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The Constitutional Court of the Republic of Turkey
Türkiye Cumhuriyeti Anayasa Mahkemesi

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**“COOPERATION OF CONSTITUTIONAL COURTS IN EUROPE –
CURRENT SITUATION AND PERSPECTIVES”**

**REPORT PREPARED BY
THE CONSTITUTIONAL COURT OF THE REPUBLIC OF TURKEY**

I. Constitutional courts between constitutional law and European law

1. Is the constitutional court obliged by law to consider European law in the performance of its tasks?

Initially, it should be reminded that Turkey is not a member of the European Union. Therefore, there is no legal regulation obliging the consideration of the European Union Law by the Constitutional Court.

Secondly, Turkey is party to many conventions concerning human rights at the level of the Council of Europe. Within this framework, these international documents are to be taken into consideration in some cases as required by the provisions of the Constitution. In this respect, Articles 15, 16, 42 and 92 of the Constitution clearly make references to the norms and obligations of international law.

One of the fundamental provisions of the Constitution, which determines the status international instruments on human rights including the Council of Europe treaties, is the last paragraph of the Article 90:

“International treaties duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these treaties, on the grounds that they are unconstitutional. (Sentence added on May 7, 2004; Act No. 5170) In the case of a conflict between international treaties, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international treaties shall prevail.”

In this context, the Constitutional Court utilizes international human rights instruments as supportive standard norms in its decisions with regard to constitutional review.

Finally, in result of landmark constitutional amendments approved by public referendum in 2010, a new remedy, which enables individuals to access to the Constitutional Court whose rights to be alleged by public power, was introduced. Crucial points of individual application system, entered into force practically as of 23 September 2012, are regulated in Article 148 of the Constitution. Thus, direct application of the European Convention on Human Rights and its additional protocols (to which Turkey is a party) became part of the review criteria in individual applications. The Turkish Constitutional Court has to consider the European Convention on Human Rights ("the ECHR") and the case-law of the European Court of Human Rights ("the ECtHR") in its decisions with regard to subject and scope of individual applications.

***2. Are there any examples of references to international sources of law, such as
a) the European Convention on Human Rights,***

Turkey became party to the European Convention on Human Rights in 1954. From its establishment in 1962 up to now, the Constitutional Court referred to the European Convention on Human Rights in its more than 150 judgments in classical constitutional review. As regards individual application review, the Court has been making references to the principles of the Convention and the case-law of the ECtHR more intensively after the introduction of the institution. Between 23 September 2012 and 8 November 2013 the Turkish Constitutional rendered 13 precedent judgments on merits finding violations of fundamental rights and freedoms, in which references to the Convention and the Strasbourg case-law were made. It should be mentioned here that decisions on admissibility of individual application cases have reached over 4000, in which the relevant Strasbourg case-law was closely scrutinized.

b) the Charter of Fundamental Rights of the European Union,

The Constitutional Court referred to the Charter of Fundamental Rights of the European Union only in its judgment dated 8/12/2011 and numbered 2011/165 with registry number 2010/119.

c) other instruments of international law at European level,

The Constitutional Court referred to the documents of the Council of Europe such as the European Social Charter and recommendations adopted by the Committee of Ministers in its more than 20 judgments. There is reference to the European Court of Justice in one judgment and to the European Commission of Human Rights in more than 10 judgments.

d) other instruments of international law at international level?

The Constitutional Court referred to the Universal Declaration of Human Rights in its more than 100 judgments. 4 references to International Court of Justice were identified.

3. Are there any specific provisions of constitutional law imposing a legal obligation on the constitutional court to consider decisions by European courts of justice?

There is no specific legal regulation in the Constitution nor in other domestic law obliging the Turkish Constitutional Court to consider the decisions of the international courts, including the European Court of Human Rights. However, The Constitutional Court prefers to interpret the references made in the Constitution to the European Convention on Human Rights covering the relevant case-law of the European Court of Human Rights.

4. Is the jurisprudence of the constitutional court influenced in practice by the jurisprudence of European courts of justice?

It is not possible to say that the jurisprudence of the European Court of Justice has a specific effect on case-law of the Turkish Constitutional Court. As for the case-law of the European Court of Human Rights, it can be mentioned that the Turkish Constitutional Court and the Strasbourg Court interrelate with each other especially on dissolution of political parties and individual applications for protection of fundamental rights and freedoms.

5. Does the constitutional court in its decisions regularly refer to the jurisprudence of the Court of Justice of the European Union and/or the European Court of Human Rights? Which are the most significant examples?

It is not surprising that there are really few references to the decisions of Court of Justice of the European Union, considering the fact that Turkey is not yet a member of the European Union.

It is necessary to evaluate the case-law of the European Court of Human Rights (ECtHR) separately. Considering that Turkey became party to the European Convention on Human Rights in 1954 and adopted individual application and recognized the compulsory jurisdiction of the ECtHR. Therefore the consideration of the European Convention on Human Rights by the Constitutional Court has emerged as a necessity.

As mentioned above, most visible examples of the mutual influence between the case-law of the ECtHR and the case-law of the Constitutional Court may be dissolution of political parties. The Constitutional Court rendered a number of decisions on dissolution of political parties in last two decades. While some of these decisions were acknowledged by the Strasbourg Court, some of them were found contrary to the Convention. However, as of early 2000s, a more liberal approach was preferred in the case-law of the Constitutional Court on dissolution of political parties. The most visible example of this new orientation in case law is the decision of the Constitutional Court dated 11/12/2009 and numbered 2009/4 with registry number 2007/1 on the dissolution of the Democratic Society Party. The Court gave much emphasis on the criteria adopted by the European Court of Human Rights and the Venice Commission when rendering this judgment.

It was noted in the mentioned judgment that Article 90 of the Constitution rendered it necessary to consider Turkish constitutional order along with universal standards of fundamental rights and freedoms generated by international organizations of which Turkey was a member; in this sense, the related provisions of the Constitution were to be “*evaluated together with the European Convention on Human Rights and the case law of European Court of Human Rights on dissolution of political parties along with the criteria determined by the Venice Commission identifying the European common standard.*”

Within this framework, the Court notes that it applies the criteria in question by referring to the judgment of *Herri Batasuna and Batasuna/Spain* rendered by the ECtHR on dissolution of political parties. Finally, the Constitutional Court decided on the dissolution of Democratic Society Party on the grounds that “*it aimed to attain ethnic disintegration by means of discourse and acts in defiance of democratic principles along with the support of the terrorist organization and used terror as a tool for its own political strategies*” by abusing rights and freedoms and principles of political pluralism. According to the Court, “*it is obvious that this measure shall be in a manner which is proportionate to the legitimate aim targeting the protection of national security and constitutional order, which is necessary in a democratic society and which responds to a pressing need.*”

Another example could be the decisions rendered within the framework of abstract and concrete norm reviews. The Constitutional Court sometimes utilizes the principles of the European Convention on Human Rights and the case-law of the Strasbourg Court, while determining the elements and scope of a right or freedom, although it is not explicitly included in the Constitution for abstract and concrete norm reviews.

For instance, the Constitutional Court in its decision dated 16/6/2011, judgment number: 2011/104, registry number 2008/12, reached the conclusion that the right to a fair trial included in Article 36 of the Constitution covered the principles of adversarial adjudication and equality of arms as understood in Article 6 of the Convention and the case-law of the ECtHR. Therefore, a rule shall comply with the Constitution only when it complies with these principles: “*It was emphasized in the justification of “fair trial” clause added to Article 36 by 2001 [constitutional] amendments that the right to a fair trial, secured by international conventions to which we are a party, was included in the article text. Among the fair trial criteria of these international conventions, including the European Convention on Human Rights, and the practice of the European Court of Human Rights; the principles of adversarial adjudication, reasoned judgment, right to be present in a hearing, right to remain silent, equality of arms, being face-to-face and directness as well as other rights of the accused exist.*”

Finally, the judgments and decisions rendered in result of individual applications are to be mentioned under this title. Within this framework, the Constitutional Court judged that “*The subordinate principles and rights arising from the text of the European Convention on*

Human Rights and the judgments of the European Court of Human Rights as the embodiment of the right to a fair trial are in fact the elements of the right to a fair trial included in Article 36 of the Constitution” in its decision dated 2/7/2013 with application number 2012/13. In this sense, according to the Court, “the right to a fair trial within reasonable time also falls into the scope of the right to a fair trial in accordance with the principles mentioned above; furthermore, it is obvious that Article 141 of the Constitution providing that the conclusion of cases at the least expense and as quickly as possible is the duty of judiciary is to be considered in the evaluation of the right to a trial within reasonable time, as required by the principle of totality of the Constitution.” The Constitutional Court referred to the criteria generated by the ECtHR on determination of reasonable time in its judgment: “Issues such as the complexity of the case, the number of instances, the attitude of parties and related authorities during the litigation process and the quality of the applicant’s benefit in the swift conclusion of the case are the criteria generated by the European Court of Human Rights by its case law in the determination of whether the lapse of time [period] in a case is reasonable.”

6. Are there any examples of divergences in decisions taken by the constitutional court and the European courts of justice?

As previously mentioned, Turkey is currently not a member of the European Union, and therefore, not under the obligation to consider the case-law of the European Court of Justice. Thus, it is not possible to identify divergences between decisions of the Constitutional Court and the European Court of Justice.

As for the divergences between the decisions of the Turkish Constitutional Court and the European Court of Human Rights, a brief information was provided above in response of Question 5.

7. Do other national courts also consider the jurisprudence of European courts of justice as a result of the constitutional court taking it into consideration in its decisions?

At this point, Article 90 of 1982 Constitution titled “Ratification of International Treaties” is to be particularly and separately mentioned. This Article introduces a very explicit provision towards the fulfillment of the integration of domestic law with international

human rights law as explained in response I.1. If the provision of a law conflicts with a duly ratified international treaty concerning fundamental rights and freedoms, provisions of international instrument on fundamental rights and freedoms shall prevail. Therefore, the first and foremost application of the European Convention on Human Rights in the decisions of national courts is a constitutional obligation. Hence, national courts have referred to decisions of the European Court of Human Rights in their decisions especially since 2004. Finally, according to Article 153 of the Constitution, the judgments of the Constitutional Court are binding on the legislative, executive and the judiciary.

8. Are there any examples of decisions by European courts of justice influenced by the jurisprudence of national constitutional courts?

As mentioned above, the Turkish Constitutional Court's interpretation especially on dissolution of political parties, concept of secularism and headscarf issues became visible in the relevant case-law of the European Court of Human Rights.

II. Interactions between constitutional courts

1. Does the constitutional court in its decisions refer to the jurisprudence of other European or non-European constitutional courts?

Turkish Constitutional Court follows the case-law of foreign constitutional courts both within the framework of norm reviews and individual applications. Thus, it closely pursues the developments in comparative constitutional law. During the preparation of internal research reports of the cases, the sources of comparative constitutional law, the case-law of the international human rights courts and works of international institutions constitute an important part of the reports. However, the judgments of the Turkish Constitutional Court, in which it referred to case-law of foreign constitutional courts, are very rare. On the other hand, judges of the Constitutional Court explicitly note in their dissenting opinions that they make use of case-law of constitutional courts of different countries. Dissenting opinions in the decision dated 19/1/2012 and numbered 2012/8 with registry number 2010/40 and the decision dated 10/3/2011 and numbered 2011/49 with registry number 2009/85 could be examples in this respect.

2. If so, does the constitutional court tend to refer primarily to jurisprudence from the same language area?

Turkish Constitutional Court believes in the importance of regional and international cooperation in the resolution of constitutional issues and pursues the case-law generated in different languages, primarily English, German and French. Therefore, the possible references may be mainly from the judgments or case-law compilations published in these languages.

3. In which fields of law (civil law, criminal law, public law) does the constitutional court refer to the jurisprudence of other European or non-European constitutional courts?

Turkish Constitutional Court pursues the case-law of foreign constitutional courts in both civil and criminal adjudication and adjudications concerning public law.

4. Have decisions of the constitutional court noticeably influenced the jurisprudence of foreign constitutional courts?

It is known that the Turkish Constitutional Court's interpretation especially on dissolution of political parties, concept of secularism and headscarf issues have been evaluated by the European and non-European constitutional courts.

5. Are there any forms of cooperation going beyond the mutual acknowledgement of court decisions?

Turkish Constitutional Court attaches great importance to the cooperation with national supreme and/or constitutional courts, international courts and institutions. In this respect, every year either on occasion of anniversary activities or on other occasions conferences, bilateral working visits and workshops are held. Turkish Constitutional Court has signed bilateral memoranda of cooperation with some foreign constitutional courts to exchange knowledge and experience. More information can be found on website of the Court (www.anayasa.gov.tr).

Furthermore, in result of geographical position of Turkey, Turkish Constitutional Court is not only the member of European institutions but also the Asian institutions. The Court holds currently the term presidency of the Association of Asian Constitutional Courts and Equivalent Institutions. This Association enables the sharing of experience and knowledge on constitutional and human rights issues between member Constitutional/Supreme Courts through various activities. Recently, the Court held an International Summer School on Comparative Constitutional Law. This year's theme was "Principle of Equality and Prohibition of discrimination".

III. Interactions between European courts in the jurisprudence of constitutional courts

The questions under this title are not responded, since Turkey is not a member of the European Union.

1. Do references to European Union law or to decisions by the Court of Justice of the European Union in the jurisprudence of the European Court of Human Rights have an impact on the jurisprudence of the constitutional court?

2. How does the jurisprudence of constitutional courts influence the relationship between the European Court of Human Rights and the Court of Justice of the European Union?

3. Do differences between the jurisprudence of the European Court of Human Rights, on the one hand, and the Court of Justice of the European Union, on the other hand, have an impact on the jurisprudence of the constitutional court?