Istanbul Convention and International Law

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On Saturday 20 March 2021, Turkey did the unthinkable. It was announced that Turkey had withdrawn from a human rights treaty. In a presidential decree, Turkey had declared that it had denounced its obligations from the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (hereinafter Convention). The convention is a legally-binding Council of Europe treaty, covering domestic violence and seeking to end legal impunity for perpetrators. It covers 34 European countries and took effect in 2014. It bears the name of a famous Turkish city (Istanbul) which straddles Europe and Asia across the Bosphorus Strait. Sitting at the epicenter of trade and commerce, one expects the leader of the aforementioned Convention to lead by example.

Centralization of the Convention as domestic law germinated on 8 March 2012 as Law No. 6284 which even pays homage to the Convention in Article 1(a) by stating that it is 'based on the Turkish Constitution and international treaties to which Turkey is a state party'. However, the President's decision to withdraw from a human rights treaty is not constitutionally valid. Since under Article 104 of the Constitution (President's executive powers vis-a-vis international treaties) the President's decree cannot be used to override the acts of the legislative. The legislation can only be amended or repealed by the Parliament. Only then, it becomes constitutionally possible for the President to complete the process of denunciation by giving effect to that law as the executive organ. Suo motto, the President cannot repeal a domestic law, which would require legislative functions, that are clearly vested in the Parliament (Article 87 of the Constitution). Moreover, Article 7 of the Constitution slams the point *"Legislative power is vested in the Grand National Assembly of Turkey on behalf of Turkish Nation. This power shall not be delegated".*

This in sum, highlights, as in many other countries, the utter disrespect and decay of Constitutional frameworks and an overriding executive's chutzpah to undermine the Constitution's sanctity. If such practice is to be understood as precedence then it will enable despotic rules to not only undermine international but even domestic law, writ large. In other words, a Presidential decree can repeal any (or all) existing domestic legislation.

In defense to quell the critics, senior AKP members announced they would deal with domestic violence through judicial reform and an Ankara Convention that would claim its power from "traditions and customs". Besides, Turkey's Communication Directorate published a statement stating that: 'The Istanbul Convention, intended to promote women's rights, was hijacked by a group of people attempting to normalize homosexuality – which is incompatible with Türkiye's social and family values. Hence the decision to withdraw. Six members of the European Union

(Bulgaria, Hungary, Czechia, Latvia, Lithuania, and Slovakia) did not ratify the Istanbul Convention. Poland (too) has taken steps to withdraw from the Convention, citing an attempt by the LGBT community to impose their ideas about gender on the entire society.' The internal political dynamic offers an insight towards the Islamist-rooted AK party which has increasingly voiced anti-LGBT+ sentiments. In an era marked by Coronavirus, unemployment, and economic fragility, all these moves seem to be related. But as he seeks to shore up his position Mr. Erdogan is also taking a risk. Risks that might eventually undermine his authority. That is because threats to constitutionalism might channelize national outrage due to the attack on the sacrosanct values of constitutional commitments. Especially towards human rights and equality of all citizens regardless of the social and family values, any citizen may have.

As per international law, the Vienna Convention on the Law of Treaties (VCLT), codifying customary international law, offers a deeper insight towards states' interaction with international law. Termination following the provisions of a treaty Article 54 of the Vienna Convention provides: 'The termination of a treaty or the withdrawal of a party may take place; (a) in conformity with the provisions of the treaty.' As per Article 80 of the Convention, "any Party may, at any time, denounce this Convention through a Notification addressed to the Secretary-General of the Council of Europe. Such denunciation shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of the notification by the Secretary-General." Therefore, there must be an official Notification highlighting that there is a three-month period before such a Notification comes into effect.

Besides, for termination by consent of the parties Article 54 (b) of the VCLT provides: 'The termination of a treaty or the withdrawal of a party may take place: (b) at any time by consent of all the parties.' Once upon a time, a treaty could be terminated only in the same way as it was made; thus, a ratified treaty could be terminated only by another ratified treaty, and not by a treaty that came into force on signature alone. But this formalistic view is no longer accepted. The International Law Commission envisaged that an agreement to terminate could even be implied if it was clear from the conduct of the parties that they no longer regarded the treaty as being in force. The technical name for this method of termination is 'Desuetude' and is enshrined in Article 56 (b) of the VCLT.

However, to do so a Party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1. It follows from the wording of Article 56 that a right of denunciation or withdrawal can never be implied if the treaty contains an express provision concerning denunciation, withdrawal, or termination. It is uncertain to what extent Article 56 reflects customary law; this is particularly true of paragraph l(b), which was added to the text of Article 56 at the Vienna conference by twenty-six votes to twenty-five with thirty-seven abstentions. The provisions of Article 56 (especially paragraph 1(b)) reflect that there could never be an implied right of denunciation or withdrawal under customary

international law. However, in Nicaragua v. USA, the International Court of Justice accepted that Article 56 was an accurate statement of customary law. Treaties of alliance and certain types of commercial treaties are often cited as the main examples of the kind of treaty in which a right of denunciation or withdrawal can be inferred from the nature of the treaty, within the meaning of Article 56(1)(b). A similar inference can also probably be made in the case of treaties conferring jurisdiction on international courts.

In other words, it can be concluded that customary international law requires reasonable notice to be given whenever an implied right of denunciation or withdrawal is exercised. Article 56(2) adds greater precision by requiring notice of at least twelve months.

Furthermore, as per 46(1) of the VCLT, the binding nature of a treaty signed by an authoritative State representative will be assumed under international law, unless there is a 'manifest' violation of a domestic rule that is of 'fundamental importance'. Besides, Article 46(2) of the VCLT states that such a violation is manifest if it 'would be objectively evident to any State conducting itself in a matter under normal practice and in good faith. One may argue that if the duty not to manifestly violate a rule of fundamental importance in domestic law applies to the consent to be bound, it must also apply to the consent to be unbound. There has also been some discussion as to the interpretation of Article 46 (2) at the level of the Inter-American Court of Human Rights. In its Advisory Opinion OC-26/20 concerning the withdrawal of Venezuela from the Inter-American Convention on Human Rights, for example, the Inter-American Court of Human Rights broached the question of what entails a good faith withdrawal.

These substantive rules have never been tested at the level of the Council of Europe — simply because this is a first. All the Council of Europe organs, member states, and the state parties to the Istanbul Convention have three months after the official notification of formal withdrawal to articulate where they stand.

The Statute of the Council of Europe, in its preamble, enshrines that state parties reaffirm 'their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy'. Considering the fact that the Council of Europe is a regional organization that is the protection of human rights, rule of law, and democracy in the domestic legal orders of its member states, the Council of Europe and its member states seem to be very well suited to take on this challenge. The status quo presents the members of the Council of Europe as well as all the organs of the Council of Europe, including its Secretary-General, to assess under general international law and the Statute of the Council of Europe what rules apply to withdrawal from human rights treaties of the Council of Europe.