Judicial Review of Constitutional Amendments in Turkey

The Question of Unamendability

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Abstract

This article deals with the judicial review of constitutional amendments, which has been a hotly debated constitutional and political issue in Turkey, particularly with regard to the unamendable provisions of the constitution. Since its creation by the Constitution of 1961, the Turkish Constitutional Court has followed a markedly activist and tutelarist approach regarding this issue and annulled several constitutional amendments arguing that they violated the unamendable provisions of the Constitution. Recently, however, the Court adopted a self-restraining approach. This shift can be explained as part of the political regime's drift towards competitive authoritarianism and the governing party's (AKP) capturing almost total control over the entire judiciary.

Keywords: judicial review of constitutional amendments, constitutional unamendability, judicial activism, competitive authoritarianism, abusive constitutionalism.

The binding nature of the 'immutable' or 'unamendable' provisions of constitutions is one of most hotly debated problems in constitutional theory and practice. In a sense, this problem is related to the broader one of the inherent tension between democracy and constitutionalism. While democratic principles require that the people as the source of all public powers must have an unlimited constituent power, constitutionalism requires that such power should be exercised only within the limits prescribed by law, including the unamendable provisions of the existing constitution. In particular, since in a democracy all public powers, including the constituent power, should emanate from the people, can this power be

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limited by constitutional means? And, if not, how can the rights and freedoms of the minorities be protected against the unchecked power of the majority?[1]

Many European countries declare some provisions of their constitutions as unamendable, while many others contain no such clauses. In France (Art. 89) and Italy (Art. 139), this is limited to the republican form of government. Some constitutions attribute unamendability to the basic principles of democracy and human rights. For example, according to the Constitution of Czech Republic (Art. 9, para. 2), "any changes in the essential requirements for a democratic state governed by the rule of law are unadmissible." The Constitution of Switzerland (Arts. 193,194) stipulates that a total or partial revision of the Federal Constitution may not violate "the mandatory provisions of international law". According to Article 79 of the Basic Law of the Federal Republic of Germany, "amendments to this Basic Law affecting the division of the Federation into Länder, their participation in the legislative process, or the principles laid down in Articles 1 and 20 shall be prohibited." Article 1 referred to by Article 79 declares the inviolability of the dignity of man, the inviolability and inalienability of human rights, while Article 20 describes the Federal Republic of Germany as a "democratic and social federal state", stipulates that "all public authority emanates from the people", and recognizes the right to resist attempts to destroy this constitutional order.

Some European democracies define the unamendable clauses more broadly. For example, under the Romanian Constitution of 1991 (Art. 148),

> the provisions of this Constitution with regard to the national, independent, unitary, and indivisible character of the Romanian State, the Republican form of government, territorial integrity, independence of the judiciary, political pluralism, and official language shall not be subject to revision. Likewise, no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms, or the safeguards thereof.

The Constitution of Ukraine (Art. 157) stipulates that:

> the Constitution of Ukraine shall not be amended, if the amendments foresee the abolition or restriction of human and citizens' rights and freedoms, or if they are oriented toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine.

Under the Norwegian Constitution (Art. 112), constitutional amendments must never "contradict the principles embodied in this Constitution, but solely related to modifications of particular provisions which do not alter the spirit of the Constitution". Under the Greek Constitution (Art. 110), "the form of government as a

1 For a comprehensive analysis of the question of unconstitutional constitutional amendments, *see* Y. Roznai, *Unconstitutional Constitutional Amendment: The Limits of Amendment Power,* Oxford, Oxford University Press, 2017; for the inherent tension between democracy and constitutionalism particularly in the context of constituent power, *see also* M. Loughlin &N. Walker (Eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, Oxford, Oxford University Press, 2007.

Parliamentary Republic" and a number of provisions referred to by this article are unamendable. The latter concern respect for and protection of human being, equality, the right to freely develop one's personality, the inviolability of personal liberty, and of the freedom of religion and conscience.

The two European Constitutions that went farthest in extending the scope of unamendable provisions are the Portuguese Constitution of 1976 and the Turkish Constitution of 1982. The former enumerated 15 items as unamendable principles (Art. 290). These included such highly ideological clauses as "the collectivization of basic means of production and the abolition of monopolies and large estates" and the "democratic planning of the economy". The inclusion of such clauses can be explained by the leftist majority in the Constituent Assembly and the pressures and threats of the leftist Armed Forces Movement.[2] These ideological provisions were later modified, however, by a constitutional revision (new text, Art. 288).

The 1982 Turkish Constitution also departed from the tradition of the earlier Republican constitutions by extending the scope of unamendable provisions. While the Constitutions of 1924 and 1961 limited the unamendability clause to the republican form of government, the military founders of the 1982 Constitution extended its scope to the first three articles of the Constitution. In fact, in the preparation of the Constitution, although the civilian Consultative Assembly (wholly appointed by the ruling junta, the National Security Council) proposed to remain faithful to the tradition of the earlier Constitutions, the Council made not only the republican form of government (Art. 1), but also Articles 2 and 3 unamendable (Art. 4). Article 2 states that:

> the Republic of Turkey is a democratic, secular and social state governed by the rule of law, respectful of human rights, committed to Atatürk nationalism, based on the basic principles referred to in the Preamble, within an understanding of social peace, national solidarity, and justice.

Article 3 stipulates that the Turkish state "is an indivisible whole together with its territory and nation. Its language is Turkish". The article also describes the flag and the national anthem, and declares Ankara as the state capital. Clearly, some of the concepts referred to in Article 2, such as social peace, national solidarity, and justice, are extremely vague terms open to different interpretations. Certain concepts embodied in the Preamble, such as 'Turkish national interests', 'Turkish entity', 'national and moral values of Turkishness', and 'Atatürk's civilizationalism', are even more so. Thus, to render the first three articles unamendable carries with it the danger of making the Constitutional Court the ultimate referee of constitutional revisions and granting it an exceedingly wide margin of appreciation. The problems arising from this state of affairs will be analyzed in greater detail next.

2 A. Bonime-Blanc, *Spain's Transition to Democracy: The Politics of Constitution-Making,* Boulder, Westview Press, 1987, pp. 119-122.

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The similarities between Turkish and Portuguese cases are striking. In both cases, the military exerted strong influence on the constitution-making process, more so in the Turkish case. In both instances, the military sought to institutionalize and freeze its own concept of good society and good polity in the form of unamendable constitutional provisions. The main difference is that while Portugal was able to liquidate this authoritarian legacy through the extensive constitutional revisions of 1982 and 1989, Turkey has not yet succeeded to totally eliminate the legacy of the military regime of 1980-1983.

Some European democracies have chosen, instead of putting absolute material limits on constitutional amendments, to adopt reinforced procedures for constitutional amendments affecting the basic characteristic of the state. For example, in the Russian Federation (Art. 135) and Bulgaria (Arts. 153, 158), such changes can be made not by the qualified majorities of ordinary legislatures but by a special Constituent Assembly. In Spain, if a total or partial revision affecting the Preliminary Title, Chapter Two Section 1 of Title 1 (fundamental rights, public liberties) of Title 2 (the Crown) is proposed, the principle shall be approved by a two-thirds majority of the members of each House, and the Cortes shall immediately be dissolved. The Houses elected must ratify the decision and proceed to examine the new Constitutional text, which must be approved by a two-thirds majority of the members of both Houses. Once the amendment has been passed by the Cortes Generales, it shall be submitted to ratification by referendum (Art. 168). Thus, it seems that there is no standard European practice on the unamendable clauses.

A closely related question of even greater practical importance is the sanction of unamendable clauses if the constitution embodies them. Interestingly, while such clauses exist in the constitutions of many European democracies, only very few (Turkey, Art. 148; Ukraine, Art. 159; Moldova, Art. 141; Romania, Art. 144a; and Azerbaijan, Art. 153) of them have empowered their constitutional courts to review the compatibility of constitutional amendments with the unamendable clause, none of which can be considered a highly institutionalized and stable democracy. Besides, in four of them (with the exception of Turkey), the review of the constitutionality is preventive (a priori), not repressive (a posteriori). In the absence of a clear empowering constitutional norm, most constitutional courts (those of France, Hungary, Slovenia, and Ireland) refuse to review the compatibility of constitutional amendments with the unamendable provisions. On the other hand, the German Constitutional Court saw such review within its competence, arguing that the phrase in the Constitutional "to review of the conformity of federal and Land laws with this Basic Law" also included the constitutional amendments, as well as ordinary laws. However, the German Court has not so far annulled a constitutional amendment on such grounds.[3]

The competence of the Constitutional Court with regard to constitutional amendments has long been a hotly debated issue in Turkey. The Constitution of 1961 had no explicit provision concerning the judicial review of constitutional

3 K. Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study,* Bursa, Ekin Press, 2008, pp. 22-23, pp. 52-64; Roznai, 2017, pp. 203-204.

amendments. Theoretically speaking, such review would be possible only if one adopts the existence of supra-positive constitutional norms or of a hierarchy of norms within the constitution itself. In the Turkish constitutional system, no such hierarchy was established, and it was commonly agreed that all constitutional norms had equal legal value. Only Article 9 of the 1961 Constitution had stipulated that Article 1 on the republican form of government was unamendable and that no proposal could be made in order to amend it. The Constitutional Court in a 1970 ruling invalidated a constitutional amendment arguing that the unamendable republican form of government should be construed to include the characteristics of the Republic enumerated in Article 2, namely a national, democratic, secular, social state, based on human rights and the rule of law. Thus, the Court argued that an amendment incompatible with any one of these characteristics would be against Article 9, which bans amendments altering the republican form of government.[4] Evidently, this interpretation gave the Constitutional Court the competence to invalidate almost any constitutional amendment, since it is hard to conceive any constitutional amendment that does not touch upon one of these characteristics.

The legislative assembly reacted to this ruling by a constitutional amendment adopted in 1971, which restricted the review powers of the Court over constitutional amendments to a merely procedural review, namely to a review of whether the procedural requirements for such amendments were complied with. However, the Court again struck down four constitutional amendments in 1975, 1976, and 1977. This time the Court's argument was that the unamendability clause concerning the republican form of government was not only a substantive, but also a procedural norm, since such a proposal could not even be submitted under Article 9 of the Constitution. Therefore, any amendment that is incompatible with the characteristics of the Republic enumerated in Article 2 would be procedurally unconstitutional and null and void.[5]

The political elites reacted to these rulings once more in the Constitution of 1982. Article 148 of the Constitution limits the procedural review of the Court to ascertain whether the quorums for the amendment proposal and its adoption are complied with and whether the ban on the use of the urgent procedure (debating a proposal once instead of twice) in the Assembly debates on the amendment bill is violated or not. Furthermore, Article 149 stipulated that the Court could invalidate a constitutional amendment only by a two-thirds majority of its members. The 2001 constitutional amendment reduced this qualified majority to three-fifths. Thus, it appeared that the controversy over the judicial review of constitutional amendments had ended. Since the adoption of the 1982 Constitution, the Court has not until 2008 invalidated any constitutional amendment, and in the

4 Constitutional Court decision, E. 1970/1, K. 1970/31, 16 June 1970, *AMKD* (Reports of the Constitutional Court), No. 8, pp. 323.

5 Constitutional Court decision, E. 1973/19, K. 1975/87, 15 April 1975, *AMKD,* No. 13, pp. 430-431; E. 1976/38, K. 1976/46, 12 October 1976, *AMKD,* No. 14, pp. 252-286; E. 1976/43, K. 1977/4, 27 January 1977, *AMKD,* No. 15, pp. 106-131; E. 1977/82, K. 1977/117, 27 September 1977, *AMKD,* No. 15, pp. 444-464.

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three cases referred to it, it decided that the alleged procedural irregularity was not among the ones covered by Article 148.[6]

However, the Turkish Court suddenly changed its opinion in a ruling on 5 June 2008 and invalidated a constitutional amendment changing Articles 10 and 42 of the Constitution. The change in Article 10 on equality involved the addition of the phrase "in the utilization of all public service", and the change in Article 42 consisted of the addition of the sentence "no one shall be deprived of his/her right to higher education unless expressly prohibited by law". Clearly, the purpose of the amendment was to abolish the ban on wearing headscarves for female university students. It should be recalled that the ban itself was not introduced by a law, but by the two rulings of the Constitutional Court rendered in 1989 and 1991. The Court first considered the question of its competence, and returning to its jurisprudence in the 1970s, ruled that incompatibility with the first three unamendable articles was not only a matter of substance, but also a matter of form (procedure). Therefore, the Court considered itself competent to review the case. It then proceeded to examine the case on substantive grounds and concluded that the abolition of the headscarf ban at universities was against the principle of secularism mentioned in the unamendable Article 2, and that therefore the constitutional amendment was unconstitutional.[7]

This ruling of the Constitutional Court was highly controversial both on procedural and substantive grounds. Procedurally, it seems impossible to maintain the argument it put forward during the 1961 Constitution, itself of very dubious legal validity. The 1961 Constitution as amended in 1971 limited the Court's competence over constitutional amendments to a merely procedural review. Article 148 of the 1982 Constitution, on the other hand, clearly specified what kind of procedural irregularities (irregularities of form) are subject to the Court's review. These are whether the quorums for the amendment proposal and for its adoption are complied with and whether the proposal is debated twice. The Constitution has no explicit or implicit rule empowering the Court to review the compatibility of a constitutional amendment with the unamendable articles of the Constitution. Therefore, the decision of the Court is not only inconsistent with its earlier rulings in the 1982 Constitution period, but also amounts to a 'usurpation of power' since it is in violation of the explicit text of Article 148.

The Court's decision can also be criticized on substantive grounds. To argue that permitting female university students to wear headscarves is tantamount to undermining the secular character of the state is a reflection of a militant and assertive notion of secularism with no parallel in any Western democracy. In fact, no such ban exists at the university level in any member state of the Council of Europe.

6 Constitutional Court decision, E. 1987/9, K. 1987/15, 18 June 1987, *Resmî Gazete* (Official Gazette), 4 September 1987, No. 19564, pp. 22-26; E. 2007/72, K. 2007/68, 5 July 2007, *Resmî Gazete*, 7 August 2007, No. 26606; E. 2007/99, K. 2007/86, 27 November 2007, *Resmî Gazete*, 16 February 2008, No. 26792.

7 Constitutional Court decision, E. 2008/16, K. 2008/116, 5 June 2008, *Resmî Gazete*, 22 October 2008, No. 27032.

The Court repeated its ruling in 2010, when it annulled certain phrases in the constitutional reform package.[8] The more recent shift of the Court towards a self-restraining position will be commented upon below. As a result of these decisions, the Turkish Constitutional Court seemed to have acquired almost total control over constitutional amendment process. Since the characteristics enumerated in Articles 2 and 3 are so vague and broad, almost no constitutional amendment can be conceived that is not in one way or another related to one of these characteristics. Such an interpretation practically deprives the people and/or its elected representatives of their constituent power, which in a democracy should ultimately belong to them. As stated at the beginning, constitutional democracy requires a balance between popular power and the institutional channels through which it should be exercised. But to limit the former to such an extent can no longer be called a requirement of constitutional democracy, but is an example of juristocracy. Perhaps the most fitting formula for constitutional democracy is, in the words of a leading American scholar, "judicial review without judicial supremacy."[9] Based on humanity's two-centuries-old experience in constitutionalism, one may conclude by repeating the classical formula that constitutions should be rigid enough to ensure the stability of the basic structure of the state and to protect minority rights against the unbridled power of the majorities, but flexible enough not to prevent peaceful and democratic constitutional change in response to changing societal needs and demands.

Similar views were expressed by the Venice Commission of the Council of Europe in its report on constitutional amendment. Thus, the Commission

> considers that unamendability is a complex and potentially controversial constitutional instrument, which should be applied with care, and reserved only for the basic principles of the democratic order. A constitutional democracy should in principle allow for open discussion on reform of even its most basic principles and structures of government. Furthermore, as long as the constitution contains strict rules on amendment, then this will normally provide an adequate guarantee against abuse – and if the required majority following the prescribed procedures want to adopt reform, then this is a democratic decision, which should in general not be limited. All historical evidence indicates that for constitutions that function over any period of time, absolute entrenchment will never in practice be absolute. If circumstances change enough, or if the political pressure gets too strong, then even 'unamendable' rules will be changed – one way or the other… On this basis the Venice Commission would as a general principle advocate a restrictive and careful approach to the interpretation and application of 'unamendable' provisions.[10]

8 Constitutional Court decision, E. 2010/49, K. 2010/87, 7 July 2010, *Resmî Gazete,* 1 August 2010, No. 27659.

9 L.D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review,* Oxford, Oxford University Press, 2004, pp. 249-253.

10 Venice Commission, Report on Constitutional Amendment, 19 January 2010, CDL – AD (2010) 001, paras. 218, 219, 220.

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Similarly, the Venice Commission is clearly unenthusiastic about the judicial review of constitutional amendments. Thus, it argues that:

> one thing is for a constitution to contain unamendable provisions or principles. Another question is whether such amendability is legally enforceable, in the sense that it is subject to substantive judicial review by the courts or a special constitutional court. There is no automatic link here, nor any necessary logical correlation. Even if there is no judicial review of unamendability, such rules may still serve a political and practical function as declarations, which may have a restraining effect. In other words, unamendability provisions are often not 'hard law'. Whether or not they are respected is then left to practice, like many other political questions.... Even in constitution with unamendable provisions or principles, it is not often explicitly stated whether this is subject to judicial review or not, and if so, on what terms. This will then be for the national constitutional system to interpret and sort out.... In other countries, judicial review is in theory possible but has never been applied in practice.[11]

A An Evaluation

Constitutional unamendability is often defended as an instrument to preserve the democratic 'essence' of the constitution against authoritarian or totalitarian movements that aim to destroy the democratic order. In this sense, it is closely linked to the idea of 'militant democracy'. As its famous slogan goes, "there is no freedom to destroy freedom." As Roznai states,

> the most common aim of unamendability is preservation of core constitutional values. As every political order is established with a clear ambition to preserve itself, the first identified and central goal of unamendable provisions is to preserve the primary constitutive values of the constitutional order. Unamendable provisions protect an inviolable core that ensures the constitution's permanence and preservation against changes that might annihilate its essential nucleus or cause disruption to the constitutional order itself.

Roznai points out, however, that in certain cases, such protected nucleus may not be a democratic order, but for example a monarchical system.[12]

The idea of the legitimacy of preservation of the core constitutional, particularly democratic, values through unamendable provisions has a considerable number of supporters in the international literature. Thus, Walter F. Murphy argues, for example, that:

11 Venice Commission, paras. 225, 226, 227, 228.
12 Roznai, 2017, pp. 26-28.

> eternity clauses do not end problems of substantive validity. Neither procedural purity nor absence of a specific prohibition always settles problems of constitutional legitimacy. The question could still arise: Would this amendment so violate the principles of constitutional democracy as to destroy the nature of the polity? ... Are these constitutional amendments valid? Consistent legal positivists and constitutionalists – that is those who accept the terms of constitutional text as providing the ultimate political norms – must give a clear, if appalled, yes... On the other hand, committed, consistent, and courageous constitutional democrats must deny the legitimacy of the change.[13]

One can hardly deny the moral appeal of this argument. On the other hand, contemporary political trends make one sceptical about the practical effectiveness of unamendable clauses as an instrument of preserving the core values of democracy, supposing that the original constitutional text is indeed democratic in substance and spirit.

Indeed, nowadays the chief threat to democratic regimes comes not from open military coups as it used to be the case in earlier decades, but from the rise of 'competitive authoritarian' or 'populist regimes', even though certain worrying trends are also observed in older and more institutionalized democracies.[14] Steven Levitsky and Lucan A. Way, who coined the term 'competitive authoritarianism', define such regimes as

> civilian regimes in which formal democratic institutions exist and widely used as the primary means of gaining power, but in which incumbents' abuse of the state places them at a significant advantage vis-à-vis their opponents. Such regimes are competitive in that opposition parties use democratic institutions to content seriously for power, but they are not democratic because the playing field in heavily skewed in favor of incumbents. Competition is thus real but unfair... When incumbent manipulation of state institutions and resources is so excessive and one-sided that it seriously limits political competition, it is incompatible with democracy.

Consequently, the authors classify such regimes as a subtype of authoritarianism rather than a subtype of democracy.[15] Incumbents obtain this advantage by their uneven access to state and private-sector resources, to media and – most important for our present purposes – to the judiciary.[16]

'Populist' regimes, as described by Jan-Werner Müller, share important characteristics with competitive authoritarian regimes. In his words,

13 W.F. Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order,* Baltimore, The Johns Hopkins University Press, 2007, pp. 502-508.

14 R.S. Foa & Y. Mounk, 'The Signs of Deconsolidation', *Journal of Democracy,* Vol. 28, No. 1, 2017, pp. 5-15.

15 S. Levitsky &L.A. Way, *Competitive Authoritarianism: Hybrid Regimes After the Cold War,* Cambridge, Cambridge University Press, 2010, pp. 5-6, pp. 15-16.

16 Levitsky &Way, 2010, pp. 9-12.

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> populist governance exhibits three features: attempts to hijack the state apparatus, corruption and 'mass clientelism' … and efforts systematically to suppress civil society. Of course, many authoritarians will do similar things. The difference is that populists justify their conduct by claiming that they alone represent the people; this allows populists to avow their practices quite openly.[17]

The most important shared characteristic of competitive authoritarian and populist regimes is that they both command a strong base of popular support. This enables them to erode the democratic essence of the constitution by using legal mechanisms of constitutional change, a trend termed 'abusive constitutionalism' by David Landau. These actors

> rework the constitutional order with subtle changes in order to make themselves difficult to dislodge and to disable or pack courts and other accountability institutions. The resulting regimes continue to have elections and are not fully authoritarian, but they are significantly less democratic than they were previously.[18]

Landau, Müller and other authors analyze cases such as Colombia, Venezuela, Hungary and Poland as examples of abusive constitutionalism where democratic institutions were eroded by means of legally correct procedures of constitutional amendment or constitutional replacement. Such constitutional amendments were made possible by the incumbents' strong support in parliament, strong enough to obtain the qualified majorities required for constitutional amendment. Landau is not optimistic about the effectiveness of such constitutional mechanisms, including the theory of unconstitutional constitutional amendments doctrine, in preventing the would-be authoritarians to undermine the democratic essence of the constitution by constitutional means. Thus, he argues that:

> the unconstitutional – constitutional amendments doctrine is intended to fill these gaps by giving courts a more flexible tool to respond to abusive constitutional practices. But both theory and experience suggests a real risk that courts cannot be depended upon to apply the doctrine in warranted cases, but rather will be both over – and under – inclusive.… In short, we are a long way from developing a coherent system to control constitutional change, and it may not be feasible to construct such a system.[19]

Finally, it should be born in mind that:

17 J.W. Müller, *What Is Populism?,* Philadelphia, University of Pennsylvania Press, 2016, p. 4.

18 D. Landau, 'Abusive Constitutionalism', *University of California, Davis,* Vol. 47, 2013, p. 189 and passim.

19 Landau, 2013, pp. 216-217 and pp. 231-239.

> the easier way for a hybrid or competitive authoritarian regime to control a court is to pack it – packing a court is relatively quiet, and a pocket court is highly unlikely to deploy tools like the basic structure doctrine against its own regime.[20]

Present-day Turkey is one of the leading examples of contemporary populist or competitive authoritarian regimes. Even though Turkey has maintained a competitive and reasonably (if defective) democratic system since 1946, in recent years, it quickly drifted towards a competitive authoritarian regime.[21] Thus, starting especially from 2012 to 2013, the governing Justice and Development Party (AKP) established its total or almost total control over the media, and most importantly for our purpose, over the judiciary, in line with the practices of most competitive authoritarian regimes. The High Council of Judges and Public Prosecutors (the *HSYK*) created by the 1961 and the 1982 Constitutions is the key institution to establish control over the entire judiciary, since it makes all personnel decisions for judges and public prosecutors (including High Court Judges), such as appointments, promotions, transfers, disciplinary actions and dismissals. The *HSYK* has had a strong pro-government majority since its 2014 elections.

Control over the *HSYK* is bound to affect the entire judiciary, including the two high courts, the Court of Cassation and the Council of State (the highest administrative court). The *AKP* government reinforced its domination over the high courts by a law passed on December 2 2014 (Law No. 6572), increasing the number of judges in both courts. Thus, 129 new judges were appointed to the Court of Cassation and 39 new judges to the Council of State. Obviously, all new judges were appointed by the *HSYK,* which by now is firmly under the government's control, a good example of 'packing the courts'.

The *AKP's* quest for a completely dependent judiciary reached its culmination point with the constitutional amendment of 2017. The amendment (Art. 159) completely restructured the *HSYK*, also, significantly dropping the word 'high' from its title (thus, HSK from now on). Under the new arrangement, the HSK comprised 13 members. The minister of justice is the president of the HSK, and the under-secretary of the Ministry of Justice is its ex-officio member. Four members shall be appointed by the President of the Republic, and seven members shall be elected by the legislative assembly by qualified (three-fifths) majorities. Thus, not a single member shall be a judge chosen by his peers. The Venice Commission strongly criticizes the new composition of the Council:

> The Commission finds that the proposed composition of the CJP is extremely problematic. Almost half of its member (4 + 2 = 6 out of 13) will be appointed

20 *Ibid.*, p. 239.

21 For a detailed account of this drift, *see* E. Özbudun, 'Problems of Rule of Law and Horizontal Accountability in Turkey: Defective Democracy or Competitive Authoritarianism?', *in* C. Erişen & P. Kubicek (Eds.), *Democratic Consolidation in Turkey: Micro and Macro Challenges,* London and New York, Routledge, 2016, pp. 144-165; E. Özbudun, 'Turkey's Judiciary and the Drift Toward Competitive Authoritarianism', *The International Spectator,* Vol. 50, 2015, pp. 42-55; Müller, 2016, also makes frequent references to Turkey as an example of populist regimes.

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> by the President… (T)he President will no more be a *pouvoir neutre*, but will be engaged in party politics: his choice of the members of the CJP will not have to be politically neutral. The remaining 7 members would be appointed by the Grand National Assembly. If the party of the President has a three-fifths majority in the Assembly, it will be able to fill all positions in the Council. If it has, as in almost guaranteed under the system of simultaneous elections, at least two-fifths of the seats, it will be able to obtain several seats, forming a majority together with the presidential appointees. That would place the independence of the judiciary in serious jeopardy, because the CJP is the main self-governing body overseeing appointment, promotion, transfer, disciplining and dismissal of judges and public prosecutors. Getting control over this body thus means getting control over judges and public prosecutors.[22]

Getting control over the HSK also means getting control of two other vitally important constitutional bodies: the Constitutional Court and the High Council of Election. Under the amended Article 146 of the Constitution, out of 15 members of the Constitutional Court, three are appointed by the President of the Republic from among the candidates nominated by the Court of Cassation and two from among the candidates nominated by the Council of State. The President also appoints four members in his own discretion. Thus, the Constitutional Court is very likely to have a pro-government majority. The same is true for the High Council of Election, which has the final say over all electoral disputes since all its members are chosen by the two high courts, now under governmental control as explained above.

Obviously, the political impact of the 2017 amendments is not limited to the restructuring of the *HSK*. The amendment also radically changed the system of government from a parliamentary one to a kind of presidential system, curiously named the 'Presidency of the Republic government system'. The amendments led to a heavy concentration of authority in the hands of the President, while marginalizing his accountability vis-à-vis the legislature and the judiciary. Thus, even though technically it is a constitutional amendment, adopted by parliament with the requisite (three-fifths) majority and approved in the mandatory referendum by a 51.5 per cent majority, in its substance, it can be considered a 'constitutional replacement', in other words, a good example of 'abusive constitutionalism'. It is not my intention to analyze the amendments in detail here.[23] Suffice it to quote the conclusions of the Venice Commission:

> The proposed constitutional amendments … are not based on the logic of separation of powers, which is characteristic for democratic presidential sys-

22 Venice Commission, 'Turkey: Opinion on the Amendments to the Constitution Adopted by the Grand National Assembly on 21 January 2017 and to be Submitted to a National Referendum on 16 April 2017', 13 March 2017, CDL-AD (2017) 005, para. 119.

23 For a fuller analysis, *see* E. Özbudun, *Türk Anayasa Hukuku,* Ankara, Yetkin, 2017, esp. Chs. 15, 16, 17, 18; İ.Ö. Kaboğlu, *15 Temmuz Anayasası,* Ankara, Tekin, 2017; K. Gözler, *Elveda Anayasa,* Bursa, Ekin, 2017.

> tems. Presidential and parliamentary elections would be systematically held together to avoid possible conflicts between the executive and legislative powers. Their formal separation therefore risks being meaningless in practice and the role of the weaker power, parliament, risks becoming marginal. The political accountability of the President would be limited to elections, which would take place only every five years… The enhanced executive control over the judiciary and prosecutors… would be even more problematic… The amendments would weaken an already inadequate system of judicial oversight of the executive… (T)he Venice Commission finds that the proposed constitutional amendments would introduce in Turkey a presidential regime which lacks the necessary checks and balances to safeguard against becoming an authoritarian one… (T)he substance of the proposed constitutional amendments represents a dangerous step backwards in the constitutional democratic tradition of Turkey.[24]

The drift towards a populist authoritarian regime also affected the role of the Constitutional Court, even though there was no change in its formal powers. Thus, the Court drifted from a highly activist mentality, as described above, to a markedly self-restraining position. For example, it refused to annul a highly controversial constitutional amendment that lifted the parliamentary inviolability of a large number of parliamentarians (Law No. 6718, 20 May 2016) based on an entirely verbal interpretation of the Constitution.[25] Similar self-restraining attitude is also observed in many other decisions of the Court.

The examination of the Turkish case demonstrates that the doctrine of constitutional unamendability, even though theoretically rich and exciting, is not an effective instrument in preserving the democratic essence of a constitution. Much depends on the overall political circumstances in the country concerned. It is difficult not to agree with the observation of the Venice Commission that:

> all historical evidence indicate that for constitutions that function over any period of time, absolute entrenchment will never in practice be absolute. If circumstances change enough, or if the political pressure gets too strong, then even 'unamendable' rules will be changed – one way or the other.[26]

24 Venice Commission, 'Turkey: Opinion on the Amendments to the Constitution', paras. 124-133.

25 Constitutional Court decision, E. 2016/54, K. 2016/17, 3 June 2016, *Resmî Gazete,* 9 June 2016, No. 29737.

26 Venice Commission, 'Report on Constitutional Amendments', para. 219.

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