of the individuals in that society or of society as a whole. The tension between the legitimacy and illegitimacy, or put it another way, the weight of one over the other may result in a reform in (future) governmental output. The reform might be positive or negative. Consistent with this, Stillman points out that the value patterns of a society, a group, or individuals may change over the course of time.

As governmental outcomes, Stillman takes into account not only promulgated laws but any action. In this connection, we will attempt to apply his definition to assess the legitimacy of judicial review of constitutional amendments (a judicial outcome). We will do this empirically on the basis of our three countries under review. However, it is obvious that managing to adapt Stillman’s definition into an analysis of the legitimacy of the issue at hand is difficult. At this point, Stillman seems to be right in asserting that the task of assessing legitimacy cannot be carried out by one discipline alone. Determination of value patterns of a group or a society requires the input of “psychologists, sociologists, political scientists and cultural anthropologists”.

Stillman states that this definition is one for the political scientists. Therefore, it requires some modification to adapt it to our purpose. As we have seen, Stillman suggests that value patterns as a tool to assess legitimacy (of a governmental output) can be associated or connected with

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<sup>715</sup> Ibid.

<sup>716</sup> Ibid. p. 41

<sup>717</sup> Ibid. p. 43.

the national character of a given country. This suggestion is, however, too broad; it will need to be adjusted for our specific purpose.

Stillman's framework can be adjusted by narrowing the connection he makes between the value patterns of a society and national character. In this respect, it seems that constitutional identity can be used in a way that is somewhat similar to national character. Thus, the constitutional identity suggests a narrower framework for value patterns. So, in terms of the value patterns Stillman suggests within the scope of his conception of legitimacy, we will use the framework indicated by the concept of constitutional identity – which is more relevant to our aim and focus in this study. The constitutional identity will thus be considered in terms of whether the governmental output is consistent with or legitimated by it.

After laying out the framework of legitimacy based on Stillman's conception, let us determine more precisely the (governmental-judicial) output(s) of legitimacy of which we will try to assess in the parts to follow. To do this, we should focus again on the jurisdictions we have selected: i.e. Germany, India, and Turkey. However, we can immediately detect that there is one common output, which refers to holding an extra-ordinary competence (of substantive judicial review of constitutional amendments) by the highest courts of each country. The particular outcome requires that we consider each jurisdiction more closely.

Based on the Indian example, we can determine that the particular outcome is the prohibition or disallowance of the compulsory expropriation of property rights without paying (an exact value of) compensation to right holders. This brought about the long-term controversy between Parliament and the Supreme Court. It has, however, evolved, or it diffused later on, to cover other subject matters as well. The particular outcome which emerges from the decision(s) of the Constitutional Court of Turkey is the prohibition of wearing the headscarf at universities. As to the German case, it seems that there is no such particular output emerging from the German Federal Constitutional Court's decisions, because the decisions of Federal Constitutional Court with regard to the constitutional amendments have not centred around one particular issue, but many. Thus, we will only assess, as the output, the competence of the Federal Constitutional Court to review constitutional amendments on substantive grounds. We will treat this output, i.e. judicial review constitutional amendments on substantive grounds, as common to all three jurisdictions.

As for the value patterns, which Stillman suggests in his framework, it appears that the concept of constitutional identity can be used to this end. In what follows, we will expand and somehow adjust what we have previously revealed about the concept of constitutional identity in the chapter dealing with the *Literature Review*.

The concept of constitutional identity involves a few issues, apart for its normative use, which we have seen before. According to Michel Rosenfeld, constitutional identity involves the creator and carrier of a constitution. For Rosenfeld, constitutional identity appears more clearly at the time of constitution making. And usually “the constitution-making moment involves a conscious act of negation- for example, overthrow of the *ancien régime*”<sup>718</sup> In his view, this is clearly seen in the French and American constitutions, but also in post-World War II constitutions of Germany and Japan and the 1978 Spanish Constitution.<sup>719</sup>

In another usage of the concept, Wojciech Sadurski suggests that constitutional identity involves “the set of values, principles, and guidelines which define “meta-politics”, that is, the actually observed and enforced constraints within which day-to-day politics must take place”<sup>720</sup> In this understanding, for example, the constitutional identity of France refers to the rules or principles that are inherent to French constitutionalism. In other words, the constitutional identity of France refers to the rules or principles that are essential or fundamental to the French Republic or without which France would no longer be a republic.<sup>721</sup> From this example, a more general description or definition of constitutional identity can be grasped.

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<sup>718</sup> Michel Rosenfeld, “The European Treaty-Constitution and Constitutional Identity: A View from America” *International Journal of Constitutional Law* 3, no. 2&3 (2005), p. 318. “Constitutional identity is constructed over time through a dynamic process that involves negation of... other [national, ethnic, cultural, historical, and political] identities accompanied by a rearrangement and reincorporation of salient features of the latter”, pp. 317-318. The act of negation may be realised, in some cases, gradually; rather than being a sudden rupture, as seen in the American constitution, p. 326. For a criticism of Michel Rosenfeld’s view on the construction of constitutional identity see Mark Tushnet, “How Do Constitutions Constitute Constitutional Identity?” *International Journal of Constitutional Law* 8, no. 3 (2010), pp. 671-676.

<sup>719</sup> Rosenfeld, “The European Treaty-Constitution and Constitutional Identity: A View from America”, p.319. Constitutional identity reflects somehow the collective (legal-political) identity of a polity. For the relation between collective identity and constitutional identity see Armin von Bogdandy, “The European Constitution and European Identity: Text and Subtext of the Treaty Establishing a Constitution for Europe” *International Journal of Constitutional Law* 3, no. 2&3 (2005).

<sup>720</sup> Sadurski, “European Constitutional Identity?”, p. 1. Sadurski separates constitutional tradition from constitutional identity. Even though the former is contiguous to the latter, they are not identical.

<sup>721</sup> Dubout, “Les Règles ou Principes Inhérent À L’identité Constitutionnelle De La France: Une Supra-Constitutionnalité”, p.456.

According to Jacobsohn, the identity of something in general is the essential features of that thing, without which, the thing so identified would not be the same thing itself.<sup>722</sup> For example, what makes something recognizable as *a table* would be its essential (or *generic*) feature. Once we recognise something as *a table*, only then we can establish *particular* identities, such as pool table, dinner table, etc.<sup>723</sup> However, the sense of constitutional identity is a little different. In his opinion (following Edmund Burke), “a constitution acquires an identity through experience, that its identity neither exists as a discrete object of invention nor as a heavily encrusted essence embedded in a society’s culture, requiring only to be discovered. Identity emerges dialogically and represents a mix of political aspirations and commitments that is expressive of a nation’s past, as well as the determination of those within the society who seek, in some ways, to transcend that past”,<sup>724</sup>

Jacobsohn, when referring to the fact that constitutional identity is a dialogic process, also refers to the fact that constitutional identity can evolve over the course of time. In order to talk about constitutional identity, as with ‘the table’ example, we need first to find a generic (or essential) meaning of the term ‘constitutional’. He provides us with an answer for the meaning of ‘constitutional’, which he associates with the rule of law. According to him, “the identity of a constitution represents an amalgam of generic and particularistic elements consisting of certain attributes of the rule of law that are the necessary condition for constitutional governance, and the specific inheritance that provides each constitution with its unique character”<sup>725</sup> The particularity of each state’s constitutional identity can be found in the specific inheritance of each state. In other words, constitutional identity is inevitably associated with the constitutional culture/tradition of a given country.

George Fletcher is aware of the problems, which arise when associating constitutional identity with the national character or general features of a given society. Thus, he tries to make his argument more objective (and thus more convincing) by pointing out that even if the constitutional identity (or culture or underlying principles) seems to be subjective choice of judges, they are not the ones which are understood by sceptics as political or discretionary, but they are the “self-realization and self-definition”<sup>726</sup> of the legal system taken as a whole.

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<sup>722</sup> Jacobsohn, “Constitutional Identity”, p.363.

<sup>723</sup> Ibid. p. 362.

<sup>724</sup> Ibid. p. 363.

<sup>725</sup> Ibid. p. 374.

<sup>726</sup> “The identity of a legal system is both reflected and shaped in these pivotal decisions concerning who the judges are and wish to be” Fletcher, “Constitutional Identity”, p.739.

In this respect, Fletcher analyses the decisions of the US Supreme Court in a number of cases to make this clearer. For example, he argues that when questioning why the confessions of the accused are not recognised as evidence or why interrogating a suspect without his lawyer present is prohibited, and why flag burning is accepted as a practice of free speech,<sup>727</sup> one will conclude that it is simply the way the criminal law functions in the US; or it is the way the free speech is understood and practiced in the US. In short, he understands these features by interpreting the reasoning of the judges in the decisions, so to speak, as the Anglo-American way of doing things,<sup>728</sup> which is, in his view, equivalent to the concept of constitutional identity.<sup>729</sup>

Stillman's framework is more general in terms of its approach to value patterns, while the term constitutional identity implies a more limited scale of values. The latter is more directly relevant to our concerns in this study. Therefore, we believe that Stillman's general framework of assessing the legitimacy (of a governmental output) can be considered together with the concept of constitutional identity. The remaining parts of Stillman's framework of legitimacy hold and appears to be plausible to assess the legitimacy of the outcome arisen from the judicial review of constitutional amendments. Thus, all other aspects of Stillman's concept of legitimacy can be retained provided that its treatment of value patterns is put into the context of constitutional identity. In this way, the difficulty of determining the value patterns of a society – which, in Stillman's view, requires a common task of psychologists, sociologists, political scientists, and cultural anthropologists could be decreased.

The difficulty of the task can also be decreased by confining the task of identification of constitutional identity to the identification of some particular constitutional values, the assessment of which would make more sense for the particular purpose of our work. In this

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<sup>727</sup> In George Fletcher's words, "[t]he First Amendment is *the* clause in our Constitution that bears the full weight of individual autonomy, the full burden of individuals bearing their souls and expressing their innermost nature in the face of organized demands of conformity and self-restraint. Here is the American spirit is at work again..." Ibid. p. 745.

<sup>728</sup> Ibid. p. 738.

<sup>729</sup> Similarly, he sees that the Federal Constitutional Court of Germany, when invalidating a liberal abortion law, stuck to its current legal culture, which is strictly affected by the history of the Nazi regime Ibid. For the concept of constitutional culture and more particularly German constitutional culture or tradition see James T. McHugh, *Comparative Constitutional Traditions*, ed. David A. Schultz, Teaching Texts in Law and Politics (New York: Peter Lang, 2002), pp. 159-173. Also see Bernard Schlink, "German Constitutional Culture in Transition" *Cardozo Law Review* 14 (1992-1993). (Schlink adopts a somewhat similar view, which seems to be comparable to that of constitutional identity; saying that "[a] country's constitutional culture lives through its constitution. It will be free if the constitution is free, democratic if it is democratic, authoritarian if it is authoritarian. p. 711, although Schlink's focus, as a component of culture, is on the interpretive practice of fundamental rights by the German Federal Constitutional Court).

respect, we argue that ‘democracy’ can be taken as a value pattern. Closely related with democracy, another value pattern could be ‘sovereignty’ in the sense of a final decision-making authority. Both concepts are used in the thesis; and they are, somehow, closely connected with each other. These concepts, as important conceptual components of constitutional identity, certainly do appear to make sense for the purpose of this study.

In this sense, it seems possible that which type of democracy (procedural or substantial) prevails or is lacking in a system would give us an idea about the legitimacy of the outcome of judicial review of constitutional amendments on substantive grounds. Thus we should keep in mind the analysis offered earlier by relying on the discussion of legitimacy of judicial review as an institution.

In short, the ways in which *democracy* and *sovereignty* (as constitutional value patterns) are conceived and applied in the political and legal systems of the three countries (Germany, India and Turkey) will give us an *idea* about the legitimacy of the outcome of judicial review of constitutional amendments on substantive grounds. In this account, our interest lies in the structural or general (constitutional) characteristics of democracy and sovereignty in the three countries. However, as the history of democracy and sovereignty would obviously matter for our evaluation we will need to address them.

## 4.2 EVALUATION OF THE LEGITIMACY OF JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS ON SUBSTANTIVE GROUNDS IN GERMANY

As we have said before, history very is important when attempting to define the constitutional identity of a given country. Thus, a brief overview of the constitutional history of Germany is necessary. However, as this thesis is not historical in its outlook, the account it will provide (including the sections dealing with India and Turkey) will not be in-depth. Thus, it may overlook some important details and facts of the history of Germany. In this section, the aim is to provide an overview regarding some structural features or general characteristics of democracy in Germany, understood as part of constitutional identity, which are evident from German history.<sup>730</sup> As previously mentioned, the search for determining constitutional identity can be considered within the broader quest for national character, i.e. a connection must be drawn between the two.

That connection could be positive or negative. To put it more clearly, the construction of constitutional identity could be a rejection of the past, as argued by Michel Rosenfeld, or it may be an endorsement of some of the features deeply carved out in the history of a nation.<sup>731</sup> Even though our attempt here cannot determine and express the German (national) character comprehensively, indeed such a task is extremely difficult (even when dealing with the character of just one individual), some of the so-called structural (general) features could be detected, which can then be put into the particular context of determining the general characteristics of democracy in Germany.<sup>732</sup>

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<sup>730</sup> These features are, in the words of Gordon Smith, what makes “the substantial differences between Germany and other West European states in the way in which fundamental issues were presented and resolved – those concerning the creation of national unity, the terms of industrialisation, rights of citizenship and political participation”. Gordon Smith, *Democracy in Western Germany- Parties and Politics in the Federal Republic*, 3 ed. (Aldershot: Gower, 1986), p. 7. One can easily add democracy to those fundamental issues, as a separate term. In the search for describing the national characteristics of Germany or German character, Ralf Dahrendorf puts the matter as ‘The German Question’ Ralf Dahrendorf, *Society and Democracy in Germany* (New York ; London: W. W. Norton & Company, 1979), p. 22. According to Dahrendorf, “Germany tried to compensate for her inferiority [being a belated nation] in the First World War by dissociating herself from the value system of the victors. Thus, she achieved in her own, characteristically spiritual way what she could not achieve by political or military means. (And Dahrendorf quotes in affirmation of the statement of Helmuth Plessner that) “[s]he thus adheres to her line of struggle against the political humanism of the Western world, whose development and national consolidation occurred in the seventeenth century, that is, at the time of the decay of the old German Empire” Dahrendorf, *Society and Democracy in Germany*, p. 8.

<sup>731</sup> As we will see below, the endorsement of some aspects of its past, while radically rejecting others, was in fact the reality in Germany. Donald P. Kommers, “German Constitutionalism: A Prolegomenon” *Emory Law Journal* 40 (1991), p. 853. Or as said by Peter Caldwell, the mistakes the Weimar Constitution made were to be avoided by the makers of the West German Basic Law. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law- the Theory & Practice of Weimar Constitutionalism* p. 1.

<sup>732</sup> Of course, there is always a danger to err or to fall into reductionism, as aptly underlined by Dahrendorf, in any attempt to define the characteristics of a nation. That attempt could turn out to be a tautology, since what has

#### 4.2.1. Historical Overview

The general characteristics of German democracy can be seen in its long history. In this sense, when someone talks about the structural characteristics of democracy in Germany, the starting point is likely to be Germany's reaction to the French Revolution, which is one of the foundational events of modern democracies. The French Revolution, which predominantly set in motion the ideals of the Enlightenment, brought about radical political and social change throughout Europe. Germany was adverse to these radical changes, and its reaction was shaped by the Romantic Movement. Romanticism in Germany railed against the western value system of the Enlightenment, at the top of which sits rationalism. Romanticism, thus, placed an emphasis on some particular characteristics of Germany, such as its ethnicity, language, culture, and religion. This paved the way for the detachment of Germany from the West and it would have some bearings on the future (constitutional) development of Germany.

There are various explanations for the German reaction to these developments, such as its late industrialization and being a belated nation, i.e. its delayed national unity or lateness in deciding and establishing its national identity.<sup>733</sup> The Romantic Movement in Germany went hand in hand with a sort of nationalistic thought. It put important emphasis on the particular characteristics of the German nation with an ethnic tone. Thus, the German reaction to the French Revolution was led by Romanticism. The desire for the establishment of national unification contributed to an authoritarian perception and implementation of state (power) in Germany. These are the reason behind the observation that "a clearer indication of a collective German system of thought may be derived from its tradition of nationalism"<sup>734</sup>

Hegelian philosophy, especially the philosophy of state, can be said to contribute and complement the German way of thought, which supported a mystical and an authoritarian conception of state. The state in Hegelian philosophy advocated the idea of *separation of state from society*, and the state has been understood as an essential guarantor of freedom;<sup>735</sup> but

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been said of the national character could be simply those events that have happened in the history of that nation. Dahrendorf, *Society and Democracy in Germany*, p. 24.

<sup>733</sup> The efforts to establish national unity and national identity started during the first half of the nineteenth century in Germany. Even behind the attempts of 1848 Revolution, this desire, together with other important factors and conditions, was decisive. Elmar M. Hucko, *The Democratic Tradition- Four German Constitutions* (Leamington Spa; Hamburg; New York: Berg, 1987), p. 4-7.

<sup>734</sup> McHugh, *Comparative Constitutional Traditions*, p. 166.

<sup>735</sup> Smith, *Democracy in Western Germany- Parties and Politics in the Federal Republic*, p. 2-4. Thus, the continuity and survival of the state prevails over any matter.



not a guarantor in the liberal sense of the word, rather in the sense that “[t]he individual is free only in the state”<sup>736</sup>

Consistent with this authoritative sense of state, a nationalist emphasis could also be detected in the legal thought; namely, in the German Historical School of Law. This school contributed very significantly to German legal culture. It was highly influenced by Hegelian philosophy and Romantic thought. The School was established at the beginning of nineteenth century by Gustav Hugo, but was developed extensively by Friedrich Carl von Savigny, who put a strong emphasis on the *Volksgeist*. The *Volksgeist* (the spirit of the people or national spirit) was claimed to carry and reflect the particular characteristics of German law, like other cultural components of the nation, such as language, religion. The Historical School of Law, in the course of its development, split into two factions. The first stuck to the particular characteristics of German culture, thus its law, and underlined the nationalist features. The second faction on the other hand took into account the Roman law, which they believed to have become part of German law after a long history.<sup>737</sup>

The political environment during the second half of the nineteenth century and the desire to unify the German nation under one state contributed to the authoritarianism. In this respect, the institutional structure set down by the first German Constitution of 1849 hardly envisaged and introduced an environment in which democracy, understood in a more liberal sense, could develop. Even though the Constitution of 1849, accepted as the outcome of the failed 1848 Revolution, was never put into effect, its model was endorsed by the following German (federal) state structures until 1949.<sup>738</sup> For example, the Emperor (*Kaiser*) was bestowed with many important powers by the 1849 Constitution, which later affected the Bismarckian Constitution of 1871. Parliament was divided into two chambers (*Staatenhaus* composed of federated state representatives and *Volkshaus* composed of people’s representatives) by the

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<sup>736</sup> Léon Duguit, “The State and the Law” *Harvard Law Review* 31, no. 1 (1917-18), Chapter V, pp. 78-102.

<sup>737</sup> The Historical School of Law was against the suggestion made by Thibaut (a lawyer subscribed to natural law theory) concerning the codification of a unique German Civil Code to be designed and adopted by taking the Napoleonic Code as its model. Savigny opposed this view and contributed (or caused) the retardation of the German Civil Code, for almost one century. On the historical school of law, see my article, Ali Acar, “Friedrich Carl Von Savigny’nin Hukuk Anlayı ı [ the Concept of Law of Friedrich Carl Von Savigny]” *Erciyes Üniversitesi Hukuk Fakültesi Dergisi* 1, no. 1 (2006), pp. 65-88. The Historical School of Law availed during the time when Germany could not yet establish its unity. With the achievement of unity in 1871, the influence of the Historical School of Law yielded to a formalistic-positivistic approach to law. This new approach dominated jurisprudence after 1871. The formalistic-positivistic approach to law, the most famous representative of which was Paul Laband, was the product of the needs of its time. Rupert Emerson counts a number of factors which enhanced this school, see Rupert Emerson, *State and Sovereignty in Modern Germany* (New Haven: Yale University Press, 1928), p. 47-49.

<sup>738</sup> Hucko, *The Democratic Tradition- Four German Constitutions*, p. 10.

1849 Constitution, which holds true even today of the 1949 Basic Law. The first attempt to embrace democracy, in 1848, resulted in an authoritarian regime by putting more importance and emphasis on the executive branch, and this was caused by mistrust and fear from the masses.<sup>739</sup> Thus, parliament could not become a “populist organ, one that expressed the people’s voice in an emerging democracy,”<sup>740</sup>

The unity of Germany was achieved only in 1871 under the powerful leadership of Prussia and Minister President Otto von Bismarck. The long-awaited desire of a united German people under one (federal) state was realised in 1871 following victories in two wars – the first against Austria in 1866, and the second against France in 1871. Under the Reich, or what is also called the Bismarckian Constitution of 1871,<sup>741</sup> a constitutional monarchy was established. Even though a more liberal environment was introduced and supported by this Constitution, yet again the monarchical authority of the emperor remained in full force. Namely, the so-called monarchical principle – that the monarch/emperor is the head of state and retains all the state’s power (in brief, the monarch is the sovereign) – was maintained by the 1871 Constitution. It was not adopted democratically, nor was it ratified by the German people. It was, as its preface suggested, decreed from above, by Wilhelm I – the German Emperor and King of Prussia.<sup>742</sup>

The 1871 Constitution gave full power to the Prussian monarch, and the Constitution established a number of institutional arrangements to strengthen this power. (Liberal) democracy was thus hardly conceivable in this structure. There was no separate part in the 1871 Constitution dedicated to fundamental rights. The strength of political power of the German people represented in the Reichstag – i.e. the Parliament – remained weak.

In light of this history it is appropriate, according to Ralf Dahrendorf, to ask why liberal democracy, like that of the US or France, did not develop fully in Germany.<sup>743</sup> Behind this question lies some of the important features that can be attributed to the German way of doing things (understood in the context of constitutionalism or constitutional identity). However, in order to determine the actual constitutional identity, and the actual practice of democracy in Germany, more needs to be said with regard to the Weimar experience and its failure. This

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<sup>739</sup> Ibid. p. 21 and pp. 12-13.

<sup>740</sup> Möllers, “We Are (Afraid of) the People”, p. 90.

<sup>741</sup> This was in fact the amended version of an already existing 1867 Constitution of North German Federation. Hucko, *The Democratic Tradition- Four German Constitutions*, p. 26.

<sup>742</sup> Ibid.

<sup>743</sup> Ralf Dahrendorf put this as ‘The German Question’, Dahrendorf, *Society and Democracy in Germany*, p. 14.

needs to be addressed because the actual perception and practice of democracy was highly influenced by the devastating experience of the National Socialist regime under the Weimar Republic. At the same time, since constitutional identity involves somehow a negation of the past, as argued by Michel Rosenfeld, this negation of the Nazi experience under the Weimar Republic must be revealed.

The Weimar Republic was established following Germany's defeat in the First World War. After the War, the 1918 Revolution in Germany saw the political power seized by the revolutionaries (later handed over to the SPD – Sozialdemokratische Partei Deutschlands/ Social Democratic Party and its leader Friedrich Ebert),<sup>744</sup> who later secured the public order and opened the way to adopt a new republican constitution. The Weimar Constitution was adopted by a national (constituent) assembly elected by the people in 1919, which was dominated by the SDP and the liberal democrat majority. It was the first German constitution that vested the sovereignty in the people,<sup>745</sup> thus, the Weimar Republic put an end to the monarchical principle and created a real republican regime.<sup>746</sup> The Weimar Republic sought the legitimating basis of the new polity in the German people. According to the Constitution, the people's representative house, the Reichstag, had sweeping powers, even if there was also the Reichsrat, composed of representatives of each of the *Länder*.

The Weimar constitution recognised a broad list of fundamental rights. However, the guarantee bestowed on them was not so strong; they could be restricted by an ordinary legislative act. Even though the amendment mechanism of the constitution predicted a two-thirds majority, it was not difficult to change them, and there were no eternal rights. However, the Constitution aimed to embrace a real liberal, parliamentary democracy.

The Constitution aimed to put a significant emphasis on the political parties to give them large influence and importance. Government – to be established by the winning party in the election – was responsible to the Reichstag. The Constitution adopted a proportional representation, which later led to and elevated an already-existing fragmentation between political parties, including the fragmentation within the left wing (social democrats and communists) as well the right wing (nationalist and other centre-right parties).<sup>747</sup> This meant

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<sup>744</sup> Smith, *Democracy in Western Germany- Parties and Politics in the Federal Republic*, p. 17.

<sup>745</sup> Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law- the Theory & Practice of Weimar Constitutionalism* p. 1.

<sup>746</sup> Möllers, "We Are (Afraid of) the People", p. 92.

<sup>747</sup> Though, there are arguments against the negative effects of the proportional representation to the fragmented multi-party systems. Smith, *Democracy in Western Germany- Parties and Politics in the Federal Republic*. pp.

that coalition governments were established at almost every election. Hence, the political parties' influences and importance remained limited during the Weimar Republic.

At the same time, the influence of political parties in politics was restricted by some checks and balances mechanisms and institutions. For example, in spite of the practical and institutional importance of the Reichstag, the powers bestowed on the Reich President were very critical. So much so that the powers bestowed on the President meant *ersatz Kaiser* (substitute Emperor),<sup>748</sup> some of whose powers could render all other democratic features of the Weimar Constitution useless. Since the President would be elected by the direct votes of the people, he could assume in himself a strong authority. This was proved by the practice in the following years of the Weimar Republic. Thus, the important institution of the Weimar Constitution and its democratic design, i.e. the Reichstag, could never achieve and assume in itself a strong position.<sup>749</sup>

Among the powers of the President was the power to appoint and dismiss the chancellor-prime minister. Others were even more crucial, such as the power to dissolve parliament and call new election (Art. 25). The most important power, however, was the emergency power and the power to issue decrees in such circumstances (Art. 48). Even though Article 48 was put into the Weimar Constitution due to the necessity of the time (i.e. social strife or “virtual anarchy”),<sup>750</sup> its later use (or abuse) by the Reich Presidents<sup>751</sup> caused the collapse of the Republic. The immediate use of Article 48 was made by the first President, Friedrich Ebert, against the extensive communist riots in 1920,<sup>752</sup> but Article 48 was abused especially after

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23-24. Whatever the reasons were, fragmentation between the political parties was the reality. Later the Nazis abused this fragmented nature of politics, and thus diversity of values within the society, to come to power by promising to end this fragmentation.

<sup>748</sup> As the architect of the Weimar constitution, Hugo Preuss was said to play a crucial role in this construction. Peter Stirk criticises the failure of the Weimar Constitution, but also the attribution of this failure to Hugo Preuss, because in Stirk's view, Preuss adhered to the liberal notion of democracy and had no intention to make the President so powerful. Peter Stirk, “Hugo Preuss, German Political Thought and the Weimar Constitution” *History of Political Thought* XXIII, no. 3 (2002), p. 497. On the other hand, the architect of the strong position of the President in the Weimar Constitution is also attributed to Max Weber. Smith, *Democracy in Western Germany- Parties and Politics in the Federal Republic*, p. 19.

<sup>749</sup> Hucko, *The Democratic Tradition- Four German Constitutions*, p. 54. Christoph Möllers commented on this as a response of the constitutional founders' response to “the general anti-parliamentarian sentiment” Möllers, “We Are (Afraid of) the People”, p. 91.

<sup>750</sup> Clinton L. Rossiter, *Constitutional Dictatorship-Crisis Government in the Modern Democracies* (Princeton: Princeton University Press, 1948), p. 33-34.

<sup>751</sup> Article 48 was used (or abused) more than 250 times between 1919 and 1933. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law- the Theory & Practice of Weimar Constitutionalism* p. 180, endnote 13.

<sup>752</sup> Rossiter, *Constitutional Dictatorship-Crisis Government in the Modern Democracies*, p. 38. For the details of the use of the emergency power also see Carl J. Friedrich, “The Development of the Executive Power in Germany” *The American Political Science Review* XXVII, no. 2 (1933), pp. 196-203.

the 1930s election. Then, the President's emergency power was employed due the fact that the minority government (of the Centre Party) could not operate (i.e. put its policies into action) in the Parliament (Reichstag). Since the functioning of the Reichstag was almost impossible, because of the fragmentation and deep disagreement between the parties, the Centre Party government asked the President to use his power to issue a decree in order to implement some of the government's essential measures to overcome the economic and financial crisis of 1929.

The employment of the emergency power by the President would render almost all democratic gains meaningless<sup>753</sup> as he could suspend the basic rights and freedoms recognised by the Constitution in such emergency situations. In fact, this was what would happen later under the National Socialists, thus it somehow paved the way for the failure of the Republic and its Constitution.<sup>754</sup>

Among the causes for the failure of the Weimar constitution were a combination of economic, social, and political reasons, such as hyper-inflation and a very high rate of unemployment; political party fragmentation, even within the left- as well as right-wing parties; and the continuity of Prussian military, judiciary and bureaucratic cadres, who were loyal to the Prussian monarchy etc. All of these factors played a role (to some degree) in assuming the power by the Nazis, which culminated in the bankruptcy of the Weimar Republic and its constitutional design.

On the basis of the Weimar experience, it will not be wrong to suggest that the perception of democracy in Germany is decisively determined by the fear of its loss. This perception was famously put into words – even before the collapse of the Weimar Republic – by Friedrich Ebert, the first president of the Weimar Republic, as: *Demokratie braucht Demokraten* – Democracy requires democratic people. The German democracy is thus labelled as 'militant democracy', in the sense that it requires protection of the democratic order established by the Basic Law.

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<sup>753</sup> The exploitation of the power granted by Article 48 to the President was subjected to the counter-signature of the chancellor (Art. 50) and approval by the Reichstag (Art. 48).

<sup>754</sup> Because of its wide scope and frequent employment, Article 48 of the Weimar Republic was called the dictatorship article, thus the Weimar Republic was labelled as a constitutional dictatorship, *see* Rossiter, *Constitutional Dictatorship-Crisis Government in the Modern Democracies*, p. 31 etc.

#### 4.2.2. The Constitutional Identity and the Practice of Democracy in Germany

Following the defeat in World War II, all political powers of Germany were taken over by the victorious powers (the US, the UK and the Soviet Union; France joined these powers later) from 1945 to 1949. The state power collapsed on every level.<sup>755</sup> The country was divided into four zones, each of which was controlled by the victorious powers. The declaration that “[i]t is our inflexible purpose to destroy German militarism and Nazism and to ensure that Germany will never again be able to disturb the peace of the world”<sup>756</sup> was decisive for all future developments following the post-war era (1945-1949) in Germany. All that occurred afterwards was geared towards this aim. Each Allied power chose, for their respective zones of occupation, a social, economic and political structure that was similar to their own; the Soviet Union established an economic and political structure dominantly determined by socialist theory, whereas the rest of the Allied Powers tried to establish a liberal-capitalist economic and political system.<sup>757</sup>

Due to irreconcilable conflicts between the victorious powers – especially between the US and the Soviet Union – the administration of the German zones (and the joint administration of Berlin) by four powers could not be sustained. It finally ended up with the establishment of two separate states in the German territory in 1949: the Federal Republic of Germany in the western part, and the German Democratic Republic in the eastern part. The former was, albeit a separate state, under the influences of the US, the UK and France, while the latter was under the Soviet Union.<sup>758</sup> These influences can be observed in their respective constitutions.<sup>759</sup>

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<sup>755</sup> Hucko, *The Democratic Tradition- Four German Constitutions*, p. 62. The so-called ‘Unconditional Surrender Act’ signed between the Allied powers and Germany ended the war, as well as the sovereignty of Germany – even if the main object of the Act was to prevent German rearmament. For the Act see Roderick Stackelberg and Sally A. Winkle, *The Nazi Germany Source Book: An Anthology of Texts* (London ; New York: Routledge, 2002), pp. 321-322.

<sup>756</sup> Konrad H. Jarausch, *After Hitler- Recivilizing Germans, 1945-1995*, trans. Brandon Hunziker (Oxford ; New York: Oxford University, 2006), p. 18.

<sup>757</sup> Hucko, *The Democratic Tradition- Four German Constitutions*, p. 63.

<sup>758</sup> Gert-Joachim Glaessner, *German Democracy- from Post World War II to the Present Day* (Oxford ; New York: Berg, 2005), pp. 1-4

<sup>759</sup> However, even though the impact of the liberal-capitalist influence of the Allied Powers was clear on the Basic Law of the Federal Republic of Germany, the constitution of the German Democratic Republic was not clearly seen at the beginning, but it left the door open for a socialist state. And it was almost two decades later that East Germany became a socialist state, and this was confirmed by its 1968 constitution. Ibid. pp. 16-17.

The Basic Law of (West) Germany (or as it was called, the Bonn Constitution of 1949) was drafted<sup>760</sup> by the Parliamentary Council, composed of seventy delegates (with the five Berlin delegates lacking voting rights), representing the newly established *Länder* (the federated states constituted by the occupying powers in the zones under their control between 1945 and 1948). The drafted constitutional document was passed by the Parliamentary Council and later by parliaments of the *Länder* – there was not a popular referendum.<sup>761</sup> Furthermore, there was not only an approval of the final text by the occupying powers over the Parliamentary Council's adoption of the Basic Law, but also frequent interventions during the drafting and deliberation process. Therefore, it is possible to say that the West German Basic Law came into existence under the tutelage of the victorious occupying powers – the US, the UK and France.

Aiming to overcome the ruin caused by World War II, as well as the drastic experience of the Nazi past, and to recover social, economic and political stability as quickly as possible, the West German Basic Law adhered to some prevailing principles. Among these are: social and democratic state (Art. 20/1), federalism (Art. 20/1), separation of powers (Art. 20/2), the rule of law (Art. 20/3), and, inviolable and inalienable basic rights (Art. 1 and the following Article). Article 28 also makes these principles compulsory for the *Länder* constitution, that is the *Länder* constitutions must also conform to *principles of a republican, democratic and social state governed by the rule of law*. In this sense, the Basic Law of Germany represents a total rupture from its (Nazi) past and its earlier constitutional design.<sup>762</sup>

However, in spite of its choice of liberal, representative democracy, the Basic Law has some particularities that should be mentioned. The Basic Law, in order to strengthen its supremacy and bindingness, is granted with some safeguards. Among these safeguards is the inviolable

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<sup>760</sup> In fact the text was first drafted by a group of experts, it was later submitted to the Parliamentary Council. Martin Kitchen, *A History of Modern Germany 1800-2000* (Malden ; Oxford ; New York: Blackwell, 2006), p. 323.

<sup>761</sup> Glaessner, *German Democracy- from Post World War II to the Present Day*, p. 13. The reason for this was based on the disunited German people or their sovereign will. In fact, this was the reason why it was called *Grundgesetz* (the Basic Law) instead of *Verfassung* (constitution). Kommers, "German Constitutionalism: A Prolegomenon", p.837. And, also, the reason why the Parliamentary Council was not called the Constituent Assembly stemmed from the disunion of the German people in two different states. Because of this, the West German Basic Law was initially thought to be provisional until the reunification of the German People (Art. 146), which was realised in 1990, and since then the Basic Law is applied in the whole territory of Germany and to all German citizens. McHugh, *Comparative Constitutional Traditions*, p. 160.

<sup>762</sup> Kommers, "German Constitutionalism: A Prolegomenon", pp. 845- 46. Though, some of the features of the Weimar Republic were endorsed, given that the political elites of Western Germany that rose after the Second World War were survivors of the Weimar Republic. Smith, *Democracy in Western Germany- Parties and Politics in the Federal Republic*, p. 36. The rupture means also that West Germany and the Basic Law learned a lesson from the (the failure of) Weimar Republic and its constitution.

nature of fundamental rights and freedoms. The very first Article of the Basic Law involving the protection of human dignity confirms this indisputably. Furthermore, it is stipulated in Article 19/2 that the essence of any basic right cannot be affected or undermined by any law or governmental action. In this sense, it can be suggested that regardless of the democratic nature of the German Republic, the Basic Law underlines the importance and priority of the fundamental rights as essential features; thus democracy will not imply in Germany the unfettered choice of majority in all cases.

To be precise, the West German democracy is strengthened by various textual wordings and institutional designs on the one hand, and by putting some core values at the top of the Basic Law on the other. In this sense, German democracy, being understood here in a procedural sense, is strengthened, but also restricted. For this reason, the Basic Law contains provisions, which are influenced directly by the spirit of mistrust.<sup>763</sup> For example, beginning the Basic Law by setting out the fundamental rights in the first place, and the state organization in the second, embodies the very simple choice that the fundamental rights prevail over the basic precepts of democracy. By making those fundamental rights, human dignity, the rule of law etc., eternal (Art. 79/3), the Basic Law further strengthens this choice.

The emphasis of the German system of democracy is on the substantive understanding rather than the procedural one. Here the substantive understanding of democracy goes hand in hand with *Rechtsstaat*.<sup>764</sup> In fact, it is the reason German democracy, as mentioned earlier, is called a *guarded* or *militant* democracy. According to the militant understanding of democracy, the fundamental rights guaranteed by the Basic Law require respective obligations in order to exercise those rights. No protection would be bestowed on those who aim to destroy the free democratic basic order. For instance, the Basic Law guarantees freedom of association, but if that freedom is used against the democratic order established by the Basic Law, those associations may be prohibited, i.e. this freedom may be limited or deprived (Art. 9/2).

Even more is laid down by the Basic law; for example, Article 21/2 of the Basic Law stipulates that political parties may be barred by the Federal Constitutional Court if their activities or by-laws are found to be incompatible with the *free democratic basic order* clearly defined by the Basic Law. Thus, any action to be made by political parties against this free democratic basic order would not be accepted by the Basic Law. This, of course, has its roots

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<sup>763</sup> McHugh, *Comparative Constitutional Traditions*, p. 160.

<sup>764</sup> Möllers, “We Are (Afraid of) the People”, p. 102.



in the fact that the Weimar Republic tolerated extremist parties, including the Nazi Party.<sup>765</sup> In this sense, the Federal Constitutional Court's rulings, which declared the Nazi and Communist Parties unconstitutional at different times, have reflected the militant character of the German democracy.<sup>766</sup>

In the Federal Constitutional Court's rulings, it is grasped that the Basic Law of Germany is conceived as being built on some objective values, the protection of which is understood as the necessary condition for maintenance of the free basic democratic order. This conception would also make it possible to restrict the individual rights, when the case arises or when there is a conflict between an individual right and an objective value.<sup>767</sup> For example, in order to protect human dignity (a value at the top of the free democratic basic order), freedom of speech may be restricted at certain points if it is found to be incompatible with the former.

On the other hand, very closely linked with our topic (i.e. judicial review of constitutional amendments on substantive grounds), some of the case law we have revealed and analysed in the previous chapter, and especially the Federal Constitutional Court judgment in *The Klass Case*, was regarded as a result of the militant understanding of democracy. *The Klass Case* was about the restriction of the privacy of correspondence, post and telecommunication and the replacement of the review of restriction by court with a commission appointed by the legislature. In this case the Court invoked the militant democracy as follows: "Constitutional provisions must not be interpreted in isolation but rather in a manner consistent with the Basic Law's fundamental principles and its system of values... In the context of this case, it is especially significant that the Constitution ... has decided in favor of "militant democracy" that does not submit to abuse of basic rights or an attack on the liberal order of the state. Enemies of the Constitution must not be allowed to endanger, impair, or destroy the existence of the state while claiming protection of rights granted by the Basic Law"<sup>768</sup>

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<sup>765</sup> Kommers, *Constitutional Jurisprudence of the Federal Republic of Germany*, p. 218.

<sup>766</sup> Kommers, "German Constitutionalism: A Prolegomenon", p.854; Kommers, *Constitutional Jurisprudence of the Federal Republic of Germany*. pp. 218-224. Donald Kommers comments that as of 1978 with the *Radical Groups* case, the Federal Constitutional Court gave up its militant democracy understanding. Kommers, *Constitutional Jurisprudence of the Federal Republic of Germany*, p. 224.

<sup>767</sup> For more particular aspects of the Federal Constitutional Court's approach to the objective values of the Basic Law, see Kommers, "German Constitutionalism: A Prolegomenon", pp. 858-861.

<sup>768</sup> Quoted from Kommers, *Constitutional Jurisprudence of the Federal Republic of Germany*, p. 228. Even the *Case of Acoustic Surveillance of Homes*, which we have analysed, can be read in the way that the Federal Constitutional Court has maintained its militant understanding of democracy.

#### 4.2.3. The *Locus* of Sovereignty in Germany

Even though the place of (popular) sovereignty in Germany can be grasped in the lights of explanations provided in the previous section, it must be clearly identified here, once again, as we need a working framework under which we can strive to assess the legitimacy of Federal Constitutional Court's important power to review the content of constitutional amendments. This will offer a sense of how an important power (judicial review of constitutional amendments) employed by the Federal Constitutional Court could be considered as legitimate or illegitimate within the German context.

Until the Weimar Constitution, the democratic self-government built on popular sovereignty, was never seriously considered by the German constitutional designers and scholars.<sup>769</sup> The Weimar Constitution, as we have stated before, put an end to the monarchical principle, according to which the source of sovereignty and its legitimate exploitation had been bestowed on the monarch. The Weimar Constitution took its authority from the German people's sovereign power. However, it created another dualism in the sense that there was a popularly elected representative of people, i.e. parliament, as well as the popularly elected President. Some of the powers of the latter, as we have demonstrated, were so broad that parliament could not function.<sup>770</sup>

The Basic Law followed the Weimar Constitution concerning the source of sovereignty. Namely, in the Federal Republic of Germany all state powers derive from the people. However, the Basic Law has introduced a strict *checks and balances* system. It is seen that even though the Basic Law envisages a parliamentary democratic system and guarantees the fundamental rights and freedoms, it also foresees an entrenched checks and balances system, in which the federal governments (state institutions) could not assume in themselves all the sovereign state power. The powerful Chancellor and parliament can exploit a wide range of powers as the representatives of the sovereign German people, yet these powers have certain limits. Thus, it is obvious that the (legitimate) use of sovereignty in Germany is shared by various organs, even though the sovereignty is vested, in the final analysis, in the people.<sup>771</sup> In

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<sup>769</sup> Möllers, "We Are (Afraid of) the People", p. 91.

<sup>770</sup> Trying to find different sources of sovereignty and its legitimacy in the Weimar Constitution had, of course, some practical outcomes, which could be better grasped in the debate between Carl Schmitt and Hans Kelsen. While Schmitt found the basis (of legitimacy) of ultimate sovereign power in the Reichpresident, Hans Kelsen did not clearly determine such a basis, yet he did argue that Parliament would have the ultimate authority in the Weimarian constitutional design. Ibid. p. 92.

<sup>771</sup> For the sake of the argument, I leave aside the limits imposed by the European Union and its law.

this sense, the use of sovereign power is distributed or shared between the Länder, Federal State and other constitutional institutions.<sup>772</sup>

In this regard, we can argue that in place of the popularly elected President in the Weimar Constitution, the Federal Constitutional Court has been introduced by the Basic Law. Even though this does not lead us to conclude that the Basic Law has established a dualism in the sense of the source of sovereignty, the establishment of the Federal Constitutional Court and its broad powers seems to offer some reasons to support that conclusion, albeit only to a limited extent.<sup>773</sup> Thus, the scope of the jurisdiction of the Federal Constitutional Court is another institutional limitation on the sovereign power. This was underlined by one of the Court's ex-presidents, Ernst Benda, who stated that "the main task of the Constitutional Court... [is to] control the power of the state..."<sup>774</sup>

In one sense, the Federal Constitutional Court, with the power of strong judicial review, has been the result of this strong checks and balances system. In another sense, it was a result of the distrust of people, which made it possible to have a disastrous regime (like the Nazi's). Thus, the sovereignty of people, delegated to parliament, could not be absolute, in the sense of the British Parliament's sovereign power. As shown by Christoph Möllers, the lack of the debate on the legitimacy of judicial review, which we have seen in the US scholarship, during and after the adoption the Basic Law proves that the Court has had an important place and meaning within the system. Even today, the legitimacy of the Federal Constitutional Court is largely accepted by the German people.<sup>775</sup> In this respect, the representative idea of democracy in Germany, the core of which rests on the idea of majority-will, thus on popular sovereignty, departs from its ideal version, as understood by Ralf Dahrendorf, which we have depicted above. In a nutshell, the German democracy is built on some core values, which majority-will cannot destroy; even a new constituent power would also be bound by the eternal clauses of the Basic Law. The discussion stems from the constitutional meaning of Article 146, which specifies "This Basic Law, which since the achievement of the unity and

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<sup>772</sup> McHugh, *Comparative Constitutional Traditions*, p. 164.

<sup>773</sup> Möllers, "We Are (Afraid of) the People", p. 97 (stating that "constitutional populism migrated from the *Reichspräsident* to the constitutional court")

<sup>774</sup> Quoted from Kommers, "German Constitutionalism: A Prolegomenon", p.850.

<sup>775</sup> According to a recent survey carried out in 2012, the Federal Constitutional Court enjoys a great legitimacy in the sense of the acceptance of its power among the German people at large. The research shows that 82% of the citizens welcomes the Federal Constitutional Court's being a supervisory body. This majority was 67 % in 1995. Of course, statistics are not always the most definitive and reliable source to assess legitimacy, nevertheless the overall outcome supports our assessment. Renate Köcker, "Das Bollwerk" (Institut für Demoskopie Allensbach, 2012). For a brief summary of the research outcomes, see *Frankfurter Allgemeine Zeitung*, 21, August 2012, <http://www.faz.net/aktuell/politik/inland/bundesverfassungsgericht-das-bollwerk-11863396.html>

freedom of Germany applies to the entire German people, shall cease to apply on the day on which a constitution freely adopted by the German people takes effect” Möllers shows that the great majority of the scholarly interpretation of this constitutional rule argue that a new constituent power, which would give the German people a new constitution (after the reunification), would be bound by Article 79/ 3), i.e. the eternal clause.<sup>776</sup>

#### **4.2.4. Evaluation of the Legitimacy of Judicial Review of Constitutional Amendments on Substantive Grounds in Germany**

We can now begin our evaluation of the legitimacy of judicial review, i.e. the output, in Germany. It seems that the Federal Constitutional Court of Germany takes, with regard to the problem in question, a position that is consistent with its famous constitutional interpretive approach, i.e. the balance theory. This implies that on the one hand, the Federal Constitutional Court holds in itself the capacity to review contents of constitutional amendments. Yet, it has not annulled any amendment so far. In another sense, the Federal Constitutional Court seems to take a middle ground position, which is in balance with respect of the substantive and procedural understanding of democracy.

In fact, the assessment we have just made seems to be consistent with the German practice of democracy. German democracy can be described, to some degree, as not merely being a majoritarian or procedural one, rather it is close to, but probably not exactly the same as, partnership democracy or substantive understanding of democracy, which we have seen earlier in Dworkin’s conception of democracy.<sup>777</sup>

However, the Federal Constitutional Court has not jeopardized democracy in the procedural or majoritarian sense, by not having annulled any amendments so far.<sup>778</sup> However, if the Federal Constitutional Court, does annul a constitutional amendment, that could not be claimed illegitimate under the conditions identified here. In that case, it would not be inconsistent with Stillman’s conception of legitimacy to encounter some degree of

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<sup>776</sup> Möllers, “We Are (Afraid of) the People“, p. 98.

<sup>777</sup> Partnership democracy is the term that Dworkin uses. A similar conception of democracy is described by Arend Lijphart as consociational democracy or consensus model. Arend Lijphart, “Consociational Democracy” *World Politics* 21, no. 2 (1969), pp. 207-25; Lijphart, *The Patterns of Democracy*. Lijphart p. 31-48.

<sup>778</sup> This remark is made only by taking into account the subject matter in question, i.e. judicial review of constitutional amendment. But the Federal Constitutional Court’s position with regard to some important EU regulations may make it necessary to refine or change our analysis or, depending one’s position, it may be held as consistent with it.

illegitimacy in the opinion of some group within German society concerning the Federal Constitutional Court's position vis-à-vis the judicial review of constitutional amendments on substantive grounds.

#### **4.3 EVALUATION OF THE LEGITIMACY OF JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS ON SUBSTANTIVE GROUNDS IN INDIA**

##### **4.3.1. Historical Overview**

As rightly stated by Burton Stein (an expert on the history of India), the economic, political, and socio-cultural structures of today's India were dominantly affected by the colonial subjugation.<sup>779</sup> To put it another way, the legacy of the colonial power in India, especially that of British colonialism, has had a significant effect on the future of India. Obviously, the constitutional history and constitutional identity is no exception from this account.

From the beginning of the colonial administration of the British Empire, i.e. from the seventeenth century onwards, all public affairs of India including “[a]ll the chief offices of states, the direction and control of armies, the administration of revenues, of divisions, of districts, the coining of money, the administration of justice, the imposing of taxes etc.”<sup>780</sup> were in the hands of the British. In short, all socio-economic and political structures of India were significantly administered by British rule, and its effect has continued, even after colonialism ended with the establishment of the independent state of India.<sup>781</sup>

In this long history, two issues should be noted. The first is that the British colonial power inherited certain already-existing socio-economic and political structures, such as the caste

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<sup>779</sup> Burton Stein, *A History of India*, (revised and edited by David Arnold) Second ed., The Blackwell History of the World (Oxford: Wiley-Blackwell, 2010), p. 223, p. 253. The colonial subjugation involves not only British colonialism (the East India Company founded in 1600 by a Crown Charter granting the company a monopoly of trade with India), but also those of the French and the Dutch (and earlier the Portuguese). However, the former had a large scope of impact and influence.

<sup>780</sup> Lajpat Rai, *Young India- an Interpretation and a History of the Nationalist Movement from Within* (New York: B. W. Huebsch, 1916), p. 78.

<sup>781</sup> However, we should draw attention to the fact India is not a unitary state. Nor was it under British rule. It has a large geographical space, and has contained people from diverse races, languages, and religions and this is accompanied by the caste system. Therefore, when we refer to the colonial influences, we are aware of the fact, and it should be kept in mind, that British colonialism had different degree of impacts and influences in different regions/parts of India. This fact determined, especially at the beginning, the course of colonialism. Yet, this does not prevent us from making remarks about some general characteristics of the British influence, which later affected the present status of political institutions of India. And after the mid nineteenth century, the colonial power, which was taken over from the East India Company, endeavoured to impose a more structural and unitary dominance and influence over India.

system,<sup>782</sup> land system, and tax system, as well as a country of deep diversities in, e.g., religions, ethnicities, tribes etc.<sup>783</sup> What the British colonial power did was to exploit these existing socio-economic structures and political institutions for their own interests. They allowed those systems and institutions to remain as long as these were suitable and beneficial for the British. Another reason for this was that the very large geographical space of India – comprising people from diverse races, languages, and religions – made it difficult for the British to change the existing socio-political conditions under one unitary system.

Secondly, we should draw attention to the fact that, when we refer to the colonial influences of British rule, British colonialism had different degrees of impact and influence in different provinces of India. British rule in India comprised various regions/provinces (such as Bombay, Madras, Bengal, Oudh, etc.,) but not all of India. It had a different degree of influence in these various provinces. Nevertheless, this does not hinder us from making general remarks about some common characteristics of the British influence, which has affected the present status of political institutions of India.<sup>784</sup> Especially after the middle of the nineteenth century, the colonial power, which was taken over from the East India Company, endeavoured to impose a more structural and unitary dominance and influence over India. This gives us possibility to make some general remarks and statements.

For the reasons mentioned above, a brief account of British colonialism in India will be useful. What we are looking for here, within this long history of British colonialism, are certain moments and/or events that are relevant to the constitutional history, and thus to the constitutional identity of India.

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<sup>782</sup> The English word caste is said to be derived from the Portuguese word ‘casta’, which means race. The caste denotes different classes into which Hindus are divided. The origin of the caste system is said to derive from Hinduism and its sacred scriptures: Vedic. John Murdoch, “Caste: Its Supposed Origin” in *Papers on Indian Reform* (London ; Madras: The Christian Literature Society for India, 1896), pp. 1-7 ; Shridhar V. Ketkar, *The History of Caste in India*, vol. I (Ithaca, N. Y: Taylor & Carpenter, 1909), p. 12. The caste system is defined differently by various scholars. For example, according to Shridhar Ketkar, “[a] caste is a social group having two characteristics: (1) membership is confined to those who are born of members and includes all persons so born; (2) the members are forbidden by an inexorable social law to marry outside the group. Each one of such groups has a special name by which it is called. Several of such small aggregates are grouped together under a common name, while these larger groups are but subdivisions of groups still larger which have independent names” Ketkar, *The History of Caste in India*, p. 15. On the other hand, Ambedkar, who criticises Ketkar’s definition, offers a different account of caste, according to which “[e]ndogamy is the only characteristic that is peculiar to caste...” Dr. B.R. Ambedkar, *Castes in India- Their Mechanism, Genesis and Development* (Punjab: Patrika Publications, 1917), pp. 7-8.

<sup>783</sup> “According to well-known Ethnologists, the population of India is a mixture of Aryans, Dravidians, Mongolians, and Scythians” quoted from Ambedkar, *Castes in India- Their Mechanism, Genesis and Development*, p. 6

<sup>784</sup> It should be mentioned though that because of the large diversity of many elements, as aptly noticed by Atul Kohli “an analysis restricted to the national [and/or federal] level can hide more than it reveals” in India. Atul Kohli, “Indian Democracy: Stress and Resilience” *Journal of Democracy* 3, no. 1 (1992), p. 56.

In this connection, the independence movement of the Indian people from British colonial subjugation would be a better starting point. One of the best candidates in this respect would be the events of 1857, when the Great Indian Mutiny or the First War of Independence broke out, in which the Indian people rose up against British colonialism.<sup>785</sup> Of course, the Mutiny did not start overnight; it grew gradually from the growing discontent of the Indian people under British rule.<sup>786</sup> One of the most important factors that triggered the discontent were the discriminatory practices. The Land System, which was the core of the English tax revenue system, requires particular attention as this system caused a significant increase in already-existing inequalities.<sup>787</sup>

The Mutiny of 1857 was accepted, within the history of India, as the first national and political movement led by Indian people themselves. Even though the Mutiny did not cover all parts of India and even though it failed (to acquire independence from the British), that failure nonetheless changed the course of affairs of the British Empire with India, and thus the socio-political future of the country. For example, the East India Company lost its power in India and the power to govern the country was passed directly to the British Crown in 1858 (by the Government of India Act).<sup>788</sup> This Act created the Council of India and abolished the Parliamentary Commissioners.

British colonialism could not, of course, have continued for so long had there not been various enabling conditions: a disorganized Indian society, Indian agents or collaborators cooperating with the British colonial power (especially among the growing middle class), the high level of illiteracy, widespread poverty, and deep socio-cultural diversities stemming from ethnicity, religion, language and the caste system. Of course, the Indian elites and middle class people collaborated with the British, because the former's interests intersected with that of the British. In other words, they believed their own interests would be best met

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<sup>785</sup> Rai, *Young India*, p. 101.

<sup>786</sup> It is reported that even though the Mutiny was largely a military revolt of the sepoys, it would not have taken place if there had not been considerable discontent among the Indian people, mainly the Brahmans, about the British interventions into many fields, like education, religion, and, of course, the economic relations etc. Sir Verney Lovett, *A History of the Indian Nationalist Movement* (London: John Murray, 1920), p. 12

<sup>787</sup> T. Rice Holmes, "The Mutiny" in *The Cambridge History of India in Six Volume (Vol Vi)*, ed. H. H. Dodwell (London: Cambridge University Press, 1932), p. 167. Burton Stein adds that in addition to British intervention, which preceded the Mutiny by a decade or so ago, some religious practices, like *sati*, also led to the discontent of the Indian people. Stein, *A History of India*, pp. 216-219

<sup>788</sup> Stein, *A History of India*, p. 227. It is reported that this Act was regarded as the Magna Carta for the people of India, since it "declared that the rights and dignity, and honour of Indian ruling princes were to be preserved as Her Majesty's own" Lovett, *A History of the Indian Nationalist Movement*, p. 15.

and maintained in the hands of British. When their mutual interests seemed to conflict, something in this collaboration started to change as of the middle of the nineteenth century.

Besides, the new capitalist middle class had gained more importance (with the help of the British style of education) in the government of India under British colonialism.<sup>789</sup> India's emerging middle class, who underwent a British style of education, started to internalize liberal ideals. An education system inspired by that of the British, which would idealize and disseminate liberal thinking among Indian middle class people, was first introduced by Lord William Bentinck, the then Governor-General, as early as 1835.<sup>790</sup> With the aid of such education – English being the language of instruction – the Indian middle class started to take part in the official administration/civil services, which would later contribute to or lead to the spread of liberal-nationalist ideals.

There were, of course, some other factors facilitating the participation of Indians in political matters. For example, after the Mutiny, the British response was to introduce the Indian Council Act of 1861, which paved the way for increasing participation of middle class Indians into the central (the Governor-General's Executive Councils) and local governments of India.<sup>791</sup>

Compared to the previous Acts of British rule, the 1861 Act introduced a more liberal form of government to India. However, the full access of Indian people to top administrative positions could never be achieved due to the distrust and fear from the growing middle class elites of India, as the 1857 Mutiny showed.<sup>792</sup> Be that as it may, the 1861 Act was important to Indian constitutional history, given that the Act contributed to a flourishing of self-esteem among the Indian people and the idea that they could have, one day, their own state. In the last quarter of the nineteenth century, in line with the increasing number of schools, including higher education institutions, the educated middle class flourished: with the good command of

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<sup>789</sup> For more on the numbers of British Indian state-funded schools and students enrolled see Stein, *A History of India*. pp. 256-57.

<sup>790</sup> Lovett, *A History of the Indian Nationalist Movement*. pp. 7-8.

<sup>791</sup> Stein, *A History of India*. pp. 232-34. In fact, the 1861 Act had restored to the local governments some of their legislative powers, which were repealed by the Company Charter Act of 1833. The title of the Act specifically endorsed this as "An Act to make better Provision for Constitution of the Governor-General of India and the Local Government of the several Presidencies and Provinces of India, and for the temporary Government of India in the event of a Vacancy in the Office of Government" For the entire Act, see *The Indian Council Acts and the Acts Amending It*, (Madras: The National Press, 1893), pp. 5-20.

<sup>792</sup> For the numbers of the top positions occupied by the Indian middle class or elites, see Stein, *A History of India*. pp. 239- 41.



English, and with a more liberal environment, the number of newspapers had increased,<sup>793</sup> which helped disseminate nationalist thoughts. The nationalist sentiment was spread broadly in the late nineteenth century. One of the important factors for this was a string of devastating famines, which occurred frequently in India as of the second half of the nineteenth century.<sup>794</sup>

Under the effects of these conditions, in March 1885 a congress was called (to be held in Bombay), which would be represented by delegates from all parts of India. Even though the majority were Hindus,<sup>795</sup> the congress included low level castes as well as Muslims. The motivation of the Congress was “the eradication, by direct friendly personal intercourse, of all possible race, creed, or provincial prejudices amongst all lovers of [India], and the fuller development and consolidation of those sentiments of national unity...”<sup>796</sup> Although it was not mentioned explicitly, the desire was to govern India by the Indian people themselves. Yet, the immediate goal was to achieve, first, an increased participation of Indian people into the (British) government of India, at various levels including the top legislative and executive positions.

The First Congress gained more than enough support from the Indian people; and participation in the second one (not only in numbers but also in terms of diversity, in the sense of covering different ethnicities, religions and caste groups) held in 1886 was even higher. This increase would continue over the following Congresses. The initial thrust of the Congress was to show to the British the desire of the Indian people to be heard, respected and represented (more) in the government of their own country. So, the nationalist sentiments grew in each Congress with the demand of social and political reforms.

The British power responded to the Congress movement with some minor compromises, introduced by various Acts, such as expanding education and offering some administrative and civil service positions to educated middle class Indians. However, these promises were not enough, especially for Hindus. Thus, the movement continued with increased enthusiasm and decisiveness. The famine and plague that occurred in 1896 brought about serious anguish. In fact, as said above, the famine was a grave and widespread problem all over India as of the

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<sup>793</sup> Ibid. pp. 258-59.

<sup>794</sup> Ibid. pp. 249-253.

<sup>795</sup> The Congress movement was said to be a British idea/product. Rai, *Young India*, p. 122. In fact, Allan Octavian Hume, ex-Secretary of the Government of India, suggested such a form of Congress. Sir William Wedderburn, *Allan Octavian Hume- Father of the Indian National Congress* (London: T. Fisher Unwin, 1913), pp. 58-59.

<sup>796</sup> Lovett, *A History of the Indian Nationalist Movement*, p. 35.

mid nineteenth century. It caused the deaths of many people, and each time to an increasing degree. In this regard, the famines that occurred in 1896 and again in 1899-1900 were the most devastating. They affected more than 60 million people and killed over five million.<sup>797</sup> For this reason, the Indian people started to blame British rule much more vocally, in the newspapers as well as in their daily life. Accordingly, the unhappiness increased.

The discontent found its organized voice in the Indian National Congress. The initial goal of the Congress, i.e. independence, was however far from being achieved. One of the reasons for this was that the Congress movement, however successful it was, was an elite-led movement. In its earlier period, the movement could not stimulate the participation of the masses. This would happen with Gandhi, after the First World War. Secondly, behind the initial failure of the Congress movement lay the members' disagreement and conflict, which mainly arose between Muslims and Hindus. This conflict, which existed even before, was augmented due to their different priorities and preferences for modes of action, and then led to the gradual separation of Muslims from the movement.

The British ruler Lord Curzon, the extremely powerful Viceroy of India, contributed to the already-existing tensions between Muslims and Hindus by dividing Bengal, in 1905, into various provinces, in which the Eastern part was dominated by Muslims.<sup>798</sup> The Hindus showed their utter disagreement with the partition by boycotting British goods and institutions, and severing all cooperation. But, ultimately their protests were futile. Following this, Hindu people within the Congress movement started to put more emphasis on their tradition and religious practices (like the sacredness of cows), which they demanded to be protected against outsiders' (including Christians and Muslims) disregards and interferences. And mutual suspicion of Muslims and Hindus within the Congress movement also increased following the partition. On the other hand, the Partition of Bengal engendered a growing degree of self-esteem and consciousness among Indian Muslims. Thereby, they established the Muslim League in 1906, which later led to the separation of the Muslim people under a different state: Pakistan.

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<sup>797</sup> Stein, *A History of India*. pp. 251-53 (Giving as reasons for the famine: the modernization process of India under the colonial power, and the capitalist commerce practice of grain (mostly export-oriented) and its easy transportation by railways – which the British started to construct widely as of the mid nineteenth century across India). Also see Lovett, *A History of the Indian Nationalist Movement*. pp. 49-52.

<sup>798</sup> Rai, *Young India*, p. 167. Lovett, *A History of the Indian Nationalist Movement*, p. 58. Also see E. C. Meysey-Thompson, *India of to-Day* (London: Smith, Elder & Co., 1913), pp. 124-129 (Trying to justify the partition as a necessity because Bengal was getting too large, as a result of its prosperity of wealth and population, which made it difficult for British rule to govern that province of India).

The partition of Bengal was an important crossroads for the Congress movement, since it contributed, to a great extent, to turning the Congress movement into well-structured political party.<sup>799</sup> However, the partition also caused the split of the Hindu members of the Congress movement into two factions, i.e. extremist and moderate groups. Each of these factions developed their own agenda and political tactics to sustain the movement. The extremists were inclined to use violence for their political goals; bombs were set off and attempts to assassinate high-ranking British officials were made.<sup>800</sup> The swadeshi (self-sufficiency) movement emerged from this schism, which developed a moderate strategy of boycotting British rule, its products, etc., and which gave Indian people more decisiveness for self-ruling. In this split among the Hindu members of the Congress movement, the extremist group seemed to triumph as they obtained more supporters, although not for long.

The British reaction to this new movement, which was prone to more nationalist and violent patterns, was to increase the number of positions that could be occupied by Indians in the legislative bodies, by the 1909 Indian Council Act at the local and central levels.<sup>801</sup> Elections gained more importance because of the seats to be occupied by Indian people. However, this solution did not stop the movement; in fact, violence even increased.

The outbreak of the First World War provided the expected conditions for the independence movement of India to be successful. The War had an important impact on the independence movement, particularly because a large number of British soldiers that were based in India were transferred to the front line to fight against Britain's enemies, i.e. Germany and her allies. This obviously weakened the British military power in India. Thus, the independence movement of India finally found itself in a situation where it might make gains in the direction of its desired goal: independence. They united in order to become more powerful against British rule. The different leanings (except for Muslims) within the movement were removed. Muslims, under the Muslim League, found their own way and moved in that direction, which would ultimately result in the establishment of Pakistan.

The British solution to the movement during the First World War was to introduce a new Act of 1919. It created a bi-cameral legislature – with the upper and lower houses, each of which

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<sup>799</sup> For the structure of the Congress Party built on its 1908 constitution see, Gopal Krishna, "The Development of the Indian National Congress as a Mass Organization, 1918-1923" *Journal of Asian Studies* 25, no. 3 (1966), pp. 414-15.

<sup>800</sup> Stein, *A History of India*, p. 274-76.

<sup>801</sup> Ibid. p. 284.

would be occupied by representatives of the Indian people. The Act went one step further, however, by making a declaration that the aim of British rule in India was to form a representative democratic regime. However, the failure of Britain to adopt all necessary measures required by this declaration, and rather using it to stall and repress the movement, engendered the notion that British rule could not be trusted.

These were the conditions under which the new form of the (Indian National Congress) movement began, under the leadership of Gandhi. Using his experience of peaceful resistance against racial discrimination in South Africa, Gandhi developed a new form of opposition to the British colonial power in India: peaceful civil disobedience. Gandhi's aim for his civil disobedience movement was to resist all kinds of discrimination, not only against British rule, but also against other forms of discrimination resulting from the caste system, etc. By means of his strategy of civil disobedience, he managed to mobilize the masses to resist all kinds of discrimination, primarily those enforced by British rule. Gandhi, by underlining socio-economic equality very significantly, aimed to achieve this goal passionately. This was consistent with the initial goal of the Indian National Congress and Gandhi used the Congress movement very successfully to achieve this end.

Throughout these years, the Congress elite developed and produced various reports, resolutions, etc., all of which put an emphasis on the freedom and equal status of the Indian people. Jawaharlal Nehru, one of the important leaders and the twin spirit <sup>802</sup> of this period, who was inspired significantly by socialism, played a crucial role in the production of these reports and resolutions. The importance of the Karachi Resolution, entitled 'Fundamental Rights and Economic and Social Change' and declared by the 1931 Congress Session, should be mentioned. This Resolution significantly affected the future constitutional development in India and it notably inspired the current constitution. The Karachi Resolution underlined the importance of the fundamental (negative) rights. It went one step further by adding a new dimension: "the real economic freedom of masses"<sup>803</sup>

The initial success of Gandhi's leadership was the introduction of the Government of India Act of 1935 by British rule. This Act advanced the representative character of the British

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<sup>802</sup> Even though Gandhi was regarded as master and Nehru as his disciple, it was said that they "were one in spirit" M. Chalapathi Rau, *Gandhi and Nehru* (Bombay, New Delhi, Calcuta: Allied Publishers, 1967), p. 98.

<sup>803</sup> "The Karachi Resolution was inspired by a socialist view. It had suggested that [t]he state was to own or control key industries and services, mineral resources, railways, waterways, shipping and other means of public transport" Austin, *The Indian Constitution- Cornerstone of a Nation*, p. 56

administration of India by reserving more seats for Indian people. The Act also created a federal structure of government, which was very similar to the federalism of India today. The Congress became more important to Indian people, and this was proved in the elections.<sup>804</sup> When the suitable conditions arrived, during the Second World War, the Congress movement attained its desired aim, i.e. the independence of India. The initial goals of the Congress movement resulted in the insertion of those goals into the Constitution of the independent India. The independent India was built upon those goals. Yet, this was only the start; there was a long way to go in order to complete the social and political revolutions.

#### 4.3.2. The Constitutional Identity and the Practice of Democracy in India

The Constitution of India entered into force on January 26, 1950<sup>805</sup> after, as we have seen, the achievement of independence by a mass movement of Indian people from the British colonial power.<sup>806</sup> In order that the independent Indian state should keep all these diverse elements together, the Constitution of India became one of the longest and most detailed constitutions in the world.<sup>807</sup> It was the product of a Constituent Assembly of Indian People. Even though the Assembly itself performed its task under the permission of British rule, this does not make it an assembly delegated by British rule and even though the Constitution came about by the (Indian Independence) Act of British Parliament, this does not diminish the political meaning of the Constitution. Today, it would certainly be meaningless to discuss whether the Constitution of India is really a constitution in the legal system or an Act of British Parliament. Today, the Constitution of India is conceived as a product of the Indian people.

The Constitution of India thus created an independent Indian state. It has vested the sovereignty in the people of India.<sup>808</sup> The Constitution of India has established a federal,<sup>809</sup>

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<sup>804</sup> Rajendra Vora and Suhas Palshikar, "Introduction" in *Indian Democracy- Meaning and Practices*, ed. Rajendra Vora and Suhas Palshikar (New Delhi, Thousand Oaks, London: Sage Publications, 2004), pp. 22-23.

<sup>805</sup> Some articles entered into force earlier, on November 26, 1949. P. B. Gajendragadkar, *The Constitution of India- Its Philosophy and Basic Postulates*, Gandhi Memorial Lectures, University College, Nairobi (Nairobi, Bombay, London: Oxford University Press, 1969), p. 1.

<sup>806</sup> Sathe, "India: From Positivism to Structuralism", p.215.

<sup>807</sup> One of the reasons for its lengthy and detailed regulation is said to derive from the federal structure of India and the necessity to cover the relation between the Federal and state level. Secondly, it is the constitution, except for two states, of all other federated states. Singh, "India", p.169. In spite of its length and detailed regulation, the Constitution of India was changed more than one hundred times. The text of the Constitution of India and of the Amendment Acts can be found at <http://indiacode.nic.in/coiweb/welcome.html>

<sup>808</sup> Let us note here that before the entering into force of the Constitution, what became later the Indian Federal State had been recognised as the Federation of Indian State (Part II) and each State as Province (Part III) by the

democratic and secular State based on the principles of rule of law and separation of powers. Regardless of the deficit of democratic considerations in the composition of the Assembly,<sup>810</sup> it has been accepted as a creation of the Indian people.

The system created by the Constituent Assembly was debated profoundly during the drafting process. Parliamentary democracy in this respect was one of the issues that was intensely discussed. However, the independent Indian state had almost no other *practical* choice but to adopt a parliamentary democracy as its system of government. This happened for several reasons. First of all, a parliamentary form of government was not an alternative choice for India, but a necessity to retain unification and to keep the nation united. Secondly, in order to complete the social and political revolutions, a form should be adopted that would be suitable to keep diverse elements together under the shared goals.<sup>811</sup> In short, the reason for this (compulsory) choice lay in the fact that it would be nearly impossible for the independent Indian state to hold together all those diverse elements through any other means.

In fact, ‘unity in diversity’<sup>812</sup> had become the motto of the independence movement in its later stages. Thus, the choice of form of government consisted of the mere fact that it was put into the constitutional context.<sup>813</sup> The partition of Bengal was a reminder of the importance of sticking to that motto, and the separation of the Muslim people by establishing another independent state (Pakistan) exacerbated the endorsement of the motto and rendered it inevitable for the Indian state to adopt a parliamentary democratic regime subscribed to a secular order.<sup>814</sup> In short, as the long history of the independence movement demonstrates, the

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Government of India Act, 1935, adopted by the British Parliament. This document seems to have been taken as a reference by the Constitution of India; their lengths and structures are very similar.

<sup>809</sup> It should be noted that the Indian federalism has some particular features, which are not relevant to deal with here. On this, see Ivor Jennings QC, *Some Characteristics of the Indian Constitution* (Madras: Geoffrey Cumberledge, Oxford University Press, 1953), pp. 55-74; also see Gajendragadkar, *The Constitution of India-Its Philosophy and Basic Postulates*. pp. 63-67.

<sup>810</sup> The Assembly was composed of representatives of the Indian people. However they were not elected by adult suffrage. The provincial legislatures designated them. Even though the dominations to take part in the Constituent Assembly were determined by the Indian National Congress, there were representatives of different groups (Muslims, Sikhs and Hindus) as well. For the composition of the Constituent Assembly and the history behind it see Austin, *The Indian Constitution- Cornerstone of a Nation*. pp. 1-25

<sup>811</sup> Ibid. pp. 39-49.

<sup>812</sup> Atul Kohli, “Introduction” in *The Success of India’s Democracy*, ed. Atul Kohli (Cambridge: Cambridge University Press, 2001), p. 5. And the experience gained during the movement was later inserted into the constitutional text, Mahendra P. Singh and Surya Deva, “The Constitution of India: Symbol of Unity in Diversity” *Jahrbuch des öffentlichen Rechts der Gegenwart/ Neue Folge* 53 (2005), pp. 649-86.

<sup>813</sup> Singh and Deva, “The Constitution of India: Symbol of Unity in Diversity”

<sup>814</sup> Saying that there was no practical alternative to the representative democracy does not mean that there was no opposition to it; there were voices against the parliamentary democracy model, but those suggested alternatives were seen, under the conditions of that time, as difficult, if not impossible, to support and put into practice. For example, even Gandhi himself objected to some features of the representative model of democracy. He

independent Indian state had no *practical* alternative other than endorsing a parliamentary democracy. On the other hand, representation was not totally unknown to the Indian people. Before the Constitution, the Indian National Congress movement had already experienced an important degree of representation, in that, as we have seen above, the Congress' initial phase had relied on the representation or delegation, albeit limited, of different segments of people from different regions of India. The representation within the Congress movement became more organized and more settled in the course of time.<sup>815</sup>

According to the model adopted, the federal state of India (and each state in the union) is based on the principle of separation of powers, that is, three branches of government – legislative, executive and judiciary – are authorized to exploit the sovereign powers. The legislative branch at the federal level (Art. 79-88) is Parliament, which is composed of two Houses: The Council of States (Rajya Sabha) and the House of the People (Lok Sabha). The head of executive branch is the President (Part V- Article 52 and so on), who is aided and advised by a Council of Ministers, with the Prime Minister at the head (Part V, Article 74 and so on). But in effect, the Council of Ministers is more powerful than the President at the practical level, even though the President is vested with certain important powers, such as declaration of emergency (Part XVIII, Articles 352-360), under which the President has very strong powers, including the power to suspend virtually all Fundamental Rights (Art. 358) and also the suspension of the right to move any court for the enforcement of fundamental rights (Art. 32) etc. The Council of Ministers is more powerful, because even the declaration of emergency shall be initiated by the Council of Ministers' demand (Art. 352/3).

In addition to secular and liberal notions of representative democracy, the founders of the independent Indian state wanted the Constitution to eradicate, first, social inequalities, and second to improve the socio-economic conditions of citizens. The abolishment of untouchability (Art. 17) and prohibition of discrimination based, *inter alia*, on caste (Art. 15)

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supported a more decentralized form of (so-called swaraj, i.e. self-sufficient village) democracy, which was significantly different from the parliamentary democracy. Not only Gandhi, but also adherents to the communist-socialist views within the Indian National Congress movement developed different models of government, at the heart of which lay the idea of decentralization. Thus, the parliamentary model of democracy endorsed in India was in fact a compromise, since its alternatives were considered as practically very difficult to put into practice. Thus, the endorsement of parliamentary democracy did not come out without challenge or opposition. For the discussion that took place in the Constituent Assembly see Austin, *The Indian Constitution- Cornerstone of a Nation*. pp. 27-32; also see Vora and Palshikar, "Introduction", pp. 11-14.

Vora and Palshikar, "Introduction", pp. 19-20.

<sup>815</sup> Vora and Palshikar, "Introduction", pp. 19-20. In fact, it is argued that "Indians became increasingly familiar with the tradition of parliamentary government ever since their association with Britain began" Fali S. Nariman, "Some Thoughts on Nehru's Vision" in *Challenges to Democracy in India*, ed. Rajesh M. Basrur (Oxford; New York: Oxford University Press, 2009), p. 12

is stipulated by the Constitution. Next to this, attainment of a welfare state was placed among the central ambitions of the Constitution – as it was one of the key goals of the Congress movement. In the words of an eminent constitutional historian of India, Granville Austin, “[t]he constitution was to foster the achievement of many goals. Transcendent among them was that of social revolution. Through this revolution would be fulfilled the basic needs of the common man, and, it was hoped, this revolution would bring about fundamental changes in the structure of Indian society...., greatly in need.... of a powerful infusion of energy and rationalism”<sup>816</sup> Part III and Part IV of the Constitution of India are dedicated to the attainment of these aspirations, both of which embody “the conscience of the Constitution”<sup>817</sup> While Part III is directed to the attainment of the first aspiration, i.e. social equalities and fundamental (negative status) rights, Part IV is directed to the second one, i.e. the welfare state.

The Part IV of the Constitution of India contains provisions (Art. 36-51)<sup>818</sup> such as Article 38, which sets out that “[t]he State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life”; and Article 39, which stipulates that “[t]he State shall, in particular, direct its policy towards securing – (a) that the citizens, men and women equally, have the right to an adequate means of livelihood; (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good...” However, in spite of all its important ideals, Part IV is not backed by any sanctions, that is to say, the rules/ideals contained in Part IV, unlike Part III, are not enforceable or justiciable by the courts (Art 37). The Part of Directive Principles of State Policy reflects the radical ideal of establishing a society based on socio-economic equality. The desire was, at least, to eradicate traditional socio-economic *inequalities*. In a sense, some sort of socialist rhetoric was working behind the scenes.<sup>819</sup>

The goal to establish a democratic regime, which is subscribed, to some degree, to substantive equality, should be supported by protecting fundamental rights – which the Constitution of India does. It consists of a part that guarantees ‘Fundamental Rights’ (Part III), and which is to secure the democratic nature of the State. Part III includes rights, which can be found in

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<sup>816</sup> Austin, *The Indian Constitution- Cornerstone of a Nation*, p. xvii.

<sup>817</sup> Ibid. p. 50.

<sup>818</sup> On the Directive Principles of State Policy see Gajendragadkar, *The Constitution of India- Its Philosophy and Basic Postulates*. pp. 15-22

<sup>819</sup> “The Directive Principles of State Policy set forth the humanitarian socialist precepts that were, and are, the aims of the Indian social revolution” Austin, *The Indian Constitution- Cornerstone of a Nation*, p. 75.



many Bills of Rights or constitutional chapters on fundamental rights. For example, equality before law (Art 14), prohibition of discriminations on any ground (Art 15), and equality of opportunity (Art 16) are among those rights and freedoms. Most important among them is Article 19 entitled 'Right to Freedom' which counts (a) freedom of expression, (b) freedom of assembly, (c) freedom of associations, (d and e) freedom to move and reside freely, freedom of conscience and religion (Art 25) etc.

Seen from this perspective, the independent state of India commits itself to free and democratic order and to achieving a substantive degree of equality. However, we can declare at the beginning that even though democracy in India has shown some degree of success in the procedural sense (i.e. in the sense of holding periodic elections based on universal adult suffrage), it has experienced some challenges in terms of the substantive side. In this respect, it has been observed that there have been some structural or inherent flaws and shortcomings, which makes Indian democracy *sui generis*.<sup>820</sup> It is argued that the practice of democracy in India does not correspond completely with the western understanding and practice of democracy.<sup>821</sup> Thus, the practice of democracy in India has some peculiar characteristics that need to be uncovered.

With regard to the success side of the coin, it can be said that democratic elections have been held regularly and fairly competitively. Furthermore, inclusion of more representatives of different segments of society (from women to backward castes) also proves the success of Indian democracy.<sup>822</sup> In addition to these, democratic elections have been regarded as the legitimate base to capture the state power.<sup>823</sup> In this connection, it can be said that India has been successful to secure institutionalization of democracy,<sup>824</sup> and it "has acquired deeper roots over the last 50 years"<sup>825</sup>

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<sup>820</sup> Valerian Rodrigues, "Two Discourses on Democracy in India" in *Challenges to Democracy in India*, ed. Rajesh M. Basrur (Oxford ; New York: Oxford University Press, 2009), p. 27.

<sup>821</sup> Monajaran Mohanty, "Theorizing Indian Democracy" in *Indian Democracy- Meaning and Practices*, ed. Rajendra Vora and Suhas Palshikar (New Delhi, Thousand Oaks, London: Sage Publications, 2004), pp. 99-100.

<sup>822</sup> Vora and Palshikar, "Introduction", p.25.

<sup>823</sup> Kohli, "Indian Democracy: Stress and Resilience", p.63; Kohli, "Introduction", p.8.

<sup>824</sup> Zoya Hasan, "Indian Democracy and Social Inequalities" in *Challenges to Democracy in India*, ed. Rajesh M. Basrur (Oxford ; New York: Oxford University Press, 2009), p. 127. Though, the success of institutionalization of democracy has been achieved "amid mass poverty, illiteracy, extreme social diversity, and rising expectations" Gerald E. Beller, "Benevolent Illusions in a Developing Society: The Assertion of Supreme Court Authority in Democratic India" *The Western Political Quarterly* 36, no. 4 (1983), p. 513.

<sup>825</sup> Javeed Alam, "What Is Happening inside India?" in *Indian Democracy- Meaning and Practices*, ed. Rajendra Vora and Suhas Palshikar (New Delhi, Thousand Oaks, London: Sage Publications, 2004), p. 78. For a similar line of view Mohanty, "Theorizing Indian Democracy" (arguing that the Indian style of democracy is a creative theory of democracy).

In this respect, the first two decades were very important in order for Indian democracy to settle firmly in terms of the procedural aspect of democracy. After having achieved the independence in a struggle against British colonialism, the National Congress Party ruled the country without significant challenge for the first two decades following independence. The immediate reason for this was that the Congress Party was a kind of umbrella party covering a wide range of different groups with various interests. The Congress Party ran the government effectively in this period, mostly under the charismatic leadership of Jawaharlal Nehru until his death in 1964. Even though it was not a single-party period, the dominance of the Congress Party could be observed at the provincial as well as the union/federal level. The Congress Party was successful enough, for some time, to accommodate those who regarded themselves as excluded, mostly the backward caste groups, tribes etc. Thus, the post-independence era witnessed that the Indian National Congress became “India’s natural ruling party”<sup>826</sup> After this period, the decline of the Congress Party began – or, more accurately, the oscillation between the decline and rise.

Despite holding regular elections and obtaining some degree of success in terms of getting people to participate in politics, some structural flaws and challenges put a strain on Indian democracy. These are the factors that make Indian democracy *sui generis*. The first immediate issue involves the fact that Indian society has been traditionally a very hierarchical society (which stemmed from the caste system). Therefore, this has been regarded as an obstacle for making democracy a reality. Democracy requires participation of citizens in political business at various levels, but in order to be able to participate in politics, there should be a minimum degree of equality. However, the traditional hierarchical social structure in India has hindered people from having a voice in politics. In addition to the hierarchical and unequal system, large-scale illiteracy and poverty<sup>827</sup> have presented significant obstacles to the flourishing of democracy in India, despite the founders’ desire and efforts to eliminate these.<sup>828</sup>

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<sup>826</sup> Kohli, “Indian Democracy: Stress and Resilience”, p.53. Today, the National Congress Party is still among the most powerful and influential political parties of India.

<sup>827</sup> It is reported that official statistics estimate that 27% of the Indian population (amounts to 270 million people) is poor. However, the real number is said to be 65%. For the figures see Hasan, “Indian Democracy and Social Inequalities”, p. 135.

<sup>828</sup> It is reported that there has been some degree of progress or amelioration on the socio-economic status of the backward castes, scheduled castes and tribes, acquired by some instruments like, quota and/or reservation in public employment and education, yet it is not at a desired level. A. Vaidyanathan, “The Pursuit of Social Justice” in *India’s Living Constitution: Ideas, Practices, Controversies*, ed. Zoya Hasan, E. Sridharan, and R. Sudarshan (London: Anthem Press, 2005), pp. 291-93.

Another important challenge for India's democracy has been that of achieving the goal of socio-economic equality, one of the central goals of the constitution. Socio-economic inequality, and the interest centred on it, has created a fragile political environment as it produces violence, which may threaten the democratic order. Indeed, widespread violence has been another cause for concern for the Indian democracy.<sup>829</sup> Those who believed that their voice would not be heard in politics, for various reasons, have occasionally carried out political violence and sometimes moved towards secession from the Indian federal state, which has become an important problem for the Indian democracy.

The fragmented multi-party political regime of India is another structural deficit of India's democracy since it has made it difficult to have a stable government.<sup>830</sup> Of course, the multi-party system is not an obstacle to democracy *per se* – quite the opposite. However, a fragmented political party structure in the context of India has made it difficult to obtain the stable majority necessary for an effective government, which in turn has brought about instability. Many political parties – with diverse priorities, tendencies, and support from various communal groups at the local as well as federal level – gained a certain degree of power following the decline of the Indian National Congress Party in the late 1960s and especially in the late 1980s. Even though Indira Gandhi's populist political strategy was successful in the early 1970s, her populist strategy led the opposition parties to work together to defeat Gandhi.

The response of Indira Gandhi to eliminate the opposition was despotic, in that she declared Emergency or what is called “democracy's death notice”<sup>831</sup> from 1975 until 1977.<sup>832</sup> This, however, stimulated the enthusiasm of the opposition to challenge her power. Indira Gandhi's Emergency period of 1975-77, during which basic rights were suspended, was the only exception to regular elections.<sup>833</sup> The importance of the Emergency period should be noted for three reasons. The first is that the Emergency period of Indira Gandhi's government brought

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<sup>829</sup> Hasan, “Indian Democracy and Social Inequalities”, p.137.

<sup>830</sup> For the issue how the electoral system has affected the multi-political party system and how this led to coalitional governments in India, see E. Sridharan, “The Origins of the Electoral System: Rules, Representation, and Power Sharing in India's Democracy” in *India's Living Constitution: Ideas, Practices, Controversies*, ed. Zoya Hasan, E Sridharan, and R. Sodarshan (London: Anthem Press, 2005), pp. 344-69.

<sup>831</sup> Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* (Delhi, Oxford: Oxford University Press, 2003 (Oxford India Paperbacks); reprint, First Published in 1999), p. 296.

<sup>832</sup> More on socio-political conditions which drove country to the emergency see Ram Joshi, “India 1974: Growing Political Crisis” *Asian Survey* 15, no. 2 (1975), pp. 85-95. (Explaining the Bihar question and showing the violent student protests as reasons.) And on the same Emergency Period, its reasons and results, see Austin, *Working a Democratic Constitution: A History of the Indian Experience*. pp. 295-313.

<sup>833</sup> Vora and Palshikar, “Introduction”, pp. 17-18.

about an unexpected outcome in that Indian people realised that democracy, even in the minimum sense of elections, was very important to them.<sup>834</sup> Secondly, it caused a sharp decline of the Congress domination and increase of other political parties with various policy choices and trajectories. That is why the Indira Gandhi-led Congress Party was defeated in the 1977 election held just after the Emergency. The following era witnessed that it was difficult to obtain majority in the parliament necessary to establish government; the fragmented structure of (big or small, strong or loose) party systems led to instability. Thus, the outcome was a period of fragile coalitional governments.<sup>835</sup> Instability resulted from the coalitional governments reproducing negative views of the excluded masses – augmented by extensive claims of corruption<sup>836</sup> – against party politics.<sup>837</sup> Thirdly, it showed the importance of the authority of the Supreme Court as a guardian of fundamental rights; thus, more weight has been given to the Supreme Court by the system.

To sum up, we have seen that the practice of democracy in India was successful in terms of the procedural sense, at least to an important degree. However, India's democracy has witnessed a failure in terms of a substantive understanding of democracy; i.e. equality, the rule of law, the protection of basic rights and freedoms, etc. – especially during the Emergency Period.

The constitutional identity has thus fluctuated between the two goals of the Constitution. When the one side prevails or takes on more weight, the other side loses effect. This was what had happened during the Emergency period. Indira Gandhi wanted to put more emphasis on the chapter of 'Directive Principles of State Policy' of the Constitution, however she attempted to do so by jeopardizing the fundamental rights and freedoms. Until the Emergency period the attainment of the goal of the welfare state seemed to have more emphasis, as seen in practice, after the Emergency period it was realised that fundamental rights and freedoms could be sacrificed.

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<sup>834</sup> Kohli, "Introduction", p.9. Yet the same event is construed as the starting point of a crisis or a rupture the political system of India has undergone since then. The crisis is defined as a legitimacy crisis of the political authority in India. For this account see, D. L. Sheth, "The Crisis of Political Authority" in *Indian Democracy-Meaning and Practices*, ed. Rajendra Vora and Suhas Palshikar (New Delhi, Thousand Oaks, London: Sage Publications, 2004), p. 56 etc.

<sup>835</sup> Kohli, "Indian Democracy: Stress and Resilience", p.57.

<sup>836</sup> On the issue of widespread corruption in India, see Jayaprakash Narayan, "Organized Crime, Corruption, and Democracy" in *Challenges to Democracy in India*, ed. Rajesh M. Batur (Oxford ; New York: Oxford University Press, 2009), pp. 106-112.

<sup>837</sup> Vora and Palshikar, "Introduction", p.17. This does not mean, however, that poor people do not respect democracy or regard it as unimportant. In fact, their trust and belief in democracy has never faded and in order to overcome the systematic flaws of the order, they have put more emphasis and showed their allegiance to democracy.

### 4.3.3. The *Locus* of Sovereignty in India

In this section, we will try to make sense of sovereignty as seen in the constitutional context of India. We will focus in particular on how sovereignty is conceived and where it is situated within the constitutional identity of India. Following this, we hope to have a framework through which we will be able to assess the legitimacy of assuming a key competence by the Supreme Court of India of reviewing substances of constitutional amendments and of annulling them.

The Constitution of India can be conceived as a product of the sovereign power of the Indian people, regardless of the fact that it was, from a pure legal point of view, bestowed by the British Parliament. Even though it was drafted and ratified by a Constituent Assembly that did not come about by universal adult suffrage, and even though it was not directly accepted by the people of India – in any way (such as a referendum), these features cannot justify identifying the Constitution of India as merely and totally an elite product. What makes the Constitution of India a reflection of the sovereign will of the Indian people is the history of the independence movement that we saw earlier. Not only the history *per se*, but also the goals which were gradually developed and idealized within that history and which were introduced into the Constitution reflects the sovereign will of the Indian people.<sup>838</sup>

In this sense, the Constitution of India also aimed to create the sovereign will through constructing the political unity of the country. This was the predominant aim of the Constitution and it would be accomplished mainly through the parliament.<sup>839</sup> How close the Constitution was to come to achieving those goals is another matter, which requires considering and taking up the deeply unequal socio-economic structure, and how easy it was, during the founding era, to eradicate. At this point, we should mention that we only try to see and show what the constitutional identity was hoped to be by the founders, in the ideal sense. In this respect, the founders wanted to achieve the ideal of parliamentary sovereignty, but to do so they needed to construct and ensure, first, the conditions necessary for exercising it.

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<sup>838</sup> For a sophisticated account of the view that the Constitution of India was truly a product of the sovereign will of the Indian people see Sarbani Sen, *The Constitution of India: Popular Sovereignty and Democratic Transformations* (New Delhi: Oxford University Press, 2011; reprint, Second Impression (Published first in 2007)), (arguing that the sovereign will was formed and developed gradually within the long period of the independence movement.

<sup>839</sup> Austin, *The Indian Constitution- Cornerstone of a Nation*, p. 144.

In this regard, universal adult suffrage was central, not only to the composition of Parliament, but also historically. Under the British colonial power, the electorate was a privilege and warranted according to community attachment or caste status, (i.e. it was limited to some groups due to their educational status, property ownership etc.).<sup>840</sup> Thus, adopting an electorate system based on universal adult suffrage has had a particular socio-historical and political meaning within the Indian context. The adoption of universal adult suffrage also had another implicit meaning and significance for the new political order of the independent Indian state. This refers to the uniting function of universal adult suffrage as it made citizens one mass electorate, in that no communal attachment or educated or illiterate status of people or property-ownership was taken into account to cast votes for the election of people's representative. In this sense, this system was believed to guarantee parliamentary sovereignty. Therefore, the distribution of sovereign power was not aimed to be limited only to some groups under the Constitution of India. Again, whether this system could really and actually put this into practice is another matter. Seen from this perspective, the Constitution of India, as a product of the sovereign will and power of Indian people, can be said to rely upon the principle of popular sovereignty.<sup>841</sup> This finds its place in the Preamble, in the US-Constitution style phrase: 'We the People of India.'

Within this picture, not only the Supreme Court, but also courts in general were regarded as important state organs for the independent state of India. Behind this lay the fact that courts as well as laws of India were under the control of British colonial power. Thus, courts were regarded as essential to the independence of India, as they would be not only responsible for the implementation of laws, but also one of the guarantors of the independence of the Indian state. Among the judiciary, the Supreme Court of India was envisaged by the Constituent Assembly as an important judicial organ, and as one of guardians of the Constitution of the free Indian state.<sup>842</sup>

However, even though the Supreme Court has been bestowed broad competences, its power would not envisage going beyond that of Parliament. During the Constituent Assembly debates, Nehru spelled out to what extent the popular sovereignty has informed the

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<sup>840</sup> Ibid. p. 144.

<sup>841</sup> For an opposite view claiming that the "[t]he doctrine of Parliamentary sovereignty has never been seriously advanced as a doctrine in Indian constitutional law" See Krishnaswamy, *A Study of the Basic Structure Doctrine*, p. 209.

<sup>842</sup> For a discussion on the significance of the courts and the wide powers of the Supreme Court of India, see Austin, *The Indian Constitution- Cornerstone of a Nation*. pp. 164-175.

Constitution. He stated “no Supreme Court and no judiciary can stand in judgment over the sovereign will of Parliament representing the will of the entire community”<sup>843</sup> We see in the Constitution that although the founders have endorsed the principle of separation of power, the power bestowed on parliament (as the true representative organ of the Indian people and their sovereign will) was preferred to prevail. However, this remark should be refined. The refinement is necessary due to the fact that it was believed that the exercise of the sovereign power would be to meet the goals the Constitution wanted to achieve. When the utilization of the sovereign power departs from this desire, people’s approach towards the political system and the Constitution changes accordingly. This was experienced during the Emergency Period.

To identify what thwarts the ideal exercise of popular sovereignty requires considering the socio-political structure of India. When one looks at the practical level to learn about the actual exercise of sovereign power, it seems that the fragmented and fragile structure of Indian politics made it difficult to realise the vision of parliamentary sovereignty. This is accompanied, sometimes, by the abuse of the sovereign power - as exemplified by the Emergency Period. The exercise of the sovereign power for unintended means or by methods not envisaged by the founders of the Constitution was not what the constitution had planned.

In this connection, “[t]he weakness of the political process provides a fertile soil for judicial activism...”<sup>844</sup> Namely, the political structure rendered it possible for the Supreme Court to intervene in politics, thus in the parliamentary sovereignty.<sup>845</sup> This is observed not only in cases of judicial review of constitutional amendments, but on many different themes. As a result, the first three decades of India’s democracy witnessed a contestation between Parliament and the Supreme Court as to what the scope of the powers of each were to be. The immediate result of this observation can be notice in the Parliament’s attempt to curb the judicial power through more than twenty amendments.<sup>846</sup> The attempts of Parliament for

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<sup>843</sup> Quoted from Ibid. p. 99. It seems that an English type of parliamentary sovereignty directly affected Nehru’s vision of sovereignty, even though, of course, the Indian parliament would have less sovereign power than its British counterpart; in this respect, it suffices to look at the amending clause (Art. 368) of the Indian Constitution. Having said that, it should be mentioned and underlined that some members of the Constituent Assembly submitted a proposal to give an unamendability status to the fundamental rights and freedoms, but this was rejected. And the rejection of this proposal suggests that the founders gave no credibility to the idea of unamendability and the notion of restrictive amending power of parliament. Sathe, “Supreme Court, Parliament and Constitution- I”, p.1826.

<sup>844</sup> Prahap Bhanu Mehta, “The Rise of Judicial Sovereignty “ *Journal of Democracy* 18, no. 2 (2007), p. 79.

<sup>845</sup> Beller, “Benevolent Illusions in a Developing Society: The Assertion of Supreme Court Authority in Democratic India”, p.518.

<sup>846</sup> Mehta, “The Rise of Judicial Sovereignty”, p. 74.

curbing the Supreme Court's power of judicial review of constitutional amendments were the most prominent examples of this fight.

Seen from this angle, the political culture of India has experienced a tension or contestation between Parliament and the Supreme Court in the exploitation of sovereign power. In this respect, it seems that the sovereign powers (in the sense of final authority to declare what the Constitution says about a particular issue) of Parliament and the Supreme Court remains an unsettled issue. The long contestation between Parliament and the Supreme Court has not yet decided what exactly the basic structure doctrine entails. The reason why there were no serious parliamentary challenges of the Supreme Court's basic structure doctrine after the 1990s derives from the fact that there has been no single party dominance due to the fragmented political structure. In other words, no parliamentary majority-composition has existed to be able to amend the constitution since the annulment of a constitutional amendment in the *Minerva Mills* case. Therefore, Parliament and the Supreme Court will probably remain competitors until the issue is settled firmly.<sup>847</sup>

#### **4.3.4. Evaluation of the Legitimacy of the Judicial Review of Constitutional Amendments on Substantive Grounds in India**

In this section, we will try to evaluate the legitimacy of the outcome(s) of the judicial review of constitutional amendments by the Supreme Court of India. The first output, as we have identified earlier, is common to all three jurisdictions: the competence held by the Supreme Court of judicial review of constitutional amendment on substantive grounds. The second is the disallowance of compulsory expropriation of property rights without paying (an market value of) compensation.

The assessment of the legitimacy of the competence held by the Supreme Court of India of judicial review of constitutional amendments on substantive grounds goes hand in hand with the context that gave rise to assuming the competence by the Court. Thus, it can be appraised within that context.

To begin with, one should look at the tension between the right to property and the welfare state goals, both of which the Constitution of India wanted to reach in a compatible manner. At this point it should be made clear that even though the amendments which were declared

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<sup>847</sup> Ibid. p. 75.



unconstitutional by the Supreme Court were not directly related to the right to property, the real controversy between Parliament and the Supreme Court was, as aptly noted by an eminent constitutional lawyer in India, the right to property.<sup>848</sup> To put it more clearly, in the midst of the tension between Part III and Part IV of the Constitution was the right to property and its compulsory expropriation without paying equal (market) value of compensation, which was a tool for land reform.

We have seen above that the constitutional identity of India has rested on two ideals, set down in Parts III and IV of the Constitution. However, these two Parts have been considered as a reflection of “inbuilt contentions”<sup>849</sup> or “the tension inherent in the desire to achieve radical social and political change”<sup>850</sup> Thus, the emergence of the basic structure doctrine rested on or resulted from the two (seemingly conflicting) ideals that the founding fathers of the Constitution of India wanted to achieve (i.e. ideals of free *democratic state* protecting fundamental rights and *welfare state* aiming to achieve an equality-seeking society).<sup>851</sup> Although these are not conflicting ideals in theory, their implementation in the Indian context made them so, which was the result of the (unjust) socio-economic or caste-based social structure of India.

The crucial issue at this point is to determine the precise place and significance of the right to property in the constitutional identity of India. The right to property had been guaranteed as a fundamental right by the original Constitution by two related articles: Article 19, sub-clause (f), and Article 31. However, Article 31 contained, as we have seen earlier, some exceptions to the right to property. The reason for the exceptions to the right to property was that the founders regarded its absolute understanding as an obstacle to obtain certain socio-economic reforms, like land reform, which had to be achieved immediately in order to accomplish the goal, i.e. the elimination of extensive economic inequalities. Therefore, what these two articles concerning the right to property implied was that the right to property was not conceived in an absolute sense,<sup>852</sup> as in some other liberal constitutions; it would have a limited scope of protection, at least until the obvious inequalities were eliminated.

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<sup>848</sup> S. P. Sathe, “Supreme Court, Parliament and Constitution- II” *Economic and Political Weekly* 6, no. 35 (1971), p. 1873.

<sup>849</sup> Rodrigues, “Two Discourses on Democracy in India”, p.32.

<sup>850</sup> Krishnaswamy, *A Study of the Basic Structure Doctrine*, p. xi.

<sup>851</sup> Vaidyanathan, “The Pursuit of Social Justice”, p.284.

<sup>852</sup> The Constituent Assembly debate was in this line, see Austin, *The Indian Constitution- Cornerstone of a Nation*. pp. 173-74.

At this point, we should recall some of the remarks made at the beginning of the section of this thesis (in Chapter III) dealing with the *Case law* of the Supreme Court of India concerning the legal-history context. The Indian type of feudalism, the zamindari land system, was an important target of the founders, the Indian National Congress, to abolish during the independence movement and within the Constituent Assembly debate.

However, before the achievement of independence, zamindari rights were treated as vested rights under the Government of India Act, 1935. Therefore, without paying compensation for such property, no land could be acquired compulsorily.<sup>853</sup> During the drafting process of the Constitution, such a requirement, i.e. paying compensation for the compulsory acquisition of zamindari' right to property, was deemed unnecessary, at least by some.<sup>854</sup> In fact, it was one of the reasons for the division within the Congress<sup>855</sup> during the drafting period of the Constitution.<sup>856</sup> In this sense, Article 31, which dealt with the compulsory acquisition of property and some exceptions to the condition of payment of compensation, was a kind of compromise between the different views.

It is clear that the founders did not want the right to property to be the one of most essential features of the constitutional identity, at least until the attainment of socio-economic equality in some substantial degree. In this sense, the initial status of the right to property, as it was set out in the original text of the Constitution, showed the desire of the founders to overcome inequalities caused by the past socio-economic order. Namely, the reason for the initial limited scope of protection for the right to property resulted from the desire to generate a rupture with the past.

However, some elite groups (higher castes and landowning rural elites) had a more liberal understanding of the right to property. It is in fact the reason why this group challenged any piece of legislation aimed to restrict the scope of protection of the right to property. The compromise, which led to the adoption of Article 31 and some exceptions (Clause 4 and 6 immunising the zamindari abolition legislation from challenges before any court) to Art. 31 within the Constituent Assembly, reflects this tension.

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<sup>853</sup> Article 299 of the Government of India Act, 1935.

<sup>854</sup> Gae, "Land Law in India: With Special Reference to the Constitution", p.315.

<sup>855</sup> There were different suggestions on the issue of compensation for compulsory acquisition of zamindar rights: For example, some suggested 'equitable compensation', others no compensation at all. On this see Suri, "The Agrarian Question in India During the National Movement, 1885-1947", p.34, 35 and 38.

<sup>856</sup> Austin, *The Indian Constitution- Cornerstone of a Nation*. pp. 23-24 ; Gae, "Land Law in India: With Special Reference to the Constitution", p.316.

Now, all that matters is to determine whether the Supreme Court's position on the side of the elites is legitimate or not within the value patterns the constitutional identity brought about. We can argue that the limited scope of the right to property (compulsory acquisition of private property for public interest) was, for historical reasons, part of the constitutional identity of the India. It also meant that the compulsory acquisition of property was allowed, even without paying fair compensation. In fact, the Constitutional Assembly debates proves this, in that "consensus of opinion was that Parliament should be the final arbiter of the quantum of compensation"<sup>857</sup>

The challenge, which continued for some time, between Parliament and the Supreme Court proved that the limited scope of protection was desired to be a part of the constitutional identity. Nehru, as one of the important figures of the period of foundation, challenged the Supreme Court's position vis-à-vis the right to property, and attempted to attain the desired aim; i.e. attainment of social equality even by restricting the scope of the right to property. In light of these explanations, we can argue that the constitutional identity of India with regard to the issue of whether limited right to property was a part of it or not, was challenged immediately after the adoption of the constitution as early as the 1950s. Thus, the disallowance of compulsory confiscation of property without paying equal value of compensation by the Supreme Court was illegitimate, at least in the initial period, as it was against the constitutional identity.

On the other hand, the evaluation we have just offered is consistent with Stillman's conception, which we follow in this study. His argument that legitimacy is a "matter of degree" holds true for the Indian experience. The tension between the degree of legitimacy and illegitimacy of a governmental/judicial output has determined the future of the output. Namely, the consideration of the illegitimacy of the Supreme Court's position with regard to the right to property has been challenged each time by a parliamentary majority. But the Supreme Court has also responded negatively to Parliament's challenge almost every time.

This is, of course, an evaluation made retrospectively and on the basis of the status of the right to property within the Indian constitutional context. The assessment we have just made comprises the period until the Emergency period, thus covering the *Kesevananda* Case, but not later, because the constitutional identity (or what one scholar terms the paradigm of the

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<sup>857</sup> Sathe, "Supreme Court, Parliament and Constitution- I", p.1824.

state)<sup>858</sup> changed considerably in India, especially following the Emergency period. Scholars' approach to the basic structure doctrine has also changed significantly. Under the conditions that existed when *Golaknath* and later the *Kesavananda Bharati* cases were decided, the illegitimacy of the Supreme Court's position can be expressed more easily.

What we have just expressed does not cover the evaluation of legitimacy of the entire basic structure doctrine developed by the Supreme Court. We have just tried to evaluate the legitimacy of judicial review of constitutional amendments realised to maintain the limited scope of the right to property. This gave rise to the emergence of that doctrine.<sup>859</sup> Each element within the basic structure doctrine, e.g. secularism, democracy, federalism, judicial review etc. requires closer and more attuned consideration and evaluation.

For example, assessing the legitimacy of the attempt made by Indira Gandhi concerning the removal of the competence of judicial review, as part of the basic structure doctrine, of the Supreme Court would require a different consideration and account. As we have seen in the *Minerva Mills* case, the target of the Forty-Second Amendment Act was not the right to property, but to curb the judicial review power of the Supreme Court. In one sense, by curbing the Supreme Court's power of judicial review, the fundamental rights would be reduced to empty words. This was, however, against one of the fundamental desires of the founders and would be against the constitutional identity. Thus the oscillation between legitimacy and illegitimacy has further determined the course.

We can now move onto the evaluation of the Turkish example.

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<sup>858</sup> Hasan, "Indian Democracy and Social Inequalities", p.134.

<sup>859</sup> Today, the basic structure doctrine goes beyond the right to property. It not only comprises judicial review of constitutional amendment, but also parliamentary acts, as well as administrative actions. On this point, see Krishnaswamy, *A Study of the Basic Structure Doctrine*.

## **4.4 EVALUATION OF THE LEGITIMACY OF JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS ON SUBSTANTIVE GROUNDS IN TURKEY**

### **4.4.1. Historical Overview**

During the Ottoman period, there were attempts to pass a constitutional monarchy. The first attempt in this respect was made in the 1876 Constitution, which established a monarchical empire. It created a bi-cameral parliament, which was granted some legislative powers. However, as it was decreed by the Ottoman Sultan, any legislative bill was subjected to the approval of the Sultan; i.e. he had a direct veto power. He could dissolve the parliament and suspend the constitution. So he did very soon (in 1878) after the adoption of the Constitution. The second attempt was made in 1908. This time there would be no new constitution. The emerging elites of the time forced the Sultan to put into effect the suspended Constitution (of 1876) with some major changes. Even though the second attempt contributed, to a certain extent, to a flourishing of constitutionalism in Turkey, its influence remained limited. Therefore, the best starting point with regard to the constitutional history of Turkey would be the establishment of the new Turkish state.

In this respect, there were four periods and accompanying documents to each, which should be discussed in order to uncover the constitutional identity. The first period can be called the establishment period and the accompanying document is the 1921 Constitution. This first constitution was adopted during the war of independence. The second period is the declaration and consolidation of the new republican state – the 1924 Constitution. This second constitution remained in force for over two decades. The other two documents are the 1961 and 1982 constitutions, both of which were adopted following a coup d'état; the latter is currently in force.

The starting point is the 1921 Constitution. It should first be highlighted that the process of its adoption was very lengthy. It was an outcome of a long development, which engendered a new sovereign power that emerged during the decline of the Ottoman Empire. After the First World War, the Ottoman Empire, even though it still legally existed, was in a process of rapid decline. The Ottoman Empire had lost most of its territories outside Anatolia, but even Anatolia was no longer under its control as the victorious powers of the First World War had surrounded and occupied it. For this reason, the Ottoman sovereign power over Anatolia was

disputable at that time; i.e. there was a sort of “interregnum”.<sup>860</sup> Under these conditions, a new sovereign power started to emerge. In various regions of Anatolia there were armed forces fighting against the occupying powers. These armed forces declared themselves as the congress power of the region for which they were fighting.

In order to turn these armed forces into an organized and united force, Mustafa Kemal Atatürk, who was then an Ottoman military staff officer, convened a series of congresses and meetings in various cities around the country. Atatürk succeeded in uniting these armed forces under ‘The Union for the Defence of the Rights of Anatolia and Rumelia’ and managed to turn this into a new sovereign power in Anatolia. In those meetings and congresses, it was proclaimed that a new sovereign power was needed, albeit not very explicitly, as the Ottoman Sultan had no power to control the country.

Seeing what was happening in the country, the Ottoman Empire tried to compromise with the new emerging power by agreeing to hold a new election for parliament. The election was held on 7 October 1919 and the majority of the Parliament was composed of representatives of ‘the Union for the Defence of the Rights of Anatolia and Rumelia.’ However, due to the surrounding of Istanbul, where parliament was assembling, by the occupying powers, the assembling of parliament was postponed indefinitely on 16 March 1920.<sup>861</sup> For this reason, the Union for the Defence of the Rights of Anatolia and Rumelia called for a new election on 11 April 1920. According to this request, each constituency, regardless of its population size, would send five representatives to the new parliament to be convened in Ankara.

The 1921 Constitution was adopted by this first parliament, which assumed in itself the (quasi) constituent power. The spirit of the time was convenient to assume such a power; i.e. there was a *constitutional moment*. The 1921 Constitution was an interim constitution, which remained in force during the war of independence. Even though the political importance of the 1921 Constitution is undeniable for the new republican state, its legal status was disputable given that the Ottoman Empire still existed at the time when the Grand National Assembly adopted the 1921 Constitution. It did not repeal the existed 1876 Ottoman Constitution. Furthermore, it was declared within the text of the 1921 Constitution that the aim was to save the caliphate and the Ottoman sultanate. It was a very short constitution,

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<sup>860</sup> Bülent Tanör, *Osmanlı-Türk Anayasal Gelişmeleri (1789-1980) [the Constitutional Developments of the Ottoman Empire and Turkey (1789-1980)]*, Geni letilmi Üçüncü Baskı ed. (İstanbul: Afa Yayınları, 1996), p. 175.

<sup>861</sup> More on this period see Ibid. pp. 175. 176.

containing only 23 articles. Its sole objective was to serve the achievement of the war of independence. There was no separation of powers, no method for its own amendment, etc.

The second document important for the constitutional history of Turkey is the 1924 Constitution. It was adopted by the Grand National Assembly (called the second parliament) through a constitutional amendment act following the victory of the war of independence by the first parliament against the western occupying powers. The 1924 Constitution was a longer document covering the necessary structures expected from a constitutional document, i.e. separated parts were dedicated to the fundamental principles of the state, legislature, executives, judiciary, and some fundamental rights and freedoms. The system envisaged by the 1924 constitution, however, was not built on the principle of separation of powers. Even though the judiciary was recognised as a separate branch of government, the executive and legislative branches were not separated from each other. Article 5 stated that the executive and legislative power belonged to parliament. And there was no power above the parliament; nor was there any institution, such as a constitutional court, to control the parliamentary power. In this respect, it can be said that the principle of parliamentary sovereignty or supremacy was endorsed by the 1924 Constitution.

Even though the 1921 constitution was not radical in the sense of representing a break with the Ottoman past, the 1924 Constitution was.<sup>862</sup> The very first article made this explicit by stipulating that “*the Turkish state is a republic*” It vested sovereignty in the people (Art. 2). In this respect, the new Republican State put an end to the Ottoman past in many respects. The 1924 Constitution laid down the essentials of the new republican state and, in order to construct the constitutional identity of the new republican state, the Ottoman legacy was radically demolished. Thus, Michel Rosenfeld’s conception of constitutional identity holds true for Turkey, as the constitution-making of 1924 was a total negation of the Ottoman past and its legacy; a legacy that was dominantly identified by its religious (Islam) affiliation.

Despite the fact that the late period of the Ottoman Empire had witnessed a constitutional movement, which was prone to secular ideas, reforms realised by the founders of the new Republic were more radical and had immediate effects. This is why the reforms introduced by the founders were described as a rupture or a revolution<sup>863</sup> rather than an evolution.<sup>864</sup> In all

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<sup>862</sup> Bülent Tanör, *Kurtuluş Kuruluşu [the Liberation, the Foundation]* (İstanbul: Cumhuriyet Kitapları, 2010), p. 141.

<sup>863</sup> Though, a leading social scientist in Turkey, Serif Mardin, argues that if we take Alex de Tocqueville’s criteria of the definition of revolution drawn up mainly by taking into account the French Revolution, for which

their endeavours, the principle of laicism had a decisive position. Atatürk was affected by the western ideas of the Enlightenment and the French Revolution, and thus intended to create a state that would take the western societies, and primarily France, as an example. To this end, the elites of the Turkish Republic strove to adopt a kind of ideology, to which the state should adhere in all its affairs. By virtue of this, everything that belonged or that was associated with the past was to be either prohibited or brushed aside; everything that was associated with the western societies of the time was to be admired and imitated.

In this connection, the elites of the new republican state endorsed a particular ideology, known as Kemalism. This ideology adopted a worldview, which is to “reach the contemporary level of civilization by establishing its political, economic, and ideological prerequisites, such as the creation of an independent nation state, and fostering industrialization and the construction of a secular and modern national identity”<sup>865</sup> This view was shared and supported, especially, by the military and state bureaucracy. In the process of making a modern Turkey, Kemalism rejected a class- and ethnicity-based society, and instead imposed a republican and laique citizenship model. The primary aim of this was to create a nation and its state first,<sup>866</sup> and then catch up with the level of development or civilization of

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the use of violence is an important element, the Turkish revolution would not be called a revolution, since there was no such violence in changing the socio-political, legal and economic system radically. Erif Mardin, “Ideology and Religion in the Turkish Revolution” *International Journal of Middle East Studies* 2, no. 3 (1971).

<sup>864</sup> It is argued that the roots of laicization went back to the late period of the Ottoman Empire, under which a quasi-secular system was about to be established. The Ottoman Empire introduced several reforms in its attempt to remedy its decline and understand the superiority of the West. The reforms were introduced at the beginning of the XIXth century by Sultan Selim III, followed by Sultan Mahmud II, but peaked in the Tanzimat era, known as the reform era (1839-1856), which was inspired by western ideas and resulted in the first Constitution of 1876 of the Ottoman Empire. Under these reforms, the Empire was reorganized in terms of its military, administrative, legal, educative etc. affairs, which are claimed to have paved the way for secularization. Jean Paul Burdy and Jean Marcou, “Laïcité/Laiklik: Introduction” *Cahier d’études sur la Méditerranée orientale et le monde turco-iranien*, no. 19 (1995). The Young Turks movement, which was a kind of reproduction of the reforms realised in the Tanzimat era, attempted to save the Ottoman Empire, which was about to decline, and they were affected by the western ideas of the French Revolution and the Enlightenment. The Young Turks movement resulted in a stronger attempt to acquire the state power by the Committee of Union and Progress at the beginning of XXth century. The Committee of Union and Progress wanted to establish a new nation-state, which would be modern, based on rationalism, secure the equality before law, and thus abolish the religiously-organized millet system of the Ottoman Empire etc. Jean Marcou, “La Laïcité En Turquie: Une Vieille Idée Moderne” *Confluences Méditerranée*, no. 33 (2000), p. 65. For a strong argument that the late Ottoman period cannot be described as a religious-system, but rather a secular one see Rossella Bottoni, “The Origins of Secularism in Turkey” *The Ecclesiastical Law Society* 9 (2007), pp. 175-186.

<sup>865</sup> E. Fuat Keyman, “Globalization, Civil Society and Islam: The Question of Democracy in Turkey” in *Globalizing Institutions: Case Studies in Social Regulation and Innovation*, ed. Jane Jenson and Boaventura de Sousa Santos (2000), p. 210.

<sup>866</sup> There are other important pillars of the Turkish state ideology, but the principle of laïcité has a particular and strong emphasis for this ideology. Even though not all aspects of this ideology are important to us here, a general outlook is necessary to grasp the subject matter we are dealing with. For example, as a nation state the Turkish state was established on the ideology that persists in the idea of a homogenous and unique nation. Taner Akçam, *From Empire to Republic: Turkish Nationalism and the Armenian Genocide* (London-New York: Zed Books,



the western societies of the time. In order to accomplish this aim, the new state adopted some rigid measures.

All of the essential elements of this ideology were identified and developed under the 1924 Constitution. In other words, under the 1924 Constitution, flesh was put on the bones of Kemalism. Symbolic as well as radical reforms and measures were adopted during this period. For example, wearing the western style of dress (hats, ties, pantaloons)<sup>867</sup> of the time was introduced and praised, while wearing the Ottoman fez was banned. The use of some (religious and Ottoman) titles and nicknames was also banned.<sup>868</sup> The Julian and Islamic calendars were replaced with the Gregorian calendar, and the weekly holiday was changed from Friday to Sunday.<sup>869</sup> The alphabet was also changed from Arabic to Latin.<sup>870</sup>

In addition to these symbolic reforms, there were some other more important and radical reforms such as the introduction of a new civil code adapted from the Swiss Civil Code, which substituted the Mecelle – the Islamic Civil Code of the Ottoman Empire based on Sharia (religious) Law. Understood as the opposite of laicism, the abolition of Sharia Law was an important step for the new republic. The new Civil Code, on the other hand, was an

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2004), p. 24. On the other hand, the idea that modern national existence requires the confirmation of a solid link between a delimited space (territory) and a people with an undivided culture and history that together produce a modern nation state is very much applicable to the Turkish state. As revealed by Benedict Anderson, the emergence (or creation) of national languages was one of the most important aspects of the nationalism and nation-states – so true for the Turkish state and nationalism. Benedict Anderson, *Hayali Cemaatler (Imagined Communities)*, trans. skender Sava ır, 4 ed. (Metis, 2004), pp.83-98. Some other implications of the state ideology can also be seen in practice. For example, the founders of the state and later the elites sharing the ideology of the founders have emphasized the Turkish nation, its identity, culture, Turkish language and particularly the principle of laïcité. Several institutions, such as the Turkish Historical Society and the Institution for Turkish Language were set up to investigate Turkish history and language, but mainly to idealise and impose them on everyone living in the territory, irrespective of their ethnicity, language and religion. The creation of a nation is also an important component of the state ideology in Turkey, which has taken place in all the preambles and also in the provisions of the Constitutions of the Republic under the term ‘Atatürk nationalism.’ Consequently, all people who reside in the Anatolian territory are believed to be Turks with the exception of Armenians, Jews and Christians and this idea is perpetuated and reproduced by several means. It can be observed clearly in the statement of one of the founders of the state, Commandant-General smet İnönü: “Our mission is to make everyone who lives on this territory Turk” Tarık Ziya Ekinçi, “Avrupa Birliği ve Kürtler” *Bianet* (2004). At [www.bianet.org/2004/12/28/51626.htm](http://www.bianet.org/2004/12/28/51626.htm). Accordingly, the state has given more and more importance to the indivisibility of the Turkish state together with its nation and territory, and this idea has been protected by the law. Following this idea, the borders where the Turkish nation was believed to reside on were drawn carefully, which is still known as the *Missak-ı Milli* (National Borders Act or National Pact). However as one historian, Ay e Hür, has stated, nobody knows exactly what the Missak-ı Milli is and what it includes as borders of Turkey, because the Act, which was adopted at the last meeting of the General Assembly of the Ottoman Empire on 28th January 1920, was not recorded. Nationalists have used it as a symbol of national unity, but in a mysterious and secret way. For example, although Cyprus was not included within this Act, it is still strictly mentioned by nationalists – as if Cyprus should be regarded as a national question. On the other and, even though Batum, a city which belongs to Georgia today, was comprised by this Act, it was given to Georgia.

<sup>867</sup> The Act on Wearing the Hat, 3, November, 1925.

<sup>868</sup> The Act on the Prohibition of the Usage of Some Titles and Nicknames, 26, November, 1934

<sup>869</sup> The Act on the Use of International Calendar and Time, 26, December, 1925.

<sup>870</sup> The Act on the Adoption of New Turkish Alphabet, 1, November, 1928.

attempt to establish equality between men and women. In this respect, it aimed, to some extent, to remove the influences of Islamic traditions in private life, albeit with hesitance in certain respects. For example, the new Code prohibited polygamy and religious marriage, and obliged civil marriage instead. Consistent with this initiative, the sharia judiciary or court system was also abolished and replaced with the laique court system.<sup>871</sup>

Furthermore, the caliphate, which refers to the political and legal governance organ of the Islamic state, was abolished.<sup>872</sup> The school system was unified under the Ministry of National Education, by which the old, religion-influenced school system was abandoned.<sup>873</sup> All of these reforms were adopted with the intention of establishing a laique (political, legal, and even social) system. And these were realised for the sake of the principle of laicism.<sup>874</sup>

The founder elites understood that it might take some time to introduce other more radical changes. For example, under the original text of the 1924 Constitution it was stipulated by Article 2 that “the religion of the Turkish state is Islam” This provision remained in the Constitution until it was repealed in 1928. The reason for keeping Islam as the state religion stemmed from the fear that the removal of this provision from the Constitution might upset mass groups of religious people, thus putting the new state at risk.<sup>875</sup> In fact, there were already some attempts in this line. It was only in 1937 that the principle of laicism (together with the other five pillars of Kemalism – republicanism, reformism, populism, statism and nationalism) was inserted into the constitution.

The 1924 Constitution served the aims of the founders fairly well for more than two decades. The new elites endeavoured to posit those reforms and entrench some radical measures to transform the society from above. However, the character of the regime under the 1924 Constitution was not inclined to endorsing and promoting democracy, even in the minimum procedural sense, given the fact that there was only one political party (The Republican People’s Party). The Republican People’s Party established by the founder elites governed the country alone until 1946 when the multi-party political system was recognised. The Party’s

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<sup>871</sup> The Act on the Abolition of the Sharia Judiciary System and the Establishment of the New Court System, 8, April, 1924.

<sup>872</sup> The Act on the Abolition of Caliphate, 3 March 1924.

<sup>873</sup> The Act on Uniting the School System, 3, March, 1924.

<sup>874</sup> Nilüfer Göle, “Laïcité, Modernisme Et Islamisme En Turquie” *Cahiers D’études sur la Méditerranée Orientale et le Monde turco-iranien (CEMOTI)* 19 (1995), p. 4. Accessible at <http://cemoti.revues.org/1691>

<sup>875</sup> Emre Öktem, “La Specificité de la Laïcité Turquie” *Islamochristiana* 29 (2003).

cadres consisted of those who played active roles in the war of independence. In this respect, the Republican People's Party was similar to the Indian National Congress Party.

However, since there was no overwhelming majority support by the public of the new regime's measures and reforms, this regime could not go further under the one-party system. Different voices and factions even within the Republican People's Party itself emerged. As a result, there was no option but to pass to a multi-political party regime in 1946.<sup>876</sup> Thereafter began the story of Turkish democracy. As an eminent historian has argued, the passing to the multi-party system and transfer of power since the inception of the Republic from one-party to the opponents marked a turning point in Turkish political history.<sup>877</sup> The story can be explained sufficiently within the scope of Turkish state ideology, of which the principle of laicism is its most essential component. During the course of this, this principle has become the most important element of the constitutional identity of Turkey.

#### **4.4.2. The Constitutional Identity and the Practice of Democracy in Turkey**

Under the one-party power (The Republican People's Party) it was easy to introduce radical reforms in line with the state ideology. However, when the multi-party system began in 1946 (with the foundation of the Democratic Party)<sup>878</sup> and when the Republican People's Party lost the election held in 1950, a new parliamentary majority began to challenge and undermine the gains acquired in the name of the principle of laicism during the early years of the Republic. As there was not enough public support for the reforms and measures introduced in the early years of the Republic, the Democratic Party majority in the parliament exploited this social fact to come to power and to consolidate its power. To put it more clearly, they used the religious affairs as a pawn to remain in power. In fact, they were quite successful in this respect: they won by a sweeping majority in the subsequent two elections held in 1954 and

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<sup>876</sup> There were two attempts to establish political parties (the first was the Progressive Republican Party (1924-1925) and the second was the Liberal Republican Party (1930)) but neither was successful. Each party was dissolved soon after its establishment.

<sup>877</sup> Kemal H. Karpat, "Political Development in Turkey, 1950-1970" *Middle Eastern Studies* 8, no. 3 (1972), p. 349.

<sup>878</sup> On Turkey's passing to the multi-political party system see Marcie J. Patton, "Constitutionalism and Political Culture in Turkey" in *Political Culture and Constitutionalism- a Comparative Approach*, ed. Daniel P. Franklin and Michael J. Baun (New York ; London: M.E. Sharpe, 1995), pp. 138-183.

1957. In this sense, the Democratic Party government<sup>879</sup> challenged or tried to soften the laïque reforms.

After passing into the multi-party system, elections have been held fairly regularly, but amid great tensions. Thus, democracy has, for much of the time, been threatened in Turkey for various reasons. Among the prevailing factors was the lack (or weakness) of democratic culture. Following the transfer of the power from the Republican People's Party to the Democratic Party, it was thought that once the majority in the parliament was gained the party could do whatever they wanted. As there was no institution, like a constitutional court, under the 1924 Constitution to control whether parliament exceeds its limits or not, the parliamentary supremacy was vulnerable to abuses. Thus, during this period democracy was considered as merely a majoritarian ruling. In this regard, the parliamentary majority's abuse of the representative democratic system (or the principle of parliamentary supremacy) and populist policies should be mentioned. For example, the reintroduction of the teaching of the Koran in Arabic, religious education in public schools, and the reappearance of certain religious cults (tariqats) in the public sphere all emerged under aegis of the Democrat Party government.<sup>880</sup>

As a reaction to these developments the military, together with bureaucratic elites – including the judiciary, have become, as the bearer of the state ideology, the protector of the laïque, republican nation state order. One of the reasons for this was that the Republic was established following the war of independence achieved by the military cadres led by Atatürk. Because of this role, coups d'état were carried out several times when governments, like the Democratic Party government, which had a different political agenda and project from that of the state ideology, came to power. The first intervention – coup d'état – occurred in 1960, which culminated in the adoption of a new constitution (of 1961). The 1961 Constitution secured the laïque character of the Turkish Republic.

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<sup>879</sup> And in fact, a great number of governments from 1950 until today have stood at the right wing (such as the Democratic Party, the Justice Party, the Motherland Party, the True Path Party etc.). Some of them were more contiguous to religion (such as the National Order Party, the National Salvation Party, the Welfare Party, the Felicity Party, the Islamic Virtue Party, and the current Justice and Democratic Party). The Constitutional Court dissolved some of the political parties belonging to this latter group on the grounds that their political affairs and acts were contrary to the laïcité – as the undermining of laïcité by political parties constitutes a reason for closure. The most famous of these was the Welfare Party (Refah Partisi), its dissolution was found not to be contrary to the European Convention for the Protection of Human Rights and Fundamental Freedoms by the Strasbourg Court in the Case of *Refah Partisi (the Welfare Party) and Others v. Turkey*; the Grand Chamber Decision was delivered on February 13, 2003.

<sup>880</sup> Burdy and Marcou, "Laïcité/Laiklik: Introduction"

In spite of its undemocratic origins, the 1961 constitution was regarded as one of the most progressive one the Turkish Republic had ever had. This Constitution recognised the fundamental rights generously. In addition, it founded, for the first time in the Republic, the Constitutional Court, which was charged with the protection of the Constitution as well as of the fundamental rights and freedoms. Yet, even this Constitution could not prevent another military intervention, in 1971, which was carried out due to the fear among military elites that the very Constitution they had introduced was too large, too liberal, for society, i.e. the state and society was moving away from the orbit of the overall state project/ideology. Therefore, the intervention of 1971 curbed many progressive provisions of the 1961 Constitution and produced a more strict state. The 1980 coup d'état cemented this austere character of the state.

The 1982 Constitution, adopted following the 1980 coup d'état, conferred more power on the state, especially on the executive; it somewhat blessed the state. Once again, it assured the laique character of the state, and this time the provision that the Turkish Republic is a laique state was laid down as unamendable.<sup>881</sup> Thus the 1980 coup d'état and its constitution decisively shaped the present character of Turkey's political and legal systems. This coup d'état was very oppressive, and gave rise to the very strict Constitution of 1982 (strict in terms of hostility to human rights and giving great power to the executive). It was upheld in a referendum by the majority of the population, but under the gun and guardianship of the military. The 1982 Constitution constrained the sphere of civil politics and paved the way for military control over politics by founding the National Security Council. In many different statutes, various restrictions were introduced to the system. The protection of laicism was deemed to be an important component of this era, which is why the principle of laicism was put into Article 2 of the Constitution as an unamendable constitutional principle.

The 1982 Constitution, like that of 1961, describes the Turkish state *inter alia* as, a unitary republican state (Art. 1, art. 2), a democratic (Art. 2), laique (Art. 2), a social state governed by the rule of law (Art. 2), and respecting human rights (Art. 2). The sovereignty is vested unconditionally in the nation (Art. 6) and its exercise relies on the principle of separation of powers (Preamble) with three common branches of government: legislative (Art. 7), executive (Art. 8), and judiciary (Art. 9). The legislature is unicameral (it was bi-cameral under the 1961 constitution). The executive consists of the Council of Ministers and the President. The

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<sup>881</sup> In accordance with its strict character, the founders of the 1982 constitution – the military – tried to reconcile the laic state ideology with Islam. For example, the 1982 constitution (Art. 24) made religious courses an obligatory part of the curricula of primary and secondary schools.

Council of Ministers is the main executive branch with power. The President has some symbolic powers, but also a number of important powers such as the appointment of senior officials and judges. The essentials of the Turkish state are laid down by the first three articles and they are made unamendable by Article 4. Among these essentials is the principle of laicism. In this respect, the state ideology and especially the principle of laicism, as its most significant component, has become a definitive part of the constitutional identity of Turkey.

Although the preceding parts explored the place of the principle of laicism in Turkey, the scholarly discussion of that principle can shed further light on the issue. Following this, some other implications of the principle of laicism in Turkey will be discussed.

To begin with, let us grapple with the issue of what the principle of laicism actually means and entails, both in general and in the Turkish context specifically. The principle of laicism has been given different meanings in different societies; but, in its basic sense, *laïcité* (which is understood as different from secularism) essentially implies a separation of the state and religion. Yet, this deceptively simple definition has very different implications and applications in different countries. In this respect, the Turkish example is described as assertive (laicism) secularism. “Assertive secularism requires the state to play an ‘assertive’ role to exclude religion from the public sphere and confine it to the private domain”<sup>882</sup>

On the other hand, according to Nilüfer Göle – a leading sociologist – *laïcité* implies a something else. For her, *laïcité* is the *sine qua non* condition of a modern political power. She further associates it with democracy and maintains, in this regard, that in Muslim countries the fate of *laïcité* and democracy depends on two interrelated facts: the attitudes of the elites towards the population – which is strictly attached to the religion; and the attitude of the population towards democracy and *laïcité*. Indeed this is the succinct history of modernization of Turkey,<sup>883</sup> as we have seen in the preceding paragraphs.

In France, which is taken as a model by Turkey, *laïcité* also has an assertive tendency<sup>884</sup> in the sense that it does not imply only the separation of the spheres of the state and religion, but also that it secures the universal values commenced by the Reformation, the Renaissance, the Enlightenment, and the French Revolution. In this regard, according to the Stasi Commission

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<sup>882</sup> Ahmet T. Kumru, *Secularism and State Policies toward Religion- the United States, France, and Turkey* (New York: Cambridge University Press, 2009), p. 16

<sup>883</sup> Göle, “*Laïcité, Modernisme et Islamisme en Turquie*”, p.1. Accessible at <http://cemoti.revues.org/1691>

<sup>884</sup> Kumru, *Secularism and State Policies toward Religion- the United States, France, and Turkey*, p. 103 etc.

Report (a report initiated by a recent debate on the ban of the Islamic veil in France) submitted to the French President Jacques Chirac, which was drawn up by twenty French academics and activists, and which concerned generally the status of the principle of laicism in the French Republic), “laïcité, which is the corner stone of the French Republic, relies on three indissociable values: freedom of conscience, equality before law of all religions, and neutrality of political power”<sup>885</sup> Thus, laïcité in France is associated with the French Revolution, which “destroyed a monarchy and its divine law and a society, which was perceived as an order of God”<sup>886</sup> Laïcité as a fundamental character of the French Republic is laid down in the French constitution (Art. 1).

The French Revolution and subsequent events accelerated the process of secularization, which did not, however, commence initially as a separation of the state and religion, but as the control of the Church by the state in terms of nominations of the head of the Church, remunerations and the educative role of the Church under the 1801 Agreement between the Church and State. According to this Agreement, Catholicism was still recognised as the religion of the majority of the French people. It was only with the 1905 Act this status ended, in that it stopped all payments from the state budget to any religious sect, and assured the separation of the state and the church. The primary aims of both the Agreement and the Act were to remove all influences of the Church – primarily on education, which is regarded as the most important institution of the French society.<sup>887</sup>

However, the Turkish understanding and practice of laïcité has some particular characteristics, indeed it is described as *sui generis*.<sup>888</sup> This is for two reasons. The first concerns the historical conditions and the second, the nature of Islam *qua* a religion. Concerning the first, it is pointed out that unlike the (quasi) democratic way laïcité was introduced in France,<sup>889</sup> laïcité in Turkey was not initially based on a strong social demand, even though there were

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<sup>885</sup> Bernard Stasi, “Commission De Reflexion Sur L’application Du Principe De Laïcité Dans La République-Rapport Au Président De La République” (2003), p. 9. For a concise history of the laïcité in France *see* the Stasi report. It can be found at <http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf>. The so-called Stasi report is the report submitted in 2003 by Bernard Stasi, Mediator of the Republic, to the President of the Republic, Jacques Chirac, who summoned the Commission for Reflecting on the Application of the Principle of Laïcité. The Report was prepared by this Commission composed of 18 members.

<sup>886</sup> Burdy and Marcou, “Laïcité/Laiklik: Introduction”

<sup>887</sup> With these effects in the education system, the laïcité in France became a kind of social movement as of 1950. During the 1950s, the subvention of private education by the state motivated a kind of laic social movement against the attempt of subvention by the state of private education institutions, amongst which there were religiously-conscious institutions. *Ibid.*

<sup>888</sup> Öktem, “La Spécificité De La Laïcité Turque”, p.94.

<sup>889</sup> The laïcité in France was introduced under the Third Republic by a democratic parliament. Burdy and Marcou, “Laïcité/Laiklik: Introduction”

some debates and initiatives on the issue during the late Ottoman period. Rather, it was imposed primarily by the republican elites as a way of drawing a line under the Ottoman legacy.<sup>890</sup> In this sense, *laïcité* in Turkey was used as a tool by the founders of the Republic to change (radically) all socio-political affairs, from politics to law, ethics to aesthetics.<sup>891</sup> Concerning the latter two aspects, it is argued that the new republican state has favoured and promoted new values for ethics and aesthetics. In fact, it has not only promoted new ethic and aesthetic values, but also banned some of the old ones. The clear example of this can be observed in dress values, where some new ideals were promoted in the early years of the Republic and old ones were banned by state-sanctioned laws.

Regarding the second fact, it is argued that the nature of Islam *qua* religion requires a different practice of *laïcité*. In this view, Islam *qua* religion does not differentiate the public sphere from the private; i.e. it regulates both. According to this perspective, therefore, it is difficult to differentiate state affairs from religion. Furthermore, Islam, as opposed to Christianity, does not have a clergy; therefore, while *laïcité* may mainly imply the separation of the state and the Church in Christian countries, in Turkey, as a Muslim country, it cannot simply mean the separation of the state and religion. Thus, the state may intervene, in this view, in religious affairs. The implication of this view is evident in the 1982 Constitution and has been further endorsed by the Constitutional Court in a number of decisions.<sup>892</sup>

As a result of this account, the principle of laicism in Turkey is not strictly based on the separation of the state and religion, but rather on the control of religion by the state. Thus, it is not strange in this view to have a department of religious affairs under the authority of the Prime Minister, which is charged with the control and maintenance of religious affairs. It is, thus, not a coincidence that this Department was established right at the beginning of the Republic, and still exists today.<sup>893</sup>

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<sup>890</sup> Marcou, “La *Laïcité* en Turquie: Une Vieille Idée Moderne”, p.61.

<sup>891</sup> Göle, “*Laïcité*, Modernisme et Islamisme en Turquie”, p. 2.

<sup>892</sup> Particularly *see* the Constitutional Court’s decision dated October 21, 1971, File No: 1970/53, Decision No:1971/76, published in the Official Gazette on June 15, 1972. In this decision, the Court dealt with the constitutionality of law, which added a new article – the Civil Servants Act, no 657, which determines imams and teachers of the Koran as civil servants to be paid by the State. And the Court held, among other things, that this article was not contrary to the principle of *laïcité*.

<sup>893</sup> This Institution was established first by a law adopted on 3 March, 1924.



The Department of Religious Affairs today has held a constitutional status since the 1961 constitution.<sup>894</sup> It was established with a view to maintaining the state control over the religion, and it controls all mosques in Turkey, appoints imams and oversees their education, training, etc. In short, in Turkey, Islam is financed by the State.<sup>895</sup> Even though this seems contrary to the very idea of *laïcité* at first glance, it is deemed necessary to protect *laïcité* in Turkey through state control over Islam. This Department is, at the same time, a reflection of the fear that if the religious sphere is taken away from the hand of the state, that sphere may become powerful enough to destroy the state, which embraces *laïcité* and democracy together. Therefore, this Department was established to intervene in the religious affairs of the state.<sup>896</sup> For the same reason, the 1982 constitution (Art. 24) made religious courses obligatory in the curricula of primary and secondary schools.

In this respect, the principle of laicism in Turkey has a particular meaning and implication and it is secured through various constitutional provisions. It is not only Article 2 that protects *laïcité*, a number of other articles also have this aim. For example, in the Preamble (with the 2001 amendments) it is laid down that a requirement of *laïcité* is that “...sacred religious feelings shall not intervene at all in the state affairs and politics” Furthermore, Article 14 specifies that [n]one of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the state with its territory and nation, and endangering the existence of the democratic and *laïque* order of the Turkish Republic based upon human rights” Article 24, after recognising the freedom of religion and conscience, determines in paragraph 5 that “[n]o one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political influence, or for even partially basing the fundamental, social, economic, political, and legal order of the state on religious tenets”

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<sup>894</sup> Its constitutional status has been assured by the 1961 Constitution (Art. 154) and presently by 1982 (Art. 136) Constitution. Its status is even more entrenched by a provision of the Political Parties Act, no 2820, according to which (Art. 89), it is laid down that political parties may not attempt to abolish the Department of Religious Affairs, otherwise they may face being dissolved.

<sup>895</sup> As of 2012, the budget of the Department of Religious Affairs is more than those of the Ministry of Culture and Tourism, the Ministry of Foreign Affairs, and the Ministry of Science, Industry and Technology, and more than half of the budget of the Ministry of Justice. For the budget data *see* web pages of the relevant departments of the Ministry of Finance [www.bumko.gov.tr](http://www.bumko.gov.tr)

<sup>896</sup> Nevertheless it should be mentioned that the religious affairs this Department deals with concern only a very specific sect of Islam: Sunni-Hanefi. Even though the majority belongs to the Sunni-Hanefi sect, there are various sects within Islam, such as the Alevi, and within the Hanefi Sect as well, like Shafi. And this discrimination is a cause for concern today due to the fact that other sects cannot benefit from the services the Department provides.

Complementary to all these provisions is Article 42, which deals with the “right and duty of training and education”. It stipulates that: “training and education shall be conducted along the lines of the principles and reforms of Atatürk, on the basis of contemporary science and educational methods, under the supervision and control of the state. Institutions of training and education contravening these provisions shall not be established” Finally, Article 174 provides for a constitutional protection of the reforms realised by a number of Parliamentary Acts in the early years of the Republic, some of which we have indicated above. Article 174 determines further that “[n]o provision of the Constitution shall be construed or interpreted as rendering unconstitutional the Reform Laws indicated below, which aim to raise Turkish society above the level of contemporary civilization and to safeguard the laique character of the Republic, and which were in force on the date of the adoption by referendum of the Constitution of Turkey”

It is clear that the principle of laicism, from the dawn of the Turkish republic, has become the fundamental element of the political and legal order. The conclusion in this section, therefore, is that the principle of laicism is a vital part of Turkey’s constitutional identity. Whether its implications have contributed to the practice of democracy positively or negatively is another matter, which will be addressed in the following.

#### **4.4.3. The *Locus* of Sovereignty in Turkey**

All the constitutions of Turkey incorporated a clause that sovereignty is vested in the people. However, the implication of this principle has rarely been observed, concretely, in practice. Namely, the Turkish people, as sovereign will, have almost never been sincerely consulted for their opinions on how to be governed, except for the referenda (which were almost certain to be approved) held for the two constitutions that were adopted following the coups d’état of 1960 and 1980.

For this reason, no constitution of Turkey, except for the 1921 and 1924 constitutions, was a product of the people in any real sense. They came into existence undemocratically, regardless of their further improvements and developments. Even though the 1961 Constitution was said to be the most progressive constitution of the time (and, indeed, among the four constitutions of Turkey, including the current one), it is nevertheless to be judged as the outcome of an undemocratic process.

On the other hand, after the passing into a multi-party political system, and thus to democracy in the procedural sense of the term, as of 1946 the governments mostly held a majoritarian understanding of democracy. Thus, in this period (including today), sovereignty is conceived as equal to majority decision. Hence, it is not entirely wrong to argue that in Turkey the majority has been conceived by ruling political parties as equal to sovereignty. This has then made the practice of democracy oscillate between populism, concealed under the umbrella of majority will, and undemocratic political intervention, by elite forces led mainly by the military.

The sovereignty is vested in the people, but the people should exploit it in a certain way; and that way is determined by the state ideology. In this respect, sovereignty in Turkey lies with the state. Thus, the sovereign power has, in fact, been with the institutions of the bearer of the state ideology. The Constitutional Court was initially envisaged as one of these institutions.

The Constitutional Court was designed as a type of sanction mechanism to maintain order in a way that was understood by the state ideology. The initial motivation behind the establishment of the Constitutional Court, introduced for the first time by the 1961 Constitution, was not that it would protect fundamental rights and freedoms, but mainly that it would be the guardian of the state order and prevent any abuses of it. Of course, over the course of time, the Court system has transformed, but, to highlight it once again, the initial idea was that the Court would protect and uphold a certain state order.<sup>897</sup> In this sense, it is no surprise that there was almost no serious discussion of the legitimacy or illegitimacy of judicial review, introduced in Turkey for the first time by the 1961 Constitution. In this respect, we can argue that the Constitutional Court should be an important shareholder of sovereign power in Turkey.

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<sup>897</sup> On this point in particular see Ceren Belge, "Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey" *Law & Society Review* 40 (2006), pp. 653-92 (Arguing that the Constitutional Court has pursued selective activism for matters important to the state ideology); Levent Köker, "Turkey's Political-Constitutional Crisis: An Assessment of the Role of the Constitutional Court" *Constellations* 17, no. 2 (2010), pp. 328-44 (Making similar points to Ceren Belge by giving details of the examples, such as party disclosure cases, the judicial review of constitutional amendment in the Headscarf case, and the decision concerning the election of the President of the Republic).

#### **4.3.5. Evaluation of the Legitimacy of the Judicial Review of Constitutional Amendments on Substantive Grounds in Turkey**

In this section, we will try to evaluate the legitimacy of the outcome(s) resulting from the judicial review of constitutional amendments by the Constitutional Court of Turkey. The first outcome, as identified earlier, is the prohibition of headscarves at universities. The second, which is common to all three jurisdictions, is the competence held by the Constitutional Court of judicial review of constitutional amendment on substantive grounds.

As demonstrated above, the exploitation of sovereign power is shared in Turkey, i.e. some part of it has been conferred on the Constitutional Court. Thus, the value patterns the system supports makes it legitimate for the Court to assume for itself the competence to review constitutional amendments on substantive grounds, which are purported to be contrary to, not only the principle of laicism, but also other essential principles of the Republic of Turkey.

Here we make no suggestion as to whether this conclusion is (from a politico-moral perspective) a good or a bad thing. We simply note that the value patterns the system promotes make it possible for us to conclude that the Constitutional Court has the competence to review the substance of constitutional amendments, and if the amendments are found to be contrary to those value patterns, the Constitutional Court may annul them and this would be legitimate on that basis. This conclusion relies on a particular understanding of legitimacy, i.e. Stillman's framework, thus it needs to be approached and judged in this context.

As for the legitimacy of the prohibition of the headscarf at universities, a more subtle explanation is necessary, as we will see in the following paragraphs. In this regard, we will apply Stillman's conception of legitimacy to the issue, but in a refined way. As we have seen above, the principle of laicism has been one of the essential characteristics of the Republic of Turkey. It is an important element of Turkey's constitutional identity. Thus, the annulment by the Constitutional Court of a constitutional amendment aiming to undermine the principle of laicism, or value patterns informed by it, is legitimate. To put it more clearly, the prohibition of the headscarf by the Constitutional Court is legitimate on the basis of the value patterns reinforced by the constitutional identity.

The conclusion we have just given may be interpreted as troubling for a number of reasons. First of all, given that the majority of society in Turkey is Muslim, that conclusion may be unacceptable. Second, in the light of recent developments in Turkey, the Headscarf Decision

by the Constitutional Court of Turkey and its results may be seen as meaningless since wearing the headscarf is now permitted not only at universities, but also in public services, albeit with some limitations. Thus, this new context should be analysed briefly.

Under the AKP government, the principle of laicism and the value patterns it has carried have been challenged. The Headscarf case is an example of such a challenge. However, it is not certain at this point whether the challenge the AKP government has been posing may reach to such an extent that there would be a paradigm/value pattern shift in the legal and political system. In other words, it is not certain whether what has been said in this thesis concerning the prohibition of the headscarf will have any further bearing or not.

Nevertheless, these recent developments do not render this study meaningless because this new situation can still be explained within our framework, in that this new situation can be comprised fairly well within the scope of Stillman's conception of legitimacy. Let us recall Stillman's remark that "legitimacy is a matter of degree". In this regard, the tension between legitimacy and illegitimacy determines the maintenance of a governmental output, and the degree of legitimacy may render illegitimate what was once legitimate and vice-versa. The determining factor is the change in value patterns. In this sense, given that the large part of society in Turkey shares and subscribes to mostly Islam-oriented value patterns, it is not surprising that these value patterns may be transmitted, through the political power of the pro-Islamic governing party, into the political and legal system. Therefore, from the point of view of the large part of society subscribing to religious value patterns, the prohibition of headscarves by the Constitutional Court would be illegitimate. And if these new value patterns are made part of the constitutional identity, the political approach to the issue at hand might change accordingly. The current events in Turkey show that the degree of legitimacy toward the issue at hand may determine whether to maintain or reject the holding of the competence to review the substance of constitutional amendments. Whether this will culminate in a total shift of the constitutional identity remains to be seen in the Turkish context.<sup>898</sup>

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<sup>898</sup> It is certain that if there will be a change or shift in the constitutional identity, this would not be realised without a challenge being posed by the laique forces. In fact, the failure of a recent attempt in Turkey with regard to the adoption of a totally new constitution can be interpreted in this way.



## CONCLUDING REMARKS

This thesis has dealt with a relatively new legal phenomenon that has recently gained a global interest: *the judicial review of constitutional amendments on substantive grounds or unconstitutional constitutional amendments*. This study approaches this legal phenomenon from a comparative law perspective, and analyses the case law of three jurisdictions: Germany, India, and Turkey. The immediate reason for the choice of these jurisdictions is the fact they have provided the most prominent examples of the case law concerning the subject.

To recapitulate the arguments and analysis of this work, it is argued that judicial review of constitutional amendments on substantive grounds is an unusual practice in constitutional democracies. In other words, judicial review of constitutional amendments on substantive grounds is contrary to the conventional practice of constitutional amendments in constitutional democratic countries, where representatives of the people (parliament) ostensibly hold the ultimate power and constitutional amendment is the ultimate tool through which to exercise that power. The conventional practice of constitutional amendments has led to the conclusion that provided the procedural requirements for constitutional amendment are met, any constitution may be amended by people's representative organs (or by themselves, in a referendum) in constitutional democracies. We have described this principle as the rule of the game of legality in constitutional democracies.

From the analysis of the case law of the three jurisdictions, it has been seen that the three jurisdictions depart from the conventional account of constitutional amendments. To put more precisely, the highest courts of the three jurisdictions have assumed, in themselves, the competence to review the substance of constitutional amendments. In the examples of India and Turkey, the courts went one step further by declaring some constitutional amendments unconstitutional. In Germany, no such declaration, to date, has been made by the Federal Constitutional Court, even though the Court has reviewed the substances of a number of constitutional amendments. Thus, the three jurisdictions we have analysed have departed from the rule of the game or the conventional account of constitutional amendment.

In order to analyse judicial review of constitutional amendments on substantive grounds, a distinction was made between two aspects of the issue. These are the legality and legitimacy aspects. Doing so has allowed us to understand the issue at hand in more depth, and, perhaps, more objectively. We have also argued that this differentiation may shed more light on the

correlation between legality and legitimacy. Furthermore, the approach followed here may be applicable to other jurisdictions where this issue arises. For this reason, we have refrained from relying on purely normative arguments. In other words, the question of whether it is politically and/or morally valuable to confer a significant competence on courts has not been considered here.

To analyse the legality aspect of the issue, we have reached the conclusion that Hart's concept of the rule of recognition offers an appropriate basis. We reached this conclusion after a detailed examination of Kelsen's concept of Grundnorm and his pure theory of law and following the conclusion that Kelsen's theory had important flaws to explain the subject matter.

To put it simple, the primary function of the rule of recognition as developed by Hart is to provide all criteria, not only constitutional norms, but also other rules, that must be met in order that a norm is counted as a legal rule of the system. We have concluded that the legality aspect of the judicial review of constitutional amendment on substantive grounds can be explained by one common theory: Hart's theory of law and his concept of the rule of recognition.

Then we moved to the analysis of the legitimacy aspect of the issue. Concerning the aspect of legitimacy, we have focused our attention on the sociological legitimacy of judicial review of constitutional amendments on substantive grounds. To this end, we employed Peter Stillman's conception of legitimacy. According to his framework, legitimacy is understood as *the compatibility of the results of governmental output with the value patterns of the relevant systems*. We used Stillman's conception to assess the legitimacy of the issue by adapting it to our subject.

We have determined the competence held by the highest court of Germany, India, and Turkey of judicial review of constitutional amendment on substantive grounds as institutional aspect, which is common to all three jurisdictions. In addition to this, we have found determined separate outcomes for India and Turkey, as the holding of this competence in these two jurisdictions were more context-dependent. In this respect, the second outcome for India was the disallowance by the Supreme Court of the acquisition of private properties without paying (equal value of) compensation, and for Turkey was the prohibition of headscarf.



As the value pattern Stillman expressed in his conception of legitimacy was too large, we deemed it more appropriate, and feasible, to consider the legitimacy of judicial review of constitutional amendments on substantive grounds within the notion of constitutional identity. In other words, in our assessment of the legitimacy of the outcomes, we determined Stillman's value patterns have turned into the value patterns advanced and pursued by the constitutional identity in each system. As a further refinement to Stillman's conception of legitimacy, it has seemed that considering two interrelated concepts, i.e. sovereignty and democracy, and their practice in the three jurisdictions would be more accurate. In this respect, we have argued that how sovereignty and democracy are conceived and practiced in the three jurisdictions sheds light on whether judicial review of constitutional amendments on substantive grounds could be considered legitimate or illegitimate in these three jurisdictions.

Following this framework, we have discovered that holding the competence of judicial review of constitutional amendments on substantive grounds by the Constitutional Courts in Germany and Turkey is *legitimate* within the practice, which has been developed in these two jurisdictions. This conclusion has been consistent and compatible with the value patterns reinforced by their respective constitutional identities.

The case was, however, not clear in the context of India, as the Indian case has some particularities. In our analysis, we have seen that the constitutional identity of India has suggested two different conclusions stemming from different period during which different part of constitutional identity came into prominence. The first is that it was *illegitimate* for the Supreme Court of India to hold the competence of judicial review of constitutional amendments on substantive grounds. Second, it was illegitimate to disallow the acquiring of property rights without paying (equal value of) compensation. The conception of sovereignty, to which the Indian constitutional identity subscribed at the beginning, was of a similar kind to parliamentary sovereignty, though not identical. Thus, conferring on the Supreme Court of India the competence of judicial review of constitutional amendments on substantive grounds was *illegitimate*. However, we have deemed it necessary to fix this conclusion for a certain period of time, in that this conclusion held true until the period in which the constitutional identity began to change during the Emergency Period in India. Following the Emergency Period, the constitutional identity entered into a process of change, in that the fundamental rights gained more importance. Thus, the goal of the welfare state by the Indian Constitution has receded. Resultantly, we have concluded that the holding of the competence to review the

substances of constitutional amendments by the Supreme Court of India, with a view to protecting fundamental rights and freedoms, has been *legitimate* as of the Emergency Period.

In this respect, we have observed in Germany that there has been great agreement about the overall position of the Federal Constitutional Court within the political system. Namely, the Federal Constitutional Court of Germany enjoys a great degree of legitimacy. Therefore, holding the power to review the substance of constitutional amendments is legitimate in Germany. This is consistent with the German constitutional identity, and it is backed by the overwhelming support of the Federal Constitutional Court by German society.

On the other hand, we have discerned that the legality of the substantive judicial review of constitutional amendments in the Turkish and Indian examples has been challenged due to the deficiencies of normative legitimacy. In this sense, we have seen in the Turkish example that the Court's composition changed following the headscarf decision by the Constitutional Court of Turkey so that no such declaration of unconstitutionality of a constitutional amendment could be made in the future. In India, the Supreme Court's decisions, which annulled a number of constitutional amendments by relying on the basic structure doctrine, have not been welcomed by the Parliament. The Parliament in India has challenged such decisions almost every time the Court has delivered them.

To sum up, we have argued that legality depends on whether the amendment complies with the rule of recognition. On the other hand, legitimacy, which has a significant bearing on the endurance and applicability of the legality, depends on whether it complies with the prevailing political morality, which is contained and disclosed in the constitutional identity. If there is a corresponding sociological acceptance of the constitutional identity, which does not have to exist always, then legality can endure. Otherwise, the (conditions of) legality would most probably be challenged and altered.

Yet, Hart's framework of the rule of recognition is rich enough account for any such situation. This is the reason why we have chosen to rely on it when explaining the legality aspect of the issue. In this respect, legality has to be determined, according to Hart's framework, mainly with regard to practice of officers in the system. Thus, to determine whether an amendment can be illegal we have to look not only at the text of a constitution but at the existing practice. The practice also determines to what extent the scope of amendment is uncertain, so that the court (in countries where this practice is accepted) are authorised to ascertain it.

Accordingly, we can suggest a conclusion that if there is a gap between legality and legitimacy, and if it is large and important, then an inevitable tension will result from this gap. That gap might subsequently give rise to plausible or implausible solutions. Any such solution may create a vicious circle or it may create a new and accepted solution.



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