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# *An unconstitutional constitutional amendment—The Turkish perspective: A comment on the Turkish Constitutional Court’s headscarf decision*

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*In June 2008, the Turkish Constitutional Court annulled amendments to the Constitution regarding the principle of equality and the right to education, which had been enacted by parliament in order to abolish the headscarf ban in universities. In an important and controversial decision, the Constitutional Court ruled that the amendments were unconstitutional because they infringed on the constitutional provision mandating a secular state. In this paper, the authors set forth the historical and legal background to the Turkish Constitutional Court headscarf case, review the facts and decision of the case, and analyze it.*

*The authors accept the Constitutional Court’s conclusion that parliament’s amendment power is distinct from the original constituent power and therefore limited. However, the authors assert that the Constitutional Court’s competence to review constitutional amendments is restricted to a procedural review. Lastly, the authors claim there was no justification for annulling the amendments because they did not infringe on the constitutionally enshrined principle of state’s secularism.*

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\*\* Research Assistant at Uludag University Faculty of Law, Department of Constitutional Law (Bursa); LL.M, Uludag University (Bursa); LL.B, Dokuz Eylul University (Izmir). E-mail: [serkanyolcu@uludag.edu.tr](mailto:serkanyolcu@uludag.edu.tr) Some of the issues raised in part 4 are elaborated in the first author’s Ph.D. thesis (in progress) entitled “Unconstitutional Constitutional Amendments - A Theoretical and Comparative Study of the Constitutional Amendment Power and its Limits”. The author would like to thank Prof. Martin Loughlin and Dr. Thomas Poole for their valuable supervision and stimulation, and Prof. Yoram Rabin for introducing him to the Turkish Constitutional Court’s headscarf decision. The authors are grateful to Stefanie Raker for assistance with editing the article and to Prof. Dr. Kemal Gözler for his substantial encouragement to write this article.

## 1. Introduction

In October 2008, the Turkish Constitutional Court published a decision that annulled parliament's amendments to the Constitution regarding the principle of equality and the right to education.<sup>1</sup> The parliament's intention in these amendments was to abolish the headscarf ban in universities. In an important and controversial decision, the Turkish Constitutional Court ruled that the amendments were unconstitutional because they infringed on the constitutionally enshrined principle of secularism.

The headscarf issue in Turkey is contentious.<sup>2</sup> As Turkey struggles with the tension between its vast majority of Muslims and its aim to preserve the modern republic's secular character,<sup>3</sup> the headscarf has become a symbol of the conflict between popular Islam and secularism.<sup>4</sup> Against the backdrop of these complex circumstances, the Constitutional Court's decision is highly significant, with far-reaching implications, and much could be gained from comparative research concerning the Turkish decision.<sup>5</sup>

Section 2 of this article sets forth the historical and legal background to the Turkish Constitutional Court headscarf case. Section 3 reviews the case's facts and decision. Section 4 is a comment on three legal issues with regard to which the decision raises difficulties: first, the limited nature of parliament's ability to amend the Constitution and the validity of unamendable provisions; second, whether the Constitutional Court has jurisdiction to review constitutional amendments, and, specifically, the constitutionality of the amendment's content; and, third, whether the amendment's content infringes on the constitutionally enshrined principle of secularism. We believe that, from a legal perspective, the decision is troublesome and, in some parts, erroneous.

<sup>1</sup> Turkish Constitutional Court decision, June 5, 2008, E. 2008/16; K. 2008/116, Resmi Gazete [Official Gazette], October 22, 2008, No. 27032, pp. 109–152 (“Headscarf Decision of 2008”).

<sup>2</sup> See Ayşe Saktanber, Gül Çorbacıoğlu, *Veiling and Headscarf-Skepticism in Turkey*, 15(4) SOCIAL POLITICS: INTERNATIONAL STUDIES IN GENDER, STATE & SOCIETY 514 (2008).

<sup>3</sup> See, generally, Seyla Benhabib, *Turkey's Constitutional Zigzags*, DISSENT 25 (2009); Ayla Göl, *The Identity of Turkey: Muslim and Secular*, 30 THIRD WORLD Q. 795 (2009).

<sup>4</sup> See ELISABETH ÖZDALGA, *THE VEILING ISSUE, OFFICIAL SECULARISM AND POPULAR ISLAM IN MODERN TURKEY* (1998). As Navaro-Yashin notes, the headscarf, which was interpreted by Islamists as a representation of Islamic chastity, has gained its own meaning, not only as a reference to female beliefs but to “politics of identity in relation to secularists and the secularist state.” See YAEL NAVARO-YASHIN, *FACES OF THE STATE: SECULARISM AND PUBLIC LIFE IN TURKEY* 110 (2002).

<sup>5</sup> See, e.g., Gary Jeffrey Jacobsohn, *If An Amendment Were Adopted Declaring the United States a Christian Nation, Would it be Constitutional? Well . . . Let's Look at Turkey*, SCHMOOZE “TICKETS” PAPER 103 (2009), available at [http://digitalcommons.law.umaryland.edu/schmooze\\_papers/103](http://digitalcommons.law.umaryland.edu/schmooze_papers/103). In the American context, Bruce Ackerman claimed that he would accept an amendment to the American Constitution repealing the First Amendment and establishing Christianity as state religion as part of the Constitution. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 14–15 (1993).

## 2. Background: The Turkish Constitution, secularism and headscarves

### 2.1. Turkish republic's basic characteristic of secularism

The legal order of the Ottoman state, which maintained its sovereign existence for over six centuries, from 1280 to 1922, was based on Islamic religious law—the Shari'a.<sup>6</sup> On October 29, 1923, the Republic of Turkey was founded as a nation-state based on the modern paradigm of secularism (*laiklik*).<sup>7</sup> The founders of the new republic rejected the entire legacy of the Ottomans and undertook radical reforms and structural transformation in order to establish a secular republic and westernized society.<sup>8</sup> The caliphate was abolished by an act of the Assembly on March 3, 1924, and the new constitution of 1924 was adopted on April 20, 1924. The 1924 constitution contained a provision declaring Islam as the state's official religion (article 2). However, this constitutional provision was repealed in 1928, and in 1937 the principle of secularism (*laiklik*) received constitutional status (article 2) in order to “better reflect modern Turkey's adherence to a strict separation of state and religion.”<sup>9</sup>

Today, this “official state policy of laicism”<sup>10</sup> is reflected in the 1982 Turkish Constitution, according to which the state is a republic (article 1), and its characteristics are that it 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” (article 2). The preamble also establishes the principle of secularism, stating that there should be “no interference whatsoever of sacred religious feelings in state affairs and politics.” According to article 4 of the Constitution, the provision establishing the form of the state as a republic (article 1) and the provision that marks the state's characteristics (article 2) may not be amended and their amendment may not be proposed.

### 2.2. Religious dress and secularism

One of the most important and symbolic reforms of modern Turkey was the dress code reform. Mustafa Kemal Atatürk, the Turkish republic's founder, declared a new “dress

<sup>6</sup> Ergun Özsunay, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Turkey*, 19 EMORY INT'L L. REV. 1087 (2005).

<sup>7</sup> On Turkish war for independence, see STANFORD J. SHAW & EZEL KURAL SHAW, HISTORY OF THE OTTOMAN EMPIRE AND MODERN TURKEY, VOL. II 340–372 (1977).

<sup>8</sup> See Serdar Demirel, *The Roots of Headscarf Ban in Turkey*, 5 J. ISLAM IN ASIA 164–165 (2008). For examination of Turkey's transformation toward a secular state, see NIYAZI BERKES, THE DEVELOPMENT OF SECULARISM IN TURKEY (1998).

<sup>9</sup> Ran Hirschl, *The Rise of Constitutional Theocracy*, 49 HARV. INT'L L.J. ONLINE 72, 75 (2008), available at <http://harvardilj.org/online/145>. See also Benjamin D. Bleiberg, *Unveiling the Real Issue: Evaluating the European Court of Human Rights' Decision to Enforce the Turkish Headscarf Ban in Leyla Sahin v. Turkey*, 91 CORNELL L. REV. 134 (2005–2006); Ran Hirschl, *The Rise of Constitutional Theocracy*, 49 HARV. INT'L L.J. ONLINE 72, 75 (2008), available at <http://harvardilj.org/online/145>.

<sup>10</sup> Hirschl, *id.*

code reform” in 1925. The first legislation regulating dress was the Headgear Act of November 28, 1925,<sup>11</sup> according to which the wearing of the fez was banned, and men were obliged to wear European-style hats rather than the fez. Likewise, another ban was imposed with the Dress (Regulations) Act of December 3, 1934, on wearing religious dress other than in places of worship or at religious ceremonies, irrespective of the religion or belief concerned.<sup>12</sup> These bans remain in force today and are protected by article 174 of the 1982 Constitution according to which the reform laws that aim at protecting the secular character of the Turkish republic cannot be invalidated. The fez and veil were considered symbols of the old regime, which conflicted with modernization and secularization.<sup>13</sup> This conflict reverberates today in the headscarf debate. Those in favor of the headscarf view wearing it as an expression of religious identity. The secularism supporters, conversely, regard the Islamic headscarf as a symbol of political Islam.<sup>14</sup>

The origins of the headscarf issue in universities date back to the 1980s, when university administrations prohibited female university students from wearing headscarves at universities.<sup>15</sup> The first legislation regarding dress in universities was a set of regulations issued by the cabinet on July 22, 1981, prohibiting female staff members and students from wearing veils in higher educational institutions. On December 20, 1982, Yüksek Öğretim Kurulu (YÖK) [Council of Higher Education] issued a circular banning the Islamic headscarf in university lecture halls. In a judgment of December 13, 1984, Danıştay [Council of State] (the highest administrative court) held that the regulations were lawful, noting that “wearing the headscarf is in the process of becoming the symbol of a vision that is contrary to the freedoms of women and the fundamental principles of the Republic.”<sup>16</sup> Thereafter, in response to the practice of university administrations and the attitude of the Council of State supporting these practices, the then majority party, Anavatan Partisi [Motherland Party], passed a law<sup>17</sup> (Law No. 3511) that brought into force article 16 as an addition to the Higher Education Act (Law No. 2547) on December 10, 1988, which states:

Modern dress or appearance shall be compulsory in the rooms and corridors of institutions of higher education, preparatory schools, laboratories, clinics and multidisciplinary clinics. A veil or headscarf covering the neck and hair may be worn out of religious conviction.<sup>18</sup>

The law was immediately challenged before the Constitutional Court by the then president of the republic. In a highly controversial judgment, the Constitutional Court annulled the aforementioned provision, holding that it was contrary to articles 2 (secularism), 10 (equality before the law), and 24 (freedom of religion) of the

<sup>11</sup> Law No. 671.

<sup>12</sup> Law No. 2596.

<sup>13</sup> Demirel, *supra* note 8, at 166–167.

<sup>14</sup> See Leyla Sahin v. Turkey, 2005-XI; 44 EHRR 99 GC. Grand Chamber's decision, para. 35.

<sup>15</sup> See WILLIAM HALE & ERGUN ÖZBUDUN, ISLAMISM, DEMOCRACY AND LIBERALISM IN TURKEY 71 (2010).

<sup>16</sup> Quoted in Leyla Sahin v. Turkey, *supra* note 14, at para. 37.

<sup>17</sup> HALE AND ÖZBUDUN, *supra* note 15.

<sup>18</sup> Quoted in Leyla Sahin v. Turkey, *supra* note 14, at para. 38.

Constitution.<sup>19</sup> It also found that it could not be reconciled with the principle of sexual equality implicit, *inter alia*, in republican and revolutionary values (see the preamble and article 174 of the Constitution).

The Constitutional Court explained that secularism had acquired constitutional status by reason of the historical experience of the country and the particularities of Islam compared with other religions; that secularism was an essential condition for democracy; and that it acted as a guarantor of freedom of religion and of equality before the law. Secularism also prohibited the state from showing a preference for a particular religion or belief. Consequently, a secular state could not invoke religious conviction when performing its legislative function. The Court stated, *inter alia*:

Secularism is the civil organiser of political, social and cultural life, based on national sovereignty, democracy, freedom and science. Secularism is the principle which offers the individual the possibility to affirm his or her own personality through freedom of thought and which, by the distinction it makes between politics and religious beliefs, renders freedom of conscience and religion effective. In societies based on religion, which function with religious thought and religious rules, political organisation is religious in character. In a secular regime, religion is shielded from a political role. It is not a tool of the authorities and remains in its respectable place, to be determined by the conscience of each and everyone. . . .<sup>20</sup>

Ergun Özbudun and Ömer Faruk Gençkaya note that the Court defined secularism in terms reminiscent of Comteian positivism, citing these arguments of the Court:

Secularism has separated religiosity and scientific thought and speeded up the march toward civilization. In fact secularism cannot be narrowed down to the separation of religion and state affairs. It is a milieu of civilization, freedom and modernity whose dimensions are broader and whose scope is larger. It is Turkey's philosophy of modernization, its method of living humanly. It is the ideal of humanity. . . . The dominant and effective power in the state is reason and science, not religious rules and injunctions.<sup>21</sup>

Stressing its inviolable nature, the Constitutional Court observed that freedom of religion, conscience, and worship—which could not be equated with a right to wear any particular religious attire—guaranteed, first and foremost, the liberty to decide whether or not to follow a religion. The Constitutional Court explained that, once outside the private sphere of individual conscience, the freedom to manifest one's religion could be restricted on public-order grounds to defend the principle of secularism.

According to the Constitutional Court, everyone was free to choose how to dress, as the social and religious values and traditions of society also had to be respected. However, when a particular dress code was imposed on individuals by reference to a religion, the religion concerned was perceived and presented as a set of values that were incompatible with those of contemporary society. In addition, in Turkey, where the majority of the population is Muslim, the wearing of the Islamic headscarf as a

<sup>19</sup> Constitutional Court Decision, E.1989/1, K.1989/12, March 7, 1989, *Anayasa Mahkemesi Kararlar Dergisi* [Constitutional Court Reports], No.25, pp. 133–165.

<sup>20</sup> Quoted in *Leyla Sahin v. Turkey*, *supra* note 14, at para. 39.

<sup>21</sup> ERGUN ÖZBUDUN & ÖMER FARUK GENÇKAYA, *DEMOCRATIZATION AND THE POLITICS OF CONSTITUTION-MAKING IN TURKEY* 106 (2009).

mandatory religious duty would result in discrimination between practicing Muslims, nonpracticing Muslims, and nonbelievers on grounds of dress, with anyone who refused to wear the headscarf undoubtedly being regarded as opposed to religion or as nonreligious.

The Constitutional Court also said that students had to be permitted to work and pursue their education together in a calm, tolerant, and mutually supportive atmosphere without being deflected from that goal by signs of religious affiliation. It found that, irrespective of whether the Islamic headscarf was a precept of Islam, granting legal recognition to a religious symbol of that type in institutions of higher education was not compatible with the principle that state education must be neutral, since it would be liable to generate conflicts among students with differing religious convictions or beliefs.<sup>22</sup>

After the annulment of additional article 16 by the Constitutional Court, the Anavatan Partisi government made a second attempt and, on October 25, 1990, the government passed a law (Law No. 3670), which put into effect additional article 17 for Law No. 2547. This article provides: “Choice of dress shall be free in institutions of higher education, provided that it does not contravene the laws in force”. The main opposition party at the time challenged this provision before the Constitutional Court. In a judgment of April 9, 1991,<sup>23</sup> published in the Official Gazette of July 31, 1991, the Constitutional Court held that, in light of the principles it had established in its judgment of March 7, 1989, the aforementioned provision did not allow headscarves to be worn in institutions of higher education on religious grounds and so was consistent with the Constitution. It stated, *inter alia*:

[T]he expression “laws in force” refers first and foremost to the Constitution. . . . In institutions of higher education, it is contrary to the principles of secularism and equality for the neck and hair to be covered with a veil or headscarf on grounds of religious conviction. In these circumstances, the freedom of dress which the impugned provision permits in institutions of higher education “does not concern dress of a religious nature or the act of covering one’s neck and hair with a veil and headscarf.” . . . The freedom afforded by this provision [additional article 17] is conditional on its not being contrary to “the laws in force.” The judgment [of March 7, 1989] of the Constitutional Court establishes that covering one’s neck and hair with the headscarf is, first and foremost, contrary to the Constitution. Consequently, the condition set out in the aforementioned article requiring [choice of] dress not to contravene the laws in force removes from the scope of freedom of dress the act of “covering one’s neck and hair with the headscarf. . . .”<sup>24</sup>

In other words, in this decision the Court found that the disputed law was not unconstitutional; however, at the same time, it ruled that it had to be interpreted in light of the Court’s earlier decisions. Thus, while the Court did not annul the provision, it ruled nonetheless that wearing the headscarf at universities was still contrary to law. The method of interpretation adopted by the Court is known as “interpretation

<sup>22</sup> *See id.*

<sup>23</sup> Constitutional Court Decision, E.1990/36, K.1991/8, April 9, 1991, *Anayasa Mahkemesi Kararlar Dergisi* [Constitutional Court Reports], vol. 1, pp. 285–323.

<sup>24</sup> *Id.* at 303–305.



in conformity with the Constitution,” and it has frequently been applied by German, French, and Italian constitutional courts.<sup>25</sup>

Since the provision enacted by additional article 17 of Law No. 2547 has not been annulled by the Constitutional Court, it remains in force today. Therefore, no legal sanction in Turkish law expressly prohibits wearing headscarves at universities. The ban on wearing the headscarf is not based on statutory law but is imposed, in practice, by the public bodies in reliance upon the two above-mentioned decisions of the Constitutional Court.<sup>26</sup> One can readily explain why the Turkish Constitutional Court used the method of “interpretation in conformity with the Constitution” rather than annulling the law on headscarves:

A clear-cut invalidation of a law can give the legislature more room for political manoeuvring, in that a new law can be enacted. However, the declaration that only one particular interpretation of a law is constitutional often entails precise prescriptions and can quite easily result in law-making by the Constitutional Court.<sup>27</sup>

Recent cases before the European Court of Human Rights (ECtHR) dealing with the controversial issue of religious dress add an interesting angle and important support for the Turkish headscarf ban in universities.<sup>28</sup> In *Dahlab v. Switzerland*, the ECtHR rejected the complaint of a female teacher in Switzerland who had refused to cease wearing an Islamic veil in a primary school. The ECtHR held that the state’s actions were justified because it sought to guarantee religious neutrality in the classroom. In that case, the ECtHR found that the need to protect very young pupils by preserving religious harmony was at stake.

In a later case, the ECtHR examined the issue of religious dress in the context of the Turkish headscarf ban. Leyla Sahin, the applicant, considered it her religious duty to wear the Islamic headscarf. Sahin complained that the prohibition against wearing Islamic headscarves in class or during exams for students at Istanbul University was contrary to article 9 of the European Convention on Human Rights (ECHR), which guarantees freedom of religion. Sahin argued on the basis of her right as an adult to dress as she wished and insisted that the headscarf was compatible with the principle of secularism as guaranteed by the Turkish Constitution. The Turkish government

<sup>25</sup> Ergun Özbudun, *Political Origins of the Turkish Constitutional Court and the Problem of Democratic Legitimacy*, 12 EUR. PUB. L. 213, 222 (2006).

<sup>26</sup> Ergun Özbudun, *Judicial Review of Constitutional Amendments in Turkey*, 15 EUR. PUB. L. 533, 537 (2009).

<sup>27</sup> Christine Landfried, *Constitutional Review and Legislation in the Federal Republic of Germany*, in CONSTITUTIONAL REVIEW AND LEGISLATION: AN INTERNATIONAL COMPARISON 154 (Christine Landfried ed., 1988).

<sup>28</sup> See, most notably, *Dahlab v. Switzerland*, No 42393/98, 2001-V-DA and *Leyla Sahin v. Turkey*, *supra* note 14. On these cases, see Bleiberg, *supra* note 9, at 143; Natan Lerner, *How Wide the Margin of Appreciation? The Turkish Headscarf Case, the Strasbourg Court, and Secularist Tolerance*, 13 WILLAMETTE J. INT’L L. & DIS. RES. 67 (2005); Case Note, *Leyla Sahin v. Turkey*, *Zeynep Tekin v. Turkey*, 15 HUM. RTS. CASE DIG. 281 (2004–2005); Kerem Altıparmak and Onur Karahanogullari, *After Sahin: The Debate on Headscarves Is Not Over*, *Leyla Sahin v. Turkey*, *Grand Chamber Judgment of 10 November 2005*, Application No. 44774/98, 2 EUR. CONST. L. REV. 268 (2006); Rachel Rebouche, *The Substance of Substantive Equality: Gender Equality and Turkey’s Headscarf Debate*, 24 AM. U. INT’L L. REV. 711 (2008–2009); Carolyn Evans, *The ‘Islamic Scarf’ in the European Court of Human Rights*, 7 MELB. J. INT’L L. 52 (2006).

strongly contested Sahin’s claims. It maintained that secularism was a key factor in Turkey’s remaining a liberal democracy, and that, because the Islamic headscarf was associated with extreme “religious fundamentalist movements,” its display posed a threat to Turkish secular values.

Both the Grand Chamber and the Chamber of the ECtHR accepted the Turkish government’s arguments. The Grand Chamber held that the headscarf ban could be justified under article 9(2) of the ECHR. Attaching considerable significance to the impact that the headscarf might have on those choosing not to wear it, the ECtHR ruled that the relevant dress restrictions were proportionate to the legitimate aims of upholding public order and protecting the rights and freedoms of others. Furthermore, in reaching the conclusion that restrictions on the headscarf were necessary in a democratic society, the ECtHR accorded the state a wide margin of appreciation and focused on the need to protect two important principles: secularism and women’s equality. The former, according to the Court, is consistent with the values underpinning the ECHR. Moreover, given the presence of extremist political movements seeking to impose their values on Turkish society, the Court found it understandable that the state would wish to preserve the secular nature of the university and, thereby, impose restrictions on the Islamic headscarf. With regard to women’s equality, the ECtHR was concerned about a link between the Islamic headscarf and women’s rights, that is, that the veil is a symbol of gender inequality.<sup>29</sup>

The Turkish Constitutional Court’s decision was issued against the backdrop of these stormy events. That decision will be reviewed in the next section.

### 3. The case’s facts and decision

#### 3.1. The facts

On February 9, 2008, the Turkish Grand National Assembly (GNAT or parliament) adopted Law No. 5735 about Amendments to Some Articles of the Constitution. These amendments provide as follows:

Article 1. The phrase “in utilization of all forms of public services” is added following the phrase “in all their proceedings” in article four of Article 10 of the Constitution.

Article 2. The phrase “No one can 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” is added following article six of Article 42 of the Constitution.<sup>30</sup>

<sup>29</sup> See D. J. HARRIS, M. O’BOYLE, E.P. BATES & C. N. BUCKLEY, *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 437–438 (2<sup>nd</sup> ed. 2009).

<sup>30</sup> The relevant provisions of the Constitution provide:

“Article 10. Equality before the Law

(1) 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.

(2) Men and women have equal rights. The State shall have the obligation to ensure that this equality exists in practice.



The General Reasons of Law No. 5735 provides the following explanation of the purposes of the amendments:

It has become a chronic problem that some students in the higher education institutions have been deprived of the right to training and education because of their dress. Such a problem does not exist in any of the member states of the Council of Europe of which we are also a member and founder. However, it is known that in our country, some female students in the university cannot exercise their right to training and a long-term education because of dress which they use to cover their heads. Educating generations which are “free in idea, free in conscience, free in learning” in the level of modern civilization that Atatürk undertook as a goal makes it necessary for individuals to enjoy the right to higher education without being subjected to any discrimination, in accordance with the principle of equality before law.<sup>31</sup>

The General Reasons further state that the purpose of the first article of the amendments is “to preclude the possibility of discrimination by the universities as well as other administrative authorities, among the people who benefit from this right on the grounds of language, color, gender, political idea, philosophical belief, religious sect, dress and similar reasons while providing higher education service.” The General Reasons explain that the purpose for the last clause in the second article of the amendments is to provide equality among the citizens who benefit from higher education services and eliminate any deprivation of the right to an education in higher education institutions.

Enactment of the amendments was initiated by the written proposal of Istanbul member of parliament (MP) Recep Tayyip Erdoğan (Prime Minister), Osmaniye MP Devlet Bahçeli (leader of the second-largest opposition party), and 346 MPs. Another 57 MPs joined this proposal after it was submitted to the presidency of GNAT but prior

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(3) No privilege shall be granted to any individual, family, group or class.

(4) State organs and administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings.”

“Article 42. Right and Duty of Training and Education

(1) No one shall be deprived of the right of learning and education.

(2) The scope of the right to education shall be defined and regulated by law

(3) 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.

(4) The freedom of training and education does not relieve the individual from loyalty to the Constitution.

(5) Primary education is compulsory for all citizens of both sexes and is free of charge in state schools.

(6) The principles governing the functioning of private primary and secondary schools shall be regulated by law in keeping with the standards set for state schools.

(7) The state shall provide scholarships and other means of assistance to enable students of merit lacking financial means to continue their education. The state shall take necessary measures to rehabilitate those in need of special training so as to render such people useful to society.

(8) Training, education, research, and study are the only activities that shall be pursued at institutions of training and education. These activities shall not be obstructed in any way.

(9) No language other than Turkish shall be taught as a mother tongue to Turkish citizens at any institutions of training or education. Foreign languages to be taught in institutions of training and education and the rules to be followed by schools conducting training and education in a foreign language shall be determined by law. The provisions of international treaties are reserved.”

<sup>31</sup> See Headscarf Decision of 2008, *supra* note 1, at 139–140.

to the discussion in the Commission of Constitution. In this case, the quorum for the proposal was 405 MPs. After approval by the GNAT Commission of Constitution, the proposal was submitted to the General Assembly. The General Assembly debated the proposal on February 6, 2008, and adopted it on February 9, 2008. The law came into force with its publication in the Official Gazette No. 26796 of February 23, 2008.

Upon adoption of the law, members of the main opposition party Hakkı Süha Okay, Kemal Anadol and 110 other MPs petitioned the Constitutional Court to annul the law on the grounds that the amendments affect the irrevocable provisions of the Constitution. Alternatively, they claimed that the law violated the “prohibition to propose” rule for not having an adequate quorum of proposal and, thus, ought to be annulled according to article 148(2) of the Constitution. The Court unanimously decided to examine the case on its merits.<sup>32</sup>

### 3.2. Formal review

The Court began its examination with a formal review of the legislative process and parliament’s competence to propose constitutional amendments. According to article 175 of the Constitution, the competence to amend the Constitution is vested in GNAT, and parliament can utilize this competence given a proposal by at least one-third of its members, followed by adoption of the proposal by a three-fifths majority of its members. The Court found that the law was proposed by more than one-third of the GNAT members and enacted by the requisite majority of the General Assembly, and thus the petition for nullification for not meeting the requirements of the procedural bar was rejected.<sup>33</sup>

Thereafter, the Court proceeded to review parliament’s power to propose constitutional amendments. The Court held that in order to analyze GNAT’s constitutional amendment power, a distinction must be made between “original constituent power” and “derived constituent power.” The original constituent power is a constitution-making power that is exercised outside the legal framework. In a participatory, deliberative, and compromising democratic state, this power belongs to the people. Once it becomes the basic norm of the system, the new constitution, created by the original constituent power, becomes the basis for the legitimacy of all constitutional institutions and establishments. The constituted powers created by the original constituent power—such as the legislative, executive, and judiciary branches, together with their subunits—derive their prerequisite legality from the Constitution and thus must act within the limits defined in the Constitution. This notion is recognized in article 6 of the Constitution, which states that “No person or agency shall exercise any state authority which does not emanate from the Constitution,” without any exceptions. Therefore, the legislature itself is bound not to use its power in violation of its stipulated authority.<sup>34</sup>

<sup>32</sup> *Id.* at 133.

<sup>33</sup> *Id.* at 136.

<sup>34</sup> *Id.*

The Court stated that in its previous decisions delivered during the period of the 1961 constitution,<sup>35</sup> which prohibited in article 9 amendments to the republican form of the state as stipulated in article 1, the Court had declared that it is not possible to amend the basic principles of the republic because such an amendment would damage the system's integrity and would create a new system that upsets the one previously described in the Constitution. Thus, the Court explained, modern constitutions protect certain principles from amendment, emphasizing that proposals of constitutional amendment "can not involve the smallest deviation or change to the Preamble and the principles laid down in Articles 1 and 2 of the Constitution." The amendment of these principles is placed out of the legislature's reach. If such amendments are, nevertheless, proposed and adopted, "it will be contrary to the rules of form provided in Article 9 of the Constitution."<sup>36</sup>

The Court continued to claim that according to article 175 of the Constitution, constitutional amendment power is vested in GNAT. It is without any doubt that this power, which originates in the Constitution, must be exercised constitutionally according to the methods and within the limits that the Constitution provides. The use of power by the legislature according to the process laid down in article 175 must be allowed by the primary constituent power. Those areas that lie outside the scope of the amendment power established by article 175 are clearly set forth in article 4 of the Constitution, which stipulates that:

The provision of Article 1 of the Constitution establishing the form of the State as a Republic, the provisions in Article 2 on the characteristics of the Republic, and the provision of Article 3 shall not be amended, nor shall their amendment be proposed.

According to the Court, in the same way that a constitutional amendment adopted without compliance with the proposal and ballot quorums in article 148 of the Constitution will not be legally valid, in the same vein, an amendment proposal aimed at one of the irrevocable provisions of the Constitution is outside the scope of the legislature's competence, and, thus, the legality of such a legislative action cannot be recognized:<sup>37</sup>

Constitutional amendments need to be in accordance with the basic preferences arising from the integrity of constitutional norms mentioned above and materializing in the first three Articles of the Constitution.<sup>38</sup>

In this context, the Court held that article 175, which establishes the amendment competence provision; article 4, which sets limits to that amendment competence; and article 148, which grants the competence to determine whether the use of power crossed these limits, must be considered together.

According to the Court, the legislature's acts and proceedings are constituted powers; thus, their validity depends on remaining within the constitutional limits

<sup>35</sup> Constitutional Court's decisions of June 16, 1970, Case No. 1970/31; April 13, 1971, Case No. 1971/37; April 15, 1975, Case No. 1975/87; March 23, 1976, Case No. 1976/19; October 12, 1976, Case No. 1976/46; January 27, 1977, Case No. 1977/4; September 27, 1977, Case No. 1977/117.

<sup>36</sup> See Headscarf Decision of 2008, *supra* note 1, at 137.

<sup>37</sup> *Id.* at 137.

<sup>38</sup> *Id.*

provided by the primary constituent power. Article 148 of the Constitution states that the scope of review with regard to the form of the constitutional amendments is restricted to consideration of “whether the requisite majority was obtained for the proposal . . .” and includes a review of whether the “valid proposal” condition is also fulfilled.<sup>39</sup>

According to the Court, the current Constitution provides for an integrated constitutional order of norms, concretized in the first three articles of the Constitution. These articles reflect the constituent power’s basic choice of political system, and the tangible reflections of this choice come into existence in the other articles of the Constitution. Article 4 is irrevocable with regard to the characteristics guaranteed in the first three articles. Amendments to any single article, including article 4, could cause changes and transformations in the constitutional and political system created by the constituent power, thus evading the limits drawn by the Constitution. Therefore, a legislative act which amends the first three articles to the Constitution or causes the same result by amending other constitutional provisions is legally invalid. On these grounds, the Court asserts that it must be accepted that it can review the constitutionality of the amendments and whether they are contrary to the characteristics of the republic in article 2 of the Constitution. If the Court finds that they are indeed contrary to the Constitution, the Court can invalidate them on the ground that they are contrary to the prohibition to amend as stated in article 4 of the Constitution.<sup>40</sup>

### 3.3. Substantive Review

After establishing the basis for judicial review, the Court conducted its review of the substance of the amendments, beginning with the principle of secularism. According to the Court:

The principle of secularism laid down in Article 2 of the Constitution provides that in a Republic, in which sovereignty belongs to the nation, no dogma other than the national will can guide the political system, and legal rules are adopted by considering the democratic national requirements as guided by intelligence and science, rather than religious orders. Freedom of Religion and Conscience is established for everyone, without any discrimination or prerequisites and not subject to any restrictions beyond those provided in the Constitution; misuse and exploitation of religion or religious feelings is prohibited; and the State behaves equally and impartially toward all religions and beliefs in its acts and transactions.<sup>41</sup>

The Court referred to other constitutional provisions from which one can understand the constitutional principle of secularism.<sup>42</sup> The Court found that the

<sup>39</sup> *Id.* at 138.

<sup>40</sup> Judges Haşim Kiliç and Sacit Adalı delivered dissenting opinions.

<sup>41</sup> See Headscarf Decision of 2008, *supra* note 1, at p. 138.

<sup>42</sup> According to the Constitution’s preamble, “as required by the principle of secularism, there shall be no interference whatsoever by sacred religious feelings in state affairs and politics”; article 14 states that “none of the rights and freedoms embodied in the Constitution shall be exercised with the aim of . . . endangering the existence of the . . . secular order of the Turkish Republic”; article 42: “training and education shall be conducted along the lines of the principles and reforms of Atatürk, on the basis of

constitution-maker took into account the country's conditions and chose to prohibit the use of religion, religious feelings, and matters considered sacred to gain political interest or influence, considering this necessary to protect the principle of secularism.<sup>43</sup>

The Court evaluated the secularism principle as it had been explained in many prior Constitutional Court decisions:

The secularism principle which has its intellectual origins in the Age of Renaissance, Reformation, and Enlightenment, is a common value of contemporary democracies. According to this principle, political and legal structures rely on the national choices that are a product of participatory democratic processes based on rationalism and scientific methodology. . . . In communities where individuals enjoy their constitutional liberties without any discrimination on the basis of belief, religion, religious sect or philosophical outlook, the conditions for enlightenment, which is a process based on rationalism, are provided, and secular and democratic values are assimilated. Therefore, political, social and cultural life obtain a modern appearance in which universal values are dominant. It is obvious that secularism in this meaning is a common value that secures social and political peace.<sup>44</sup>

According to the Court, when religions, relying on the free conscientious choices of individuals and functioning as social institutions, begin to rule the political structure or to constitute the legitimacy grounds for legal rules of the political structure instead of national will, then protecting social and political peace becomes impossible. Legal arrangements based on religious orders, rather than the national will that arises within a participatory democratic process, make individual liberty and the democratic process arising from such liberty impossible. The dogmas that become dominant in the political structure displace the freedoms. Thus, contemporary democracies deny claims about an absolute reality, stand with rationalism against dogmas and prevent religion from becoming politicized and an instrument of governance by separating religious and governmental affairs.

The Court indicated that it understood from the GNAT's debates that the amendments were seriously criticized in the Assembly by the members of parliament. It has been noted that, with regard to the amendments, society's anxiety has not been resolved but, rather, a defiant solution had been adopted as a method that excludes a democratic compromise even if the amendments could solve the problem of those students who are prevented from exercising their right to education due to the headscarf ban in universities.

According to the Court, article 1 of the amendments imposes an obligation on both state organs and administrative authorities to act in compliance with the principle of

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contemporary science and educational methods, under the supervision and control of the state" and "the freedom of training and education does not relieve the individual from loyalty to the Constitution"; article 174, according to which the reform laws which aims at protecting the secular character of the Turkish Republic cannot be invalidated; the last para. of article 24: "No 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."

<sup>43</sup> See Headscarf Decision of 2008, *supra* note 1, at 139.

<sup>44</sup> *Id.*

equality before the law in all their proceedings and to ensure that individuals utilize public services in compliance with the principle of equality before the law. It also creates an opportunity for individuals to demand the use of public services in compliance with the principle of equality before the law from state organs and administrative authorities. Therefore, in terms of dress, when individuals utilize their right to higher education, article 1 of the amendments would prevent state organs and administrative authorities from imposing a restriction upon utilization of this right.

The Court stated that, according to article 2 of amendments, the right to higher education could not be prevented due to religious dress, unless explicitly prohibited by law.<sup>45</sup> However, the Court ruled that, although wearing the headscarf is an individual choice and freedom, there is a possibility that this religious symbol, when worn in classrooms and laboratories in which the presence of other students is mandatory, might become an instrument of compulsion imposed on people who have different preferences about life, political ideas, or beliefs. If this possibility becomes a reality, then the religious symbol poses a risk to public order by causing a compulsion upon others and potential delays in obtaining higher education, which could limit the individual's equal exercise of the right to education.<sup>46</sup>

The Court interpreted the phrase “any reason not explicitly written in the law” in article 2 of the amendments to mean an active *act* of the legislature. Since no legal body forces the legislature to make legal arrangements, it is obvious that taking legal measures to protect the freedoms of others and determine public policy are in the legislature's discretion. Considering that the legislature is the primary mechanism for political decisions and a sizeable majority of the population belongs to a particular religion, the difficulty posed by the potential use of this discretion to restrict religious freedoms is obvious. When amending the Constitution, which is the basic norm of the political system, it is a requirement for a state based on human rights—which is the result of the experiment of democratic constitutionalism—that guaranteeing the fundamental rights and freedoms of the people who do not share the majority's beliefs shall not be left to the legislature's discretion; the conditions and mechanisms for this guarantee must be provided directly in the Constitution.

The Constitutional Court examined article 24(5) of the Constitution, which provides: “No 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.” The Court held that the disputed amendments ignore the basic obligations that reflect the meaning and core of article 24(5) of the Constitution. The Court noted that in its decision of March 7, 1989,<sup>47</sup> an arrangement allowing the wearing of headscarves for religious beliefs was

<sup>45</sup> *Id.* at 140.

<sup>46</sup> *Id.* at 141.

<sup>47</sup> E.1989/1, K.1989/12, March 7, 1989, *Anayasa Mahkemesi Kararlar Dergisi* [Constitutional Court Reports], No. 25, pp. 133–165.



found unconstitutional with respect to the rights and freedoms of others, the instrumentation of religion, and public order.<sup>48</sup>

The Court referred to the ECtHR case of *Dahlab v. Switzerland*, emphasizing the wide margin of appreciation granted to states on the issue of religious symbols. In that case, the Court noted, the ECtHR held that the Islamic headscarf might endanger the impartiality of state schools and that the prohibition on wearing the headscarf in schools is a proportionate and democratic measure aimed at protecting other people's rights and freedoms, the public order, and security. The Court also referred to the ECtHR judgment of July 31, 2001, in the case of the Refah Partisi [Welfare Party], which held that the freedom to wear the headscarf may be restricted when it conflicts with the need to protect other people's rights and freedoms, the public order, and public security; therefore, measures that prevent putting pressure on students who either do not fulfill the requirements of the majority's religion or who belong to another religion are consistent with the ECHR.<sup>49</sup>

Considering the decisions of the Constitutional Court and ECtHR, the Court concluded that the amendments to articles 10 and 42 of the Constitution are clearly contrary to the principle of secularism and give rise to the infringement of other's rights and breach of public order. Since the amendments indirectly change the basic characteristics of the republic, as provided in article 2 of the Constitution, rendering them nonfunctional, they are contrary to the prohibition to amend and propose as stated in article 4 of the Constitution; hence, it is impossible to accept that the conditions provided in article 148(2) had been fulfilled. For the foregoing reasons, the Court held that articles 1 and 2 of the amendments are contrary to articles 2, 4, and 148 of the Constitution and, therefore, must be annulled.<sup>50</sup>

#### 4. Comment

This important decision has several implications. In general, there is a rising interest in issues concerning secularism in modern countries;<sup>51</sup> specifically, the issue of

<sup>48</sup> The Court also referred to the Constitutional Court's decisions of 09.04.1991 Case No. 1990/36, Decision No. 1991/8, 16.01.1998 Case No. 1997/1 (DPP), Decision No. 1998/1, namely, The Welfare Party decision, and 22.06.2001 Case No. 1999/2 (DPP) Decision No. 2001/2, namely, Virtue Party decision, which held that attempts to make arrangements with religious reasons are not valid under the Constitution. See *Headscarf Decision of 2008*, *supra* note 1, at 141.

<sup>49</sup> *Id.* at 142.

<sup>50</sup> Judges Haşim Kiliç and Sacit Adalı delivered dissenting opinions.

<sup>51</sup> See, e.g., George W. Dent, Jr., *Secularism and the Supreme Court*, 1999 BYU L. REV. 1 (1999); Robert Russell Melnick, *Secularism in the Law: The Religion of Secular Humanism*, 8 OHIO N.U. L. REV. 329 (1981); Peter A. Samuelson, *Pluralism Betrayed: The Battle Between Secularism and Islam in Algeria's Quest for Democracy*, 20 YALE J. INT'L L. 309 (1995); Thomas C. Berg, *Slouching Toward Secularism: A Comment on Kiryas Joel Scholl District v. Grumet*, 44 EMORY L. J. 433 (1995); Steven G. Gey, *Unity of the Graveyard and the Attack on Constitutional Secularism*, 2004 BYU L. REV. 1005 (2004); Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 FORDHAM L. REV. 493 (2003–2004); Ranta Kapur, *The Fundamental Face of Secularism and its Impact on Women's Rights in India*, 47 CLEV. ST. L. REV. 323 (1999); Badrinath Rao, *The Variant Meaning of Secularism in India: Notes Toward Conceptual Clarifications*, 48 J. CHURCH & ST. 47 (2006); Jacques Robert, *Religious Liberty and French Secularism*, 2003 BYU L. REV.

headscarf bans is highly relevant in various European countries.<sup>52</sup> Moreover, while the definition of the nature of the constitutional amendment power is among the most abstract questions of public law,<sup>53</sup> the question of limits on constitutional amendments is not purely of academic interest; it has practical importance. This complex issue, which has attracted an increased attention in recent years,<sup>54</sup> has been adjudicated in various countries (for example, India, Czech Republic, Brazil, and Germany<sup>55</sup>) and is likely to arise, sooner or later, in other countries as well. Therefore, much could be gained by comparative research into the Turkish experience. In all these aspects, from a legal perspective, the judgment raises some important issues and difficulties. We shall focus on the main points that we find most curious.

#### 4.1. Limitations on the constitutional amendment power

The first legal issue is that of limits to the constitutional amendment power. According to article 4 of the Turkish Constitution, no amendment may be made, inter alia, to the provisions concerning the characteristics of the republic. Are such limitations

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637 (2003); Mary Harter Mitchell, *Secularism in Public Education: The Constitutional Issues*, 67 B.U. L. REV. 603 (1987); Brenda Cossman & Ratna Kapur, *Secularism's Last Sigh?: The Hindu Right, the Courts, and India's Struggle for Democracy*, 38 HARV. INT'L. L. J. 113 (1997); Benjamin Berger, *The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State*, 17 CAN. J.L. & SOC. 39 (2002); Michel Troper, *French Secularism, or Laïcité*, 21 CARDOZO L. REV. 1267 (1999–2000); Carl Horn, III, *Secularism and Pluralism in Public Education*, 7 HARV. J. L. & PUB. POL'Y 177 (1984); Eugene D. Genovese, *Secularism in the General Crisis of Capitalism*, 42 AM. J. JURIS. 195 (1997); Robert J. Stephens, *Sites of Conflict in the Indian Secular State: Secularism, Caste and Religious Conversion*, 49 J. CHURCH & ST. 251 (2007); William P. Marshall, *The Limits of Secularism: Public Religious Expression in Moments of National Crisis and Tragedy*, 78 NOTRE DAME L. REV. 11 (2002–2003); W. Cole Durham, Jr., & Alexander Dushku, *Traditionalism, Secularism, and the Transformative Dimension of Religious Institutions*, BYU L. REV. 421 (1993); EUROPEAN MUSLIMS AND THE SECULAR STATE (Seán McLoughlin, Jocelyne Cesari eds., 2005); RELIGION IN THE PUBLIC SPHERE: A COMPARATIVE ANALYSIS OF GERMAN, ISRAELI, AMERICAN AND INTERNATIONAL LAW (Winfried Brugger & Michael Karayanni eds., 2007).

<sup>52</sup> See, e.g., Maximilien Turner, *The Price of a Scarf: The Economics of Strict Secularism*, 26 U. PA. J. INT'L ECON. L. 321 (2005); Dominique Custos, *Secularism in French Public Schools: Back to War? The French Statute of March 15, 2004*, 54 AM. J. COMP. L. 337 (2006); Karima Bennouna, *Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expressions, and Women's Equality Under International Law*, 45 COLUM. J. TRANSNAT'L L. 367 (2006–2007); T. Jeremy Gunn, *French Secularism as Utopia and Myth*, 42 HOUS. L. REV. 81 (2005–2006); Claire Saas, *Muslim Headscarf and Secularism in France*, 3 EUR. J. MIGRATION & L. 453 (2001).

<sup>53</sup> Claude Klein, *Is There a Need for an Amending Power Theory?*, 13 ISR. L. REV. 203 (1978).

<sup>54</sup> See e.g., Richard Albert, *Nonconstitutional Amendments*, 22 CAN. J. L. & JUR. 5 (2009); Gary Jeffrey Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective*, 4 INT'L. J. CONST. L. (I·CON) 470 (2006); Jason Mazzone, *Unamendments 90* IOWA L. REV. 1747 (2004–2005); Rory O'Connell, *Guardians of the Constitution: Unconstitutional Constitutional Norms* 4 J. C. L. 48 (1999); Vincent J. Samar, *Can a Constitutional Amendment Be Unconstitutional?* 33 OKLA. CITY U. L. REV. 667 (2008).

<sup>55</sup> See, e.g., Kieran Williams, *When a Constitutional Amendment Violates the Substantive Core: The Czech Constitutional Court's September 2009 Early Elections Decision*, 36 REV. CEN. & EAST EUR. L. 33 (2011); Conrado Hübner Mendes, *Judicial Review of Constitutional Amendments in the Brazilian Supreme Court*, 17 FLA. J. INT'L L. 449 (2005); Michael Freitas Mohallem, *Immutable clauses and judicial review in India, Brazil and South Africa: expanding constitutional courts' authority*, 15 INT. J. HUM., RIGHT. 765 (2011); Helmut Goerlich, *Concept of Special Protection For Certain Elements and Principles of the Constitution Against Amendments and Article 79(3), Basic Law of Germany*, 1 N.U.J.S. L. REV. 397 (2008).

valid? We agree with the Court that the answer to the question regarding the competence to amend the Constitution lies in the legal status of the parliament versus that of the constituent power.<sup>56</sup> We must, therefore, return to primary principles. As early as 1792, Tom Paine articulated that “all power exercised over a nation, must have some beginning.”<sup>57</sup> What is this beginning? The greatest theorist of the constituent power and the one to whom the concept of “constituent power” is often attributed is Abbé Emmanuel Joseph Sieyès, who stated in a speech before the National Assembly in 1789: “Une Constitution suppose avant tout un pouvoir constituant.”<sup>58</sup> According to Sieyès, “in each of its parts a constitution is not the work of a constituted power but a constituent power.”<sup>59</sup> Constituent power is the power to establish the constitutional order of a nation. Almost one hundred and forty years later, this notion was reaffirmed by Carl Schmitt when he declared that “a constitution is valid because it derives from a constitution-making capacity . . . and is established by the will of this constitution-making power.”<sup>60</sup> Constituent power is thus, in Martin Loughlin’s words, “the generative principle of modern constitutional arrangements.”<sup>61</sup>

In the modern era, the constitution of a nation is regarded as a creation *ex nihilo*, receiving its normative and universal status from the political will of the people to act as a constitutional authority<sup>62</sup> and through which “the people” manifests itself as a political and legal unity.<sup>63</sup> This idea of “the people” as a collective of individuals, standing as a distinct force behind all constituted forms of sovereignty, can be traced to Hobbes’s *Leviathan*.<sup>64</sup> The notion that all power originates from the people—which de Tocqueville believed lies “at the bottom of almost all human institutions”<sup>65</sup>—is now explicitly expressed in various constitutions.<sup>66</sup> Sieyès distinguished between constituent power and constituted power. The former is the extraordinary power to form a constitution, the immediate expression of the nation and thus its representative. The

<sup>56</sup> See Headscarf Decision of 2008, *supra* note 1, at 136.

<sup>57</sup> THOMAS PAINE, *RIGHTS OF MAN, COMMON SENSE, AND OTHER POLITICAL WRITINGS* 238 (2008).

<sup>58</sup> Emmanuel Joseph Sieyès, *Préliminaires de la Constitution - Reconnaissance et exposition raisonnée des droits de l'homme et du citoyen*, 20 et 21 Juillet 1789, Comité de Constitution, available at <http://www.unice.fr/ILF-CNRS/politext/Sieyes/sieyesTextes.html>. The concept of constituent power emerged almost simultaneously in France and North-America. See Claude Klein, *A propos Constituent Power: Some General Views in a Modern Context*, in *NATIONAL CONSTITUTIONS IN THE ERA OF INTEGRATION* 31 (Antero Jyränki ed., 1999).

<sup>59</sup> EMMANUEL JOSEPH SIEYÈS, *POLITICAL WRITINGS* 136 (2003).

<sup>60</sup> CARL SCHMITT, *CONSTITUTIONAL THEORY* 64 (2008).

<sup>61</sup> MARTIN LOUGHLIN, *THE IDEA OF PUBLIC LAW* 100 (2004). On the distinction between “constituent power” and the concept of “constituent authority” see Richard Kay, *Constituent Authority*, 59 *AM. J. COMP. L.* 715 (2011).

<sup>62</sup> On “the people” as the subject of constituent power, see Ulrich K. Preuss, *The Exercise of Constituent Power in Central and Eastern Europe*, in *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM* 211–222 (Martin Loughlin & Neil Walker eds., 2007).

<sup>63</sup> RENE BARENTS, *THE AUTONOMY OF COMMUNITY LAW* 89–90 (2004).

<sup>64</sup> See Murray Forsyth, *Thomas Hobbes and the Constituent Power of the People*, 29 *POLITICAL STUDIES* 191 (1981).

<sup>65</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 61 (Bantam Dell 2004).

<sup>66</sup> See, e.g., GRUNDGESETZ [GG] [German Constitution] art. 20(2) (F.R.G.); DE BESCHE GRONDWET [Belgian Constitution] art. 25 (1831).

latter is the power created by the constitution (for example, legislative), an ordinary power that functions according to the forms and mode the nation grants it in positive law.<sup>67</sup> The constituted power thus acts as trustee of the constituent power.<sup>68</sup> These two powers exist on different planes: constituted power exists only in the state, inseparable from a preestablished constitutional order, while constituent power is situated outside the state and exists without it.<sup>69</sup>

Is the constitutional amendment power an exercise of constituent power or constituted power? This is a thorny question.<sup>70</sup> “Amendment formulas”, Grégoire Webber noted, “are, by definition, means according to which a constituted authority may assume the status of constituent authority .....”<sup>71</sup> Ostensibly, it is permissible for “the people” to revise the constitution; hence, amending a constitution, like constitution making, is part of the constituent power. This position may be vindicated by the fact that most constitutions provide procedures for adopting constitutional amendments that differ from the procedures for enacting ordinary legislation. Furthermore, via constitutional amendments, “the people” can alter constituted powers, such as the legislative or executive body. If the nation controls the government through the constitution, then, arguably, amending the original constitutional articles is an exercise of the constituent power—the “final controlling power” in Paine’s words.<sup>72</sup> In other words, while the constituted power originates in the constitution, once adopted, and may undertake only those acts it is authorized to undertake by the constitution itself and cannot constitute itself,<sup>73</sup> the amendment power *can* constitute itself; it can change the constitution and thus its own boundaries. If “constituent power produces the fundamental laws that activate the legislative and executive bodies set by the constitution,”<sup>74</sup> then amending those fundamental laws is an exercise of that constituent power.<sup>75</sup>

<sup>67</sup> Sieyès, *supra* note 59, at 134–137; see ANTONIO NEGRI, *INSURGENCIES: CONSTITUENT POWER AND THE MODERN STATE* 216–217 (1999).

<sup>68</sup> Ulrich K. Preuss, *Constitutional Powermaking for the New Polity: Some Deliberations on the Relations between Constituent Power and the Constitution*, 14 *CARDOZO L. REV.* 639, 653 (1992–1993).

<sup>69</sup> GEORGES BURDEAU, *TRAITÉ DE SCIENCE POLITIQUE* 173 (3<sup>rd</sup> ed. 1983), referred to in GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 39 (1998).

<sup>70</sup> See Preuss, *supra* note 68.

<sup>71</sup> GRÉGOIRE C. N. WEBBER, *THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS* 49 (2009).

<sup>72</sup> Paine, *supra* note 57, at 245.

<sup>73</sup> JÁNOS KIS, *CONSTITUTIONAL DEMOCRACY* 136 (2003); Damian Chalmers, *Constituent Power and the Pluralist Ethic*, in *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM* 299 (Martin Loughlin & Neil Walker eds., 2007).

<sup>74</sup> Negri, *supra* note 67, at 216.

<sup>75</sup> This seems to be the prevailing approach of American constitutionalism: after the establishment of the Constitution, the constituent power is contained by the constituted institutions and can manifest itself through article V of the Constitution – the amendment procedure. Stephen Griffin described this notion: “the conventional meaning of constituent power within American constitutionalism is the power of the people to change the Constitution through amendment or a constitutional convention”, concluding that “the constituent power of the people plays no direct role in American constitutionalism, other than through the amendment process”. See Stephen M. Griffin, *Constituent Power and Constitutional Change in American Constitutionalism*, in *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM* 49, 50, 66 (Martin Loughlin & Neil Walker eds., 2007).

Some argue, however, that the constitutional amendment power is part of the constituted power on the grounds that it is legally defined in the constitution and subject to constitutional limits.<sup>76</sup> This seems to be the Turkish Constitutional Court's view.

In our view, Schmitt correctly noted that the constitutional amendment power is an extraordinary authority.<sup>77</sup> It is extraordinary because, as Stephen Holmes and Cass Sunstein observed, it “inhabits a twilight zone between authorizing and authorized power . . . the amending power is simultaneously framing and framed, licensing and licensed, original and derived, superior and inferior to the constitution.”<sup>78</sup>

We claim that the constitutional amendment power is neither an expression of the original constituent power nor a legislative power. It is a special power, weaker than the former but greater than the latter. This proposition primarily relies on those French writers who developed a theory regarding the distinction between “pouvoir constituant originaire” and “pouvoir constituant dérivé/institué.”<sup>79</sup> On this basis, “the people” are regarded both as a source of absolute power and as a constitutional organ established by the constitution for its own amendment.<sup>80</sup> A lengthy review of the distinction between the two powers is beyond the scope of this essay.<sup>81</sup> It is sufficient for our discussion to note that the original constituent power is the power to establish a new legal order (*ordre juridique nouveau*). It is an absolute power, which may set limits for the exercise of amendments, such as determining which body has the authority to amend the constitution (for example, a constitutional convention, an assembly, the parliament, or a referendum) and other conditions (for example, procedural and substantive limitations).<sup>82</sup> In contrast, the derived constituent power acts within the constitutional framework and is, therefore, limited under the terms of its original mandate.<sup>83</sup> Presumably, this proposition would be acceptable to William Harris: “when the machinery of government is acting as the agent of the people in its sovereign capacity, the notion of limits not only makes sense; it is necessary”;

<sup>76</sup> MARKKU SUKSI, MAKING A CONSTITUTION: THE OUTLINE OF AN ARGUMENT 5, 10–11 (Rättsvetenskapliga Institutionen 1995); Barents, *supra* note 63, at 91.

<sup>77</sup> Schmitt, *supra* note 60, at 150.

<sup>78</sup> Stephen Holmes & Cass R. Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 276 (Sanford Levinson ed., 1995).

<sup>79</sup> See, e.g., GEORGES BURDEAU, *DROIT CONSTITUTIONNEL ET INSTITUTIONS POLITIQUES* 78–94 (15<sup>th</sup> ed. 1972); GEORGES BURDEAU, FRANCIS HAMON & MICHEL TROPER, *DROIT CONSTITUTIONNEL* 76–84 (21<sup>st</sup> ed. 1988). Holmes & Sunstein, *supra* note 78, call the term “derived constituent power” “farfetched,” but we believe it appropriately reflects the complexity of its nature.

<sup>80</sup> Klein, *supra* note 53, at 213.

<sup>81</sup> On this issue, see KEMAL GÖZLER, *LE POUVOIR DE RÉVISION CONSTITUTIONNELLE* 12–32 (Thèse, Faculté de droit de Université Montesquieu–Bordeaux IV, 1995); KEMAL GÖZLER, *POUVOIR CONSTITUENT* 10–28 (Ekin Press Bursa, 1999); CLAUDE KLEIN, *THÉORIE ET PRATIQUE DU POUVOIR CONSTITUENT* 187 (1996). For a useful historical note see Arnaud Le Pillouer, *Pouvoir constituant originaire et pouvoir constituant dérivé: à propos de l'émergence d'une distinction conceptuelle*, 25–26 *REVUE D'HISTOIRE DES FACULTÉS DE DROIT ET DE LA SCIENCE JURIDIQUE*, 123 (2005–2006).

<sup>82</sup> Claude Klein, *After the Mizrahi Bank Case: The Constituent Power as Seen by the Supreme Court*, 28 *MISHPATIM* 356 (1997).

<sup>83</sup> Claude Klein, *The Constituent Power in the State of Israel*, 2 *MISHPATIM* 51–52 (1970–1971).

however, when the sovereign constitution maker acts as sovereign, “the notion of limits on constitutional change is inapposite.”<sup>84</sup>

Consequently, we accept the Court’s conclusion that the parliament’s amendment power is not the original constituent power and must, therefore—like every constitutional authority—be understood as subject to those limits placed on it by the original constituent power. Once one accepts the distinction between the original and derived constituent power, it becomes less problematic to accept the existence of limits on the amendment power. The delegated amending power, like all other powers organized in a constitution, is limited.<sup>85</sup> In the Turkish case, we focus on article 4 of the Constitution, which places explicit substantive limitations on the amendment power:

The provision of Article 1 of the Constitution establishing the form of the state as a Republic, the provisions in Article 2 on the characteristics of the Republic, and the provision of Article 3 shall not be amended, nor shall their amendment be proposed.

According to Article 2:

The Republic of Turkey is a democratic, secular [*laik*] 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.

These types of provisions are not unique phenomena. Many constitutions contain unamendable provisions.<sup>86</sup> The constitutions’ drafters regarded the content of these specific provisions as so pivotal to the essence of the Constitution that they prohibited their amendment.<sup>87</sup> The most famous example is article 79(3) of the German Basic Law (1949). Written against the background of the experience of the Weimar constitution, the authors of article 79(3) prohibited amendments to the Basic Law affecting the division of the federation into *Länder*, human dignity, the constitutional order, or basic institutional principles describing Germany as a democratic and social federal state. In France, the republican form of government is protected to avoid a return to monarchy (article 89[5]). Similar protection of the republican form is provided by other countries’ constitutions.<sup>88</sup> Turkey is also not the only state to limit explicitly

<sup>84</sup> WILLIAM F. HARRIS, II, *THE INTERPRETABLE CONSTITUTION* 193 (1993).

<sup>85</sup> EDWARD SAMUEL CORWIN, HAROLD WILLIAM CHASE, & CRAIG R DUCAT, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 22 (13<sup>th</sup> ed., Princeton Univ. Press 1973).

<sup>86</sup> See, e.g., MARIE-FRANCOISE RIGAUX, *LA THEORIE DES LIMITES MATERIELLES A L’EXERCICE DE LA FONCTION CONSTITUANTE* 46-51 (Larcier 1985); Richard Albert, *Constitutional Handcuffs*, 42 *ARIZONA STATE L. J.* 8 (2010).

<sup>87</sup> BARDO FASSBENDER, *UN SECURITY COUNCIL REFORM AND THE RIGHT OF VETO: A CONSTITUTIONAL PERSPECTIVE* 142 (Martinus Nijhoff Publishers 1998); IVO D. DUCHACEK, *RIGHTS & LIBERTIES IN THE WORLD TODAY: CONSTITUTIONAL PROMISE AND REALITY* 32-36 (1973).

<sup>88</sup> See e.g., Algeria Const. (1989), art. 178; Angola Const. (2010), art. 236; Burkina Faso Const. (1991), art. 165; Cameroon Const. (1972), art. 63; Cape Verde Const. (1992), art. 313; Chad Const. (1996), art. 223; Chechnya Const. (2003), art. 112(3); The Republic of Congo Const. (2002), art. 185; Djibouti Const. (1992), art. 88; Equatorial Guinea Const. (1991), art. 104; Gabon Const. (1991), art. 117; Guinea Const. (2010), art. 154; Italy Const. (1947), art. 139; Madagascar Const. (2010), art. 163; Mali Const. (1992), art. 118; Mozambique Const. (2004), art. 292; Portugal Const. (1976), art. 288; Romania Const. (1991), art. 148; Timor-Leste Const. (2002), art. 156; Togo Const. (1992), art. 144.



constitutional changes to the secularism principle. Similar provisions protecting secularism or separation between the state and churches can be found in several other constitutions.<sup>89</sup> Such explicit limits on constitutional amendments are generally considered valid.<sup>90</sup>

This analysis concludes with our acceptance of the Constitutional Court's first point regarding the limited nature of the Turkish parliament's amendment power. The more contentious issue, discussed in the next section, is whether the Constitutional Court has the competence to review the constitutionality of a constitutional amendment's content, that is, to determine whether or not the exercise of the amendment power exceeded its limits.

#### 4.2. Judicial review of constitutional amendments

Is the Constitutional Court empowered to review the constitutionality of the amendments? Some constitutions expressly vest courts with competence to review the constitutionality of constitutional amendments; others, however, are silent on this point.<sup>91</sup> The Turkish case is interesting in this respect. The 1961 Turkish Constitution, prior to its 1971 amendment, did not include any provision concerning the adjudication of constitutional amendments. Indeed, Ergun Özbudun notes that, under the terms of the 1961 Constitution, judicial review of constitutional amendments to that constitution would be possible only "if one adopts the existence of supra-positive constitutional norms or a hierarchy of norms within the Constitution itself"; however, he also adds that "no such hierarchy was established in the Turkish constitutional system and it was commonly agreed that all constitutional norms had equal legal value."<sup>92</sup>

Nevertheless, the Constitutional Court declared itself competent to review the constitutionality of constitutional amendments to the 1961 Constitution.<sup>93</sup> In an early decision from September 26, 1965, the Constitutional Court stated, in obiter dicta, that constitutional amendments must conform to the spirit of the Constitution and, therefore, the amendment power could not abolish the essence of the Constitution. Most notably, in its decision from June 16, 1970, the Court reviewed a constitutional

<sup>89</sup> See e.g., Angola Const. (2010), art. 236; Benin Const. (1990), art. 156; Burundi Const. (2005), art. 299; Central African Republic Const. (2004), art. 108; Chad Const. (1996), art. 223; The Republic of Congo Const. (2002), art. 185; Guinea Const. (2010), art. 154; Guinea-Bissau Const. (1984), art. 102; Mali Const. (1992), art. 118; Mozambique Const. (2004), art. 292; Portugal Const. (1976), art. 288; Togo Const. (1992), art. 144.

<sup>90</sup> See Hans Kelsen, *Derogation*, in *ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND* 339, 343-44 (1962); HANS KELSEN, *GENERAL THEORY OF NORMS* 109-110 (1991); Schmitt, *supra* note 60, at 150-153; Klein, *supra* note 58, at 37. On the distinction between Kelsen's approach and Schmitt's to this issue, see Claude Klein, *On the Eternal Constitution: Contrasting Kelsen and Schmitt*, in HANS KELSEN AND CARL SCHMITT: A JUXTAPOSITION 61 (Dan Diner & Michael Stolleis eds., 1999).

<sup>91</sup> For a comparative study, see KEMAL GÖZLER, *JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS: A COMPARATIVE STUDY* 4-5 (2008) and Özbudun, *supra* note 26, at 533-36.

<sup>92</sup> Özbudun, *supra* note 26, at 536.

<sup>93</sup> See Decision of June 16, 1970, No. 1970/31; Decision of April 3, 1971, No. 1971/37; GÖZLER, *supra* note 91, at 40-42.

amendment on the grounds of procedural irregularity. In that decision, the Court went further and declared itself competent to review the substance of an amendment, although it held that it was not necessary to rule on the substantive regularity of that amendment given that it was invalidated due to its procedural flaws. The question of jurisdiction was examined, once again, in a decision from April 3, 1971. The Constitutional Court declared itself competent to review the conformity of the constitutional amendment's substance with the republican form of state, which was protected from amendment by article 9. The Court broadly interpreted the phrase "republican form of state" to include other characteristics of the Turkish republic, such as secularism, rule of law, democracy, and social state. According to the Court, constitutional amendments must be in conformity with the coherence and system of the Constitution. In that case, the Court held that an amendment that postpones senatorial elections for one year and four months does not affect the invulnerable republican form of government or the fundamental principles of the Constitution.<sup>94</sup>

Following the enactment of the 1971 amendment, article 147 of the 1961 Constitution specified that the Turkish Constitutional Court is competent to review the constitutionality of constitutional amendments only with respect to their form. During that period, the Turkish Constitutional Court rendered five decisions reviewing the constitutionality of constitutional amendments.<sup>95</sup> Although restricted to reviewing merely the formal regularity of the amendments, and not their substance, the Turkish Constitutional Court held that the prohibition to amend the republican form of state is a condition of form and not of substance. i.e., the Court affirmed that it has the competence to rule only on the formal regularity of constitutional amendments; nonetheless, it adopted an extraordinarily wide interpretation of the concept of "formal regularity." According to the Court, formal regularity must also include the prohibition on modifying the republican form of state. In practice, the Constitutional Court brought in substantive review through the back door. Moreover, in its decisions, the Court also gave a broad interpretation to the concept of republican form of state so as to include other characteristics such as democracy, the rule of law and secularism.<sup>96</sup>

As a result of those rulings of the Court in the 1970s, the 1982 Constitution specifically regulates the adjudication of constitutional amendments. Article 148(1) explicitly empowers the Constitutional Court to review the constitutionality of constitutional amendments. However, this review is limited to their form:

Article 148. Functions and Powers

(1) 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. . . .*

<sup>94</sup> See GÖZLER, *supra* note 91, at 64–66, 95–97.

<sup>95</sup> Decision of April 15, 1975, No. 1975/87; Decisions of March 23, 1976, No. 1976/1963 and October 12, 1976, No. 1976/46; Decision of January 28, 1977, No. 1977/4; Decision of September 27, 1977, No. 1977/117; see GÖZLER, *supra* note 91, at 42–46.

<sup>96</sup> GÖZLER, *supra* note 91, at 42–46. For criticism of these decisions, see Gözler, *id.*, at 46–47.

(2) The verification of laws as to form shall be restricted to consideration of whether the requisite majority was obtained in the last ballot; *the verification of constitutional amendments shall be restricted to consideration of whether the requisite majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates under urgent procedure was complied with.* . . . [emphasis added].

Prior to 2008, the Turkish Constitutional Court ruled three times on the constitutionality of constitutional amendments under the 1982 Constitution.<sup>97</sup> In all three decisions, the Court declined to review either the substance of the amendments or the compatibility of those amendments with the unamendable articles of the Constitution.<sup>98</sup> In these decisions, the Court basically held that it did not have the jurisdiction to review an application for annulment relying on any grounds other than those stipulated in article 148(1) of Constitution, thus declaring the petitions inadmissible because there were no procedural flaws.<sup>99</sup>

Nonetheless, as noted above, in the headscarf decision of June 5, 2008, the Constitutional Court revised its opinion and reiterated its earlier broad interpretation of its competence to review constitutional amendments:

The provision in article 148 of the Constitution which states that the scope of the review in respect of form of the constitutional amendment is restricted to consideration “whether the requisite majority was obtained for the proposal” includes a review whether the “valid proposal” condition is also fulfilled.<sup>100</sup>

Therefore, the Court held that it is competent to review the constitutionality of the amendments and whether they are contrary to the characteristics of the republic as provided in article 2 of the Constitution.<sup>101</sup>

We do not agree with the Court’s conclusion for several reasons. First, the Court’s notion of “form” is ill-founded and inadequate. The concept of formal review is that a court ignores the content of the constitutional provision, that is, the judicial review must be content-neutral.<sup>102</sup> Obviously, the inquiry into whether an amendment conflicts with the republic’s characteristics is not a procedural inquiry; it must be undertaken with reference to an amendment’s substance.

Second, the provision’s text and legislative history both lead to the same conclusion: according to the 1982 Constitution, amendments may be reviewed only with regard to their form, namely, the procedural aspects of their adoption. As Kemal Gözler demonstrates, in response to the Constitutional Court’s overly broad and incorrect interpretation of the concept “formal regularity” during the 1970s, the framers of the 1982 Constitution intentionally and expressly adopted a narrow definition of the

<sup>97</sup> Constitutional Court decisions. E.1987/9, K.1987/1518 June 1987, Resmi Gazete [Official Gazette], 4 September 1987 no. 19564; E.2007/72, K.2007/68, 5 July 2007, Resmi Gazete [Official Gazette], 7 August 2007, no. 26606; E.2007/99, K.2007/86, 27 November 2007, Resmi Gazete [Official Gazette], 16 February 2008, no. 26792; see Özbudun, *supra* note 26, at 537 footnote 6.

<sup>98</sup> ÖZBUDUN AND GENÇKAYA, *supra* note 21, at 109.

<sup>99</sup> *Id.* at 4–5, 47–49.

<sup>100</sup> Headscarf Decision of 2008, *supra* note 1, at 138; see the text accompanying *supra* note 39.

<sup>101</sup> *Id.*

<sup>102</sup> See Abdurrahman Saygili, *What is Behind the Headscarf Ruling of the Turkish Constitutional Court?* 11 TURKISH STUDIES 127, 131 (2010).

term “review in respect of form” in article 148(2).<sup>103</sup> This formal review, according to article 148(2), “shall be restricted to consideration of whether the requisite majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates under urgent procedure was complied with.” Therefore, this provision specifically states that judicial review of constitutional amendments is restricted only to procedural review. Indeed, according to the maxim *expressio unius est exclusio alterius*, the existence of the explicit grant of competence to review the process of amendments (including the word “restricted”) provides evidence that the constitution makers, in fact, had considered substantive review of constitutional amendments by the courts, which had already occurred in prior years; that omission of substantive review was intentional; and that, therefore, judicial review of an amendment’s substance should be excluded. Moreover, as Gary Jacobsohn correctly notes, this limited jurisdiction is in contrast with the judicial review authority over ordinary legislation; the Court is explicitly granted the competence to evaluate both the form and substance of legislation.<sup>104</sup> Therefore, this is not a lacuna but rather a negative arrangement.<sup>105</sup>

Third, because adoption of the 1982 Constitution represents an act of the original constituent power limiting judicial competence to review of only procedural issues of constitutional amendments, the Constitutional Court must act within those limits. Ironically, in establishing parliament’s limited amendment power, the Constitutional Court states that the legislature, as a constituted power, must remain within the constitutional limits provided by the primary constituent power and, as article 6 of the Constitution states, “No person or agency shall exercise any state authority which does not emanate from the Constitution.” Yet it seems that the Court has forgotten that it is itself a constituted power bound by the limits imposed upon it by the original constituent power. Therefore, the Court itself is bound not to use its power in violation of its stipulated authority.

However, one might ask, who will guard the immutable characteristics of the republic? Would not such an application of the amendment provision empty the irrevocable-provision principles expressed in article 4 of content, rendering them meaningless without an enforcement mechanism?<sup>106</sup> Not necessarily. Even if we acknowledge

<sup>103</sup> GÖZLER, *supra* note 91, at 47–48.

<sup>104</sup> Jacobsohn, *supra* note 5, at 5; see Constitution, art. 148(1): “The Constitutional Court shall examine the constitutionality, in respect of *both form and substance*, of laws . . . [emphasis added].”

<sup>105</sup> See GAD TEDESCHI, RESEARCH IN THE LAW OF OUR STATE 167 (1959): “When we find in front of us a web of norms that aspire fully to constitute complete arrangement of an institute of a certain matter, there is a great deal of value in the silence of the legislator as a sign of his willingness to regulate the matter as a negative arrangement, as opposed to cases where we have a mosaic of fragmentary rules which do not make up a harmonious picture,” quoted in Baruch Bracha, *Personal Status of Persons Belonging to No Recognized Religious Community in Israel*, 5 ISRAEL YEARBOOK ON HUMAN RIGHTS 88, 110 (1975).

<sup>106</sup> See Baranger’s contemplation with regard to the French case: “How, if the Conseil Constitutionnel refuses to review amendments, can such limitations be enforced? The answer is clear: de lege lata they cannot, at least in the course of constitutional review as exercised by the Conseil Constitutionnel. This might appear as a blunt disregard of the blank letter of the Constitution, and indeed it might well be just that.” Denis Baranger, *The Language of Eternity: Constitutional Review of the Amending Power in France (Or the Absence Thereof)*, ISR. L. REV. 7 (forthcoming, 2012), also published in 5 JUS POLITICUM: JOURNAL OF CONSTITUTIONAL LAW AND POLITICS, available at <http://www.juspoliticum.com/The-language-of-eternity,319.html>.

that the amendment power is limited and some provisions may not be amended, one could reasonably argue that this decision regarding whether the amendment modifies the republican form of state is not one for the courts to make.<sup>107</sup> In other words, irrevocable provisions do not necessarily lead to substantive judicial review of constitutional amendments. The Norwegian context is an interesting example. The Constitution of Norway states in article 112 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.” Nevertheless, it seems that this explicit limit is only a directive for the parliament, not granting courts any authority.<sup>108</sup> Accordingly, the parliament—the *Storting*—has the final word in the interpretation of the constitution’s “spirit” and “principles,” and thus it defines the limits of constitutional amendment power. Therefore, in Norway, judicial review does not comprise substantive review of amendments.<sup>109</sup> Even if not justiciable in courts, the unamendable provision has political importance, as it may “be invoked and make an impression in the debate on constitutional amendments.”<sup>110</sup>

In the US, the scope of the amendment power was given relatively extensive attention during the 1920’s and 1930’s.<sup>111</sup> Famously, in the case of *Coleman v. Miller*, the majority of the US Supreme Court deemed the amendment process a political question

<sup>107</sup> See Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 440–443 (1983); Joseph F. Ingham, *Unconstitutional Amendments*, 33 DICK. L. REV. 168 (1928–1929); WALTER F. MURPHY, *CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER* 519–521 (Johns Hopkins Univ. Press 2007); Susan Wright, *The Constitutional implications in France of the Maastricht Treaty*, 9 TUL. EUR. & CIV. L. F. 35, 72 (1994).

<sup>108</sup> Dietrich Conrad, *Limitation of Amendment Procedures and the Constituent Power*, 15–16 INDIAN Y.B. INT’L. AFF. 380 (1970); Klein, *supra* note 81, at 181. In nearly two hundred years of practice, courts never annulled a constitutional amendment, despite the fact that the 1814 constitution has been amended more than two hundred times, including some major reforms. See *Report on constitutional amendment Adopted by the European Commission for Democracy Through Law* (Venice Commission) at its 81<sup>st</sup> Plenary Session (Venice, 11–12 December 2009), in footnote 153, available at [http://www.venice.coe.int/docs/2010/CDL-AD\(2010\)001-e.asp](http://www.venice.coe.int/docs/2010/CDL-AD(2010)001-e.asp).

<sup>109</sup> Hans Chr. Bugge, “Constitution” and “Constitutional law” in Norway, in *CONSTITUTIONAL JUSTICE UNDER OLD CONSTITUTIONS* 308–309 (Eivind Smith ed., 1995).

<sup>110</sup> Torkel Opsahl, *Limitation of Sovereignty under the Norwegian Constitution*, 13 SCANDINAVIAN STUD. L. 151, 164 (1969).

<sup>111</sup> See William L. Marbury, *The Limitations upon the Amending Power*, 33 HARV. L. REV. 223, 225 (1919–1920); William L. Frierson, *Amending the Constitution of the United States: A Reply to Mr. Marbury*, 33 HARV. L. REV. 659 (1919–1920); Everett P. Wheeler, *Limit of Power to Amend Constitution*, 7 A.B.A. J. 75 (1921); D. George Skinner, *Intrinsic Limitations on the Power of Constitutional Amendment*, 18 MICH. L. REV. 213 (1919–1920); Lester B. Orfield, *The Scope of the Federal Amending Power*, 28 MICH. L. REV. 550 (1929–1930); E.V. Abbot, *Inalienable Rights and the Eighteenth Amendment*, 20 COLUM. L. REV. 183 (1920); Justin DuPratt White, *Is There an Eighteenth Amendment?*, 5 CORNELL L. Q. 113 (1920); Arthur W. Machen, *Is The Fifteenth Amendment Void?*, 23 HARV. L. REV. 169 (1909–1910); Dudley O. McGovney, *Is The Eighteenth Amendment Void Because of its Contents?*, 20 COLUM. L. REV. 499 (1920); Chas. W. Pierson, *The Eighteenth Amendment*, 18 LAW & BANKER & S. BENCH & B. REV. 54 (1925); Note, *Challenge to the Constitutionality of Proposed Constitutional Amendments*, 17 IOWA L. REV. 250 (1931–1932); George Washington Williams, *What, If Any, Limitations Are There upon the Power to Amend the Constitution of the United States?*, 62 AM. L. REV. 529 (1928).

not subject to judicial review.<sup>112</sup> While the court had not directly dealt with amendment which conflicts with the unamendable provision of Art. V, it could be inferred from the Supreme Court's general approach to the constitutional amendment process to restrain from adjudicating constitutional amendments, treating them as "political question" and thus under the hospice of the political arena.<sup>113</sup>

Apart from ignoring the explicit words of the Turkish Constitution, according to which the judicial review of amendments is restricted to procedure, the Court's taking to itself the competence to review constitutional amendments raises a number of theoretical, conceptual and practical problems, which are applicable to any grant of such competence. Judicial review of constitutional amendment engages with the status and role of the court in a democratic society,<sup>114</sup> and bears significant implications for the principles of judicial discretion,<sup>115</sup> independence and accountability.<sup>116</sup> We shall mention just few of these difficulties.

Prima facie, the Constitution creates the courts and grants them authority. How then can courts rule on the Constitution's validity? As Joseph Ingham argued:

If the Supreme Court, created by, and owing its authority and existence to the Constitution, should assume the power to consider the validity or invalidity of a constitutional amendment . . . it would be assuming the power to nullify and destroy itself, of its own force, a power which no artificial creation can conceivably possess.<sup>117</sup>

Moreover, endowing courts with competence to declare an amendment unconstitutional enhances the countermajoritarian difficulty embodied in the situation of a nonelected court invalidating legislation enacted by a legislature.<sup>118</sup> How can a small, often divided, set of appointed judges replace the democratic judgment of the people and their representatives? Allowing courts to review amendments might turn the "people's guardian of the Constitution against politicians... into a guardian of the Constitution against all comers."<sup>119</sup> This problem obviously casts doubts on the legitimacy of constitutional review of amendments, and, especially in the Turkish case, the

<sup>112</sup> 307 U.S. 433, 456 (1939); see James E. Fleming, *We the Exceptional American People*, 11 CONST. COMMENT 375 (1994–1995); Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 389–392 (1983–1984).

<sup>113</sup> On these issues see Marty Haddad, *Substantive Content of Constitutional Amendments: Political Question of Justiciable Concern?* 42 WAYNE L. REV. 1685 (1995–1996); Grover Rees III, *Rescinding Ratification of Proposed Constitutional Amendments – A Question for the Court*, 37 LA. L. REV. 896 (1976–1977); Note, *Article V: Political Questions and Sensible Answers*, 57 TEX. L. REV. 1259 (1978–1979).

<sup>114</sup> See Aharon Barak, *The Unconstitutional Constitutional Amendment*, in GAVRIEL BACH BOOK 361 (D. Hahn, D. Cohen-Lekach & M. Bach eds.,).

<sup>115</sup> See Rosalind Dixon, *Transnational Constitutionalism and Unconstitutional Constitutional Amendments*, CHICAGO PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 349 (May 2011), available at <http://ssrn.com/abstract=1840963>.

<sup>116</sup> Teresa Stanton Collett, *Judicial Independence and Accountability in an Age of Unconstitutional Constitutional Amendments*, 41 LOY. U. CHI. L.J. 327 (2009).

<sup>117</sup> Ingham, *supra* note 107, at 165–66.

<sup>118</sup> See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–23 (1962).

<sup>119</sup> O'Connell, *supra* note 54, at 51.



Constitutional Court seems to be pushing its limits in terms of democratic legitimacy because of its judicial activism.<sup>120</sup>

Furthermore, unpopular judicial decisions may instigate an amendment to overturn these decisions.<sup>121</sup> Given that one of the arguments in favor of judicial review is that courts do not necessarily possess the last word, then, arguably, it is inappropriate for a court to rule on the validity of an amendment overturning a judicial decision.<sup>122</sup> Also, the taking of the competence to review an amendment overturning a judicial decision leads to a power imbalance by elevating the judiciary's power vis-à-vis the executive and legislature.

Lastly, judicial enforcement of limitations on the constitutional amendment power could threaten society's stability, as the constitutional change might be pursued through violent means. One may therefore query if the change were to occur irrespective of the temporary hindrance created by a small number of judges, would it not be better to allow the change to occur by peaceful means?<sup>123</sup>

Yet clearly, on the other hand, judicial review of constitutional amendments arguably carries with it significant advantages. Indeed, the abuse of power is to be feared not only from the legislative branch in its ordinary legislative power but also from the legislature in its constitutional amendment power.<sup>124</sup> The liberal argument according to which judicial review is necessary to protect minorities from a majority's abuse of its legislative power, as the people's institutionalized self-control,<sup>125</sup> applies to constitutional amendments to the same extent. Hence, endowing courts with competence to review constitutional amendments may be a useful tool for protecting minorities' rights and preventing human rights abuses. Those who argue that such a competence is antidemocratic rely on a narrow view of democracy. This competence may, perhaps, be antimajoritarian, yet it accords with a theory of democracy that conceives of democracy as more than merely a people's majority but, rather, a constitutional democracy based on values and fundamental rights.<sup>126</sup> The Indian

<sup>120</sup> Saygılı, *supra* note 102, at 132, 138–39. On the Turkish Constitutional Court's eroding legitimacy see Levent Köker, *Turkey's Political-Constitutional Crisis: An Assessment of the Role of the Constitutional Court*, 17 CONSTITUTIONS 328 (2010).

<sup>121</sup> Dellinger *supra* note 112, at 414–415.

<sup>122</sup> Tribe, *supra* note 107, at 442–43; Louis Favoreu, *La légitimité du juge constitutionnel*, 46 REVUE INTERNATIONALE DE DROIT COMPARÉ 581 (1994).

<sup>123</sup> Douglas Linder, *What in the Constitution Cannot Be Amended?*, 23 ARIZ. L. REV. 717, 723 (1981). See also JORGE REINALDO A. VANOSI, *TEORIA CONSTITUCIONAL* 188 (2<sup>nd</sup> ed., 2000).

<sup>124</sup> Marie-Claire Ponthoreau & Jacques Ziller, *The Experience of the French Conseil Constitutionnel: Political and Social Context and Current Legal-Theoretical Debates*, in CONSTITUTIONAL JUSTICE, EAST AND WEST: DEMOCRATIC LEGITIMACY AND CONSTITUTIONAL COURTS IN POST-COMMUNIST EUROPE IN A COMPARATIVE PERSPECTIVE 139 (Wojciech Sadurski ed., 2002).

<sup>125</sup> See CHARLES L. BLACK, *THE PEOPLE AND THE COURT* 106–107 (1960).

<sup>126</sup> See Dominique Rousseau, *The Constitutional Judge: Master or Slave of the Constitution?*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES 273–282 (Michel Rosenfeld ed., 1994); Dietrich Conrad, *Constituent Power, Amendment and Basic Structure of the Constitution: A Critical Reconsideration*, 6-7 DELHI L. REV. 1, 18 (1977-1978).

“basic structure” doctrine,<sup>127</sup> which was adopted in response to the abuse of the constitutional amendment power by the parliament, proved that judicial enforcement of limits on the amendment power may preserve democracy.<sup>128</sup>

All of these issues must be borne in mind when thinking about the broad authority with which the Turkish Constitutional Court has empowered itself. However, as we discuss in the next section, even if one acknowledges the Court’s competence to review the amendments’ substance, the headscarf case was not an appropriate case for using the extreme power of annulling constitutional amendments.

### 4.3. Amendment’s content

As discussed above, the Constitutional Court held that the amendments to articles 10 and 42 of the Constitution are contrary to the principle of secularism and, because they indirectly change the basic characteristics of the republic, they are contrary to the prohibition to amend and propose as stated in article 4 of the Constitution and thus should be annulled.<sup>129</sup> In our view, even if one accepts—and we do not—the claim that the Constitutional Court is empowered to review the *content* of an amendment, there was no justification for annulling the amendments because they did not infringe on the secular principle of the State.

The Constitutional Court reasons that “legal arrangements based on religious orders, rather than the national will arising within a participatory democratic process, make individual liberty and the democratic process arising from this ground impossible.”<sup>130</sup> However, here lies a profound absurdity: the Constitutional Court’s decision perpetuates the very situation that the amendments aimed to change, that is, the situation that caused discrimination based on religious belief, limited women’s liberty, violated people’s right to freedom of religion, and harmed the democratic process by not enabling a significant part of the population to obtain higher education, which is an important condition for political education and participation. If the values of equality and liberty are the ones the judges wanted to preserve, then, in our view, they should have promoted women’s equal right to education by upholding abolition of the headscarf ban. For Muslim women, wearing the headscarf enables them to be present in the public sphere in a manner consistent with their Islamic beliefs, allowing them to study in universities and pursue professional careers.<sup>131</sup>

<sup>127</sup> The Indian Supreme Court held that “the power to amend the constitution does not include the power to alter the basic structure, or framework of the constitution so as to change its identity.” See *Kesavanda Bharati v. State of Kerala*, AIR 1973 SC 1461. For a description of the basic structure doctrine and its development, see SUDHIR KRISHNASWAMY, *DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE* (2009). See also the NUJS Law Review Symposium: Basic Structure of the Constitution, in 1 NUJS L. REV. (2008).

<sup>128</sup> Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 COLUM. J.L. & SOC. PROBS. 273 (1995–1996).

<sup>129</sup> See text accompanying note 50.

<sup>130</sup> Headscarf Decision of 2008, *supra* note 1, at 139.

<sup>131</sup> See Demirel, *supra* note 8, at 177, referring to NILÜFER GÖLE, *THE FORBIDDEN MODERN: CIVILIZATION AND VEILING*: (1996).

The Constitutional Court further stated:

It is a possibility that the religious symbol [of the headscarf], when worn in classrooms and laboratories in which attendance of all students is mandatory, could serve as an instrument of compulsion upon people who have different preferences regarding life, political ideas and beliefs. If that possibility were to occur, then, due to the religious symbol causing compulsion upon others, public order could be violated and delays in education could occur; with the university administration and other public bodies prohibited from intervening, the right to equal education for all could be violated.<sup>132</sup>

This is a very strange argument, for it suggests that the Court, taking a cue from T. Jeremy Gunn's criticism following the *Sahin* case, is "more solicitous of the sensibilities of those who do not like religious expression (which is not guaranteed by the European Convention) than of the right to manifest religion (which is guaranteed by the Convention)."<sup>133</sup>

Furthermore, we believe that the Constitutional Court's reliance on the *Dahlab v. Switzerland* case to bolster its argument is inapposite, because the potential influence of wearing religious symbols in educational institutions seems far greater with young people than in the context of higher education. In the *Dahlab* case discussed above,<sup>134</sup> the ECtHR held that a ban on wearing the Islamic veil in a primary school was justified in order to guarantee religious neutrality in the classroom. However, in that case, the ECtHR perceived the issue as the need to protect very young pupils by preserving religious harmony. The *Dahlab* case did not involve a university, and the headscarf ban was imposed on a primary school teacher. Thus, we believe that Judge Tulkens was correct when she argued, in her dissent in *Sahin*, that the ECtHR in *Dahlab* had expressly relied on the role-model aspect of the teacher's wearing the headscarf in a primary school classroom.<sup>135</sup> In that respect, one has to distinguish between the position of primary school pupils and university students and between teachers and students. Even where a secular state wants to preserve the neutrality of the public sphere, it seems that forbidding a teacher of a state institution to wear a religious symbol can be more tolerable due to his role than extending the same prohibition to students.<sup>136</sup> Moreover, since the headscarf ban depends on the practice of the administrations of the universities, Christopher Decker and Marnie Lloyd's query, following the ECtHR case of *Sahin v. Turkey*, seems adequate:

It seems a very dubious argument to claim that without the ban, the principle of secularism is in jeopardy, which in turn puts democracy in Turkey in jeopardy, but yet the measure need not have wide application. If Turkish democracy were truly threatened by the religious symbol of a

<sup>132</sup> Headscarf Decision of 2008, *supra* note 1, at 141.

<sup>133</sup> T. Jeremy Gunn, *Fearful Symbols: The Islamic Headscarf and the European Court of Human Rights in Sahin v Turkey*, 3 DROIT ET RELIGION 18 (2008).

<sup>134</sup> No. 42393/98, 2001-V DA; *see supra* note 28.

<sup>135</sup> *See para. 7* of Judge Tulkens' dissent in *Leyla Sahin v. Turkey*, *supra* note 14.

<sup>136</sup> For such a position *see* Silvio Ferrari, Sabrina Pastorelli, *The Public Space: The Formal and Substantive Neutrality of The Public Sphere*, RELIGARE WORKING PAPER No. 4 (September 2010), available at [http://www.religareproject.eu/system/files/WP5\\_State\\_of\\_the\\_art\\_paper\\_e-version.pdf](http://www.religareproject.eu/system/files/WP5_State_of_the_art_paper_e-version.pdf); Silvio Ferrari, *Religion in the European Public Space—A Legal Overview* 18 (2011, unpublished, copy with authors).

headscarf, one would presume the ban must be applied at every university in Turkey. If the ban does not need to apply in all universities then how is the headscarf a threat?<sup>137</sup>

Did the amendments change the immutable principle of secularism of the Turkish republic? We believe the answer is no. Secularism, in general, “involves organizations and legal constructs that reflect the institutional expressions of the secular in a nation’s political realm and public life.”<sup>138</sup> More specifically, in secular regimes, sovereignty belongs to the nation and not to a divine body, the state is separate from religion, the government is neutral toward all religions, and the education and legal systems are secular.<sup>139</sup> The enshrined basic principle of the secularism of a nation, as part of the supra-civil identity common to all religions, obliges the state to act in a neutral manner with respect to religious identity, strictly to separate state and religion, and to provide a civil-secular state education.

In our view, students’ clothing does not affect the state’s obligations under the secularism principle. Allowing a student to wear a scarf does not violate the neutrality of the state in religious matters. Therefore, we accept Sharon Weintal’s assertion, in his doctoral thesis regarding eternal clauses in constitutions, that the argument according to which wearing a scarf threatens the public secular sphere and places secular students under the influence of religious identity, such that the required neutrality is violated, seems rather tenuous.<sup>140</sup> A religious symbol in students’ clothing neither violates the state’s principle of secularism nor infringes on the state’s neutrality. The wearing of religious symbols reflects the choice of individuals to adhere to their cultural and religious identity when entering the public sphere; it has no bearing on the secularism principle enshrined in a constitution.<sup>141</sup> Any other interpretation leads to a very extreme understanding of secularism—a fundamentalist secularism—which assumes that religion is only a private issue and that outer manifestations of religion cannot have any place within the public realm.<sup>142</sup>

Furthermore, we reject the Constitutional Court’s opinion according to which an amendment “cannot involve the *smallest deviation or change* to the Preamble and the principles laid down in Article 1 and 2 of the Constitution.”<sup>143</sup> Such an approach can perhaps be accepted if one adopts a very narrow interpretation of unamendable principles, which includes only the principles’ nucleus. But that, as aforementioned, is not the interpretation of the Court. We assert that even if one accepted the claim that

<sup>137</sup> Christopher Decker & Marnie Lloyd, *Case Comment, Leyla Sahin v. Turkey*, 6 EUR. HUM. RTS. L. REV. 677 (2004).

<sup>138</sup> Barry A. Kosmin, *Contemporary Secularity and Secularism*, in SECULARISM & SECULARITY: CONTEMPORARY INTERNATIONAL PERSPECTIVES 1 (Barry A. Kosmin & Ariela Keysar eds., 2007).

<sup>139</sup> Adrien Katherine Wing & Ozan O. Varol, *Is Secularism Possible in a Majority-Muslim Country?: The Turkish Example*, 42 TEX. INT’L L.J. 1, 5–6 (2006–2007).

<sup>140</sup> SHARON WEINTAL, *ETERNAL CLAUSES IN THE CONSTITUTION* 99, 143 (2005), (unpublished Ph.D. dissertation, Hebrew Univ. of Jerusalem, Faculty of Law) (on file with the authors).

<sup>141</sup> *Id.*

<sup>142</sup> See Jennifer M. Westerfield, *Behind the Veil: An American Legal Perspective on the European Headscarf Debate*, 54 AM. J. COMP. L. 646–651 (2006).

<sup>143</sup> Headscarf Decision of 2008, *supra* note 1, at 137 (emphasis added).

wearing headscarves in universities could have an effect on the enshrined principle of secularism, in order to invalidate an amendment, a small deviation from the principle is insufficient. Limitations on the amendment process are not aimed at preventing minor changes that contradict unamendable principles or deviate from them. The main function of limits on the amendment power is to maintain the constitutional order and to protect against revolutionary changes in the basic self-determination characteristics of a nation.<sup>144</sup> Such limits thus apply only to those extraordinary and exceptional circumstances in which the constitutional change strikes at the heart of the constitutional principle, depriving it of its minimal conditions of existence.<sup>145</sup> The nature of the conflict between the amendment and the basic principle must cause a change of such intensity and to such extent that it modifies the principle's essence, rather than merely deviating from it or limiting it. The amendment's content must have a broad impact on the essence of the principle. After such an amendment, if allowed to stand, the constitutional principle would no longer be the same—it will have been essentially modified. The change would not be a mere deviation affecting a certain matter, period, or sector, which only limits the constitutional principle but leaves the principle the same as it was before the amendment. This test is one of degree and extent.<sup>146</sup> For example, consider the constitutional principle of free speech. An amendment prohibiting flag burning surely infringes the freedom of speech.<sup>147</sup> However, such an amendment ought to be viewed as carving out an exception to the protection and not as modifying the constitutional principle of free speech itself. An amendment prohibiting political expressions, on the other hand, would modify the previously existing norm. With regard to secularism, an amendment declaring a certain religion as a state religion, or establishing a state system of religious education, would change the essence of the principle of secularism.

<sup>144</sup> See Weintal, *supra* note 140, at 102.

<sup>145</sup> Compare with Professor Barak's assertion that a constitutional amendment cannot violate the minimum requirements for a democracy. See AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 99 (2004). See also the majority decision of the German Federal Constitutional Court in the *Klass* case (30 BVerfGE 1, 24 (1970)): "The purpose of Art. 79, par. 3, as a check on the legislator's amending the Constitution is to prevent both abolition of the substance or basis of the existing constitutional order, by the formal legal means of amendment . . . and abuse of the Constitution to legalize a totalitarian regime. This provision thus prohibits a fundamental abandonment of the principles mentioned therein. Principles are from the very beginning not "affected" as "principles" if they are in general taken into consideration and are only modified for evidently pertinent reasons for a special case according to its peculiar character. . . . Restriction on the legislator's amending the Constitution. . . must not, however, prevent the legislator from modifying by constitutional amendment even basic constitutional principles in a system-immanent manner." An English translation of the case is available in *COMPARATIVE CONSTITUTIONAL LAW: CASES AND COMMENTARIES* 659, 661-662 (Walter F. Murphy, Joseph Tanenhaus eds., 1977).

<sup>146</sup> Compare with the Israeli tests distinguishing between a "modification" and an "impingement"; see Avigdor Klagsbald, *A Contradiction to a Basic Law*, 48 ISRAELI BAR ASSOC. L. REV. [Hapraklit] 293-294 (2006).

<sup>147</sup> See Jeff Rosen, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L. J. 1073 (1990-1991) (arguing in the American context that amendments may only be used to secure rather than restrain individual's natural rights).

In other words, changes to unamendable principles which do not severely alienate substantial groups in society, and which preserve the state's constitutional identity, do not justify the annulment of constitutional amendments.<sup>148</sup> Such a test for evaluating conflicts of constitutional amendments with unamendable principles does not gravely impair the efficacy of the constitutional amendment process and is compatible with principles of separation of powers, since it ensures that the extreme power of judicial review of amendments would be undertaken only in the most aggravated cases.

## 5. Conclusion

“At first blush,” as William Harris commented, “the question of whether an amendment to the constitution could be unconstitutional seems to be either a riddle, a paradox or an incoherency. This problem is accentuated when one asks whether there is an agency that could make the determination.”<sup>149</sup> In light of the problems raised by Harris and others, the Turkish Constitutional Court's decision is an exceptional topic for theoretical and comparative inquiry.

To recapitulate, the amendment power is an extraordinary power, capable of amending the Constitution and its components; however, it is not an expression of the original constituent power. “The people” is regarded in two distinct capacities: the original constituent power and the derived constituent power. In the first capacity, “the people” is the holder of an absolute power, while in the second capacity, “the people” is the constitutional organ established by the Constitution for its amendment. In this second capacity, it is thus constrained to act in the manner prescribed by the Constitution. This conception of the amendment power supports explicit limitations on the amending power, such as those found in article 4 of the Turkish Constitution.

Nevertheless, as we have sought to demonstrate, this conception of the amendment power does not necessarily lead to the power of judicial review over the content of constitutional amendments. Although this point is subject to debate, we view the Turkish example as a relatively easy case for this issue, since the Constitution itself grants the Court authority to review only procedural aspects of the adoption of constitutional amendments. The lesson for the future Turkish constitutional debate should be clear: the judicial review of constitutional amendments ought to be limited to formal regularity.

However, even if the Constitutional Court continues to follow what we believe is a mistaken path and reviews a constitutional amendment's content for conflict with the

<sup>148</sup> For an important discussion on limits on constitutional amendments with regard to a state's constitutional identity see GARY JEFFREY JACOBSON, *CONSTITUTIONAL IDENTITY* (2010) at chapter 2.

<sup>149</sup> Harris, *supra* note 84, at 169.



immutable characteristics of the republic,<sup>150</sup> then the annulment of an amendment on the grounds that it contradicts an immutable principle should be undertaken only in extraordinary circumstances, such as when the amendment changes or modifies the essence of the republic's characteristics, leaving them utterly different from what they had been. The power to amend the constitution is extraordinary indeed. The power to declare a constitutional amendment "unconstitutional" is no less remarkable and should be used carefully. Our proposed principle of application would not seriously impair the usefulness of the constitutional amendment process while simultaneously preserve the constitution's core principles. It would also mandate the courts to use their extraordinary power of declaring amendments unconstitutional carefully as means of last resort, as the "judgment day weapon."

<sup>150</sup> Indeed, our prediction has become real. On July 7, 2010 The Turkish Constitutional Court again reviewed the constitutionality of *Constitutional Amendment Package of 2010* (which was adopted on September 12, 2010 by a national referendum and included twenty-six articles) and annulled a few of the amendments' clauses in respect of substance by finding them contrary to the principle of a "democratic . . . [s]tate governed by the rule of law" provided in the article 2 of the 1982 Constitution (Turkish Constitutional Court decision, July 7, 2010, E. 2010/49; K. 2010/87, Resmi Gazete [Official Gazette], August 1, 2010, No. 27659 (reiterated)). On this decision see Serkan Yolcu, *More constitutional amendments by Turkish High Court are unwarranted* (7.7.2010), available at <http://jurist.org/hotline/2010/07/more-constitutional-amendments-by-turkish-high-court-are-unwarranted-and-unjust-on-the-merits.php>.