

CONSTITUTIONAL COMPLAINT AND INDIVIDUAL COMPLAINT IN TURKEY

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In modern day states of law, giving people right to litigate in both general trial and administrative court provides the enlargement of the sphere of the judicial participation. Institution of constitutional complaint, serves to this participation in the aspect of constitutional jurisdiction at important amounts.

According to the article 90/1 of German Constitutional Court Law “Any person who claims that one of his basic rights or one of his rights under Articles (4), 33, 38, 101, 103 and 104 of the Basic Law has been violated by public authority may lodge a constitutional complaint with the Federal Constitutional Court.” The purpose of the constitutional complaint is not only protect rights of status navigatus but also rights of status positivus. The first aim of this institution is to protect and improve fundamental rights and freedoms via constitutional jurisdiction. On the other hand constitutional complaint also has objective functions like keeping the community legal order and developing the constitutional law. Constitutional complaint is a legal remedy that intended to resolve violation of fundamental rights. Because of that, with that institution, legislation or paying compensation can not be taken into consideration.

INDIVIDUAL COMPLAINT

To make an individual complaint, complainant must assert that his rights has been violated by a public force. With the statement of public force legislative, executive and jurisdiction organs must be understood. Direct constitutional complaint against administrative actions can be made only exceptional situations of exhaustion of legal remedies condition.

As a rule, only verdict of the court decision can be subject to the constitutional complaint. But if justification of the decision is creating an independent reason for complaint, complainant can also complaint against that part. Again, as a rule, final decisions can be subject to the constitutional complaint. There must be an important and worth to protect value to become interim decisions subject to the constitutional complaint.

In constitutional complaint lawsuits, there are no plaintiff and defendant parties. In constitutional complaint, respondent is neither public body which is the owner of the subject matter nor government. There is only demand for removal of the treatment/action/negligence. Although it is not technically true, the term plaintiff can be used for the person who applies constitutional court. If it is appropriate, fundamental rights are also effective for private law legal entities. Because of being carrier of the public force, public legal entities do not have capacity to become party in constitutional complaint as a rule. But this rule has exceptions arise from both some constitutional rules and qualifications of public legal entities.

One must have legal interest to apply constitutional complaint. It is not enough to have right to litigation to sue. Moreover plaintiff must have judicial interest to sue. That is to say, right to litigation is limited by the judicial interest. Judicial interest must be personal, direct and up to date.

To apply constitutional complaint, legal remedies must be exhausted. If it is possible for complainant to remove negligence which is occurred from public force action in domestic court and he takes a valid legal means back or does not use it or application become invalid because of formal reasons, legal remedies are not exhausted. As a result of being last and extraordinary legal remedy to prevent violation of fundamental rights, condition of exhaustion of legal remedies is a natural consequence.

According to article 93/I of constitutional court code , application of constitutional complaint must be done and justify in one month. If it is done ex officio according to the relevant procedural law rule, duration starts from the date of notification or pronouncement. In other conditions, it starts with declaration of the decision or if declaration can not made, it starts from notification to the complainant in whichever way. According to the 93/III if constitutional lawsuit is against an enactment or a public force proceeding which there is no legal remedy against it, constitutional complaint application can be made in a year after inurement of code or public force proceeding happen.

According to the article 95/I if constitutional complaint is accepted, which constitutional rule is violated by which action or negligence should be indicated in the decision.

When a constitutional complaint against a court decision is accepted, constitutional court reverses the judgement and sends the case to the competent court.

When a constitutional complaint against a code is accepted, this code become void.

The complainant may lodge the complaint himself. Should he require representation, this may in principle only be carried out by an attorney registered with a German court or by a lecturer of law at a German institution of higher education (Article 22 (1), sentence 1, BVerfGG). Other persons may only be permitted by the Federal Constitutional Court to act as counsel if it deems this necessary in exceptional cases (Article 22 (1), sentence 4, BVerfGG). The powers of attorney must be granted in writing and must relate expressly to the proceedings in hand (Article 22 (2) BVerfGG)

The constitutional complaint must be lodged and reasons given in writing. These reasons must, at the very least, contain the following information (Articles 23 (1), sentence 2, 92 BVerfGG):

1. The sovereign act (court decision, administrative act, law) against which the complaint is directed must be precisely described (in the case of court decisions and administrative acts the date, reference and day of proclamation or receipt must be given).

2. The basic right or similar right allegedly violated by the sovereign act under dispute must be named or at least described in terms of its legal content.

3. It must be stated in what individual areas the violation of the basic right is alleged. To this end the disputed court decisions, notices etc. must be attached as originals, certified copies or photocopies; at the very least their content must be definable from the content of the complaint.

Proceedings before the Federal Constitutional Court are free of charge. The Court may, however, charge the complainant a fee of up to 5,000 Deutsche Mark if the lodging of the complaint represents an abuse (Article 34 (2) BVerfGG).

INDIVIDUAL COMPLAINT IN TURKEY

The amendment of the Constitution from May 7, 2010 (No. 5982) 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. Constitutional complaint is one of the most effective remedies to protect the fundamental rights and freedoms. It constitutes a new challenge for the Turkish constitutional review system.

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. 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.

The Law on Establishment and Rules of Procedures of the Constitutional Court (Law No: 6216), has been enacted and entered into the force. There are seven articles relating to the individual application in this Law. Jurisdiction of the Court *ratione materiae* comprises fundamental rights which are regulated by both the Constitution and the European Convention on Human Rights. But some acts of public power exempted from the scope of individual application. Basically, direct individual applications against legislative acts and regulatory administrative acts are prohibited. The Constitutional Court judgments and the acts excluded from judicial review by the Constitution are also excluded from the scope of the individual application.

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.

According to the Law, individual applications are subject to payment of a fee. The amount of fee is determined by the Law as 172,50 Turkish Liras (approximately 100 US Dollars). Individual applications must be filed within thirty days after the notification of the final proceeding which exhausts legal remedies.

Admissibility examination of individual applications is to be made by commissions. The structure of the commissions has not been regulated by the Law and it was left to the Rules of Procedure. 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 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.

If an application is found admissible, it is examined by a section on the merits. The sections convene with four members under the chairmanship of a deputy president. Principally the examination is to be made on the file, but section may decide to hold a hearing if it deems necessary to do so.

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 applicant's 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.

At the end of an examination, the Constitutional Court 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.

Finally, the Court may impose a fine of up to 2000 Turkish Liras in addition to the costs arising from the proceedings on the applicants who clearly abused the right of individual application.

In Turkey, either court of appeal or council of state has a hesitation about constitutional courts's power to reverse their decisions. For this reason intitution of constitutional complaint is stirectly 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. 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. Corporation between every instance of judicial body is needed for consitiutional court to use constitutional complaint as a effecitve appeal means.

RESOURCES

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