

The Judicial Application of Human Rights Law in Turkey

İnsan Hakları Hukukunun Türk Yargısındaki Uygulaması

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Introduction

Turkish judicial system has significantly changed in the last decade mainly with the effect of legal harmonization process of Turkey with the European Union. The fundamental changes made in the Constitution and the other legislative regulations has created high expectations about minimizing the human rights violations and establishing a judicial system, in which people can trust. The legal harmonization process also required great deal of number of institutional changes. This rapid change process, made it difficult but indispensable to update the legal information of Turkish practitioners and especially to update professional knowledge of Turkish judges. However because of some technical deficiencies in access to information and the intense workload of the courts, Turkish judges showed a weak interest in applying human rights law. As a consequence of these insufficiencies it has emerged the need for acceptance of constitutional complaint mechanism. One of the basic aims of Turkish Constitutional complaint mechanism was being the last legal resource with which the protection of constitutional rights and freedoms can be requested. Therefore reducing the number of cases to the European Court of Human

Rights can become possible¹ and the constitutional complaint mechanism can fulfil its function as a domestic law filter.²

The aim of the constitutional amendments in 2004 was to ensure the implementation of the provisions of the European Convention on Human Rights by the all national first instance courts. 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.” Subsequent to this adoption, the question of superiority between international agreements on fundamental rights and freedoms and domestic laws has been resolved theoretically. But in practice Turkish first instance courts did not implied this provision in effective way, because of their conservative legal approach or their lack of technical knowledge about the provisions of the European Convention on Human Rights .³ In this regard the excessive workload is another factor of the reluctance of Turkish Judges.⁴ The new adopted law (No. 6216) aims at the same goal that generates similar concerns.⁵ The target of new adopted constitutional and legislative changes is to protect the human rights at the European standarts. So that the scope of the right

¹ Anayasa Mahkemesinin Kuruluşu ve Yargılama Usuller Hakkında Kanun Tasarısı ile Anayasa Komisyonu Raporu, TBMM 23. Dönem, Yasama Yılı: 5, /696, p. 19; See also Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, University of Cincinnati Law Review, University of Cincinnati 1985.

² Ece Göztepe, “Türkiye’de Anayasa Mahkemesi’ne Bireysel Başvuru Hakkının (Anayasa Şikayeti) 6216 Sayılı Kanun Kapsamında Değerlendirilmesi”, *Türkiye Barolar Birliği Dergisi*, July-August 2011 (95), p. 24.

³ Kemal Başlar, *Türk Mahkeme Kararlarında Avrupa İnsan Hakları Mahkemesi*, Council of Europe European Commission, October 2007, p. 9.

⁴ Haşim Kılıç, Opening Remarks of President of the Constitutional nCourt of Turkey, *Joint Project on Enhancing the Role of the Supreme Judicial Authorities in Respect of European Standarts*, 22 October 2013, http://www.yargitay.gov.tr/abproje/eng/belge/acilis/speech_Hasim_Kilic_EN.php (30.11.2014)

⁵ Péter Paczolay, *Comments on the Law on the Establishment and Rules of Procedure of the Constitutional Cort of Turkey: Law no. 6216, Adopted 20 March 2011*, Venice Commission, Opinion No.612/2011, Strasbourg, 15 September 2011

to appeal is organically linked with the European Convention on Human Rights mechanisms.⁶ However some technical issues needs to be resolved to achieve this goal.

It has recently been observed that, Turkish Constitutional Court has attached an increasing importance to the international human rights instruments. If the development of the Court's approach comes up in more libertist way it can effect the all other domestic courts. For instance if the Constitutional Court interprets the legal provisions in their broadest sense when using its discretion and also if court proceedings are concluded within a reasonable time, then the new accepted legislations will reach its real purpose.⁷ Then with the help of Article 90 of the Constitution and the great contribution of individual complaint mechanism it can be achieved significant progress in the judicial implementation of human rights in Turkey.

The Place of International Human Rights in Turkish Law

Although the Convention is not the only binding source of human rights law, it appears to be the most effective one on the Turkish jurisprudence.⁸ Since the beginning of the legal harmonisation process, protection of human rights are among the priority policy objectives of Turkey. In this regard Turkey has been going through a comprehensive legal process in recent years with a view to consolidating the rule of law and ensuring respect for fundamental rights and freedoms. So far following the comprehensive constitutional amendments of 2001, several reform packages and substantial constitutional amendments have been

⁶ Ece Göztepe, "Türkiye'de Anayasa Mahkemesi'ne Bireysel Başvuru Hakkının (Anayasa Şikayeti) 6216 Sayılı Kanun Kapsamında Değerlendirilmesi", *Türkiye Barolar Birliği Dergisi*, Temmuz-Ağustos 2011(95), p. 15.

⁷ Individual application was introduced into the Turkish legal system by the 2010 constitutional amendments and 23 September 2012 was determined as the first day of receiving applications. The amendment of the Constitution from May 7, 2010 has been introduced the constitutional complaint remedy which has to be concretised by the law on the Establishment and Rules of Procedure of the Constitutional Court.

⁸ Code Number 5170, Article 7 (07.05.2004).

adopted.⁹ One of the most dramatic amendments was made within the 2004 constitutional amendment package. Amended in 2004 Article 90 of the 1982 Constitution addresses the status of international treaties. Article 90 provides that in case of a conflict between international agreements in the area of fundamental rights and freedoms and domestic law due to differences in provisions on the same matter, the provisions of international agreements shall prevail.

The original version of the provision, which repeated verbatim Article 65 of the Constitution of 1961, states that “international agreements duly put into effect bear the force of law. No appeal to the Constitutional Court shall be made regard to these agreements, on the grounds that they are unconstitutional.” However, the formulation of this provision has raised some problematic issues about the status of international agreements in domestic law since the era of the 1961 Constitution. The confusion derived from the prohibition of appeal to the Constitutional Court against an international agreement. Besides intending to eliminate this argument in the constitutional law literature, the necessity to adopt EU regulations into the domestic law as a candidate country required Turkey to add a sentence into Article 90 in 2004.¹⁰

Hence, the amendment made it clear that international human rights agreements have precedence over domestic laws. Accordingly, the ECHR rulings are binding, since they interpret, clarify and concretize provisions of the concerned agreement. However if an international agreement regarding fundamental rights and freedoms conflicts with the Constitution then the latter will still be binding. So if it conflicts with the Constitution, the Turkish Constitutional Court may overcome the problem only by interpreting the Constitution in conformity with the

⁹ *Avrupa Birliği Temel Haklar Sürecinde Yargı ve Temel Haklar Faslı*, Avukatlar için Yargı ve Temel Haklar Projesi, T.C. Avrupa Birliği Bakanlığı, Ankara, Nisan 2014, p. 50-51.

¹⁰ Antonija Petričušić - Ersin Erkan, Constitutional Challenges Ahead the EU Accession: Analysis of the Croatian and Turkish Constitutional Provisions that Require Harmonization with the Acquis Communautaire, *Uluslararası Hukuk ve Politika*, Vol. 6, No. 22, p. 152.

international agreement. In this regard we can say that ECHR affects the Turkish constitutional system through two distinct paths. First, some of the constitutional provisions are rooted in the Convention. The motive for many recent amendments in the Turkish Constitution has been to meet international standards, the Convention and the European Court of Human Rights. These constitutional clauses have supremacy over domestic laws. Second, the Convention and the ECHR guide the interpretation of domestic law in courts.¹¹

The Turkish Constitutional Court has long been prevented domestic law from conflicting with the Convention and the ECHR rulings, thanks to Article 90 of the Constitution that gives international human rights agreements priority over statutory norms. The Constitutional Court uses the principles of the Convention for the interpretation of the characteristics of the State as set out in Article 2 of the Turkish Constitution, including such concepts as democracy, rule of law, and respect for human rights. Since 1982, the Court has referred to the Convention, generally in cases regarding gender equality, fair trials, property rights, freedom of association, and political parties. However, the Court's approach to rights and freedoms has tended to be narrowing and limiting, rather than expansive and broadening. Ironically, the Court uses the Convention to support its restrictive and strict interpretation of domestic norms, at times even disregarding and contradicting the rulings of the ECHR. Cases concerning the dissolution of political parties may be given as good examples to illustrate the court's relatively closed viewpoint. An opposing current is seen in the political process in which recent constitutional amendments follow the EU standards and ongoing ECHR rulings that have been decided against Turkey have made some changes in the Constitutional Court's established perspective on basic rights and freedoms.¹² The Council of State showed its

¹¹ Kemal Başlar, *Türk Mahkeme Kararlarında Avrupa İnsan Hakları Mahkemesi*, Council of Europe European Commission, October 2007, p. 17-18; Selin Esen, How influential are the standarts of the European court of Human Rights on the Turkish Constitutional System in Banning Political Parties, *Ankara Law Review*, Vol. 9, No. 2 (Winter 2012), pp.135-156.

¹² Kemal Başlar, p. 19.

perspective on fundamental rights in early nineties. According to the Council of State anything related to human rights and fundamental freedoms cannot be considered as only a problem of domestic law.¹³ The Council with reference to the Vienne Document stated that, the participating States to the Vienna meeting promised to make their domestic laws, actions and policies comply with international agreements ratified by themselves and the decisions of the Conference on Security and Cooperation in Europe.¹⁴

Some of the provisions of the 1982 Constitution were formulated following the Convention coming into force.¹⁵ The influence of the Convention is evident even in the original text of the Constitution that was prepared under conditions at the time and which reflected the values of its military founders. Consider, for example, Article 15 that establishes the conditions for the suspension of fundamental rights and freedoms in the time of war or other public emergency. The criteria that the Constitution provides to protect rights and freedoms in emergency situations also are found in Article 15 of the Convention.

Article 38 provides another example of direct influence of the Convention on the 1982 Constitution. This article lists some important rules and principles governing criminal law that have found their way into the Turkish Constitution. Some of these are found in the Convention or within the principles of the international law. The 1982 Constitution has been amended several times (in 1987, 1993, 1995, 1999, 2001, 2002, 2004, 2007 and 2010). Many of the important changes related to the human rights were made in order to meet the EU standards as contained in the Convention. To give an example, in 2001, a revision to Article 13 altered the core approach to the restriction on fundamental rights and liberties, so that Article 13 ceased to be a general restrictive clause and became a general protective clause in line with European standards. The 'principle of

¹³ Council of State (Section 5), E. 1986/1723, K. 1991/933 (22.05.1991).

¹⁴ Yasemin Özdek, "The Turkish Constitutional Court and the International Human Rights Instruments", *Turkish Yearbook of Human Rights*, TODAİE Ankara, p. 31.

¹⁵ Şeref Ünal, "Avrupa İnsan Hakları Mahkemesi Kararlarının Türk İç Hukukuna Etkileri", *Anayasa Yargısı Dergisi*, AYM Yayınları no. 42, p. 63-85.

proportionality' comes from the jurisprudence of the German Constitutional Court and the ECHR, whereas the protection of the 'essence' of rights and freedoms was added into Article 13 as the limits of the grounds for restrictions of rights and freedoms.¹⁶

Both of these principles were used by the Constitutional Court prior to the 2001 amendment. However, the amendment provided an additional constitutional guarantee for the protection of rights and freedoms. The right to a fair trial from the Convention was added into the Constitution as well. The 2001 constitutional changes also reduced the period of arrest for collectively committed crimes from 15 to 4 days. This alteration established conformity with the jurisprudence of the ECHR. Another change in 2001 was to Article 14 of the Constitution which prohibits the abuse of fundamental rights and freedoms. Constitutional drafters rewrote this provision and limited the criteria deemed to be a misuse of fundamental rights and freedoms. The second paragraph of the revised article repeats almost verbatim Article 17 of the Convention.¹⁷ All these amendments were made with the effect of the Harmonization process with the aim of strengthening the human rights protection in Turkish domestic law.

Studies to Support the Judicial Implementation of Human Rights Law

We can clearly say that according to the provisions of Turkish Constitution, a judge has an obligation about implementation and monitoring international human rights norms.¹⁸ To what extent the Civil Code, the Turkish Penal Code, the Administrative Procedure Act and other domestic legal norms are binding for Turkish judges, international agreements are also binding. How judges do not have the luxury of neglecting the internal legal norms, they can not ignore international human rights norms too. These principles have been

¹⁶ Kemal Başlar, p. 17-18; Selin Esen, p. 138.

¹⁷ Selin Esen, p. 139.

¹⁸ Andras Baka, Türkiye Barolar Birliği ve İHAUM İnsan Hakları Avrupa Sözleşmesi ve Adli Yargı Sempozyumu açılış konuşması (26-27 September 2003), *İnsan Hakları Avrupa Sözleşmesi ve Adli Yargı*, TBB Yayınları, December 2004, Ankara, p. 19.

widely adopted as a theoretical practice unfortunately violated in practise. As a result, Turkey can be convicted in the Court because of lack of jurisdiction. One of every five cases to bind the Court's decision finding guilty Turkey is verified with numerical data.¹⁹ In this case we have to accept that the most important reason of Turkish Judges to neglect the international norms is the lack of experience about interpreting the international norms and the unawareness how to apply them.

Both the acceleration of the European Union integration process and intensive legislative changes in this direction and due to the proliferation of given decisions by European Court of Human Rights against Turkey all Turkish judges and public prosecutors were subjected to seminar about European Human Rights Convention and European Court of Human Rights. In Turkey, approximately 9,200 judges and public prosecutors are subject to the seminar date with prosecutors in 30 centers between 11.06.2004 and 05.04.2004 due to the decision 15/03/2004 day, and No. 132 of Supreme Board of Judges and Prosecutors. First, according to the program 225 judges and prosecutors were taken "the educational seminar" in Antalya and then Turkish bureaucrats, academics and foreign lawyers appointed by the Council of Europe have made the educational work in this seminar.²⁰ Subsequently, these 225 judges and prosecutors gave two day seminar judges and prosecutors in groups of 2-3 province and their districts. These seminars were made by judges who is working in that area to 40-50 in groups. For example, in Konya, judicial and administrative jurisdiction of 6 judges (ECHR held that the rights position in the domestic law, the Court attribute) have prepared in advance presentation topics. And then these judges have made a presentation case with 4 separate group of about 200 judges in Konya, Karaman and their district's. Due to the this project of Ministry of Justice, 9200 judges and prosecutors were passed seminars even

¹⁹ Kemal Başlar, p. 5.

²⁰ Osman Ermumcu, *Türk (İdari) Yargısında Avrupa İnsan Hakları Sözleşmesi Uygulaması*, <http://www.izmirmim.adalet.gov.tr/> (26.12.2014), s. 21; Hüseyin Bilgin, *Avrupa İnsan Hakları Mahkemesi Kararlarının Türk İdari Yargısına Yansımaları*, Adalet Yayınevi, May 2014.

though it has been short and superficial.²¹ The most important coincidence that, while “place of the Convention in domestic law” was being discussed during the seminar, The Constitution’s Article 90 had been changed by Law No. 5170.²² Thus, to go along with the seminars and the constitutional amendment process has increased the interest in this topic and subject is understood better with live examples.

Observations relating to the seminar showed that the most important reason for not implementing of international norms by place of jurisdiction is “not knowing”. Although participants of seminar were lawyer profession and vast majority of judges and prosecutors at least 8-10 years at their work, the majority of judges and prosecutors did not have information about the Convention’s nature again, scope, and most importantly the location in Turkish law. Few judges and prosecutors who had a little idea about the Convention, did not have enough ideas and experience how to apply the provisions. Most importantly, there was no opportunities to access the Courts’ decisions in Turkish till that time.

Through seminars, primarily discussions about the content of the Convention and place of the Convention in our domestic law has become understandable. Convention is a legislative provision in the law level. In judicial practice, it is understood that it must be regarded as the Courts’ decisions about norms are reference points, not decisions which is taken by judges according domestic law. The Courts’ decisions are important and these decisions should be considered as reference points. After the seminar implementation of the Convention in the domestic courts has become commonplace and thus it can be assumed that purpose of seminar is occurred.

²¹ Osman Ermumcu, p. 23.

²² In the preparation process of the Law No. 5170 and dated May 7, 2004 which made amendments in ten articles of the Constitution, it was thought to provide superiority for all the international treaties before 2004; however, due to the pressure from the public, the principle of superiority only for the international treaties about “the basic rights and freedoms” was accepted. The Law Draft on Changing Certain Articles in the Turkey Republic Constitution, Term: 21, Legislative Year: 3, T.B.M.M. Number: 773.

Direct References to the International Human Rights Treaties by Turkish Domestic Courts

ECHR is a normative part of Turkey since 1954, but the need to take seriously both the public notice and the legal community is after 1987. Turkey has recognized authority of individual applications of European Commission of Human Rights for the first time on 28 January 1987 for a period of three years. After the expiry of this period until the entry into force of Protocol 11, Turkey has extended the commission authority to accept individual applications for three-year periods. Because the Eleventh Protocol of ECHR about individual applications accepted authority reorganized as a mandatory element of the contract, like other Contracting States, Turkey is recognized regardless of any time constraints about right of individual petition to be approved Protocol. Turkey has accepted the compulsory jurisdiction of the European Court of Human Rights in 1990. After this development, mediatic decisions have proliferated attracting public attention.

After the seminars the Turkish Courts Judges began to give place to the Convention in their decisions. Still their judicial references were sometimes in wrong way, because of lack knowledge about the provisions of the Convention. Sometimes the Turkish Constitutional Court has deliberately ignored the Conventional provisions²³ while the first instance courts had applied them.²⁴ The Constitutional Court has sometime repeatedly ignored the European Convention of Human Rights and the case law of the European Court of Human Rights especially in the political parties dissolution cases.²⁵ According to decisions of the Turkish Constitutional Court the Constitutional provisions and the Political Parties Code necessitated the closure of

²³ AYM, E.2004/30, K.2008/55, KT.07/02/2008; AYM, E.2001/8, K.2004/95, KT.14/07/2004; AYM, E.2004/36, K.2009/92, KT.30/06/2004; AYM, E.2004/31, K.2007/11, KT.31/01/2007; AYM, E.2004/25, K.2008/42, KT.17/11/2008.

²⁴ Konya İM, E.2003/783, KT.10/03/2004; Adana 8.ASCM, KT.23/14/2004; Kartal 1.ASHM, E.2005/71

²⁵ AYM, E.2003/6, K.2008/4, KT.08/01/2008; AYM, E.2003/1, K.2008/2, KT.08/01/2008; AYM, E.2003/2, K.2008/3, KT.08/01/2008.

the respondent party.²⁶ In all these cases Turkish Constitutional Court decided just according to national norms.

Contrary to that situation after the amendment of the Constitution from May 7, 2010 has been introduced the constitutional complaint remedy which has been concretised by the law on the Establishment and Rules of Procedure of the Constitutional Court, the role and the legal approach of the Constitutional Court has been changed. After the acceptance of the constitutional complaint mechanism Turkish Constitutional Court began to refer the ECHR provisions. Even in its last period judgements the Court frequently and regularly has cited the ECHR's different desicions to support its jurisprudence.²⁷

We encounter a similar approach when we look at the Court of Cassation's decisions. Some of the references to the ECHR decisions, has been used to strengthen the justification of the Court's desicions. ²⁸ At an important desicion of the Court of Cassation, there was a direct reference to the Article 6/3 of the European Convention of Human Rights. ²⁹ The subject of the case was the right to benefit from free translator of the defendant. The Supreme court also connected this issue with Article 90 of the Constitution. In the first period the Council of State made references to the provisions of the European Convention on Human Rights in its decisions given place with the Universal Declaration of Human Rights. We see the same approach in other desicions³⁰ related with the right to defense in native language. In this case Court of Cassation (Section 4.) ruled for a compensation

²⁶ Oktay Uygun, "Siyasi Partilerin Kapatılması Rejiminin Avrupa İnsan Hakları Sözleşmesi Çerçevesinde Değerlendirilmesi", *Anayasa Yargısı* 17, Anayasa Mahkemesi Yayını, Ankara, 2000, p.256-272; Fazıl Sağlam, Siyasal Partiler Hukukunun Güncel Sorunları, Beta Yayınları, July 1999, İstanbul and Fazıl Sağlam, "Siyasi Partiler Kanunu'nda Uluslararası Standartlara Uygunluk Sağlamak için Yapılması Gereken Değişiklikler", *Anayasa Yargısı Dergisi*, no. 17, 2000, p. 233-254.

²⁷ See Constitutional Court App. No. 2014/256 (25.06.2014). Court cites the ECHR's case law: Sidabras and Dziautas v. Lithuania, App. No: 55480/00 and 59330/00, 27/7/2004, §§ 46-67; Dahlab v. Switzerland (dec.), App. No: 42393/98, 15/2/2001).

²⁸ Kemal Başlar, p. 75.

²⁹ 17.12.1997, 103/D/11272, 01.02.1999, 12725/427.

³⁰ Yargıtay 8. Daire, 1997/8068-9593, 12.06.1997; Yargıtay 4. Daire, 1995/17577/1996/2011, 12.02.1996.

because of the violation of Article 90. of Turkish Constitution and Article 6/3 of ECHR.

The most important aspect of the judicial application matter is understanding the essential role of the Superior courts like the Court of Cassation. That is why the training programmes are vital and they should be implemented in effective way. Also there is a project named "Joint Project on the Role of the Supreme Judicial Authorities in respect of European Standards"³¹ and being carried out by The Court of Cassation as a leading partner. The objective of the project is to contribute to enhancing the role of the higher judiciary in Turkey in initiating further changes in the normative framework and its implementation in line with the *acquis*, the rights and freedoms guaranteed by the European Convention on Human Rights, the provisions of the European Social Charter and other European standards. The specific objective of the project is to enhance the respective roles of the Higher Courts (Constitutional Court, Court of Cassation and Council of State) and of the High Council of Judges and Prosecutors as the superior judicial authorities in the accession process and in the adoption of European high judicial standards. The expected success of the project would be meaningful because The European Convention is an international treaty whose vocation is to be applied at national level, by national judges, not as a foreign instrument intruding into the domestic system, but as part and parcel of that system.³² Therefore, the issue is not just to adopt the European

³¹ Under the scope of the Project it is expected from the members of the beneficiaries to attend Round Table meetings, conferences, study visits and placements in European institutions and will share and exchange experiences on the implementation of European Convention on Human Rights and the European Social Charter in national level. The activities to be implemented under the scope of the project were designed by considering the current functioning of the Turkish judicial system and by keeping the principal of judicial independence in mind. The aim is creating atmosphere that allows sharing experience and knowledge between the members of the Turkish supreme judicial authorities and the EU and the member states' judicial institutions; www.yargitay.gov.tr (30.12.2014)

³² Andras Baka, *Türkiye Barolar Birliği ve İHAUM İnsan Hakları Avrupa Sözleşmesi ve Adli Yargı Sempozyumu açılış konuşması* (26-27 Eylül 2003), *İnsan Hakları Avrupa Sözleşmesi ve Adli Yargı*, TBB Yayınları, December 2004, Ankara, p. 19.

judicial standarts, but also is to improve the approach to the human rights of Turkish judges.

In recent years, in their judgment of the Council of State it is seen that makes a direct reference to the rights enshrined in the Convention.³³ The first instance courts also makes direct reference to the Conventional provisions. In a case relating to restrictions against the boy rights, the first instance court (Konya Administrative Court) applied to the Constitutional Court by favor of Article 90 of the Constitution.³⁴ There is many other judgements referring to the human rights law, but said references are not made sistematically. For instance in the judgement of Council of State Plenary Session of the Chambers for Administrative Cases³⁵ there is a reference to the United Nations Convention on the Rights of People with Disabilities. Another judgement of Council of State³⁶ refers directly both to the 13. Article of the Turkish Constitution and the 10. Article of the European Convention of Human Rights wich are regulating the freedom of expression.

Giving place to a detailed justification of the decision of 2013,³⁷ The Council of State refers to the International Covenant on Economic, Social and Cultural Rights' Article 9. In this judgement Council of State refers to the international instruments in direct way, secondly refers related Turkish constitutional and legislative arrangements. Within its other judgements³⁸ Council of State shows statutory grounds referring to the European Convention making an explanation about article 90 of Turkish Constitution. In adition The Council of State makes references to different resolutions of European Court of Human Rights.³⁹ In other judgements there are referrences to

³³ Kemal Başlar, p. 141.

³⁴ Konya 1.İ.M, E.2003/787, KT.10/03/2004.

³⁵ Danıştay İ.D.D.K., E. 2008/2220, K. 2012/2239.

³⁶ Danıştay İ.D.D.K., E. 2012/2606, K. 2013/1271.

³⁷ Danıştay İ.D.D.K., E. 2012/2606, K. 2013/1271.

³⁸ Danıştay İ.D.D.K., E. 2009/1063, K. 2013/1998; Danıştay 6.D., E. 2011/8152, K. 2013/2702.

³⁹ Danıştay Dergisi (Journal of Turkish Council of State), No. 134/ 2013, p. 122-123.

Article 6. of the Convention and there was cited the case law of the European Court of Human Rights.⁴⁰

Conclusions

As we mentioned above, there is an increasing interest of Turkish domestic courts to international human rights mechanisms. Still that level of interest is not enough to meet the European standards. Just an understanding of protecting fundamental rights and freedoms depends on European Court of Human Rights is not enough to built an effective protection system in domestic law in long term. Although the Turkish legal provisions 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.⁴¹ Still corporation between every instance of judicial body is needed for constitutional court to use constitutional complaint as an effective appeal means.

Turkey’s relationship with the ECHR also shows that the ability of human rights courts to affect change on the ground is conditional on the domestic institutional culture and the Court’s perceived international authority. Despite the authoritative nature of the judgments of the ECHR, the Court is a distant actor in the implementation of its judgments and in ensuring that future decision-making occurs in accordance with them. Without a doubt we can say that, constitutional complaint mechanisms are the most powerful among the mechanisms for the legal protection of constitutional rights in domestic law.⁴² As a result the approach of Turkish constitutional Court is most important and effective one, especially after 2004 constitutional amendment related with the Article 90 and 2010 legislation for individual application.

⁴⁰ Danıştay 14.D., E. 2011/16787, K. 2012/9669.

⁴¹ Peter Paczolay, p. 4.

⁴² Gerhard Danneman, Constitutional Complaints: The European Perspective, *The International and Comparative Law Quarterly*, Vol. 43, No. 1 (Jan. 1994) p. 142; Hasan Tahsin Fendoğlu, Anayasa Mahkemesine Bireysel Başvuru (Anayasa Şikayeti), *Stratejik Düşünce Enstitüsü (SDE)*, March 29. 2010.

For a long period Constitutional Court has used international human rights instruments as a “supporting norm”. The Court also considered the position of international human rights instruments in its decision as “referring”. According to the statements of it, the Court in its many decisions, referred to the Universal Declarations of Human Rights, The European Convention of Human Rights and the European social Charter.⁴³ After the Individual application was introduced into the Turkish legal system by the 2010 constitutional amendments and 23 September 2012 was determined as the first day of receiving applications, Turkish Constitutional Court has taken a more technical function in the protection of human rights. Henceforth the use of judicial reference to the human rights can be expected to be more widespread and more systematic with the positive effect of the individual application mechanism in Turkish jurisprudence. It should be strongly remembered that The European Convention of Human Rights and the other similar human rights conventions are international treaties whose vocation is to be applied at national level, by national judges, not as a foreign instrument intruding into the domestic system, but as a part and parcel of domestic system.

⁴³ Yasemin Özdek, *Avrupa İnsan Hakları Hukuku ve Türkiye*, TODAİE Yayınları, March 2004, p. 85.