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

**DRAFT OPINION**

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

**OF TURKEY**

**on the basis of comments by**

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## **I. INTRODUCTION**

1. By a letter of 27 September 2010, Mr Sadullah Ergin, Minister for Justice of Turkey, requested an opinion of the Venice Commission on draft laws implementing the constitutional amendments approved by referendum on 12 September 2010. The letter referred in particular to four draft laws: (1) on the High Council for Judges and Prosecutors, (2) on the Organisation of the Ministry of Justice, (3) on the Organisation of the Constitutional Court and (4) on Judges and Prosecutors.

2. The present opinion deals with the Law on the establishment and rules of procedure of the Constitutional Court (CDL-REF(2011)047, hereinafter referred to as "CCL"). The Venice Commission has adopted an Interim Opinion on the draft Law on the High Council for Judges and Prosecutors of Turkey (CDL-AD(2010)042) as well as an Opinion on the Draft Law on judges and prosecutors (CDL-AD(2011)004).

3. In view of the urgency of adopting the Law on the Establishment and Rules of Procedure of the Constitutional Court, the Ministry of Justice asked the Venice Commission to give its opinion not on the draft law but on the Law, which was adopted on 30 March 2011.

4. The Venice Commission invited Messrs van Dijk, Grabenwarter, Hoffmann-Riem and Paczolay to act as rapporteurs for this opinion. Their comments appear respectively in documents CDL(2011)063, CDL(2011)064, CDL(2011)065 and CDL(2011)062.

5. On 7 September 2011, a delegation of the Venice Commission, composed of Messrs Grabenwarter and Paczolay, accompanied by Mr Dürr from the Secretariat, held meetings with the Constitutional Court (CC), the Council of State, the Court of Cassation and the Ministry of Justice. The results of these meetings are reflected in the present opinion.

6. *The present opinion was adopted by the Venice Commission at its ... Plenary Session (Venice, ...).*

## **II. GENERAL REMARKS**

### **A. Introduction of the individual complaint**

7. Already in 2004, the Venice Commission was requested to give an opinion on draft constitutional amendments introducing a constitutional complaint procedure. In its opinion the Commission 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" (CDL-AD(2004)024). This is the main justification for the present introduction of a constitutional complaint procedure in Turkey as well. But besides this justification in principle, there is a more practical consideration in this case. According to the expectations of the drafters – as formulated in the reasoning accompanying the Law – "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 main aim of the new regulation would seem to be to provide a domestic remedy for the violation of fundamental rights. This purpose may also explain why the constitutional complaint procedure only relates to the Convention and its additional Protocols, and not to other human rights treaties to which Turkey is a party.

8. As only the rights and freedoms regulated in the European Convention on Human Rights may be relied upon in the constitutional complaint procedure, this amounts to a limited scope of

human rights protection when compared to the fundamental rights and freedoms enumerated in the Constitution of Turkey and in other human rights treaties to which Turkey is a party.

9. Individual applications can be launched as of 22 September 2012. The Venice Commission's delegation learned from the President of the Constitutional Court, Mr Kilic, that he expected a huge workload (more than 100.000 cases were mentioned in various discussions).

10. The Constitutional Court will be called upon to interpret the ECHR. In doing so, it will have to avoid as much as possible that its interpretation diverge from that given by the Strasbourg Court. The risk of divergence will be even greater in cases where the Constitutional Court will also interpret the rights and freedoms laid down in the Constitution. The two interpretations of a similar right (the one based on the constitution, and the other based on the ECHR) might diverge, and lead to different conclusions.

11. In view of what has been said above, for the examination of individual complaints a profound knowledge of the case-law of the European Court of Human Rights is essential.<sup>1</sup> Already in May 2004, an amendment of Article 90 of the Constitution acknowledged the primacy of the European Convention on Human Rights: "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." However, the Commission was informed that direct application of the Convention by the ordinary courts has been rather the exception until now.

## **B. Relevant constitutional provisions and European standards**

12. On the constitutional level, regulation regarding the Constitutional Court can be found in Articles 146-153 of the Constitution of Turkey while rules for the judiciary in general, especially the principle of judicial independence, are enshrined in its Articles 138 *et. seq.*

13. At the European level there is no comprehensive set of standards that must be obeyed regarding constitutional justice. National systems are manifold and provide for a wide range of different solutions. Nevertheless, certain aspects, namely the right to an independent and impartial tribunal and the right to a decision within a reasonable time, are guaranteed by Article 6 ECHR<sup>2</sup>. Furthermore, the case-law of the ECtHR sheds light on a number of important aspects of judicial independence and other aspects of a fair trial, but, by its very nature, does not approach the issue in a systematic way. Apart from the ECHR, the most authoritative text on the independence of the judiciary in general at the European level is the recent Recommendation (2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities.

14. The Venice Commission has often analysed national legislation dealing with the organisation and the rules of procedure of constitutional courts. This caseload has been compiled by the Sub-Commission on Constitutional Justice in the Compilation on Constitutional Justice<sup>3</sup>. Certain aspects of good practice in this field have moreover been laid down in the Study on the individual access to constitutional justice<sup>4</sup>.

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<sup>1</sup> The Commission's delegation was informed that the Constitutional Court and the other high courts launched a training program in co-operation with the Council of Europe in order to get profoundly acquainted with the case-law of the Strasbourg Court. Judges, rapporteur-judges and assistant rapporteurs will receive training on the ECHR. Study visits to the ECtHR in Strasbourg as well as to several Constitutional Courts in member States are planned.

<sup>2</sup> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

<sup>3</sup> CDL(2011)048.

<sup>4</sup> CDL-AD(2010)039rev.

15. While these documents are not in all respects also applicable to constitutional courts, the principle of independence is referred to in numerous documents supplying standards for regulations on the judiciary in general, in particular, for the European level, in the Venice Commission's Report on the independence of the judicial system, Part I: The independence of judges<sup>5</sup> and in Opinions of the Consultative Council of European Judges (CCJE), namely Opinion No 1 "On Standards Concerning the Independence of the Judiciary and the Irremovability of Judges"<sup>6</sup>. For the international level, reference may be made to the UN's "Basic Principles on the Independence of the Judiciary"<sup>7</sup> and the "Bangalore Principles of Judicial Conduct of 2002"<sup>8</sup>. Moreover, the Recommendation of the Committee of Ministers of the Council of Europe to member States on judges: independence, efficiency and responsibilities even explicitly refers to constitutional courts, even though a number of its provisions, for example on judicial councils, do not relate to these Courts.<sup>9</sup>

16. A constitutional court forms a specific judicial power, which is usually separate from the courts of general jurisdiction. While some of the principles laid down in the instruments mentioned above are applicable to the ordinary judiciary only,<sup>10</sup> there are other principles, *e. g.* the independence of judges, which apply to both the judges of the ordinary judiciary and those of the constitutional courts. In fact the adherence of these has to be observed even closer as far as judges of constitutional courts are concerned.<sup>11</sup>

17. Finally, the Laws on constitutional courts of the Council of Europe member States, which can be found in the Commission's CODICES database<sup>12</sup>, may function as comparative pattern for assessing the CCL.

### **C. Preliminary remarks**

18. The following comments are based on an English translation of the Law on the establishment and rules of procedure of the Constitutional Court of Turkey. The translation may not accurately reflect the original version on all points and, consequently, certain comments can be due to problems of translation.

19. These comments essentially focus on the wording of the provisions of the Law under consideration and do not constitute a full and comprehensive review of the entire relevant legislation.

## **III. CONSIDERATION OF THE LAW**

### **A. General provisions**

20. It may well be due to a translation problem, but the term "or have reviewed" in Article 3.1.e CCL on the property of political parties does not seem to make sense. The duties and powers of the Court can only relate to future activities, not to those of the past.

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<sup>5</sup> CDL-AD(2010)004.

<sup>6</sup> CCJE (2001) OP No 1.

<sup>7</sup> GA resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

<sup>8</sup> [http://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf).

<sup>9</sup> CM/Rec(2010)12 of 17 November 2010.

<sup>10</sup> Cf. CDL-AD(2010)004, § 11.

<sup>11</sup> CDL-AD(2009)042, Opinion on draft amendments to the Law on the Constitutional Court of Latvia.

<sup>12</sup> [www.CODICES.coe.int](http://www.CODICES.coe.int).

## B. Membership of the Constitutional Court

21. Article 6 deals with the composition of the Court in accordance with Article 146 of the Constitution. It ought to be stressed, that the selection of judges must be based on objective criteria pre-established by law or by the competent authorities and should primarily focus on merits.<sup>13</sup> Not only legal professionals such as judges, lawyers or professors can become members of the Court, but also persons from the fields of economics or political sciences are eligible for Court membership. This is to be welcomed<sup>14</sup> and follows a tradition that can be found in other constitutional courts and similar organs.

22. While this is in principle seen as a progressive approach, there seems to be a lack of consequence, as long as other branches, social sciences in particular, are excluded. The Venice Commission is of the opinion that the selection criteria have to be more balanced. This holds also true with respect to rapporteurs in Article 24.2.b), too.

23. There exist different groups of candidates under the CCL. The first group consists of members of the higher courts, which are not subject to further exigencies. The second group is formed by rapporteurs at the Constitutional Court, who must have been in duty for a minimum of five years. Finally, the third group (professors and assistant professors, private lawyers, functionaries of the public education sector and first class judges and prosecutors) face three major requirements: a minimum age of 45, a degree in higher education as well as the ability to be nominated for office of a judge in general. Although these criteria are as such in line with European standards<sup>15</sup>, the regulatory approach with different criteria for different groups might lead to discriminatory consequences. Thus, the Venice Commission recommends to **extend the general criteria of age, education and eligibility for the office of a judge on all candidates**. At least the age requirement seems to be set out for all candidates in Article 146 of the Constitution, anyhow. In addition, it should be pointed out that the introduction of a criterion of Turkish nationality would not be seen as discriminatory.<sup>16</sup>

24. The procedure of the **election of members** of the Constitutional Court is laid down in Article 7 CCL. It mostly takes over the wording of Article 146 of the Constitution. Nevertheless, the procedure provided for the Grand National Assembly in the Constitution could be improved. Whereas in the first round of voting a majority of two thirds is required, an absolute majority suffices in the second round of voting. As provided for in Article 146 of the Constitution, the **majority regarded in the third round is not qualified at all. Thus, the threshold of two thirds can easily be circumvented**. However, the effect of this deficiency is limited by the fact that the Grand National Assembly is only free to vote among the candidates presented by the General Assembly of the Court of Accounts (or the Court of Auditors, as the term is translated in the Constitution) or the Chairmen of the Bar Associations.

25. With respect to the field of work of newly elected judges, specifications are advisable. While the wording of both Article 146 of the Constitution and Article 7 CCL calls for seventeen elects in case of "each vacancy" at the Constitutional Court, the intended system seems to consist of a fixed number of judges from the different branches, which can only be replaced by judges from the same branch. If so, when only one judge from a certain branch is to be elected, it remains subject to speculation, whether in this case three candidates are proposed as well. This should be clarified.

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<sup>13</sup> Rec.(2010)12, § 44.

<sup>14</sup> Cf. CDL-AD(2006)006, Opinion on two draft laws amending Law No. 47/1992 on the organization and functioning of the Constitutional Court of Romania, § 17.

<sup>15</sup> Cf. CDL-AD(2009)042, §§ 11 *et seq.*

<sup>16</sup> Rec.(2010)12, § 45.

26. Furthermore, **the composition of the Constitutional Court's Chambers should be regulated taking into account the mixed composition of the Court by providing for members from different branches in each Chamber. The composition should be pre-determined in order to exclude the possibility to influence a case through an ad doc composition.**

27. The form of oath enshrined in Article 9 CCL names both the Constitution and the fundamental rights and freedoms. Whereas this is arguably meant to emphasise the eminence of the latter, at least the translation creates the impression of two different – though not necessarily divergent – aims. **The oath should better refer to the Constitution in general.**

28. The **combination of a long term of office** (twelve years according to Article 10.1 CCL) **together with a prohibition of re-election is appreciated.** This approach safeguards the independence of the judges.<sup>17</sup>

29. The retirement age of sixty-five years seems to be reasonable as well. Anyhow, its formulation in Article 10.2 CCL seems somewhat vague. The words “or before sixty-five years of age” must be read in a way that they refer to “cannot be removed”. Perhaps this is a question of translation. It is recommended to restate this provision, for instance, by addressing the different matters of removal from office and retirement in two separate paragraphs. Moreover, the same issue is dealt with in Article 11.2 second sentence CCL. A clear restatement could make the latter superfluous. **To ensure continuity of membership at the Constitutional Court, a judge whose term has expired should remain in office until his/her successor takes over.**<sup>18</sup>

30. The provisions of the election of the President and his/her deputies in Article 12 CCL largely repeat the relevant paragraph of Article 146 of the Constitution. Nevertheless, the term of office of four years seems not to have been stipulated in the CCL by mistake and should thus be introduced. In addition, there might be a conflict if the term of office as the President or his/her deputy exceeds his or her term as a court member. In these cases the latter should be decisive.

31. Article 13 CCL deals with the duties and powers of the President. These comprise *inter alia* **the appointment of the Secretary General and his/her deputies** as well as court staff and the removal of the former. This is arguably understood rather as a full competence of both substantive decision and formal execution. While this may not constitute a problem with regard to the staff, taking into account the powers of the Secretary General and his/her deputies (e. g. lodging an annulment case by referring it to the Writing Office, Article 38.3 CCL) **a decision by a collegiate body, for instance the General Assembly of the Court, would seem preferable.**

32. Furthermore, according to Article 13.f CCL the President is entitled “to assign members from another Chamber in case a Chamber fails to convene due to a factual or legal impossibility”. Rec(2000)12, para. 24 may be recalled, stating that “the allocation of cases within a court should follow objective pre-established criteria in order to safeguard the right to an independent and impartial judge. It should not be influenced by the wishes of a party to the case or anyone otherwise interested in the outcome of the case.” Thus, **if it is seen necessary to assign members from the other Chamber, it should better be done by lot or by a list agreed upon in advance.** The foresaid should as well be taken into account with respect to the President's measures for balancing the workload among the Chambers in Article 49.1 CCL.

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<sup>17</sup> CDL-AD(2009)042, § 14.

<sup>18</sup> CDL-STD(1997)020, The composition of constitutional courts, Science and Technique of Democracy no. 20, sub 4.3 *et seq.*; see also CDL-AD(2009)042, Opinion on the draft amendments to the Constitutional Court Law of Latvia, § 15.

33. Amongst the obligations of the Members in Article 15 CCL one can find in lit. a the commitment to “act in concordance with the dignity and honour of the profession of a judge”. A breach of this obligation is sanctioned via the corresponding disciplinary investigation proceedings under Article 18.1 CCL.<sup>19</sup>

34. Recommendation (2010) 12 ought to be recalled, stating that the interpretation of legal provisions, assessment of facts or weighing of evidence carried out by judges to determine cases should give rise to neither criminal nor civil nor disciplinary liability, except in cases of malice and gross negligence.<sup>20</sup> “Disciplinary proceedings may follow where judges fail to carry out their duties in an efficient and proper manner. Such proceedings should be conducted by an independent authority or a court with all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanction. Disciplinary sanctions should be proportionate.”<sup>21</sup>

35. The CCJE recommends preparing standards defining “all conduct which may lead to any disciplinary steps”.<sup>22</sup> On the one hand this approach would safeguard the principle of judicial independence, while on the other hand it could prevent undertaking disciplinary measures from appearing biased.

36. Although appropriate behaviour is indeed desirable, it comprises a wide range of behavioural patterns and is thus rather broad and hard to define. Terms such as “dignity and honour of the profession of a judge” can only be seen as in line with European standards of judicial independence, if applied with utmost restraint. The Venice Commission invites the Turkish legislator to **further elaborate the elements constituting misbehaviour worthy of disciplinary sanctions.**

37. Article 15.1.e provides for certain obligations of the members of the Court. The members must obtain permission from the President in order to attend national and international congresses, conferences and similar scientific meetings. This provision seems too restrictive. The members of the Court are already bound by their confidentiality obligation (see lit. c) and their obligation to act in accordance with their profession as a judge (see lit. a). Constraining the members’ possibilities to attend scientific meetings cannot be justified by the function of the members, while scientific exchange and interaction – especially in human rights law matters – are essential for every legal professional, including members of constitutional courts. It is therefore recommended that **the attendance of the members in scientific gatherings should not depend on the President’s approval unless this would result in the member’s excessive absence from Court sessions.**

38. Article 19.4 CCL provides for resignation or an “invitation to withdraw”. Obviously there is no choice on the side of the judge concerned. It seems that this invitation should save the face of the member concerning by allowing him or her to resign from the Court him or herself rather than being dismissed.

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<sup>19</sup> It may be assumed that the words “not incompatible” should be read as: “not compatible”.

<sup>20</sup> Rec.(2010)12, §§ 66, 68.

<sup>21</sup> Rec.(2010)12, § 69.

<sup>22</sup> CCJE (2001) OP No 1, § 60.



### C. Organisation

39. Article 22 CCL deals with the two Chambers of the Court as defined in its Article 2 lit. ç, which are entitled to rule individual applications. Whereas the Chamber consists of seven members, it convenes with only four of them. The latter number is arguably to be seen as a minimum requirement, *i. e.* a quorum. Unless all members of a chamber are systematically invited and a lower number would only be the result of illness etc., clarification would be required with regard to a selection of those four members. In this case, an objective system would be favourable to rule out all possibilities of subjective influence on the Chamber's composition. Notwithstanding, it seems unclear, whether the Deputy President, who is to chair the Chamber, is already included in that count of four, which may be important in view of reaching a majority vote..

40. Article 22.2 CCL refers to Commissions next to Chambers, while the establishment of commissions has not been regulated in the first paragraph. And while the number of membership of the Chambers is regulated in the first paragraph, the number of member in the commissions will be regulated by (internal) Regulation. Since the decision on admissibility is of great importance and, in case of a unanimous decision declaring the application inadmissible, will be final and bring the application to an end, it is **recommended to fix the number of members of the commissions in Article 22.**

### D. Rapporteur judges

41. The Venice Commission has underlined the importance of staff in its recent study on the individual access to constitutional justice: "The Venice Commission recommends that judges are supported by qualified assistants; their number should be determined in relation to the court's case-load. (...) In fact, permanent or long serving staff allow for the construction of an institutional memory conducive to greater consistency and continuity of the court's case-law; an issue more pertinent to civilian systems than common law systems."<sup>23</sup> Nevertheless, the competences of the staff are subject to certain limitations. Bearing this in mind, the Venice Commission emphasised: "Depending on the number and qualification of the staff, the secretariat of the court may perform a first preliminary examination in order to weed out manifestly inadmissible complaints as far as possible. However, as the judicial power cannot be delegated to the secretariat, its opinion can only be advisory."<sup>24</sup>

42. In the Turkish Constitutional Court the rapporteur-judges play a key role. They are selected from regular judges with at least five years of judicial experience, professors of law and legal researchers or five years of work as assistant rapporteurs (Article 24.2) and they enjoy judicial immunity (Article 24.4). Administratively, they are subordinated only to the President of the Court, not to the members of the Court. The cases are assigned by the President to the rapporteur-judges, not to the members. **It would be preferable to introduce either an automatic system of case-distribution or to have a special case-assignment committee composed of the president and members of the Court doing that.**

43. The delegation was informed by the President of the Constitutional Court that he cannot give any instructions to the rapporteurs on the substance of the cases. The rapporteurs prepare non-binding reports on which the members of the Court deliberate and decide in the rapporteurs' presence. Once the decision is taken by the members, the rapporteur prepares the judgement in accordance with that decision. Consequently, the role of the Turkish rapporteur-judges is rather close to that of the rapporteur public of the French Council of State rather than that of legal assistants, as in other constitutional courts. **In the light of the important role of**

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<sup>23</sup> CDL-AD(2010)039rev, § 224.

<sup>24</sup> CDL-STD(1995)015 The Protection of fundamental rights by the Constitutional Court, Science and Technique of Democracy no. 15, 1995, as affirmed in CDL-AD(2010)039rev, § 224.

**the rapporteurs, this procedure should be spelt out in the Law in order to make it clear that the judgements are decided upon by the members of the Court only.**

44. The system of rapporteur judges seems to be a general feature of the Turkish judicial system. The Commission's delegation learned that by relying on the role of rapporteur judges, the Court of Cassation and the State Council deal with the incredible number of cases before these Courts every year (some 500.000 for the Court of Cassation and 130.000 for the State Council). Given that the Constitutional Court fears a very high number of individual complaints, especially during the first year, the Court prepares for this onslaught by recruiting rapporteur judges.

45. Even if the special role of rapporteur judges in the Constitutional Court is recognised by the Venice Commission, the Law seems to go too far in some respects, especially when Article 26.2 CCL provides for the taking of evidence, such as the hearing of witnesses, by the rapporteur judges. Hence, taking evidence cannot be delegated. The delegation of the Venice Commission was told that in practice this function does not relate to the examination of witnesses but the gathering of general information necessary in the preparation of a case for trial. However, **the taking of any evidence should be carried out by the members of the Court themselves**, since it requires immediateness to develop an own opinion on matters like credibility. .

46. According to Article 26.3 CCL; the President may also assign rapporteurs to commissions that are *inter alia* competent to examine the admissibility of individual applications (see Article 48 CCL). **As an essential legal activity of the Court, the decision on admissibility has to be examined under the authority of the members of the Court.**

**47. In order to strengthen the internal independence of the rapporteur judges, the Law should clearly spell out that nobody, including the President of the Court, can give instructions to a rapporteur judge on how to deal with a case with the exception of the members of the Court when they deliberate.**

48. Furthermore, It is not clear why for the qualifications required for a rapporteur the fields of economics and political sciences are mentioned in addition to that of law, and not, for instance, also that of history, philosophy and others (Article 24.2.b CCL). It may be pointed out that the second paragraph of Article 27 is formulated broader in respect of assistant rapporteurs and candidates.

49. Article 27.2 provides that assistant rapporteurs can only be persons who are below thirty years of age in case they have completed higher and post graduate education, or below thirty-five years of age in case they have earned a doctoral degree. This provision does not take into account periods of time that a person might have dedicated to parenthood. These months or years, especially in the case of young women, can lead to a delay in a person's education or working life and might prevent somebody from being employed as an assistant rapporteur because of the above-mentioned age limit in Art. 27. In accordance with labour law principles in the majority of the European countries, **there should be an extension of the age limit for persons applying as assistant rapporteurs who exceed the age limit by reason of parenthood.**

50. It would seem that chapter three of Part Tree 5 (Articles 29-34) would be better placed in the Regulation rather than in the law.

## E. Examination and trial procedures

51. The procedure of abstract judicial review is provided for in Articles 35-39 CCL. In Article 35.1.b CCL **the parliamentary groups of the ruling party and the main opposition party are entitled to lodge an abstract judicial review on the merits**, while lit. c guarantees the same right to at least one fifth of the total deputies of the Grand National Assembly. Finally, according to Article 35.2 CCL the competence of the ruling party foreseen in Article 35.1.b CCL shall in case of a coalition government be devolved upon the coalition party “with the highest number of members”. Arguably, the latter is to be understood rather as number of deputies within the Grand National Assembly than as total number of all members of the party. The restriction of the competence to initiate an abstract judicial review to the two main parliamentary groups of the Grand National Assembly as well as a minimum of one fifth of the latter’s deputies favours larger parties. The Venice Commission does not see a justification for this limitation.

52. In general, the possibility to lodge an application for annulment by a group of parliamentarians is, in particular, meant to protect the opposition against the ruling party or parties, and certainly not to give the largest parliamentary groups special protection. Whereas there is a wide range of restrictions in this regard in Europe<sup>25</sup> not allowing for a uniform definition of common standards, **a different approach including all parties in Parliament or focussing more on a certain number of individual deputies instead of parties would be appreciated.**

53. Finally, it is difficult to understand why, in relation to the right of application, a difference is made dependent on whether the law or regulation is alleged to be in violation of the Constitution on the merits or as to form.

54. The proceedings of cases of abstract judicial review with regard to the form are supplied in Article 36 CCL. Its paragraph 3 states, that the review and resolving of abstract judicial review cases on the basis of formal reasons is given priority. While it is not exactly clear, what this priority refers to, such a provision might foster a practice of lodging cases always on both formal and material reasons. Article 36.4 CCL denies courts the right to initiate an annulment case on the basis of formal deficiencies. If this refers to concrete judicial review, the provision is superfluous, since courts are not entitled to initiate them at all according to Article 35 CCL. If the provision refers to the preliminary ruling procedures it should be placed in this context, *i. e.* in Articles 40-41 CCL.

55. Article 37 CCL regulates **the right to lodge a direct annulment case**. It is **permitted to submit a case within the ten days/sixty days following the date of the promulgation of the legal act** (depending on the nature of the legal act). Although there are no clear European Standards in this field, many countries do not provide for a time limit at all<sup>26</sup> while the range of those supplying a limit reaches from three months from the date of publication in Spain<sup>27</sup> to three years after entering into force in Albania<sup>28</sup>. Ten/sixty days cannot be regarded as an appropriate period of time for the competent parties authorised to submit an annulment case. Especially parliamentary groups and the members of the Grand National Assembly might be in need of more time in order to make their decision. In view of the regulations of other European countries that grant periods ranging from three months to unlimited time intervals to submit

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<sup>25</sup> While in Albania one fifth of all parliamentary deputies is required (Art. 49.1 CCL), in Germany (Art. 76 CCL ) and Slovenia (Art. 23a.1 CCL) the threshold is one third. Art. 40 CCL of Ukraine provides for a Minimum of 45 deputies whereas in the bicameral Systems of the Czech Republic (§ 64.1 lit. b CCL), France (Art. 18.1 CCL) or Spain (Art. 32.1 lit c-d CCL) a concrete number of both deputies and senators is given with a range from 41 deputies or 17 senators in the Czech Republic to a minimum of 60 deputies or 60 senators in France. Nevertheless, in all these systems the key factor is the individual, be it a deputy or a senator, not the party.

<sup>26</sup> *E. g.* Austria, Czech Republic, Germany, Slovenia.

<sup>27</sup> Art. 33.1 CCL.

<sup>28</sup> Art. 50 CCL.

cases, the time limit of Art. 37 **should be revised in order to be prolonged**. This would also require an amendment to Article 151 of the Constitution.

56. As it is formulated, Article 38.1 CCL seems to stipulate that the parliamentary group concerned needs the permission of a majority of its general assembly to lodge an application for annulment. This would seem to be in violation of the autonomy of individual members of Parliament and parliamentary groups, who derive their mandate from those who voted for their candidature and not from their party.

57. According to Article 38.3 CCL an abstract judicial review is deemed lodged, when the petition is referred to the Writing Office of the Constitutional Court by the Office of the Secretary General. This should correspond with a duty of the latter to do so without undue delay.

58. Article 39 CCL deals with the problem of **incomplete petitions**. The Constitutional Court is obliged to check within ten days from the date of registration, whether the petition is in line with the requirements set out in Article 39 CCL. If the petition is found to be incomplete, the initiator is notified and free to complete it "within the period specified in paragraph 1". Firstly, it seems unnecessary, that the entire Constitutional Court is required to carry out the examination of completeness of the petition. This should be left to its registry. Secondly, the time limit should be refined. Besides the fact, that a **time limit of just ten days is rather short** in this context, the reference in Article 39.3 CCL does not only include the duration of ten days but also its starting point, that is the date of registration. Thus, completion of a petition is virtually impossible. At least, a time limit of ten days starting with the reception of the notification of the Constitutional Court with respect to the incompleteness of the petition is required. **Depending also on the nature of the missing parts of missing items, a longer period may be necessary.**

59. The **preliminary ruling procedure** is laid down in Articles 40-41 CCL. 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** of Article 40.5 CCL, which otherwise **seems to be too short**. Article 40.5 CCL states that the referring court may stay the proceeding for only five months and afterwards is obliged to decide on the case as if the contested provisions were still in force unless the Constitutional Court has come to another decision within that time, meets with concern. In consequence, the referring court is bound to decide on the basis of a law it holds to be unconstitutional, a view that could be confirmed by the Constitutional Court in its later decision. Even if the chance of a retrial would be granted, such a mechanism is hardly satisfying and does not meet the interests of the parties involved. It is recommended to **stipulate that, in principle, the Constitutional Court will decide within five months, but that it may prolong that period on good grounds, in which case it informs the trial court concerned.**

60. In its recent study on individual access to constitutional justice the Venice Commission has stated: "Ordinary proceedings should be stayed, when preliminary questions in this case are raised to the constitutional court. This can take place either *ipso iure* or by decision of the competent court. Anyway it must be ensured, that the ordinary judge does not have to apply a law, he/she holds to be unconstitutional and whose constitutionality is to be decided by the constitutional court with regard to the same case."<sup>29</sup>

61. According to Article 40.2 CCL, the court decision dismissing the application for annulment may be appealed together with the main judgment. This may be understood to imply that the decision may be appealed only if appeal lies against the main judgment, and that a dismissal by the highest instance is final. This should be clarified.

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<sup>29</sup> CDL-AD(2010)039rev, § 142.

62. On the basis of Article 152 of the Constitution, Article 41.1 CCL provides that after a preliminary ruling procedure has been dismissed for being without merit, the identical provision may not be subject to another preliminary ruling procedure for ten years from the promulgation of the judgement. The formulation seems rather strict and does not allow for exceptions, especially on grounds, which would as well allow for a retrial. Typical situations for reopening cases are, however, when new facts appear of which the parties could not have been aware, to correct errors made by the constitutional court, if the constitution has changed or where the ECtHR has decided that there has been a breach of the ECHR and this also implies a violation of the Constitution.<sup>30</sup>

63. On the basis of Article 90 of the Constitution, Article 42 CCL exempts international treaties and enlisted legal acts from abstract judicial review and preliminary rulings. The provision excludes a list of national legal acts and international treaties in general from being contested on the grounds of unconstitutionality in the course of an annulment case before the Constitutional Court. While it is true, that a national constitutional court should not be enabled to bring down international treaties that does not mean that international activities of a state implementing a treaty are exempted from constitutional review. Moreover, a constitutional court should be free to review the act of ratifying an international treaty, since this constitutes an act of national legislation.

## F. Individual application

64. Articles 45-51 CCL provide for the constitutional complaints procedure. The concept laid down in Article 45.1 CCL allows for constitutional complaints, as long as the violated fundamental right or freedom under the Constitution "falls into the scope of the ECHR".

65. These words can be interpreted narrowly, if they would imply that only those fundamental rights and freedoms secured under the Constitution may be invoked in an application to the Constitutional Court, which are also guaranteed in the European Convention on Human Rights and its Protocols, and to the extent that their scope in the ECHR and its Protocols is identical to their scope in the Constitution.

66. This clause can be interpreted also widely and result in an extension if their purpose is to incorporate the human rights guaranteed in the ECHR and its Protocols into those secured under the Constitution. The latter would especially mean an important extension, if the words "the scope of" imply that **this incorporation also encompasses the interpretation given to the ECHR rights in the case law of the European Court of Human Rights (ECtHR). An explicit specification in view of the latter alternative would be appreciated.**

67. The jurisdiction of the Constitutional Court concerning constitutional complaints is further elaborated in Article 45.3 CCL. The provision does not refer to an act as a result of proceedings, but it refers to „proceedings“. This terminology may lead to misunderstandings. In constitutional court proceedings it is usually the result that is subject to review (law, regulation, court decisions, administrative decisions). Does the provision intend to exclude individual petitions for abstract constitutional review of laws and regulations? If so, this should be expressed in a more clear way. The provision might be combined with that of the first paragraph of Article 46 which excludes the filing of an abstract petition or actio popularis.

68. Additionally, the term "pursuant to Constitutional Court judgments" in Article 45.3 CCL can be understood as enabling the Court to define its own jurisdiction. It is unclear whether this relates to Article 158 of the Constitution, which provides that "Decisions of the Constitutional Court shall take precedence in jurisdictional disputes between the Constitutional Court and

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<sup>30</sup> CDL-AD(2010)039rev, § 118.

other courts." If this is so, the Law should specifically refer to judgements relating to jurisdictional disputes only.

69. Otherwise, the Constitution should itself in a limitative way define the jurisdiction *ratione materiae* of the Constitutional Court. Of course, the Court will then have to interpret and apply the constitutional provision(s) concerned, but that does not require a special provision since any court will have to interpret its jurisdiction. However, the words just referred to seem to imply that the Constitutional Court has an autonomous competence to define its jurisdiction, and to further extend or restrict its jurisdiction *ratione materiae*. It seems advisable to delete the words referred to, unless they have a different and useful meaning.

70. Article 46.2 prohibits applications by public legal persons. Under the domestic law of a number of European states applications of public legal persons, such as municipalities, broadcasting companies, universities or churches are admissible under certain circumstances. For example, in Austrian and German Constitutional Law, the right of individual application before the Constitutional Court comes with the compulsive existence of a subjective right granted by the law. This is often true for property rights. Fundamental rights are guaranteed to legal persons as well as far as they are applicable to them according to their nature. Also a limited number of **public legal persons** come under this provision. Hence they **should be able to invoke rights under the Constitution before the Constitutional Court**.

71. According to the Strasbourg case-law, legal persons may allege to be victims, and therefore are entitled to raise a complaint, concerning any of the rights and freedoms guaranteed in the ECHR, to the extent that the right or freedom concerned is allegedly violated (also) in their respect. Thus, for instance, a legal person cannot claim that its right to life or the prohibition of torture with respect to it has been violated, but it may claim that its right to a fair trial, its right to respect of the home, its right to freedom of religion etcetera has been violated; the latter are no "rights concerning legal personality", but have a collective dimension and/or are of importance to the existence and functioning of the legal person. Therefore, the phrase referred to should be replaced by the words "their rights have been actually and directly violated", or words of the same purport.

72. **As stated in Article 46.3 CCL, aliens may not lodge a constitutional complaint based on rights reserved for Turkish citizens.** According to Article 1 ECHR the States parties "shall secure to everyone within their jurisdiction" the rights and freedoms guaranteed therein. This includes both citizens and foreigners. There are certain rights which, by their nature, only apply to citizens or may be restricted to citizens, such as the right to vote and stand as a candidate for the national parliament, and the right of access to certain public functions. However, Article 14 of the ECHR implies that, in principle, foreigners should enjoy fundamental rights and freedoms to the same extent as citizens. Consequently, the third paragraph **is both unfortunate and superfluous**: it may lead to a too restrictive application, while the rights which by their nature or on other justified grounds belong to citizens only, for foreigners are not "personal rights" in the sense of the first paragraph.

73. Article 47.1 CCL provides for individual applications filed "through courts or representations abroad". This could be understood as allowing courts or – arguably Turkish – representations in other countries to initiate constitutional complaints. This concept is not sufficiently elaborated in Article 47.1 CCL and can thus not be analysed thoroughly. The Venice Commission's delegation was informed that **foreign representations and courts would only transmit the applications without any intervention in substance. This should be spelt out clearly in the Law**.

74. According to Article 47.2 CCL for initiating a constitutional complaint one must pay a fee. In its recent study on individual access to constitutional justice the Venice Commission has concluded: "The Venice Commission recommends that in view of increasingly more

comprehensive human rights protection, court fees for individuals ought to be relatively low and that it should be possible to reduce them in accordance with the financial situation of the applicant. Their primary aim should be to deter obvious abuse."<sup>31</sup> Article 78 introduces a fee of 150 TL for individual complaints into Article 5 of the Law on Fees. The Commission's delegation was informed that **the general system of legal aid will also apply to cases before the Constitutional Court. This is to be welcomed.**

75. There seems to be a contradiction between Article 148 of the Constitution, and Article 47.3 CCL. 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 an act of public authorities that might include also acts of the legislator ("violated due to a proceeding, act or negligence...").

76. Article 47.6 provides for an **additional deadline for providing missing documents**. If it is the intention of this provision is not to build up artificial formal barriers it **should not be limited to missing documents but should be extended to other cases of minor mistakes** that can easily be remedied.

77. The words "in case no legal remedy is provided for" in Article 47.5 indicate that the law takes into consideration the situation that an individual petition to the Constitutional Court is the only legal remedy available against an alleged violation of a fundamental right or freedom. However, in that respect it has to be taken into account that the Constitutional Court is not a court with full jurisdiction (unless it acts as a Supreme Court, Article 148 of the Constitution). Therefore, if and to the extent that the determination of a civil right or obligation, or of a criminal charge is (also) at issue, access to the Constitutional Court as the only judicial remedy available might not be sufficient in the sense of Article 6 ECHR.

78. The law makes a difference between inadmissible applications and applications that are dealt with on the merits. The admissibility criterion in Article 48.2 has the obvious aim to give the Constitutional Court the possibility to steer its work load. The instrument follows examples in other countries by giving discretion to the Court in deciding which cases are of minor importance so that they do not need a decision on the merits of the Constitutional Court. However, one should reconsider the technique of filtering applications at the admissibility stage for at least two reasons:

79. It is true that also the European Court of Human Rights (like the former Commission) deals with the question of „minor“ or „irrelevant“ cases under the head of inadmissibility. However, in the Strasbourg case-law only some of the inadmissibility criteria are admissibility criteria in the traditional sense of procedural law (like non-exhaustion of domestic remedies, expiration of the time limit for applications etc.). The criterion of „manifestly ill-founded“ and the new criterion introduced by Protocol No. 14, however, are substantive „filtering criteria“. In many systems of constitutional justice, **a distinction is made between inadmissibility in the strict sense and the alternative of declining to deal with a case**<sup>32</sup>. Such a distinction **should be introduced for the reasons of clarity and of efficiency of Court proceedings**. Bearing in mind the size of Turkey measures of reducing workload should be considered from the outset. Otherwise the new Court runs the risk of becoming a victim of its own success very soon.

80. The admissibility procedure consists of two phases. The first step will be a formal filtration executed by a so-called filtration centre. This deals with the fulfilment of the formal criteria. In the second step the decision on the admissibility in merits is taken by a commission of three

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<sup>31</sup> CDL-AD(2010)039rev., § 117.

<sup>32</sup> E.g. „Nichtannahme“ in Germany, „Ablehnung der Behandlung“ in Austria. The Austrian Constitutional Court for instance has a number of cases where admissibility is doubtful and would need enquiry, but as it declines jurisdiction it may leave the question open; in such cases no „decision“ of the case is effected, so there is no need of publication of these cases; reasoning is shortened to formulas of only one or two pages.

judges unanimously. If the commission admits the application, the case goes for substantial examination (Article 48 CCL).

81. Article 48 does not contain a criterion that refers to the prospects to win a case. The ECtHR and also many constitutional courts have a criterion, which enables the Court to decline jurisdiction in cases where there is a lack of prospects to get a positive decision. On the European level this is the „manifestly ill-founded“ criterion, at national level there exist similar instruments. This instrument is important because the Constitutional Court can enter into an examination internally but can stop this when it reaches the conclusion that at the end the result will be negative without giving lengthy reasoning. The reason for such criterion is again efficiency.

82. With reference to one of the observations made under Article 45.3 CCL, as well as to the wording of Article 49.7, it is emphasised that the Constitutional Court must restrict itself to examining the constitutional issue before it and the facts and law relevant thereto. Therefore, the words **"all types of examinations and investigations" in Article 49.3 CCL would seem to be too broadly formulated. It is recommended to make an express reference to Article 49.6 CCL.**

83. Article 49.5 provides for **interim measures. However, the time limit of six months for revocation of such measures seems too general**, sometimes too short, and not flexible enough. In norm control proceedings the Court may well need more than six months for a decision. On the other hand there are often individual applications against individual decisions where publication of the decision of the Constitutional Court would seem exaggerated. A clarification on that point seems advisable.

84. Article 49.6 tries to delimit the spheres of the Constitutional Court and the ordinary courts by limiting the former to the determination of a violation of a human right. While this general rule is certainly useful, the border between the courts will have to be determined over time through case-law of the Constitutional Court in specific matters (see also Article 158 of the Constitution).

85. Article 49.6 provides for the possibility that the Chamber concerned may determine in what way the established violation of a fundamental right can be removed. The Commission's delegation learned that the Constitutional Court is limited to give instructions to the competent ordinary court whose decision has been found in violation of a fundamental right. In view of the cassation system, the highest ordinary courts (Court of Cassation and State Council) are not the "concerned" courts in the sense of Article 50.2 CCL. The instructions will be addressed to the first instance court or regional court in criminal matters, once the regional courts will have been set up, starting in 2012. However, **the Constitutional Court should be allowed to refer the case to the last instance ordinary court in cases where the unconstitutionality lies only in the unconstitutional interpretation of the law by that court and when there is no need to gather and examine further evidence.** Sending the case to the first instance court would lead to a loss of time if one of the parties would then appeal to the last instance court.

86. The Chamber cannot annul the ordinary court decision that had been taken in violation of a fundamental right. However, in order to make sure that the instructions are implemented, **the decision by the ordinary court should be annulled.**

87. Most importantly, **the Law should clearly spell out that the Constitutional Court can declare null and void the underlying legal regulation in individual complaint proceedings** as is the case for applications of annulment. In Article 49.6, the draft Law expressly provided for the annulment of a legal provision. Unfortunately, this provision has been removed in the Law as adopted.



88. Article 50 CCL leaves the detailed regulation of the consequences 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. As set out above in relation to Article 49.6, the Constitutional Court should annul the unconstitutional judicial decision. Mere instructions might not sufficiently compel ordinary courts to comply with the Constitutional Court decision in the case. This might also be important to have the individual complaint recognised as an effective remedy by the Strasbourg Court.

89. 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 for similar cases pending before ordinary courts. Will only the party in the complaint benefit from the Constitutional Court’s decision or will it affect also the parties in similar ongoing cases? If the underlying Law is annulled, it seems clear that the ordinary courts will make their decision on the basis of the new legislative situation. However, **the Law should more clearly provide that the Constitutional Court’s interpretation of the Constitution will be binding on all ordinary courts**, not only the court concerned.

90. **It is welcomed that Article 50.3 stipulates a publication of the court’s judgments on the website of the Court** as well as a promulgation of selected judgments in the Official Gazette. Further provisions shall be found in the Internal Regulation of the Court. These regulations meet the requirements of Art 6 of the European Convention on Human Rights and the need for information in a democratic society.

91. Article 50.4 provides for a **system of settlement of differences between the chambers**, which should be established by the (internal) Regulation of the Court. A number of issues need to be addressed, for instance, of the issue of who is in charge of supervising the conformity of the case law of the different commissions and Chambers, and indeed within the commissions and Chambers; who brings a difference of decisions among commissions to the attention of the Chamber concerned, and a difference of decisions among Chambers to the attention of the General Assembly; what kind of procedure is subsequently followed, and what is the role of the commissions or Chambers concerned in such a procedure; what kind of decision or measure may be taken if the conclusion is reached that there is a difference of decisions; what are the legal consequences of such a decision or measure; is there also a preventive procedure to avoid differences of decisions. These points are of such importance that the **main issues should be regulated in the Law itself**.

92. In clear wording, Article 50.5 provides that the Constitutional Court shall terminate its proceedings if the applicant withdraws the application. This provision means that the review by the Constitutional Court on an individual application does not primarily serve the general interest of reviewing court decisions, and laws and regulations, for their conformity with fundamental human rights. In addition of the purpose to reducing the case-load of the Constitutional Court, the aim of the Law to reduce the number of cases brought to the Strasbourg Court might be at the origin of this solution. However, one could well imagine that **the Court should be given the power, if an important constitutional issue has been raised by the individual application, to continue its examination after the applicant has waived his or her application, in the interest of constitutional justice.**<sup>33</sup>

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<sup>33</sup> See Report on Individual Access to Constitutional Justice, para. 144 (CDL-AD(2010)039rev).

93. **As long as it is applied correctly, a fine for the abuse of the right of individual application as set out in Article 51 CCL is in line with European Constitutional practice.**<sup>34</sup>

The law contains a disciplinary fine not exceeding 2.000 Turkish Liras.

### **G. Dissolution of political parties and financial audit**

94. In view of the serious character of the cases involved (**dissolution of political parties**) and the required two-thirds majority, the term "attending members" in Article 52.1 CCL would seem to **require some further qualification by fixing a minimum quorum requirement** to make sure that judges of the Court who are out of town cannot be "surprised" by a quickly announced session to dissolve a party.

95. Article 52.3 stipulates the procedure followed in cases of the dissolution of political parties. Obviously, the rapporteur judge to whom the case is assigned has a central position in the procedure, given that he or she cannot take instructions during the preparation of the case, even from the President of the Court. **This strong position of a single rapporteur judge is problematic in such important and potentially politically controversial cases, dealing with the dissolution of a political party.**

96. **The Venice Commission regrets that the draft constitutional amendment, which would have made the dissolution of a political party more difficult, failed to be approved by Parliament in 2010. The Commission recommends taking up this issue again in future constitutional amendments.**

97. Articles 55 and 56 raise the question of whether the financial control of political parties is not of a too strict and general character, limiting their freedom of association. But this is an issue that relates rather to the legislation concerning political parties. Given the additional case-load of the Constitutional Court because of the individual complaint, it seems that the Constitutional Court is overburdened with functions. Short of an amendment of Article 69 of the Constitution also in this respect, which would be welcomed, **the Law could provide that the Constitutional Court deals with the financing of political parties only when the Court of Accounts has found a violation of the applicable provisions.**

### **H. Trials**

98. The fact that the defence lawyer and the attorney, respectively, are mentioned in Article 58 CCL in paragraphs 1 and 5 next to the defendant and the intervening party suggests that the former may also apply for a re-examination without permission of the latter. Indeed, if the former act on behalf of the latter their entitlement needs no separate regulation.

99. The headline of Article 59 CCL suggests, that the Court may not try certain cases, while it follows from the content, that only potentially biased members of the Court are excluded. Despite this exclusion Article 61 CCL stipulates their participation in the rendering of the judgment, but only calls for an abstention in voting. Thus, the risk of bias is not addressed sufficiently, since the potentially biased member may influence the outcome of the decision as well by other means than his/her vote. In addition, a judge should also not sit in a case if the interests are involved of another person with whom he or she has a special connection.

100. Article 60, paragraphs 1 and 4 relate to the challenging of a member of the Court. The words "which prove the partiality" are formulated too narrowly. According to the European Court of Human Rights the impartiality of the trial is also not guaranteed if one of the parties has an

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<sup>34</sup> The German and the Austrian System provide for fees or even fines in cases of abuse (Missbrauchsgebühr, Mutwillensstrafe).

objectively justified fear of lack of impartiality.<sup>35</sup> The same holds good for the word "required proof" in paragraph 4, which constitutes too strict a requirement. It is not sufficiently clear what the words "unacceptable on merits" in Article 60.5 mean. Since a disciplinary penalty may be risked, the transparency and foreseeability of the rule is especially important.

101. Article 60 only covers the challenging of the members of the Court. In view of the key position of the rapporteur judges and their work as a single judge, **the possibility to challenge them is as least as important as that of the member of the Court and should be added to Article 60.**

102. With the exception of state secrets (Article 62.3) and information relating to third parties, the information and material which the Constitutional Court has at its disposal shall also be made accessible to the parties involved.

103. Article 65 CCL provides for a two thirds-majority in certain cases. While it is adequate to have a two thirds majority in cases of party dissolution and similar cases (and most necessary as the near past has shown), this is questionable with regard to constitutional laws. In party cases the qualified majority protects a political party often a minority group. In the case of constitutional amendments, however, the higher legitimacy of a two thirds majority in parliament is not matched by a higher majority in the Constitutional Court. It is **difficult to explain why a constitutional law violating basic principles of the Constitution should remain in force although a (simple) majority of judges has voted in favour of unconstitutionality.**

104. Article 66 CCL specifies the scope and **effect of the Court's judgments**. The binding force is specified in Article 66.1 CCL. Nevertheless, it remains unclear, to which parts of the judgment the binding force is assigned. This should be specified especially with regard to the reasons, namely when the Constitutional Court supplies an interpretation of sub-constitutional norms.

105. Cases of retrial due to a later decision of the ECtHR are enlisted in Article 67.2 CCL. These are restricted to decisions on the dissolution of political parties as well as decisions of the Court in its capacity as the Supreme Court, *i. e.* trials against higher officials of the state (see Article 3 lit. ç CCL). Article 46.1 ECHR<sup>36</sup> states the binding force of the ECtHR's judgments "in any case". Turkey has not made any reservation or notification with respect to Article 46.1 ECHR. Since the ECtHR can as well find decisions of the Constitutional Court on other matters, constitutional complaints based on human rights in particular, in breach of the ECHR, the restrictions in Article 67.2 CCL are not in line with Article 46.1 ECHR. It is difficult to see under what circumstances a request for retrial based on a judgment of the European Court of Human Rights which is deemed to have merits, is nevertheless considered inadmissible (Article 67.3 CCL).

106. The salaries are regulated in Article 69 CCL. These comprise a **bonus system** as provided for in Article 69.1 CCL. In this context it should be emphasised, that the remuneration of judges should be based on a general standard and rely on objective and transparent criteria.<sup>37</sup> The salary table supplied in Article 69.1 lit. a-s CCL is in line with these standards. Taking into account an assessment of the individual performance of a judge might influence his/her decisions, thus forming a threat to judicial independence. A bonus system generally includes a certain element of discretion. Therefore the Venice Commission has taken a firm stand against bonuses as part of remuneration system for judges.<sup>38</sup> Hence, the Turkish

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<sup>35</sup> ECtHR [GC], *Kleyn and others v. The Netherlands*, judgment of 6 May 2003, § 194.

<sup>36</sup> „The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.“

<sup>37</sup> CDL-AD(2010)004, § 46.

<sup>38</sup> CDL-AD(2009)042, §§ 29, 36; CDL-AD(2010)004, §§ 46, 51, 82.

legislator should **exclude bonuses and adjust the general amount of remuneration, if appropriate.**

#### **IV. CONCLUSIONS**

107. The Law on the Constitutional Court is balanced; it deals with issues that are relevant, and leaves the details to secondary legislation.

108. The major change brought about by the Law is the introduction of the individual complaint, based on the 2010 amendments to the Constitution. While ordinary courts may have feared that the Law would elevate the Constitutional Court to the rank of a "super-court", this seems not to be the case as the scope of the review by the Constitutional Court is limited to the constitutional issues.

109. Providing a constitutional remedy by a specialised constitutional court with restricted jurisdiction is not in violation of the principle of *res judicata*. It could be compared with the possibility of an alleged victim of a final court judgment to apply to the ECtHR for violation of any of his or her rights or freedoms laid down in the ECHR. However, as holds true for the latter court, the Constitutional Court should not act as a "fourth instance" and examine the facts and the law of the case irrespective of their relevance for the constitutional issue put before it. Apart from the consideration that ignoring this limitation would overburden the Constitutional Court this would lead the Constitutional Court to overstepping its jurisdiction *ratione materiae*. This limitation has been laid down in Article 49.7 of the Law.

110. The Law is well drafted coherent and in general in line with European standards. Nonetheless, the Venice Commission makes some recommendations to improve the Law:

1. The general criteria of age, education and eligibility for the office of a member of the Court should be applicable for all categories of candidates (Article 6).
2. A qualified majority should be required in all rounds of voting in the election of members of the Court (Article 7 and Article 146 of the Constitution).
3. The composition of the Constitutional Court's Chambers should be clearly regulated, taking into account the mixed composition of the Court by providing for members from different branches in each Chamber. The composition should be pre-determined in order to exclude the possibility to influence a case through an ad hoc composition (Article 7).
4. The member's oath should refer to the Constitution as a whole (Article 9).
5. To ensure continuity of membership at the Constitutional Court, a member whose term has expired should remain in office until his/her successor takes over (Article 10).
6. The appointment of the Secretary General and his/her deputies should be decided by the General Assembly of the Court (Article 13).
7. The assigning of members to another chamber should be done by lot or by a list agreed upon in advance (Article 13).
8. The elements constituting misbehaviour worthy of disciplinary sanctions should be spelt out more clearly (Article 15).
9. The attendance of the members in scientific gatherings should not depend on the President's approval unless this would result in the member's excessive absence from Court sessions (Article 15).
10. The number of members of the commissions should be determined explicitly (Article 22).
11. The attribution of cases to rapporteur judges should be made either via an automatic system of case-distribution or by a special case-assignment committee composed of the president and members of the Court doing that (Article 24).

12. The procedure of attributing cases to a rapporteur, preparing a report for the members, deliberation and drafting of the judgment should be spelt out in the Law in order to make it evident that the cases are decided upon by the members of the Court only (Article 26).
13. The decision on admissibility has to be examined under the authority of the members of the Court (Article 26).
14. The Law should clearly spell out that nobody can give instructions to a rapporteur judge on how to deal with a case with the exception of the members of the Court when they deliberate (Article 26).
15. For persons applying as assistant rapporteurs and who exceed the age limit by reason of parenthood, this limit should be extended (Article 27).
16. Instead of favouring the parliamentary groups of the ruling party and the main opposition party, all parties in Parliament or only a certain number of individual deputies should be able to request abstract review of laws (Article 35).
17. The time-limit for lodging a direct annulment case should be extended (Article 37 and Article 151 of the Constitution).
18. The time-limit for correcting incomplete petitions should be extended (Article 39).
19. The five month deadline for the preliminary ruling procedure seems to be too short (Article 40.5 CCL).
20. An explicit reference to the European Convention as *interpreted by the European Court of Human Rights* should be added as the basis for individual complaints (Article 45).
21. Public legal persons should be able to invoke applicable rights under the Constitution before the Constitutional Court (Article 46).
22. The explicit exclusion of constitutional complaints based on rights reserved for Turkish citizens is both unfortunate and superfluous (Article 46.3 CCL).
23. The Law should make it clear that foreign representations and courts can only transmit the applications without any intervention in substance (Article 47).
24. The additional deadline for providing missing documents in individual complaint cases should be extended to other cases of minor mistakes (Article 47).
25. A distinction should be made between inadmissibility in the strict sense and the alternative of declining to deal with a case (Article 48).
26. In order to make clear that the Constitutional Court is restricted to examining the constitutional issue before it and the facts and law relevant thereto, the clause "all types of examinations and investigations" in Article 49.3 should be reformulated.
27. The time limit of six months for revocation of interim measures should be amended (Article 49).
28. In order to make sure that the instructions by the Constitutional Court to the ordinary courts are implemented, the decision by the ordinary court should be annulled (Article 49).
29. The Law should clearly spell out that the Constitutional Court can declare null and void the underlying legal regulation in individual complaint proceedings as is the case for applications of annulment (Article 49).
30. The Law should more clearly provide that the Constitutional Court's interpretation of the Constitution will be binding on all ordinary courts (Article 49).
31. The Constitutional Court should be allowed to refer the case to the last instance ordinary court in cases where the unconstitutionality lies only in the unconstitutional interpretation of the law by that court and when there is no need to gather and examine further evidence (Article 50).
32. Central issues of the system of settlement of differences between the chambers should be regulated by the Law rather than by Regulation (Article 50.4).
33. The Constitutional Court should be given the power, if an important constitutional issue has been raised by the individual application, to continue its examination even after the applicant has waived his or her application (Article 50).

34. In cases of dissolution of political parties the minimum quorum requirement should be spelt out (Article 51).
35. The Venice Commission regrets that the draft constitutional amendment, which would have made the dissolution of a political party more difficult, failed to be approved by Parliament in 2010. The Commission recommends taking up this issue again in future constitutional amendments.
36. The Constitutional Court should deal with the financing of political parties only when the Court of Accounts has found a violation of the applicable provisions (Article 55 and Article 69 of the Constitution).
37. The possibility to challenge rapporteur judges should be introduced (Article 60).
38. The two-thirds majority for the vote required to invalidate constitutional amendments should be removed (Article 65 CCL).
39. The binding force of the decisions of the Constitutional Court for other courts should be spelt out more clearly (Article 66).
40. Bonuses should be excluded (Article 69).

111. The Venice Commission remains at the disposal of the Turkish authorities for any further assistance they may need.