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The Legal Effects of the New Presidential System on Turkey's Treaty-Making Practice

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Abstract

Turkey has always assigned important powers to the legislature, establishing a strong parliamentary tradition. This also applies to the treaty-making process of the state. However, in 2017, the governmental structure was changed from a parliamentary system into a presidential one. This article examines the implications of this transformation on national rules concerning the ratification/termination of treaties, with special emphasis on the withdrawal decision of Turkey from the Istanbul Convention. It is first argued that the new system empowers the president on his/her own to put the Republic under international obligations without assuming political responsibility. It is then argued that the withdrawal decision is unconstitutional, demonstrating that the expansion, without checks and balances, of presidential powers may result in the arbitrary application of the domestic principles of treaty termination. The validity of the decision under the VCLT is also discussed. It is concluded that international law has its limits in intervening in cases of violations of national rules concerning the termination of treaties. It is finally argued that the attribution of all competences concerning the various stages of treaty-making to only one person may have consequences on invalidity claims that Turkey may raise concerning its consent to be bound by treaties.

1 Introduction

Since the late imperial era of the Ottoman Empire, the Turkish constitutional tradition has put a strong emphasis on the delegation of powers to Parliament.[1] The first Ottoman Constitution in the material sense – the Charter of Alliance (Sened-i i İttifak) – was signed in 1808 between the Ottoman Empire and the local rulers, while the

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[1] K.O. Kanadoğlu and A.M. Duygun, *Anayasa Hukukunun Genel Esasları* (*General Principles of Constitutional Law*) (2020), at 340.

1839 Imperial Edict of Reorganization (Tanzimat Fermanı) and the 1856 Ottoman Reform Edict (Islahat Fermanı) launched a period of reforms and reorganization in the empire. All were enacted to divert power from the sultan to the representatives of the nation and to limit the power of high-ranking bureaucrats. The Constitution of 1876 (Kanun-i Esasi) constitutes the first Ottoman Constitution in the formal sense. A revised Constitution was adopted in 1909, known as the 1909 Constitution, and another was adopted in 1921, known as the 1921 Constitution – all were adopted with similar aims and purposes.[2]

Since its creation in 1923, the Republic of Turkey has attributed important competences to the legislature – hence, continuing to institute a strong parliamentary tradition. This tradition naturally applies to the treaty-making process of the state. All three constitutions of the republic, adopted respectively in 1924, 1961 and 1982, provided detailed rules concerning the conclusion of international treaties, according to which, for approximately 60 years, the right to ratify treaties was shared between the Council of Ministers, the Grand National Assembly and the President of the Republic. However, following the adoption of Law no. 6771 on the constitutional amendment on 21 January 2017, which was approved by referendum on 16 April 2017, the governmental system in Turkey was transformed from a parliamentary system into a presidential one. The abolishment of the Council of Ministers and the position of prime minister as well as the designation of the president as both head of state and head of government has radically modified the well-established constitutional order and has also profoundly affected the treaty-making practice of the state. Thus, the new system – which, in Turkish, is known as the presidential system of government – has necessitated a change in the national regulation of treaty making.

The changes realized in this context within the Turkish national legislation have started to produce serious legal and political consequences, both at a national and international level. One such example can be seen with the withdrawal of Turkey from the Council of Europe's Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)[3] on 20 March 2021, which was done solely by a presidential decision,[4] although the president had ratified the convention only after the

[2] For all these comments and considerations, see *ibid.*; E. Özbudun, *Türk Anayasa Hukuku* (*Turkish Constitutional Law*) (2000), at 25–27; E. Teziç, *Anayasa Hukuku* (*Constitutional Law*) (1998), at 139–140; Özsoy Boyunsuz, 'Regime Cycles, Constitution Making, and the Political System Question in Ottoman and Turkish', in F. Petersen and Z. Yanaşmayan (eds), *The Failure of Popular Constitution Making in Turkey: Regressing toward Constitutional Autocracy* (2020) 84, at 87. For a detailed analysis of the Ottoman constitutionalism, see B. Tanör, *Osmanlı-Türk Anayasal Gelişmeleri* (*Ottoman-Turkish Constitutional Developments*) (2016). On the Turkish constitutionalism in English, see Kydyralieva, 'Turkish Parliamentary Experience: Review of the Parliamentary Experience of Turkey from Ottoman to Republic Periods', 2 *Journal of Universal History Studies* (2019) 239.

[3] Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) 2011, CETS no. 210.

[4] Presidential Decision no. 3718, Official Gazette no. 31429, 20 March 2021.

Grand National Assembly adopted a law approving the ratification.[5] This decision was criticized by several Turkish constitutional lawyers who considered it to be an arbitrary use of power and, hence, null and void under Turkish law.[6] The president's withdrawal decision also raises important questions from an international law perspective.

This article focuses on the implications of the transformation of the Turkish parliamentary system into a centralized presidential system on the national rules concerning the ratification and termination of international treaties. In this context, after reviewing the regulation of treaty making adopted by Turkey under the parliamentary system, this article will analyse the legal framework established after the major constitutional reforms adopted in 2017, thereby moving the country away from its parliamentary-oriented political tradition. The consequences of Turkey's new treaty-making rules under international law will then be assessed with special emphasis on the withdrawal decision of Turkey from the Istanbul Convention and on its validity under the Vienna Convention on the Law of Treaties (VCLT).[7]

2 The Turkish Legal Regulation of Treaty Making under the Former Parliamentary System

Following the proclamation of the republic on 29 October 1923, the first constitutional text of the Republic of Turkey was ratified on 20 April 1924.[8] It provided that legislative and executive authorities belonged to the Grand National Assembly and empowered it to conclude international treaties without foreseeing any authority for the head of state in this field. According to Article 26 of the Constitution, 'the Grand National Assembly itself executes the holy law; makes, amends, interprets and abrogates laws; concludes conventions and treaties of peace with other states; declares war'. This was the result of the 'assembly government' system of the 1924 Constitution, based on the unity-of-powers principle, according to which both legislative and executive powers were vested in the Grand National Assembly.[9]

5 Law no. 6251 of 24 November 2011 Approving the Ratification of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, Official Gazette no. 28127, 29 November 2011.

6 See note 54 below.

7 Vienna Convention on the Law of Treaties (VCLT) 1969, 1155 UNTS 331.

8 The Constitution of the Republic of Turkey (Teşkilât-ı Esasiye Kanunu) (1924 Constitution), adopted on 20 April 1924 and promulgated as Law no. 491, Official Gazette no. 71. For the text in English of the 1924 Constitution, see E.M. Earle, 'The New Constitution of Turkey', 40 *Political Science Quarterly* (1925) 73.

9 Art. 5 of the 1924 Constitution provides that 'the legislative and executive powers are vested and centred in the Grand National Assembly which concentrates these two powers in itself'. According to Article 7, 'the Assembly exercises the executive power through the intermediary of the President of the Republic, whom it elects, and through a Cabinet chosen by him. The Assembly controls the acts of the government and may at any time withdraw power from it'. This system is considered as 'an assembly government system, but with parliamentary overtones'. Gönenç, 'Presidential Elements in Government: Turkey', 4 *European Constitutional Law Review* (2008) 488, at 491–492; Kanadoğlu and Duygun, *supra* note 1, at 266; S. Batum, D. Yılmaz and S. Köybaşı, *Anayasa Hukuku: Temel Kavramlar ve Genel Esaslar* (*Constitutional Law: Basic Concepts and General Principles*) (2021), at 446.

In practice, the text of an international treaty adopted by the authorized representative was initially sent to the Council of Ministers through the Ministry of Foreign Affairs.[10] The text discussed at the Council of Ministers was then sent to the Assembly's presidency and, later, to the relevant parliamentary commission in the form of draft legislation proposing the ratification of the treaty. If the Assembly adopted the draft law, the president then published the text.[11] Even though statutes adopted by the Grand National Assembly under the 1924 Constitution stipulated that the Assembly was 'ratifying' the concerned treaties, the acts of the Assembly did not amount to the expression of Turkey's consent to the treaties at the international level. Hence, they did not constitute acts of ratification but, rather, approvals for ratification.[12] For the treaties to be binding upon Turkey within the meaning of international law, they had to be ratified by the head of state or the minister of foreign affairs.[13]

The principle according to which the legislature should give its approval for the ratification of international treaties in order for these to be binding upon the state was maintained in the following Turkish constitutional texts, which were based at that time on the principle of the separation of powers. Articles 65 and 97 of the 1961 Constitution, which replaced the 1924 Constitution, regulated the treaty-making process. Article 65 specified the competences of the legislature, and Article 97 enumerated the duties and authorities of the executive.[14] According to Article 65(1), 'the ratification of treaties negotiated with foreign States and international organisations on behalf of the Turkish Republic is dependent upon the approval of the Turkish Grand National Assembly and such ratification can be finalised only through the enactment of a law by the Turkish Grand National Assembly'.[15] As for Article 97, it provided that

[10] A. Tütüncü *et al.*, *Milletlerarası Hukuk. Giriş, Kaynaklar* (*International Law. Introduction, Sources*), *Prof. Dr. Sevin Toluner'in Ders Notlarından (From Prof. Sevin Toluner's Lecture Notes*) (2017), at 142.

[11] *Ibid*. See also Meray, 'Türk Anayasa Sisteminde Andlaşmaların Görüşülmesi (Negotiation of International Treaties in Turkish Constitutional System)', 19 *Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi* (1964) 75, at 82–85.

[12] This rigid system was softened in practice by the attribution to the executive of the right to conclude international treaties in certain matters. These treaties concerned implementation agreements based on an international treaty that Turkey had previously ratified, and treaties determined by a statute enacted by Parliament. These treaties were directly ratified by the Council of Ministers before being published in the Official Gazette. Tütüncü *et al.*, *supra* note 10, at 143–144; Meray, *supra* note 11, at 75.

[13] Tütüncü *et al.*, *supra* note 10, at 143.

[14] The Constitution of the Republic of Turkey (1961 Constitution), adopted on 9 July 1961 and promulgated as Law no. 334, Official Gazette no. 10859, 20 July 1961. For the text in English of the 1961 Constitution, see S. Balkan, A.E. Uysal and K.H. Karpat, *Constitution of the Turkish Republic*, translated for the Committee of National Unity (1961).

[15] Art. 65 of the 1961 Constitution also provides that 'treaties which regulate economic, commercial and technical relations, and which are not effective for a period longer than one year, may be put into effect through promulgation, provided they do not entail a commitment of the State's finances and provided they do not infringe upon the status of individuals or upon the rights of ownership of Turkish citizens in foreign lands. In such cases, these treaties must be brought to the attention of the Turkish Grand National Assembly within two months following their promulgation. Agreements concluded in connection with the implementation of an international treaty, and economic, commercial, technical, or administrative treaties concluded pursuant to the authority provided by laws are not required to be approved by the Turkish Grand National Assembly provided however that economic and commercial treaties or treaties affecting the rights of individuals shall not be put into effect unless promulgated. The provisions of paragraph 1 shall apply in all treaties involving amendments in Turkish legislation. International treaties duly put into effect carry the force of law. No recourse to the Constitutional Court can be made as provided in articles 149 and 151 with regard to these treaties'.

the president of the republic, who is considered the head of state and who, in this capacity, represents the Turkish Republic and the integrity of the Turkish nation, 'shall ratify and promulgate international conventions and treaties'.[16]

The 1961 Constitution remained in force until the 1980 *coup d'état* and was replaced in 1982 by a new Constitution.[17] Despite the profound differences between these two texts,[18] the 1982 Constitution maintained the provisions of its predecessor concerning the conclusion of international treaties. Article 104 regulating the president's powers and Article 90 regarding the ratification of treaties provided the same conditions as those in the 1961 Constitution.[19] Article 104, employing the terms of Article 97 of the 1961 Constitution, foresaw the general rule according to which Turkey's consent to be bound by an international treaty could only be expressed by the president of the republic, who, in his or her capacity as the head of state, 'shall ratify and promulgate international treaties'. Nevertheless, according to Article 90(1) of the Constitution, international treaties, as a matter of principle, should be approved by Parliament before ratification. The article provides that 'the ratification of treaties concluded with foreign states and international organisations on behalf of

[16] The 1961 Constitution, *supra* note 14, and the 1982 Constitution, *infra* note 17, and their non-official and official translations use the term 'ratification' to qualify the act of the president who intervenes in the procedure after the adoption by the Parliament of the law approving the ratification of the treaty. The act of the president amounts to ratification within the meaning of both national and international law. Although, and as Frank Berman and David Bentley confirm, ratification is a technical term of international law that is inaccurately translated into 'parliamentary or presidential ratification'; the article stays with the script of the Turkish Constitution. See Berman and Bentley, 'Treaties and Other International Instruments: IV Ratification, Accession, Acceptance and Approval, Treaty Succession', in I. Roberts (ed.), *Satow's Diplomatic Practice* (2017) 628, at 631, para. 34.9. See also M. Fitzmaurice and P. Merkouris, *Treaties in Motion: The Evolution of Treaties from Formation to Termination* (2020), at 100.

[17] Constitution of the Republic of Turkey (1982 Constitution), adopted on 18 October 1982 and promulgated as Law no. 2709, Official Gazette no. 17863, 9 November 1982. The official text in English provided by the Grand National Assembly of Turkey is available at https://global.tbmm.gov.tr/docs/constitution_en.pdf.

[18] The 1961 Constitution is known for being the most liberal Constitution in Turkish legal history, while the 1982 Constitution is considered as 'authoritarian' or 'semi-authoritarian'. The 1961 Constitution was based on principles of pluralistic democracy providing for the separation of powers and checks and balances among the three branches of government, the independence of the judiciary, the establishment of a Constitutional Court empowered with judicial review, the structural development of a pluralistic society, the autonomy for higher education institutions, the expansion of human rights and the concept of social state, whereas the 1982 Constitution adopted after the 1980 *coup d'état* strengthened the executive branch of government's authority, weakened participatory democracy and those liberties maintained by its predecessor and provided a restrictive approach towards individual rights. Özsoy Boyunsuz, *supra* note 2, at 85–86; Hazama, 'Constitutional Review and the Parliamentary Opposition in Turkey', 34(3) *The Developing Economies* (1996) 316, at 317; Isiksel, 'Between Text and Context: Turkey's Tradition of Authoritarian Constitutionalism', 11 *International Journal of Constitutional Law* (*IJCL*) (2013) 702, at 710, 714; Bâli, 'Courts and Constitutional Transition: Lessons from the Turkish Case', 11 *IJCL* (2013) 666.

[19] The only difference with respect to Art. 65 of the 1961 Constitution is that, according to the sentence added to Art. 90 of the 1982 Constitution in 2004 by 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'.

the Republic of Turkey shall be subject to adoption by the Grand National Assembly of Turkey by a law approving the ratification'.[20]

The 1982 Constitution provided three exception categories to this general rule of ratification of treaties. The treaties that do not require the approval of the Parliament and thus rely on the discretionary competence of the president are (i) those treaties that are relatively 'trivial' in terms of their scope and duration; (ii) treaties that are called implementation agreements (later agreements concluded to an original one for the purpose of providing the details of its application) that has already been approved by the Parliament; or (iii) treaties that are concluded on the basis of laws adopted by the Parliament itself. Still, under the parliamentary system, the Council of Ministers under the political responsibility of Parliament was involved in the process by sending these agreements to the president for ratification.[21] Indeed, the first exceptional category of international treaties for which the ordinary method of ratification would not be applied is provided by the Constitution itself. According to Article 90(2), 'agreements regulating economic, commercial or technical relations, and covering a period of no more than one year, may be put into effect through promulgation, provided they do not entail any financial commitment by the State, and provided they do not interfere with the status of individuals or with the property rights of Turks abroad. In such cases, these agreements shall be brought to the knowledge of the Grand National Assembly of Turkey within two months of their promulgation'. This paragraph should be read in conjunction with paragraph 4, which provides that such agreements should also not result in amendments to Turkish laws. Agreements mentioned in these two paragraphs do not need to be approved by the Grand National Assembly; the president of the republic directly ratifies them.

The second category of treaties for which the ordinary method is not applied is once again stipulated by the Constitution itself, which provides in Article 90(3) that 'implementation agreements based on an international treaty, and economic, commercial, technical, or administrative agreements, which are concluded depending on the authorisation as stated in the law, shall not require approval of the Grand National Assembly of Turkey. However, economic, commercial agreements or agreements relating to the rights of individuals

[20] This article lies behind the discussions on whether the Turkish constitutional order is monist or dualist in relation to treaties. The Constitution does not contain any explicit provisions on whether Turkey has a monist or dualist approach, and both legal doctrine and jurisprudence are divided on the subject. According to some authors, the laws approving the ratification of international treaties adopted by the Parliament constitute 'transformation acts' of these treaties into national instruments, and the Turkish legal order is thus dualist. See Y. Aksar, *Teori ve Uygulamada Uluslararası Hukuk I* (*International Law in Theory and Practice I*) (2017), at 172–177. Some authors argue, however, that, although the issue is not clear, the Turkish legal order has a certain monistic approach in light of Art. 90(5) of the Constitution, which provides that 'international agreements duly put into effect have the force of law' and the references to international law made by Articles 2, 15, 16, 42 and 92. See H. Pazarcı, *Uluslararası Hukuk* (*International Law*) (2016), at 23; Öktem, 'Les rapports énigmatiques entre le droit international et le droit interne turc', 18 *Revue européenne de droit public* (2006) 947, at 954. For the controversy on the subject, see Apaydın, 'Turkish Legal System in the Monism-Dualism Conundrum: The Reasons of the Doctrinal Disagreement on the Viewpoint on International Law and a Review in the Light of EU Law', 1 *İnönü Üniversitesi Hukuk Fakültesi Dergisi* (2018) 529.

[21] Under the previous system, the president used to ratify international treaties and laws approving the ratification, adopted by Parliament. Thus, the ratification of the president used to merge with the Council of Ministers' decrees.

concluded under the provision of this paragraph shall not be put into effect unless promulgated'. Therefore, implementation agreements and economic, commercial, technical or administrative agreements, which are concluded based on authorization as stated in the law, are directly ratified by the president, thus without being discussed at Parliament, although they might cover a period of more than one year, entail financial commitment by the state and interfere with the status of individuals or with the property rights of Turks abroad.

The third and the last category of treaties that are directly ratified by the president without being negotiated in Parliament is provided by Law no. 244 concerning the conclusion, entry into force and publication of international treaties and the empowerment of the Council of Ministers to this effect. This law has remained in force since 1963.[22] Law no. 244, which completed the provisions of the Constitution regarding the ratification of treaties and determined the main principles applicable in this field, provides in Article 5 that bilateral and multilateral treaties aiming at realizing the purposes of economic, commercial, technical and administrative provisions of the treaties already in force between the Republic of Turkey and the third states or international organizations, treaties awarding grants, credits or other aids to Turkey, technical or administrative cooperation agreements and debt renegotiation or commercial agreements are to be concluded by the Council of Ministers and ratified by the president. Similarly, Article 6 of Law no. 244 provides that bilateral or multilateral treaties concluded with NATO states, or with NATO itself according to the North Atlantic Treaty,[23] are to be concluded by the Council of Ministers and ratified by the president. Hence, these treaties were not to be brought before the Grand National Assembly of Turkey.[24]

[22] Law no. 244 of 31 May 1963 Concerning the Conclusion, Entry into Force and Publication of International Treaties and the Empowerment of the Council of Ministers to Conclude Certain Treaties, Official Gazette no. 11425, 11 June 1963.

[23] North Atlantic Treaty, 4 April 1949, UNTS Registration No. 541. It was ratified by Turkey by Law no. 5886 on 18 February 1952.

[24] The compatibility of Law no. 244 with the Turkish constitutional order has always been the subject of debate. See M. Soysal, *Dış Politika ve Parlamento* (*Foreign Policy and Parliament*) (1964), at 211–212; Çelik, 'Andlaşma Yapma Yetkisi' (Capacity to Conclude Treaties), 31 *Journal of Istanbul University Law Faculty* (1965) 363; S. Toluner, *Milletlerarası Hukuk ile İç Hukuk Arasındaki İlişkiler* (*Relationships between International Law and National Law*) (1973), at 356–394; Armağan, '1982 Anayasası'nda Uluslararası Andlaşmaların İmzalanması ve Onaylanması Sistemi' (Signature and Ratification of International Treaties under the 1982 Constitution), 17 *Journal of Constitutional Justice* (2000) 340; Öktem, *supra* note 20, at 954–955. Law no. 244 was brought, in 1965, to the Constitutional Court by the Worker's Party of Turkey, raising a plea of unconstitutionality of the last paragraph of Articles 5 and 6 as a whole. The plaintiff invoked that these articles were contrary to Articles 65 and 97 of the 1961 Constitution regarding the ratification of international treaties and bypassed the Constitution: those agreements mentioned in these articles were being placed under the authority of the Council of Ministers by virtue of Law no. 244, even though these agreements covered a period of more than one year, entailed financial commitment by the state or interfered with the status of individuals or with the property rights of Turks abroad, in a manner contrary to Art. 90(2) of the Constitution, which required the approval of Parliament for such agreements. The Constitutional Court did not strike down the law. According to the Court, agreements mentioned in Art. 5 of Law no. 244 were among 'economic, commercial, technical, or administrative agreements, which are concluded depending on the authorization as stated in the law', and agreements mentioned in Art. 6 were among the 'implementation agreements' for which approval of the Assembly is not required under Art. 90(3) of the Constitution. Therefore, agreements provided by Law no. 244 were considered under the authority of the Council of Ministers. Decision no. 1965/12 of the Turkish Constitutional Court of 4 March 1965, Merits no. 1963/311, Official Gazette no. 12185, 24 December 1965, at 3.

As can be seen, under both the 1961 and 1982 Constitutions, international treaties were concluded in Turkey following two different procedures: while, in principle, treaties were subject to adoption by the Grand National Assembly through a law-approving ratification, an array of treaties have been exceptionally left to the authority of the Council of Ministers.[25] In the case of the treaties requiring the approval of the Assembly, the Ministry of Foreign Affairs prepared an approval bill that was to be sent to the Council of Ministers, which was required to present the law to the Assembly's presidency. The law was later submitted to the concerned parliamentary commissions and then to the plenary session.[26] After its ratification by the president, in order to enter into force in the Turkish legal order, the treaty, annexed to a decree of the Council of Ministers, was published in the *Official Gazette*.[27]

3 The Establishment of the Presidential System and Its Implications on the Rules Concerning Turkey's Treaty-Making Process

In 2017, substantial modifications were made to the 1982 Constitution, which 'began to formally transform Turkey's long-standing parliamentary system into a heavily centralised presidential one'.[28] The new 'presidential system of government' was

[25] The Ministry of Foreign Affairs provides a non-binding opinion to the government with regard to whose authority the international treaty is under. See Pazarcı, *supra* note 20, at 74; Aksar, *supra* note 20, at 184.

[26] The text of the international treaty has always been approved by the Grand National Assembly as a whole, which means that the treaty has either been approved or rejected without being subject to any modification and then submitted to the president's discretion. Pazarcı, *supra* note 20, at 152. The 1927 and 1956 Rules of Procedure provided this principle, which is not explicitly maintained by the internal rules and regulations in force from the Grand National Assembly of Turkey. The Assembly can nevertheless make reservations while adopting the laws approving the ratification of international treaties. This practice is in conformity with Art. 19 of the VCLT, *supra* note 7, which provides that a state may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless the reservation is prohibited by the treaty. The Assembly follows an open vote procedure in the voting of the ratification of international agreements and the whole of the bills on approval of the accession to these agreements. Rules of Procedure of the Grand National Assembly of Turkey, 1973, Art. 142.

[27] Law no. 244, *supra* note 22, Art. 3(1). However, according to para. 3 of the same provision, technical or administrative implementation agreements that are concluded by the Council of Ministers based on an international treaty and technical or administrative agreements that are concluded by the Council of Ministers, depending on the authorization as stated in the law, are not required to be published in the Official Gazette, provided that they do not have a financial or commercial nature, that they do not interfere with individuals' rights and that they do not result in amendments to Turkish laws.

[28] Kırışçı and Toygür, 'Turkey's New Presidential System and a Changing West: Implications for Turkish Foreign Policy and Turkey-West Relations', 15 *Foreign Policy at Brooking, Turkey Project Policy Paper* (2019) 1, at 1. The talks about the parliamentary system being inadequate started during the 1970s and increasingly continued in the 1990s by reason of the economic and political crises, weak coalition governments formed by political parties from different ideological backgrounds and other systemic problems seen as being associated with the parliamentarianism by the proponents of a presidential system. Özbudun, 'Presidentialism vs. Parliamentarism in Turkey', available at www.files.ethz.ch/isn/151197/GTE_PB_01.pdf.

established following a disputed referendum held on 16 April 2017,[29] and it resulted in the abandonment of the parliamentary system. This new system, which constitutes a significant transformation of the Turkish legal and political order, has had profound implications not only for the making and substance of Turkish foreign policy[30] but also for the rules concerning the ratification, implementation and termination of international treaties that Turkey has been applying for more than half a century.

A *Constitutional Law Considerations*

As mentioned above, Law no. 6771, which was adopted in 2017,[31] abolished Articles 109–115 of the Constitution and put an end to the existence of the Council of Ministers and to the position of the prime minister. Therefore, the position of the head of the executive passed from the prime minister to the president of the republic who became both the head of government and the head of state.[32] There has thus arisen the need to regulate the powers enjoyed by the Council of Ministers that existed under the parliamentary system.

1 Implications of the Presidential System on the Rules Concerning the Ratification of International Treaties

In July 2018, Presidential Decree no. 9 on the procedural and the substantial issues regarding the ratification of international treaties[33] was adopted to align the treaty-making rules with the new governmental system of the republic. According to this presidential decree, all powers previously enjoyed by the Council of Ministers during the ratification process of treaties were transferred to the president. The decree provides that 'the initialling, signature, and exchange of notes of international treaties or the representatives who will be appointed to make accession declarations to these treaties and the competences of these representatives will be determined by a Presidential decision'.[34] In addition, according to Presidential Decree no. 9,

[29] The new system was accepted with a slim majority of 51.4 to 48.6 per cent. The Supreme Election Council of Turkey considered unsealed ballot papers valid in the referendum results, and the referendum was marred by serious voting irregularities, which, according not only to several commentators and politicians but also to the Council of Europe and to the Organization for Security and Co-operation in Europe (OSCE), overshadowed the referendum. For observations on the referendum of the Parliamentary Assembly of the Council of Europe, see 'Turkey's Constitutional Referendum: An Unlevel Playing Field', available at https://pace.coe.int/en/news/6596/turkey-s-constitutional-referendum-an-unlevel-playing-field. See OSCE / Office for Democratic Institutions and Human Rights Limited Referendum Observation Mission Final Report, available at www.osce.org/files/f/documents/6/2/324816.pdf. For the voting irregularities that were seen as being able to influence the outcome of the referendum, see Klimek *et al*., 'Forensic Analysis of Turkish Elections in 2017–2018', *PLOS One* (2018), available at https://doi.org/10.1371/journal.pone.0204975. See also Sinem Adar and Günter Seufert who argue that, for the first time in the history of the Republic, 'obstruction, electoral fraud and manipulation reached levels that called into question the legitimacy of the outcome'. Adar and Seufert, 'Turkey's Presidential System after Two and a Half Years: An Overview of Institutions and Politics', German Institute for International and Security Affairs SWP Research Paper (2021), at 7.

[30] Kırışçı and Toygür, *supra* note 28, at 1.

[31] Official Gazette no. 29976, 11 February 2017.

[32] According to Art. 8 of the Constitution as amended in 2017, 'executive power and function shall be exercised and carried out by the President of the Republic in conformity with the Constitution and laws'.

[33] Presidential Decree no. 9 on the Procedural and Substantial Issues Regarding the Ratification of International Treaties, Official Gazette no. 30479, 17 July 2018.

[34] *Ibid.*, Art. 1.

> (1) Treaties concluded with foreign states and international organisations on behalf of the Republic of Turkey are ratified by presidential decisions. The ratification of international treaties or the accession to those, shall be subject, except to the extent required by the second and the third paragraphs, to adoption by the Grand National Assembly of Turkey by a law approving the ratification or the accession. (2) Implementation agreements based on an international treaty, and economic, commercial, or technical agreements, which are concluded depending on the authorisation as stated in the law are directly ratified by the President. (3) Agreements regulating economic, commercial, or technical relations, and covering a period of no more than one year are directly ratified by the President, provided they do not entail any financial commitment by the State and provided they do not interfere with the status of individuals or with the property rights of Turkish citizens abroad. (4) The ratification of all kinds of international agreements resulting in amendments to Turkish laws or the accession to those agreements, shall be subject to adoption by the Grand National Assembly of Turkey by a law approving the ratification or the accession.

Finally, Article 7 of the decree provides that 'bilateral or multilateral treaties concluded with NATO States or with NATO itself as required by the North Atlantic Treaty approved by the Law No. 5886 of 18 February 1952 are directly ratified by the President, provided they do not result in amendments to Turkish laws'.[35]

The adoption of these regulations has important implications on the treaty-making system of Turkey and seems to raise problems of democratic legitimacy. First and foremost, according to Article 6 of Presidential Decree no. 9, the decision concerning whether an international treaty requires the approval of the Grand National Assembly of Turkey or is directly under the authority of the president now belongs to the president.[36] Second, under the parliamentary system, international treaties that did not require the approval of the Parliament became binding upon Turkey after, first, the adoption of a decree by the Council of Ministers that had political responsibility towards Parliament and then the ratification by the president, who, in order to preserve their impartial status, could not be affiliated with any political party. By contrast, the new system puts these treaties under the sole authority of the president, who in fact can remain a member, and even a chairperson, of a political party[37] and does not

[35] *Ibid.*, Art. 2.

[36] '(1) Treaties that require the approval of the Grand National Assembly of Turkey for ratification or accession are sent to the Grand National Assembly of Turkey by the President. (2) Treaties which are directly ratified by Presidential decisions and have to be promulgated, shall be brought by the Ministry of Foreign Affairs to the knowledge of the Grand National Assembly of Turkey within two months of their promulgation'.

[37] Under the parliamentary system, according to former Arts 101(1) and 101(4) of the 1982 Constitution, the president of the republic was elected for a term of office of seven years by the Grand National Assembly of Turkey from among its own members and 'the President-elect, if a member of a party, shall sever his relations with his party and his status as a member of the Grand National Assembly of Turkey shall cease'. This provision was amended in 2017, according to which the president is directly elected by the public from among Turkish citizens and is nominated by political party groups, political parties that have received at least 5 per cent of valid votes on their own or collectively in the latest parliamentary elections or at least 100,000 voters. Thus, under the current system, the president, who is affiliated to a political party, no longer has an impartial status. It should be noted here that Art. 103 of the Constitution, having the objective of assuring the president's impartiality, has not been amended in 2017. According to this article and very paradoxically, the president continues to take an oath before Parliament swearing upon his/her honour and integrity to perform 'without bias' the functions that he/she assumes.

provide for his or her political responsibility, even though he or she becomes the main authority using the executive power as head of state.

Under a presidential system of government, the president leads an executive branch with extensive powers related to both internal and foreign affairs, which is separate from the legislature[38] and therefore may be allowed to engage, without the involvement of the Parliament, in international agreement making. The practice of American presidents of concluding 'executive agreements' that do not need the approval of the Senate is usually regarded as a classic example.[39] However, this possibility needs to be assessed in light of the general legal framework of American presidentialism, marked by the principle of separation of powers and various checks and balances between the executive and the legislature. Indeed, in the American constitutional system, where citizens directly elect the members of the executive and the legislature within different time frames, these branches are organically and functionally independent from each other and may claim their own independent source of legitimacy: 'Each one enjoys a considerable degree of political independence vis-à-vis the other: the legislature may not remove the government by a vote of no confidence, nor can the government dissolve the parliament and call for new elections. In consequence, a complex system of institutional checks and balances emerges',[40] among which is the impeachment procedure, which is a fundamental component of the system based on the accountability of the executive power.[41]

By contrast, the new system established in Turkey is based on a unity-of-powers:[42] parliamentary and presidential elections are held simultaneously;[43] the president who assumes all executive powers[44] can dissolve Parliament without any justification;[45]

[38] J. Patrick, *Understanding Democracy: A Hip Pocket Guide* (2006), at 76.

[39] The American Constitution provides in its Art. II, section 2, that the president 'shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur'. Practice confirms, on the other hand, that the president may conclude 'executive agreements' that are 'categorized as congressional-executive agreements sanctioned by the joint authority of the President and both Houses of Congress; agreements concluded pursuant to existing treaties; and presidential or "sole" executive agreements made by the President on his independent constitutional authority'. Treaties and Other International Agreements: The Role of the United States Senate. A Study Prepared for the Committee on Foreign Relations United States Senate by the Congressional Research Service (2001), at 77.

[40] Fix-Fierro and Salazar-Ugarte, 'Presidentialism', in M. Rosenfeld and A. Sajo, *The Oxford Handbook of Comparative Constitutional Law* (2012) 628, at 629–630.

[41] American Constitution, *supra* note 39, Art. I, ss 2, 3.

[42] The main difference between presidentialism and other systems of government, in which one person plays the role of the head of state and the head of government, such as sultanates, hereditary presidential systems or executive monarchies, is the separation of powers, one of the essential features of a presidential constitution. Fix-Fierro and Salazar-Ugarte, *supra* note 40, at 629–630. In this context, the new Turkish system seems to have similar features as those of some Latin American states, considered as 'delegative democracies' because of their nature that is deprived of instruments of checks and balances. Ş. Özsoy Boyunsuz, *Dünyada Başkanlık Sistemleri* (*Presidential Systems in the World*) (2017), at 101–107, 170–181; O'Donnell, 'Delegative Democracy', 5(1) *Journal of Democracy* (1994) 55.

[43] 1982 Constitution, *supra* note 17, Art. 77.

[44] *Ibid.*, Art. 8.

[45] *Ibid.*, Art. 116.

presidential decrees are considered independent acts – unlike 'executive orders' in the USA, which are based on laws – and have the same legal power as laws adopted by the Turkish Parliament;[46] the president also exercises significant influence over the judiciary. The president alone appoints four of the 13 members of the Council of Judges and Prosecutors – other than the minister of justice and the undersecretary of the Ministry for Justice who are also natural members of the Council[47] – and appoints 12 of the 15 members of the Constitutional Court.[48] It is within this constitutional framework that the president is empowered to put the republic under international obligations, without, furthermore, assuming any political responsibility.[49]

2 Implications of the Presidential System on the Rules Concerning the Termination of International Treaties and Turkey's Withdrawal Decision from the Istanbul Convention

The establishment of the presidential system seems to have had implications for the rules concerning the termination of international treaties as well. Indeed, Turkish constitutions have never contained a provision concerning the termination, suspension or revision of treaties. Under the parliamentary system, these issues had been dealt with by reference to Law no. 244, which empowered the Council of Ministers to suspend, terminate and determine the modification of the scope of application of international treaties by way of decrees.[50] After the transformation of the parliamentary system into a presidential one, the Council of Minister's power to terminate, suspend or revise international treaties was transferred to the president of the republic by virtue of Article 3(1) of Presidential Decree no. 9.

Incidentally, the president, relying on this article, decided on 20 March 2021 to withdraw[51] from the Istanbul Convention.[52] The withdrawal decision took place in conformity with the provisions of this convention, according to which the contracting parties, at any time, have a unilateral right of denunciation by means of a notification

[46] *Ibid.*, Art. 104(17). Under Art. 150 of the Constitution, cases against presidential decrees can be brought to the Constitutional Court only by the president, by the two largest parliamentary groups or by a group of deputies representing one-fifth of the seats in Parliament.

[47] *Ibid.*, Art. 159. The Council, according to Art. 159(8) appoints judges and prosecutors to the lower courts.

[48] *Ibid.*, Art. 146. The president's appointments are not subject to approval of the Parliament, unlike, for instance, in the USA where, according to Art. II, s 2, of the Constitution, the judicial nominations made by the president shall be approved by the US Senate.

[49] As of now, the 1982 Constitution provides solely the criminal responsibility of the president, making, however, impeachment almost impossible. According to Art. 105(1) 'absolute majority of the Grand National Assembly of Turkey may table a motion requesting that the President of the Republic be investigated on allegations of a crime. The Grand National Assembly of Turkey shall debate the motion in one month at the latest and may decide to launch an investigation with three-fifths of the total number of its members by secret ballot'. According to Art. 105(3), if the Inquiry Commission decides to send the president to the Supreme Court, it will require the backing of a two-thirds majority. On the basis of historical examples such as the Weimar Constitution (Art. 59), it is admitted that the invocation of the criminal responsibility of the president is virtually impossible. Kanadoğlu and Duygun, *supra* note 1, at 337.

[50] Law no. 244, *supra* note 22, Art. 3(1).

[51] Presidential Decision no. 3718, *supra* note 4.

[52] Istanbul Convention, *supra* note 3.

addressed to the Secretary General of the Council of Europe.[53] Therefore, Turkey's withdrawal decision complied with Article 54 of the VCLT, which states that the termination of a treaty or the withdrawal of a party may take place in conformity with the provisions of the treaty. However, the validity of the withdrawal decision under the national legal order was seriously questioned and has generated intense debate in Turkey.[54] Such was the extent of the debate that Presidential Decision no. 3718 withdrawing Turkey from the Istanbul Convention was brought before the Council of State by more than 200 institutions, including opposition parties, bar associations and civil society organizations, that asked the Court to annul the decision, to suspend its execution and to lodge an appeal of unconstitutionality according to Article 3(1) of Presidential Decree no. 9 at the Constitutional Court.[55]

The Council of State, ruling three votes against two, rejected the demand to suspend the execution of the withdrawal decision.[56] This rejection was approved – by eight votes against five – by the Court of Appeal at the plenary session of the Chambers for Administrative Cases of the Council of State.[57] The decision on the merits of the case is still before the Court. The arguments concerning the invalidity of the presidential decision put forward in the statements of claims and in the dissenting opinions to the Council of State's judgments on the suspension of the execution of the withdrawal decision[58] deserve emphasis nonetheless. These arguments concern the principle of

[53] *Ibid.*, Art. 80(1). Turkey's denunciation, notified to the Council of Europe on 22 March 2021, became effective on 1 July 2021 in accordance with Art. 80(2) of the convention, which stipulates that 'denunciation shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of the notification by the Secretary General'. See *Chart of Signatures and Ratifications of Treaty 210*, available at www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=210.

[54] See arguments developed by professors of constitutional law, İbrahim Kaboğlu, Bertil Oder, Sibel İnceoğlu and Ece Göztepe Çelebi, available at https://twitter.com/ibrahimkaboglu/status/1373304269730877442?lang=tr; www.gazeteduvar.com.tr/anayasa-hukukculari-sistem-degisikligi-cumhurbaskanina-sozlesme-fesih-yetkisi-vermez-haber-1518048. See also the statement from the Association of Research on Constitutional Law, available at http://anayasader.org/statement-from-the-association-of-constitutional-research-on-the-presidential-decision-on-the-istanbul-convention/. The expediency of the withdrawal decision has also been widely questioned. Several non-governmental organizations, opposition parties, academics and holding companies saw the withdrawal from a human rights treaty, for the first time in the history of the republic, as a step backward for Turkey in the protection of women against violence. While, at the same time, the Istanbul Convention was seriously criticized by powerful religious groups, known for their influence on the government, and was accused of corrupting the traditional Turkish family structure, especially by protecting lesbian, gay, bisexual and transgender rights. See Eskitaşçıoğlu, 'Turkey's Withdrawal from the Istanbul Convention: A Sudden Presidential Decision in the Dead of the Night and an Alarming Setback', *Völkerrechtsblog*, available at https://voelkerrechtsblog.org/turkeys-withdrawal-from-the-istanbul-convention/.

[55] See, for instance, the statement of claim of Meral Akşener, the leader of the opposition İYİ Party, not available online; the statement of claim of the Union of Chambers of Turkish Engineers and Architects, available at www.tmmob.org.tr/icerik/tmmob-tarafindan-istanbul-sozlesmesinin-feshine-iliskin-cumhurbaskani-kararinin-iptali-icin.

[56] Council of State 10th Chamber, Decision no. 2021/1747, 28 June 2021.

[57] Plenary Session of the Chambers for Administrative Cases of the Council of State, Appeal no. 2021/618, 14 October 2021.

[58] These opinions are annexed to the judgments cited in notes 56 and 57 above.

parallelism of competences and procedures and the usurpation of legislative power by the executive.

(a) The issue of formal parallelism

The constitutionality of the withdrawal decision from the Istanbul Convention is contested on the grounds that it was adopted in violation of the principle of parallelism of competences and procedures, also known as the *acte contraire* theory.[59] Indeed, the president made the withdrawal decision without the approval of the Grand National Assembly, despite the fact that the president had ratified the convention in March 2012 only after the adoption by the Assembly of a law approving its ratification, with the unanimous votes of all political parties represented therein.[60]

As mentioned above, according to the president, the justification of this choice is to be found in Article 3 of Presidential Decree no. 9,[61] which aligns the parliamentary system's rules on the termination of international treaties with the presidential system: this article transfers to the president the power to suspend and to terminate treaties, which belonged to the Council of Ministers under the parliamentary system, according to Law no. 244. Yet this justification does not seem to be in line with Turkish legal theory and practice. Indeed, Law no. 244 had always been interpreted by Turkish public law scholars as empowering the Council of Ministers to suspend and to terminate international treaties only if the president directly ratified these treaties without being approved by the Parliament.[62] That interpretation arises from the legal maxim of *unumquodque eodem modo quo colligatum est dissolvitur*, according to which, in law, 'in the same manner in which anything is bound, it is loosened'.[63] This principle, known as the principle of parallelism of competences and procedures, provides therefore that 'statutory instruments shall be construed as including a power to revoke, amend or re-enact them, subject to the same conditions as applied to the making of them'.[64] Although not regulated in law, it is a settled procedural principle in Turkish

[59] C. Debbasch, *Droit administratif* (2002), at 486–487.

[60] Law no. 6251, *supra* note 5.

[61] Presidential Decision no. 3718, *supra* note 4, provides that 'it is decided that the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence which was signed by Turkey on 11/5/2011 and approved by the Cabinet Decree No. 2012/2816 on 10/2/2012 shall be terminated on behalf of Turkey according to Article 3 of the Presidential Decree No. 9'.

[62] See Pazarcı, *supra* note 20, at 103; K. Gözler, 'Cumhurbaşkanının Uluslararası Sözleşmeleri Feshetme Yetkisi Var Mı? İstanbul Sözleşmesinin Feshi Hakkında 3718 Sayılı Cumhurbaşkanı Kararı Üzerine Eleştiriler' (Does the President Have the Authority to Terminate International Treaties? Criticisms on the Presidential Decision No. 3718 Concerning the Withdrawal from Istanbul Convention), available at www.anayasa.gen.tr/ua-sozlesme-fesih.htm; B. Çali, 'Withdrawal from the Istanbul Convention by Turkey: A Testing Problem for the Council of Europe', *EJIL Talk!* (22 March 2021), available at www.ejiltalk.org/withdrawal-from-the-istanbul-convention-by-turkey-a-testing-problem-for-the-council-of-europe/.

[63] *Legal Dictionary*, available at https://legaldictionary.lawin.org/unumquodque-eodem-modo-quo-colligatum-est-dissolvitur/.

[64] W. Wade and C. Forsyth, *Administrative Law* (2014), at 736; Debbasch, *supra* note 59, at 486–487.

public law, developed under the jurisprudence of national courts and especially that of the Council of State.[65]

Under the parliamentary system, the practice concerning the termination of international treaties was broadly in line with this procedural rule that 'applies also to issues of the distribution of powers amongst various organs of the State'.[66] It is true that, under the parliamentary system, the Council of Ministers happened to terminate a limited number of treaties whose ratifications had nonetheless been approved by the Parliament. However, these cases concerned bilateral commercial agreements whose implementation was seen as being no longer in the public interest,[67] and, thus, such examples are considered to be exceptional and incomparable to human rights conventions.[68] Early practice under the presidential system itself also confirms the principle of formal parallelism. Other than the Istanbul Convention, although few, there are cases of international treaties that have been terminated by presidential decision only. However, in these cases, the termination of the concerned treaties was followed by the adoption of other treaties that provide higher standards in the same field and whose ratification was approved by Parliament. For instance, the European Convention on Spectator Violence and Misbehaviour at Sports Events and, in Particular, at Football Matches[69] was terminated only by a presidential decision,[70] which also ratified the Council of Europe's Convention on an Integrated Safety, Security and Service Approach at Football Matches and Other Sports Events.[71] In addition, the European Convention for the Protection of Animals during International Transport and its

[65] See O. Karahanoğulları, *İdarenin Hukukla Kavranması: Yasallık ve İdari İşlemler-Yargı Kararlarına Dayalı Bir İnceleme* (*Understanding Administration by Law: Legality and Administrative Acts-An Analysis Based on Courts' Decisions*) (2015), at 395–404; M. Günday, *İdare Hukuku* (*Administrative Law*) (2013), at 148–149; T. Tan, *İdari İşlemin Geri Alınması* (*Withdrawal of the Administrative Act*) (1970), at 111–116; K. Gözler, *İdare Hukuku* (*Administrative Law*) (2003), at 643–648; Ş. Gözübüyük and T. Tan, *İdare Hukuku-Genel Esaslar* (*Administrative Law. General Principles*) (1998), at 334–335; Hasoğlu, 'The Principle of Parallelism of Competence and Procedure within the Light of Decisions of the Council of State', 33 *Türkiye Adalet Akademisi Dergisi* (2018) 123; Sar, Çakıroğlu and Özdoğan, '"The Principle of Formal Parallelism" or "The Principle of Congruent Form" in Turkish Administrative Law', 20 *Göksu Safi Işık Articletter* (2019) 115.

[66] Karahanoğulları, *supra* note 65, at 403; A. Ulusoy, *Yeni Türk İdare Hukuku* (*New Turkish Administrative Law*) (2019), at 383.

[67] See Decree no. 2017/9873 of 6 February 2017 of the Council of Ministers on the Withdrawal from the 2007 International Coffee Agreement, Official Gazette no. 30014, 21 March 2017; Decree no. 2013/4981 of the Council of Ministers on the Denunciation of the Free Trade Agreement Concluded on 13 March 2002 between the Republic of Turkey and the Republic of Croatia, Official Gazette no. 28718, 25 July 2013; Decree no. 2006/11537 of the Council of Ministers on the Denunciation of the Free Trade Agreement Concluded on 29 April 1997 between the Republic of Turkey and Romania, Official Gazette no. 26409, 20 January 2007.

[68] See Sibel İnceoğlu, available at https://twitter.com/ibrahimkaboglu/status/1373304269730877442?lang=tr.

[69] European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches 1985, ETS no. 120.

[70] Presidential Decision no. 2327, Official Gazette no. 31084, 30 March 2020.

[71] Council of Europe Convention on an Integrated Safety, Security and Service Approach at Football Matches and Other Sports Events 2017, ETS no. 218.

Additional Protocol[72] were terminated only by a presidential decision,[73] which also ratified at the same time the revised European Convention concluded on the same subject.[74]

It is despite all these considerations that the Council of State rejected – at both first instance and appeal – the demand to suspend the execution of the withdrawal decision.[75] Concerning the argument of the principle of parallelism of competences and procedures, the Council of State stated that the power of the legislative organ regarding international treaties is limited to the adoption of a law approving their ratification and that the fact that the president has a discretionary power concerning the ratification confirms that the general authority regarding treaties, including their termination, belongs to the executive.[76] It remains to be seen how this argument will be received during the judgment on the merits.

(b) Compatibility of the withdrawal decision from the Istanbul Convention with the constitutional restrictions on the powers of the president

The validity of the Turkish president's withdrawal decision from the Istanbul Convention under Turkish legal order also remains questionable under the restrictions laid down on the powers of the president by the Constitution itself. Indeed, under the Turkish Constitution, international treaties that are duly put into effect have the force of statutory law,[77] which may be enacted, amended or repealed by the Grand National Assembly of Turkey.[78] In other words, the right to repeal law falls within the scope of the legislative competence that belongs to the Turkish Parliament, according to Articles 7 and 87 of the Constitution.[79] This observation is reinforced by Article 104(11) of the Constitution according to which the president is only empowered to 'ratify and promulgate' international treaties after the Parliament adopts a statutory law approving the ratification.

[72] European Convention for the Protection of Animals during International Transport 1968, ETS no. 65; Additional Protocol to the European Convention for the Protection of Animals during International Transport 1979, ETS no. 103.

[73] Presidential Decision no. 179, Official Gazette no. 30563, 12 October 2018.

[74] European Convention for the Protection of Animals during International Transport (revised) 2006, ETS no. 193.

[75] The two dissenting opinions to the judgment of first instance and the joint dissenting opinion delivered by five judges of appeal express their disagreements with the majority opinion on the ground of the principle of formal parallelism. Council of State 10th Chamber, *supra* note 56, at 8–9, 12–13; Plenary Session of the Chambers, *supra* note 57, at 17.

[76] Council of State 10th Chamber, *supra* note 56, at 4–6; Plenary Session of the Chambers, *supra* note 57, at 4–7.

[77] 1982 Constitution, *supra* note 17, Art. 90(5).

[78] *Ibid.*, Art. 87.

[79] Gözler, *supra* note 62; Kula, 'An Unconstitutional Setback: Turkey's Withdrawal from the Istanbul Convention', *VerfBlog*, 22 March 2021, available at https://verfassungsblog.de/erdogan-istanbul-convention; Çali, *supra* note 62.

The consideration of the fact that the right to repeal law falls within the scope of legislative power is crucial because, according to Article 104(17) of the Constitution, 'the President of the Republic may issue presidential decrees on the matters regarding executive power'. Therefore, the president who has the authority to issue presidential decrees only on executive matters cannot repeal an international treaty that has become part of the Turkish legal order once its ratification is approved by Parliament. This act, which is essentially within the scope of legislative authority, if adopted via presidential decrees or presidential decisions based on these decrees, would constitute a usurpation of legislative power by the executive.[80] To admit that the president has the authority to act alone and terminate international treaties would also create legal inconsistency concerning the fate of the law approving the ratification of treaties. For instance, as mentioned above, the Istanbul Convention was approved by the Turkish Parliament according to Law no. 6251, which continues to be part of Turkish legislation, whereas the convention that this law approves is not. In addition, right after the ratification of the treaty, the Turkish Parliament adopted Law no. 6284 on the Protection of the Family and Prevention of Violence against Women for the same purposes as the Istanbul Convention, to which it explicitly refers.[81]

In light of all these considerations, international treaties concerning fundamental rights and freedoms, approved by a statutory law by the Assembly before being ratified by the president, must not be terminated only by virtue of a presidential decision; a statutory law for the withdrawal should be adopted in Parliament before the president's decision.[82] In the absence of such an interpretation, the constitutionality of Article 3 of Presidential Decree no. 9 would remain questionable.[83] Despite this legal framework, however, the Council of State, in its decisions of both first instance and appeal rejecting the demand to suspend the execution of the withdrawal decision from the Istanbul Convention, stated that the termination of international treaties belonged solely to the executive and that the claim on the unconstitutionality of Article 3(1) of Presidential Decree no. 9 was not well founded. According to the tribunal, what follows from Article 104(17) of the Constitution is that the president may not issue presidential decrees that 'directly regulate the content of fundamental rights'. Yet Article 3(1) of the presidential decree on which the withdrawal decision from the Istanbul Convention is based provides solely procedural rules.[84] Nonetheless, one of

[80] For a similar opinion, see Eskitaşçıoğlu, *supra* note 54; Kula, *supra* note 79.

[81] Law no. 6284 on the Protection of the Family and Prevention of Violence against Women of 8 March 2012, Official Gazette no. 28239, 20 March 2012. Art. 1(1)(a) of this law provides that its application is 'based on the Constitution of the Republic of Turkey and international treaties to which Turkey is a state party, in particular, the Council of Europe Treaty on Preventing and Combating Violence against Women and Domestic Violence and other regulations in force'.

[82] For a similar opinion, see Kula, *supra* note 79; Eskitaşçıoğlu, *supra* note 54; Gözler, *supra* note 62.

[83] Some Turkish constitutional lawyers propose that the concerned provisions of Presidential Decree no. 9 be annulled and a statutory law in a manner that complies with the Constitution should instead regulate the subject. In the absence of such a regulation, the only way to comply with the Constitution would be to interpret the concerned article of the presidential decree in accordance with the principle of parallelism of competences and procedures. See Gözler, *supra* note 62.

[84] Council of State 10th Chamber, *supra* note 56, at 4–5; Plenary Session of the Chambers, *supra* note 57, at 7–10.

the two dissenting opinions delivered to the judgment of first instance and the joint dissenting opinion delivered by five judges of appeal argue that, similar to the views expressed in this article, the president who has the authority to issue presidential decrees only on executive matters cannot alone terminate an international treaty that falls within the scope of legislative power.[85]

All these observations illustrate that the powers of the president regarding the termination of international treaties remains a controversial subject in Turkish legal doctrine,[86] which leads us to the question whether this finding would have consequences under international law.

B *Consequences Arising from Turkey's New Treaty-Making Rules under the Law of Treaties*

The coexistence of national and international legal orders and the effect of unconstitutional acts committed by states during their national treaty-making process on the validity of the concerned treaty under international law has always been subject to debate and tension in international practice and judicial proceedings.[87] However, Article 27 of the VCLT makes it very clear that the two treaty orders are different. According to this article, states cannot invoke their internal law provisions to avoid responsibility for the observance of their treaty obligations.[88] Therefore, in the relations between states parties to a treaty, domestic law provisions, including constitutional ones, cannot prevail over those of the treaty.[89] Article 27 nevertheless contains a 'without prejudice' clause providing that it refers solely to treaties that are legally valid on the international level and that it applies only if the relevant internal provisions do not fall within the scope of Article 46 of the VCLT.[90]

1 The Effects of Unconstitutional Withdrawals under International Law

Article 46 of the VCLT, which is considered part of customary international law,[91] stipulates that 'a State may not invoke the fact that its consent to be bound by a treaty

[85] Council of State 10th Chamber, *supra* note 56, at 8–9; Plenary Session of the Chambers, *supra* note 57, at 11–16.

[86] For a critical assessment of the tribunal's judgment on the withdrawal decision from the Istanbul Convention, see K. Gözler, 'Critique of the Council of State's Judgment on the Withdrawal Decision from the Istanbul Convention' (İstanbul Sözleşmesi'nin Feshine İlişkin Danıştay Kararı Hakkında Eleştiriler), available at www.anayasa.gen.tr/danistay-istanbul-sozlesmesi.htm.

[87] J. Crawford, *Brownlie's Principles of Public International Law* (2012), at 387; Woolaver, 'From Joining to Leaving: Domestic Law's Role in the International Legal Validity of Treaty Withdrawal', 30(1) *European Journal of International Law* (2019) 73, at 84.

[88] M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), at 371; Schmalenbach, 'Article 27. Internal Law and Observance of Treaties' in O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2018) 493.

[89] Villiger, *supra* note 88, at 370.

[90] *Ibid.*, at 373; Schmalenbach, *supra* note 88, at 494.

[91] Woolaver, *supra* note 87, at 93; Rensmann, 'Article 46. Provisions of Internal Law Regarding Competence to Conclude Treaties', in Dörr and Schmalenbach, *supra* note 88, at 866; Bothe, 'Article 46 (1969 Convention)', in O. Corten and P. Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (2011) 1090, at 1092.

has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance'. The article makes it clear that 'a violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith'. Therefore, it is admitted that the violations of internal law provisions would affect the validity of the treaty only if the contracting state is aware or could be aware of the failure to comply with internal law.[92] Although rules of fundamental importance are not enumerated in the article, they have been interpreted as including those concerning parliamentary participation in concluding international treaties.[93]

In addressing the question of the consequences, under international law, of violations of internal law provisions regarding the joining a treaty, Article 46 is silent on whether the invalidity of internal acts concerning the withdrawal from treaties could impact the validity of the notification of withdrawal under international law. Indeed, apart from Articles 65–68 setting out the procedure to be followed, the only express rules provided by the VCLT on the termination of treaties are enacted in Articles 54 and 56, according to which treaties may be terminated in conformity with the treaty's provisions or at any time by consent of all the contracting states.[94] Therefore, international law does not seem to offer a clear answer to the question of whether unconstitutional withdrawals from treaties would produce implications under international law.

The question was asked during South Africa's attempt to withdraw from the Rome Statute, although it could not be resolved due to the 'withdrawal of notification of withdrawal' decision of the South African government.[95] The South African government submitted, on 19 October 2016, a written notification of withdrawal from the Rome Statute of the International Criminal Court to the United Nations (UN) Secretary-General, pursuant to Article 127 of the Rome Statute. Like the notification of withdrawal from the Istanbul Convention made by the Turkish president, the notification of the South African government was issued not only in the absence of any form of public consultation but also, especially, without any debate before South Africa's Parliament.[96] And, like in Turkey's case, the South African government's unilateral withdrawal notice was brought to court by the opposition party, the Democratic Alliance, claiming that the executive was not entitled to decide alone on the withdrawal from the Rome Statute without seeking prior legislative approval.[97]

92 Woolaver, *supra* note 87, at 91.

93 *Ibid.*, at 92–93; Rensmann, *supra* note 91, at 847; Bothe, *supra* note 91, at 1094; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea Intervening)*, Judgment, 10 October 2002, ICJ Reports (2002) 303, para. 265.

94 For an analysis of these articles, see V. Pergantis, *The Paradigm of State Consent in the Law of Treaties* (2017), at 154–188.

95 Rome Statute of the International Criminal Court 1998, 2187 UNTS 90.

96 Du Plessis and Mettraux, 'South Africa's Failed Withdrawal from the Rome Statute', 15 *Journal of International Criminal Justice* (2017) 361, at 362.

97 *Democratic Alliance v. Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)*, Case no. 83145/2016, 22 February 2017, available at www.saflii.org/za/cases/ZAGPPHC/2017/53.html.

According to section 231 of the Constitution of the Republic of South Africa, 'the negotiating and signing of all international agreements is the responsibility of the national executive', and 'an international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces unless it is an agreement referred to in subsection',[98] which concerns technical, administrative or executive matters.[99] The same section specifies that international agreements enacted into law by national legislation become law in the republic.[100] Based on these provisions, the High Court of South Africa decided that 'in terms of section 231(1) and (2) of the Constitution the national executive first negotiates and signs an international agreement. Parliament thereafter approves the agreement to bind the country. The process of withdrawal should follow the same route with the national executive first taking the decision, followed by parliamentary approval'.[101] Thus, according to the Court, 'if it is parliament which determines whether an international agreement binds the country, it is constitutionally untenable that the national executive can unilaterally terminate such an agreement'.[102] In consequence, the Court decided that both the notice of withdrawal and the Cabinet decision to deliver the notice to the UN Secretary-General without prior parliamentary approval were unconstitutional and invalid.[103] Subsequently, South Africa's withdrawal notification was revoked on 7 March 2017 as required by the High Court's judgment.

The *acte contraire* theory adopted by the High Court of South Africa to interpret the domestic requirements for treaty withdrawal[104] was also adopted by the Inter-American Court of Human Rights, in its Advisory Opinion OC-26/20 concerning the withdrawal of Venezuela from the American Convention on Human Rights[105] where the Court followed, for the most part, the general rules of the international law of treaties.[106] The Court indicated in its opinion that it 'considered it pertinent to have

[98] Section 231, para 2.

[99] Section 231, para 3 provides that 'an international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time'.

[100] Constitution of the Republic of South Africa, 1996, s. 231, para. 4.

[101] *Democratic Alliance, supra* note 97, para. 46.

[102] *Ibid.*, para. 51.

[103] See Kemp, 'South Africa's (Possible) Withdrawal from the ICC and the Future of the Criminalization and Prosecution of Crimes against Humanity, War Crimes and Genocide under Domestic Law: A Submission Informed by Historical, Normative and Policy Considerations', 16 *Washington University Global Studies Law Review* (2017) 411, at 415; see also Ssenyonjo, 'State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and the Gambia', 29 *Criminal Law Forum* (2018) 63.

[104] Woolaver, *supra* note 87, at 79.

[105] IACtHR, *Obligations in Matters of Human Rights of a State That Has Denounced the American Convention on Human Rights and the Charter of the Organization of American States* (Advisory Opinion OC-26/20), 9 November 2020; American Convention on Human Rights 1969, 1144 UNTS 123.

[106] S. Steininger, 'Don't Leave Me This Way: Regulating Treaty Withdrawal in the Inter-American Human Rights System', *EJIL Talk!* (5 March 2021), available at www.ejiltalk.org/dont-leave-me-this-way-regulating-treaty-withdrawal-in-the-inter-american-human-rights-system/.

recourse to the principle of parallelism of forms, which implies that if a State has established a constitutional procedure for assuming international obligations it would be appropriate to follow a similar procedure when it seeks to extricate itself from those obligations'.[107] According to the Court, the application of the principle of parallelism of forms would guarantee a pluralistic, public and transparent debate within the states, which is necessary in cases of termination of human rights treaties that imply a possible curtailment of rights.[108] Finally, the Court did not hesitate to state that, although there is currently no uniform state practice concerning the termination of international treaties, 'there is a marked tendency to require the participation of the legislative branch as a necessary condition for a democratic society'.[109]

The question concerning the respective roles of the legislature and executive was also asked during the United Kingdom's (UK) exit from the European Union (EU).[110] After the referendum on 23 June 2016 resulted in favour of leaving the EU, the British government announced its intention to withdraw from the Treaty on European Union (TEU).[111] However, the UK Supreme Court, where there is no written regulation on treaty withdrawal, held that the executive did not have the unilateral power to withdraw from the TEU because the withdrawal would result in a change to the constitutional framework.[112]

All these cases have prompted controversy over whether, by analogy of Article 46 of the VCLT, manifest violations of fundamentally important rules of internal law could invalidate a state's withdrawal from an international treaty. Although some authors support an application by analogy of Article 46 to treaty withdrawal,[113] such an interpretation seems to be problematic. This is because, although Article 46 constitutes the most important reference point dealing with the state's treaty-making capacity, it remains doubtful, under general rules of treaty interpretation, whether it may apply, by analogy, to withdrawal from treaties. Treaty interpretation rules that provide that a treaty shall be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty[114] do not seem to allow that Article 46, which refers only to provisions of internal law regarding competence to 'conclude treaties' and addresses

[107] *Obligations in Matters of Human Rights*, *supra* note 105, para. 64.

[108] *Ibid.*

[109] *Ibid.*, para. 62.

[110] On this point, see Woolaver, *supra* note 87, at 76–78.

[111] Treaty on European Union, OJ 2010 C 83/13.

[112] *R. (on the Application of Miller and Another) (Respondents) v. Secretary of State for Exiting the European Union (Appellant)*, [2017] UKSC 5, paras 80–81; see also Woolaver, *supra* note 87, at 76–78.

[113] For instance, Hannah Woolaver suggests that Art. 46, in light of the *travaux préparatoires* of the VCLT and the normative principles of the law of treaties, 'should be interpreted to apply analogically to state representatives' power to withdraw from treaties in international law' and that 'a manifest violation of an internal rule of fundamental importance should potentially invalidate a state's treaty withdrawal internationally as well as domestically'. Woolaver, *supra* note 87, at 96. In the same vein, Başak Çali argues that 'if the duty not to manifestly violate a rule of fundamental importance in domestic law applies to the consent to be bound, it must also apply to the consent to be unbound'. Çali, *supra* note 62. For a similar view, see also Eskitaşçıoğlu, *supra* note 54.

[114] VCLT, *supra* note 7, Art. 31.

only the issue of 'the consent to be bound by a treaty', is also to apply to cases of leaving treaties.[115]

The internationalist approach maintained by the VCLT concerning the relationship between international and national legal orders would also prevent such an interpretation. Indeed, during the drafting of the VCLT, the debates on the subject gave rise to two different theories. The 'constitutionalist theory', which is also called the 'theory of international relevance', argues that treaties concluded in contravention of constitutional limitations on a state representative's treaty-making power would have to be considered void or voidable.[116] While the 'internationalist approach', which is also known as 'the theory of international irrelevance',[117] argues that 'the disregard of constitutional limitations to the treaty-making power does not affect the validity of the consent expressed on the international plane as long as the Head of State or any other agent representing the State acted within the scope of his or her authority under international law'.[118] The VCLT has adopted a rather internationalist approach by stating in Article 46 that only manifest violations of internal rules of fundamental importance regarding the competence to conclude treaties would cause the invalidity of the consent to be bound by the treaty.[119]

With respect to treaty withdrawal, Article 46 needs to be read in conjunction with Article 67 of the VCLT, which seems to be exclusively concerned with the external manifestations of a state's will to withdraw from a treaty[120] and which does not maintain any similar 'manifest violation exception' to the one provided by Article 46.[121] Indeed, Article 67 provides that any act declaring a treaty invalid or terminating, withdrawing from or suspending the operation of a treaty shall be carried out through an instrument communicated to the other parties and signed by the head of state, the head of government, the minister for foreign affairs or the representative of the state producing full powers. An *a contrario* interpretation of this article would lead to the conclusion that failure to comply with constitutional requirements may not entail the

115 For a similar opinion, see Frankowska, 'Competence of State Organs to Denounce a Treaty: Some Internal and International Legal Problems', 7 *Polish Yearbook of International Law* (1975) 277, at 311. The author argues that different articles in various parts of the VCLT regulate the competence of state representatives to conclude a treaty and to terminate a treaty differently.

116 See C. Rousseau, *Droit international public* (1970), at 210; G. Haraszti, *Some Fundamental Problems of the Law of Treaties* (1973), at 252–253. The first two special rapporteurs on the law of treaties, James Brierly and Hersch Lauterpacht, supported this approach. See Brierly, 'Third Report on the Law of Treaties', 2 *ILC Yearbook* (1952) 50, at 51–52; Lauterpacht, 'Report on the Law of Treaties', 2 *ILC Yearbook* (1953) 90, at 142–143.

117 The last two special rapporteurs, Gerald Fitzmaurice and Humphrey Waldock, adopted this approach. See Fitzmaurice, 'Third Report on the Law of Treaties', 2 *ILC Yearbook* (1958) 20, at 33–34; Waldock, 'Second Report on the Law of Treaties', 2 *ILC Yearbook* (1963) 36, at 45, paras 16ff.

118 Rensmann, *supra* note 91, at 840; Woolaver, *supra* note 87, at 84–89; Frankowska, *supra* note 115, at 305.

119 Villiger, *supra* note 88, at 586–587; Rensmann, *supra* note 91, at 843; Woolaver, *supra* note 87, at 89.

120 'Report of the ILC on the Work of the Second Part of Its Seventeenth Session', 2 *ILC Yearbook* (1966) 169, at 241.

121 Woolaver, *supra* note 87, at 94.

invalidity of the withdrawal decision in international law so long as the competent agent has acted within the scope of his or her authority under this legal order.

This interpretation also arises from Article 7 of the VCLT, according to which heads of state, heads of government and ministers for foreign affairs are considered as representing their state, without having to produce full powers, for the purpose of performing 'all' acts relating to the conclusion of a treaty. Therefore, international law that designates state organs and agents as competent representatives to perform such acts on behalf of their states and that endows the head of state with the *ius representationis omnimodae*[122] does not seem to have a choice but to recognize the validity of the acts of withdrawal adopted by the president through established procedures.[123] In other words, there seems to be no legal means making it possible for international instances to question the validity of a decision taken by the executive authority of a state, recognized as a competent representative under international legal order. Otherwise, states, instead of relying on the authority to commit the state under international law, would have to verify, in each case, whether the provisions of the state's Constitution are not infringed,[124] and any such verification would constitute an interference in the state's internal affairs in a manner contrary to the very basic principles of international law.[125]

Furthermore, none of the examined national jurisprudence addresses this question, which in return proves that state practice does not provide support for the international invalidity of withdrawals in cases of unconstitutional decisions.[126] Last but not least, the wording of Article 46 makes clear that it is only the state whose internal law provisions regarding competence to conclude treaties that were violated may invoke this basis for invalidity.[127] Article 46's formulation 'is based on the idea that the verification of the constitutionality of treaties between States is not the affair of other States, and that it is for each State to take the necessary steps to ensure there is no violation of its internal law regarding competence to conclude treaties'.[128] Such an interpretation would also be inevitable when it comes to withdrawal decisions. Thus, whereas the new executive authority of a state could invoke the invalidity of a

122 Rensmann, *supra* note 91, at 840.

123 For a similar opinion, see Ciampi, 'Invalidity and Termination of Treaties and Rules of Procedure', in E. Cannizzaro (ed.), *The Law of Treaties beyond the Vienna Convention* (2011) 360, at 368; Tyagi, 'The Denunciation of Human Rights Treaties', 79 *British Yearbook of International Law* (2008) 86, at 94; Pergantis, *supra* note 94, at 108.

124 'Report of the ILC', *supra* note 120, at 240.

125 Rensmann, *supra* note 91, at 841.

126 According to Woolaver, these decisions may even be interpreted as confirming the internationalist approach: '[T]he South African court decision, by ordering the executive to revoke the instrument of withdrawal sent to the UN Secretary-General, could be interpreted to mean that domestic invalidity would not be necessary if the instrument was simply ineffective in international law.' Woolaver, *supra* note 87, at 83, 95.

127 *Ibid*., at 91.

128 Reuter, 'Eighth Report on the Question of Treaties Concluded between States and International Organizations or between Two or More International Organizations', 2(1) *ILC Yearbook* (1979) 126, at 132; see also Rensmann, *supra* note 91, at 841.

withdrawal under international law in case the previous government or the head of state had unconstitutionally withdrawn from an international treaty, other states do not seem to be legally empowered to make such an invocation.

Thus, from an international law standpoint, the withdrawal from a treaty seems to be the prerogative of the executive branch of the withdrawing state.[129] Such prerogative 'would mean that, while a violation by the State's executive of the requirement to obtain legislative approval when joining a treaty may invalidate the state's treaty consent, the very same violation would be irrelevant in the case of treaty withdrawal'.[130] This conclusion may undoubtedly cause undesirable political consequences, especially in cases where the withdrawal concerns a human rights treaty, as in the case of the Istanbul Convention. However, a technical approach to international law does not seem to allow a contrary interpretation, which naturally increases the need for clarification and adjustment of the new presidential powers in Turkey's domestic legal order.

2 From a Ratification Rule to the Possibility of Concluding Agreements in Simplified Form Increasing the Risks for Turkey to Claim the Invalidity of Its International Obligations?

The above considerations demonstrate, and the withdrawal process from the Istanbul Convention confirms, that the expansion of presidential powers, without any checks and balances, under the new Turkish governmental system may easily result in the discretionary application by the president of the domestic principles of treaty making and treaty terminating. The attribution of all competences concerning the various stages of the treaty-making process to only one person may furthermore have consequences on invalidity claims that Turkey may increasingly raise concerning its consent to be bound by international treaties. Indeed, as is well known, states conclude international treaties through negotiation, authentication and ratification processes. According to Article 10 of the VCLT, the text of a treaty is established as authentic and definitive by the signature of the text of that treaty in the absence of any other procedure provided for in the text or agreed upon by the states participating in its drawing up. In those cases where the signature is subject to ratification, acceptance or approval, it does not establish consent to be bound by the treaty,[131] and, according to Article 18 of the VCLT, the state assumes only the obligation not to defeat the object and purpose of the treaty.[132]

[129] Tyagi, *supra* note 123, at 94.

[130] Woolaver, *supra* note 87, at 95.

[131] Crawford, *supra* note 87, at 372; Fitzmaurice, 'The Practical Working of the Law of Treaties', in M.D. Evans (ed.), *International Law* (2018) 138, at 146; Villiger, *supra* note 88, at 187; Council of Europe, Committee of Legal Advisers on Public International Law, Expression of Consent by States to be Bound by a Treaty, Analytical Report and Country Reports, Secretariat Memorandum Prepared by the Directorate General of Legal Affairs, Doc. 13 Final (2000), at 16–17.

[132] See Dörr, 'Article 18. Obligation Not to Defeat the Object and Purpose of a Treaty prior to Its Entry into Force', in Dörr and Schmalenbach, *supra* note 88, 243; Boisson de Chazournes, La Rosa and Mbengue, 'Article 18 (1969 Convention)', in Corten and Klein, *supra* note 91, 369; Villiger, *supra* note 88, at 242–253.

However, signature of the text of a treaty may have a different legal significance from the authentication of the treaty according to the circumstances in which it is performed. Although, under Article 10 of the VCLT, the main function is the authentication of the treaty, the signature may amount to the expression of the state of its consent to be bound by the treaty if 'it constitutes the final stage of a treaty-making process',[133] in accordance with Article 11. Treaties to which this procedure is applied are called 'agreements in simplified form'[134] (*accords en forme simplifiée* in French).[135] This procedure, which allows treaties to enter into force immediately upon signature by the state representatives, aims at simplifying and accelerating the procedure of the conclusion of treaties.[136] According to Article 12(1) of the VCLT, in order for the signature to express the consent of a state to be bound by a treaty, the state should provide that the signature shall have that effect or that it should be otherwise established that the negotiating states are agreed that the signature should have this effect or that the intention of the state to give that effect to the signature should appear from the full powers of its representative or should be expressed during the negotiation.[137] Therefore, the consent of a state to be bound by a treaty may be expressed by signature if the contracting states have intended to provide their signature to this effect under international law.[138] From the standpoint of domestic legal orders, the internal legislation of that state must undoubtedly also provide such possibility.

Although the VCLT does not establish different rules for treaties in simplified form,[139] the short procedure may have consequences concerning the invalidity claims of a treaty. Indeed, Article 47 of the VCLT provides that the invalidity of a treaty may be invoked in cases where specific restrictions made on the authority of the representative of the state were notified by the other negotiating states and the representative did not respect the concerned restrictions. Similarly, Articles 48, 49, 50 and 51 stipulate that, in cases of error, fraud, corruption and coercion of a representative of a state, the invalidity of a treaty may be claimed.

[133] Fitzmaurice, *supra* note 131, at 146.

[134] Hoffmeister, 'Article 11. Means of Expressing Consent to Be Bound by a Treaty', in Dörr and Schmalenbach, *supra* note 88, 172; Hoffmeister, 'Article 12. Consent to Be Bound by a Treaty Expressed by Signature', in Dörr and Schmalenbach, *supra* note 88, 182; Van Assche, 'Article 12 (1969 Convention)', in Corten and Klein, *supra* note 91, 211.

[135] P. Daillier *et al*., *Droit international public* (2009), at 157–158.

[136] Van Assche, *supra* note 134, at 210. The possibility of concluding international agreements in simplified form is recognized by the International Court of Justice in the cases concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, 1 July 1994, ICJ Reports (1994) 112, paras 21–30; *Land and Maritime Boundary between Cameroon and Nigeria*, *supra* note 93, para. 264.

[137] As mentioned above, according to Art. 7 of the VCLT, *supra* note 7, heads of state, alongside heads of government and ministers for foreign affairs, are considered as representing their state without having to produce full powers, for the purpose of all acts relating to the conclusion of a treaty, including its signature.

[138] Hoffmeister, 'Article 12', *supra* note 134, at 181.

[139] *Ibid*., at 183.

A priori, these articles make sense in cases where the invalidity grounds materialize at the last stage of the treaty-making process. In other words, in cases where a treaty has been authenticated by signature on circumstances provided by Articles 47–51 but then ratified by the empowered authority establishing the state's consent to be bound, the invalidity grounds cannot be invoked. For instance, in a case where the representative of the state does not respect the restrictions provided by the state on their authority while authenticating a treaty, and where the state still decides to ratify the text so authenticated, that state will not be able to invoke Article 47 anymore as a ground for the invalidity of the treaty. In such a case, the ratification would amount to an *ex post facto* consent to the omission of the representative to observe the restrictions.[140] Humphrey Waldock, the last special rapporteur on the law of treaties, made this issue clear when he indicated in his report that 'where a treaty depends on ratification, acceptance or approval, the State in question will have the clear choice at that subsequent stage of repudiating the text established by its representative, or of ratifying, accepting or approving the treaty; if it does the latter, it will necessarily be held to have endorsed the unauthorised act of its representative and, by doing so, to have cured the original defect of authority'.[141]

As explained above, both the 1961 and 1982 Constitutions provide that Turkey's consent to be bound by an international treaty could only be expressed by ratification that is understood as 'a formal, solemn act on the part of the Head of State through which approval is given and a commitment to fulfil its obligations is undertaken'.[142] Thus, signature has never been used by Turkey as the expression of the definitive consent to be bound by an international treaty.[143] Indeed, under the parliamentary system, treaties were negotiated and signed by ministers, approved by the Grand National Assembly of Turkey and ratified by the president. Even in cases where an international treaty falls under the authority of the Council of Ministers and does not require the Assembly's approval, the authorities that used to sign and ratify treaties were not the same. However, under the new constitutional system, it is theoretically possible for the president to first sign an international treaty and then to ratify it, if it is a treaty that does not fall under the authority of Parliament. Therefore, even if the possibility to conclude 'agreements in simplified form' was not explicitly provided for under the presidential system, such a conclusion can be drawn in cases where the adoption of a statutory law by the Assembly approving the ratification of the agreement is not required. This may increase invalidity claims that Turkey may raise concerning treaties to which it becomes a party. Although it is, for now, a hypothetical scenario, one should

[140] See Mark Villiger, *supra* note 88, at 599, who indicates that 'a priori, Article 47 is limited to cases where States become parties to a treaty by mere signature'.

[141] Waldock, *supra* note 117, at 46, para. 2; 'Report of the ILC', *supra* note 120, at 243, para. 2.

[142] Fitzmaurice, *supra* note 131, at 146.

[143] According to Toluner, Art. 97 of the 1961 Constitution, *supra* note 14 (replaced by Art. 104 of the 1982 Constitution, *supra* note 17, which employs the same terms), does not create an obstacle for Turkey to give its definitive consent to be bound by international treaties by signature. Tütüncü *et al.*, *supra* note 10, at 153. However, the wording of the aforementioned article that provides that the president of the republic 'shall ratify and promulgate international treaties' does not seem to support such an interpretation.

not forget that, in case of treaties binding upon the signature of a single person, thus resulting in a lack of transparency and opportunity for debate at the national level,[144] there may be a greater risk of constitutional provisions being overlooked.[145]

4 Conclusion

The new governmental system established in Turkey in 2017 has had profound impacts on the rules concerning the ratification and termination of international treaties that Turkey has been applying for more than half a century. This change of system has also raised important international law issues. Concerning the ratification of international treaties, as is well known, the intermediate stage between signature and ratification allows the respect of the democratic principle that the executive 'should consult public opinion either in parliament or elsewhere before finally approving a treaty'.[146] Yet the attribution of all competences concerning the various stages of the treaty-making process to the Turkish president makes it possible for him or her to first sign a treaty and then to ratify the treaty that he or she has already signed, as long as it is a treaty that does not fall under the authority of Parliament. This possibility abolishes not only the opportunity for public consultation but also the exercise of multi-stage domestic legal control, which thus would increase the risks of violations of constitutional provisions. Although one might argue that this possibility amounts to a streamlining of domestic law procedure on the adoption of treaties, it would constitute from an international law standpoint an implicit 'simplified form agreement-making procedure', rendering Turkey's potential invalidity claims concerning its international contractual obligations easier to be raised.

Concerning the termination of international treaties, the consequences of the change of system are even less hypothetical. The president's decision to withdraw from the Istanbul Convention despite having ratified the convention only after the Parliament adopted a law approving the ratification confirms that, under the presidential system, the power to terminate treaties has started to be used in defiance of well-established Turkish legal traditions. Although not yet decided on the merits,[147] the decisions rendered by the Council of State – over which the president, who appoints a number of its judges, exercises significant influence – to reject the suspension of the execution of the withdrawal decision foreshadow that this may not be a unique case. Since international law has its limits in intervening in cases of violations of national law provisions, the adoption, in the short term, of a law clarifying the president's and Parliament's powers concerning the termination of international treaties seems to be of vital importance. In the long term, however, the ideal solution seems to be the (re)establishment of the parliamentary system based on a solid separation of powers and democratic control mechanisms whose absence seems to be at the core of the legal problems discussed in this article.

[144] Council of Europe, *supra* note 131, at 17.

[145] This observation is also made by the 'Report of the ILC', *supra* note 120, at 242.

[146] Fitzmaurice, *supra* note 131, at 146.

[147] As of 13 June 2022.