

INTERNATIONAL LAW IN THE TURKISH LEGAL ORDER: TRANSNATIONAL JUDICIAL DIALOGUE AND THE TURKISH CONSTITUTIONAL COURT

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Abstract

Much has been written on the increasing significance of domestic courts in the international realm. However, the role of the Turkish constitutional judges in determining and orienting the relationship between international law and Turkish domestic law has rarely been subject to legal analysis. Literature on the involvement of the Turkish judges in transnational judicial dialogue is also almost non-existent. As far as the existing Turkish literature is concerned, much of the contemporary writing on the subject tends to focus on the hierarchical position of international agreements in the Turkish legal order. This paper intends to fill an important gap in the scholarship by providing an analysis of the decisions of the Turkish Constitutional Court (TCC) and by illuminating the TCC's role as implementers or non-implementers of international law, and the scope of their participation in transnational judicial dialogue. Relevant sub-questions concern the extent to which the stance of the TCC's judges may or may not alleviate concerns of the international community on the rule of law in Turkey, and whether their engagement in international law is substantial enough to limit and moderate the excesses of different political forces, including those in power, engaged in the domestic power struggle.

Keywords: judicial dialogue; the Turkish Constitutional Court; rule of law; international law; foreign law.

1. INTERNATIONAL RULE OF LAW, DOMESTIC COURTS AND TRANSNATIONAL JUDICIAL DIALOGUE: THE CASE OF THE TURKISH CONSTITUTIONAL COURT

International legal obligations of States are increasingly becoming “inward-looking” in that they are more often expected to produce effects within the domes-

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tic legal orders of States.¹ More and more domains traditionally belonging to the domestic realm are regulated by multilateral institutions and regimes. There is also a growing penetration of international human rights law into domestic law. In this context, domestic courts are naturally turning into important players at the intersection of international law with domestic legal orders as they become confronted with international law in a variety of domestic legal settings. This, in turn, leads to more engagement between international law and domestic courts, as well as increased interaction between courts of different orders belonging to different national/international legal orders.

There is an emerging body of literature on the increasing role and importance of domestic judges in determining and orienting relationships between international law and domestic law through constructing dialogues and conversations between national constitutional judges and their international peers based on the principle of reciprocal influencing.² Studies on judicial dialogue are all explicitly or implicitly part of a larger and more substantial debate, that on the possibility of an international rule of law and on the role domestic courts can play in the advancement of this objective. Several scholars have attempted to provide a general framework for analysing mutual relationships between national courts and international courts in order to identify the consequences of their cooperation – or lack thereof – for the advancement of an international rule of law and normative development of international law.

The focus on the international rule of law as the main goal of international law, and the increasing entanglement of domestic legal orders with international law, creates expectations and assumptions as to the decisions of domestic courts. If one can assume that the international rule of law is an objective shared both by the international community and its State constituencies, then a convergence between domestic courts' general attitude toward and respect for international law is a reasonable expectation. A familiarity among domestic courts about the position and decisions of their foreign peers towards an international rule of law can then also be assumed. Consciousness of a shared objective – the international rule of law – sets a foundation for solidarity among domestic courts in reaching that objective.

The scholarship on judicial dialogue has become more substantial in content and scope over the last two decades. However, it still suffers from important gaps. First, the term “judicial dialogue” is used to describe different situations, lending some ambiguity to this terminology. Judicial dialogue can be relevant to describe

¹ TZANAKOPOULOS, Final Report of the Study Group on Principles on the Engagement of Domestic Courts with the International Law, International Law Association, 2016.

² See, i.e. NOLLKAEMPER, *National Courts and the International Rule of Law*, Oxford, 2011; SHELTON (ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion*, Oxford, 2011; HALJAN, *Separating Powers: International Law before National Courts*, TMC Asser Press, 2013; and DELMAS-MARTY, *Les forces imaginantes du droit: La fondation des pouvoirs*, Paris, 2007.

when judges “use international materials to interpret the Constitution”;³ or, when domestic courts use “opinions of foreign courts [...] to assist in articulating rules and decisions in their own domestic cases”;⁴ and even leading to “the emergence of a global jurisprudence, especially in the area of human rights”.⁵ Judicial dialogue can also refer to informal dialogue⁶ between representatives of international and domestic judiciaries.

This type of judicial dialogue can take different forms. Slaughter elaborates on three types of transjudicial conversation: horizontal, vertical, and mixed. Horizontal dialogue refers to transjudicial communication between courts of the same status. Horizontal dialogue takes place when the Turkish Constitutional Court refers, for example, to the decisions of the French Constitutional Court, or the Inter-American Court of Human Rights refers to decisions of the European Court of Human Rights (ECtHR). Vertical dialogue describes transjudicial communication between national and supranational courts. The decisions of the European Court of Justice or ECtHR are the basis of such vertical judicial dialogue. Mixed dialogue, or mixed vertical-horizontal communication occurs, for example, when supranational courts initiate horizontal communication among national courts.⁷

Another visible shortcoming is that the literature is limited to a handful of States and regions. Judicial dialogue between European supranational courts and national courts and among European constitutional courts is well covered.⁸ Recent studies have also taken into account certain practices of regional courts beyond Europe,

³ BODANSKY, “The Use of International Sources in Constitutional Opinion”, *Georgia Journal of International & Comparative Law*, 2004, p. 421 ff.

⁴ HALJAN, *cit. supra* note 2, p. 2.

⁵ LAMBERT and GOODWIN-GILL, *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union*, Cambridge, 2010, p. 2.

⁶ National and international judges frequently come together at different annual meetings, conferences or workshops. To mark the opening of the judicial year, the European Court of Human Rights regularly organises seminars where judges from the ECHR and other national and international courts exchange and interact around different themes. There are also different networks bringing together judges from different jurisdictions such as the International Hague Network of Judges.

⁷ SLAUGHTER, “A Typology of Transjudicial Communication”, *University of Richmond Law Review*, 1994, p. 99 ff., pp. 99-100, 112-113.

⁸ Decaux sees the phenomenon of judicial dialogue as intrinsically related to and derived from constant interactions between national courts in Europe and the European supranational courts *inter alia* the European Court of Justice and the European Court of Human Rights. He argues that “there is no longer a ‘sovereign jurisdiction’ that has the last word, because other judges are able to judge the judges, whether in Luxembourg or Strasbourg. This remarkable development, which creates a permanent interaction between national and European tribunals, has been systematized in doctrine, both in the area of judicial practice with the notion of a ‘dialogue of judges’ – coined as a median term between a government of judges and a war of judges”. DECAUX, “France”, in SHELTON (ed.), *cit. supra* note 2, p. 207 ff., p. 210.

such as MERCOSUR⁹ or the Inter-American Court of Human Rights (IACtHR).¹⁰ However, there is a paucity of works analysing the participation – or lack thereof – of other countries and regions in judicial dialogue. Only a few works appear to deal with this topic.¹¹

This article focuses on Turkey, which to a large extent has also remained outside the scope of the literature on judicial dialogue. It is a largely unappreciated fact in European politics that Turkey is firmly rooted in the European public order, and has been so for many decades. In this context it is strange that the Turkish courts' practice of judicial dialogue has drawn little attention until now. Furthermore, the ignorance is mutual: Turkish scholarship has also paid no attention to judicial dialogue.

Moreover, with particular regard to the Turkish case, while there is a wealth of scholarly works on the conundrums of the relationship between the European Court of Human Rights (ECtHR) and Turkey¹², a more in-depth legal scrutiny of the involvement of the Turkish Constitutional Court (TCC) in judicial dialogue is lacking. In a rare contribution to the literature, Esin Örüçü tackles the issue from the perspective of “judicial comparativism” in human rights cases (albeit in the context of the European Convention on Human Rights – ECHR). However, she does not address the issue of the TCC's integration into international law. This paper intends to fill an important gap in the legal scholarship by providing an analysis of the decisions of the TCC. In this vein, this paper attempts to illuminate the role of the Turkish constitutional judges as implementers or non-implementers of international law, and the scope of their participation in international judicial dialogue.

⁹ ALMEIDA, “The Challenges of the Judicial Dialogue in Mercosur”, *The Law & Practice of International Courts and Tribunals*, 2015, p. 392 ff.

¹⁰ AYALA, “The Judicial Dialogue between International and National Courts in the Inter-American Human Rights System”, in SCHEININ, KRUNKE and AKSENOVA (eds.), *Judges as Guardians of Constitutionalism and Human Rights*, Cheltenham, 2016, p. 306 ff.; and ANSUATEGUI ROIG, “Human Rights and Judicial Dialogue between American and Europe: Toward a New Model of Law”, *The Age of Human Rights Journal*, 2016, p. 24 ff.

¹¹ In a recent study, Law investigates the judicial comparativism in relation to four leading courts in East Asia, namely the Japanese Supreme Court, the Korean Constitutional Court, the Taiwanese Constitutional Court, and the Hong Kong Court of Final Appeal. LAW, “Judicial Comparativism and Judicial Diplomacy”, *University of Pennsylvania Law Review*, 2015, p. 927 ff.

¹² ÖZBUDUN and TÜRKMEN, “Impact of the ECtHR Rulings on Turkey's Democratization: An Evaluation”, *Human Rights Quarterly*, 2013, p. 985 ff.; SMITH, “Leveraging Norms: The ECHR and Turkey's Human Rights Reforms”, in ARAT (ed.), *Human Rights in Turkey*, University of Pennsylvania, 2007, p. 262 ff.; TÜRMEN, “Avrupa İnsan Hakları Sözleşmesi'nin İç Hukukumuzda Etkileri” (The Impact of the ECHR on Our Domestic Law), Opening Remarks at the 38th Anniversary of the Foundation of the Constitutional Court, 2000; and ESEN “How Influential Are the Standards of the European Court of Human Rights on the Turkish Constitutional System in Banning Political Parties?”, *Ankara Law Review*, 2012, p. 135 ff.

2. METHODOLOGY AND SCOPE

This paper strives to shed some light on the degree of engagement of the TCC in transnational judicial dialogue by building on a content analysis of its judicial decisions. Although the different circumstances to which the term “judicial dialogue” may apply can cause some ambiguity, for the purposes of this article it describes the practice of referring to the decisional law of international and foreign courts.¹³ In particular, the article focuses on the presence and frequency of external citations¹⁴ in the jurisprudence of the TCC to identify and evaluate its involvement in transjudicial dialogue. Earlier works on domestic and international courts followed the same method of analysing the presence of external citations in judicial decisions.¹⁵ Such focus on judicial citations may in fact highlight the depth of involvement of courts with judicial dialogue as well as offer clues about orientations and milestones that courts fix for them when choosing to cite decisions of particular courts.

A special focus on the TCC can be explained first from a domestic perspective. The TCC has recently come into spotlight due to its dealings with many controversial acts of the Turkish Government as well as politically contentious topics. From time to time, the Turkish constitutional judges’ decisions represent bold steps towards implementing international norms of the rule of law in the context of an imperfect democracy.¹⁶ However, the practice of TCC is usually motivated by a protection of domestic interests or national values at the expense of the international

¹³ States are unavoidably bound by international law, whereas the practice of comparative foreign law is purely voluntary. See HIRSCHL, *Comparative Matters: The Renaissance of Comparative Constitutional Law*, Oxford, 2014, p. 75; JACKSON, *Constitutional Engagement in a Transnational Era*, Oxford, 2013, p. 169; LAW, “Constitutional Convergence and Comparative Competency: A Reply to Professors Jackson and Krotoszynski”, *Alabama Law Review*, 2014, p. 145 ff. Bobek also distinguishes between mandatory, advisable and voluntary uses of foreign and international law by domestic Supreme courts in Europe. This can be seen as a slightly different categorisation of vertical and horizontal judicial dialogue. See BOBEK, *The Comparative Reasoning in European Supreme Courts*, Oxford, 2013, pp. 19-35.

¹⁴ Here a distinction must be drawn between judicial usage and judicial citation by borrowing from David Law that “citation of foreign law is a narrow phenomenon that can be measured simply by reading judicial opinions. Usage of foreign law is a broader phenomenon that can be much harder to observe. Perhaps because citation is so easily observed and quantified, it is tempting to conflate citation and usage, or to treat citation as a convenient proxy for usage. However, the two are not the same, and neither is a satisfactory proxy for the other, for several reasons”. LAW, *cit. supra* note 11, p. 946.

¹⁵ VOETEN, “Borrowing and Non-Borrowing among International Courts”, *The Journal of Legal Studies*, 2010, pp. 547-576; and LAW and CHANG, “The Limits of Global Judicial Dialogue”, *86 Washington Law Review*, 2011, pp. 523-577.

¹⁶ In 2014, the TCC overturned the Turkish Telecommunications Communication Presidency’s decisions on banning Twitter and YouTube. The Court has received two separate individual applications. See the Turkish Constitutional Court (Turkey), Twitter Decision, App No: 2014/3986 of 2 April 2014, and YouTube Decision, App No: 2014/4705 of 29 May 2014.

rule of law. This posture of the Court merits special attention, as public institutions in Turkey have been experiencing a significant crisis in legitimacy in recent years. Second, reason for focusing only on the TCC is driven by the broader literature on judicial dialogue. Literature on the judicial dialogue covering the experiences of domestic courts is most often focused on the practice of constitutional courts. Accordingly, this paper aims to contribute to the literature by bringing the TCC's experience to light.¹⁷

According to Article 148 of the 1982 Turkish Constitution and Article 3 of the Turkish Law No. 6216, the TCC has the following competencies: (i) constitutional review of legislative acts; (ii) dissolution and/or financial control of political parties; (iii) the capacity of Supreme Criminal Tribunal; (iv) control of parliamentary immunity and deprivation of the status of MP; and (v) individual applications (since September 2012).

This paper examines the constitutionality review and the dissolution of party closure cases, as these decisions constitute the bulk of constitutional litigation in Turkey. Within this framework, the TCC's database contains more than 3,000 decisions. The time frame for cases reviewed for this analysis is between 1999 and 2012. 1999 corresponds roughly to two important dates with respect to Turkey's position in the European order. The fundamental reason for choosing this time frame is that, until the entry in force of Protocol No. 11 to the ECHR on November 1998, which established a full-time single Court replacing the Convention's former monitoring machinery,¹⁸ the TCC was reluctant to engage in international law or foreign judicial precedents in other jurisdictions.¹⁹ Another factor is that near the end of 1998, Turkey had made significant progress in the EU negotiation process, eventually being granted official candidate status at the Helsinki Summit on 11 December 1999.

Turkey launched a mechanism of individual applications to the TCC in September 2012. However, because the individual application process is indexed on the ECHR,²⁰ focusing on them will not present a complete picture of engage-

¹⁷ LAMBERT and GOODWIN-GILL, *cit. supra* note 5; SCHEININ, KRUNKE and AKSENOVA, *cit. supra* note 10.

¹⁸ Turkey signed the Protocol on 11 May 1994 and ratified it on 22 May 1997. The Turkish Law No. 4255 'İnsan Haklarını ve Ana Hürriyetleri Korumaya Dair Sözleşmenin Oluşturduğu Denetim Mekanizmasının Yeniden Yapılanmasına İlişkin 11 No.lu Protokolün Onaylanmasının Uygun Bulunduğu Hakkında Kanun' of 14 May 1997, available at: <https://www.tbmm.gov.tr/tutanaklar/KANUNLAR_KARARLAR/kanuntbmmc080/kanuntbmmc080/kanuntbmmc08004255.pdf>.

¹⁹ ÖRÜCÜ, "Ulusal Anayasa Mahkemelerinde 'Yargısal Karşılaştırmacılık' ve Mahkemeler Arası Diyalog" (Judicial Comparativism in National Constitutional Courts), 24 Anayasa Yargısı, 2007, p. 433 ff., p. 441.

²⁰ Article 148/3 of the Turkish Constitution, as revised in 2010, states that "everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities [...]". In light of this provision, the TCC

ment by the TCC's judges with international law. Therefore the database of the Court is screened for decisions rendered until 2012 and the decisions concerning individual applications are expressly left out of the scope.

For the party closure cases, a different time frame was chosen. Since its inception in 1962, a total of 134 applications seeking to dissolve political parties have been made to the TCC by the Office of the Chief Public Prosecutor of the High Court of Appeals of Turkey (*Yargıtay Başsavcılığı*). Only 6 of them occurred under the 1961 Constitution. 128 applications have been made under the 1982 Constitution. From 1982 to 2016, the TCC examined a total of 41 cases, through which the Court dissolved 20 political parties.²¹ The majority of these cases concerned political parties deemed to pose serious threats to the Turkish constitutional order, being either politically left and/or committed to political Islam and/or committed to separatist Kurdish nationalism.²²

3. INTERNATIONAL LAW AND THE TURKISH CONSTITUTIONAL ORDER

3.1. *The TCC in the Turkish Political System*

Although Turkey introduced the Constitutional Court as the highest jurisdiction in its constitutional system for the first time in the 1961 Constitution,²³ it was already clear that the TCC was going to be a *powerful* court when it began hearing cases in 1962. Its strength and strategic position stem from its design and from the purpose for which it was created and later co-opted by influential players of Turkish politics, to maintain balance between different forces in domestic politics.²⁴ For

accepts individual applications only when a human rights norm, which is allegedly violated by State, is covered both by the Turkish Constitution and the ECHR. If a human rights norm is covered only by one of the two, the Court will reject the application. See TCC, Onurhan Solmaz Decision, App No:2012/1049 of 26 March 2013.

²¹ From 1991 to date, the TCC has dissolved Halk Partisi (1991), Türkiye Birleşik Komünist Partisi (1991), Sosyalist Parti (1992), Büyük Anadolu Partisi (1992), Sosyalist Türkiye Partisi (1993), Halkın Emek Partisi (1993), Özgürlük ve Demokrasi Partisi (1993), Demokrasi Partisi (1994), Demokrat Parti (1994), Sosyalist Birlik Partisi (1994), Yeşiller Partisi (1994), Diriliş Partisi (1996), Demokrasi ve Değişim Partisi (1996), Emek Partisi (1997), Demokratik Kitle Partisi (1999), Fazilet Partisi (2001), Halkın Demokrasi Partisi (2003), Hak ve Özgürlükler Partisi (2008), Adalet Partisi (2009), and Demokratik Toplum Partisi (2009).

²² BÂLI, "Courts and Constitutional Transition: Lessons from the Turkish Case", *International Journal of Constitutional Law*, 2013, p. 666 ff., pp. 666-701.

²³ ZÜRCHER, *Turkey: A Modern History*, 2004, pp. 221-240.

²⁴ ÖZBUDUN and GENÇKAYA, *Democratization and the Politics of Constitution-Making in Turkey*, 2009, pp. 14-19.

these purposes, the TCC was vested with excessive powers and far-reaching competences, however, with significant differences in nature.²⁵

The 1961 Constitution introduced a liberal framework for the protection of civil rights. Obviously, the TCC was expected to be the guardian of this liberal framework, using its independence and powers to accomplish this. However, the role played by the TCC in Turkish politics turned out to be completely different from its formal calling as guardian of liberal values.

This early transformation of the TCC into a guardian of political regimes resulted from the entanglement of two factors. First, new regimes, which came to power after the 1960 and 1980 coups, deliberately avoided weakening the status of the TCC. Instead, they sought to co-opt the TCC to strengthen their grip over Turkish politics and society. When a new constitution was adopted in 1982 following the coup of 1980, the drafter of the 1982 Constitution “did little to alter the powers of the TCC save clarifying a limitation on the powers of judicial review and modifying the appointments procedure to afford the executive together with the military a larger role in selecting justices”.²⁶

The second factor leading to the TCC developing the role of guardian of the regime was the elevation of particular powers of the Court at the expense of others. Constitutional scholars identified five functions of constitutional courts in contemporary politics: (i) the veto-force; (ii) the guardian; (iii) the public-reasoner; (iv) the institutional interlocutor; and (v) the deliberator.²⁷ These are not necessarily mutually exclusive, and some may prevail over others. In the case of the TCC, justices most often used their powers as veto-force and as guardian. A study analysing the practice of the TCC found that between 1962 and 1999 the Court used its veto powers to strike down more than half of the statutes referred to it.²⁸

The TCC has developed an image as guardian of a particular ideological regime, described as “elite hegemonic preservation through juristocracy”.²⁹ More specifically, these powers were exercised in the service of a very particular interpretation of the Constitution as written, as well as the political foundation and ideology of the Turkish Republic known as Kemalism. The Court has thus redefined itself into a mechanism to guard the Republic’s fundamental values and principles,

²⁵ Constitutional review is a very different judicial function from that of political party closures. As aptly put by Köker, party closure is not a function of “judicial review”, but bears more of a resemblance to criminal law procedure. KÖKER, “Turkey’s Political-Constitutional Crisis: An Assessment of the Role of the Constitutional Court”, 17.2 *Constellations*, 2010, p. 328 ff., p. 336.

²⁶ BÂLI, *cit. supra* note 22, p. 670.

²⁷ MENDES, *Constitutional Courts and Deliberative Democracy*, Oxford, 2013, pp. 1-4.

²⁸ BELGE, “Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey”, *Law & Society Review*, 2006, p. 653 ff., p. 654.

²⁹ HIRSCHL, “The Political Origins of the New Constitutionalism”, *Indiana Journal of Global Legal Studies*, 2004, p. 71 ff., p. 103.

and has reserved its support “to protect some groups and values while suppressing the demands of others”.³⁰

The TCC’s role as the guardian of Kemalist ideology has been largely reported and analysed in the literature, especially among political scientists and legal scholars.³¹ This image of the Court prevailed until recent years, when the Kemalist political establishment was effectively challenged by the AKP Government. The Kemalist establishment tried to use the TCC to resist political reforms from the early 2000s. The TCC was an effective instrument to resist change precisely due to its judicial independence and veto powers.³² The TCC emerged as a “tutor” institution, aligned with the interests of the military-state elites and aimed at limiting the actions of a pluralistic democracy, particularly through its docket of political party closure cases. In doing so, the TCC has always played a key role in preserving the strictly secular and nationalist nature of Turkey’s political context by repeatedly outlawing political parties either based on alleged threats to national unity or based on alleged anti-secular activities.

3.2. *The Structural Ambiguity Concerning the Status of International Law in the Turkish Constitutional Order*

Approaches to the study of international/domestic law topics in the Turkish literature³³ since the adoption of a new Constitution in 1982 have evolved pri-

³⁰ Shambayati also proposes a slightly different explanation for transformation of the TCC into the guardian of the regime. To him, countries like Turkey and Iran used modern constitutions to create new nations under new political regimes. Constitutions adopted by Turkey and Iran in the 20th century were thus ideological constitutions which were opposed by powerful actors and large segments of populations. This opposition to social engineering efforts engineered by political elites led to the emergence of guardian institutions: “the civilizing mission of the state in Turkey has led to the creation of a regime with guardians where elected and unelected institutions jointly exercise power. The presence of guardians requires the creation of institutions such as constitutional courts that serve to preserve the above politics posture of the guardians by putting a distance between them and day-to-day politics. What distinguishes these institutions from their counterparts in consolidated democracies is that despite their political importance they are isolated from elected institutions and their primary role is to protect the ideological dominance of the guardians”. SHAMBAYATI, “The Guardian of the Regime: The Turkish Constitutional Court in Comparative Perspective”, in ARJOMAND (ed.), *Constitutional Politics in the Middle East: With Special Reference to Turkey, Iraq, Iran and Afghanistan*, Farnham, 2008, pp. 99-121.

³¹ See BÄLİ, “The Perils of Judicial Independence: Constitutional Transition and the Turkish Example”, *Virginia Journal of International Law*, 2011, pp. 235-320; BELGE, *cit. supra* note 28, p. 656; and SHAMBAYATI *cit. supra* note 30, p. 106.

³² BÄLİ, *cit. supra* note 22, pp. 667-673.

³³ GÜNDÜZ, “Eroding Concept of National Sovereignty: The Turkish Example”, *Marmara Journal of European Studies*, 1991, p. 99 ff.; BAŞLAR, “Uluslararası Antlaşmaların Onaylanması, Üstünlüğü ve Anayasal Denetimi Üzerine” (On Ratification, Primacy and Constitutional Control of International Agreements), 24/1-2 *Milletlerarası Hukuk ve Milletlerarası Özel Hukuku*

marily around three questions: (1) How are international agreements transposed into Turkish law? (2) What is the hierarchical position of international law in the Turkish domestic legal setting? (3) Should international treaties be submitted to constitutional review?

The Turkish Constitution, unlike others (e.g., the German Constitution), does not contain a general reference to international law including international customary law. It is therefore Article 90(5) of the Turkish Constitution which addresses the normative status of international agreements which is the starting point to investigate the status of international law in Turkey's 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".

The formulation of Article 90(5), however, generated controversy regarding the supremacy of international law in the era of the 1982 Constitution. Some scholars argued that international treaties have the same effect as domestic law; therefore, the provision was not a manifest recognition of the supremacy of international law. Accordingly, in case of a conflict between a domestic law and an international treaty, which might result in the State's responsibility, the principles of *lex posteriori* and *lex specialis* were to apply. Unless expressly mentioned in the Constitution, an international norm cannot prevail over domestic law.³⁴ Others have countered this argument by focusing on the fact that no appeal can be made with regard to an international agreement on the basis of the unconstitutionality thereof. Even though these scholars agreed that the Constitution did not explicitly recognise the

Bülteni: Prof. Dr. Sevin Tolner'e Armağan, 2004, p. 279 ff.; BAŞLAR, "Yeni Sivil Anayasada Uluslararası Hukuka İlişkin Hükümler" (Provisions Regarding International Law in the New Civilian Constitution), in GÖZTEPE and ÇELEBİL (eds.), *Demokratik Anayasa: Görüşler ve Öneriler (Democratic Constitution: Opinions and Recommendations)*, Metis Yayınları, 2012, p. 339 ff.; AKIPEK, "Türk mevzuatının onaylanan uluslararası antlaşmalar ile uyumlaştırılması sorunu" (Problem of Harmonization of Turkish Legislation with Ratified International Agreements), 48/1-4 Ankara Üniversitesi Hukuk Fakültesi Dergisi, 1999, p. 15 ff.; AYBAY, "Uluslararası Antlaşmaların Türk Hukukundaki Yeri" (The Place of International Treaties in the Turkish Legal Order), Türkiye Barolar Birliği Dergisi, 2007, p. 187 ff.; CAN, "Türk Hukuk Düzeninin Milletlerarası Hukuka Açıklığı" (The Openness of Turkish Legal Order to International Law), Yasama Dergisi, 2009, p. 5 ff.; PAZARCI, "Türk Hukukunda Andlaşmalar ile Yasaların Çatışması" (The Conflict between Turkish Domestic Law and International Treaties), 24/1-2 Milletlerarası Hukuk ve Milletlerarası Özel Hukuku Bülteni: Prof. Dr. Sevin Tolner'e Armağan, 2004, p. 651 ff.; SOYSAL, "Uluslararası Andlaşmalar Konusunda Anayasa Yargısı" (Constitutional Review on International Treaties), Anayasa Yargısı Dergisi, 1997, p. 171 ff.; TUNÇ, "Milletlerarası Sözleşmelerin Türk İç Hukukuna Etkisi" (The Impact of International Treaties on Turkish Domestic Law), Anayasa Dergisi, 2000, p. 174 ff.

³⁴ GÖZLER, "İnsan Hakları Normlarının Anayüstülüğü Sorunu" (The Question of the Supra-Constitutionality of Human Rights Norms), in ÇITCI (ed.), *Türkiye'de İnsan Hakları (Human Rights in Turkey)*, Ankara, 2000, p. 25 ff., p. 39; PAZARCI, *cit. supra* note 33, p. 660; ÖZBUDUN and YAZICI, *Democratization Reforms in Turkey (1993-2004)*, Ankara, 2004, p. 12; and PAZARCI, *Uluslararası Hukuk Dersleri (International Law Lectures)*, Vol. 1, Ankara, 2001, p. 32.

supremacy of international law, as they further argued, at least it accorded a protection to international treaties in the Turkish domestic legal order. In this manner, the general principles of *lex posteriori* and *lex specialis* would not be sufficient to disregard international treaties, as such treaties can be regarded as the embodiment of “a common will of states”³⁵ or, even more, “common cultural heritage”³⁶.

In 2004, Article 90 was amended to clarify a protracted concern over the normative status of the international agreements duly put into effect. The 2004 amendment gave preferential treatment to human rights treaties, stipulating that in the case of a conflict between international human rights treaties duly put into effect and domestic law, international agreements take precedence over domestic law.³⁷

This considerable degree of ambiguity persists even after the 2004 amendment, which has also been used equally by the proponents of the supremacy of international law in the Turkish legal order as much as by those who affirm the primacy of the Turkish domestic law. For proponents of dualism, a conflict between international law norms and constitutional norms is almost impossible.³⁸ If such a conflict occurs, the TCC must ignore international law and enforce the Constitution.³⁹ As for the proponents of a monist approach and thus, the supremacy of international law, the TCC must consider international law as forming part of a “constitutional-ity block” or reference norms when adjudicating.⁴⁰ If there is a conflict between

³⁵ EROĞLU, *Devletler Umumi Hukuku* (Public International Law), Ankara:Turhan Kitabevi, 1984, 3rd ed., p. 32.

³⁶ BATUM, *Avrupa İnsan Hakları Sözleşmesi ve Türk Anayasal Sistemine Etkileri* (The European Convention on Human Rights and its Impact on the Turkish Constitutional System), İstanbul Üniversitesi Basımevi, 1993, p. 261.

³⁷ “(Sentence added on May 7, 2004; Act No. 5170) In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail”.

³⁸ For a strong argument in favour of dualism in Turkish legal system, see GÖZLER, “The Question of the Rank of International Treaties in National Hierarchy of Norms: A Theoretical and Comparative Study”, in REÇBER, ÖZDAL and ÖZGENÇ (eds.), *Prof. Dr. Mehmet Genç’e Armağan* (Essays in Honor of Prof. Dr. Mehmet Genç), Bursa, Dora, 2016, pp. 21-46. For useful overview of different approaches in the monism-dualism debate as well as discussion on hierarchical relations between international law and Turkish law see GÜNDÜZ, *cit. supra* note 33; PAZARCI, *cit. supra* note 33; ŞAHBAZ, “Avrupa İnsan Hakları Sözleşmesi’nin Türk Yargı Sistemindeki Yeri” (The Place of the European Convention on Human Rights in the Turkish Juridical System), 54 *Türkiye Barolar Birliği Dergisi*, 2004, pp. 178-216.

³⁹ GÖZLER, *cit. supra* note 34, p. 39.

⁴⁰ The term “constitutionality block” was first introduced to the Turkish context by YUZBASIOĞLU, “Türk Anayasa Yargısında Anayasallık Bloku” (Constitutionality Block in Turkish Constitutional Jurisprudence), İstanbul, 1993. For a critical overview of the “constitutionality block” approach, see GÖZLER, “Türk Anayasa Yargısında Anayasallık Bloğu Kavramına İhtiyaç Var mıdır?” (Is There a Need for the Concept of ‘Bloc of Constitutionality’ in the Turkish Constitutional Justice?), 56.3 *Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi*, 2000, pp. 81-103.

conventional norms and domestic norms, the Court must enforce the international norm and ignore the conflicting domestic rule, without hesitation.

The TCC's case law, however, does not provide clarity for this ambiguity. A closer look at its jurisprudence shows that the Court adopts a pragmatic approach exemplified by divergent opinions. A salient example can be found in its 1997 ruling in which the Court had to review the constitutionality of "Law No. 4163 approving the ratification of the Agreement of the Islamic Corporation for the Insurance of Investment and Export Credit (ICIEC)".⁴¹ The TCC first confirmed that Article 90 "intended to leave international agreements outside the scope of constitutional review. Hence, independently from treaty, claims against laws approving ratification can be brought before the Constitutional Court".⁴² More importantly, the Court underlined that international treaties cannot be attributed supranational or supra-constitutional status in the Turkish legal order:

"Despite the fact that some countries recognize treaties as supranational and even supra-constitutional norms and the doctrine supports this opinion, it is impossible to draw similar conclusion from the article 90 of the Constitution. [...] From the perspective of domestic law; in case of conflict between treaties and laws and if it is impossible to remove it by way of interpretation, solution is taken on the basis of rules applied to conflict between two domestic laws".⁴³

On the other hand, several decisions of the TCC can be read as a tacit confirmation of the supremacy of international law. The TCC recognises that specific international treaties may hold the utmost importance and a privileged position in the Turkish legal order. For example, the Court has held that "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 another deci-

⁴¹ Article 90(4) expressly prevents claims on the basis of unconstitutionality of international treaties. However, the TCC reserves the right to control conformity of international agreements with the Constitution indirectly by reviewing not the agreement *per se* but the law approving its ratification.

⁴² The Constitutional Court (Turkey), Esas No. 1996/55, Karar No. 1997/33 (Resmi Gazete 24 March 2001). All translations from Turkish are by the authors.

⁴³ *Ibid.*

⁴⁴ The Constitutional Court (Turkey), Esas No. 1979/38, Karar No. 1980/11 (Resmi Gazete 15 May 1980).

sion, the Court ruled that “treaties that eliminated all forms discrimination between children could be qualified as supra-constitutional norms”.⁴⁵

The TCC thus sends contradictory signals about its attitude toward international law. It neither sides completely with the sovereignty approach, nor does it fundamentally adhere to the supremacy of international law. In doing so, it protects and strengthens its own position as a strong political actor carrying power to arbiter not only between domestic constituencies, but also between Turkish law and the international legal system.

In sum, the reception and hierarchical position of international agreements in the Turkish domestic legal system has always been controversial. Even more controversial has been the extent to which international law is applied and/or implemented by the Turkish domestic courts.

4. ENGAGING WITH THE TCC FROM THE PERSPECTIVE OF JUDICIAL DIALOGUE

The present part of the article evaluates the TCC’s involvement with transnational judicial dialogue. In doing so, it focuses on patterns of external citations in the jurisprudence of the Court. The analysis also includes both vertical and horizontal judicial dialogue in order to identify the level of the TCC’s dialogue with international and foreign courts.

| <i>Important treaties</i> | <i>International organisations</i> | <i>International, Regional and Foreign Courts</i> |
|---------------------------|------------------------------------|---|
| UN Charter 1/0 | United Nations 5/33 | ECHR 16/58 |
| ECHR 17/36 | European Union 7/30 | ICJ 0/0 |
| UDHR 1/5 | Council of Europe 4/17 | ECJ 0/1 |
| ICCPR 0/5 | NATO 1/6 | Human Rights Courts 0/0 |
| ICESCR 0/3 | ILO 2/7 | German Constit. Court 0/3 |
| ILO Treaties 0/0 | | French Constit. Court 1/0 |
| Lausanne Treaty 2/5 | | US Supreme Court 0/0 |

Table 1: International Law in the constitutionality review cases of the TCC. ‘/’ separates two periods (1999-2005 and 2006-2012).

⁴⁵ The Constitutional Court (Turkey), Esas No. 1990/18, Karar No. 1991/5 (Resmi Gazete 27 March 1992).

| <i>Important treaties</i> | <i>International organisations</i> | <i>International, Regional and Foreign Courts</i> |
|---------------------------|------------------------------------|---|
| UN Charter 4/1 | United Nations 6/3 | ECtHR 4/4 |
| ECHR 10/3 | European Union 2/3 | ICJ 0/0 |
| UDHR 11/3 | Council of Europe 7/1 | ECJ 0/0 |
| ICCPR 1/2 | NATO 2/1 | Human Rights Courts 0/0 |
| ICESCR 3/2 | | German Constit. Court 3/1 |
| ICJ Statute 0/1 | | French Constit. Court 4/0 |
| Lausanne Treaty 12/3 | | US Supreme Court 3/0 |

Table 2: *International Law in the political party closure decisions of the TCC. ‘/’ separates two periods (1982-2005 and 2006-2012).*

4.1. *Level of International Law in the Decisions of the TCC: Internationalisation or Europeanisation?*

The actual percentage of constitutional cases in which the TCC cites international law is roughly 4-5%.⁴⁶ However, there has been a perceptible increase in frequency in the last 10 years. In the context of the European Union accession process, the TCC has started to take heed of international human rights law. From a historical point of view, the TCC’s practice in terms of usage of international law has been fuelled by the fact that compliance with ECtHR rulings is a proviso of Turkey’s EU membership. An increased level of engagement in transnational judicial dialogue has thus been intrinsic to the EU accession process. Despite the more global dimensions of judicial dialogue in the sense of “internationalisation” of law, “Europeanisation” has unquestionably driven and shaped much of the TCC’s approach to the phenomenon. The TCC has thus become increasingly porous to the influence of the European human rights regime. Given that Turkey has often had rocky relations with the ECtHR, the Strasbourg court has taken a key role in the democratisation process in Turkey and in reforming the country’s legal system.⁴⁷ To some extent, this “dialogue” has been uncontroversial as this marked “openness” toward European and international standards has prompted the Court to take necessary steps aimed at eliminating grave inconsistencies and incompatibilities in the Turkish legal order. In other words, this is a classic example of what Tzanakopoulos has described as the “alignment” strategy that the TCC adopted to

⁴⁶ This excludes references to foreign law.

⁴⁷ See *inter alia* SMITH, *cit. supra* note 12, pp. 262-274.

align or harmonise domestic legislation with international law. For an example, in a 2002 case⁴⁸ in which the appellate courts sought annulment of Article 38 of the Turkish Expropriation Law⁴⁹ on the basis of its compatibility with the Turkish Constitution, the TCC stated that the occupation and use of the land by States constituted a *de facto* expropriation of property for the purposes of Article 1 Protocol No. 1 of the ECHR. In *Carbonara and Ventura*⁵⁰ and *Belvedere Alberghiera*,⁵¹ the ECtHR stated that the interpretation of the rule on constructive expropriation by the Italian courts deprived litigants of effective protection of their rights and thus infringed Article 1 Protocol No. 1. In reaching their decision, the TCC followed the guidance of the ECtHR in these cases and annulled the aforementioned provision of the Turkish Expropriation Law. It is a salient factor that between 1992 and 2003 more than 350 expropriation cases concerning Turkey came before the ECtHR.⁵²

In a similar vein, in 2010, the Siirt first instance court made an application seeking annulment of Article 4 of the Turkish Surname Act,⁵³ which stated that “in cases of annulment of marriage or divorce, the child shall adopt the surname chosen/to be chosen by father even if right of custody was given to mother”. The TCC annulled the relevant provision finding it contrary to Articles 10 and 41 of the Constitution and ruled that issues of gender equality and gender-based discrimination, including the right of custody and the exercise of powers related to such right, are included in various international legal documents on human rights such as Articles 1 and 2 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Article 23 of the International Covenant on Civil and Political Rights (ICCPR), and Article 14 of the ECHR and in the case law of the ECtHR, such as the *Burghartz*⁵⁴ and *Ünal Tekeli* cases.⁵⁵

⁴⁸ The Constitutional Court (Turkey), Esas No. 2002/112, Karar No. 2003/33 (Resmi Gazete 4 November 2003).

⁴⁹ Article 38 of the Turkish Expropriation Law (No. 2942 adopted on 4 November 1983, published on the Official Gazette of Turkey No. 18215 on 8 November 1983) stated that “in the case of immovable property subject to expropriation where the expropriation procedure has not ended or of immovable property whose expropriation has not been requested but which has been assigned to public-service use or on which buildings intended for public use have been erected, all the rights of owners, possessors or their heirs to bring an action relating to that property shall lapse after twenty years. Time shall begin to run on the date of the occupation of the property”.

⁵⁰ *Carbonara and Ventura v. Italy*, Application No. 24638/94, Judgment of 30 May 2000.

⁵¹ *Belvedere Alberghiera S.R.L. v. Italy*, Application No. 31524/96, Judgment of 30 May 2000.

⁵² For a detailed analysis see YOMRALIOGLU, UZUN and NISANCI, “Land Valuation Issues of Expropriation Applications in Turkey”, Vol. 9, FIG Commission, 2007, pp. 80-90.

⁵³ The Turkish Surname Act No 2525 (adopted on 21 Haziran 1934, published in the Official Gazette of Turkey on 2 Temmuz 1934) required all Turkish citizens to adopt the use of surnames.

⁵⁴ *Burghartz v. Switzerland*, Application No. 16213/90, Judgment of 22 February 1994.

⁵⁵ *Tekeli v. Turkey*, Application No. 29865/96, Judgment of 16 November 2004.

What remains controversial, however, is the extent to which Turkish domestic judges are, or ought to be, responsible for ensuring the effectiveness of international law in the Turkish legal system. From a legal standpoint, the 2004 amendment granting normative status of international agreements has clarified the situation. At least from a theoretical perspective, the aim of the 2004 amendment was to resolve the issue by making it clear that international human rights agreements have precedence over domestic laws.

When assessing the application and implementation of international law by Turkish domestic courts, however, the picture is dismal. While the Turkish lower courts almost never make use of international law, the trajectory of the TCC's decisions demonstrates another grave disconnect: the international commitments made by the ratification of human rights treaties have remained on paper, but are not matched in practice. Although there are a few examples of making use of international law in the Turkish legal order – as noted above – the TCC seldom looks at international law while exclusively engaging in dialogue with one particular court – the ECtHR – as is clear from the tables above. This dialogue is best described as a mandatory dialogue as patently evidenced by the TCC's usage of the ECHR. While it is a fact that direct references to the ECHR by the TCC are rare, at the same time, they are generally a reference to the most cited (and the least open-ended) ECHR articles, such as Articles 2, 3, 6, 8, 10, 11, 17. Interestingly, these articles correspond to articles on the basis of which Turkey is frequently challenged and convicted by the ECtHR.⁵⁶ More importantly, the TCC generally quotes provisions of the ECHR, but fails to test the case at hand against the criteria developed through the jurisprudence of the ECtHR. Thus, there is a substantial gap between the international norms and the TCC's actual practices.⁵⁷

In this regard, it must be highlighted that the TCC has hitherto appeared friendly to the use of international law but in practice has been generally hostile to it. This is particularly due to the fact that the Turkish Constitution adopted by a military regime in 1982 enshrines fundamental principles in its Preface and contains “unamendable provisions” reflected in Articles 2 and 3, not limited to the rule of law, the respect for democracy and human rights, but also some peculiar ones, such as the principles of secularism and the indivisible integrity of the State with its territory and nation. A closer examination of the case law of the TCC shows that these so-called peculiar principles form the *fundamentum* of the Turkish constitutional

⁵⁶ See, e.g., the latest report of the ECtHR, which analyses violations of the ECHR by articles and by States to observe this overlap between citations of the TCC and decisions of the ECtHR regarding Turkey, available at <http://www.echr.coe.int/Documents/Stats_violation_2016_ENG.pdf>.

⁵⁷ On a particular note, the TCC also takes into account whether there are equivalent provisions (or counterparts) in the Turkish domestic law when it cites the ECHR. For example, Article 6 of the ECHR (as a counterpart to Article 36 of the Turkish Constitution (TC)-hak arama hürriyeti), Article 8 of the ECHR (Article 20 of the TC-özel hayatın gizliliği), and Article 1 Protocol No. 1 ECHR (Article 35 of the TC-mülkiyet hakkı).

order and thus cannot be debated or questioned even if it carries potential conflict vis-à-vis international standards. According to one author, this may reflect a 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.⁵⁸ The TCC, therefore, seems to be particularly reluctant to apply international law when the case touches upon linguistic, religious, and minority rights, and freedoms of expression and association.⁵⁹ In such cases, the TCC relies on domestic law to contest international norms.

4.2. *A Paradigmatic Area of Disparity: The Party Closure Cases*

The TCC's reasoning in the dissolution of political party cases is particularly illuminating. In these decisions, the representatives of the political parties based their arguments on Articles 11 and 17 of the ECHR. Instead, the TCC relied upon Article 68(4) of the Turkish Constitution⁶⁰ and the more draconian list of prohibitions in the Turkish Law on Political Parties⁶¹ in deciding whether parties should be excluded from the arena of permissible participation on the basis of the principle of "the indivisible integrity of the Turkish state with its territory and nation".

A salient example of the TCC's narrowing and limiting approach to freedom and rights based on its restrictive interpretation of the territorial unity of the State can be found in its ruling on the Democracy Party (DP) in 1993. The TCC ruled that "the Constitution which is based on the principle of unitary state, does not permit federal state. Therefore, political parties cannot include federal system in their program, and cannot advocate such a structure [...]. As the principle of nation-state does not permit the notion of a multi-national state, there is no room for a federal structure in such a system".⁶² In the same decision, the TCC defined even "regional States" as "discriminatory" by stating that "the Constitution is closed to [...] autonomy and self-rule for regions", even though regionalism is a form of unitary

⁵⁸ ÖRÜCÜ, "The Turkish Experience with Judicial Comparativism in Human Rights Cases", in ÖRÜCÜ (ed.), *Judicial Comparativism in Human Rights Cases*, London, 2003, pp. 131-136.

⁵⁹ ORAN, "The Minority Concept and Rights in Turkey: The Lausanne Peace Treaty and Current Issues", in ARAT (ed.) *Human Rights in Turkey*, University of Pennsylvania, 2007, pp. 35-57.

⁶⁰ Article 68(4) of the Turkish Constitution: "The bylaws and programmes, as well as the activities of political parties shall not be in conflict with 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 protect or establish class or group dictatorship or dictatorship of any kind, nor shall they incite citizens to crime".

⁶¹ The Turkish Law on Political Parties No. 2820 of 22 April 1983, published in the Official Gazette of Turkey on 24 April 1983.

⁶² The Constitutional Court (Turkey), Esas No. 1993/3, Karar No. 1994/2 (Resmi Gazete 16 June 1994).

State. In another ruling on the Socialist Party (SP), the TCC even advanced this peculiar interpretation by stating that international human rights law such as Articles 11 and 17 of the ECHR, and the jurisprudence of the ECtHR support its restrictive interpretation. In the words of the TCC, “there is no doubt that the activities of the Socialist Party which were found to be in breach of the Constitution would also be in violation of the provisions of the ECtHR”.⁶³ Interestingly, the Court did not propose a convincing argument. As one would expect, the ECtHR has consistently found a violation of the ECHR in all cases from Turkey including the Democrat Party and the Socialist Party cases, except for the Welfare Party case.⁶⁴

In another ruling on the Democratic Peace Movement Party in 1997, the TCC ruled:

“Article 90 says ‘international agreements duly put into effect are equal to law’. According to this rule, provisions of European Convention of Human Rights have the force of law. But, the Turkish Law on Political Parties has priority here due to its character of special law. Moreover, the Convention 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”.⁶⁵

While it is a fact that the TCC’s approach to the dissolution of political parties has been on a changing path recently, the Court is better known for its unchanging mindset despite numerous European Court judgments. It is only recently that there have been some modest efforts, including the constitutional amendment of 2010 that increased the simple majority to dissolve a political party to a two-thirds vote in the TCC.

⁶³ The Constitutional Court (Turkey), Esas No. 1996/1, Karar No. 1997/1 (Resmi Gazete 14 February 1997).

⁶⁴ Consider also some of the judgments rendered by the ECtHR on the dissolution of pro-Kurdish political parties: *Socialist Party and Others v. Turkey*, Application Nos. 20/1997/804/1007, Judgment of 25 May 1998; *United Communist Party of Turkey and Others v. Turkey*, Application No. 133/1996/752/951, Judgment of 30 January 1998; *Freedom and Democracy Party v. Turkey*, Application No. 23885/94, Judgment of 8 December 1999; *Yazar, The People’s Labour Party and Others v. Turkey* Application Nos. 22723/93, 22724/93 and 22725/93, Judgment of 9 April 2002; *Dicle for the Democratic Party v. Turkey*, Application No. 25141/94, Judgment of 10 December 2002; *Democracy and Change Party and Others v. Turkey*, Application Nos. 39210/98 and 39974/98, Judgment of 26 April 2005; *Emek Partisi and Şenol v. Turkey*, Application No. 39434/98, Judgment of 31 May 2005; *Demokratik Kitle Partisi and Elçi v. Turkey*, Application No. 51290/99, Judgment of 3 May 2007; and *HADEP and Demir v. Turkey*, Application No. 28003/03, Judgment of 14 December 2010.

⁶⁵ The Constitutional Court (Turkey), Esas No. 1996/3, Karar No. 1997/3 (Resmi Gazete 2 June 2000).

As for the three recent closure cases on the Rights and Freedoms Party (Hak-Par), the Democratic Society Party (DTP) and the Justice and Development Party (AKP), the TCC only dissolved the DTP based on evidence that it had become a centre for the execution of activities which violated the State's indivisible integrity of its territory and nation by providing assistance and support to the Kurdistan Workers' Party (PKK).⁶⁶ Although it is a modest positive move, the TCC's approach towards international law still continues to be controversial. In these recent cases, the judges tended to argue that the conflict in those cases is between the Turkish Constitution and international law rather than between domestic law and international law. When international law is in conflict with the Constitution, a domestic court may be expected to overcome the problem by interpreting the Constitution in conformity with international law.⁶⁷ However, looking at the TCC's infrequent use of international law reveals that the Court consistently gives priority to a strict reading of the Turkish Constitution over international law.⁶⁸ To illustrate, in its ruling on the Hak-Par case in 2008, the TCC judges had to interpret the normative status of international human rights law in the Turkish domestic order. Due to the absence of a qualified majority (at least 7 out of 11 judges), the case did not result in closure of the party. However, the Court argued:

“[T]he ‘domestic norm’ alleged to be in contradiction with Article 11 of the European Convention on Human Rights is not a law but a Constitutional provision. Hence, Article 90 of the Constitution is not applicable in this case. Moreover, according to Article 138 of the Constitution, judges ‘shall give judgment in accordance with the Constitution, law, and their personal conviction conforming with the law’ and for this reason, while there are concrete Constitutional rules, the TCC cannot reach a verdict based on a direct application of the ECtHR jurisprudence through interpretation”.⁶⁹

The TCC could have opened a door for a rights-based approach giving the ECHR and its rulings priority but missed the opportunity. Instead, the Court con-

⁶⁶ The Constitutional Court (Turkey), Esas No. 2007/1, Karar No. 2009/4 (Resmi Gazete 11 December 2009).

⁶⁷ To take two examples, Article 10(2) of the Spanish Constitution (1978) states that “the norms relative to basic rights and liberties which are recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain”; whereas Article 16(2) of the Portuguese Constitution (1976) also prescribes “the provisions of the Constitution and laws relating to fundamental rights are to be read and interpreted in harmony with the Universal Declaration of Human Rights”.

⁶⁸ ÖRÜCÜ, *cit. supra* note 58, p. 141.

⁶⁹ The Constitutional Court (Turkey), Hak ve Özgürlükler Partisi Kapatma Davası, Esas No. 2002/1, Karar No. 2008/1 (Karar Tarihi, 29 January 2008).

tinued to support its restrictive and strict interpretation of domestic norms, notwithstanding that it was a potential violation of Turkey's international legal obligations. This is another striking example of the generally dismissive attitude of the TCC in which reference to international law has been made "[...] either as mere lip-service or in justification for the restrictions on fundamental rights and liberties".⁷⁰

4.3. *Level of Foreign Law and Precedents in the Decisions of the TCC*

The TCC almost never cites foreign law or judicial decisions in other jurisdictions. Furthermore, the present research demonstrates that actual references to foreign precedents appear very low in absolute terms and are declining. From 1998 to 2012, less than 0.4% of opinions in constitutional cases cited foreign case law.⁷¹ Although the ratio is relatively high in the dissolution of political party cases (10 references out of 41 cases), almost all references occurred before 2006.

It is paradoxical that the TCC has only limited interaction with foreign courts because Turkey's legal system was heavily imported from the French, German, Italian and Swiss legal systems. To borrow Slaughter's terminology, the lack of horizontal communication in the TCC's practice is very surprising.

In understanding this, it may be useful to focus on a particular perspective, i.e. that of the importer.⁷² By choice, desire and design of the ruling elite, the entire Turkish legal system was created by importing from codes of foreign origin. It was accompanied by a series of social reform laws⁷³ "[...] to supplement these Codes aimed at 'changing the people' – by trying to eradicating their cultures – and forging a new identity".⁷⁴ This *élite dirigeante* ensconced their vision in all Turkish State institutions without exception, including the TCC. When the legal system conflicted with the culture, the Turkish judges either turned a blind eye to the cul-

⁷⁰ KÖKER, *cit. supra* note 25, p. 338.

⁷¹ This excludes references to international law.

⁷² The term "importer's perspective" was coined by Catherine Dupre in her study focusing on the Hungarian Constitutional Court, where she argues that "[t]his perspective considers the movement of law from the inside, i.e. from the point of view of those who import the law of a foreign country and it questions the reasons for importing that law. The differences existing between the original model and the form it takes after its importation are not used to assess that importation in terms of good/bad or success/failure; instead, they become a starting point to reflect on the logic and the scope of law importation [...]" . DUPRE, *Importing the Law in Post-Communist Transitions*, Oxford, 2003, p. 10.

⁷³ These social reforms were introduced under the heading of *Inkılâp Kanunları*, which aims at *inter alia* establishing secular education (by adopting the Latin alphabet), a new legal system (by importing Western codes), and a new cultural identity (by introducing the mandatory use of hats, closing the dervish lodges and prohibiting the wearing of certain garments).

⁷⁴ Emphasis added. ÖRÜCÜ, "Judicial Navigation as Official Law Meets Culture in Turkey", *International Journal of Law in Context*, 2008, p. 35 ff., p. 41.

ture or attempted to accommodate it within the official framework.⁷⁵ The same is particularly true when it comes to the TCC's usage of foreign law. The TCC lends an ear to the decisions of foreign courts, albeit rarely, as long as their interpretation is in line with the official Turkish framework. These references also remain superficial and lacking in method when the TCC refers to foreign law. As an example, the French Constitutional Court is referred to by the TCC in roughly 10% of its party closure decisions (4 cases out of 41) but these references – with identical wording – served as supplementary foreign legal opinions to verdicts already rendered in the dissolution of 4 very different Turkish political parties.⁷⁶

5. CONCLUSION

The focus on the TCC can be justified by the importance of Turkey for the future of the international and European liberal order at the basis of which lies the idea of the international rule of law. Accordingly, one would expect substantial involvement of the Turkish domestic courts in emerging transjudicial conversations between international and domestic judges. However, a closer analysis of the Turkish experience once again confirms ambiguities around the phenomenon of judicial dialogue as an element of the international rule of law. Both international and domestic courts, including the TCC, do cite international and foreign law. Yet, the increase in the practice of cross-referencing does not necessarily lead to the consolidation of an international rule of law. Courts engage in transjudicial dialogue in different ways and for different reasons.

The TCC's involvement in judicial dialogue relies on a practice of citing international and foreign courts. In terms of vertical dialogue, the TCC has exclusively engaged in dialogue with one particular court – the ECtHR. This dialogue is best described as a mandatory dialogue as patently evidenced by the TCC's usage of the ECHR. As noted earlier, the TCC mostly cites Articles 2, 3, 6, 8, 10, 11, and 17 of the ECHR. Interestingly, these articles correspond to articles on the basis of which Turkey is frequently challenged and convicted by the ECtHR.

⁷⁵ *Ibid*, p. 42.

⁷⁶ The Constitutional Court (Turkey), Özgürlük ve Demokrasi Partisi Kapatma Davası, Esas No. 1993/1 Karar No. 1993/2 (Resmi Gazete 23 November 1993); the Constitutional Court (Turkey), Halkın Emek Partisi Kapatma Davası, Esas No.1992/1, Karar No. 1993/1 (Resmi Gazete 14 July 1993); the Constitutional Court (Turkey), Demokrasi Partisi Kapatma Davası, Esas No. 1993/3, Karar No. 1994/2 (Resmi Gazete 16 June 1994); the Constitutional Court (Turkey), Sosyalist Türkiye Partisi Kapatma Davası, Esas No. 1993/2, Karar No. 1993/3 (Resmi Gazete 30 November 1993): “In its decision on the annulment of the (French) Law granting special status to Corsica, the French Constitutional Court refused the notion of ‘Corsican People’ as a complement (*mütemmim cüzi*) of ‘French People’ and stressed that French People cannot be divided by law”.

There is, however, a clear lack of horizontal judicial dialogue in the practice of the TCC, which needs some further commentary. It is noted that horizontal communication among European supreme courts is common from the perspective of judicial dialogue. However, the TCC's dialogue with its foreign peers is very peculiar and restricted in scope. Taken together, the prevalence of vertical dialogue and the almost non-existence of horizontal communication in this particular case shows the TCC's reluctance to engage in transjudicial conversation unless it is required to do so by external pressure.

The Turkish experience of judicial dialogue seems to comfort those who challenge the very substance of judicial dialogue. For its critics, judicial dialogue is only relevant within a limited legal and political sphere, namely the European public order. Beyond this, judicial dialogue is not common. Evidence from Turkey goes further as it purports to show that even within Europe, judicial dialogue is not yet fully developed.

Moreover, alternative explanations may be forwarded based on the peculiarity of the Turkish political system and nature of the TCC. It has already been noted that the TCC played a key role as the guardian of the political regime in Turkey for decades. As such, it was vested with considerable power in the Turkish political system, which led the Court to become a "tutor" institution. Accordingly, the TCC did not need the support of any additional reference to assert its authority in the domestic political order.

Finally, this paper also reveals a great need to enlarge the scope of contemporary scholarship to incorporate national practices of countries that have received relatively little scholarly attention, such as Turkey. The posture of Turkey towards the international community and its norms has the potential to affect the state of international law in general for years to come. It is through similar experiences that we may be able to have more sustainable conclusions on the reality and longevity of phenomena such as judicial dialogue or the international rule of law.