The Development of Constitutional Review through Prominent Judicial Decisions

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ABSTRACT

In the discourse of constitutional law, the 'judicial review', often referred to as 'constitutional review', or 'the review of the constitutionality of laws', which supplements the 'legality review' of the modern democratic legal state, holds a significant position. The primary concern, though, is figuring out how this particular judicial model came to be and which countries pioneered the emergence of this model of review. Accordingly, this article will examine the British and American case law that prioritized the constitutional judicial model, focusing especially on the decisions that paved the way for the establishment of the constitutional court in Türkiye and examine the conditions under which the judicial review model emerged.

Keywords: *Judicial review, Anglo-Saxon law, Constitutionality of laws, case law.*

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I. INTRODUCTION

The case law selected in this article is precedent that shows how and where the constitutional review emerged and, in a way, pioneered the introduction of this system into the legal world. As explained below, it shows how this judicial model emerged in England in the 1600s with the Dr. Bonham case, even though it does not have a written constitution. However, it is the way in which the Madison case was introduced in the United States of America. Here, the judge made the decision that laid down the constitutional review that is now used in almost every legal system today. The role of the United States at this point is crucial. The introduction of common constitutional review by American judges has led to the main idea of this article. The cases discussed in this article after the Madison case and until the 1970's are included to show how constitutional review has been applied in American courts over the years: *Dred Scott v. John F.A. Sandford* (1857), *Plessy v. Ferguson* (1896), *Brown v. Board of Education of Topeka* (1956), *Harper v. Virginia Board of Elections* (1966), *Roe v. Wade* (1973-2022)). These chosen decisions, as their content indicates, will illustrate the socio-cultural and socio-political eras the country has experienced in the US legal system, giving the reader a sense of the changes the American judicial system has undergone outside of the constitutional review. Thus, when asked how these cases differ from one another and why they were chosen, the same response should be provided: The selection of these cases was appropriate, particularly in terms of observing the various decisions that different judges have given when considering similar facts. These are the cases that stand out in the US constitutional courts, particularly with regard to constitutional review model.

With respect to Türkiye, on the other hand, some decisions are mentioned to show how late the constitutional review came to the country compared to the other two countries, although the issue was brought up in parliamentary committees in the early periods, but only in the 190s with the establishment of the Constitutional Court, and what processes have been gone through up to this time. However, the main point of application of the methodology is to show how constitutional review has been adopted into the legal systems of three countries with different legal systems through leading cases and decisions, which has led us to apply a comparative method. As is well known, comparative studies play a role in formulating, revising, and amending legislation. In particular, some studies choose this methodology as a way to define a functional tool to improve their own legal system. Therefore, by using this methodology, it is aimed to analyse the concept of constitutional jurisdiction, which is a

complex legal concept, through the jurisprudence of the relevant countries in order to identify commonalities and differences.

Regarding data collection, as mentioned above, it is aimed to use secondary data obtained mostly through library research. Therefore, without losing sight of the topic, the cases are put together from a variety of case law sources (such as legal books and websites)[1] and are chosen based on precedents that are significant in all three countries.

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The 'understanding of national sovereignty' and the belief that 'the law is the expression of the national will' led to the long-held belief that Parliaments, which are directly elected by the people, are superior to Kings and Heads of State, or the executive branch.[2] Since Rousseau believed that "the general will is infallible," it did not appear that it was feasible to audit the laws passed by parliaments. Likewise, in the United Kingdom, the argument over the superiority of Parliament or the common law was intensifying. After acknowledging that constitutions are "the most fundamental guarantee of the fundamental rights and freedoms of citizens" and embracing the idea that they are superior, this phenomenon of lack of control presented a significant paradox. While it was recognized that constitutions were the "supreme document," it was also acknowledged that governments could alter the constitution or enact "unconstitutional regulations" without facing consequences. Finally, the French Revolution of 1789 brought about the solution—or at least the first step toward it. The idea that "the acts of legislative bodies could also be audited" gained acceptance after the Revolution. Three distinct models arose as a result of this acceptance: the political review model, the quasi-political review model and the judicial review model.

The notion of a political body reviewing whether laws are unconstitutional or not was first proposed by Sieyès in France in the days following the 1789 Revolution. Sieyès suggested that "an elected constitutional jury (*jurie constitutionnaire*) should be formed and this jury should decide whether the laws made by the Parliament were unconstitutional or not" in 1795[3], during the drafting of the Constitution of the Third Year. Nevertheless, despite the fact that

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[1] In particular, the following two web pages were used: https://www.oyez.org/ and https://supreme.justia.com/

[2] Süheyl Batum, Didem Yılmaz and Serkan Köybaşı, Anayasa Hukuku Temel Kavramlar ve Genel Esaslar (1st edn, Seçkin 2021) 651.

[3] Marco Fioravanti, 'Sieyes et le Jury constitutionnaire' (1995) 302 Annales historiques de la Révolution Française 87–103; Hüseyin Nail Kubalı, Esas Teşkilat Hukuku Dersleri (n.d.) 79; Tarık Zafer Tunaya, Siyasal Kurumlar ve Anayasa Hukuku (4th edn, İstanbul Üniversitesi Yayınları 1980) 138.

this proposition was rejected in 1795, Sieyès' proposal was approved in 1799 with Napoleon's backing. This time, though, it was significantly altered and added to the constitution as a second chamber known as the 'Senate Conservateur'.[4] Similar practices were also put forward during the Turkish-Ottoman Empire.[5] Although the purpose of this paper is not to dwell on the first two models, it would be useful to mention the quasi-political review model.

This time, the 1946 Constitution would bring the French to the fore. With the new law, the French opted to adopt a different strategy after the political review model did not produce the expected results. As a result, "a model of review by a quasi-judicial/semi-political institution that utilizes judicial procedures, whose members have a status with similar guarantees to those of judicial organs, but whose formation depends on political institutions. Apparently, the authorities of the time idealized the idea of delegating the constitutionality of laws to the executive branch, even partially. As with almost everything else, World War II necessitated a change in these ideas and models of review, and thus, the judicial review model, which is the main idea of this paper, made its first step into the legal field. While insights regarding the emergence of the constitutional review model into the legal system have been provided, it is still essential to take a look at the landmark ruling of the pioneering judge that introduced this model.

I. UNITED KINGDOM

There is no judicial review of a law's constitutionality under English law. In the UK, constitutional review has not emerged since there is no standard hierarchy of norms between the unwritten constitution and laws. For several reasons, this is one of the most contentious topics among British jurists. In a nutshell, common law, also known as judge-made law, is based on two institutions: Parliament, which is an elected body that enacts, alters or repeals laws, and the courts, which apply and interpret the laws passed and create new laws where no precedent or pertinent legislation exists to address a particular issue. Therefore, the supremacy of Parliament when it comes to law-making is undeniable and non-negotiable, since Parliament's competence is to clarify, replace, or supersede common law jurisprudence.

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[4] Süheyl Batum, Didem Yılmaz and Serkan Köybaşı, Anayasa Hukuku Temel Kavramlar ve Genel Esaslar (n 2) 651–652.

[5] Article 64 of the 1876 Constitution; Heyet-i Ayan (Senate).

In this respect, considering the history of English constitutional law in the last century,[6] it can be concluded that A.V. Dicey's theory is the most influential theory among others. According to Dicey, "the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."[7] In the English legal system, this idea is referred to as 'Parliamentary Sovereignty' or 'Supremacy of Parliament'. Therefore, Parliament has the responsibility to review laws in the United Kingdom.

Generally speaking, there are no formal regulations or judicial checks that restrict the government's legislative authority through parliament. The lone exception, which was last employed in 1986, is the potential for MPs of the ruling party or parties to vote against a government bill[8]. Judges, on the other hand, are primarily responsible for interpreting the law using rules of interpretation. Apart from all of these, as it is widely acknowledged that the formation of the English Common law system dates back to 1250 and is a system of law known to the people of ancient England as 'common law' or 'law of the peoples', the principles of which are determined by custom and traditions, not by politicians and parliamentary legislation. Unlike laws, the origin of any customary law is created by a judge (judge-made law) and developed over the years through case law to adapt to contemporary circumstances and the level of society.[9] This leads to the following dilemma. Which will take precedence when a statute passed by Parliament conflicts with the common law in England, a country that acknowledges the supremacy of Parliament? The answer to this issue is in fact that the roots of constitutional jurisprudence were established in the United Kingdom, where it is not possible to discuss 'a constitutional jurisprudence method' since, in contrast to continental European countries, there is no written constitutional text. Doesn't it sound odd? The answer came, as expected, with a case law. Thus the following parts will examine how the seeds of constitutional jurisprudence were sown in the UK through relevant case law.

Thomas Bonham v College of Physicians (1610) (Dr Bonham's Case)

In Dr. Bonham's Case of 1612, Justice Edward Coke argued that laws made by Parliament and the King must not contravene the common law, which is the body of precedent

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[6] Ian Loveland, 'Parliamentary sovereignty and the European Community: the unfinished revolution?' (1996) 49(4) Parliamentary Affairs 517–532.

[7] A V Dicey, The Law of the Constitution (Oxford Press 1915).

[8] Bahadır Kılınç, 'Common Law (Ortak Hukuk) Sistemine Sahip Ülkelerden A.B.D. ve İngiltere'de Anayasa Kavramı Ve Yargısal Denetim' in Anayasa Yargısı İncelemeleri-1 (Anayasa Mahkemesi Yayınları 2006) 113–148, 126.

[9] Robert Ludlow Fowler, 'The Future of the Common Law' [1913] 13(7) Columbia Law Review 563–580.

established by the courts over the years. In the relevant judgment, Judge Coke pointed out that a law made by the legislature would be held invalid if it contravened rights and principles derived from the common law, thus sowing the seeds of the idea constitutional jurisprudence of the conformity of laws to a higher rule.[10]

The plot unfolds as follows. Bonham, a trained medical doctor, applied to join the College of Physicians but was rejected. Shortly afterward, he applied for membership again; this time the rejection was accompanied by a fine and the threat of imprisonment if he continued to practice. Bonham would be arrested while continuing his medical practice. Bonham told the College that he would continue to practice as a doctor and claimed that the College had no authority over Oxford and Cambridge graduates. As a result, Bonham was imprisoned. The College sued Bonham for fines for operating an illegal practice in King's Bench, and Bonham responded by claiming rape of the person and wrongful imprisonment. Upon this, the College argued that there was a legal basis for its claim that it was free to decide who could practice medicine and to punish those without a license, including imprisonment. On the other hand, Bonham argued that the law was aimed at preventing malpractice but was not concerned with unlicensed practice. A minority of two judges sided with the College as a valid licensing authority. They held that the law gave the College powers that should be exercised on behalf of the King (because it was the King's duty to care for the sick). However, the majority found for Bonham. Sir Coke, delivering the majority judgment, argued that the power to fine those involved in unlawful practice was separate from the power to imprison practitioners who committed misconduct. Thus, working without a license did not amount to misconduct and the College had no power to imprison Bonham. He declared that laws that allowed the College to act both as a party and as a judge were *absurd*, so that

> "when an act of parliament is against common right or reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void".

Coke had already applied this doctrine to acts of the king and in this case was extending it to parliamentary legislation. However, the principle of constitutionality review of parliamentary acts implied by the Bonham Case was never accepted in England and Coke himself seems to have later abandoned the idea.

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[10] Erdal Onar, 'Anayasa Yargısı İncelemeleri 1: Türkiye'de Kanunların Anayasaya Uygunluğunun Yargısal Denetimi Alanında Öncüler' (1st edn, Anayasa Mahkemesi Yayınları 2006) 2.

Following this first example, the constitutionality review carried out by the ordinary judicial organs started to be applied permanently in the *Marbury v. Madison* case in the Federal Supreme Court of the United States of America in 1803, when the Supreme Court refrained from applying a law that it found unconstitutional in the case. However, some authors draw attention to the fact that the judicial bodies in the United States of America had already been concerned with the issue of constitutionality review before *the Marbury v. Madison* case and criticize the fact that Chief Justice Marshall's 1803 decision in Marbury did not include both the previous opinions in the court decisions and the opinions of Alexander Hamilton in "The Federalist Papers". The same authors point out that the *Ware v. Hylton* case of 1796 also deals with the issue of judicial review and underlines that the Supreme Court conducted a constitutionality review in the *Hylton v. United States* case of 1796. Nevertheless, the 1803 ruling in *Marbury v. Madison* is without a doubt the most definitive decision on constitutionality review, and as such, it is the first instance of this kind of review that exists today.[11]

II. UNITED STATES OF AMERICA (JUDICIAL REVIEW OR COMMON REVIEW)

This model is not a constitutionally prescribed model. In other words, neither the Federal Supreme Court nor any other Court was authorized by the 1787 Constitution to review and decide on the constitutionality of laws. However, as a result of practice, such a review was set up. And it continues to this day, establishing this model. So what does this mean? Does it mean that even without a necessary provision in the Constitution, the Courts can find the authority to review the constitutionality of laws by developing their own interpretation? Indeed, today, either the constitution or a law explicitly grants such a review power to the courts (expressis verbis); or, in the absence of such an explicit provision, the courts decide that they have this power through their own interpretation. Finland, Sweden, Japan, Greece and Estonia are examples of countries where this supervisory power is expressly conferred on the ordinary organs, while Norway, Denmark and Israel are examples of countries where, as in the United States, the courts have found such supervisory power through their own interpretation. The famous decision that paved the way for this model is the *Marbury v. Madison* decision of the US Federal Supreme Court.[12] However, as was already indicated,

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[11] Ibid.
[12] (February 24, 1803)

there are earlier rulings even if the Marbury case served as the model's precedent. This section will address the pertinent case law.

Ware v. Hylton (1796)

The Treaty of Paris, which ended the Revolutionary War, provided that creditors of both countries "shall encounter no legal impediment" in recovering bona fide debts. A Virginia law passed during the American Revolution provided for the seizure of such debts on the grounds that the debt belonged to a foreign enemy. A Virginia resident owed money to a British subject, and the British administrator sued in federal court to recover the promissory note. The administrator argued that the Treaty of Paris provided for the recovery of such debts. The legal question arises is whether the Treaty of Paris overrides a valid state law. Opinions were written by four of the five justices. Together, the judges decided that federal courts have the authority to decide whether state laws are constitutional. According to the Supremacy Clause, which states that federal treaties always supersede conflicting state legislation, the Court declared the Virginia law unconstitutional. As can be seen, even before the Marburry case, the Federal Court made it clear that lower norms must follow higher norms by ruling that federal treaties always take precedence over conflicting state laws.

Hylton v. United States (1796)

It is among the earliest decisions in which the US Supreme Court has decided whether a congressional act is unconstitutional. In 1794, Congress decided to levy a tax of sixteen dollars on every carriage owned by an individual or business. Hylton viewed this law as a direct tax that violated the constitutional requirement passed by Congress that taxes be apportioned, that is, determined by each state's population and number of representatives. The legal question was whether a law taxing individual cars violated the constitutional requirement that "direct taxes be apportioned among the several states". If the carriage tax were a "direct tax", the law would be unconstitutional, as it was apportioned only according to each means of transport and not according to the states. The Court concluded that the transportation tax was not a direct tax and therefore did not violate the Article I, Section 2, Clause 3 and Article I, Section 9, Clause 3 requirements for apportionment of direct taxes.

The case is also significant in that it was the first in which the Supreme Court relied on the judicial review later formally established in *Marbury v. Madison* (1803) to determine whether a Congressional statute was unconstitutional.

Marbury v Madison (1803)

The political disputes that have existed in the US since the War of Independence and the 1787 Constitution serve as the foundation for this judgment. The US system has produced two parties: Republican Democrats, who support the autonomy of the federal states and the limitation of the federal state's powers, and Federalists, who support the expansion of the federal state at the expense of the federal states. While still the President of the United States, John Adams, a member of the Federalist Party, entered the 1800 presidential election as the new nominee. The Republican Democrat candidate, Thomas Jefferson, ran against him. Furthermore, Thomas Jefferson was elected as the new president after defeating Adams in the November 1800 elections. There is a peculiarity with US presidential elections, though. Elections were held in November at the time. However, the newly elected one waits until March 4, 1801, when the previous one's time is up. In order to stay in power for this lengthy time, Federalist John Adams appoints numerous people. members of his own party, federal officials, and judges. He assigned two more appointments in the interim. He names John Marshall President of the Federal Supreme Court, which is a crucial appointment; the person behind the Marbury/Madison ruling.

The other appointee is William Marbury. He appoints him as a justice of the peace in Washington DC. The next day, Thomas Jefferson takes over as president. And he appoints James Madison, another famous name of the party, as Attorney General. However, James Madison did not notify the appointees of these new appointments signed by the previous president. Thereupon, Marbury appealed to the Federal Supreme Court against the Attorney General based on the Judiciary Act of 1789. This law gives the Federal Supreme Court the power to issue a "judicial order" to all officers and officials in the service of the Federal Government (i.e., Madison in the service of the Ministry) to take an action (i.e., to notify them of Marbury's appointment) when it deems it necessary. And Marbury is asking the Federal Supreme Court to exercise this power. In deciding this matter, the Federal Supreme Court is introducing a very important institution into constitutional law: the institution of "judicial review of the constitutionality of laws."

The judgment stated that the plaintiff had a right to be notified of the appointment decision and that Marbury was right. However, there was a crucial question. Did Marbury have the right to appeal directly to the Supreme Court in this case? According to the 1789 law, Marbury had the right of direct appeal. However, the Constitution enumerated those who could make a direct application to the Supreme Court, according to which Marbury had

no right to make a direct application, i.e. the law of 1789 was unconstitutional. Due to this contradiction, the Supreme Court did not accept Marbury's request. This inconsistency prevented the Supreme Court from granting Marbury's request. This is because the Court ruled as follows: "a) Yes, the law of 1789 grants such a power to the Supreme Court. And it allows the judiciary to give orders to the executive branch; to the President of the United States, b) However, the Constitution of 1787 does not grant such a power to the Court in any of its articles. Neither does it authorize it to interfere in the exercise of the President's discretion. Nor does it authorize the Court to hear a case as a court of first instance; c) Therefore, the Court decides by reasoning that: -the Constitution of 1787 is supreme over all laws; -the relevant provision of the law of 1789 is contrary to the Constitution of 1787; -therefore, the Court is not able to apply this law".[13]

The logic applied by Justice Marshall in the reasoning of the case paved the way for the review of the constitutionality of laws. This logic is as follows: Every rule of law loses its force in the face of a superior rule of law. The Constitution is stronger than ordinary laws. As a result of this logic, Marshall stated that the Constitution is a superior law that cannot be changed like ordinary laws, and that a law that does not comply with the Constitution should not be considered valid as laws that comply with the Constitution. It is the judicial bodies that will carry out this control. Marshall stated that the courts should perform this control on their own, without the need for a special regulation. According to Marshall, this 'enforcement' by the courts was not only a power but also a duty, and judges should observe the principle of the supremacy of the Constitution while performing this duty. This form of reasoning and this authority 'applies to all courts'.

In other words, all courts in the United States have the authority to declare the law in question invalid and not to apply it, as the Constitution is the supreme rule, if they see a conflict between the law and the Constitution in the application of the law. For this reason, the type of 'judicial review' model also practiced in the US is called 'common review'. In subsequent judgments, the Federal Supreme Court has ruled differently on the constitutionality of laws. From this chapter onwards, these judgments will be presented.

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[13] Süheyl Batum, Didem Yılmaz and Serkan Köybaşı, Anayasa Hukuku Temel Kavramlar ve Genel Esaslar (n 2).

Dred Scott v. John F.A. Sandford (1857)

Dred Scott was a slave owned by John Emerson of Missouri. Emerson began his military service in 1833, and traveled on a series of journeys, taking Scott from Missouri (a state where slavery was legal) to Illinois (a free state) and finally to Wisconsin Territory (a free territory). Scott reportedly tried to purchase his freedom from Emerson's widow, but she refused. In 1846, with the help of abolitionist lawyers, Dred Scott filed a lawsuit in the Missouri state court in St. Louis seeking his freedom on the grounds that his residence in a free state and territory freed him from the bonds of slavery. The Scott v. Emerson case took years to resolve. The state court declared Scott free in 1850, but the decision was overturned by the Missouri Supreme Court in 1852 (thus overturning Missouri's long-standing "once free, always free" doctrine). Emerson's widow then left Missouri and gave control of her husband's estate to her brother, John F. A. Sanford, who resided in New York state. Since Sanford was not subject to litigation in Missouri, Scott's attorneys filed a lawsuit against Sanford in U.S. district (federal) court, which ruled in Sanford's favour. The case eventually reached the U.S. Supreme Court, which ruled in March 1857. The legal issue concerns whether Scott's slavery ended when he moved to free territory.

The court ruled that a "negro whose ancestors were imported into [the United States] and sold into slavery," whether slave or free, could not be an American citizen and therefore did not have standing to sue in federal court. Chief Justice Roger Brooke Taney dismissed the case on procedural grounds because the court lacked jurisdiction. Taney also ruled that the Missouri Compromise of 1820 was unconstitutional and prevented Congress from freeing slaves in federal territories. The opinion upheld the Missouri courts, which had ruled that moving to a free state would not free Scott. Finally, Taney ruled that slaves were property under the Fifth Amendment and that any law that would deprive a slaveholder of that property was unconstitutional. Benjamin Robbins Curtis, in a dissenting opinion, criticized Taney for going into the merits of the case after finding that the Court lacked jurisdiction. He noted that invalidating the Missouri Compromise was not necessary to resolve the case and was skeptical of Taney's view that the Founders categorically opposed anti-slavery laws. John McLean echoed Curtis, stating that the majority improperly considered the merits of the claim when it should have been limited to the procedural. He also argued that African men could become citizens because they already had the right to vote in five states.

Arguably the most controversial decision ever handed down by the United States Supreme Court, Scott v. Sandford , is also one of the most important cases in American constitutional history. In the words of Cass Sunstein, it was

> "the first Supreme Court case since Marbury v. Madison to invalidate a federal statute. Because Marbury created judicial review in the context of a denial of jurisdiction, Dred Scott may be said to be the first real application of the power of judicial review."

Moreover, it is known as "the birthplace of the controversial idea of 'substantive due process".[14]

Another case coincides with the time when the 'Separate but Equal' theory was at its peak in the legal world, thus how the Federal Supreme Court applied discriminatory laws at an equal level in a discriminatory manner.

Plessy v. Ferguson (1896)

The phrase 'Separate but Equal' is derived from an 1890 Louisiana law. A legal doctrine that once permitted racial segregation in the United States. Under this doctrine, as long as segregation laws affected whites and blacks equally, they did not violate the equal protection clause of the Fourteenth Amendment to the U.S. Constitution, which prohibited states from "denying to any person within their jurisdiction the equal protection of the laws". However, in practice, 'separate but equal' was, according to some, a fraud; treatment and accommodations for black citizens ranged from shoddy to barbaric.

The case arose in 1892 as a challenge to Louisiana's Separate Car Act (1890). The law required all railroads operating in the state to provide 'equal but separate accommodations' for white and African-American passengers and prohibited passengers from entering accommodations other than those to which they were assigned on the basis of race. In 1891, a group of Creoles[15] in New Orleans formed the Committee of Citizens to test the constitutionality of the Separate Car Act. They hired social reformer Albion Tourgée as their legal counsel. The committee selected a mixed-race plaintiff in the test case to support their claim that the law could not be applied consistently because it failed to define the races of

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[14] Cass R. Sunstein, "Constitutional Myth-Making: Lessons from the Dred Scott Case," University of Chicago Law Occasional Paper, No. 37 (1996) 1-23.

[15] They are a Louisiana French ethnic group, descended from inhabitants of colonial Louisiana before it became part of the United States during the period of both French and Spanish rule.

white and ‘colored’. Homer Plessy, who was seven-eighths white and one-eighths African American, purchased a train ticket to travel within Louisiana and took a seat in a car reserved for white passengers. After refusing to move to a train car reserved for African Americans, he was arrested and charged with violating the Separate Train Act. At Plessy's trial in U.S. District Court, Judge John H. Ferguson rejected Plessy's argument that the law was unconstitutional, and the state Supreme Court upheld the district court's decision. Associate Justice Henry Billings Brown, who wrote the majority decision, rejected Plessy's arguments that the law violated the Thirteenth Amendment to the U.S. Constitution (1865), which banned slavery, and the Fourteenth Amendment, which granted full and equal citizenship rights to African Americans. According to Brown, the Separate Carriage Act did not conflict with the Thirteenth Amendment because it did not re-establish slavery or constitute a ‘badge’ of slavery or servitude.

However, according to Brown, this law did not conflict with the Fourteenth Amendment, because this amendment was intended to secure only the legal equality of African Americans and whites, not their social equality. The law sufficiently respected legal equality because accommodations for each race were required to be equal, and segregation of passengers by race did not in itself mean that any race was legally inferior—a conclusion supported by numerous state court decisions that upheld the constitutionality of laws establishing separate public schools for white and African American children. In what would become a classic of American civil rights jurisprudence, Associate Justice John Marshall Harlan insisted that the court had ignored the clear purpose of the Separate Carriage Act. According to Harlan, because it was understood to universally assume that African Americans were inferior, the law imposed a badge of servitude on them, violating the Thirteenth Amendment. Thus, because it attempted to arbitrarily interfere with the civil liberties and freedom of movement of both African Americans and whites because of their race, the law violated the principle of legal equality underlying the Fourteenth Amendment's equal protection clause. "Our Constitution is color-blind," Harlan wrote.

Following these developments, although Justice Brown ruled that the treatment of white and African-American children in public schools was constitutional, in the mid-20th century, at a time when individual rights were expanding, the court declared racial segregation in schools unconstitutional.

Brown v. Board of Education of Topeka (1956)

In the late 1940s, the National Association for the Advancement of Colored People (NAACP) began a concerted effort to challenge segregated school systems in several states, including Kansas. The NAACP encouraged several of African American parents in Topeka to enrol their children in all-white schools. All of the parents, including Oliver Brown, were denied their requests. Brown was told that his daughter could not attend a nearby white school and would instead have to enrol in an African American school far from his home. The NAACP filed a class-action lawsuit. Although it argued that the education provided to African Americans (including facilities, teachers, etc.) was inferior to that provided to whites, the NAACP's main argument was that segregation was inherently a violation of the Fourteenth Amendment's equal protection clause. A U.S. district court heard Brown v. Board of Education in 1951 and ruled against the plaintiffs. The court sympathized with some of the plaintiffs' claims but dismissed the case. The NAACP subsequently appealed to the U.S. Supreme Court. The legal issue concerns whether segregating public education solely on the basis of race violates the Fourteenth Amendment's Equal Protection Clause.

Chief Justice Earl Warren delivered the unanimous opinion of the Court. The Supreme Court held that 'separate but equal' facilities were inherently unequal and violated the protections of the Fourteenth Amendment's Equal Protection Clause. The Court held that segregation of public education on the basis of race instilled a sense of inferiority that had a profoundly detrimental effect on the education and personal development of African American children. Warren based much of his opinion on social science studies rather than on court precedent. The decision also used language that was relatively understandable to laymen, because Warren felt it was important for all Americans to understand the logic of the decision. Thus, separate but equal educational opportunities for racial minorities were inherently unequal and violated the Fourteenth Amendment's Equal Protection Clause.

It would not be wrong to claim that *Brown v. Board* of Education is considered a watershed in American civil rights history. The case and efforts to weaken the decision brought greater awareness to racial inequalities and the struggles faced by African Americans. Brown's success galvanized civil rights activists and increased efforts to end institutionalized racism in American society.

Harper v. Virginia Board of Elections (1966)

Annie Harper was not allowed to register to vote in Virginia because she could not afford to pay the state's poll tax. Under Virginia law, voters had to pay a $1.50 tax to register, and the money went to fund public schools. Ms. Harper sued the Virginia Board of Elections, claiming that the poll tax violated her 14th Amendment right to equal protection. The U.S. District Court rejected Ms. Harper's case in favour of the Board of Elections. It then asked the U.S. Supreme Court to review the case. The legal issue was whether Virginia's state poll tax law unconstitutional or not? The Supreme Court ruled that Virginia's poll tax law was unconstitutional. By making it harder for poor people to vote, the state was violating the 14th Amendment's equal protection principle:

> "The right to vote is a fundamental right and must be available to all citizens. The amount of wealth a person possesses should have no bearing on their ability to vote freely."

Roe v. Wade (1973-2022)

In 1970, Jane Roe (a fictitious name used in court documents to protect the plaintiff's identity) filed a lawsuit against Henry Wade, the district attorney of Dallas County, Texas, where she resided, challenging a Texas law that made abortion illegal except with a doctor's order to save a woman's life. Roe argued that the state law was unconstitutionally vague and restricted her right to privacy protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. On January 22, 1973, the Supreme Court ruled 7–2 that overly restrictive state regulations on abortion were unconstitutional. In a majority opinion written by Justice Harry A. Blackmun, the Court held that a number of Texas laws criminalizing abortion in most cases violated a constitutional right to privacy implicit in the Fourteenth Amendment's guarantee of freedom ("...no state shall deprive any person of life, liberty, or property, without due process of law"). After 1973, repeated challenges to *Roe v. Wade* narrowed the scope of the decision but did not overturn it. In Planned Parenthood of Southeastern *Pennsylvania v. Casey*[16], the Supreme Court found that restrictions on abortion were unconstitutional if they imposed an "undue burden" on a person seeking an abortion before the foetus was viable.

In May 2021, the Supreme Court agreed to review in October 2021 a lower court decision that struck down a Mississippi state law passed in 2018 that banned most abortions after the

[16] (1992).

15th week of pregnancy, well before the point of foetal viability. Although the law is clearly unconstitutional under *Roe v. Wade* and *Planned Parenthood v. Casey*, Mississippi lawmakers passed the measure in the hope that an inevitable legal challenge would eventually make its way to the Supreme Court, where a conservative majority would overturn or greatly reduce the scope of the rulings. In May 2022, a draft of the majority opinion in the case, penned by Justice Samuel A. Alito, Jr., was leaked to a political news outlet in an extraordinary breach of the traditional confidentiality with which the Court conducts its deliberations. The February 2022 opinion indicated that the Court had voted to uphold the Mississippi law and overturn both *Roe v. Wade* and *Planned Parenthood v. Casey*. As expected, Roe and Casey were overturned (5–4) in the Court's formal decision in Dobbs, issued in June 2022, in which Alito ruled that there is no constitutional right to abortion. Shortly after the decision was issued, several states passed laws that drastically restricted the availability of abortion. Thus, *Roe v. Wade* was overturned by the Supreme Court in 2022.

III. TÜRKİYE

The constitutional review, which was formed in England and the United States, came to a country like Türkiye, which maintained continental European law, only with the establishment of the Constitutional Court in 1962, compared to the previous two countries. Türkiye, which rooted to a different legal family, was selected in this manner because it provides a different example. Accordingly, the subsequent part will first discuss the history of Türkiye's constitution before moving on to discuss significant efforts that have contributed to the development of a constitutional review.

The 1876 Constitution (Kanuni Esasi)

The 1876 Constitution, the first constitution in Turkey's political history, was a tough constitution because it required a more difficult process than ordinary laws in terms of amendment. However, in this Constitution, although a more difficult method was adopted for its own amendment, judicial review of the constitutionality of laws that could be made by following an easier process was not foreseen. Considering that Article 64 of the Constitution states that a bill accepted by the Chamber of Deputies (Heyet-i Mebusan) will be reviewed by the Chamber of Deputies for its compliance with the Constitution, as well as its compliance with certain other issues, it can be said that the 1876 Constitution adopted

the method of political review in terms of constitutionality.[17] As Tunaya also stated at this point, although nearly 80 years had passed since the first applications in this direction in the United States, when the 1876 Constitution was being made, and more than a century had passed since the very comprehensive amendments were made to the Constitution in 1909, the idea of judicial review of the constitutionality of laws had not yet emerged in our country at that time.[18] Accordingly, a remarkable attempt to have the constitutionality of laws reviewed by judicial bodies during the Ottoman period appears in a constitutional amendment proposal prepared by Aleppo Deputy Artin Efendi in 1915.

In this context, the proposal prepared by Artin Efendi suggested adding the following paragraph to Article 85 of the Constitution:

> "If the courts see a conflict between the articles of law to be applied in the matters they try, they should be obliged to prefer the provisions of the Constitution to all laws, orders and regulations. If a person who claims to have been harmed by the application of a law or regulation files a petition to the court claiming that that law or regulation is contrary to the Constitution, and if the court finds this claim justified, it is obliged (duty) to decide that the law that is contrary to the Constitution should not be applied to the defendant."

If this proposal had been accepted, the 1876 Constitution would have explicitly granted ordinary judicial bodies the authority to review the constitutionality of the provisions of law they apply in the case they try (expressis verbis). However, as Tunaya also mentioned, Artin Efendi's proposal was 'not accepted as worthy' by the Constitutional Commission in 1916 and it was decided that it did not need to be discussed in the vote held on it.[19]

The 1921 Constitution Period

The Grand National Assembly, which took office in Ankara on April 23, 1920 by gathering extraordinary powers, as is known, also made a Constitution on January 20, 1921. However, this Constitution, which reflected the characteristics of the parliamentary government system, was a soft constitution since it did not seek more difficult conditions than ordinary laws in terms of the method to be followed in its amendment. In addition, some areas such as fundamental rights and freedoms and the judicial function were not regulated at all in this Constitution, and it was content to establish a political structure suitable

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[17] Ergun Özbudun, Türk Anayasa Hukuku, (8. edn. Yetkin Yayınları, Ankara 2004) 369.
[18] Tarık Zafer Tunaya, Siyasal Kurumlar ve Anayasa Hukuku (n 3) 143.
[19] Ibid 144.

for the extraordinary conditions of the day. In short, due to the fact that this Constitution was a soft constitution, the fact that fundamental rights and freedoms and the judicial body were not included in this Constitution, and the fact that the First National Assembly was a revolutionary assembly, the concept of judicial review of the constitutionality of laws was not on the agenda of those days.[20]

The 1924 Constitution Period

The 1924 Constitution, which remained in force for 36 years from the year it was made in 1924 until it was terminated by a military intervention on May 27, 1960, was a strict constitution. Based on this strict constitutional feature mentioned above, it was a conclusion that ordinary laws made by following an easier method could not be contrary to the constitution, even though it could be reached through interpretation; the subject was also clearly regulated in the Constitution. Article 103 of the Constitution stated, "No article of the Constitution can be ignored or prevented from being implemented for any reason or excuse. No law can be contrary to the Constitution".[21]

Even though there was no explicit provision (expressis verbis) in the Constitution that the judicial bodies could review the constitutionality of laws, during the period of the 1924 Constitution, the courts could review the constitutionality of the legal provision they applied in a case based on the aforementioned Article 103 and could decide the case in light of the constitutional rules by ignoring the legal provisions they found unconstitutional. Indeed, as mentioned before, in the USA, Norway, Denmark and Israel, despite the absence of such an explicit provision, the judicial bodies considered themselves authorized to review the constitutionality of the legal provision they applied in the case and initiated this review. The case of Israel is particularly interesting.[22] In Türkiye, however, during the period when the

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[20] Ibid 253.

[21] Turhan Feyzioğlu, Kanunların Anayasaya Uygunluğunun Kazai Murakabesi (Ankara Üniversitesi Siyasal Bilgiler Fakültesi Yayınları No 19-1, Ankara 1951) 253.

[22] In fact, it can be said that the situation in Israel is extremely interesting. Because, there is no constitution in the known sense in this country. In fact, Israel is one of the rare countries that has not collected the rules determining the basic foundation of the state and the fundamental rights and freedoms of individuals in a constitution since it was founded in 1948. In this country, the work of preparing a constitution was postponed due to the fact that it was at war during its founding years and that the religious and secular sectors could not agree on the role of religion in the state structure, or as some academics put it, "they agreed to disagree". In Israel, the problem caused by the fact that the basic foundation of the state and the fundamental rights and freedoms of individuals were not determined in a written constitution has been tried to be solved by the "Basic Law" issued by the legislative body Knesset from time to time and regulating some of these issues. In other words, Israel has adopted a constitutional system consisting of various basic laws. In this context, there are currently "11 Basic Laws" that were issued at different dates and some of which have undergone some changes over time. There is no significant difference between the process of

1924 Constitution was in force, there were those who argued that such a review could be conducted based on the aforementioned constitutional provision, while there were also those who argued that it was not possible and opposed such a review. As a result, in practice, such a control remained at the initiative stage, and in order to be able to speak of effective control, it was necessary to wait until the 1961 Constitution and the establishment of the Constitutional Court in accordance with this Constitution.

The Court of Cassation's General Assembly's Ruling on February 4, 1931

The General Assembly of the Court of Cassation Civil Law, which have seen above, indirectly accepted that the courts could review the constitutionality of a legal provision applied in a case they were considering, and very shortly after its decision dated 20 April 1927, it was seen that on 4 February 1931, it decided very clearly that the courts did not have such authority. Indeed, in its decision dated 4 February 1931, the General Assembly of the Court of Cassation Civil Law (General Assembly of the Court of Cassation Civil Law) stated that a judge could not avoid applying any law by mentioning that the law was unconstitutional while exercising his/her judicial authority. Thus, the Court of Cassation ruled that the courts could not review whether the legal provision applied in a case they were considering was in accordance with the constitution, and did not allow such a method of review to be established through precedent.

On the other hand, a decision made by Judge Refik Gür is among the most prominent in this period regarding constitutional justice.

Decision dated April 7, 1951

There is no doubt that the decision given by Akşehir Civil Judge Refik Gür on April 15, 1949 and the decision of resistance given by Refik Gür on April 7, 1951 after this decision was overturned by the Supreme Court of Appeals were the most resounding decisions during the 1924 Constitution period regarding the fact that a legal provision implemented in a court

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making Basic Laws and the process of making ordinary laws, unless otherwise stated in the Basic Law that is being amended. Therefore, although it may be thought that there will be no order of priority between Basic Laws and ordinary laws; considering that the Knesset's position was the same during the making or amendment of Basic Laws and that these laws were called Basic Laws, it has long been generally accepted that they have a superiority over ordinary laws. The idea that such a superiority exists has been fully reinforced in the decisions of the Israeli Supreme Court since the mid-1990s. Accordingly, the Supreme Court has ruled that a law that it finds to be contrary to one of the Basic Laws should not be taken into consideration, in other words, it should be ignored.

could be reviewed by that court in terms of constitutionality. The incident that led to this decision can be summarized as follows:

Article 3 of the "Technical Agriculture and Technical Horticulture Schools Law No. 4486, accepted by the Turkish Grand National Assembly on July 19, 1943, states that,

> "The Ministry of Agriculture is authorized to accept male and female students to Technical Agriculture and Technical Horticulture Schools by selecting them from among the children of village farmers who have completed at least a five-grade village primary school and who are not over 16 years old and are not continuing their education. Students, whose health conditions are determined to be suitable for training in these schools, are obliged to send them to schools and continue their education according to the written notification to be made to them. The expenses of students who leave the school for any reason without a health necessity during their stay at school shall be collected from them or their parents or guardians."

Article 7 states,

> "Parents and guardians who do not fulfil the obligation stated in the third article within ten days from the date of notification shall be sentenced to a light fine of 50 lira to 200 lira."

In accordance with the above-mentioned provisions of the aforementioned Law, A.O. Kurt, a village boy from Akşehir, was admitted to the Technical Agricultural School and later his relationship was terminated, therefore, the amount of expenses incurred during his stay at school, 290 lira and 2 pennies, was requested from A.O. Kurt's mother Z. Kurt, who is his guardian. When the student's guardian Z. Kurt did not pay this money, a lawsuit was filed against him by the Akşehir Revenue Directorate on behalf of the Treasury at the Akşehir Civil Court of First Instance. However, Judge Refik Gür dismissed the lawsuit on the grounds that the provisions of the aforementioned Law regarding the forced admission of individuals to these schools without their consent and the collection of expenses incurred by those who leave school without completing their education by any means from the individuals themselves or their parents or guardians were unconstitutional and that he could not apply a law that he found unconstitutional according to Article 103 of the Constitution. However, upon the appeal of this decision by the plaintiff administration, the Fourth Civil Chamber of the Court of Cassation found the decision to dismiss the case to be irregular even though the defendant was responsible for the expenses incurred by his son under his

guardianship according to Article 7 of Law No. 4486 and overturned the decision on November 18, 1949.

The Court of Cassation does not address the issue of unconstitutionality in its decision, and only states that the courts cannot avoid applying laws they find unconstitutional.[23] In reaching this decision, the Court of Cassation points out that the Constitution does not grant such authority to the courts. It is really not possible to agree with this decision of the Court of Cassation. First of all, there is no doubt that the aforementioned Law is against the Constitution. Indeed, since Article 87 of the 1924 Constitution states that all citizens, both men and women, are required to receive primary education, it is clear that it would be against the Constitution to make it mandatory for individuals to receive another education after primary education. In addition, Article 70 of the Constitution includes, among other freedoms, the freedom to work. In light of these, subjecting individuals to compulsory agricultural and horticultural education cannot be in harmony with the regulations of the 1924 Constitution. In fact, since Article 103 of the Constitution states very strongly, "No article of the Constitution can be ignored or prevented from operating for any reason or pretext. No law can be contrary to the Constitution," this provision will also bind the courts. Since the Constitution is also a law, when a provision of law that the courts apply in the cases they are hearing conflicts with a provision of the Constitution, they have to resolve this conflict. In short, as mentioned before, the Court of Cassation has shown its determination in this case that the way of constitutional review should not be formed by precedents.

Attempts to Form Constitutional Review through Legal Regulations

In the final stages of the 1924 Constitution, although some bills were submitted to the TBMM (Grand National Assembly of Türkiye) by the deputies expressly granting the courts the authority to refrain from implementing laws they found unconstitutional (expressis verbis), they were not discussed and enacted into law. From the early 1950s onwards, the CHP (Republican People's Party), the main opposition party of the period, began to put forward the need for a Constitutional Court to monitor the constitutionality of laws. In this context, Article 10 of the program accepted at the 'Tenth Grand Congress' held on June 22, 1953, envisaged that the regime would operate under the guarantee of a Constitutional Court.

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[23] Hasan Halis Sungur, 'Kanunların Teşkilatı Esasiye Kanununa Uygunluğunun Kazais Murakkebesi' (1953) 44 Adalet Dergisi 751–755, quoted by Erdal Onar, 'Anayasa Yargısı İncelemeleri 1: Türkiye'de Kanunların Anayasaya Uygunluğunun Yargısal Denetimi Alanında Öncüler' (n 10) 17.

In the 'Initial Objectives Declaration' accepted at the CHP Fourteenth Grand Congress held on January 12, 1959 and declared on January 14, 1959, it was stated that the Constitution would be changed when the necessary majority was reached, and when listing what would be done in this context, it was stated as follows regarding the constitutional court:

> "In the Constitution: ...the fundamental rights and freedoms that are common to all Turks, regardless of race, gender, religion, sect, political opinion, social origin, birth and wealth, will be included. Freedom of thought and speech, freedom of the press, freedom of science and art, freedom of religion and conscience, immunity of person and residence, freedom of assembly and association, security of property and estate, freedom of labor and economic enterprise, right to strike, right to establish unions and professional organizations, right to be treated equally before the law and to benefit equally from public services, impartiality of state broadcasting means, all rights and freedoms accepted by the civilized world of which we are a member and principles of the rule of law will be provided to Turkish citizens and these rights will be clearly defined and secured. By establishing a Constitutional Court, the restriction and cancellation of these rights included in the Constitution by other laws will be prevented."

This is evident, numerous groups have attempted to have a central judicial authority oversee the constitutionality of laws during the 1924 Constitution era, particularly following the shift to multi-party life. As a result of all of those factors, the concept of creating a special judicial body to handle the work of determining whether laws are constitutional was widely embraced throughout the process of drafting a new constitution following the intervention of May 27, 1960. In this regard, it is well known that the 1961 Constitution established the Constitutional Court as a central court charged with ensuring that our nation's laws are constitutional.[24]

V. CLOSING REMARKS

In order to uphold the supremacy of the constitution and safeguard fundamental rights and freedoms, constitutional movements led to the establishment of the constitutional courts. Its primary goal is to keep an eye on whether laws are constitutional. Therefore,

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[24] Erdal Onar, 'Anayasa Yargısı İncelemeleri 1: Türkiye'de Kanunların Anayasaya Uygunluğunun Yargısal Denetimi Alanında Öncüler' (n 10) 40.

efforts are made to guarantee the protection of fundamental rights and freedoms as a result of judicial oversight of constitutionality. Accordingly, as the foundation of constitutional protection, the historical background of constitutional review is examined in this paper, along with specifics of the rulings and steps it did to establish itself in three different legal systems. It would not be inaccurate to speculate that the UK is the birthplace of constitutional review, despite its well-known lack of a codified constitution. The United States, however, popularized the 'judicial review' concept of constitutional review after the Marbury case. In Türkiye, on the other hand, which is a member of the continental European legal family, along with these two countries based on almost the same legal culture and system, although proposals were made to parliamentary committees regarding judicial review, the introduction of this method to the country only awaited the establishment of the Constitutional Court with the 1961 Constitution. All these can lead to the conclusion that countries' responses to legal events and the solutions they later provide are intimately tied to the areas where their legal systems diverge from one another. A case-law analysis of constitutional justice has shown how various legal systems, particularly those about constitutional law, have interpreted this matter.

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