The Problem of the Application of Less Protective International Agreements in Domestic Legal Systems: Article 90 of the Turkish Constitution

Levent Gonenc[*] and Selin Esen[**]

A. Introduction

The Turkish Grand National Assembly (TGNA) amended ten articles of the 1982 Constitution in May 2004. This was the ninth alteration since the inauguration of the Constitution and – after the 2001 amendments – the second major constitutional restructuring within the framework of a legal reform campaign that had gained momentum after the approval of Turkey's candidate status by the EU during the Helsinki Summit of 1999. One of the main purposes of the 2004 amendments, as had been the case with the 2001 amendments, was to elevate the standards of fundamental rights and liberties in Turkey so that they meet the "Copenhagen Criteria", i.e. the political criteria which had been introduced as a precondition of accession to the EU. The amendment package included several significant changes, such as the elimination of capital punishment, the abolition of State Security Courts, and the opening of military expenses to the State Audit's Office inspection.[1] Of these novelties, however, the addition to Article 90 of the Constitution was the most radical one. The new regulation, establishing the supremacy of international human rights agreements over national legislation, was a "silent revolution" in the Turkish constitutional system.[2] True, this was a long awaited constitutional amendment and, at first glance, its adoption was an achievement on its own; however, as things stand today, it has become clear that the newly-added sentence to Article 90 might bring more problems than it solves. To discuss all these problems is beyond the scope of this article. Instead, we wish to focus on a specific issue, which has a great deal of potential to create serious controversies in the Turkish constitutional system: the application of more restricting international agreements in the presence of less-restricting national laws. It has generally been taken for granted that international human rights regulations are always more progressive than those in national legal systems,

[*] Ankara University, Faculty of Law; leventgonenc@yahoo.com.
[**] Ankara University, Faculty of Political Sciences; selin.essen@politics.ankara.edu.tr.

[1] *See* for the details of the 2004 amendments, E. Ozbudun & S. Yazici, Democratization Reforms in Turkey (1993-2004) (2004).

[2] L. Gonenc, *2004 Anayasa Değişiklikleri*, [2004 Amendments to the Constitution], 7 Güncel Hukuk [Current Law] (2004).

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so this problem has hardly occupied a place in the minds of legal scholars and practitioners working in the field of human rights. Indeed, the recent revision of Article 90(5) is also a product of such a way of thinking. However, as we shall attempt to bring to the reader's attention, it is quite conceivable that the recognition of the supremacy of international agreements in a given constitution may paradoxically result in the further restriction of rights and liberties. Placing international law above the national law may sometimes affect national constitutional systems negatively.[3]

Having introduced the main theme of the article, we wish to underline the following point at the very outset: we are aware of the fact that legal practitioners may solve those problems we discuss below in everyday legal routine or that the perils we mention in this paper may never materialize or that law-makers may take necessary measures to prevent the emergence of controversies such as those we touch upon in the paragraphs to come. This all may be true, but we believe that the application of less protective international agreements in domestic legal systems still deserves to be studied at least at the theoretical level. The Turkish

[3] The application of less protective international agreements may not be considered a problem within the context of EU Law for two reasons. First, international agreements in the European Union Legal System are superior to national laws and directly applicable. Thus, one may not speak of a real 'conflict' between international law and domestic law in Europe. The international agreements must be applied in every case. Second, as we shall explain in detail below, the European Convention on Human Rights (ECHR), which is the basic human rights protection mechanism in Europe, contains a provision (Article 53), prohibiting the limitation or derogation from any rights and liberties under national laws. This regulation allows the national authorities to put aside the ECHR and apply the national law, in case the latter is more protective than the former. We should, however, note that the core problem, discussed in this article, may not be totally irrelevant for European Law in the near future. Particularly Article 53 of the EU Charter of Fundamental Rights, stating that:

> Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

provoked discussions about the application of more protective provisions of national constitutions, in the presence of less protective EU norms (for these discussions, *see* J. B. Liisberg, *Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? Article 53 of the Charter: A Fountain of Law or Just An Inkblot?*, Jean Monnet Working Paper, 4/01 (2001). Certain authors argued that Article 53: "… is diametrically opposed to the constant jurisprudence of the ECJ [European Court of Justice] according to which the legality of Community law must not be questioned on the basis of national fundamental rights, but may only be ruled upon by the ECJ against the yardstick of Community fundamental rights. This clause therefore calls into question the uniform application of Community, a cardinal principle of the European integration process which essentially relies on the idea of a Community of law." (E. Vranes, *The Final Clauses of the Charter of Fundamental Rights – Stumbling Blocks for the First and Second Convention*, 7(7) European Integration online Papers (EIoP) (2003), at 11. Available at http://eiop.or.at/eiop/texte/2003-0007a.htm).

case, in this sense, may provide rich material for comparative projects on the issue of the relations between international law and domestic law, which seems to be a growingly important research area in the age of globalization.

B. The Place of International Agreements in the Turkish Legal System

Before proceeding to our analysis, it would be appropriate to provide some background information about the status of international agreements in the Turkish Constitutional System. The beginning of the Turkish experience with constitutionalism goes back to the Ottoman times. The Constitution of 1876, promulgated by Sultan Abdulhamid II, was the first constitution in the Ottoman-Turkish constitutional history. This was followed by the Constitution of 1921, which was drawn up under the extraordinary conditions of the Turkish War of Independence. The 1924 Constitution, in turn, provided the basic framework of the newly-born Turkish Republic, which was founded by Kemal Ataturk in 1923. There were two more constitutions, coming into effect in 1961 and 1982, in the republican era, which were made after military interventions in 1960 and 1980 respectively. Of these constitutions, the first three contained no provision about the status of international agreements in domestic law. The Constitution of 1961 was the first to include a provision concerning the relations between international law and domestic law in Paragraph 5 of Article 65. The latter was repeated verbatim by the Constitution of 1982 (Paragraph 5 of Article 90) and amended by the TGNA in 2004.

The original version of Paragraph 5 of Article 90 reads as follows:

> International agreements duly put into effect bear 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 this provision had already raised some problematic issues in the Turkish constitutional system in the era of the 1961 Constitution. These issues remained unsolved during the application of the Constitution of 1982. The ambiguity derived particularly from the regulation prohibiting an appeal to the Constitutional Court on the basis of the unconstitutionality of an international agreement. One group of authors remained loyal to the text of the Constitution and construed the 5th paragraph in conformity with the letter of the provision, concluding that international agreements had the same value and force as laws. According to them, the Constitution did not recognize the supremacy of international agreements. Even though the Constitution prohibited appealing to the Constitutional Court, it was still possible to make laws contravening those agreements. Put in another way, although such an act might result in the state's responsibility on the basis of international law, it was possible to change a

provision of an international agreement by a *lex posterior* or a *lex specialis* law.[4] According to this way of thinking, relations between international agreements and national laws are subject to the general legal principles; when a conflict arises between an international agreement and a national law, we should decide which one is more specific in content (*lex specialis*) or sequentially later (*lex posterior*); the detailed or the later norm should be applied.

Another group of authors countered this argument by pointing out that this provision, i.e. the prohibition of an appeal to the Constitutional Court, allowed us to give priority to international agreements. According to these scholars, neither the 1961 Constitution nor the 1982 Constitution explicitly recognized the supremacy of international agreements. However, the clause prohibiting appealing to the Constitutional Court for international agreements put them in a different position in the legal system and accorded them a different value when compared with ordinary laws. More explicitly, this provision should indicate that it was not possible to annul an international agreement, which was the embodiment of "a common will of states"[5] or "common cultural heritage,"[6] with a *lex posterior* or a *lex specialis* law of national authorities. Certain authors within this group, in turn, diverged from the main stream and argued that not all international agreements, but only human rights agreements should be superior to national laws.[7] Those defending the supremacy of international human rights agreements developed this argument particularly for the European Convention on Human Rights (ECHR). Some of them, for example, argued that, because of the fact that the party states agreed to apply the provisions of the ECHR to every individual under their jurisdiction, they were obliged not to legislate against the Convention, even to change existing laws, which were in conflict with the ECHR. The rules of ECHR, in this sense, were constitutional provisions for all members of the European Council, including Turkey.[8]

The place of international agreements in the Turkish constitutional system is not only a popular discussion theme for legal scholars in Turkey: it is also relevant within the framework of Turkey's membership process to the EU. Along with

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4 Ozbudun & Yazici, *supra* note 1, at 12; H. Pazarci, Uluslararası Hukuk Dersleri [Textbook, International Public Law], I. Kitap [Volume I] (2001), at 32.

5 H. Eroglu, Devletler Umumi Hukuku [Public International Law], 3rd Edition, (1991), at 23.

6 S. Batum, *Avrupa İnsan Hakları Sözleşmesi ve Türk Anayasal Sistemine Etkileri* [The Impact of the European Convention on Human Rights on the Turkish Constitutional System], Ph. D. Thesis, Istanbul (1990), at 261.

7 M. Turhan, *Değişen Egemenlik Anlayışının Hak ve Özgürlüklere Etkisi ve Anayasa Mahkemesi* [The Impact of Changing Understanding of Sovereignty and the Constitutional Court], Anayasa Yargısı [Constitutional Adjudication], Anayasa Mahkemesi Yayını [A Publication of the Constitutional Court] 20, at 229 (2003); I. Kaboglu, Anayasa Yargısı [Constitutional Adjudication] 79 (1994).

8 E. Celik, *Avrupa İnsan Hakları Sözleşmesinin Türk Hukukundaki Yeri ve Uygulaması*,[The Status and Application of the European Convention on Human Rights in Turkish Law], 1-3 IHID 55 (1988).

Article 6[9] and Article 7,[10] Article 90(5) was a serious obstacle to the prospective EU membership of Turkey, for these constitutional regulations were not allowing the EU legislation to become part of the domestic law. So, the necessity of adopting the EU law as part of the Turkish domestic law came on the scene repeatedly in the process of Turkey's accession to the EU. In fact, most of the newly-accepted members of the EU had already made amendments to their constitutions in order to give priority to the international law.[11] Thus, Turkey, as a candidate country, also felt the need to implement a similar provision in its constitution without undue delay. So, as a first attempt, such a regulation was included in the 2001 constitutional amendment package. However, when the amendment package came before the TGNA, that arrangement, granting international agreements supreme status over domestic laws, failed to garner the amount of the votes sufficient for the legislation of the amendment.[12] The intent of the TGNA in this attempt was to open the door to international legal standards, which would serve the Turkey's need to incorporate the EU law into domestic law. However, the attempt bore no fruit, most likely due to the traditional sensibilities of the members of the TGNA about preserving the unconditional sovereignty of the republic. The second attempt at recognizing the supremacy of international agreements came during the 2004 amendments. This time, the Government formulated the amendment to Article 90(5) differently from the text that had been submitted to the TGNA in 2001, and foresaw only the supremacy of international human rights agreements over national laws.

The new amendment was, in fact, a partial solution to Turkey's enduring problem of the incompatibility between international legal standards and domestic law. So, the constitution-makers, most likely thinking that some change is better than no change, opted to start from the most problematic area, i.e. the field of human rights, which was constantly creating problems between Turkey and the democratic world, especially between the EU and Turkey.[13]

To this end, the TGNA added the following provision to Article 90, Paragraph 5:

> In case of contradiction between international agreements regarding basic rights and freedoms approved through proper procedure and domestic laws, due to different provisions on the same issue, the provisions of international agreements shall be considered.

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[9] Article 6 – Sovereignty is vested fully and unconditionally in the nation. The Turkish Nation shall exercise its sovereignty through the authorised organs as prescribed by the principles laid down in the Constitution. / The right to exercise sovereignty shall not be delegated to any individual, group or class. No person or agency shall exercise any state authority which does not emanate from the Constitution.

[10] Article 7 – Legislative power is vested in the Turkish Grand National Assembly on behalf of the Turkish Nation. This power cannot be delegated.

[11] A. Albi, Constitutions of Central and Eastern Europe and EU Membership, World Congress of International Association of Constitutional Law, available at www.iaclworldcongress.org (2004).

[12] *See* for details, L. Gonenc, *The 2001 Amendments to the 1982 Constitution of Turkey*, 1(1) Ankara Law Review (2004).

[13] *Id.,* at 47.

This provision made it clear that international human rights agreements have priority over conflicting national laws. Now, the controversy about the place of international agreements was put at an end – although only for human rights agreements[14] – by the insertion of the supremacy clause to Article 90 Paragraph 5. Yet, even a quick skim through the new provision reveals that this amendment is deficient in solving completely the problem mentioned above, i.e. the incorporation of the EU *Acquis Communautaire* into the Turkish Legal System. So, it will be necessary to implement further constitutional amendments – not only to Article 90, but also to Article 6 and Article 7 – to provide delegation of the legislative power to international authorities such as the EU and to directly apply the EU legislation.[15]

C. Problems Deriving from the New Version of Article 90, Paragraph 5

As we have tried to demonstrate above, the addition to Article 90(5) seems to be an improper means to desired ends. This is, however, not the only problem related with the recent amendment. The last version of the provision brings up additional problematic issues. First, the provision cites "basic rights and freedoms". Yet, it is unclear which *agreements* will be considered as basic rights and freedoms.[16] If

[14] As for other international agreements, we subscribe to the more positivist interpretation of the Article. That is, we think that the text of the Constitution is exact enough to consider that international agreements and national laws are at the same level in the Turkish Legal System. Prohibition to appeal to the Constitutional Court, in this sense, does not accord these agreements supremacy; it only provides extra protection for them. Presumably, constitution-makers included this provision in the Constitution so as not to cause any problems in international relations due to the annulment of a norm of an international agreement by domestic legal authorities. However, this exception is apparently contrary to the principle of the rule of law. The latter requires that acts and actions of legislative and executive authorities should be subject to judicial review in democratic states. As a solution, the Constitution might be changed in a way to empower the Constitutional Court to carry out a preventive review for international agreements.

[15] N. Yuzbasioglu, *İnsan Hakları Uluslararası Sözleşmelerinin İç Hukukta Doğrudan Uygulanması* [Direct Application of International Human Rights Agreements in Domestic Law], Paper delivered at that Symposium organized by the Turkish Bar Association (2004), at 90.

[16] It is interesting to note that the draft amendment to Art. 90(5), brought before the TGNA in 2001, envisaged the supremacy of all international agreements. The draft, adopted by the Constitutional Commission of the TGNA, contained the following provision: "In case of contradiction between domestic laws and international agreements, international agreements shall be considered." During parliamentary discussions, three revisions to the 2001 draft had been submitted to the TGNA, yet these did aim at singling out certain categories of international agreements to be supreme over domestic laws; they were basically clarified the meaning of the newly added paragraph. Then, however, as we have mentioned above, this draft was not adopted by the TGNA. During the parliamentary discussions of the 2004 constitutional amendment package, on the other hand, the main opposition party in the TGNA, the Republican People's Party (RPP), suggested a modification to Government's proposal. They proposed to enumerate which international human rights agreements would be considered superior to laws in Article 90(5). Deputies from RPP emphasized that there were too many agreements to which Turkey was a party, so it could be difficult for legal

we construe the provision in favor of rights and liberties, we may conclude that it should not exclude any international human rights agreement which has been ratified by Turkey,[17] and also that, no matter what title they have, if there is a provision in a particular international agreement that is related to a human right we should consider that this clause is superior to the domestic law. Moreover, the new formulation of Article 90(5) invites us to consider the problem of the status of the jurisprudence of international human rights courts in the Turkish legal system. Can we consider the judgments, decisions and opinions of international human rights courts within the scope of Article 90(5)? Given the fact that international human rights courts, e.g. European Court of Human Rights, are the principal organs, which have an exclusive power to clarify and interpret the meaning of the provisions of agreements, we should answer this question positively.[18] In connection with this problem, we may also inquire about the status of several international agreements on the same issue. What happens if more than one international agreement, regulating the same issue, contradicts a domestic law? Here, it is clear that the domestic law is inapplicable under Article 90(5), yet it is still unclear which international agreement is to be applied in a concrete situation. One may propose to utilize the general principles of law, namely *lex posterior* and *lex superior*, to solve this problem. Since there is no hierarchical relationship between international agreements from Article 90(5)'s point of view, the principle of *lex superior* seems to be irrelevant. The principle of *lex posterior*, in turn, would not be an appropriate principle to be applied in this case, because the application of this principle, without taking into account the content of the respective provisions of the concerned agreements, involves the risk of undermining the human rights protection. To be more exact, the later agreement may be more limiting or less protecting than the earlier agreement. In such situations, then, we may rely on other principles of international human rights law, such as "*pro homine*" – which we shall later explain in detail – and apply the most favorable international provision for the individual, irrespective of the agreement's date of entering into force. Second, the newly-added sentence to Article 90 Paragraph 5 mentions "… contradiction between international agreements regarding basic rights and freedoms approved through proper procedure and domestic laws …" What would be the meaning of "domestic laws"? Does this term only refer to statutes or to all norms which have the status and force of statutes? If we want to open our national legal system to international human rights standards more effectively, we should not interpret this provision narrowly. That is, the term of "domestic laws" should be considered a generic term, which would encompass not only statutes, but also other status-like regulations, particularly law-amending

practitioners to be aware of them all. They suggested to list international human rights agreements in the Constitution. However, this proposal was rejected by the ruling party (*see* M. Gulmez, *Anayasa Değişikliği Sonrasında İnsan Hakları Sözleşmelerinin İç Hukuktaki Yeri ve Değeri* [The Status and Value of International Human Rights Agreements in the Domestic Law after the Constitutional Amendment], 54 Türkiye Barolar Birliği Dergisi [The Journal of the Turkish Bar Assocaition] 149 (2004)).

[17] *Id.,* at 153-154.

[18] *Id.*, at 158-159.

ordinances.[19] Third, the addressee of the provision is also ambiguous. To put it in another way, the provision does not answer the question of who will decide if there is a conflict between an international agreement and domestic law; judges? If the answer is yes, then another question arises: Which judges, judges in the lower courts or judges in the higher courts? What about administrative agencies? Does the new version of the Article charge the administrative agents with the responsibility of finding, selecting and applying relevant international agreements in concrete situations? To answer these questions we may take into consideration another regulation of the Constitution: According to Article 11, the provisions of the Constitution are fundamental legal rules and binding on legislative, executive, judicial organs, administrative authorities and other institutions and individuals. Legislative, executive and judicial authorities alike should take Article 90(5) into account when exercising their constitutional powers and functions.[20] As for the judiciary, no matter which level they are, all courts should consider Article 90(5) when they adjudicate.

Two additional problems might be brought into consideration on this point. First, all courts have a heavy workload. So it will be difficult for judges even to be aware of the human rights agreements that Turkey becomes a party to. This is, of course, also a relevant concern for the administrative agencies. Second, since the 90(5) clause is binding for all state organs, there might be different interpretations about the same issue between the actors, applying same norms. Here, one may argue that this problem for the administrative agencies can easily be solved within the context of administrative hierarchy. However, the case is more complicated for the judicial organ. As for the courts at the lower level, one may still rely on the control mechanisms in the legal system, i.e. the control of the lower courts' decisions by the higher courts. As for the higher courts, however, no such mechanisms exist. What happens, if, for example, the High Court of Appeals and the Council of State interpret the same norms differently? There will be, most likely, two incompatible decisions for the same issue at hand. The Constitution does not make it clear how such problems should be solved.[21]

D. Application of More Restricting Human Rights Agreements

As we have tried to explain above, the revised version of Article 90 may be the source of serious problems for the Turkish constitutional system in the future. Now,

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[19] *Id.,* at 154-155.

[20] S. Gerek & A. R. Aydin, *Anayasa'nın 90. Maddesi Değişikliği Karşısında Yasaların Geleceği ve Anayasal Denetim* [The Future of Laws and Constitutional Review within the Framework of the Revision of Article 90 of the Constitution], 55 Türkiye Barolar Birliği Dergisi [The Journal of the Turkish Bar Assocaition] 236 (2004).

[21] One may again propose to empower the Constitutional Court, as the ultimate authority, to solve the incompatibility between the interpreatations concerning the conflicting international agreements and domestic laws. *See* S. Batum, *et al.*, *Opinion prepared for the Turkish Economic and Social Studies Foundation about the revision of Article 90 of the Constitution*, available at www.tesev.org.tr.

we wish to turn to another problem concerning the application of international human rights agreements in national legal systems. Let us illustrate this particular problem with an imaginary example: Assume that the Turkish Criminal Procedure Code requires that arrestees must appear before a judge within 24 hours. Assume again that Turkey has signed and put duly in effect an international agreement which contains such a provision as: "A suspect must be brought before a judge within 48 hours." Please note that there is no directly applicable provision in the Constitution in this imaginary situation. To make the example more concrete imagine that a person was caught and arrested by the police and held in prison for 36 hours before taken to the court. Is this an unlawful arrest? If we read Article 90(5) of the Constitution, we may come to the conclusion that the Judge should apply the international agreement, not the Criminal Procedure Code, and reject such allegations. Could this be acceptable, particularly taking into account the fact that the aim of such provisions, foreseeing the supremacy of international human rights agreements, is to strengthen the human rights protection mechanisms in a given legal system?

This problem has been discussed on several occasions in Turkish legal literature. Generally, the authors concur that, in spite of the explicit proscription of the Constitution, more protective national laws should be applied in such situations. That is, in our imaginary example, an arrested person cannot be held in custody for a period of more than 24 hours without a court hearing. Although there is a general consensus among scholars on the answer, the reasons they provide vary. Some argue that the logic of the new regulation is based on the assumption that national laws always fall behind international agreements as far as the protection of fundamental rights and liberties is concerned. Given the fact that one may not verify this assumption in this specific situation, there is no ground for the application of Article 90(5).[22] Some argue that one may detect a "passive conflict" here, i.e. no real conflict exists in such a situation, so Article 90(5) would simply not be relevant.[23] Still others accept that there is an "active conflict" between such norms, yet they object the application of international agreements by making reference to the more general principles in the field of human rights. For example, those authors in the latter category argue that the application of more restricting international agreements would violate the "spirit of the protection of fundamental rights and liberties."[24] Undoubtedly, the latter type of arguments, deriving from the theory and practice of international human rights protection, are not uncommon in the field of human rights. Indeed, today, one may speak of

[22] M. Gulmez, *Anayasa Değişikliği Sonrasında İnsan Hakları Sözleşmelerinin İç Hukuktaki Yeri ve Değeri* [The Status and Value of International Human Rights Agreements in the Domestic Law after the Constitutional Amendment], 54 Türkiye Barolar Birliği Dergisi [The Journal of the Turkish Bar Assocaition] 156 (2004).

[23] K. Baslar, *Uluslararası Antlaşmaların Onaylanması, Üstünlüğü ve Denetimi Üzerine* [On the Approval, Supremacy and the Review of International Agreements], 24 (1-2) Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni: Prof. Dr. Sevin Toluner'e Armağan [Bulletin of International Law and International Private Law: Festschrift for Prof. Dr. Sevin Toluner] 39 (2004).

[24] A. Karagulmez, *5170 Sayılı Yasa'yla Anayasa'nın 90. Maddesinde Yapılan Değişikliğe Bir Bakış* [A Glance at the Amendment to Article 90 of the Constitution Made by Law No. 5170], 54 Türkiye Barolar Birliği Dergisi [The Journal of Turkish Bar Association] 173 (2004).

the so-called "universal human rights standards" that are accepted and applied by the liberal-democratic states all around the world. This standardization enables national actors to use a common-international language when dealing with the human rights problems in their countries. Here, for example, we may utilize the principle of "*pro homine*", as understood and applied in Latin America, which is a remote legal environment for Turkish legal scholars and practitioners, to solve the problem in our legal system.

The principle of *pro homine,* on the one hand, requires the interpretation of human rights norms in such a way as to limit the concerned right as little as possible. Put in another way, if it is possible to interpret a human rights norm in various ways, the most tutelary interpretation for the individual will be adopted. The principle, in this sense, is a hermeneutic criterion that shapes all human rights law. On the other hand, *pro homine* renders the general principles of law, governing the relations between international agreements and domestic laws, irrelevant, i.e. *lex superior* and *lex posterior*. First, when a concrete situation occurs, it is possible to apply *pro homine* to solve the conflict between domestic and international norms in force, without taking into account the hierarchy between them. Thereby the most protective regulation for the person will be implemented. Second, in case of succession of norms, the principle of *pro homine* again steps in and, regardless of the sequential order of the norms; the more favorable one will be applied. To be more specific, norms in an *a posterior* international agreement, which has a less protective regulation than the previous domestic law, will not derogate or render inapplicable the latter.[25] Equally, if a previous international agreement has a more protective regulation than an *a posterior* domestic law has, the former will be taken into account, even though the international law is below the domestic law within the hierarchical order. Consequently, in virtue of the principle of *pro homine*, a more protective norm or a more expansive interpretation should be applied in human rights cases. Conversely, a less protective norm or a narrowing interpretation should be preferred when establishing permanent limitations on the exercise of a right or its extraordinary suspension.[26] Due to these characteristics, this principle is also called "*pro cives*" or "*favor libertatis*".

This principle has already found its expression in certain international human rights agreements. For instance, Article 5.2 of the United Nations International Covenant on Civil and Political Rights (ICCPR) establishes that: "(t)here shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent."

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[25] H. Henderson, *Los Tratados Internacionales de Derechos Humanos en el Orden Interno: la Importancia del Principio Pro Homine*, 39 Revista Instituto Interamericano de Derechos Humanos 93-96 (2004).

[26] M. Pinto, El Principio Pro Homine. Criterios de Hermenéutica y Pautas para la Regulación de los Derechos Humanos 163 (1977); C. Medina Quiroga, (1996), *El derecho Interno de los Derechos Humanos*, *in* C. Medina Quiroga and J. Mera Figueroa (Eds.), Sistema Jurídico y Derechos Humanos. El derecho internacional y las obligaciones inst. de Chile en materia de Derechos Humanos 81 (1996).

The formula, existing Article 5.2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) is similar to the ICCPR: "No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent."[27] The ECHR also includes parallel arrangements. According to Article 53 of the Convention: "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other areement to which it is a Party." Interestingly enough, such provisions in international agreements, which are in force in Turkey, would create a kind of "boomerang effect". That is, Article 90(5) requires the application of international agreements, even though the latter is less protective than domestic laws. However, when we turn to such international agreements as those mentioned above, they send us back to the national legislation, via "the-most-favorable-to-individual-clause,"[28] such as Article 5.2 of the ICCPR, Article 5.2 of the ICESCR and Article 52 of the ECHR, on the condition that they are more progressive than international agreements. So, in these particular situations, the problem, deriving from the new version of Article 90(5), can be solved by the agreement itself. Such clauses in international agreements, in fact, reflect a well-known principle of international law, i.e. the principle of "minimum standards", according to which international agreements set the minimum standards for human rights and individuals are entitled to better protection under the most favorable regulation. However, as in the examples we shall discus below, an international agreement may not explicitly recognize this principle or it may require the application of its provisions unconditionally. Then, by taking into account such cases, it would be safer to rely on the national Constitution itself to solve the problem. Given the fact that the Constitution is still the highest legal norm, binding all organs of the state, to seek the solution within the framework of the Constitution of 1982 may solidify our theoretical position. In this context, we shall argue below that certain provisions in the Constitution provide a safer framework to interpret Article 90 in a more favorable way for rights and liberties.

Let us start with reading another article of the Constitution, Article 13. The original version of the Article provides that: "Fundamental rights and liberties may be restricted by law …" Now, it is legitimate to ask: What is the meaning of "law" within the context of this article? Does this term cover international agreements? Indeed, in our example, if we put the Criminal Procedure Code aside and apply the international agreement instead, the latter becomes the main norm restricting this particular liberty. In other words, it is the international agreement which draws the limits of the right to liberty in criminal proceedings. Is this possible under Article 13 of the Constitution? In order to clarify the meaning of the term

[27] In addition to some of the UN agreements some regional human rights treaties such as "American Convention on Human Rights" (Art. 29) also enshrine the principle of *pro homine*.

[28] L. B. Sohn, *The Human Rights Law of the Charter*, 12 Texas International Law Journal 137 (1977).

of "law" in Article 13, we ought to turn to Article 90 again. The first paragraph of Article 90 states that "the ratification of treaties concluded with foreign states and international organisations on behalf of the Republic of Turkey, shall be subject to adoption by the Turkish Grand National Assembly by a law approving the ratification." That means that, in the Turkish Constitutional System, we need a law, adopted by the TGNA, approving the ratification – not approving the agreement itself – to put an international agreement into effect in the national legal system. The Fifth Paragraph of Article 90 adds that: "International agreements duly put into effect bear the force of law." Accordingly, under the current Constitution of Turkey, an international agreement enters into force thanks to a law and assumes the status of law. Taking into account the latter fact, can we interpret Article 13 of the Constitution in a way that the Constitution allows the restriction of fundamental rights and liberties also by international agreements?

One may answer this question affirmatively on the basis of the following argument. The term "law" in Article 13 cannot be understood solely as "formal laws", i.e. pieces of legislation, made and adopted by the parliament, in accordance with the procedures laid down in the Constitution. True, as for the positive legal framework, an international agreement is and remains to be separate from the law, approving its ratification, international agreements and laws are not different from each other in terms of their status and effects. The TGNA can regulate the same issue, either by law or by an international agreement. We should look into the will of parliament. To put it in a candid language, those who would follow this line of argument may maintain that what is important is the "letter", not the "envelope". To return to our imaginary example, the TGNA could always have made a law, increasing the length of custody from 24 hours to 48 hours; yet, it did not wish so; it preferred to regulate the issue by an international agreement. So, we may conclude that the TGNA expressed its will in the form of international agreement and we should take into account its will in this situation.[29]

Although it seems reasonable, this argument is not tenable on a further analysis of the relevant provisions. First of all, we ought to take into account that the term of "only" was added to the text of Article 13 during the 2001 amendments to the Constitution. Now the provision concerned reads: "Fundamental rights and liberties may be restricted *only* by law …" (emphasis added). We think that this revision would help us to develop a counter argument: By adding the term of "only", the constitution-makers wanted to clarify that fundamental rights and liberties cannot be limited by "other regulatory norms", i.e. those generally applicable norms made by the executive (e.g. regulations)[30] and international

[29] It is apparent that this analysis mainly aims to explain the circumstances in which the human rights standards in national legal systems are worsened by the later ratification of less protective international agreements. As for the reverse case, i.e. expanding the scope of existing rights and liberties at the national level (e.g. 48 hours custody) by putting more progressive subsequent international agreements into effect (e.g. 24 hours custody), there should be no constitutional obstacle to apply Article 90(5). For in this case, what is done by the international agreement is not "restricting", but "regulating", i.e. reinforcing, complementing or concretizing certain rights and liberties, and this is not prohibited by Article 13.

[30] Although this is not the main concern of this note, the status of law-amending ordinances

agreements. So, after the 2001 revision, it is by no means possible to consider international agreements among the right-restricting norms.[31] The jurisprudence of the Constitutional Court bolsters our argument. The Court understands the meaning of "law" in Article 13 as an "exclusively legislative act",[32] i.e. statutes. This reflects the formal understanding of law, as defined by Duguit, and leaves international agreements out of the scope of Article 13.

E. Conclusions

So far, we have basically remained at the theoretical level in discussing whether fundamental rights and liberties can be restricted by international agreements. This, however, is more than a theoretical discussion for Turkey. By way of conclusion, it would be appropriate to end this paper by discussing certain concrete examples. Before that, however, let us first revisit our imaginary example to complete our argumentation. Just suppose that the Constitution contains such a provision: "A suspect must be brought before a judge within 24 hours", and the Criminal Procedure Code repeated this proscription verbatim.[33] Now, what would happen if Turkey signs and puts duly in effect an international agreement which contains such a provision as: "A suspect must be brought before a judge within 48 hours."? If we remain loyal to the word of Article 90(5), we must apply the international agreement. This, however, not only narrows the right to liberty in criminal proceedings, but also – and more importantly – contravenes the Constitution itself.

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deserves particular attention. In the Turkish legal literature, it is generally made a distinction between "regulation" and "restriction" of rights and liberties. Without going into detail, we may point out that, as a general rule, fundamental rights and liberties cannot be "restricted" by law-amending ordinances. However, the Constitution allows the regulation (i.e. reinforcing, complementing or concretizing) of one category in the catalogue of rights and liberties, i.e. social and economic rights. Those law-amending ordinances, issued during the state of emergency, are exceptions to these general rules. According to the Constitution all rights and liberties can be restricted by extra-ordinary law-amending ordinances under certain conditions, such as the protection of certain core liberties, e.g. right to life.

[31] Such an interpretation takes the Western constitutional tradition into account. Since the French and American revolutions, it has been thought that the sole source of political power is the people. Accordingly, it is natural that only parliament can restrict the people's rights and liberties as its legitimate representative. Apart from this philosophical premise, those who propagate to entrust the power to restrict rights and liberties exclusively to parliament must face two practical considerations: First, statutes are openly debated and adopted in parliament. Accordingly, all discussions take place before the eyes of the public, who, in turn, may control the law-makers through several informal mechanisms in the realm of civil society. Second, statutes introduce general rules, which could be applicable in all relevant cases and are binding for every citizen. This guarantees that restrictions for rights and liberties will not target only specific persons or groups. These two advantages, i.e. transparency and objectivity, make parliament and statutes as the preferred organ and legal norm for restricting fundamental rights and liberties. Generally, Turkish legal scholarship and constitutional practice share this tradition.

[32] The decision of the Constitutional Court: E. 1985/21, K. 1986/23, dated 6 September 1986.

[33] Needles to say, this is a directly applicable constitutional provision. So, even if the Criminal Procedure Code did not contain any provision concerning the length of pre-trial detention, we could still apply the custody period as "48 hours" in relevant cases.

Here, we should also recall another element of the Turkish Constitutional System concerning the status of international agreements in domestic law: No appeal to the Constitutional Court can be made with regard to international agreements, on the grounds that they are unconstitutional (Article 90(5)). Now we are in a precarious position to apply an international agreement, which cannot be brought before the Constitutional Court, in spite of the fact that it is explicitly in conflict with the Constitution. How can we explain such a contradiction particularly in the presence of Article 11 of the Constitution, providing that: "The provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, and administrative authorities and other institutions and individuals."?

We hope it is now fairly transparent that Article 90(5) bears serious traps in it. When we return from the realm of theory to the realm of practice, we are even faced with more serious problems. The following example may illustrate the complexity of the issue we have discussed throughout this paper. A recently adopted piece of legislation ("Law on the Principles of Warding off Emergencies and Compensation of Damages Resulting from the Pollution of the Sea Areas Caused by Oil and Other Noxious Substances" [34]) contains a provision which is more expansive in scope than the parallel provision of an international agreement ("International Convention on Civil Liability for Oil Pollution Damage of 1969"), as far as the protection of the relevant fundamental rights and liberties is concerned. The latter, comprising several legal mechanisms to compensate oil pollution damages resulting from maritime casualties had been signed by Turkey and duly put into effect by the TGNA. According to Article 8 of the Convention, "[r]ight of compensation under this Convention shall be extinguished unless an action is brought thereunder within three years from the date when the damage occurred. However, in no case shall an action be brought after six years from the date of the incident which causes the damage. Where this incident consists a series of occurrences, the six years' period shall run from the date of the first such occurrence." This provision of the Convention is incompatible with Article 12 of the Law. First, the Law envisages a longer prescription period, i.e. 5 years from the date of becoming aware of the damage and after identifying those who are liable for this action and, in any case, 10 years from the date of the occurrence of the incident. Second, in case of a series of occurrences, the Convention takes into account the first incident in the series, whereas the Law foresees the termination of the period of prescription in 10 years, starting from the occurrence of not the first, but the last incident. It should be apparent from all this that the domestic regulations are more protective in terms of being free to claim rights in this specific case. What would happen if a person applies to the court within the fourth year after the occurrence of the damage? What would be the decision of the local judge on the period of prescription? Will it be three years according to the Convention or five years according to the Law; in case of a series of occurrences, will this period start from the date of the first or the last incident? If the judge applies the Convention, this may restrict the freedom to claim one's rights. If, however, the

[34] Law No. 5312, Adoption Date: 3 March 2005 (Official Gazete, 11 March 2005-25752).

judge takes into consideration the Law, this would mean the ignorance of Article 90(5) of the Constitution and Article 12 of the Law itself, which provides that the provisions of international treaties are reserved with regard to the period of prescription.[35]

Apart from such legal-technical complications, applying international agreements unconditionally may even create irrecoverable damages for the liberal-democratic regime itself. Within this context, the following example would show the importance of the interpretation of Article 90 in connection with Article 13, as we have done above. An international agreement, establishing the Islamic corporation for the development of the private sector, was signed by the representative of Turkey on 1 September 2003 in Kazakhstan. In accordance with the procedure laid down in the Constitution, the Government submitted a draft law, approving the ratification of the Agreement, to the TGNA on 17 August 2004. During the discussion of the Agreement in parliamentary commissions, the opposition party called the public's attention to several provisions of the Agreement, which are explicitly in conflict with Turkish laws and the Constitution.

The general framework of the Agreement was explained in Article 3, paragraph 1, as follows: "The purpose of the Corporation shall be to promote, *in accordance with the principles of the Shari.ah*, the economic development of its member countries by encouraging the establishment, expansion and modernization of private enterprises producing goods and services in such a way as to supplement the activities of the Islamic Development Bank." The Corporation will not carry out any operation which falls under a category of investment that *the Shari.ah Committee*, consisting of three erudite Islamic Scholars, finds to be *incompatible with the Shari.ah* (Article 14/6) (emphases added). Without going into detail, those opposing the Agreement underlined that these and certain other provisions point to the fundamental logic of the Agreement; to discriminate between non-Islamic and Islamic entrepreneurs and support the latter. Indeed, such a practice would contravene most regulations in the field of Commercial Law in Turkey and the provision of the Constitution regulating the freedom to work and conclude contracts (Article 48). Apart from these specific contradictions, such a discriminatory practice would apparently be against the "principle of equality", enshrined in Article 10 of the Constitution. Last but not least, allowing the application of the Shari.ah in a secular republic would undermine the "principle of secularism", which is one of the defining characteristics of the Turkish Republic (Article 2). Given the fact that international agreements cannot be reviewed by the

[35] Here, one may argue that state authorities can easily prevent the emergence of such problems by amending the national law in accordance with the signed international agreements. This argumentation may go further as; such harmonization is not only necessary for the proper application of international agreements in domestic legal environment, but also it is the natural consequence of the state's international commitments. This might be generally true, however, for those specific cases as mentioned in the last paragraph, state authorities face a dilemma; they must choose between the supremacy of international law and effective protection of human rights domestically. We believe that, in many real-life cases, responsive and responsible rulers of a given country would prefer to solve this dilemma in favor of the rights and liberties of its citizens, and in spite of an apparent contradiction with international agreements, they would preserve more protective national provisions.

Constitutional Court on the ground of their unconstitutionality, such agreements as the one establishing the Islamic corporation for the development of the private sector may inflict irreparable harm on the Turkish constitutional system.

Having faced serious opposition from major civil and political actors, the Government defended itself by making reference to the derogations from the above mentioned Shari.ah-related articles, which had been inserted in the draft law of the approval of the ratification of the agreement. Putting questions such as whether such derogations are valid in international law, whether they are acceptable by the other parties in general, whether they provide sufficient protection for the Turkish Constitutional System, aside, one may see the dark side of Article 90(5) in this debate. The above mentioned agreement is still pending in parliamentary commissions and the Government will most likely not attempt to pass the law approving the ratification of the agreement in the near future. However, the existence of this discussion alone underlines the danger of the application of the "supremacy clause" in Article 90(5) unconditionally. Although the latter was brought by constitution-makers in goodwill, its improper interpretation may give a destructive weapon to political authorities, who cannot do what they wish to do by national legal means.