

Possible Effects of the Constitutional Complaint Mechanism on Human Rights Practices

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Abstract

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. In most of the Continental European and Latin-American countries, constitutional complaint mechanism is accepted as one of the most effective remedies to protect the fundamental rights and freedoms. In our study, firstly the constitutional complaint mechanism, are dealt with technical aspects, then the possible effects of the constitutional complaint institution for human rights practices are evaluated in accordance with the decisions made by the Turkish Constitutional Court, the European Court of Human Rights case law and the work of the Venice Commission.

Introduction

The increased awareness of human rights questions resulting from the abuse of state power, has led to the introduction or expansion of existing legal mechanisms for the protection of constitutional rights and freedoms in so many countries. Without a doubt we can say that, constitutional complaints are the most powerful among the mechanisms

for the legal protection of constitutional rights.¹ As in many modern constitutions, the Turkish Constitution contains a bill of fundamental rights and freedoms which are directly applicable and not mere declarations of goodwill. Because of this constitutional trend, today in more than forty countries constitutional application mechanism is adopted.²

Overall 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. According to the European perspective, constitutional complaint is characterised by four factors. Firstly they provide a judicial remedy against violations of constitutional rights. Secondly they lead to separate proceeding which are concerned only with the constitutionality of the act in question and not with any other legal issues connected with the same case. Thirdly they can be lodged by the person adversely affected by the act in question. In the last the court which decides the constitutional complaint has the power to restore to the victim his or her rights.³

Giving remedy to the individuals in case of violation of their rights by administrative or judicial decisions is the main justification for introducing constitutional complaint in European perspective. We can say the same for Turkey too. But besides this justification in principle, there is a more practical consideration in this case. According to the report of the Venice Commission, the provisions of the Turkish constitution and related legal provisions of the Law No. 6216 regulating constitutional complaint are meeting the European standards.⁴ But more important

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

² Hasan Tahsin Fendođlu, Anayasa Mahkemesine Bireysel Başvuru (Anayasa Şikayeti), *Stratejik Düşünce Enstitüsü (SDE)*, 29 Mart 2010.

³ Gerhard Danneman, Constitutional Complaints: The European Perspective, *The International and Comparative Law Quarterly*, Vol. 43, No. 1 (Jan. 1994), p.142.

⁴ Péter Paczolay, *Comments on the Law on the Establishment and Rules of Procedure of the Constitutional Court of Turkey: Law no. 6216, Adopted 20 March 2011*, Venice Commission, Opinion No.612/2011, Strasbourg, 15 September 2011.

factor is, how the Turkish Constitutional Court will interpret these provisions and in which way its case law will effect the human rights practices.

We need to examine the case law of the Constitutional Court for the last two years, then can have some results about its legal approach. Actually 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 because of their conservative legal approach or their lack of technical knowledge about the provisions of the European Convention on Human Rights . In this regard the excessive workload is another factor of the reluctance of Turkish Judges.⁵ The new adopted law (No. 6216) aims at the same goal that generates similar concerns. The target of new adopted constitutional and legislative changes is to protect the human rights at the European standarts. However some technical issues needs to be resolved to achieve this goal.

The Basis of Individual Application

Constitutional protection of the rights and freedoms of citizens is interesting but also complex question that takes a central position in most democratic states. The complex nature of the basic form of protection that is directly determined by the character of the constitutional or

⁵ 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 (Erişim tarihi 30.11.2014)

legislative regulation with which the material on rights and freedoms and their protection is regulated. Above all it is referred to the constitution, constitutional laws, laws, charters and declarations as well as acts of international law – mostly because of recent tendencies that the guarantees of rights and freedoms should not be treated exclusively as an internal question of a certain state, but rather as universal principles that are guaranteed by the acts of international law.⁶ Nevertheless, the basic principle of the rights and freedoms of citizens, the method of their protection, the reasons and the form of their limitations should be approved within the constitution, as the highest and primary legal act of the state. On the other hand the constitutional complaint represents an instrument for the protection of the individual rights of citizens. What is referred to actually is an individual initial activity shown through a specific positive and procedural instrument.⁷

The modern concept of constitutional judiciary, based on the ideas of Hans Kelsen and normatively portrayed in the Constitution of Austria in 1920, played a large role in shaping the contemporary physiognomy of the constitutional complaint.⁸ Accordingly the constitutional jurisdiction, like judicial review, is of a kind that makes the constitution effectively considered “law” in its own specific legal signification. Not only is the regime of democracy constitutionalised, but it is also “jurisdictionalised”. It becomes a binding norm, the duty of respecting which is entrusted to the moderating and arbitrating function of the judge. Kelsen described this shift of the political process to the level of legality as “pacification”, underlining the conciliatory function of law. In fact, it is possible to observe a relationship of cause and effect between the low level of con-

⁶ As mentioned in the introduction, this trend has been embodied in the final paragraph of Article 90 of the Turkish Constitution adopted in May 2004.

⁷ Tanja Karakamisheva, *Constitutional Complaint – Procedural and Legal Instrument for Development of the Constitutional Justice (Case Study – Federal Republic of Germany, Republic of Croatia, Republic of Slovenia and Republic of Macedonia)*, <http://www.venice.coe.int>, (Erişim tarihi 02.11.2014)

⁸ Tanja Karakamisheva, *Constitutional Complaint – Procedural and Legal Instrument for Development of the Constitutional Justice (Case Study – Federal Republic of Germany, Republic of Croatia, Republic of Slovenia and Republic of Macedonia)*, <http://www.venice.coe.int>, (Erişim tarihi 02.11.2014), p. 3.

frontation which usually characterises the political/social environment in contemporary democracies and the existence of constitutional jurisdiction or judicial review. According to another opinion constitutional courts have not only had to apply the law as Kelsen intended but have also, under certain guises and at certain times, had to create it. This situation raises some discussions along, basically because constitutional provisions often express no fixed legal concept and therefore permit, the constitutional jurisdiction a profound interpretive possibility; in the final analysis there is a choice for the court interpreter between possible readings of the same provision. This is certainly not what Kelsen wished when he focused on the need for constitutional provisions to express only fixed legal concepts.⁹

Eventually the continental European legal systems treat constitutional complaints as an exceptional and specific legal instrument, one that can be used only if the national legal order does not foresee any other method of protection of the breached right. This means that citizens can use the constitutional complaint after exhaustion of all legal methods for protection of their right. From a practical aspect this means that citizens before using the constitutional complaint should absolve the administrative or regular judicial procedure. It is specified that in terms of injuries, and where initiating of the administrative procedure is permitted, the revision within a litigation or non-litigation procedure could be made after the normal procedure of the legal protection is fully exhausted, and after the decision is made with these legal methods. Such limitations are necessary so that the constitutional complaint will not be used as regular method of legal protection, because this will lead to a situation where the entire load will fall on the Constitutional Court – something that could lead to serious consequences.

As a result the constitutional complaint is accepted as the last resource with which the protection of constitutional rights and freedoms can be requested. This means that it is neither a regular or irregular legal instrument. Using such legal and procedural instrument represents

⁹ Mario Patrono, *The Protection of Fundamental Rights by Constitutional Courts: A Comparative Perspective*, www.upf.pf/IMG/doc/6Patrono, p. 406.

a necessary presumption for satisfying the requests of exhaustion of all National legal instruments as a precondition for reference in front of the international bodies, the European Commission and the European Court for Human Rights established in the European Convention for Human Rights.¹⁰

Technical Issues Regarding the Implementation of Constitutional and Legislative Provisions

One of the problematic issues mentioned above is determining the scope of rights to be protected by individual application. Article 148 of the Constitution stipulates that “anyone who thinks that his/her constitutional rights set forth in the European Convention on Human Rights have been infringed by a public authority will have a right to apply to the Constitutional Court after exhausting other administrative and judicial remedies”.¹¹ Almost the same expression is used in the 45th article of the Law No. 6216.¹² There are seven articles relating to the individual application in this Law.

Jurisdiction of the Court comprises fundamental rights which are regulated by both the Constitution and the European Convention on Human Rights. But some acts of public power are exempted from the scope of individual application. Basically, direct individual applications against legislative acts and regulatory administrative acts are prohib-

¹⁰ Tanja Karakamisheva, p. 4.

¹¹ The original text of the article 148: “... (Ek fıkra: 12/9/2010-5982/18 md.) Herkes, Anayasada güvence altına alınmış temel hak ve özgürlüklerinden, Avrupa İnsan Hakları Sözleşmesi kapsamındaki herhangi birinin kamu gücü tarafından, ihlal edildiği iddiasıyla Anayasa Mahkemesine başvurabilir. Başvuruda bulunabilmek için olağan kanun yollarının tüketilmiş olması şarttır...”

¹² The original text of the article 45: “Herkes, Anayasada güvence altına alınmış temel hak ve özgürlüklerinden, Avrupa İnsan Hakları Sözleşmesi ve buna ek Türkiye’nin taraf olduğu protokoller kapsamındaki herhangi birinin kamu gücü tarafından, ihlal edildiği iddiasıyla Anayasa Mahkemesine başvurabilir.

İhlale neden olduğu ileri sürülen işlem, eylem ya da ihlal için kanunda öngörülmüş idari ve yargısal başvuru yollarının bireysel başvuru yapılmadan önce tüketilmiş olması gerekir...”

ited. The Constitutional Court judgments and the acts excluded from judicial review by the Constitution are also excluded from the scope of the individual application. According to article 45 of the law on the Establishment and Rules of Procedure of the Constitutional Court, the constitutional complaint is limited to cases where the violation of rights defined in the ECHR occurred. That means the scope of the right to appeal is organically linked with the European Convention on Human Rights mechanisms.¹³ As only the rights and freedoms regulated in the European Convention on Human Rights are protected by constitutional complaint, the result is a limited scope of protection compared to the fundamental rights and freedoms enumerated in the Constitution.

Another issue related to jurisdiction of The Constitutional Court is that, the jurisdiction of the Court *ratione personae* comprises both real and legal persons. But, public legal persons cannot lodge individual applications while, private-law legal persons may apply solely on the ground that their rights concerning legal personality have been violated. Foreigners may not petition individual applications concerning rights exclusive to Turkish citizens. That means if a public legal person violates for example the property right, without using its public authority but using its authority to make private law actions, the public person can not be sued. In this case the constitutional complaint mechanism can not perform the function of the protection objective rule of law.¹⁴

Admissibility examination of individual applications is to be made by commissions. A commission may decide that an application is inadmissible unanimously. The aim of the admissibility examination is to control whether the application is within the jurisdiction of the Court. But the Law empowered the Court to eliminate some unimportant applications. The Court may decide an application inadmissible if it is manifestly ill-founded or if it does not bear any significance for the interpretation or application of the Constitution or for the determination

¹³ 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.

¹⁴ Ece Göztepe, p. 29.

of the scope and limits of fundamental rights and the applicant did not suffer any significant damage. The rationale behind the recognition of these inadmissibility reasons is to protect the Court from excessive workload and to provide more time to deal with serious fundamental rights allegations. When an application is found admissible, it is examined by a section on the merits.¹⁵

Another technical problem is related with the differences in approaches or interpretations of the Turkish Constitutional Court and the Strasbourg Court. As we accepted above the Constitutional Court will be constrained to interpret the ECHR, and its interpretation might diverge from that of the Strasbourg Court. Another concern is that the Constitutional Court will interpret also the freedoms and rights defined in the constitution. The two different interpretations (that of based on the constitution, and the other based on the ECHR) might diverge, and lead to different conclusions.¹⁶

Also it seems like there is an inner contradiction between Article 148 of the Constitution, and Article 47(3) of the Law on the Constitutional Court. The wording of the Constitution restricts the scope of individual complaint to the negligence of public power (“violated by public authorities”), while the Law refers also to ACT of public authorities that might include also acts of the legislator (“violated due to a proceeding, act or negligence...”).¹⁷ Then we can say that if it is expected the legal provisions to have an impact on the mechanisms for the development of human rights should be interpreted in its broadest sense. Another aspect of this issue is the functioning of the constitutional complaint mechanism as “a domestic law filter”.¹⁸ Some members of the Parliamentary Commission

¹⁵ Hasan Tahsin Fendoğlu, p. 7.

¹⁶ 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.

¹⁷ 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.

¹⁸ Ece Göztepe, “Türkiye’de Anayasa Mahkemesi’ne Bireysel Başvuru Hakkının (Anayadsa Şikayeti) 6216 Sayılı Kanun Kapsamında Değerlendirilmesi”, *Türkiye Barolar Birliği Der-*

have objected the expansion of the provision in the new adopted Code. These objections are incompatible with the aim of reducing the number of cases to the European Court of Human Rights.¹⁹ If the Constitutional Court interprets the legal provisions in their broadest sense when using its discretion and if court proceedings are concluded within a reasonable time then the new legislation will reach its real purpose. Otherwise the constitutional complaint mechanism can not fulfil its function as a domestic law filter.

An interesting but controversial issue about the constitutional complaint is, whether the right for application has a subjective character or not. Because of the different definitions of the term subjective right, it arises some complications when we look out of the different angles to the issue. If a subjective right truly exists then the national order must regulate an obligation for the court to make meritory decisions in terms of the constitutional complaint, if all previously regulated procedural presumptions are fulfilled. If such an obligation is not regulated then the constitutional complaint becomes not a subjective right, but rather clemency of the court, or in other word, a discretionary right of the court to decide whether or not it will proceed based on the constitutional complaint.²⁰

The Legal Effects of the Desicions

The consequences of the Constitutional Court decisions are regulated in the Article 50 of the Code number 6216. The detailed regulation of the consequences is left to the respective procedural codes (penal, civil, administrative) and the constitutional case law.²¹ 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 inbetween the “real” constitutional complaint, and those that are closer

gisi, Temmuz-Ağustos 2011(95), s. 24.

¹⁹ Anayasa Mahkemesinin Kuruluşu ve Yargılama Usuller Hakkında Kanun Tasarısı ile Anayasa Komisyonu Raporu, TBMM 23. Dönem, Yasama Yılı: 5, ss.: 696, s. 19.

²⁰ Tanja Karakamisheva, p. 6.

²¹ Ece Göztepe, p. 33.

to the norm control. It would be advisable to introduce the possibility of annulment: the Constitutional Court should annul the unconstitutional judicial decision.²²

In order to prevent any conflict between the Constitutional Court and other courts both the Constitution and the Law provided that examination of the sections on the merits is limited to determine whether a fundamental right has been violated and they cannot examine the matters which will be dealt with at the appeal or cassation stages. This provision should be interpreted by the Constitutional Court in a manner that its role in examination of individual application consists solely of determining whether the applicants fundamental rights have been violated. But it should refrain from further commenting on the actions of the judicial bodies, the facts of the case and the proper interpretation of laws by other courts.

The Constitutional Court at the end of an examination, decides whether the fundamental rights of the applicant have been violated or not. If it finds violation, it may also decide what should be done in order to redress the violation and its consequences. In case the violation has been caused by a court decision, the Constitutional Court sends the file to the competent court for retrial in order to restore the fundamental rights of the applicant. But if the Constitutional Court deems that there will be no use of a re-trial, then it may decide some compensation for the applicant or it may ask the applicant to file a case before the competent first-instance court to seek compensation for the damages s/he suffered.

The present regulation might not compel ordinary courts to comply with the Constitutional Court decision in the case. It is not clear from the text of the law what is the consequence of the decision of the Constitutional Court in a constitutional complaint case to the other similar cases pending before ordinary courts. Only the party in the complaint case will profit from the decision or it will effect also the parties in the similar cases. During the consultation with members of the Council of

²² Peter Paczolay, p. 4.

State, they were on the opinion that if a case is decided, other cases on the same issue are also settled.

According to the Rules of Procedure of the Constitutional Court we can say there is three version of decisions that can effect the human rights practises in three different way. The effect of the decision varies according to the legal causes of the judgements.

The first one of the versions is the pilot court decision. In pilot decision making procedure, according to the article 75, Sections can create a pilot decision, if the sections evaluate that application grow out from structural argument and can raise many other similar applications. In this way, it is intended to create a response for similar applications. When section carries out pilot decision procedure, decision will not be applicable only for the petitioner in the case, it will be special to the all similar applications. So that many other similar individual applications can also be solved by administrative bodies such ways. It means that, more than one applications can be solved collectively via pilot decision making procedure.

Pilot Decision can be given in case of Constitutional Court's judicial notice or application of Ministry of Justice or claim of applicant . With this pilot decision, Section can postpone considering such applications about structural problems regarding the decision. Thereby, it is aimed to solve all applications by unique decision thanks to a given pilot decision. If a situation happens like this, it will immediately reported to the persons concerned. However, if section thinks that it is a necessity it can continue handling other applications which are postponed by section.²³

The second version of the court decision is decision of violation. If the Constitutional Court decides that there is a violation of human rights because of a regular court's judgement, it sends the case file back to the regular court, and instructs for retrial to remove the violation and its legal consequences. Then the regular court has to make a retrial taking into consideration the legal reasons on witch the Constitutional Court's

²³ Cihan Yüzbaşıoğlu, "Anayasa Mahkemesi'ne Bireysel Başvuru", www.insanihakukuk.com (Erişim tarihi: 29.11.2014)

decision of violation was based. This results in the regular court, making a judgement which corresponds to the content of the decision of the Court. As the result of the retrial the regular court removes the violation. In this case examination of the Constitutional Court on the legal merits is limited to determine whether a fundamental right has been violated and it cannot examine the matters which will be dealt with at the appeal or cassation stages.²⁴

If the relevant section of the Constitutional Court decides that, there is no way or there is not pragmatic reason to remove the violation by making a retrial, then the Section rules in an appropriate compensation in favour of the petitioner. When there comes up a need to calculate the amount of compensation, the petitioner can apply to the regular courts for a detailed calculation.

Thirdly there is another alternative for the Sections named decision to drop the case. Section or the Commissions of the Constitutional Court can make a decision to drop the case in every phase of the trial. But of course there must be some valid legal reasons to drop the case.

One of them is the application of the petitioner to waive the trial clearly. Second possibility when the plaintiff quits the representation in constitutional lawsuits

Thirdly if the violation and its results are disappeared the Constitutional Court can drop the case. Also departments and commissions in constitutional court are empowered eliminate some unimportant applications. The Court may decide an application inadmissible in case of any other reason too. However, departments and commissions in constitutional court may continue to view lawsuit despite the realization of these conditions mentioned above. Because the aim of constitutional court is to protect and improve fundamental rights and freedoms via constitutional jurisdiction in its broadest sense.²⁵

²⁴ Cihan Yüzbaşıoğlu, p. 2.

²⁵ Cihan Yüzbaşıoğlu, p. 3.

Commission and Sections' decisions is arranged structurally in a similar way. Although in terms of content Commission and Sections' decisions have similar attribute and form. The only one difference is derived from page layout. Matter of how Commission and Section decisions will be lined up is arranged detailed in Standing Order article 77 and 78. Firstly, case events is told and than both sides put forth their allegations and advocacies in the Section and Commission' decision. After, decisions with reasons are announced. Subsequently Judgement on which the decision based is stated too. Furthermore it must be decided in the decision about trial costs. There must be negative vote or different reasons which are separately or together

Decisions made by the Section on the individual application is irreversible and not subject to appeal. The only one decision which can be objected of Constitutional Court is administrative rejection about investigation of acceptability conditions. Judgement on the merits given by Sections can not be examined again in front of the General Assembly. General Assembly has only one function which resolving the differences jurisprudence between

Conclusion

In Turkey, either court of appeal or council of state has a hesitation about constitutional courts' power to reverse their decisions. For this reason intitution of constitional complaint is stirtcly rejeted by this high courts. Constitutional complaint can not be affective untill this problem is solved. Besides that, legislator must revise his view about function and aim of the constitutional complaint for success of the intitution.²⁶ Just an understanding of protecting fundemanetal rights and freedoms depends on European Court of Human Rights is not enuough 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

²⁶ Nazlı Can Ülvan, "Constitutional Complaint And Individual Complaint In Turkey", *Ankara Bar Review*, 2013/2, s. 185.

Constitutional Court is limited to the constitutional aspect of the case.²⁷ Still corporation between every instance of judicial body is needed for constitutional court to use constitutional complaint as an effective appeal means. In Germany the situation is more specific.²⁸

In contribution to the existence and efficiency of the application of this procedural-legal instrument, it is important to mention the need for previous exhaustion of all legal instruments of citizen rights and freedoms protection within the national legal order, as a precondition for submitting the instruments for human rights protection to the international judiciary organs, the European Commission and European Court of Human Rights, as subjective right guaranteed within the European Convention for Human Rights.²⁹

It is a fact that constitutional courts within Europe are following a trend of expanding and contemporizing their competences on the benefit of strengthening the quality of personal activism. In European constitutional-legal practice, acting on a constitutional complaint as a specific positive-procedural instrument for protection of constitutionally guaranteed citizen rights and freedoms of citizens is becoming a more and more acceptable and applicable instrument. Positive experiences that are extracted from the application of this instrument in Spain, Germany, Slovenia, Croatia, etc, are having in mind the power and effectiveness of this instrument in the legal system in terms of citizen rights and freedoms protection. Additionally to the existence of the constitutional complaint is the dilemma of how many judges in the regular court system are legally prepared to examine constitutional issues, or if they are prepared would that lead to implementation of double standards in constitutionalism.

²⁷ Peter Paczolay, p. 4.

²⁸ If the judgment is of one of the highest courts, the German Constitutional Court will refer the matter back to the competent court. However, if the basis for the challenge is a judgment which indirectly violates fundamental rights because it was founded on an unconstitutional law, the Constitutional Court as well as declaring the judgment void will also declare the statute void. In doing this the Constitutional Court has become an institution with the capacity to dictate a uniform interpretation of the Constitution and to impose it on the ordinary courts, Mario Patrono, p. 413.

²⁹ Tanja Karakamisheva, p. 7.