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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT CONSTITUTIONAL AMENDMENTS WITH REGARD TO THE CONSTITUTIONAL COURT OF TURKEY

Prepared by the Constitutional Court of Turkey and transmitted to the Turkish Grand National Assembly

DRAFT BILL PROPOSAL
ON CONSTITUTIONAL AMENDMENTS
WITH REGARD TO THE CONSTITUTIONAL COURT*

1. The terms which read "the members of the Constitutional Court" in Article 104 paragraph (c) of the Constitution shall be amended as "two members of the Constitutional Court".

Reasoning:

The duty and power of the President provided in paragraph (c) of Article 104 of the Constitution shall be harmonized with the amendments to be made on forms of elections of the Constitutional Court members.

2. Article 146 of the Constitution shall be amended as follows:

"Article 146- The Constitutional Court shall be composed of seventeen members sitting in two chambers and in plenary assembly.

Five of the members (of the Constitutional Court) shall be elected from the Court of Cassation, four members from the Council of State, one member from the Military Court of Cassation and one member from the Military High Administrative Court by the Plenary Assemblies of these courts, by absolute majority of the total members and by secret ballot, from among their members and presidents who have served at least 3 years as members of high courts and who are over the age of fifty. If an absolute majority cannot be obtained in the assemblies, the candidate who has received the highest number of votes –with a condition of not being below two-fifths of the total votes- shall be assumed elected after the sixth round of elections.

One member shall be elected from among three candidates –to be nominated by the Plenary Assembly of the Higher Education Institution- who have worked as professors in the fields of general public law, constitutional law, administrative or criminal law; one member shall be elected from among three candidates –to be nominated by the Union of Turkish Bars- who have worked actually at least 15 years as lawyers; two members shall be elected from among the presidents and the members of the Court of Audit who have served at least 3 years as members of the Court of Audit, totally four members (of the Constitutional Court) shall be elected by the Plenary Assembly of the Turkish Grand National Assembly by secret ballot and by absolute majority of its total members. If an absolute majority cannot be obtained, the candidate, who has received the highest number of votes –with a condition of not being below two-fifths of the total votes- shall be assumed elected after the sixth round of elections. Two members (of the Constitutional Court) shall be appointed by the President of the Republic from among

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* **Unofficial Translation made by Reporter Judge Bahadır KILINÇ**

governors, ambassadors, undersecretaries and deputy undersecretaries who has served at least 3 years at their posts and graduated from faculties of law, economy and political sciences.

The members of the Constitutional Court shall be elected/appointed for a period of 12 years. The members who shall be elected by the Turkish Grand National Assembly and the members who shall be appointed by the President shall be required to be over fifty years and not to be members or presidents of high courts. The principles and procedures of nominations and elections to be held by the legislative shall be regulated by law.

The Constitutional Court shall elect a president and two deputy presidents from among its members for a term of four years by secret ballot and by an absolute majority of the total number of members. They may be re-elected at the end of their term of office. The quorum of session in these elections shall be at least thirteen.

The members of the Constitutional Court shall not assume other official and private functions, apart from their main functions.

Reasoning:

The day-by-day increasing workload of the Constitutional Court and in addition to this the introduction of individual application "constitutional complaint" into the existing system make it necessary to re-organize the structure of the Constitutional Court. Especially, after 2001 there was a considerable increase in the number of both the annulment and contention of unconstitutionality files brought before the Constitutional Court. The number of the annulment and contention of unconstitutionality files was yearly around 70-80 till to 2001, since then the number of those files were increased 5 times higher than the average. Besides; the Grand Court[1] files, files on dissolution of political parties, financial supervision of political parties, the objections against losses of Parliamentary membership and parliamentary immunity also fall within the competence of the Constitutional Court. Taking into consideration of such a workload, it became hardly possible for the Court to maintain an efficient and productive functioning with one chamber composed of 11 members and to produce new case-law which will add new dimensions to fundamental rights and freedoms.

In order to surmount this difficulty, as is the case in most of the European constitutional courts, transforming (the existing system) into a court of two chambers and a plenary assembly was chosen as a suitable solution. In this system, it is accepted that all the files shall be distributed to the chambers equally except files on examination of constitutional amendments, dissolution of political parties and trials to be performed in capacity of the Grand Court. This approach would be advantageous in respect of decreasing the workload and maintaining a just distribution of files. It was thought that

[1] The capacity of the Constitutional Court while trying high officials such as the President, the Prime Minister, ministers, members of the High Courts etc. on account of crimes relating to their functions.

the possible inconsistencies between the case-law of the chambers can be settled by the Plenary Assembly of the Court and the model was prepared so as to realize it.

Since it became clear, by the experience of many years, that the sources providing members to the Constitutional Court are reflecting the needs of our Country quite correctly, the same composition will be maintained in organization of the new chambers and member sources are determined in accordance with this preference. Such a re-organization made it necessary to increase the number of the members up to seventeen.

Taking into consideration the principle of independence of judiciary and in order to profit from the contribution of national will, the duty of appointing the members is distributed among the High Courts, the Turkish Grand National Assembly and the President. Thus, 5 members from the Court of Cassation, 4 from the Council of State, 1 from the Military Court of Cassation and 1 from the Military High Administrative Court, namely 11 members shall be elected by the High Courts. For the members to be elected from among lawyers and professors by the Turkish Grand National Assembly, the participation of the Higher Education Institution and the Union of Turkish Bars is included in the elections. The Turkish Grand National Assembly shall elect the other two members directly from among the presidents and members of the Audit Court. Similarly, the President of the Republic shall appoint directly two members from among the high officials who have worked at least 3 years at particular posts.

In principle, absolute majority is accepted for the elections to be held for each vacant post. However, other proportions are also accepted to solve possible deadlocks in elections.

Bearing in the mind that serving in the Constitutional Court requires certain amount of knowledge and experience, the condition of being over the age of fifty and the condition of having worked at least 3 years at the last posts are set forth for the members to be elected from high courts and officials.

The term of Office for membership is limited with 12 years. As a matter of fact, the periods of membership are between 8 and 12 years in European Countries.

The President and Deputy Presidents of the Constitutional Court shall be elected at a session with the participation, in principle, of all members. However, taking into consideration of different circumstances, such as membership post/s becoming vacant because of different reasons, health problems or official engagements of the members, it is foreseen that participation of all members may not be maintained at the same time. Thus, the quorum of session is determined as at least 13 members. Two Deputy President posts are provided in order that the Deputy Presidents can preside two chambers. The President shall represent the Court and be responsible from the general management of it and preside its' Plenary Assembly.

3. Article 147 of the Constitution shall be amended as follows:

"Article 147**-** The members of the Constitutional Court shall retire on reaching the age of sixty-seven.

Membership in the Constitutional Court shall terminate automatically if a member is convicted of an offence requiring his/her dismissal from the judicial profession, it shall terminate by a decision of an absolute majority of the total number of members of the Plenary Assembly of the Constitutional Court if it is definitely established that he/she is unable to perform his/her duties on account of ill-health."

Reasoning:

The knowledge and experience gained during the membership of the Constitutional Court bears great importance for the Court. Certain circumstances, such as maximizing the profit from such knowledge and experience, limitation of the term of office with 12 years, the condition of being over the age of fifty, make it necessary to increase the retirement age up to sixty-seven. In the second paragraph of the article, it is approved that the decision on termination of membership on the ground of health problems is to be delivered by the Plenary Assembly of the Constitutional Court in accordance with the new structure of the Court.

4. Article 148 of the Constitution shall be amended as follows:

"Article 148**.** The Constitutional Court shall examine the constitutionality in respect of both form and substance of laws, decrees having the force of law, and the Rules of Procedure of the Turkish Grand National Assembly. Constitutional amendments shall be examined and verified only with regard to their form. However, no action shall be brought before the Constitutional Court alleging unconstitutionality as to the form or substance of decrees having the force of law issued during a state of emergency, martial law or in time of war.

The verification of laws as to form shall be restricted to consideration of whether the requisite majority was obtained in the last ballot; the verification of constitutional amendments shall be restricted to consideration of whether the requisite majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates under urgent procedure was complied with. Verification as to form may be requested by the President of the Republic or by one-fifth of the members of the Turkish Grand National Assembly. Applications for annulment on the grounds of defect in form shall not be made more than ten days after the date on which the law was promulgated; nor shall objection be raised.

The President of the Republic, members of the Council of Ministers, presidents and members of the Constitutional Court, of the High Court of Cassation, of the Council of State, of the Military Court of Cassation, of the High Military Administrative Court, their Chief Public Prosecutors, Deputy Public Prosecutors of the Republic, and the

presidents and members of the Supreme Council of Judges and Public Prosecutors, and of the Audit Court shall be tried for offences relating to their functions by the Plenary Assembly of the Constitutional Court in its capacity as the Grand Court.

The Chief Public Prosecutor of the Republic or Deputy Chief Public Prosecutor of the Republic shall act as public prosecutor in the Grand Court.

An application for a review against the judgments of the Grand Court can be made. The judgements of the Plenary Assembly in respect of reviews shall be final.

All individuals, claiming that one of their constitutional rights and freedoms in the scope of European Convention on Human Rights has been violated by public power, are entitled to apply to the Constitutional Court on condition that they have exhausted legal remedies. The principles and procedures on admissibility of applications of constitutional complaints, on establishment and competence of pre-review commissions and on judgments of the Chambers shall be regulated by law.

The Constitutional Court shall also perform the other functions given to it by the Constitution."

Reasoning:

No amendment is provided in the first two paragraphs.

In third paragraph it is determined that the duty of Grand Court shall be discharged by the Plenary Assembly.

In fifth paragraph, review against the Grand Court judgments is introduced. This model is inspired from the model according to which there is a possibility of review against the judgments rendered by the Plenary Assembly of the Court of Cassation acting in its capacity of first instance court.

Sixth paragraph is a new regulation introducing individual application procedure (constitutional complaint) which is functioning properly in most of the European States principally in Germany, Austria and Spain. The constitutional complaint is a way of claiming rights different than the examination of the unconstitutionality of laws or of the illegality of administrative acts, or the cassation and review of judgments. It is a domestic implementation similar to that of individual application brought before the European Court of Human Rights. From this aspect, it provides to determine the violations by public power against fundamental rights and freedoms on a factual basis and to take the necessary measures to redress violated rights. For this reason, individual application (constitutional complaint) is considered to be an effective method of protecting fundamental rights and freedoms, and in accordance with the subsidiary quality of the European Court of Human Rights and the European Convention on Human Rights, it should be first introduced into our domestic constitutional system. The introduction of constitutional complaint will result in a considerable decrease in the number of files

against Turkey brought before the European Court of Human Rights. Because, the exhaustion of constitutional complaint will be required as a pre-condition for an application for the European Court of Human Rights.

The implementation scope of constitutional complaint should be limited to classic rights. However, bearing in the mind that it would be difficult to distinguish these rights from each other in the context of triple classification of rights in the present Constitution, it was decided that the protection to be granted by the constitutional complaint should comprise the rights and freedoms in the European Convention of Human Rights. Thus, a similar approach with the implementation of the European Court of Human Rights is preferred. The proper and effective functioning of constitutional complaint depends on determining application and admissibility criteria in respect of public needs, on evaluation of these criteria during a pre-review stage and on re-organization according to this new institution. Regulating such details in the Constitution exceeds the scope of a constitution and may provoke difficulties in finding solutions for the problems of implementation. For this reason, only the main principles of the constitutional complaint are indicated in the text of the Constitution. The conditions of application, the admissibility criteria, establishing pre-review commissions and their competence, the principles and procedures on decisions of the chambers (such as the effectiveness, elements and consequences of the judgments) are reserved to be regulated by law. This preference would be also advantageous in respect of adapting the experiences of the European States while implementing constitutional complaint according to the needs of our Country.

5. First Paragraph of Article 149 of the Constitution shall be amended as follows:

"Article 149- The Constitutional Court shall sit in plenary and in two chambers. Each Chamber shall convene with its president and six members, and shall take decisions by absolute majority. The President of the Constitutional Court shall preside the Plenary Assembly and the Deputy Presidents shall preside the Chambers. The Plenary Assembly shall convene with its president and twelve members and shall take the decisions by absolute majority. However, decisions of annulment of Constitutional amendments and dissolution decisions of the political parties shall be taken by three-fifths majority of the Plenary Assembly."

Reasoning:

The amendment proposed in the first paragraph of Article 149 concretises the form of sitting in Plenary Assembly and two Chambers and indicates the quorum for convention and decisions. Besides, it indicates that competence in annulment cases against the Constitutional amendments and in dissolution cases of political parties belongs to the Plenary Assembly.

6. The Last Paragraph of Article 152 of the Constitution shall be amended as follows:

"No allegation of unconstitutionality shall be made with regard to the same legal provision until five years elapse after publication in the Official Gazette of the decision of the Constitutional Court dismissing the application on its merits."

Reasoning:

The time restriction of ten years, which was subjected to critics widely, in the last paragraph of the article, is reduced to five years in order to maintain necessary transformation and improvement in decisions of the Constitutional Court in accordance with the quick transformation of the social life.

7. The Second Sentence of the First Paragraph of Article 153 of the Constitution shall be abrogated and Third Paragraph (of the same Article) shall be amended as follows:

"**Article153**- In the course of annulling the whole, or a provision, of laws or decrees having the force of law or the Rules of Procedure of the Turkish Grand National Assembly, where there are strong signs on unconstitutionality, the Constitutional Court may take a decision of "stay of implementation" in order to prevent situations and damages that can not be recovered after implementation of the related provisions. Laws, decrees having the force of law, or the Rules of Procedure of the Turkish Grand National Assembly or provisions thereof, shall cease to have effect from the date of publication in the Official Gazette of the annulment decision. Where necessary, the Constitutional Court may also decide on the date on which the annulment decision shall come into effect. That date shall not be more than one year from the date of publication of the decision in the Official Gazette."

Reasoning:

The provision, which reads "The annulment decisions of the Constitutional Court cannot be made public without a written statement of reasons" in the second sentence of first paragraph of the Article, was excluded from the text. This provision was construed in implementation that the decisions on rejection of the files can be made public. Consequently, the absence of such a public statement concerning a file gives the impression that the related file is to be annulled; meanwhile, it provoked some ambiguities.

The new provision added to the third paragraph is introduction of the institution of "stay of implementation", invented by the case-law of the Constitutional Court, to the positive constitutional rules.

8. A Provisional Article in respect of the amendments shall be added as follows:

"Provisional Article- The substitute members shall become permanent members on the date of publication of Constitutional amendments in the Official Gazette. Time limitation of twelve years on term of office for the members shall be applied for the present members of the Court as from that publication date. The Constitutional Court shall convene with its President and at least ten members and shall take decisions by absolute majority until the transition to new regulations on member elections is terminated. The least experienced member shall not participate in the meetings if the number of the participants is even. In the elections to be held by the public institutions, the principles and the order accepted in these amendments shall be obeyed."

Reasoning:

The provisional article is a regulation of transition to new state resulted from abolition of substitute membership and from the increase in number of members. In addition, this regulation brings a temporary solution to sitting and working form of the Court during the period in which the provisions of the Law on Foundation of Constitutional Court and Trial Procedure shall be harmonized with the Constitutional amendments.

N.B.: *The whole text of the present Constitution in English can be found at the website of the Constitutional Court of Turkey* (http://www.anayasa.gov.tr/engconst/cct.htm). *Besides, short information is provided on the Constitutional Court of Turkey at the same website.*