CHAPTER ON TURKEY

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Duelling for Supremacy: International law vs. National Fundamental Principles

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Turkey[1]

Abstract

This chapter offers a critical account of how the Turkish (high) courts have approached the complex questions that arise in domestic litigation concerning the relationship between international law and Turkey's domestic law. In what follows, the chapter first engages in a theoretical debate and doctrinal exploration on the place of international law in the Turkish domestic legal order. It also provides a brief account of the Turkish constitutional approach to its international obligations, which has been extensively interpreted, implemented and supplemented by the practices of Turkish national legislative and executive organs. Second, and more importantly, it maps the explicit and implicit influence of Turkish constitutional-national principles in Turkish case law *vis-à-vis* Turkey's international legal commitments.

Keywords: Turkey, international law, human rights, Turkish Constitution, domestic law

A. Introduction

In 2004, the Turkish Constitution was amended to render it more 'friendly' towards international law by clarifying issues of protracted concern over the normative status of international agreements in the Turkish legal order. Prior to the 2004 amendment, the Turkish Constitution, in Article 90/5, provided that international agreements duly put into effect would have the force of law, but it did not clearly define the role and rank of such treaties in the Turkish domestic legal hierarchy. Nor did it include explicit provisions –as international law friendly[2] constitutions do– incorporating these treaties directly into the Turkish legal order once they have been ratified. As a consequence, the formulation of Article 90/5 has generated considerable controversy among legal scholars as well as within Turkish judicial circles.

The 2004 amendment nevertheless did accord human rights treaties preferential treatment, stipulating that when there is a conflict between international human right treaties duly put into effect and domestic law, the former takes precedence over the latter. Before the amendment, no such conflict-rule existed, resulting in the adoption of different standards of application by different levels of the Turkish judiciary whenever there was a conflict between human right treaties and national statutes.

[1] This chapter focuses solely on the rulings and the decisions of the Turkish high courts before the attempted coup of 15 July 2016 and the subsequent declaration of the state of emergency. During two-year state of emergency rule that officially culminated on 17 July 2018, the Turkish Government adopted more than 30 emergency decrees, which introduced very far-reaching and almost unlimited discretionary powers and targeted a wide number of fundamental rights and freedoms through mass detentions, massive dismissals, and broad institutional closures. More specifically, the Turkish courts have proven unable (i.a., by the massive purge of judges and public prosecutors) or unwilling (i.a., by abdicating their judicial duty and deferring to the Turkish Government) to provide a meaningful legal review on the emergency decrees and the resulting derogation measures. This, in turn, has clearly eroded the already fragile foundations of the Turkish courts' compliance with international law and international human rights law.

[2] Antonio Cassese, *Modern Constitutions and International Law,* (III Academie de Droit International, Recueil des Cours, 1985) pp. 331-343. See also, Daniel Lovric, 'A Constitution Friendly to International Law: Germany and its Volkerrechtsfreundlichkeit' (2006) 25 *Austrian Yearbook of International Law* pp. 75-104.

It is true that Turkish courts have started to make greater use of international law in domestic cases after the 2004 amendment, especially in the field of human rights. However, juxtaposing the jurisprudence of Turkish domestic courts before and after the amendment reveals that national implementation of international law still remains a matter of controversy.

This chapter offers a critical account of how the Turkish (high) courts have approached the complex questions that arise in domestic litigation concerning the relationship between international law and Turkey's domestic law. In what follows, the chapter first engages in a theoretical debate and doctrinal exploration on the place of international law in the Turkish domestic legal order. It also provides a brief account of the Turkish constitutional approach to its international obligations, which has been extensively interpreted, implemented and supplemented by the practices of Turkish national legislative and executive organs. Second, and more importantly, it maps the explicit and implicit influence of Turkish constitutional-national principles in Turkish case law *vis-à-vis* Turkey's international legal commitments.

B. A theoretical debate and doctrinal exploration on the uncertain relationship between international law and Turkish domestic law

The Turkish Constitution does not contain a general reference addressing the role and rank of sources of international law in the Turkish domestic legal order, including international custom and the general principles of international law. Therefore, Article 90/5 of the Turkish Constitution, which addresses the normative status of international treaties, is the starting point for investigating the status of international law in Turkey's domestic legal order: "International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional."[3] In order for a treaty to be duly incorporated into Turkish domestic law, the process of ratification traditionally involves approval by the Turkish Parliament, the Government and the President per Article 90/1[4] and Article 104[5] of the Turkish Constitution. As with most Western constitutions, publication is essential for an international treaty to become binding in Turkish law.[6]

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[3] The 1961 Turkish Constitution, which was drafted under the aegis of the 1960 military regime, introduced for the first time a radical provision concerning the relations between domestic law and international law in its Article 65. This provision found its place as repeated verbatim by the 1982 Constitution in Article 90/5.

[4] Article 90/1 states: "The ratification of treaties concluded with foreign states and international organizations on behalf of the Republic of Turkey shall be subject to adoption by the Grand National Assembly of Turkey by a law approving the ratification." While the Turkish Constitution has no specific provisions on the competence of 'negotiation and conclusion' of treaties, this competence has traditionally been accepted to be enjoyed by the President, the Prime Minister, the Minister of Foreign Affairs and/or those empowered by the Council of Ministers. See, Servet Armağan, '1982 Anayasası'nda Uluslararası Antlaşmaların İmzalanması ve Onaylanması Sistemi' (The System of Negotiation and Conclusion of International Treaties in the 1982 Constitution) (1982) 17 *Anayasa Yargısı Dergisi* 340-367.

[5] According to Article 104 of the Turkish Constitution, the duties and powers of the President also include "the ratification and the promulgation of international treaties."

[6] It must be also noted that some categories of treaties are exempted from the requirement of parliamentary approval and publication. International treaties as stated in Article 90/2 can be ratified only by a decision of the Council of Minister and then, a final approval by the President on condition that they are brought to the knowledge of the Parliament within two months of their publication. Moreover, some treaties, which fall outside the scope of Article 90/2, may acquire binding force without official publication pursuant to Article 90/3. It is argued that the exceptions to the – Article 90/1 – general rule as stated in Article 90/2 and 90/3 rapidly appear to be becoming the 'new normal', enabling the Turkish Government to transpose certain types of international treaties to domestic law by neutralizing the judiciary and the Parliament's control. This is all the more so in light of the tendency of the Turkish Government in the last decade to try to make use of the current system to advance controversial projects through international treaties. See, Kemal Başlar, 'Uluslararası Antlaşmaların Onaylanması, Üstünlüğü ve

The formulation of Article 90/5 has generated much controversy among legal scholars.[7] One view claims that an international treaty has the same effect as a domestic law, and therefore the provision is not a manifest recognition of the supremacy of international law. Accordingly, in a conflict between a domestic law and an international treaty, which might result in the state's responsibility, the general principles of *lex posterior, lex specialis and lex superior* were to apply.[8]

Another view counters this argument by focusing on the fact that no appeal can be made with regard to an international agreement based on the unconstitutionality thereof. Even though scholars ascribing to this view agree that the Turkish Constitution did not explicitly recognize the supremacy of international agreements, they argue that, the Constitution accords special protection to international treaties in the Turkish domestic legal order. For this reason the general principles for the resolution of antinomies would be insufficient to disregard international treaties, as such treaties can be regarded as the embodiment of "a common will of states"[9] or "common cultural heritage"[10]. If there is conflict between a conventional norm and a domestic norm, the international norm must be enforced and the conflicting domestic rule must be ignored without hesitation.

A third view expressed since early 1990s suggests that only international human rights treaties should be superior to Turkish domestic law. This group of scholars, having regarded the European Convention on Human Rights (ECHR) system as the most effective and advanced human rights regime in the world, argues that the ECHR functions as constitutional provisions for all members of the European Council including Turkey.[11]

As a result, the reception and hierarchical position of international agreements in the Turkish domestic legal system has always been controversial.[12] In 2004, Article 90 was amended to clarify this protracted concern over the normative status of

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Anayasal Denetimi Üzerine' (On Ratification, Primacy and Constitutional Control of International Agreements) (2004) 24/1-2 *Milletlerarası Hukuk ve Milletlerarası Özel Hukuku Bülteni: Prof. Dr. Sevin Tolner'e Armağan* 279-336 at 285 and Serkan Köybaşı, 'Yargı Denetiminden Milletlerarası Andlaşmalar Yoluyla Kaçmak: Akkuyu Nükleer Güç Santrali Andlaşması (Fleeing control of constitutionality through international agreements: case of Akkuyu Nuclear Central Agreement)' (2014) 3-5 *Anayasa Hukuku Dergisi* 343-358.

[6] According to Article 104 of the Turkish Constitution, the duties and powers of the President also include "the ratification and the promulgation of international treaties."

[7] For a detailed account on these discussions, see, Levent Gönenç and Selin Esen. 'The Problem of the Application of Less Protective International Agreements in Domestic Legal Systems: Article 90 of the Turkish Constitution' (2006) 8 *European Journal of Law Reform* 485-500 at 487.

[8] Ergun Özbudun & Serap Yazıcı, *Democratization Reforms in Turkey (1993-2004)*, (Ankara: TESEV, 2004) p. 12; Hüseyin Pazarcı, *Uluslararasi Hukuk Dersleri*, (International Law Lectures) (Ankara: Turhan Kitabevi, 2001) vol.1, p. 32.

[9] Hamza Eroğlu, *Devletler Umumi Hukuku* (Public International Law*)* (Ankara:Turhan Kitabevi, 1984, 3rd ed.) p. 32.

[10] Süheyl Batum, *Avrupa İnsan Hakları Sözleşmesi ve Türk Anayasal Sistemine Etkileri* (European Convention on Human Rights and its Impact on the Turkish Constitutional System), (İstanbul: İstanbul Üniversitesi Basımevi, 1993) p. 261.

[11] See for example, Mehmet Turhan, 'Değişen Egemenlik Anlayışının Hak ve Özgürlüklerin Korunmasına Etkileri ve Türk Anayasa Mahkemesi' (The Impact of Changing Understanding Sovereignty on Fundamental Human Rights and the Constitutional Court) (2003) 20 *Anayasa Yargısı* 215-48 at 229; Ibrahim Kaboğlu, *Anayasa Yargısı* (Constitutional Adjudication) (İstanbul: İmge Kitabevi, 1994) p. 79; Edip Çelik, 'Avrupa İnsan Hakları Sözleşmesinin Türk Hukukundaki Yeti ve Uygulaması' (The Place and Application of the European Convention on Human Rights in the Turkish Legal Order) (1998) 9.1-3 *İdare Hukuku ve İlimleri Dergisi* 47-56 at 55.

[12] On a particular note, the Turkish literature on the international law and the Turkish municipal law interface since the adoption of a new Constitution in 1982 has evolved primarily around three questions: "(a) How are international agreements transposed into Turkish law? (b) What is the hierarchical position of international law in the Turkish domestic legal setting? (c) Should international treaties be submitted to constitutional review?" *See* Ikboljon Qoraboyev and Emre Turkut, 'International Law in the Turkish legal order: Transnational Judicial Dialogue and the Turkish Constitutional Court' (2017) 26 *Italian Yearbook of International Law* 41-62.

international agreements duly put into effect. [13] The rationale behind this modification was to open the door to international legal standards, which also corresponds to the most basic principle maintained by international law since its foundation – the supremacy of international law over domestic laws.[14] The 2004 amendment has only accorded human rights treaties preferential treatment, stipulating that in the case of a conflict between international human right treaties duly put into effect and domestic law, international agreements take precedence over domestic law.[15] Before the amendment, no such conflict-rule existed, resulting in the adoption of different standards of application by different levels of the judiciary when a conflict arose between human right treaties and national statutes. Nonetheless, a considerable degree of ambiguity continues to persist even after the 2004 amendment.

Furthermore, Article 90/5 must be harmonized with other provisions of the Turkish Constitution. The Turkish Constitution is explicit only on the status generally of international treaties. However, it does provide some 'case-specific' references to international custom in four articles.

First, Article 15 of the Turkish Constitution allows for 'partial or total' suspension of fundamental rights and freedoms only 'to the extent required by the exigencies of the situation' as long as measures taken are in conformity with Turkey's international legal obligations. Article 15/2 further contains a list of non-derogable rights, which apply even in times of war, mobilization, martial law, or a state of emergency.

Second, Article 16 states that the fundamental rights and freedoms in respect to foreigners may be restricted in accordance with international law.

Third, although Article 42 provides that 'no language other than Turkish shall be taught as a mother tongue to Turkish citizens at any institution of education', the provisions of international treaties to which Turkey is a party – particularly, those of 1923 Lausanne Treaty – are reserved.

And fourth, Article 92 makes the power to authorize the declaration of a state of war conditional on such cases being deemed legitimate under international law.

In light of the foregoing, it is clear that Turkish constitutional provisions accord clear superiority only to international human rights treaties over the Turkish domestic law and customary international law in some specific cases. It does not give international law priority over the Turkish Constitution.[16] As expressly stated in Article 11 of the

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[13] The first attempt had been made in 2001 within the context of Turkey's accession to the European Union (EU). Several articles in the Turkish Constitution such as Article 6 ('Sovereignty resides unconditionally and unreservedly in the Turkish nation and shall not be transferred under any circumstances') and Article 7 ('Legislative power vested in the Turkish Parliament on behalf of the Turkish Nation, shall not be delegated') along with Article 90/5, have been considered as major obstacles for a possible Turkish membership of the EU as these provisions provided no fertile grounds in allowing the EU law to become part of the Turkish domestic legal order. The 2001 constitutional amendment package aimed to grant all international agreements supreme status over domestic laws, however, failed to pass due to the absence of sufficient votes for the legislation. For a fruitful discussion, see Levent Gönenç, 'The 2001 amendments to the 1982 constitution of Turkey.' (2004) 1.1 *Ankara Law Review* 89-109 at 97.

[14] Fulvio Maria Palombino, 'Compliance with International Judgments: Between Supremacy of International Law and National Fundamental Principles' (2015) 75 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 503-529 at 508.

[15] The 2004 amendment had played an outstanding role in changing and upgrading the Turkish domestic legal system by reflecting the desire for greater openness of Turkey to the international community in general, and into international human rights mechanisms in particular. From a domestic point of view, this constitutional recognition has become crucial in the context of the legal guarantees of national implementation of Turkey's international commitments, particularly those deriving from the ECHR. Turkey has been a party to the ECHR since 1954, but did not accept its binding jurisdiction until 1990.

[16] See also, Giulio Bartolini, 'A Universal Approach to International Law in Contemporary Constitutions: Does It Exist?' (2014) 3 *Cambridge Journal of International and Comparative Law* 1287-1320 at 1297 (claiming that 'comprehensive examination allows us to confirm that numerous contemporary constitutions proclaim the impossibility for international law sources to contradict the constitution. At a glance these provisions could still be

Turkish Constitution[17], the supremacy of the Constitution is an indisputable principle of the Turkish legal order.

Although Turkish courts have begun to make greater use of international law in domestic cases, especially over the past decade, compliance with international law is still a highly controversial matter.

First, structural ambiguity in the Turkish Constitution limits the constitutional impact of international law in the Turkish legal order. Although the Turkish Constitution provides that international agreements duly put into effect have the force of law, it fails to clearly define the role and rank of such treaties in the Turkish domestic legal hierarchy. Nor does it declare that these treaties are implemented directly (or, 'self-executing'). The jurisprudence of the Turkish high courts also fails to provide clarity or resolve ambiguity due to divergent rulings as discussed in the next chapter.

Secondly and even more significantly, the Turkish Constitution, which was adopted by a military regime in 1982, enshrines certain fundamental principles in its Preface and its 'irrevocable provisions', which are set out in Articles 2 and 3. These include the rule of law and the respect for democracy and human rights; but they also include some unusual ones such as the principles of secularism, the absolute supremacy of the will of the Turkish nation and the indivisible integrity of the – Sublime – Turkish state with its territory. A closer examination of judicial practices demonstrates that these so-called unusual principles form the *fundamentum* of the Turkish constitutional order. Thus, they cannot be debated or questioned even when there is potential conflict *vis-à-vis* international standards. According to one author, this may reflect the covert presence of Turkish cultural 'exceptionalism', i.e. the unique official Turkish identity that must be upheld above all else, even at the expense of violating Turkey's international obligations.[18] Turkish domestic courts, therefore, seem to be particularly reluctant to apply international law when a case touches upon linguistic, religious, and minority rights, and freedoms of expression and association.[19]

Additionally, Turkish courts have been hampered by the large number of cases on their dockets, a lack of a detailed knowledge of international law, the inadequate familiarity of domestic judges with particular foreign languages, and the scarcity of relevant materials in Turkish translation.

C. The Practice of Turkish Domestic Courts

The Turkish judiciary, having been modelled after the French system, is composed of the Court of Cassation (hereinafter, the *Yargıtay*), the Council of State (hereinafter, the *Danıştay* or the Council) and the Constitutional Court (*Anayasa Mahkemesi*, hereinafter, the AYM) at the top of its structure. However, the Yargıtay and the Danıştay are courts of appeal, whereas, the AYM is the only authentic Supreme Court in Turkey. From the domestic perspective of Turkish judges, in the interface between international law and domestic law, supremacy in the domestic legal hierarchy rests in the Turkish Constitution. Accordingly, when there is a conflict between international

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interpreted as indicating a 'nationalistic' constitutional approach that is skeptical of international law, as they tend to confirm that international values and obligations cannot be introduced into the domestic legal order when in contrast with the constitution').

[17] XI. Supremacy and binding force of the Constitution, Article 11: **"**The provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, and administrative authorities and other institutions and individuals."

[18] Esin Örücü, 'The Turkish Experience with Judicial Comparativism in Human Rights Cases', in Esin Örücü (ed.), *Judicial Comparativism in Human Rights Cases* (London, 2003) pp. 131-136.

[19] Baskın Oran, 'The Minority Concept and Rights in Turkey: The Lausanne Peace Treaty and Current Issues', in Zehra Arat (ed.) *Human Rights in Turkey* (University of Pennsylvania, 2007) pp. 35-57.

law and the Constitution, the latter prevails. The judicial practices of the Turkish high courts have been largely consistent in affirming the supremacy of the Turkish constitution. However, the more profound and complex questions as for the Turkish constitutional approach to international law and the increasing tension between Turkish fundamental principles and the supremacy of international law have given rise to different judicial decisions by these judicial organs.

I. The Court of Cassation (Yargıtay)

In a 1996 case the Yargıtay confirmed that the Turkish legal order is closer to the dualist approach than to the monist approach.[20] According to the Court, "the fact that the [*Turkish*] Constitution leaves international agreements outside the scope of constitutional review does not mean that these agreements have force above the domestic law or are placed on the equal footing as constitutional norms in the normative hierarchy. Indeed, the Constitution clearly states that international agreements have the force of a domestic law. It does not however provide a criteria for the resolution of conflict between an international agreement and a domestic law." At that time, the Yargıtay was of the opinion that an international treaty cannot serve as the sole basis for a domestic court's verdict when there are more concrete domestic rules.[21] Accordingly, in this case the Yargıtay noted that a Turkish judge could only resort to the general principles (*lex superior, lex specialis and lex posterior*) in case of a conflict. Only when there is a lacuna in the legal system can that be filled by a provision of an international treaty.[22] A striking example of this approach is that the Yargıtay has, for many years, relied on the – Former – Turkish Law on International Private and Procedural Law No. 2675 and a Decree of 1931 by the Turkish Council of Ministers, rather than on the 1961 Vienna Convention on Consular Relations (VCCR), to which Turkey became party in 1975, or on international custom, when dealing with cases involving diplomatic immunity.[23]

Therefore, prior to the 2004 amendment, Turkish domestic judges tended to render judgement "[…] in accordance with the Constitution, laws, and their personal conviction conforming with the law" as set out in Article 138 of the Constitution. The fact that international treaties are not explicitly described in this domestic hierarchy has greatly limited the domestic implementation of international law. Even after the 2004 amendment, there is no significant progress in the approach of Turkish judges to international law. This is due, at least in part, to the fact that Article 90/5 in the 2004 amendment was not accompanied by a further amendment in Article 138 of the Turkish Constitution.

Nonetheless, beginning with the 2004 amendment, the Yargıtay began to change its approach significantly, thereby explicitly recognizing the importance of replicating all effects of international law in the Turkish national legal system. To this end, several decisions of the Yargıtay can be read as a confirming the direct applicability of international treaties in the Turkish juridical order. In a noteworthy case, the Yargıtay

[20] The Yargıtay, Appeal Judgement, 21st Civil Chamber, E. 1996/2261, K. 1996/5790, K.T. 18.10.1996.
[21] Pazarcı, 'Uluslararasi Hukuk Dersleri', p. 25.
[22] The Yargıtay has been consistent with this affirmation in its different judgments since the 2004 amendment. See, i.a., The Yargıtay, Appeal Judgement, 8th Criminal Chamber, E. 1995/17577, K. 1996/2011, K.T. 12.02.1996; The Yargıtay, Appeal Judgement, 4th Criminal Chamber, E. 1999/10183, K. 2000/780, K.T. 09.02.2000.
[23] See i.a., The Yargıtay, Appeal Judgements, 6th Civil Chamber, E.1984/3729, K.1984/5731, K. T. 8.5.1984; 13th Civil Chamber, E. 1989/3896, K. 1989/6648, K.T. 16.11.1989; Assembly of Civil Chamber, E.1991/6299, K.1991/406, K.T. 18.9.1991; 10th Civil Chamber, E.1993/5620, K.1993/10875, K. T. 14.10.1993.

held that "according to Article 1 of the CMR Convention [the Convention on the Contract for the International Carriage of Goods by Road], this convention shall apply to all contracts for the carriage of cargo by land and by car, regardless of the residence or nationality of the parties, provided that at least one of the designated places for loading and delivery is in two separate countries. Although the carriage provisions of the TTK [the Turkish Commercial Code] are still in force, the CMR Convention, which entered into force later for international carriage and became a domestic law, should be directly implemented." [24]

In a similar vein, in 2010 the Yargıtay considered a case where the Turkish first instance court had decided to 'transfer and deliver' the inheritance of a foreign national to the Turkish Treasury.[25] In reaching its verdict, the Court first discussed the place of international law in the Turkish domestic setting and then ruled that the decision of transferring and delivering the inheritance of a foreign national by a Turkish court would be a breach of Article 5 (g) of the VCCR.[26] The Court further emphasized that, in light of Article 46/5 of the "Consular Agreement between the Republic of Turkey and Turkmenistan" of 1994, the consular officer of Turkmenistan may request the delivery of the heritage goods of a Turkmen national to him and has the right to send the goods to the persons concerned provided the value of the inheritance is insignificant. By giving full effect to the purposes for which the rights and functions of consular officers are intended, the Yargıtay overturned the decision of the first instance court.

Although the case law of the Yargıtay – to some extent – provides valuable insights for the direct applicability of international legal instruments in the Turkish domestic order, the Court and other Turkish domestic courts generally become somewhat hostile when they must decide a case that is susceptible to disregard of the fundamental principles of the Turkish 'exceptionalism'. Cases that touch upon linguistic, religious, and minority rights, and freedoms of expression and association are particularly illuminating in this regard.

A salient example of the Yargıtay's increasing need to preserve Turkey's sovereignty-sensitive areas, is found in its ruling on the legal status of the Fener Greek Patriarchate in 2007, a topic which has long been a matter of grave contention almost since the Lausanne Treaty of 1923.[27] Although the Lausanne Treaty makes no explicit reference to the status of the Patriarchate, in sub-commission negotiations during the Lausanne Peace Conference it was eventually decided that the Patriarchate would bear 'purely religious matters', thus agreeing to be stripped of its 'political and administrative' character bestowed on it by the Ottoman authorities.[28] When the Turkish republic was established, the Patriarchate was treated as a religious institution –subject to the Turkish law- serving only the Rum Orthodox minority in Istanbul in reciprocal terms with the status to that of the Turkish muftis in Western Thrace. Thus the official status recognized in Turkey challenges the status of the Patriarchate as the '*primus inter pares* (first among equals)' of all autocephalous Orthodox Christian churches. A case arose, addressing the decision of the Patriarchate to withdraw

[24] The Yargıtay, Appeal Judgement, 11th Civil Chamber, E. 2005/13676, K. 2007/521, K.T. 22.01.2007 (*emphasis added*)

[25] The Yargıtay, Appeal Judgement, 2nd Civil Chamber, E. 2009/16487, K. 2010/20342, K.T. 06.12.2010

[26] According to Article 5 (g) of the VCCR, consular function includes "safeguarding the interests of nationals, both individuals and bodies corporate, of the sending States in cases of succession *mortis causa* in the territory of the receiving State, in accordance with the laws and regulations of the receiving State…"

[27] Prodromos Yannas, 'Leveraging Norms: The ECHR and Turkey's Human Rights Reforms', in Zehra Arat (ed.), *Human Rights in Turkey* (University of Pennsylvania, 2007) pp. 57-71.

[28] Kemal Başlar, 'Case Analysis: The Ecumenical Status of the Fener Greek Patriarchate' (2008) 14 *Uluslararası Hukuk ve Politika Dergisi* 200-209.

clerical powers of a Bulgarian Orthodox priest for failing to acknowledge the ecumenical title of the Patriarchate by omitting the name of the Patriarch from the Orthodox liturgy.[29] In its decision, the Yargıtay supported Turkey's long-held position, stating that the Patriarchate "is a religious institution which has no legal personality and which has religious powers only over the persons of a certain minority in the Turkish Republic…" The Court has further emphasized that "[s]ince it will openly contradict with the principle of equality enshrined in Article 10 of the Constitution, it is unacceptable for a sovereign state to implement a law as regards the minorities living on its territories which is different from that applicable to its own citizens and grant them a special status by way of recognizing them with certain privileges which are denied for even the majority. Therefore, there is no legal basis for the claim that the patriarchate is 'ecumenical'".

Leaving aside the bigger question of whether a (secular) court has any competence or jurisdiction to rule on the title or status of a religious leader – as it may possibly be outside the realm of the law, the 2007 judgment of the Yargıtay is still 'troubling in the sense that the fact that a national court seems to consider itself entitled to interfere in this way with the internal ecclesiastical status of a religious leader may easily lead to a violation of Article 9' of the ECHR.[30]

It must be underlined that freedom of religion as protected by Article 9 ECHR covers the right of religious communities to determine the spiritual and ecclesiastical status and titles of their leaders without government interference.[31] Accordingly, the right of the Patriarchate to title itself ecumenical in Turkey cannot be set aside and limited with a reference to the Lausanne Treaty as the fundamental rights protected by the ECHR clearly take precedence over it.

The Yargıtay, however, upheld the decision of the first instance criminal court, noting that the withdrawal decision by itself was insufficient to infringe the freedom of religion of the Bulgarian priest under Article 115/2 of the Turkish Penal Code No. 5237 which penalizes the 'prevention of mass religious service or worship by use of violence or threat or performance of any act contrary to the law'.[32]

II. The Council of State (Danıştay*)*

The Council of State (the *Danıştay)* recognizes and enforces international human rights norms in the Turkish legal order. It has also increasingly borrowed from the reasoning of the ECtHR in its interpretation of human rights norms and analysis of relations between international and domestic norms. In its decision no. 2006/4503 relating to interim relief measures in the *Turkcell* case, involving a leading GSM operator, the Danıştay had to evaluate the right to a fair trial in light of the 2004 constitutional amendment. The *Danıştay* stated that following the constitutional

[29] The Yargıtay, Appeal Judgement, 4th Criminal Chamber, E. 2005/10694, K. 2007/5603, K.T. 13.06.2007

[30] See, the Venice Commission, 'Opinion on the Legal Status of Religious Communities in Turkey and the Right of the Orthodox Patriarchate of Istanbul to Use the Adjective 'Ecumenical'', CDL-AD (2010) 005, 15 March 2010, pp. 21-22.

[31] This was confirmed by the European Court of Human Rights (ECtHR) in a case of 2009 in which it held that the Bulgarian authorities had breached Article 9 by trying to interfere in an internal dispute over leadership in the Bulgarian Orthodox Church. See, ECtHR, Holy Synod of the Bulgarian Orthodox Church and Others v. Bulgaria, App nos 412/03 and 35677/04, 22 January 2009, para 104.

[32] Restriction of freedom of belief, conception, conviction, Article 115: **"**(1) Any person who forces another person by using violence or treat to disclose or change his religious, political, philosophical beliefs, conceptions and convictions, or prevents discloser and publication of the same, is punished with imprisonment from one year to three years. (2) In case of prevention of mass religious service or worship by use of violence or threat or performance of any act contrary to the law, the punishment to be imposed is determined according to the above subsection."

amendment of 2004, "it was accepted that provisions of international agreements dealing with fundamental rights and freedoms shall take precedence over national statutes in domestic law. Consequently, Article 90 mandates that provisions of the ECHR relating to the right to a fair trial shall be applied with priority over provisions with respect to the same right in national laws." And, when the Danıştay has found that national laws regulating the right to a fair trial are not substantial enough, it has turned to the case law of the European Court: 'but our domestic law contains no statutory provision defining this right. The definition of this right is contained in article 6 of the European Convention on Human Rights […] and has been interpreted in judgments of the European Court of Human Rights. According to the case law of the European Court of Human Rights, the existence of legal remedies against the judgments of courts of first instance is a *conditio sine qua non* of the right to a fair trial'.[33] In a similar vein, the Council annulled the judgment of an administrative court which had approved the decision of a local education body to cut the salary of a teacher following participation in a professional strike. The Council stated that participation in professional strikes is not considered an absence without reason either according to article 11 of the ECHR or in the jurisprudence of the ECtHR. Hence, it was impossible to implement a provision of national law which provide for cuts in salaries of workers who do not show up in their workplace without permission.[34]

Since 2004, the Danıştay has thus broadly construed the constitutional amendment with regard to international human rights norms in the Turkish legal order,and has overruled decisions of lower courts which do not comply with international law. The Danıştay's efforts to harmonize interpretation of national laws with international obligations of Turkey have even reached beyond the scope of the ECHR. To illustrate, the Danıştay ruling in case no-2009/4526 summarizes its posture on conflicts between international treaties and national laws. The aforementioned case involved a request by a professional union to enforce its right to participate in meetings of the Disciplinary Committee of Central Election Commission when it was considering disciplinary proceedings against its members. The union also asked to be notified in advance about any disciplinary procedure initiated by the Committee against its members. This request was denied by the Administrative Court of Ankara. The Danıştay found the denial unjustified and annulled the decision of the Administrative Court. In reaching its final decision, the Danıştay stated that 'this modification [i.e. the 2004 constitutional amendment] covered every fundamental right and freedom provided in all of international treaties duly put into force. Consequently, when it is the matter of workers to join professional unions and of their professional life, ILO Convention [no. 87] concerning Freedom of Association and Protection of the Right to Organise and ILO Convention [no. 151] concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service, which offer more advanced protection of workers' rights in this regard, shall prevail'.[35]

In case no. 2009-1637, the Danıştay sat as a Grand Chamber to evaluate a request by the Turkish Government to annul judgment no. 2008/7969 of the 10th Chamber of the Council. In that decision, the 10th Chamber cancelled the gag order imposed by the Government due to recent terrorist attacks in the Hakkari region because the order

[33] The Danıştay, Judgment E2006/4503, ILDC 964 (TR2006), Oxford Reports on International Law.
[34] The Danıştay, Judgment E. 2013/5972, K. 2013/9647, K.T. 4.12.2013.
[35] The Danıştay, Judgment E. 2009/45263, K. 2012/1924, K.T. 4.04.2012. (emphasis added). For a similar case when the Danıştay requested the administration to implement provisions of the ILO Convention on Equal Treatment (Social Security) relating to widow compensations, see The Danıştay, Judgment E. 2012/4392, K. 2013/6228, K.T. 07.06.2013.

violated the freedom of expression. While the Grand Chamber of the Danıştay agreed that the Constitution provided for lawful restrictions to the exercise of freedom of expression, it also commented that the freedom of expression was an essential element of the rule of law. The Grand Chamber acknowledged that the necessity of protecting the indivisible integrity of the state is among the legitimate restrictions to the freedom of expression. Nonetheless, in this specific case, the Grand Chamber of the Danıştay opted to align with the European human rights law. It stated that: "in this context the Constitution should be considered together with the provisions of the European Convention on Human Rights as well as the jurisprudence of the European Court of Human Rights, and it is understood that restrictions to the freedom of expression should be strictly prescribed in law, carry legitimate purpose, and be necessary in a democratic society as well as respect be used in a proportional manner". Following this strict interpretation imposed by the European public order, the Grand Chamber found the state imposition of a general gag order on reporting terrorist attacks was a violation of the principle of proportionality.[36]

The cases cited above establish the consistent approach of the Danıştay where it requires lower courts to construe national laws in harmony with international treaties and, especially, in conformity with international human rights norms. However, some cases litigated well after the entry into force of the 2004 amendment expose a different vision of the Danıştay regarding international law: a discretionary approach that protects executive power by construing national laws, or even international norms, in abstraction from international human rights norms. The extension of the *Kadi* judicial imbroglio into the Turkish legal order is an interesting example where the Danıştay seemingly enforced the supremacy of international law while at the same time ignoring considerations of the international rule of law and international human rights norms. In case no. 2006/2824, the Danıştay's Board of Administrative Affairs annulled the decision of the 10th Chamber of the Danıştay.[37] The 10th Chamber had approved the demand of Kadi's representatives to annul the Council of Ministers decision to freeze Kadi's financial and economic interests in Turkey, stipulating that it was against the rule of law to freeze financial assets of an individual in the absence of a court decision. The Danıştay's Board annulled the Chamber's judgment, stating that the Turkish state has an obligation to honour its international obligations stemming from the Charter of the United Nations. It stipulated that the Council of Ministers decision was indeed the enforcement of the UNSC resolution, which had listed Kadi among the 131 persons who aid international terrorism. For Danıştay's Board, the UNSC is competent to require UN member states to enforce these resolutions based on Article 28 of the UN Charter. More interestingly, it elaborated that member states must recognize the direct applicability of UNSC Chapter VII resolutions, as Article 48 of the UN Charter stipulates that 'such decisions shall be carried out by the Members of the United Nations directly'. The Board reasoned that the Turkish state was obliged to enforce the UNSC resolution in the Turkish legal system directly without any additional legislative action. It also went further by stating that while decisions of the Council of Ministers are subject to appeal as administrative procedures, the specific decision enforcing the UNSC resolution could not be appealed because the UN system already provided for appeals against the decisions of the Sanctions committee. Even if the wording and reasoning of the Danıştay in this decision seem, superficially, to be international law-friendly, a closer scrutiny reveals

[36] The Danıştay, Grand Chamber Judgment E. 2009/1637, K. 2013/1160, K.T. 01.04.2013

[37] The Danıştay, Judgment E. 2006/2824, K. 2007/115, K.T. 22.02.2007. For the text and analysis of this decision, see ILDC 311(TR2007), Oxford Reports on International Law.

an underlying preference to defer to the state at the expense of human rights and the rule of law as promoted by the 2004 amendment. Hence this decision became a focus of scholarly criticism both in Turkey and abroad. Scholars found it problematic that the Danıştay referred to the UN procedures for appeals instead of to national judicial procedures.[38] By denying judicial remedies, the Danıştay clearly ignored both the international human rights obligations of Turkey and the well-established constitutional principle in the Turkish legal order, which allows restrictions to fundamental rights and freedoms only on the basis of law.[39]

III. The Turkish Constitutional Court (AYM)

The AYM's approach toward international law reflects a certain amount of stability even though the Constitution itself has been modified several times over the years. However, this approach is not monolithic. Variations are discernible depending on the categories of norms in question, revealing at least three distinct positions with respect to international law. First, the AYM adheres to a position similar to the one-voice doctrine, which reflects a judicial respect for the state activities impinging on the validity and efficacy of foreign policies.[40] Second, the Court gives precedence to international human rights norms when they conflict with domestic laws. Third, the Court declines to recognize the precedence of international norms, or at least avoids the question of the supremacy of international law, whenever it must enforce fundamental norms of the Constitution.

The Court holds the view that judicial organs must consider the fact that Turkey is an active and responsible member of international community and as such it has certain international obligations. Whenever a norm or a practice stemming from a foreign policy of the Turkish state is scrutinized, the Court should seek to construe the case in a way that avoids putting the Turkish state and Government in a difficult situation in the international arena. As explained, "the 'one voice principle' is the principle according to which, in light of the delicate position of the government in the conduct of international relations, national judges should never totally "divorce" themselves from the positions expressed by the government"[41]. For the AYM, this logic explains the absence of a provision for constitutional review of treaties in the Turkish constitutional order. When the Court was requested to review the constitutionality of an international treaty, it stipulated that annulment of treaties based on their unconstitutionality would unavoidably render the State incapable of honoring its international obligations and this would put the state in a difficult position before international law. This could also result in sanctions against the state and could endanger its reputation in the international arena. It is precisely for these reasons that treaties were omitted from the scope of constitutional review in the Turkish legal order.[42]

In 2011, the Court had to evaluate an application concerning the constitutionality of Law no. 6004 on the Establishment and Duties of the Ministry of Foreign Affairs of

[38] Andre Nollkaemper, *National courts and the international rule of law* (Oxford University Press, 2011), p. 27.
[39] See analysis of Leyla Uyar in ILDC 311(TR2007), Oxford Reports on International Law.
[40] For a detailed discussion of the doctrine, see: David H. Moore, 'Beyond One Voice' (2013) 98 *Minnesota Law Review* 953-1045. For a discussion of the doctrine in the context of the Italian constitutional order, see: Guiseppe Cataldi, 'A historical decision of the Italian Constitutional Court on the balance between the Italian legal order's fundamental values and customary international law' (2015) 24 *Italian Yearbook of International Law* 37-52.
[41] See Cataldi, 'A historical decision of the Italian Constitutional Court' p. 48.
[42] The AYM, E. 2011/48, K. 2012/88, K.T. 22.11.2013-28829

the Republic of Turkey. This law was worded in a way that authorized ambassadors to represent 'the Turkish Government' along with the Turkish State and the Turkish President. The opposition MPs who brought the case argued that the law was in conflict with the Turkish Constitution because ambassadors should represent only the State and President, who are considered to be impartial in the Turkish legal order, not the Government. In explaining their position, the applicants stated that governments primarily serve their political interests, but ambassadors are required to have no political allegiance. However, the AYM rejected the request by holding that "it is a general rule that foreign relations are conducted by governments. The Republic of Turkey, which is the rule of law-abiding State respecting universal principles of law, also conducts its foreign relations in conformity with diplomatic customs and necessities of the international legal system. […] Modifications made by Law 6004 are thus understood as an effort to clarify the situation which is in conformity with international customs and the Constitution".[43]

Even if the AYM does not sanction supremacy of international law in general, it acknowledges that specific international treaties may be accorded the utmost importance and hold a privileged position in the Turkish legal order. Long before the constitutional modification of 2004, the Constitutional Court recognized the special status of human rights treaties. When clarifying the principle of presumption of innocence in its decision of 29 January 1980, the Court held that the "imperative and binding content of the declaration [Universal Declaration of Human Rights] and the agreement [European Convention of Human Rights] in question, which is right for defendants, also carries characteristic of supreme and universal legal rule and as such strengthens the principle of presumption of innocence which has solid base in our legal order as guarantee of human rights and freedoms".[44] In its decision no. 1990/15, the AYM held that "treaties that could be qualified as supra-constitutional norms eliminated all forms of discrimination between children".[45] Following the 2004 amendment which recognized the primacy of international human rights norms over domestic norms, the Court stated that: "when courts determine there is a conflict between the provisions of domestic laws on individual rights and freedoms and those of international treaties, it is evident that they must implement provisions of international treaties".[46] For the AYM, "this rule which aims to bring closer Turkey's legal order with principles and practices which prevail in modern democracies, makes it necessary to take into account standards of fundamental rights and freedoms established by international organizations where Turkey acts as a founding or member state".[47]

The case of Akat-Eksi, which addressed the possibility for a woman to keep only her maiden name after marriage, illustrates the evolution of the AYM's jurisprudence on the primacy of international human rights norms. When Sevim Akat-Eksi brought a case before the Fatih Family Court, seeking to change her current surname Akat-Eski to Eski, thus keeping only her maiden name, the Family Court requested the Constitutional Court to abolish those provisions of Turkish law which prohibited such a practice, asserting that they were incompatible with Turkish constitutional law. But in its decision 2011/49, the AYM dismissed the request. The Court held that the practice of privileging one of the parties to the marriage in defining the policy of

[43] The AYM, E. 2010/89, K. 2011/179, K.T. 05.04.201-28225
[44] The AYM, E. 1979/38, K. 1980/11, K.T. 15.5.1980-16989
[45] The AYM, E. 1990/18, K.1991/5, K.T. 27.03.1992-21184
[46] The AYM, E. 2008/22, K. 2010/82, K.T. 17.6.2010-27812
[47] The AYM, E. 2007/1, K. 2009/4, K.T. 31/12/2009

family names for the sake of public interest and public order, and especially to protect unity and integrity of family, was compatible with the principle of rule of law.[48]

After the introduction of the mechanism of individual complaint to the AYM in 2012, Akat-Eski submitted her request to the Constitutional Court again, this time in the form of individual complaint. And this time the decision of the Court was different.. Her request was granted. The Court found that Akat-Eski's right to personal development was violated by refusing her request to keep her maiden name, because the provisions of Turkish law regulating the policy of family names is contrary to European human rights norms. With respect to the conflict between domestic norms and international law, the Court elaborated that article 90/5 obliges implementers of law, including judicial organs, to enforce international human rights norms at the expense of domestic norms when a conflict between the two arises. It went even further by affirming that this provision (Article 90/5) pertains to 'indirect abolition' as it removes the possibility of implementation of domestic norms conflicting with international human rights norms.[49]

However, the AYM is not consistent in maintaining this kind of progressive interpretation of relationships between international law and Turkish domestic law. Reluctance of the Court to enforce international law is most evident in cases concerning the closure of parties. Article 68§4 of the Constitution provides that "The statutes and programs, as well as the activities of political parties, shall not be contrary to the independence of the State, its indivisible integrity with its territory and nation, human rights, the principles of equality and rule of law, sovereignty of the nation, the principles of the democratic and secular republic; they shall not aim to promote or establish class or group dictatorship or dictatorship of any kind, nor shall they incite citizens to crime." Article 69§4-6 provides that "the dissolution of political parties shall be decided finally by the Constitutional Court […] The decision to dissolve a political party permanently owing to activities violating the provisions of the fourth paragraph of Article 68 may be rendered only when the Constitutional Court determines that the party in question has become a centre for the execution of such activities".

Out of 19 parties closed by the AYM after the adoption of 1982 Constitution, 12 were closed because the Court had found them in breach of the principle of the 'indivisible integrity with its territory and nation' underlined in the Constitution.[50] Prior to 2004, the Court followed a strict interpretation of Article 90 and rejected supremacy of international norms over conflicting domestic norms. When the 'Democratic Peace Movement Party' defended against closure by invoking the right to liberty of expression protected by international agreements, the Court argued that: "Article 90 says 'international agreements duly put into effect are equal to law'. According to this rule, the provisions of the ECHR have the force of laws. But, Law no. 2820 on Political Parties has priority here due to its character of special law. Moreover, the ECHR does not include concrete norms that could be applied to party closure cases. Due to these considerations, there exists no possibility to directly apply relevant provisions of the ECHR by ignoring rules of Political Parties Act in this case".[51]

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[48] The AYM, E. 2009/85, K. 2001/43, K.T. 21.10.2011-28091

[49] The AYM, Akat Eşki, Constitutional complaint, BN 2013/2187, ILDC 2155 (TR 2013), 19th December 2013

[50] Hikmet Tulen, 'Son Üç Kararı Çerçevesinde Anayasa Mahkemesinin Siyasi Partilerin Kapatılmasına İliskin Içtihadı' (The doctrine of the Constitutional Court relating to closure of political parties under the light of its three latest decisions)" 2 December 2010, available at http://www.anayasa.gov.tr/files/insan_haklari_mahkemesi/sunumlar/TulenSiyasiPartilerinKapatilmasi.pdf (accessed on 29 June 2018)

[51] The AYM, E. 1996/3, K. 1997/3, K.T. 02.06.2000-24067

Frequently, the Court also referred to the right of States to self-defence against threats to their territorial integrity and political structure. For the Court, "in international law, the right to self-defence is defined as a competence to maintain the existence of states and to take measures against threats to their independence and political structure. […] International norms do not provide for the possibility to disrupt the unity of state, territory and nation".[52]

The Court's position on enforcing fundamental norms of the Turkish state order has not changed substantially, not even after recognition of the supremacy of international human rights norms in 2004. Three cases on closure of political parties were brought before the AYM by public prosecutors following the 2004 amendment. In two of these cases, the AYM found the political parties in question (the AKP and the DTP) in breach of Article 68§4 of the Constitution. The AYM ruled to close the Democratic Society Party (DTP) in 2009. In the case of AKP,[53] the ruling party since 2002, the AYM found the party in breach of the Constitution but nevertheless it decided only to deprive the party of State aid, thus implementing provisions of Article 69§7 of the Constitution for the first time.[54]

In these decisions, the AYM shifted its reasoning from enforcing the right to self-defense of the State to the obligation to protect democratic order. In its decision closing the DTP, the Court underlined the new status of international human rights norms in the Turkish constitutional order. It further stated: "[…] concrete norms of the Constitution, considered together with European Convention on Human Rights, the ECHR jurisprudence concerning closure of political parties, and criteria defined by the Venice Commission, aim to safeguard political freedoms as necessary part of classical democracy logic provided in the Constitution on one hand, but they also aim to protect democratic order by sanctioning closure of parties as a last resort on the other hand".[55] The only difference between the AYM's decisions before and after the 2004 amendment seems to be a change in the form of argument rather than a change in substance. Prior to 2004 the AYM decisions to close down parties were justified as necessary to protect the interests and integrity of the State. Post 2004 the Court switched to an argument that closure decisions are based on the necessity to safeguard democratic order.

D. Conclusion

What do the practices of Turkish courts reveal about tensions arising from domestic implementation of international rules? To what extent do those practices support the hypotheses raised in this volume? The main hypotheses presented in the Editor's Introduction will be discussed as follows.

First, it is stated that 'conflicts between supremacy of international law and national fundamental principles give rise to a conundrum which, as such, does not lend itself to any formal solution'. This statement aptly describes the situation in Turkey. As a State party to the ECHR and an official candidate to accession to the EU, the Turkish government proposed to solve tensions between international norms and domestic laws by the 2004 constitutional amendment which states that 'in the case of a conflict between international agreements, duly put into effect, concerning fundamental rights

[52] The AYM, E. 1996/1, K. 1997/1, K.T. 26.6.1998-23384

[53] The AYM, E. 2008/1, K. 2008/2, K.T. 24 October 2008

[54] Article 69(7) states that "Instead of dissolving it permanently in accordance with the above-mentioned paragraphs, the Constitutional Court may rule the concerned party to be deprived of state aid wholly or in part with respect to intensity of the actions brought before the court"

[55] The AYM, E. 2007/1, K. 2009/4, K.T. 11 December 2009-27243.

and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail'. However, subsequent practice of Turkish courts reveals that implementation of the 2004 amendment has not always been straightforward. On one hand, the high courts in Turkey took note of the amendment and have since been giving more room to enforcement of international law in the domestic legal order. Before the 2004 amendment Turkish courts continued enforcing domestic laws in violation of international responsibilities of the Turkish state by implementing general principles of *lex posterior* or *lex specialis*.[56] This argument has largely been dropped from judicial practice in Turkey since the 2004 constitutional modification. On the other hand, introduction of a formal rule on the supremacy of international law over domestic norms has not relieved all tension between the two. This is most evident when Turkish courts must weigh international norms against national fundamental principles. The Yargıtay's judgment on the legal status of the *Fener Greek Patriarchate* in 2007 (see above Section C (I)), or the AYM's decision *on closure of the Democratic Society Party* in 2009 (see above Section C (III)) were both decided after the 2004 amendment and they both differ from their own previous practices which mostly protected national fundamental values and principles at the expense of relevant international human rights norms. These examples clearly demonstrate the difficulty in resolving conflicts between international law and domestic law by simply introducing formal rules or amending the Constitution to be more specific.

The second hypothesis is based on the premise that 'the supremacy of international law is not infringed where the national value is susceptible to be internationalized'. According to this argument, national judges are sometimes asked to protect international norms, not from domestic norms but rather from other international norms. In this kind of situation, for Professor Palombino, a national judge is simply contributing to coordination between international norms. However, it is difficult to find clear evidence in support of this argument in Turkish judicial practices. The Danıştay's *Kadi* case could be deemed to confirm this argument. The Danıştay effectively referred to the UNSC resolutions and to the principle of loyalty in the UN Charter to justify its decision.[57] However, a closer look at the judgment, which resulted in a denial of judicial remedies,[58] reveals a concern for protecting the executive's prerogatives rather than a genuine effort to coordinate between international norms. On the other hand, the Turkish practices bring to light the adaptive capacity of national judges to respond to the new reality of increasing intrusion of international norms. National judges can indeed rationalize this material reality to improve their strategic decision-making capacity. In fact, national judges may refer to norms of general international law instead of national values to justify refusal of enforcement of international human rights law. This was indeed the logic behind the Danıştay's judgment in the *Kadi* case.

The third hypothesis is that 'national courts oppose a reasonable resistance to international norms contrary to national fundamental principles'. For Professor Palombino, courts show reasonable resistance when they provide 'an illustration of the reasons which justify the resort to fundamental principles as a tool to disregard international law'. For him, this kind of reasoning can be considered a 'tacit confirmation' of international law's supremacy. While Turkish judicial practice can be effectively modelled under the first two hypotheses, it is difficult to find support

[56] See above notes 8, 20, **Error! Bookmark not defined.**, 53 and 55.
[57] See above note 37.
[58] See above notes 38 and 39.

for the third hypothesis. This chapter provides a critical account of the engagement of the Turkish courts with international law in the context of the constitutional amendment of 2004, which consecrated formal supremacy of international human rights norms over domestic laws. Three high courts of Turkey embraced this amendment positively. However, when they deal with cases relating to the bloc of 'irrevocable provisions' of the Turkish constitution that have been described as the *fundamentum* of Turkish constitutional order,[59] courts usually oppose or resist enforcement of international norms. However, their opposition is implicit in form, as they omit any reference to conflicting international norms when enforcing national fundamental principles. While Turkish courts have gone to great lengths to explain implications of the 2004 amendment in many different cases. referring both to international norms and to the ECtHR jurisprudence, they choose expedient arguments and omit mention of any international framework when they reject enforcement of the same norms when they conflict with national fundamental norms. This ongoing practice by the Turkish national courts can reasonably be interpreted as evidence of a continuing resistance to the supremacy of international law, notwithstanding the existence of a formal constitutional provision that supports giving precedence to international norms.

[59] See above note 18.