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# THE USE OF FOREIGN LAW IN TURKISH CONSTITUTIONAL ADJUDICATION

*Türk Anayasa Muhakemesinde Mukayeseli Hukukun Kullanımı*

**Cem TECİMER**[*]

## ABSTRACT

The increasing references to foreign law by constitutional courts worldwide has generated a voluminous literature on the subject of the permissibility of these references. While the Turkish Constitutional Court ("TCC") has historically used and continues to use foreign law in domestic constitutional adjudication, the TCC's practice of referring to foreign law has remained thus far a largely understudied phenomenon. This Article aims to fill that gap in three parts. First, it assesses extant debates on the benefits and disadvantages of considering foreign law in domestic constitutional adjudication, assessing the potency of arguments for and against the practice in the Turkish context. Second, and while ultimately not espousing any particular view on the permissibility question, the Article discusses five separate doctrinal arguments that may be indicative of the permissibility of foreign law references under Turkish constitutional law. These are (1) the Preamble; (2) the principles and reforms of Ataturk; (3) international law; (4) general principles of law; and finally (5) the TCC's precedents. Third and lastly, building on the TCC's reliance on foreign law without providing any justification for doing so, the Article concludes with possible reasons that might account for the Court's use of foreign law.

**Keywords**: foreign law, Turkish constitutional adjudication, permissibility of references to foreign law, Turkish constitutional bloc, judicial transparency.

[*] Doctoral candidate in law (S.J.D.) at Harvard Law School, ctecimer@sjd.law.harvard.edu. ORCID ID: 0000-0002-4322-371X



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**ÖZET**

Anayasa mahkemelerinin dünya genelinde artan mukayeseli hukuk atıfları, bu atıfların meşruiyeti hakkında hacimli bir literatür ortaya çıkarmıştır. Anayasa Mahkemesi'nin ("AYM") mukayeseli hukuku anayasa muhakemesinde öteden beri kullanmış ve hâlen kullanıyor olmasına rağmen, AYM'nin bu pratiği bu güne değin büyük ölçüde gözden kaçırılmış bir hadise olarak kalmıştır. Bu makale, üç ayrı bölümde bu gözden kaçırılmaya son vermeyi hedeflemektedir. Evvela, anayasa muhakemesinde mukayeseli hukuk atıflarının faydaları ve dezavantajları hakkındaki tartışmalardan yararlanılarak bu argümanların Türkiye örneği üzerindeki açıklayıcı güçleri sınanmıştır. İkinci olarak, nihayetinde mukayeseli hukuk atıflarının meşruiyeti konusunda herhangi bir taraf tutmamakla beraber, Türk anayasa muhakemesinde mukayeseli hukuk atıflarının meşruiyetini destekler nitelikte beş ayrı hukuki argüman incelenmiştir. Bu hukuki argümanlar sırasıyla (1) Anayasa'nın Başlangıç kısmı; (2) Atatürk ilke ve inkılapları; (3) milletlerarası hukuk; (4) hukukun genel ilkeleri ve (5) AYM içtihatlarına ilişkindir. Üçüncü ve son olarak da, AYM'nin herhangi bir gerekçelendirmeye girişmeksizin mukayeseli hukuktan istifade etmesinden hareketle, Mahkeme'nin mukayeseli hukuk atıflarını kullanmasının muhtemel sebepleri tartışılmıştır.

**Anahtar kelimeler**: mukayeseli hukuk, Türk anayasa muhakemesi, mukayeseli hukuk atıflarının meşruiyeti, Türk anayasallık bloku, yargısal şeffaflık.

## INTRODUCTION

*"Bu talih bir Kanun-i Esasi ile değişmez"*[1].
(This destiny will not change with a constitution).

The continuing overlap of judicialization and globalization in recent decades has had a number of implications for the way in which judicial bodies handle disputes, chief among which is the increasingly more visible use of foreign (constitutional) law by courts[2]. The United States Supreme Court's invocation of foreign law to dispose of some constitutional cases in recent years has revitalized the debate not only among judges and politicians in the United States, but also among scholars of comparative constitutional law more generally. These debates have generated a voluminous literature on the use of foreign law not only by the U.S. Supreme Court, but also by apex courts in countries other than the United States, including the Israeli Supreme Court[3], the South African Constitutional Court[4], the Supreme Court of the United Kingdom[5], the Spanish Constitutional Court[6], and many others.

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1 Tanpınar, A. H. (2005). *Mahur Beste*, Istanbul: Dergah Publishing, p. 95. Tanpınar, one of Turkey's greatest writers, was probably expressing his distrust in the idea of a cure-all constitution. His words, no doubt with a stretch, can also be construed as a call for looking not only at "a/one constitution", but also at the constitutions of others. And in that comparative inquiry may lie some potential that could relieve, if not overcome, Tanpınar's disappointment. This second interpretation is enabled by the fact that the word "bir" in Turkish can translate to English either as the indefinite article "a" or as the number "one", and translated as "one", Tanpınar could have meant "(t)his destiny will not change with one constitution", implying that it might with more than one. Enter comparative constitutional inquiry!

2 See generally Slaughter, A. (2000). "Judicial Globalization", *Virginia Journal of International Law*, Vol. 40, No. 4, p. 1124 (arguing that increased cooperation between constitutional courts as a result of globalization is "likely to highlight the fault-lines of conflict as well as the opportunities for cooperation").

3 See Porat, I. (2013). "The Use of Foreign Law in Israeli Constitutional Adjudication", in *Israeli Constitutional Law in the Making* (Gideon Sapir et al, Oxford: Hart Publishing) pp. 151-172 (documenting the Israeli Supreme Court's use of foreign law).

4 See du Bois, F. & Visser, D. (2003). "The Influence of Foreign Law in South Africa", *Transnational Law & Contemporary Problems*, Vol. 13, No. 2, pp. 644-657 (documenting the South African Constitutional Court's use of foreign law).

5 See Künnecke, M. (2019). "German Constitutional Law in the UK Supreme Court", *Liverpool Law Review*, Vol. 40, No. 1, pp. 31-47 (documenting German law influences on the UK Supreme Court).

6 See Guerra, L. (2005). "*Tribunal Constitutional* (Constitutional Court) Spain", *International Journal of Constitutional Law*, Vol. 3, No. 4, p. 567 (noting that "(r)eferences to the case law of the constitutional courts of other countries (…) are to be found frequently in the opinions of the Spanish Constitutional Court").

Despite the sustained attention the citation of foreign law by courts has received in other parts of the world, the Turkish Constitutional Court's ("TCC") use of foreign law still remains an understudied phenomenon. With a few notable exceptions[7], including a recent empirical study that usefully draws attention to statistical evidence documenting the Court's reliance on foreign law[8], there has been little discussion about the issue among academic circles and judges as well as practitioners of Turkish constitutional law.

In an attempt to fill this gap, this Article proceeds in three parts: Part I explores the many and varied criticisms directed against the practice of referencing foreign law as well as its defenses in the context of Turkish constitutional adjudication. Part II, which constitutes the bulk of the Article, focuses on the normative question of whether it is constitutionally permissible for the TCC to invoke foreign law in its decisions. While ultimately refraining from taking a strong side on the issue of permissibility, Part II nevertheless points out tentative textual and non-textual licenses in Turkish constitutional law that may be read as allowing judges on the Court to cite foreign law. The permissibility question aside, as an empirical reality, the TCC invokes foreign law. Building on this constitutional reality, and taking note of the fact that the practice of referring to foreign law is pervasive in the Court's jurisprudence and remains to this day unquestioned by judges and scholars alike, Part III considers some potential reasons as to why members of the TCC refer to foreign law. Part III ends the discussion by pointing out that the Court's omission of a discussion on the relevance of foreign law, while perhaps an indicator of how firmly established a constitutional practice the phenomenon has become, also raises concerns for observers who argue that the right to a reasoned judgment specifically and judicial transparency more generally should require the Court to explain its justifications for referencing foreign law.

Before proceeding any further, I should point out an important caveat at the outset: this Article deals with foreign law understood as

[7] For some rare studies touching on the issue of the Court's relationship with foreign law see Örücü, E. (2007). "Ulusal Anayasa Mahkemelerinde 'Yargısal Karşılaştırmacılık' ve Mahkemeler Arası Diyalog", *Anayasa Yargısı*, Vol. 34, pp. 433-459; Oder, B. (2010). *Anayasa Yargısında Yorum Yöntemleri*, İstanbul: Beta Yayınları, pp. 193-204.

[8] See Yıldırım, E. & Gülener, S. (2018). "Anayasa Mahkemesi Kararlarında Uluslararası Ve Karşılaştırmalı Hukuka Yapılan Atıflar: Ampirik Bir Analiz", *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, Vol. 67, No. 1, pp. 105-144.

a phenomenon different from international law or the law produced by transnational judicial and/or political bodies. By foreign law I refer to the law of domestic jurisdictions and this Article exclusively examines those invocations by the TCC. The difference between the two is perhaps better articulated in Turkish: this study surveys the Court's references to *foreign* law, which, in this context, loosely translates as *mukayeseli hukuk* or *yabancı iç hukuk* in Turkish, as opposed to *international* law (tr. *uluslararası hukuk*)[9].

## I. THE "VICES" and "VIRTUES" of FOREIGN LAW CITATIONS

A brief exploration of the U.S. Supreme Court's encounters with foreign law in its caselaw might shed light on the diverse array of criticisms levelled against those Justices who use foreign law in their opinions and against the practice more generally. Perhaps most infamously, the references to foreign law in *Roper v. Simmons*[10] caused considerable controversy over the permissibility and appropriateness of citing foreign law. *Roper* held that the imposition of the death penalty on juvenile offenders was in violation of the Eighth Amendment to the U.S. Constitution, which prohibits "cruel and unusual punishment". The majority opinion essentially looked at three separate sources of law to arrive at that conclusion[11]: First, the Justices in the majority examined domestic law which had evolved such that imposing the capital punishment on juvenile offenders had become much rarer. Second, they relied on their own ideas about the commensurability of the death penalty for minors, which the Justices backed up with precedents. Third, and finally, they relied on foreign law to buttress their conclusion, holding that the "(o)pinion of the world community" provided "confirmation for (their) own conclusions".[12] The Court was somewhat reticent about its invocation of foreign law, as it made clear that foreign law was not "controlling"[13] of the outcome, asserting instead that it

9 For a similar treatment that differentiates between "foreign law" and "international law" as used by the TCC, see Yıldırım, E. & Gülener, S. (2018). p. 110 (using a two-part distinction to empirically document the TCC's references to (i) foreign law understood as the domestic law of foreign jurisdictions and (ii) international law).

10 543 U.S. 551 (2005).

11 For a concise summary of the Court's reasoning in *Roper* see Tushnet, M. (2006a). "Referring to Foreign Law in Constitutional Interpretation: An Episode in the Culture Wars", *Baltimore Law Review*, Vol. 35, No. 3, pp. 301-302.

12 Roper v. Simmons, 543 U.S. 551, 578 (2005).

13 Roper v. Simmons, 575.

merely provided confirmation to an already-reached result by the Court. Another point some members of the Court made to justify their use of foreign law was to argue that traditionally, and as a matter established by practice, it was not unusual for the Justices to look to foreign law in deciding cases that involved interpreting the Eight Amendment: "This inquiry reflects the special character of the Eighth Amendment, which, the Court has long held", asserted Justice O'Connor, "draws its meaning directly from the maturing values of civilized society"[14].

Not all were convinced. In a scathing dissenting opinion, Justice Scalia articulated most variants of the criticisms that those Justices invoking foreign law have to face to this very day. First and foremost, he argued that using foreign law to determine, however remotely, outcomes in domestic constitutional disputes amounted to an imposition of foreign law on Americans. In essence, this view objects to the use of foreign law because it is believed to "facilitate() the erosion of US sovereignty by the forces of globalization"[15]. In similar vein, one scholar argues that the use of foreign law to interpret the U.S. Constitution "dramatically undermines sovereignty by utilizing the one vehicle—constitutional supremacy—that can trump the democratic will"[16]. Taken to its extreme, what could be termed the "sovereignty objection" finds expression in a multitude of political statements—especially those by, to use common political parlance, conservatives—that draw on conspiracy theory-like narratives to suggest that some Court members, under the influence of foreign forces, are invoking foreign law to insidiously undermine American law and sovereignty[17]. The sovereignty objection cannot and should not be lost on scholars and practitioners of Turkish constitutional law, given that the Turkish Constitution provides in Article 6(1) that "(s)overeignty belongs to the Nation", which is an emphatic rejection of foreign interference, and in Article 6(3) that "(n)o person or organ shall exercise any state authority that does not emanate from the

14 Roper v. Simmons, 604-605.

15 Choudry, S. (2006). "Migration as a new metaphor in comparative constitutional law", in *The Migration of Constitutional Ideas* (Sujit Choudry, Cambridge: Cambridge University Press) p. 7.

16 Alford, R. (2004). "Misusing International Sources to Interpret the Constitution", *American Journal of International Law,* Vol. 98, No. 1, p. 59; also quoted in Choudry, S. (2006). p. 8.

17 For a brief overview of some of these statements, ranging from accusing the Court of condoning "foreign interference in (the American) government" to accounts of foreign forces using the Court to try "to infiltrate into (America's) judicial system" see Choudry, S. (2006). pp. 11-13.

Constitution". But these provisions, taken in isolation, do not answer the question of whether the TCC's invocation of foreign law violates the Constitution, chiefly because they eschew answering the question of whether the authority to consider foreign law for purposes of domestic constitutional adjudication "emanate(s) from the Constitution"—a topic which I shall turn to later in Part II. Still, these provisions of the Turkish Constitution serve as a reminder that similar sovereignty concerns may expectedly arise in the Turkish context.

A second criticism Justice Scalia offered in his dissenting opinion in *Roper* and elsewhere is a particular inconsistency within the faction that supports the use of foreign law: almost all Justices in the U.S. agree that foreign law is not controlling or authoritative on the outcomes of constitutional cases. Justice Breyer, who cites foreign law frequently in his opinions, for instance, has remarked that when he refers to foreign law he "realize(s) full well that the decisions of foreign courts do not bind American courts. Of course they do not"[18]. Justice Scalia's response to that is simple. If there seems to be agreement among Justices on both sides of the issue that foreign law is emphatically not controlling or authoritative on the outcome, then why cite it at all? Or to put it in Justice Scalia's words, "(w)ell if you don't want it to be authoritative, then what is the criterion for citing it?"[19] Justice Breyer, representing the proponents of referencing foreign law, does not provide a satisfactory answer[20], which, in turn, invites skepticism as to the actual motivations behind references to foreign law. After all, if not to authoritatively dispose of a particular constitutional dispute at bar, why would the Justices invoke, or as one scholar insisted, even merely *mention*[21], foreign law?

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18 Dorsen, N. (2005). "A conversation between U.S. Supreme Court justices", *International Journal of Constitutional Law*, Vol. 3, No. 4, p. 523.

19 Dorsen, N. (2005). p. 522.

20 See also Choudry, S. (2006). p. 4 (describing "Breyer's failure to respond to Scalia's challenge").

21 Tushnet, M. (2008). *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law,* Princeton: Princeton University Press, p. 3 (asserting that "*mention* is the right word" to describe the U.S. Supreme Court's references to foreign law). In the Turkish context, one scholar has pointed to "pseudo-references" to comparative and international law and has urged the TCC to engage with these sources in an in-depth and genuine manner. See Oder, B. (2013). "Anayasa Yargısında Temel Hak ve Özgürlüklerin Somutlaşması Normatif Kurgular, Teloslar ve Uluslararası Hukuka Açıklık", *Anayasa Yargısı*, Vol. 30, pp. 49-59.

The potential answer to that query relates to a third criticism levelled against proponents of referencing foreign law, namely that its use is merely decorative and without substance—and the TCC is not immune from these criticisms mainly because it too never relies exclusively or even predominantly on foreign law to resolve constitutional questions, choosing instead to use it as a means to buttress its conclusions. Turkish constitutional scholars are in nearly universal agreement that foreign law is never controlling of outcomes. At best, some scholars would argue, it is a supplementary source guiding constitutional interpretation (tr. *destek ölçü norm*)[22]. These scholars will typically assert that "(f)oreign law cannot independently determine the meaning of a constitutional norm or a rule that is the subject of constitutionality review"[23]. Further, some scholars, especially those with a legal orientation that is more positivist than others, altogether reject reliance on foreign law as a benchmark against which the constitutionality of laws can be assessed. This second group of scholars rejects the idea of a so-called Turkish *bloc de constitutionnalité* (tr. *anayasallık bloku*)—a term adopted from French constitutional law that is used to describe the compendium of Turkish constitutional law sources that ought to be used by members of the TCC in adjudicating the constitutionality of legislation[24], including for example the text of the Turkish Constitution as well as what are believed to be supra-constitutional norms such as general principles of law. They basically argue that the Constitution (while they are mostly unclear by what they mean by "the Constitution", they can be presumed to be referring to the *text* of the Constitution) is the only benchmark against which constitutional adjudication can take place; thus, they conclude, there is no use for the term *bloc de constitutionnalité*[25]. To be sure, rejecting the idea of a Turkish "constitutional bloc" does not necessarily mean that the idea of foreign law having a supplementary effect on constitutional

[22] See e.g., Oder, B. (2010). p. 193 (asserting that "(f)oreign law is not amenable to independent use by the TCC"). For an earlier statement see Duran, L. (1984). "Türkiye'de Anayasa Yargısının İşlevi ve Konumu", *Anayasa Yargısı*, Vol. 1, p. 65 (arguing that the Court may rely on insights that foreign law can yield, but only as "additional justifications that supplement and confirm the main holding").

[23] Oder, B. (2010). p. 193.

[24] See generally Yüzbaşıoğlu, N. (1993). *Türk Anayasa Yargısında Anayasallık Bloku*, İstanbul: İstanbul Üniversitesi Basımevi.

[25] For the classic statement see Gözler, K. (2000). "Türk Anayasa Yargısında Anayasallık Bloğu Kavramına İhtiyaç Var Mıdır?", *Ankara Üniversitesi SBF Dergisi*, Vol. 55, No. 3, pp. 81-101 and especially p. 97.

interpretation is also rejected. However, it is plausible to predict that legal positivists who tend to reject the idea of a bloc, in the main, are more aversive than others toward the idea of foreign law playing some role in the TCC's decision-making process.

This short detour into Turkish constitutional law scholarship's divided stance on the question of whether there is a constitutional bloc that consists of "main" and "supplementary" constitutional benchmarks to use in constitutional adjudication has important ramifications for the debate on references to foreign law: virtually no scholar would argue that foreign law references are among the "main" constitutional benchmarks (such as the text of the Constitution) that are *dispositive* in determining the outcome in any given constitutional case. What is more, those scholars who go as far as to reject the category of "supplementary" benchmarks altogether can be expected to be all the more against foreign law's relevance, if any. Enter Justice Scalia's question: why refer to foreign law if it is not even a supplementary source for constitutional adjudication, especially if one contends that there is no such category? Or to those who accept the category of supplementary sources: why invoke foreign law if it is emphatically not outcome-determinative (and therefore part of the "supplementary" and not "main" benchmarks category in constitutional adjudication)? Reasons, unsurprisingly, vary[26]. One prominent reason that has been suggested by scholars and judges aversive to references to foreign law alike is "window-dressing"[27] or "beautification"[28]—the idea that references to foreign law do not substantively contribute to the resolution of a particular constitutional dispute, but rather "demonstrate an educated, cosmopolitan sensibility, as opposed to a narrow, inward-looking, and illiterate parochialism"[29]. If the view of those scholars who allocate no place to foreign law in constitutional adjudication is accepted, then, one is compelled to wonder what purpose references

[26] For a tentative typology that divides various courts' reasons for invoking foreign law into three main categories, including (i) need-based explanations (for example, to satisfy legal-cultural demands in socially diverse polities), (ii) structural and disciplinary explanations (that have to do with similarities of legal traditions and other factors such as language capabilities and institutional competence), and (iii) social science explanations such as identity entrenchment see Hirschl, R. (2018). "Judicial review and the politics of comparative citations: theory, evidence and methodological challenges", in *Comparative Judicial Review* (Erin F. Delaney & Rosalind Dixon, Massachusetts: Edward Elgar Publishing) pp. 407-417.

[27] See e.g., Yıldırım, E. & Gülener, S. (2018). p. 110.

[28] Hirschl, R. (2018). p. 404.

[29] Choudry, S. (2006). p. 4.

to foreign law by the TCC serves. "(D)ecorative"[30] reasons that do not bear on the resolution of the particular issue at bar, but rather obfuscate and distract from the core issues, might be one possible answer to that question. I will attend to the "why" question in further detail in Part III where I discuss some possible explanations as to why members of the TCC invoke foreign law. But if only to embellish opinions, then, a critique of references to foreign law seems warranted.

A fourth criticism levelled against the use of foreign law is methodological. Even if references to foreign law, for the sake of argument, were accepted as a permissible constitutional practice, how would the Court know *which* foreign law to cite? The Court cannot possibly exhaust all relevant sources of foreign law. Out of necessity—dictated by time constraints, language- and expertise-based limitations, and limitations having to do with institutional capabilities—the Court must choose to include in its decision a discussion of *some* foreign law to the exclusion of some other. In deciding which countries' laws (constitutions, statutes, caselaw, etc.) to discuss, and by implication, which ones to omit from discussion, the Court may find itself trapped in selection bias. Simply put, what is to stop the Court from looking only at the laws of those foreign jurisdictions that would lend credence to the judgment already reached or desired by the Court, and not consider the laws of other foreign jurisdictions which may cast doubt on the Court's judgment? If uses of foreign law cannot offer a balanced account, that might result in its instrumentalization to buttress already-reached constitutional outcomes. Scholars have labelled this selection bias difficulty the "cherry-picking" or "forum shopping" problem[31].

Some scholars are more optimistic about the use of foreign law. Especially those who believe in a variant of "normative universalism", defined as the belief and search in common cores of constitutionalism across polities[32], think that cross-judicial dialogue may help detect

30 Hirschl, R. (2018). p. 404.

31 See e.g., Choudry, S. (2006). p. 7. For the so-called "cherry-picking" problem in comparative constitutional law more generally see Hirschl, R. (2014a). *Comparative Matters: The Renaissance of Comparative Constitutional Law*, Oxford: Oxford University Press, pp. 237-238 (describing the cherry-picking problem as a result-oriented and biased selection of case studies that ultimately confirm, but not prove, the initial hypothesis).

32 For a definition and use of the term see Tushnet, M. (2006b). "Some reflections on method in comparative constitutional law", in *The Migration of Constitutional Ideas* (Sujit Choudry, Cambridge: Cambridge University Press) pp. 68-72.

and better articulate those similarities. Others are skeptical about the normative universalist project to begin with, and they argue further that judicial dialogue might equally result in more isolationist doctrines, especially if foreign law is invoked with an eye to articulating the uniqueness of a jurisdiction and its exceptional status among others. What is more, constant non-use of the law of certain polities, but consistent reliance on the law of others may help courts, for better or worse, to build up or entrench their conceptions of the good, and by implication, the bad. A striking example comes from the Supreme Court of Israel, which consistently avoids invoking the foreign law of Muslim-majority polities who face similar difficulties in achieving a satisfactory interpretive balance between religious and secular/democratic laws[33]. While the assertion that "there is no citation whatsoever of Israeli Supreme Court cases by the Turkish Constitutional Court (or vice versa)"[34] is descriptively inaccurate, given at least one dissenting opinion in a decision by the TCC in which an Israeli Supreme Court case was referenced[35], it is still true that judicial dialogue between these two jurisdictions is very limited, in large part due to historical and ongoing political tensions as well as each Court's unique conception of model courts to look to, which, in each case, excludes the other.

One strain in the various arguments used by proponents of cross-judicial dialogue is equally troubling. Justice Breyer has articulated a variant of this argument when he urged the U.S. Supreme Court to look to other courts because "for years people all over the world have cited the Supreme Court, why don't we cite them occasionally? They will then go to some of their legislators and others and say, 'See, the Supreme Court of the United States cites us.' That might give them a leg up"[36]. Simply put, Justice Breyer was urging to look to foreign law not so much on legal grounds, but rather to "return a favor", and not turn a blind eye to the many references to the U.S. Supreme Court's caselaw by other

33 Hirschl, R. (2018). pp. 413-416.

34 Hirschl, R. (2014b). "In Search of an Identity: Voluntary Foreign Citations in Discordant Constitutional Settings", *The American Journal of Comparative Law*, Vol. 62, No. 3, p. 580. See also Yıldırım, E. & Gülener, S. (2018). p. 113.

35 Justice Engin Yildirim, in a dissenting opinion he authored in 2014, has relied on secondary sources to reference an Israeli Supreme Court case in which it was stated that because it represented the collective honor of the people of Israel, the country's flag was afforded constitutional protection. See TCC, E.2013/99, K.2014/61, 27/03/2014.

36 Choudry, S. (2006). pp. 9-10.

courts of the world. This motivation to cite foreign law "to consolidate judicial review in transitional democracies"[37] is, at best, paternalistic. It essentially argues that the Court can "condescend" to the level of other courts in an effort to give them some sort of a jurisprudential boost. Justice Sandra O'Connor had already stated a variant of this view when she remarked that the Court's use of foreign precedents would enhance the U.S.' "ability to act as a rule-of-law model for other nations"[38]. This line of argumentation upends the sovereignty criticism I discussed earlier by essentially arguing that references to foreign law by U.S. Supreme Court Justices can contribute to the enhancement of U.S. influence overseas—which basically reverses the object of influence in the original formulation of the sovereignty criticism from being the U.S. to other nations, but still perpetuates the nationalist and even parochialist undertones embedded in the sovereignty criticism in the first place. If this notion were to hold true, that is, if the TCC's references to the U.S. Supreme Court were to one day generate some reciprocity because Americans felt it necessary to either give Turkey a "boost", or worse yet, to perpetuate American influence over Turkish jurisprudence while feigning reciprocal interaction, then, the TCC might eventually back away from referencing Supreme Court cases altogether. This hypothetical suggests that the "giving others a boost" type of reasoning for referring to foreign law may generate backlash from other courts and counterproductively entrench judicial insularity.

Having briefly outlined some of the most prominent concerns scholars and judges have about the use of foreign law in domestic constitutional adjudication, I now turn to a discussion of whether the Turkish Constitution permits references to foreign law.

## II. DOES THE TURKISH CONSTITUTION LICENSE JUDGES to CITE FOREIGN LAW?

One classic example invoked by commentators to suggest that their jurisdictions do not license the use of foreign law in domestic constitutional adjudication is the South African Constitution[39]. As is

37 Choudry, S. (2006). p. 9 (footnote omitted).

38 Posner, E. & Sunstein, C. (2006). "The Law of Other States", *Stanford Law Review*, Vol. 59, No. 1, p. 140, fn. 43. Justice O'Connor's speech is also quoted in Choudry, S. (2006). p. 10.

39 See e.g., Choudry, S. (2006). p. 5; Yıldırım, E. & Gülener, S. (2018). p. 107, fn. 2 and p. 117.

well known, the South African Constitution provides that "(w)hen interpreting the Bill of Rights, a court, tribunal or forum (…) may consider foreign law"[40]. This provides, some scholars argue, an explicit textual mandate to look to foreign law that is lacking in many other countries' constitutive documents. While that may be true, an explicit mandate in the Turkish Constitution may not be necessary to license members of the TCC to invoke foreign law. A closer examination of the text of the Turkish Constitution as well as non-textual considerations, either in isolation or when coupled with one another, can be deemed to provide the Turkish Justices with a sufficient mandate or permission to look to foreign law.

In this Part, I will consider five such considerations that can potentially be understood, either singularly or collectively, as licensing TCC Justices to reference foreign law. These are (1) the Preamble to the Turkish Constitution; (2) the principles and reforms of Ataturk (tr. *Atatürk ilke ve inkılapları*); (3) international law indirectly permitting the use of foreign law; (4) the notion of general principles of law; and finally (5) the TCC's precedents. While considering each, I will also allude to an earlier discussion by intervening in a longstanding debate in Turkish constitutional law scholarship about whether each of the five is considered part of the "Turkish constitutional bloc", defined as a collective point of reference comprising constitutional law sources against which the constitutionality of laws may be assessed by the TCC.

**A. THE PREAMBLE**

The Preamble to the in-force Turkish Constitution of 1982 is relatively long and replete with phrases that hardly lend themselves to any form of objective constitutional interpretation, especially those that speak of lofty goals of attaining peace and unity and those that mention "Ataturk, the immortal leader and unrivalled hero" or "the democracy-loving Turkish sons' and daughters' love for the motherland and nation"[41]. Nevertheless, with only a few exceptions[42], there appears to be scholarly

40 South African Const. sec. 39(1).

41 On the ceremonial and symbolic signaling purposes of preambles see further Orgad, L. (2010). "The preamble in constitutional interpretation", *International Journal of Constitutional Law*, Vol. 8, No. 4, pp. 722-723.

42 One exceptional view, articulated under the 1961 Constitution, was that the Preamble was of no legal import. See Arsel, I. (1965). *Türk Anayasa Hukukunun Umumi Esasları*, Ankara: Mars Publishing, p. 145. Under the 1982 Constitution, some members of the TCC (most notably in

consensus that the Preamble should be authoritative in interpreting the Constitution, not least because Article 2 provides that "(t)he Republic of Turkey is (…) based on the fundamental tenets set forth in the preamble", and Article 176 provides that "(t)he preamble, which states the basic views and principles the Constitution is based on, shall form an integral part of the Constitution".

Against the backdrop of these relatively unambiguous constitutional stipulations, as already stated, nearly all Turkish constitutional law scholars agree that the Preamble is of binding value. The disagreement arises over whether some parts of the Preamble are more amenable to legal interpretation than others, and thus whether overtly political and even "romantic" parts of the Preamble should be considered non-justiciable. Some scholars who espouse a legal positivist orientation are of the opinion that all "tenets set forth in the preamble", as per Article 2, are of binding value, while some argue that the term "fundamental tenets" provides a textual basis to assess which tenets in the Preamble are "fundamental" and therefore deserving of legal value. These scholars often agree that the fundamental tenets in the Preamble, whatever they may be, can be used independently in constitutional adjudication, whereas the rest can only be used to *interpret* other norms in the operative part of the Constitution[43]. Most scholars also caution the TCC not to use the vague and "romantic" parts of the Preamble in constitutional adjudication[44]. In similar fashion, some scholars agree that the Preamble is of legally binding value, but assert that it should always be invoked in conjunction with a constitutional norm enshrined in the operative part of the document[45]. Others disagree and believe it is impossible to

one dissenting opinion in 1985) have articulated the view that the Preamble should not be justiciable, but can be used as a tool with which the enforceable provisions of the Constitution could be interpreted. See TCC, E.1984/14, K.1985/7, 13/06/1985 (dissenting opinions asserting that "the principles in the Preamble are not amenable to independent implementation"), quoted in Yüzbaşıoğlu, N. (1993). pp. 129-130.

43 See e.g., Yüzbaşıoğlu, N. (1993). p. 119; Tanör, B. & Yüzbaşıoğlu, N. (2012) *1982 Anayasasına Göre Türk Anayasa Hukuku*, İstanbul: Beta Yayınları, p. 83; Özbudun, E. (2017). *Türk Anayasa Hukuku*, Ankara: Yetkin Yayınları, pp. 75-76; Teziç, E. (2017). *Anayasa Hukuku*, İstanbul: Beta Yayınları, p. 223.

44 See e.g., Hakyemez, Y. Ş. (2007). "Anayasa Mahkemelerinin Geleneksel İşlevi Bağlamında Günümüzde Ortaya Çıkan İki Sorun: Yerindelik Denetimi Tartışmaları ve Ulusalüstü Örgüte Üye Devletlerdeki Anayasa Yargısının Konu Bakımından Sınırlandırılması", *Anayasa Yargısı*, Vol. 24, pp. 536-538; Yazıcı, S. (2009). *Demokratikleşme Sürecinde Türkiye*, İstanbul: Istanbul Bilgi University Press, p. 125; Özbudun, E. (2017). p. 76.

45 See e.g., Oder, B. (2010). pp. 29-30 (arguing that the Preamble's reference to the principle

objectively separate the "fundamental" tenets from those that are not—therefore, they argue, the entire Preamble must be considered as being independently authoritative in constitutional interpretation[46].

Moving beyond the confines of the debate, if the Preamble is at least of some legal value, which it is, as numerous TCC cases also confirm[47], then it might be plausible to argue that some words and phrases in the Preamble license judges to look to foreign law for purposes of constitutional adjudication. To this end, two stipulations in the Preamble are of special concern.

The first is in the second paragraph of the Preamble which speaks of the "(d)etermin(ation) to attain everlasting existence, prosperity, material and spiritual wellbeing for the Republic of Turkey, and the standards of contemporary civilization as an honorable member with equal rights of the family of world nations". The emphasis here is on "the family of world nations" as well as "the standards of contemporary civilization". The TCC, in two cases dating back to 1985 and 1986, respectively, invoked the phrase "honorable member with equal rights of the family of world nations" to infer a constitutional principle of reciprocity in international relations, and then moved to annul parts of a legislation that it deemed contrary to that principle which was implied in the Preamble[48]. That suggested to observers that the Court was willing to rely on the Preamble *independently* for purposes of constitutional adjudication, even to annul legislation. But the Court could also use that same phrase, and perhaps more importantly, the phrase "the standards of contemporary

of "Peace at home; peace in the world" can be construed to narrow down the meaning of Article 92 of the Constitution on declarations of war, and to construe it as forbidding the declaration of war as an act of aggression, but permitting defensive wars to respond to aggressions from other parties). See also Uran, P. (2015). "Anayasaların Başlangıç Kısımları", *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası*, Vol. 73, No. 1, p. 235, fn. 86 (articulating an interesting textual argument that the Preamble's reference to "(w)ith these ideas, beliefs, and resolutions to be interpreted and implemented accordingly" might be a textual basis for construing the Preamble as a general interpretive guide to elucidate the meaning of other constitutional norms).

46 Gözler, K. (2019). *Türk Anayasa Hukuku Dersleri*, Bursa: Ekin Publishing, p. 90. See also Aliefendioğlu, Y. (1996). *Anayasa Yargısı ve Türk Anayasa Mahkemesi*, Ankara: Yetkin Yayınları, p. 96 (stating emphatically that the Preamble should be used by the TCC). To be sure, Gözler also recognizes the potential difficulties associated with judges having to interpret some of the vague stipulations in the Preamble. See Gözler, K. (2019). p. 90.

47 These cases are too numerous to exhaust in a single footnote. For a comprehensive list of TCC cases referencing the Preamble from the early 1960s until the late 1980s see Yüzbaşıoğlu, N. (1993). p. 129, fns. 53-54 and p. 130, fns. 55-58.

48 See TCC, E.1984/14, K.1985/7, 13/06/1985; TCC, 1986/18, K.1986/24, 09/10/1986.

civilization" in the Preamble as an authorization to look to foreign law, even if not to determine the outcomes of constitutional disputes, to at least provide some interpretive guidance. The argument is a simple one: the standards of contemporary civilization, which is in fact based on a proverb attributed to Mustafa Kemal, the founder of the Turkish Republic, reflects the modernist aspirations of early Republican political elites[49], and is a reference to those jurisdictions that have traditionally been regarded as setting the benchmark for Republican Turkey's plans to modernize, and to a large extent, westernize. Thus, it could be argued that this stipulation in the Preamble is a textual mandate, or at the very least a constitutional permission, for Turkish judges and especially for members of the TCC to look to foreign law and specifically to the laws of traditional western liberal democracies for guidance. One scholar has relatedly made the argument that these stipulations in the Preamble should be read as evidence of the Constitution's embrace of international law and international human rights law especially[50]. To be sure, "the standards of contemporary civilization" is a vague and perhaps even antiquated formulation in this day and age. Further, it is not entirely clear which countries are to be regarded as setting those standards, even when western liberal democracies can be assumed to offer a probable starting point. The selectivity and bias in favor of western democracies embedded in the formulation, especially when considered within the context—informed by early Republican modernist and pro-westernization discourses—in which it was first articulated, is somewhat troubling: the phrase's potential pro-western use, in light of the history associated with "the standards of contemporary civilization", might give rise to concerns about identity politics and the judiciary's role in that debate. The Constitution's drafters were undoubtedly influenced by western models, and were not particularly fond of looking "eastward" for inspiration[51], and the Preamble's "westward-looking" use

[49] See e.g., Atatürk Araştırma Merkezi. (2006). *Atatürk'ün Söylev ve Demeçleri*, Ankara: Atatürk Araştırma Merkezi Publishing, Vol. 1, p. 356 (quoting a speech by Mustafa Kemal in which he said "(t)he people have made the final decision to identically and fully implement in substance and form the lifestyle and means provided to all nations by contemporary civilization").

[50] See Yüzbaşıoğlu, N. (1993). p. 121. Cf. Özbudun, E. (2017). p. 76 (arguing that the TCC's invocation of these sections of the Preamble were troubling and that these provisions should be read as reflecting the non-aggressive component of Ataturk's nationalism).

[51] Cf. Dixon, R. & Landau, D. (2019). "1989-2019: From democratic to abusive constitutional borrowing", *International Journal of Constitutional Law*, Vol. 17, No. 2, pp. 489-496 (arguing

might accord with that initial outlook, but whether the judiciary has the constitutional mandate and legitimacy to perpetuate initial conceptions of "model countries" and by implication non-models is doubtful[52].

A second and final phrase in the Preamble that might be argued to license references to foreign law is located in the third paragraph, which enjoins those exercising sovereignty in the nation's name from "deviat(ing) from the liberal democracy indicated in the Constitution and the legal system instituted according to its requirements". Here the emphasis is on the part of the provision prohibiting deviations from "the liberal democracy indicated in the Constitution", and on whether it could be construed as a potential license to look to the laws of other liberal democracies to guide Turkish constitutional law and practice. The TCC's earlier jurisprudence construed this phrase quite narrowly as referring to nothing other than the Turkish Constitution's *own* understanding of liberal democracy, and not as a reference to the general concept of liberal democracy with many and varied instantiations in other parts of the world. In a decision dating back to 1986, the TCC ruled that "the democratic society mentioned here undoubtedly means the liberal democracy *indicated in our Constitution*"[53]. The purported textual basis for the Court's ruling was that the Preamble spoke of "*the* liberal democracy indicated in *the* Constitution". This rather parochial view of liberal democracy would have made it predictably more difficult for the Court to reference both international and foreign law[54]. Shortly after, however, the Court reconsidered the issue and repudiated its earlier caselaw[55]. In a decision dated the same year, the Court ruled: "Classical democracies[56]

that a shift has taken place in the geography from which constitutional actors are getting their inspiration, notably and increasingly including "eastward" looking for purposes of constitutional borrowing).

52 The TCC's membership composition at any given time will, of course, affect the chances of the Court's reliance on "the standards of contemporary civilization" for purposes of constitutional interpretation. A more conservative and/or nationalist composition, to use common political parlance, will likely be less inclined to make use of the quoted formulation in the Preamble.

53 TCC, E.1985/21, K.1986/23, 06/10/1986.

54 One Turkish scholar notes some of the various factors behind courts' resistance to engaging with foreign law as lack of foreign language skills, nationalism, localism, and notions of cultural exceptionalism. See Örücü, E. (2007). pp. 435-436.

55 On this jurisprudential turn see Çağlar, B. (1990). "Anayasa Mahkemesi Kararlarında Demokrasi", *Anayasa Yargısı*, Vol 7, pp. 96-97; Kaboğlu, I. (1991). "Hukukun Genel İlkeleri ve Anayasa Yargısı", *Anayasa Yargısı*, Vol. 8, pp. 312-313; Yüzbaşıoğlu, N. (1993). pp. 125-126; Özbudun, E. (2017). pp. 118-119.

56 The Court used the term "classical democracies" (tr. *klasik demokrasiler*) not to allude to

are regimes in which fundamental rights and freedoms are provided and safeguarded to their fullest extent".[57] This was an affirmation that "the liberal democracy" alluded to in the Preamble was not confined to the Constitution's specific conception, but that it was used in its generic sense to denote an abstract concept of democracy implemented in a wide range of other jurisdictions.

Arguably, this jurisprudential change that now conceives of the Constitution as referring to liberal democracy as a generic notion to strive toward permits the Constitution's interpreters to look to other nations understood as practicing liberal democracy—first and foremost, European liberal democracies, but presumably others too, including, for example, the United States, Canada, South Africa, Australia, New Zealand, India, and perhaps even others. The concern of pro-western bias, which I intimated earlier, is also present here. However, in a series of decisions, the Court has equated the notion of liberal democracy to western democracy, which lends jurisprudential credence to the argument that the reference to "liberal democracy" in the Preamble permits members of the TCC to look to western democracies *in particular* to interpret the Constitution. Consider for example a case dating back to 1972 which defined a democratic state by referencing "the notion of democracy espoused by western civilization"[58]. Consider also subsequent decisions handed down in the late 1980s that have repeatedly defined the Constitution's commitment to liberal democracy as a commitment to "civilized western democracies"[59]. Thus, it could be argued, the reference to liberal democracy in the Preamble, when read in light of and mediated by the TCC's subsequent precedents which have refined the idea of liberal democracy by introducing a geographical dimension (i.e., the west), permits the TCC to look to the domestic laws of foreign (and especially western) liberal democracies.

In sum, the second and third paragraphs of the Preamble, and specifically the references to "the family of world nations", "the standards of contemporary civilization", and "liberal democracy" may

Athenian democracy or associated ideas about direct democracy, but to refer to generic liberal democracies.

57 TCC, E.1985/8, K.1986/27, 26/11/1986.

58 TCC, E.1970/48, K. 1972/3, 08-09/02/1972, quoted in Özbudun, E. (2017). pp. 118-119.

59 See e.g., four TCC cases cited in Yüzbaşıoğlu, N. (1993). p. 126.

be read as constitutional licenses to invoke the laws of foreign, and especially western, countries to explicate the meaning of these terms more precisely. To be sure and to reiterate, the normative desirability of the TCC's reliance on these provisions of the Preamble is a separate and reasonably troubling matter. First, it engages in identitarian constitutional politics by permitting uses of the laws of western liberal democracies in order to resolve domestic constitutional disputes, at the expense of possible engagement with the east or the constitutional polities of the so-called Global South. Second, while a form of constitutional identitiarianism may be inevitable and even normatively desirable, whether the courts and the TCC are right avenues to pursue such enterprises is an additional cause for concern. Third, these licenses to look to foreign law, even when construed more precisely as permitting only a consideration of the laws of western, or even more specifically European, democracies, do not address the "cherry-picking" concerns alluded to earlier. For instance, when should the TCC consider German and not French law (or vice versa)? Fourth, and related to the first point on identity politics, the invocation of terms such as "contemporary civilization" and subsequent citations to certain countries' laws, by implication, may signal which countries are *not* considered to come under the category of civilized nations from the TCC's perspective, which might perpetuate impoverished political and legal stereotypes about non-western constitutional polities[60]. All that notwithstanding, the Preamble, when especially read together with precedents, contains the first tentative constitutional license for members of the Court to consider foreign law in their deliberations.

### B. THE PRINCIPLES and REFORMS of ATATURK

A second textual indication granting members of the TCC the authority to consult foreign law is arguably Ataturk's principles and reforms mentioned in several parts of the Constitution. The first mention is in the Preamble, which in its first paragraph speaks of "this Constitution, in line with the concept of nationalism introduced by the founder of the Republic of Turkey, Atatürk, the immortal leader and

[60] See generally Rabb, I. (2015). "Against *Kadijustiz*: On the Negative Citation of Foreign Law", *Suffolk University Law Review*, Vol. 48, pp. 343-377 (drawing attention to the U.S. Supreme Court's invocations of Islamic law which tend to perpetuate impoverished notions about its characteristics).

the unrivalled hero, and his reforms and principles…." The Preamble further invokes Ataturk in its fifth paragraph where it stipulates "(t)hat no protection shall be accorded to an activity contrary to … the nationalism, principles, reforms and civilizationism of Atatürk…." Similar phrases are repeated throughout the Constitution's text, with minor alterations. Because of its *repeated occurrence in the operative part of the Constitution* in addition to the Preamble[61], even if the Preamble were deemed to be non-binding, or of merely *some* legal value in constitutional interpretation, Ataturk's principles and reforms can still be separately and alternatively relied on to introduce foreign law considerations into Turkish constitutional adjudication.

Consider, for example, Article 2 that speaks of "the nationalism of Ataturk", which is among the traditional six principles of Kemalist ideology, taught to this very day to elementary school children in Turkey as part of the national curriculum: (i) republicanism; (ii) populism[62]; (iii) secularism[63]; (iv) reformism; (v) nationalism; and (vi) statism[64]. Article 42 further provides that "(e)ducation shall be conducted along the lines of the principles and reforms of Atatürk, based on contemporary scientific and educational principles, under the supervision and control of the State". On top of that, members of Parliament and the President of the Republic invoke their loyalty to Ataturk's principles and reforms in their constitutional oaths of office. Finally, and most importantly, Article 174, before listing seven pieces of legislation enacted during the Kemalist era that are immune from constitutional review, provides: "No provision of the Constitution shall be construed or interpreted as rendering unconstitutional the Reform Laws indicated below, which aim to raise Turkish society above the level of contemporary civilization and to safeguard the secular character of the Republic, and whose

61 See also Varol, O. (2011). "The Origins and Limits of Originalism: A Comparative Study", *Vanderbilt Journal of Transnational Law*, Vol. 44, No. 5, pp. 1259-1262 (providing a general overview of the parts of the Turkish Constitution that mention Ataturk, with an overstatement of their actual value for purposes of Turkish constitutional adjudication, especially in recent times).

62 Populism divorced from its more pejorative connotations, of course.

63 More accurately, laicite, which is usually regarded as being more stringent and less tolerant than secularism in granting religion public visibility. The difference between these two concepts need not be explored any further for purposes of my argument.

64 For a view that argues that the Constitution's reference is merely to principles and reforms of Ataturk without mentioning this well-known six-part list, and therefore that it is up to the TCC to define the precise content of the phrase see Gözler, K. (2000). p. 88.

provisions were in force on the date of the adoption of the Constitution by referendum…."

The argument is simple: (1) either Ataturk's *principles*, especially reformism (tr. *inkılapçılık*) that encapsulates the modernist core of the Kemalist era that transplanted the civil and criminal codes and other laws of western European countries of the time, including Switzerland, Italy, France, and Germany[65], or (2) the idea of Ataturk's *reforms*, (3) or both license an inquiry into the laws of other nations, especially western European nations which Kemalist Turkey historically strived to emulate. That the concept of Ataturk's principles and reforms would invite research into the laws of other nations is not merely an assertion made possible by historical context; the preamble embedded in Article 174 describes Reform Laws as those laws "which aim to raise Turkish society above *the level of contemporary civilization* and to safeguard the secular character of the Republic…."[66] Article 174 thus seems to corroborate the historically-informed assertion that the concept of Ataturk's reforms includes looking at (and emulating) the practices of other "civilized" nations. Here, we are again confronted with a phrase already mentioned in the Preamble: "the level of contemporary civilization", which as previously stated, comes from a proverb attributed to Mustafa Kemal and is closely linked to his modernist ideology. And again, a distinctly western tone infuses the discussion of Ataturk's principles and reforms that could reasonably be criticized as permitting judges to engage in identitarian (judicial) politics by choosing to look to the laws of a specific region, namely that of western Europe.

If the reference to "contemporary civilization" can be somewhat divorced from the historical context from which it descends, and if the phrase can thus be read purposively and more broadly, the formulation

[65] The process of codification of laws in Turkish history has strong antecedents in Ottoman constitutional history. See generally Tanör, B. (2017). *Osmanlı-Türk Anayasal Gelişmeleri*, İstanbul: YKY Publishing, pp. 98-99, 212-216.

[66] Some Turkish constitutional law scholars, some of whom are cited in fn. 67, articulate the view that it is the core of Ataturk's principles and reforms—which they take to be liberal democracy—that should be controlling, not specific principles and reforms that are inevitably the products of the Kemalist era, and thus historically contingent and unfit for purposes of present-day constitutional adjudication. Regardless of whether that view is apt, the preamble of Article 174 speaking of Ataturk's reform laws as constitutionally "aim(ing) to raise Turkish society above the level of contemporary civilization" should be taken into consideration *a fortiori* when arguing that Ataturk's reforms have a—whatever that might be—core content.

can be liberated from the confines of a particular corner of the world and used instead as a tool whereby members of the TCC can invoke the law of any country deemed to be reflective of the standards of contemporary civilization. The word "contemporary" can be read as permitting this line of purposive interpretation that would serve to update the phrase, and broaden its content and applicability. This purposive reading would pluralize the number of potential countries that the phrase licenses interpreters to consider. Ultimately, however, a consideration of which country's laws reflect standards of civilization (and impliedly, which country's laws do *not*) is bound to be an inquiry about with which countries the TCC chooses to identify—again, raising reasonable concerns of identitarian politics and of "forum shopping".

One purposive reading of—not necessarily the phrase "contemporary civilization" but of—Ataturk's principles and reforms as a whole that is dominant among a certain faction of the Turkish constitutional law academe asserts that the Constitution's references to Ataturk's principles and reforms should be construed as a reference to what they argue constitutes the "core" of these principles and reforms: civilizing and establishing a western-type liberal democracy[67]. This purposive reading and the resulting "updating" of Ataturk's principles and reforms is meant to mitigate some embarrassments that would ensue from the obvious tension between certain notions associated with those principles and reforms, and some of the core tenets of liberal democracy[68].

While the connection between Ataturk's principles and reforms, and an inquiry into the laws of foreign (read: western European) nations is more or less straightforward, there is one caveat that needs

[67] See, e.g., Kubalı, H. (1968). "Atatürk Devrimi ve Gerçeklerimiz", *Mukayeseli Hukuk Araştırmaları Dergisi*, Vol. 1, No. 2, pp. 5-25, especially p. 9, fn. 2 ("Ataturk, by the term 'Contemporary Civilization' without a doubt, meant 'Western Civilization'."); Teziç, E. (2017). pp. 223-224; Tanör, B. (2017). p. 325 (asserting that despite its repressive methods, the Kemalist revolution's aims were political modernization and democratization). But see Akyol, T. (2012). *Atatürk'ün İhtilal Hukuku*, İstanbul: Doğan Kitap Publishing, pp. 47 et seq. (describing the Kemalist regime as one opposed to the doctrine of separation of powers both practically and normatively).

[68] Erdoğan Teziç recognizes this. Teziç, E. (2017). p. 223. See also Tanör, B. (1997). *Türkiye'de Demokratikleşme Perspektifleri,* İstanbul: TÜSİAD Publishing, pp. 25-26 (asserting that the concept of Ataturk's principles and reforms is vague and its content indeterminate and thus unfit to be used in constitutional adjudication); Özbudun, E. (2017). p. 392 (arguing that a broad and purposive reading of Ataturk's principles and reforms would be anachronistic and tantamount to imposing a Kemalist ideology on to the Constitution's liberal democratic system).

to be addressed. According to one view prevalent among Turkish constitutional scholars, motivated again by some of the embarrassments that would have to be dealt with if all of Ataturk's principles and reforms were regarded as guides to constitutional interpretation, only those principles and reforms that are *explicitly* and *specifically* provided for in the text of the Constitution ought to bind members of the TCC in constitutional interpretation. So, for example, while republicanism, secularism, and nationalism are all part of Ataturk's principles that are also mentioned specifically in the text of the Constitution[69], statism, populism, and reformism, the last of which is arguably the most convincing principle licensing judges to look to foreign law, are not. On that basis, some scholars argue that the Constitution's reference to Ataturk's principles and reforms should be confined only to those principles that find explicit mention in the text[70]. Others dismiss this as an untenable position especially in light of the Preamble's general reference to Ataturk's principles and reforms, which they believe should be treated just like the operative part of the Constitution because Article 176 renders the Preamble an "integral" part of the text[71].

In fact, in a case dating back to 1985, the TCC employed a similar line of argumentation to those differentiating between explicitly mentioned and unmentioned principles of Ataturk, and concluded that statism was not expressly mentioned in the text of the Constitution: "While statism was among the characteristics of the Turkish Republic via the 1937 amendment to the 1924 Constitution, the principle of statism has not been included in the Constitutions of 1961 and 1982"[72]. Yet, on balance,

69 Republicanism is mentioned in Article 2. Nationalism is references in many parts of the Constitution including the Preamble (paragraphs 1 and 5) and Article 2. The principle of secularism has numerous references in the Constitution, including the Preamble (paragraph 5); Article 2; Article 13; Article 14; Article 68; Article 81; Article 103; Article 136; and Article 174.

70 For iterations of this view see e.g., Özbudun, E. (2017). p. 392.

71 See Yüzbaşıoğlu N. (1993). p. 82; Gözler, K. (2000). p. 88; but see Gözler, K. (2019) p. 439 (arguing that the TCC should only mention those principles expressly mentioned in the text).
For an unpersuasive attempt to reconcile the Kemalist principles of populism and statism with the notion of liberal democracy see also Yüzbaşıoğlu N. (1993). pp. 83-94.

72 TCC, E.1985/2, K.1985/16, 27/09/1985. For a similar reasoning see also Özbudun, E. (2017). p. 392 (asking the question of whether the principle of statism, not mentioned in either the Constitution of 1961 or the Constitution of 1982 should be regarded as among the principles of Ataturk mentioned by the latter, concluding that it should not). The use of antecedent constitutions to resolve interpretive debates arising from the in-force constitution is a practice which I have termed "inter-constitutional interpretation" and discuss elsewhere.

the TCC has ruled on many occasions, without going into the details of their precise content, that the principles and reforms of Ataturk, taken together, constitute "the foundation" of the 1982 Constitution[73].

This debate is only partially important for our purposes: even if reformism, as one of Ataturk's principles *not* specifically mentioned in the text, cannot be accepted as a license for reliance on foreign law, the idea that at the core of Ataturk's principles and reforms lies the notion of liberal democracy can serve as a more general license to consider the laws of liberal-democratic nations.

The identitarian politics problem already alluded to is compounded by another problem that is closely associated with constitutional inquiries into the principles and reforms of the Kemalist era. It is a pervasive problem attendant to historical inquiries more broadly: can an originalist inquiry by judges into what these principles and reforms meant (and still mean) serve as an objective and normatively desirable basis on which to decide whether reliance on foreign law is permitted by the Turkish Constitution? Many critics would argue that it cannot. Judges and constitutional law scholars tend to be bad historians, and even in the hands of the ablest of historians, history usually provides an ambiguous set of facts and a set of limited sources of evidence from which varying and even contradictory outcomes could be inferred[74]. The precise content of Ataturk's conception of nationalism—one of Ataturk's principles—is a paradigmatic example: the rather "lofty" description, backed up by a carefully-selected sample of sources, is that Ataturk's nationalism is utterly void of any ethnic or racial considerations[75]. A voluminous history on the early Republican era and on the Ottoman-Turkish elite's conception of nationalism as a concept informed by race may indicate otherwise. The difficulty, more generally stated, is this: arguing that Ataturk's principles and reforms ought to license reliance

See generally Tecimer, C. (forthcoming, 2020). "Inter-Constitutional Interpretation: A Case Study of the Articles of Confederation" (on file with author).

73 See e.g., TCC, E. 1983/2, K.1983/2, 25/10/1983 and TCC E.1989/1, K.1989/12, 07/03/1989, both of which are cited in Özbudun, E. (2017). p. 392.

74 See generally Tushnet, M. (1988). *Red, White, and Blue: A Critical Analysis of Constitutional Law*, Cambridge: Harvard University Press, pp. 34-45 (noting the attendant problems of trying to deduce the intent of a constitution's framers, discussed in the particular context of U.S. constitutional law and practice).

75 For such an attempt by a constitutional law scholar at what some would call "rehabilitating" Ataturk's nationalism see e.g., Özbudun, E. (2017). pp. 78-79.

on foreign law is a question of whether Ataturk's principles were historically understood as licensing references to foreign law, and that, in turn, is a question of historical fact that may not have a simple and definitive answer.

Still, with all its attendant problems, Kemalist reformism and the reforms of Ataturk more generally, which are linked to the idea of "contemporary civilization" as per Article 174, is yet another textual indication that possesses the potential to license reliance on foreign law in Turkish constitutional adjudication.

### C. RELIANCE ON FOREIGN LAW VIA INTERNATIONAL LAW

This Article discusses the TCC's reliance on foreign law only, which it defined as the law of other nation states. However, that does not preclude the possibility that international law may indirectly permit reliance on foreign law.

Notwithstanding its scattered references to international law[76], the Turkish Constitution is not a "monist" constitution unlike some others, that is, it does not automatically incorporate international law into the Turkish constitutional order; it requires laws or certain executive actions that give effect to international law in the domestic legal order[77]. Once incorporated into the Turkish legal order, however, treaties become fully enforceable as any other ordinary legislation as per Article 90(5), which provides that "(i)nternational agreements duly put into effect have the force of law". The same article further provides that "(i)n 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", which is regarded by some as establishing a hierarchy between human rights treaties and ordinary legislation. Still others insist that laws and duly incorporated

[76] Some notable examples include Articles 15 (permitting suspension of the exercise of fundamental rights, "as long as obligations under international law are not violated") and 16 ("The fundamental rights and freedoms in respect to aliens may be restricted by law compatible with international law.").

[77] While I maintain the monist-dualist dichotomy for the purposes of this Article, this view has come under sustained academic attack, especially on grounds that it conceives of the authority of international law in domestic law's terms and with the latter's terminological and analytical "baggage". See generally Çalı, B. (2015). *The Authority of International Law: Obedience, Respect, and Rebuttal*, Oxford: Oxford University Press.

international law are on a par in the Turkish legal system, but in the specific area of treaties concerning human rights, Article 90(5) imposes a duty to interpret ordinary laws compatibly with treaties, and that failing, to uphold treaties as superseding ordinary laws[78]. In these scholars' view, Article 90(5) does not grant the TCC authorization to assess the constitutionality of legislation in light of treaties; it merely provides that laws should be interpreted in conformity with such treaties and disregarded if they cannot be interpreted compatibly with these treaties. This view thus denies international law the status of being part of the Turkish constitutional bloc. It further, and as a logical consequence of its previous assertion, argues that the TCC cannot annul legislation based on its alleged incompatibility with international law. However, it still concedes that it is incumbent upon the TCC to interpret laws harmoniously with human rights treaties, and failing that, disregard the former and apply the latter[79].

Other scholars argue that international law (for some even international law *not* duly incorporated into the Turkish domestic legal system) is part of the Turkish constitutional bloc[80]. Scholars who contend

78 See Özbudun, E. (2017). pp. 388-389 (insisting that incorporated international law is on par with national law, not above it). See in similar vein, Gözler, K. (2019). p. 439. See also Soysal, M. (1997). "Uluslararası Andlaşmalar Konusunda Anayasa Yargısı", *Anayasa Yargısı*, Vol 14, p. 172 (vaguely suggesting that the rule stipulating that treaties cannot be construed incompatibly with the Constitution, as per Article 90(5), grants treaties a "privileged" status in comparison to ordinary law). For a critique of Soysal's position, arguing that the author changes his views depending on the treaty in question (whether the treaty is the European Convention on Human Rights or a treaty among Muslim-majority countries) see Gözler, K. (2000). p. 89, fn. 12.

79 See e.g., Özbudun, E. (2017). p. 389 ("But the Constitutional Court too, like all other courts, in a case before it, has the authority to disregard a law that it has found to be in violation of international treaties."). This view suffers from one minor embarrassment: assume that a piece of ordinary law is in direct contravention to a human rights treaty Turkey is party to. Assume further that this law is brought before the TCC for an annulment action (either through abstract or concrete review). What should the TCC do in the face of uncontroversial contradiction between the terms of the law and the human rights treaty that does not allow the TCC to interpret the law harmoniously with the treaty? It cannot annul the law, according to this view, because the text of the Constitution fails to mention expressly that the Court may assess the constitutionality of legislation against treaties. But nor does the Constitution expressly provide that the Court ought to "disregard" such ordinary laws; Article 90(5) merely states that international laws will "prevail" without prescribing a method through which international law will prevail over ordinary legislation. It is thus not clear why "disregarding" a law is the better option to annulling it when none are expressly mentioned in the Constitution as options the TCC may pursue.

80 One interesting reconciliatory view of the two positions (i.e., the positions that, respectively, omit and include international law as part of the Turkish constitutional bloc) is that international law should be considered part of the Turkish constitutional law bloc in limited

that the Turkish Constitution permits interpreters to rely on international law to assess the constitutionality of legislation typically marshal the scattered references to international law in the Constitution in their aid. In one scholar's words, the collective references to international law in the Constitution reflect "a principle of openness to international law"[81]. Some argue that not only direct references to international law, but also references to "contemporary civilization", which I have argued might permit reliance on foreign law, can be understood as an interpretive license to consider international law in interpreting both statutes and the Constitution[82].

Regardless of the position taken, both sides to the debate agree that laws cannot violate treaties concerning human rights, and while they differ on the effective remedy if that is ever the case, all are in agreement that violating laws should not be applied; they should be disregarded (for those who believe the Court cannot annul them based on their incompatibility with international treaties) or annulled (for those who believe the Court indeed can). This necessitates interpreting both the treaty in question and the ordinary law which is alleged to be violative of that treaty. And interpreting treaties may, at times, involve looking at the laws of individual nations. Two examples are cases in point: the Statute of the International Court of Justice (ICJ) and the European Convention on Human Rights (ECHR), to both of which Turkey is a contracting party.

The ICJ Statute's Article 38 enumerates the norms of international law the ICJ ought to consider. Apart from scholarly publications as subsidiary sources, the Statute considers (1) international treaties; (2) international custom; and (3) the general principles of law recognized by civilized nations to be the main sources of international law, and the TCC has accepted these sources as constituting the authoritative sources of international law[83]. If the TCC is ever called upon to interpret this treaty,

cases in which the Constitution actually references international law. For example, if the Constitution speaks of international law and the principle of reciprocity in granting non-citizens constitutional rights, then, in relation to constitutional disputes concerning the rights of non-citizens, a review of constitutionality should take into consideration, among others, the appropriate rules of international law. See Özbudun, E. (2017). p. 390.

81 Çağlar, B. (1998). "Anayasa Yargısının Güncelliği: Yargıçlar Zamanı", *Anayasa Yargısı*, Vol. 15, p. 51.

82 Oder, B. (2010). p. 214.

83 The TCC, in a decision dating back to 1986, made a very similar statement: "International law is constituted by bilateral or multilateral treaties to which states are party, international

or to consider international law more generally (especially in light of one view that considers the three sources of international law provided in the ICJ Statute to be part of the Turkish constitutional bloc *independently of that Statute*), it may very well consider the laws of other nations for purposes of identifying whether a norm of customary international law has emerged from consistent state practice or to identify general principles of law. International lawyers have reached a near consensus that customary international law consists of two elements: (1) *opinio juris*, that is, a belief on part of the state acting that its actions ensue from international law; and (2) *usus* or state practice[84]. This second prong necessitates an inquiry into the laws of foreign nations, which the TCC may consider to see if an international customary norm has emerged. Identifying general principles of law also demands an inquiry into the laws of foreign nations. The outdated formulation of "civilized nations" that follows general principles of law in the ICJ Statute is a designation that is considered largely to be of little legal relevance today but more reflective of the time of the Statute's drafting during which the civilized/uncivilized distinction was pervasive among the discourses of lawyers and international actors more generally[85]. That same designation also appears in the caselaw of the TCC, permitting the Court's reliance on laws of countries that it considers to be "civilized", which, as repeatedly suggested, intensifies problems associated with identitarian (judicial) politics. Alternatively, the TCC can interpret the "general principles of law" prong of Article 38 of the ICJ Statute as licensing a broader consideration of the general principles of law accepted by the world community.

Turkey is also party to the ECHR, and the TCC frequently invokes the caselaw of the European Court of Human Rights (ECtHR) interpreting the ECHR, especially in its own caselaw concerning individual application decisions that allege violations by state authorities of fundamental rights enshrined in both the Constitution and the ECHR.

custom, general principles of law accepted by civilized nations…." TCC, E.1986.18, K.1986/24, 09/10/1986.

84 See representatively Crawford, J. (2012). *Brownlie's Principles of Public International Law*, Oxford: Oxford University Press, pp. 23-27.

85 See White, N. (2005). *The Law of International Organisations*, Manchester: Manchester University Press, p. 159; Siems, M. (2014). *Comparative Law*, Cambridge: Cambridge University Press, p. 225.

The practice of relying on ECtHR's caselaw is not only not contested, but arguably required of the TCC by Article 148(3) of the Constitution which provides: "Everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities". To the extent that it is uncontested for the TCC to rely on ECtHR jurisprudence, it should also be uncontested for the TCC to consider the laws of members states to see whether a "European consensus" has emerged with regard to the development of a legal norm—a test that is part and parcel of the ECtHR's jurisprudence[86]. An inquiry into whether a "European consensus" has emerged necessitates a consideration of the laws of members of the Council of Europe.

As exemplified by the ICJ Statute and the ECHR, once accepted as a relevant source for purposes of Turkish constitutional adjudication, international law may indirectly permit reliance on foreign law.

**D. GENERAL PRINCIPLES OF LAW**

Apart from being enumerated in Article 38 of the ICJ Statute to which Turkey is a party, there is a robust discussion among Turkish constitutional law scholars on whether general principles of law, in and of themselves, are part of the Turkish constitutional bloc. The concept of "general principles of law", as intimated under the discussion on international law, is almost automatically understood to permit an inquiry into the laws of a wide array of nations to identify principles of law *common* to all. Thus, if part of the Turkish constitutional bloc, general principles of law provide members of the TCC with an additional license to consider foreign law.

The thrust of the debate is between a strict textualist approach that fails to identify a reference to general principles of law in the text of the Constitution and another approach which reads the Constitution as containing both express and implied indications pointing to general principles of law.

[86] See generally Dothan, S. (2018). "Judicial Deference Allows European Consensus to Emerge", *Chicago Journal of International Law*, Vol. 18, No. 2, pp. 393-419.

Those in favor of importing general principles of law into the Turkish constitutional bloc refer first and foremost to Article 2 of the Constitution, which dictates that the Republic of Turkey be a "state governed by the rule of law".[87] The understanding is that the concept of the rule of law implies an embrace of certain core legal tenets that are presumed to inhere in the very concept of law. A more interesting textual observation is based on Article 138 of the Constitution, which provides that "(j)udges shall be independent in the discharge of their duties; they shall give judgment in accordance with the Constitution, laws, and their personal conviction conforming to the law". Here, judges are called upon to adjudicate based on laws (tr. *kanun/yasa*) and also law (tr. *hukuk*) as a distinct meta-concept that embraces not only specific legal enactments such as statutes but also more general ideas that are thought to inhere in the concept of law[88] (*pacta sunt servanda*, for example). An additional textual indication that the drafters of the Constitution were familiar with and embracing of general principles of law is located in Article 19, providing that "(d)amage suffered by persons subjected to treatment other than these provisions shall be compensated by the State in accordance with the general principles of the compensation law". The framers' recognition that there are general principles of *compensation* law can be understood to suggest that they were *a fortiori* familiar with general principles of law.

Strict textualists object to adding general principles of law into the Turkish constitutional law bloc. The argument is that the reference to the rule of law alone cannot be construed as a basis upon which a set of judge-made principles can be generated and then employed in constitutional adjudication—the argument is that that would be unable to constrain judicial discretion[89].

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87 See e.g., Yüzbaşıoğlu N. (1993). p. 21 (noting that the TCC defines general principles of law by reference to the principle of rule of law); Özbudun, E. (2017). p. 391 (asserting that the textual basis from which the general principles of law may be used in Turkish constitutional adjudication is Article 2 of the Constitution and its reference to "the rule of law"). Özbudun also asserts that for a general principle of law to be recognized as such, it must be recognized, as per Article 38 of the ICJ Statute, by "civilized nations"—but he does not address why an inquiry into general principles of law that stems not from an inquiry into international law and specifically into the ICJ Statute, but from an inquiry into the Turkish Constitution itself should mandate that the principle be recognized by "civilized nations". See Özbudun, E. (2017). p. 391.

88 This observation can be found in Oder, B. (2010). pp. 114-115. Oder argues that the reference to law as a meta-concept in Article 138 could be construed as permitting an adjudicatory process that is less positivistic (tr. *mevzuatçı*) and more reliant upon general principles of law.

89 See e.g., Gözler, K. (2000). p. 95 (asserting that the concept of "general principles of law"

The jurisprudence of the TCC, as a general matter, however, recognizes that there are certain principles of law to which laws ought to conform[90]. The TCC has in the past made broad inferences of principles of law based on the Constitution's reference to the rule of law. It defined a state governed by the rule of law as a state that "deems itself bound by the Constitution and supreme norms of law…(and by) fundamental principles of law that are above (ordinary) law that no lawmaker can breach"[91]. Some of the general principles of law the Court has articulated thus far include the supremacy of public international law over domestic law[92], the principle of acting in good faith, *pacta sunt servanda*, the general prohibition on retroactive laws, among many others[93]. This suggests that those Turkish constitutional law scholars who assert that general principles of law constitute part of the Turkish constitutional bloc have precedential arguments to buttress their view. And if it is the case, that is, if general principles of law can indeed be relied on by the TCC, then, that would permit an inquiry into the laws of foreign nations to aid Justices in their identification of such general principles.

**E. PRECEDENT**

Regardless of whether the foregoing four arguments can be utilized to permit the Court's references to foreign law, the TCC invokes foreign law in its caselaw, and has consistently done so since its inception in 1962. One might think, then, that there is an argument that could be made based on precedent alone, that invoking foreign law for purposes of domestic constitutional adjudication has a constitutional status in Turkish constitutional law and practice.

is not even legal and that it cannot form part of the Turkish constitutional bloc); Gözler, K. (2019). p. 439 ("Similarly, international law norms and general principles of law mentioned in the list above do not have a textual basis. They are not mentioned in the Constitution. There is also no reference in the Constitution suggesting that the Constitutional Court can assess the constitutionality of laws against international law norms or general principles of law".).

90 For a similar observation see Kaboğlu, I. (1991) pp. 310-314; Yüzbaşıoğlu N. (1993). p. 21; Aliefendioğlu, Y. (1996). pp. 105-106; Teziç, E. (2017). pp. 219-220; Özbudun, E. (2017). p. 391.

91 TCC, E.1985/31, K.1986/11, 27/03/1986, also cited in Aliefendioğlu, Y. (1996). pp. 105-106.

92 The recognition of this principle would also justify the view taken by those who consider Turkey to be a so-called "monist" state from an international law perspective, that is, a jurisdiction in which international law norms are of legal value regardless of whether they are additionally incorporated into domestic law via legislative or executive action. It would also support the proposition that international law is part of the Turkish constitutional bloc.

93 For a detailed overview with citations to relevant TCC decisions articulating each principle see Yüzbaşıoğlu, N. (1993). p. 23.

However, this assertion necessitates answering a more fundamental question about the constitutional stature of the Court's caselaw under Turkish constitutional law. More precisely put, is the Court's caselaw part of the Turkish constitutional bloc against which the constitutionality of laws can be assessed? There is disagreement among scholars on this front. According to some, and especially in light of Article 153 of the Constitution providing that the TCC's judgments "shall be binding on the legislative, executive, and judicial organs, on the administrative authorities, and on persons and corporate bodies", the caselaw of the Court is on a par with the Constitution itself[94]. More skeptical observers, while recognizing Article 153, caution against including the TCC's caselaw in the Turkish constitutional bloc, which they argue could result in the Court's invoking an extra-constitutional (or worse yet, *contra*-constitutional) norm in its caselaw and thereby elevating it to the status of constitutional law. For those who argue that precedents are the coequals of the Constitution itself, the Court's consistent and repeated invocation of foreign law since 1962 is an additional argument to be made in favor of the permissibility of the Court's practice of using foreign law.

In concluding the discussion under Part II, I should reiterate a point raised earlier: the permission to cite foreign law can be located in (1) either one of the foregoing five sources, (2) or in any combination of some of the five, (3) or in all of them collectively.

## III. WHY DO MEMBERS of THE TURKISH CONSTITUTIONAL COURT CITE FOREIGN LAW?

Part II provided some tentative and technical/doctrinal arguments which could be advanced to show that the Constitution permits members of the TCC to consider foreign law in constitutional adjudication. Regardless of whether one accepts or rejects the arguments elaborated there, from a constitutional practice standpoint, the TCC references foreign law in its decisions. That, in turn, makes it all the more urgent to account for that phenomenology rather than the normative question of whether judges should, as a matter of constitutional law, invoke foreign law in their opinions. I provide some speculative hypotheses as to why members of the TCC invoke foreign law in their opinions.

[94] See e.g., Yüzbaşıoğlu N. (1993). pp. 195-196; Teziç, E. (2017). p. 97.

One mundane reason might have to do with arguments made by the parties to constitutional disputes. The argument is as follows: members of the TCC read the briefs of each side to any given constitutional dispute and engage with them. If either one or both of the briefs invoke foreign law, in engaging with these submissions, the TCC members can consider the parties' invocation of foreign law, even if only to disagree with their inferences[95]. But that cannot possibly explain the extent to which the TCC relies on foreign law in its jurisprudence. As one empirical study has recently observed, the TCC invokes foreign law even when none of the parties discusses or even mentions foreign law in their submissions to the Court[96]. Additionally, the caselaw of the Court suggests that it does not feel bound to answer and react to every single argument raised by the parties in an equally detailed manner, which would result, in what the TCC considers, a tedious and inefficient adjudicatory process[97].

One other reason may have to do with considerations of judicial transparency[98]. Even if members of the TCC invoking foreign law remain unsure about whether the Constitution permits reliance on foreign law, if their conclusions are informed by their personal expertise on foreign law, it is better for them to acknowledge the sources of their conclusions in their opinions than to not mention them at all[99]. And that may be one reason for the Court's mention of foreign law. This provides the adjudicatory process with transparency, which enables an open discussion about the descriptive accuracy of the conclusions drawn by the member(s) invoking foreign law as well as a more fundamental discussion about the permissibility of the invocation of foreign law. The opposite scenario, in which arguments from foreign law are stated in the decisions of the Court without acknowledging their origins, obscures the relevance of foreign law and disables a transparent conversation about

95 The recent empirical study conducted by Justice Engin Yıldırım and Serdar Gülener looks at the correlation between cases that invoke foreign law and the party submissions in those cases, and whether those submissions also contain references to foreign law. See Yıldırım, E. & Gülener, S. (2018). pp. 122-123.

96 See Yıldırım, E. & Gülener, S. (2018). p. 125.

97 One such view was articulated in an individual application case. See *Nurten Esen*, App. no: 2013/7970, 10/06/2015, §36. See also *Muhittin Kaya*, App. no: 2013/1213, 04/12/2013, §26.

98 I thank Professors William Alford and Intisar Rabb for drawing my attention to this point.

99 Justice Breyer of the U.S. Supreme Court made a similar point: "If the foreign materials have had a significant impact on my thinking, they may belong in the opinion because an opinion should be transparent. It should reflect my actual thinking". Dorsen, N. (2005). p. 540.

its permissibility[100]. Even if its permissibility remains dubious, invoking foreign law openly, rather than discretely without actually letting the readers of the opinion know that foreign law played an important role in the authorship of the opinion, is the lesser of two evils.

Relatedly, and in aid of the point on judicial transparency, there is a legal argument to be made that some Justices do (and also believe they ought to) mention foreign law whenever their opinions are informed by foreign law because the right to a reasoned judgment demands it. The right to a reasoned judgment is guaranteed by the Turkish Constitution in its Article 141 which provides that "(t)he decisions of all courts shall be written with a justification".

That possibility, while still viable, is somewhat naïve, as it runs the risk of imputing a greater degree of judicial solicitude to opinion writing than is warranted. Another possible reason as to why the TCC invokes foreign law might have to do with reputational concerns. One intuitive way to create or entrench extant perceptions that the TCC is situated within a larger global context and alongside other courts would be simply to cite the decisions handed down by those other courts. Somewhat speculatively, perhaps it is all the more important for the TCC (or at least for some of its members) to retain the practice of referencing the laws of others so as to preserve its reputation as the guardian of fundamental rights and freedoms, especially in this day and age when the Court is perceived from outside, correctly or incorrectly, as one of the few remaining liberal institutions in what many foreign and domestic observers believe has become an increasingly authoritarian country. Again, the point is not the factual accuracy of these observations about the Court and the country. What matters is whether referencing foreign law is a practice motivated by a desire to dispel those accurate or inaccurate perceptions and thereby suggest that the TCC (and by implication perhaps also the country) still inhabits a liberal and democratic legal landscape. A related question would be whether the Court expects to be cited by other courts, as that would cement the Court's perception by outsider observers as occupying a seat at the table of the liberal and democratic courts of the world. Pending

[100] Of course, there is the possibility of judges simply not remembering or not even knowing that a particular reasoning advanced by them in their opinions was informed by considerations of foreign law.

empirical confirmation, my impression is that the rate at which the TCC cites foreign law is much higher than the rate at which other courts cite decisions by the TCC (or Turkish law more generally). Current Chief Justice Zühtü Arslan's remarks in a speech he delivered in 2018 are instructive: "I tell my rapporteur friends at the Court: do not write a sentence (in Turkish) that you aren't able to translate into a foreign language"[101]. This statement could be read as further evidence of the Court's willingness to engage in cross-judicial dialogue (or at least one member's willingness, but there is reason to believe that that sentiment is shared by other members of the Court as well). References to foreign law, conceived of in this way, are part of "an authority-, prestige- or legitimacy-enhancing practice"[102].

Another likely reason that I have repeatedly alluded to throughout the Article, and is in tandem with the desire discussed in the preceding paragraph to signal to outsiders the Court's place among other liberal and democratic courts, is judicial identitarianism. By invoking the (constitutional) law of a careful selection of countries, the Court is carving out a space for itself in the liberal and democratic world order—at least, that is one of its intentions. Consider some of the Court's decisions to this end. In one dissenting opinion in 1975, foreign law was invoked with this prefacing statement: "The proposition that higher education ought to be free of charge is untenable from a comparative law perspective as well. Indeed, in well-known democratic nations such as America, England, Germany, and France…."[103] Consider similarly another dissenting opinion dating back to a case decided in 1972, which mentioned the "practices of England, France, the United States and similarly civilized nations"[104], and cautioned the majority not to deviate from their path. Consider also a joint dissent from 1971, which spoke of "European countries which have formed the basis of our Constitution", and invoked the practices of some of the "richest democratic nations such as America, Japan and Germany"[105]. These decisions exemplify a

101 Arslan, Z. (2018). "Yargı Reformu Strateji Belgesinin Yenileme Çalışmalarında Yaptığı Konuşma" (October 30, 2018), https://www.anayasa.gov.tr/tr/baskan/baskanin-konusmalari/ (accessed October 22, 2019).

102 Hirschl, R. (2018). p. 411.

103 TCC, E.1973/38, K.1975/23, 11-14, 25/02/1975.

104 TCC, E.1970/52, K.1971/46, 27/04/1971.

105 TCC, E.1969/31, K.1971/3, 12/01/1971.

larger pattern of judicial inclination: a tendency to look westward (with the notable exception of Japan) and to the laws of western countries to inform Turkish constitutional adjudication. In stark contrast, references to the laws of Muslim-majority nations are very infrequent—to a certain extent justifiably so because the Turkish constitutional framework is overwhelmingly secular and more akin to its western neighbors[106]. But apart from that difference between the constitutional structures of Turkey and other Muslim-majority polities, identitarian judicial politics must indubitably play a, if not *the* largest, role in ensuring frequent references to western, and not to Muslim-majority, nations.

One other reason behind the practice of referring to foreign law might have to do with the extensive legal borrowing and transplantation that can be traced back to late Ottoman and early Republican modernization. The resulting "similarity of legal tradition"[107] might have incentivized interpreters to look to original jurisdictions from which borrowing has occurred to see how those jurisdictions have dealt with similar questions of constitutional adjudication. The TCC's many references to Swiss law[108], from which an overwhelming portion of Turkish civil law—which is often the subject of constitutional review—stems, may have to do with the similarity between the two countries' civil law systems as a result of Turkey's extensive legal borrowing.

Before proceeding to the Conclusion, the discussions under Parts II and III need to be qualified by a final point. While Part II noted possible legal arguments in making the case for referencing foreign law, and while Part III tried to account for the phenomenon more generally, one particular dissenting opinion in the Court's jurisprudence merits discussion. In a dissenting opinion issued in 1966 (therefore, under the 1961 Constitution)—only 4 years after the Court started hearing cases in 1962—the late Justice Recai Seçkin in fact did justify his reliance

106 The composition of the Court has changed, and perhaps dramatically so. This change has manifested itself, first and foremost, in the Court's jurisprudence on secularism and religious liberties. See Tecimer, C. (2017). "Rethinking Turkish Secularism: Towards 'Unofficial' Islamic Constitutionalism?", *Verfassungsblog*, https://verfassungsblog.de/rethinking-turkish-secularism-towards-unofficial-islamic-constitutionalism/ (noting the "Court's espousal of what it called the 'liberal interpretation of secularism'").

107 Hirschl, R. (2018). p. 410.

108 See e.g., TCC, E.1980/29, K.1981/22, 21/05/1981; TCC, E.1988/15, K.1989/9, 14/02/1989; TCC, E.1990/30, K.1990/31, 29/11/1990; TCC, E.1990/15, K.1991/5, 28/02/1991; TCC, E.1999/47, K.1999/46, 28/12/1999; TCC, E.1992/2, K.2001/2, 22/06/2001.

on foreign law, which makes his opinion an exception in the entire jurisprudence of the TCC (provided that there are not similar opinions to his which I may have overlooked). Justice Seçkin appended the following as justification for his reliance on foreign law, which I quote in length because his full reasoning cannot easily be captured in excerpt. The issue at bar in that case was the constitutionality of a law that set up the Turkish Armed Forces (tr. *Genelkurmay Başkanlığı*) as a unit under the Ministry of National Defense instead of the Prime Ministry. Article 110 of the 1961 Constitution provided that the Chief of the Turkish Armed Forces was "responsible to the Prime Minister in the exercise of his duties and powers". The majority struck down the law, holding that the law purported to place the Armed Forces under the supervision of a single ministry whereas the Constitution explicitly provided that the Armed Forces were to be supervised by the Prime Ministry. Justice Seçkin disagreed. To him, it was possible to read the law compatibly with the Constitution and thus uphold it. In his dissent he reasoned that it was possible to constitute the Armed Forces under the Ministry of National Defense (rather than under the Prime Ministry) and still have the Chief of the Armed Forces be responsible and answerable to the Prime Minister:

> The notion that the Chief of the Armed Forces can only be (constituted) under the Prime Ministry is not only incompatible with the wording of Article 110 of the Constitution, which merely speaks of the Chief's responsibilities, but is also in contravention—which is a very important drawback—of the principles espoused by nations of the Western Civilization as a result of a years-long trial-and-error process. Indeed, in the Preamble to our Constitution, the principle of our country being one of the "honorable members with equal rights of the family of world nations" is espoused, and Article 153 of the Constitution provides that "no provision of the Constitution may be interpreted to impede the attainment of standards of contemporary civilization by the Turkish society" (….) Our departure in matters of national defense, which are of special importance for the survival of the State and the Nation, from the practices of civilized countries such as England, France and the United States that set up their armed forces under a certain ministry, and our interpretation of constitutional norms in a way that enables this departure contradicts

> **the aforementioned principle of abiding by the rules of civilization**, and may give rise to dangerous consequences in application[109].

To be sure, Justice Seçkin's arguments were not flawless. For one, and perhaps somewhat embarrassingly, he misquoted the 1961 Constitution's Article 153, which largely corresponds to Article 174 of the current Constitution, immunizing certain laws associated with Ataturk's principles and reforms from constitutional review. To that end, Article 153 of the 1961 Constitution merely provided that no provision of the Constitution was to be construed in a way that would annul a list of enumerated laws enacted during the Kemalist period that, again in the Constitution's words, "aim(ed) at raising the Turkish society to the level of contemporary civilization". It takes a generous analytical leap to make the argument, as Justice Seçkin did, that Article 153 (now Article 174) contained a general interpretive instruction that *all* constitutional norms must be construed as to ensure that the Turkish society is raised "to the level of contemporary civilization". It is through this generous reading of Article 153 of the 1961 Constitution (now Article 174), combined with the invocation of the Preamble to the 1961 Constitution, whose phrasing has been retained by the current Preamble, that Justice Seçkin was able to make the case for a constitutional "principle of abiding by the rules of civilization" (tr. *uygarlık kurallarına uygun davranma ilkesi*). And he construed that principle as a license to cite foreign law, which he did, by alluding to the practices in "nations of the Western Civilization", including "England, France, and the United States". Regardless of the legal acumen reflected in it, his dissent remains an early, if not the earliest, judicial attempt to justify the practice of referring to foreign law for purposes of Turkish constitutional adjudication.

## CONCLUSION

Importantly, though, no other Turkish Justice seems to have followed the trail blazed by Justice Seçkin. Members of the Court continue to refer to foreign law in their opinions, to be sure, but none of them seem to be particularly interested in the permissibility of doing so. "When we look at comparative law"[110] (tr. *karşılaştırmalı hukuka baktığımızda*)

[109] TCC, E.1963/67, K.1966/19, 14/04/1966 (emphasis added).

[110] See e.g., Engin Yıldırım's dissenting opinion in TCC, E.2009/85, K.2011/49, 10/03/2011, discussing Japanese, American, and British law.

and similarly casual prefacing statements are often deemed sufficient to introduce foreign law considerations into the Court's constitutional analysis. And perhaps justifiably so. On balance, the academic literature on cross-judicial dialogue may be doing a disservice to the field by confining itself to the narrow question of the permissibility of foreign law citations[111]. It may be very possible that the very question of whether a constitution permits its interpreters to look to foreign law in interpreting it is a culturally informed inquiry that is of relevance to, for example, the United States, but not to, for example, Turkey. Perhaps the reason why almost no Justice on the TCC feels the necessity to justify their reliance on foreign law is that it needs no justification. And perhaps referring to foreign law in constitutional adjudication is so firmly rooted in Turkish constitutional law and practice so as to render the permissibility question trivial.

If that is indeed so, the question to ask is not whether the Turkish Constitution permits references to foreign law in constitutional adjudication. The rather more relevant question to pose in the Turkish context might simply be this: why do members of the TCC refer to foreign law *without ever needing to justify its use*? And the answer to that may—equally simply—be this: if judges (and interpreters more generally) in other jurisdictions are grappling with similar constitutional questions, why not look at how they are handling similar problems? In this sense, references to foreign law are perhaps simple instances of reaching out to learn from the experiences of others. "Even if you know a thousand things", as the old Turkish adage goes, "still consult him who knows one thing"[112].

[111] See, in similar vein, Dixon, R. & Jackson, V. (2013). "Constitutions Inside Out: Outsider Interventions in Domestic Constitutional Contests", *Wake Forest Law Review*, Vol. 48, No. 1, p. 149 (noting that "(d)ebates over the effects of globalization on constitutional law have thus far tended to focus on questions of the permissibility of domestic courts considering foreign or international law in domestic interpretation").

[112] Tr. *Bin bilsen de bir bilene danış*.

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