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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**COMMENTS**

**ON THE LAW ON THE ESTABLISHMENT AND RULES OF  
PROCEDURE OF THE CONSTITUTIONAL COURT**

**OF TURKEY  
(LAW NO: 6216, ADOPTED 30 MARCH 2011)**

by

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## **I. General remarks**

The Constitution of Turkey in Articles 146-153 contains quite detailed provisions on the structure, competences and even on the procedure of the Constitutional Court. Compared to these detailed regulation, the Law on the Constitutional Court is balanced, it deals with issues that are relevant, and leaves the details to the By-law and the Court rules.

### **Art. 26.**

The rapporteur-judges are selected from regular judges with at least five years of judicial experience. They are subordinated only to the President of the Court, not to the other judges. The cases are assigned by the President to the rapporteur-judges, not to the judges. The rapporteurs prepare the drafts that are discussed and decided by the judges. The draft report is not binding on the plenary. After the decision is taken by the judges, the rapporteur prepares the final reasoning according the decision of the plenary. Their role is close to that of the advocate-generals. It is unusual to share the judicial responsibilities with non-elected officials; however, the entire system of constitutional justice is built upon the growing number of rapporteur-judges.

### **Art. 40.**

Concrete norm control initiated by ordinary judges is an existing competence of the Constitutional Court. The court receives 70-80 applications annually, and it is able to comply with the five month deadline which otherwise seems to be too short.

## **II. Articles 45-51. Individual application**

### **III. Introduction of individual complaint**

The opinion issued by the Venice Commission in 2004 on the previous attempt – initiated by the Constitutional Court – to introduce constitutional complaint underlined that “The function of constitutional complaint is in principle the effective protection of fundamental rights by giving remedy to the individuals in case of violation of their rights by administrative or judicial decisions. This is the main justification for introducing constitutional complaint in Turkey, too. But besides this justification in principle, there is a more practical consideration in this case. According the expectations of the drafters – as formulated in the reasoning – ‘The introduction of constitutional complaint will result in a considerable decrease in the number of files against Turkey brought before the European Court of Human Rights’. Thus the aim of the new regulation is to provide domestic remedy for the violation of fundamental rights.”

Nazim Kaynak, President of the Supreme Court of Appeals in his speech delivered on September 6, 2011 on the occasion of the opening of the judicial year underlined that in only 2010 compensations ordered by the ECtHR costed Turkey 25 million euros (Daily News, September 7, 2011, page 5). He warned that the biggest and most urgent problem of the justice system is the failure to complete trials in a reasonable time. President Kaynak said that the Supreme Court handled in 2010 more than a million cases (173 times more than its equivalent in Germany - but note that the number of judges sitting at the Court was elevated to 387).

As only the rights and freedoms regulated in the European Convention on Human Rights are protected by constitutional complaint, the result is a limited scope of protection compared to the fundamental rights and freedoms enumerated in the Constitution of Turkey.

The amendment of Article 90 of the Constitution in May 2004 acknowledged the primacy of the ECHR: "In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to the differences in provisions of the same matter, the provisions of international agreement shall prevail."

The adopted law aims at the same goal that generates similar concerns.

The constitutional complaint is limited to cases where the violation of rights defined in the ECHR occurred. The Constitutional Court will be constrained to interpret the ECHR, and its interpretation might diverge from that of the Strasbourg Court. The second concern is that the Constitutional Court will interpret also the freedoms and rights defined in the constitution. The two different interpretations (that of based on the constitution, and the other based on the ECHR) might diverge, and lead to different conclusions.

For the appropriate application of individual complaint it is important the profound knowledge of the jurisprudence of the EctHR. Therefore the Constitutional Court, and the other high courts launched a training program in order to get profoundly acquainted with the jurisprudence of the EctHR. Individual applications will be launched on 22 September, 2012. Supreme Court President Nazim Kaynak is anxious about the introducing individual complaint to the CC, as it could result in hundreds of thousand cases before that court, and prolong the length of trials, thus becoming another ground for complaints of unfair trials at the ECtHR.

However, as the Secretary-General of the Supreme Court explained, the Court will do its best for the success of individual complaint. Their guiding principles should be:

- good faith,
- effective remedy,
- cooperation mechanism among the courts.

#### **Art 47(1)**

The possibility of submitting the individual complaints by indirect way - through local courts and embassies (foreign representations) - aims at to make easier the access to the Constitutional Court. Local courts and embassies transmit the applications to the CC.

#### **Art. 47(2)**

The fee for the application to the Constitutional Court is regulated in a separate law, the Law on Fees. It is settled in 150 Turkish Lira (approx. 60 €).

#### **Art. 47(3)**

There is an inner contradiction between Article 148 of the Constitution, and Article 47(3) of the Law on the Constitutional Court. The wording of the Constitution restricts the scope of individual complaint to the negligence of public power ("violated by public authorities"), while the Law refers also to ACT of public authorities that might include also acts of the legislator ("violated due to a proceeding, act or negligence...").

**Art. 48 Admissibility**

The admissibility procedure consists of two phases. The first step will be a formal filtration executed by a so-called filtration center. This deals with the fulfillment of the formal criteria. In the second step the decision on the admissibility in merits is taken by a commission of three judges unanimously. If the commission admits the application, the case goes for substantial examination.

**Art. 50 The consequences of the Constitutional Court decisions**

The detailed regulation of the consequences is left to the respective procedural codes (penal, civil, administrative). In case of the newly introduced constitutional complaint the Constitutional Court may only declare the unconstitutionality of the judicial decision. Therefore the constitutional complaint to be introduced in Turkey has a mixed nature in-between the “real” constitutional complaint, and those that are closer to the norm control. It would be advisable to introduce the possibility of annulment: the Constitutional Court should annul the unconstitutional judicial decision. The present regulation might not compel ordinary courts to comply with the Constitutional Court decision in the case.

It is not clear from the text of the law what is the consequence of the decision of the Constitutional Court in a constitutional complaint case to the other similar cases pending before ordinary courts. Only the party in the complaint case will profit from the decision or it will effect also the parties in the similar cases. During the consultation with members of the Council of State, they were on the opinion that if a case is decided, other cases on the same issue are also settled.

The Law in my view does not elevate the Constitutional Court to the rank of a “super-court” over the regular courts as the scope of the review by the Constitutional Court is limited to the constitutional aspect of the case.