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Right to re-trial: Determination to implementation

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Extraordinary improvements have been made to Turkish law through the so-called sixth and seventh harmonization packages. The already adopted sixth harmonization package includes significant amendments to Turkish law, including permission to broadcast in languages and dialects traditionally used by Turkish citizens, the right to retrial and improvements to the laws on fighting terrorism. (See <http://www.euturkey.org.tr> for the full text of the latest amendments) The most important change is the right to appeal to domestic courts for retrial in any case found to be in violation of any right highlighted in the European Convention of Human Rights. The second harmonization package, which came into force on February 4, allowed retrial in civil and criminal cases. Now administrative cases have been added. Amendments related to the right for retrial have important implications in both the legal and political domains. This step by the Parliament ends the debate on the superiority of international law over domestic law at least in the context of European Court of Human Rights (ECHR) decisions. A key legal question is what happens when international law and domestic law clash. In other words, to what extent are international laws binding? The answer to these questions depends on the signatories. For Turkey there are two different issues stemming from different sentences in the Turkish constitution. Article 90 of the Constitution states that "International Agreements duly put into effect carry the force of law. No appeal to the Constitution can be made with regard to these agreements on the ground that they are unconstitutional." Those who concentrate on the first sentence support the idea that international laws are equal to the domestic laws. On the other hand, those who focus on the last sentence assert that there

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is a superiority of international laws over domestic laws since international norms cannot be appealed to the Turkish Constitutional laws.

The logic behind the last sentence is as follows: If any contradiction occurs between domestic law and international law, such a constitutional principle is necessary in order to prevent a legal problem, through by-passing international law. Nevertheless, such an explanation cannot clarify the principle of *pacta sunt servanda* (the binding character of a contractual agreement that is signed). The latest legal amendments, as regards ECHR mean that from now on every ECHR ruling can reopen a completed legal process. ECHR decisions already have an influence over domestic final rulings because if domestic and international decisions conflict, then the contracting party must pay a fine as stated in the article 50 of the Convention: "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party, is completely or partially in conflict with the obligations arising from the present convention, (...) the decision of the Court shall, if necessary, afford just satisfaction to the injured party." Today, this has been expanded and now it is possible to apply for the retrial of not only civil and criminal, but also administrative law.

Enforcing the law permitting retrial of ECHR cases should pave the way for human rights improvements in Turkey. In fact there are some deficiencies that even Turkish government admits "regretfully". For example, in a case which finished in friendly settlement, "the Government regret the occurrence, as in the present case, of individual cases of ill-treatment by the authorities of persons detained in custody notwithstanding existing Turkish legislation and the resolve of the Government to prevent such actions." Such a confession and regret exists in another case related to "destruction of home, property and possessions resulting from the acts of agents of the State in south-east Turkey." It is possible to find other examples in finalized cases as for Turkey related to the length of detention in police custody, independence and impartiality of National Security Courts, right to a fair trial, prohibition of inhuman or degrading treatment

From now on Turkish lawyers will have to consider ECHR cases in order not to conflict with international standards of law, which means the *implementation of progressive democratic amendments within harmonization laws related to the fundamental freedoms would automatically be supervised* not only by domestic courts but also ECHR. Turkey is showing the political self-confidence and determination to reach a universal level of human rights via re-trial amendments.