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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON THE LAW ON THE ESTABLISHMENT AND RULES OF PROCEDURE OF THE CONSTITUTIONAL COURT

OF TURKEY
(LAW NO: 6216, ADOPTED 30 MARCH 2011)

by

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The Venice Commission has received a request by the Minister of Justice of Turkey, concerning the draft Law on the Establishment and Rules of Procedure of the Constitutional Court.

General remark

My earlier observations focussed on Articles 45-51 of the draft law. To the extend that these observations and recommendations have not been taken into account in the amendments of 30 March 2011, I will also include them in the following observations.

It has to be stressed that the present observations are based upon the English translation of the draft law, available to the Venice Commission. This could mean that one or more of the observations made may be explained by a misunderstanding of the original text.
In the following the comments are made article by article.

Article 7

The wording of this provision in the English translation implies the suggestion that for each vacancy in the CC, more than one member may be elected from among the candidates nominated by the different institutions. The wording seems to relate to the election of all members, and not to incidental vacancies, while, on the contrary, Articles 8 and 9 starts from the presumption that in case of an election, there is a President and Presidential Office of the CC, and the oath will be taken in the presence of the President and members of the CC. Most likely, the words "two members from among three candidates nominated for each vacancy" mean that for each vacancy one member will be elected from among three candidates. The wording, at least in the translation, should be clarified.

Article 9

In the wording of the oath, "fundamental rights and freedoms" have been included next to the Constitution, which would seem to imply that fundamental rights and freedoms are not an integral part of the Constitution.

Article 18, paragraph 1

It may be assumed that the words "not incompatible" should be read as: "not compatible".

Article 22, paragraph 2

This provision refers to Commissions next to Chambers, while the establishment of commissions has not been regulated in the first paragraph. And while the number of membership of the Chambers is regulated in the first paragraph, the number of membership of the commissions will be regulated by Regulation. Since the decision on admissibility is of great importance and, in case of a unanimous decision declaring the application inadmissible, will be final and bring the application to an end, it is recommended to fix the number of members of the commissions in Article 22.

Article 24, paragraph 2b)

It is not self-evident why for the qualifications required for a rapporteur the fields of economics and political sciences are mentioned in addition to that of law, and not, for instance, also that of history, philosophy and others. It may be pointed out that the second paragraph of Article 27 is formulated broader in respect of assistant rapporteurs and candidates.

Articles 29-34

It would seem that chapter three of Part Tree would be better placed in the Regulation rather than in the law.

Article 35, paragraph 1

The wording under b) is not clear. Does it imply that the application may be lodged by a parliamentary group only as a whole, unless individual members together constitute one-fifth of the membership of Parliament? Why is, in the case of a coalition government the right of application restricted to the largest parliamentary group of that coalition? And what are the criteria of "main opposition party"? Why should such a party be in a privileged position as compared to one or more other political groups of the opposition, even if it does not meet the condition of one-fifth under c)? Finally, it is difficult to understand why, in relation to the right of application, a difference is made dependent on whether the law or regulation is alleged to be in violation of the Constitution on the merits or as to form.

In general, the possibility to lodge an application for annulment by a group of parliamentarians is, in particular, meant to protect the opposition against the ruling party or parties, and certainly not to give the largest parliamentary groups special protection. It may, therefore, be recommended not to grant the right of application to separate parliamentary groups but to restrict it to an undefined group of at least one-fifth of the membership.

Article 38, paragraph 1

This provision seems to stipulate that the parliamentary group concerned needs the permission of a majority of its general assembly to lodge an application for annulment. This would seem to be in violation of the autonomy of individual members of Parliament and parliamentary groups, who derive their mandate from those who voted for their candidature and not from their party.

Article 40, paragraph 2

The court decision dismissing the application for annulment may be appealed together with the main judgment. This may be understood to imply that the decision may be appealed only if appeal lies against the main judgment, and that a dismissal by the highest instance is final. This should be clarified.

Article 40, paragraph 5

This provision may give rise to serious complications if, after the collapse of five months, the trial court continues the examination of the case and shortly before pronouncing the judgment receives the decision of the CC. This may cause a considerable delay in the pronouncement. It is recommended to stipulate that, in principle, the CC will decide within five months, but that it may prolong that period on good grounds, in which case it informs the trial court concerned.

Article 45, paragraph 1

The wording of this provision in its English translation is formulated in an ambiguous way. The words "which falls into the scope of the European Convention on Human Rights and additional protocols thereto" may imply a limitation as well as an extension of the jurisdiction *ratione materiae* of the Constitutional Court (CC) in relation to the words "secured under the Constitution".

These words will mean a restriction, if they imply that only those fundamental rights and freedoms secured under the Constitution may be invoked in an application to the CC, which are also guaranteed in the European Convention on Human Rights (ECHR) and its Protocols, and to the extent that their scope in the ECHR and its Protocols is identical to their scope in the Constitution.

They will mean an extension if their purpose is to incorporate the human rights guaranteed in the ECHR and its Protocols into those secured under the Constitution. The latter would especially mean an important extension, if the words "the scope of" imply that this incorporation also encompasses the interpretation given to the ECHR rights in the case law of the European Court of Human Rights (ECtHR).

If the Turkish text is also ambiguous on this point, as the English translation is, it should be clarified.

The provision also raises the question why it only refers to the ECHR and its additional Protocols, and not to other human rights treaties to which Turkey is a party, if needed with the proviso that they may only be invoked to the extent that they are self-executing.

Article 45, paragraph 3

The words "legislative proceedings" and "administrative proceedings" in the English translation are not clear. Does the provision intend to exclude individual petitions for abstract constitutional review of laws and regulations? If so, this should be expressed in a more clear way. The provision might be combined with that of the first paragraph of Article 46 which excludes the filing of an abstract petition or *actio popularis*.

The words "pursuant to Constitutional Court judgments" are rather unusual. The Constitution should itself in a limitative way define the jurisdiction *ratione materiae* of the CC. Of course, the CC will than have to interpret and apply the constitutional provision(s) concerned, but that does not require a special provision since any court will have to interpret its jurisdiction. However, the words just referred to seem to imply that the CC has an autonomous competence to define its jurisdiction, and to further extent or restrict its jurisdiction *ratione materiae*. It seems advisable to delete the words referred to, unless they have a different and useful meaning.

Article 46, paragraph 1

Since the second paragraph refers to "Public legal persons", it would be preferable to define, in paragraph 1, "Individual applications" as applications by natural or legal persons.

Article 46, paragraph 2

The words "rights concerning legal personality" are unclear and may imply an unjustified restriction. According to the Strasbourg case law, legal persons may allege to be victims, and therefore are entitled to raise a complaint, concerning any of the rights and freedoms guaranteed in the ECHR, to the extent that the right or freedom concerned is allegedly violated (also) in their respect. Thus, for instance, a legal person cannot claim that its right to life or the prohibition of torture with respect to it has been violated, but it may claim that its right to a fair trial, its right to respect of the home, its right to freedom of religion *etcetera* has been violated; the latter are no "rights concerning legal personality", but have a collective dimension and/or are of importance to the existence and functioning of the legal person. Therefore, the phrase referred to should be replaced by the words "their rights have been actually and directly violated", or words of the same purport.

Article 46, paragraph 3

The exclusion of foreigners is formulated too broadly, or at least not clearly enough. According to Article 1 of the ECHR the States parties "shall secure to everyone within their jurisdiction" the rights and freedoms guaranteed therein. This includes both citizens and foreigners. There are certain rights which, by their nature, only apply to citizens or may be restricted to citizens, such as the right to vote and stand as a candidate for the national parliament, and the right of access to certain public functions. However, Article 14 of the ECHR implies that, in principle, foreigners should enjoy fundamental rights and freedoms to the same extent as citizens. Consequently, the third paragraph is both unfortunate and superfluous: it may lead to a too restrictive application, while the rights which by their nature or on other justified grounds belong to citizens only, for foreigners are not "personal rights" in the sense of the first paragraph.

Article 47, paragraph 1

The words "or through courts" suggest some kind of a reference procedure or preliminary ruling procedure, whereas Article 45, paragraph 2, stipulates that all judicial remedies must have been exhausted. The system of reference of constitutional issues by "ordinary" courts to a constitutional court means that the final decision is taken by the "ordinary" court, taking into account the preliminary ruling of the constitutional court. This would seem not to be the system of the present Law. Therefore, the words "through courts", and the procedure meant by these words, should be clarified.

The same holds good for the words "through other modes".

Article 47, paragraph 2

The draft law does not specify the fee that is due for an application to the CC. Although this may be left to delegated legislation, it has to be observed that the fee must not be of an amount that constitutes too high a barrier for an individual applicant or a legal person, respectively. Although in most cases the applicant will have had previous access to the "ordinary" court procedure and there is no obligation for States parties to the ECHR to provide for an additional remedy before a constitutional court, if such a judicial remedy is provided for, it must be accessible without a financial barrier that makes the remedy in fact illusory or is disproportionate to the aim served by the levying of a fee..

Article 47, paragraph 5

The words "in case no legal remedy is provided for" indicates that the law takes into consideration the situation that an individual petition to the CC is the only legal remedy available against an alleged violation of a fundamental right or freedom. However, in that respect it has to be taken into account that the CC is not a court with full jurisdiction. Therefore, if and to the extent that the determination of a civil right or obligation, or of a criminal charge, in the sense of Article 6 of the ECHR is (also) at issue, access to the CC as the only judicial remedy available may be in violation of that treaty provision.

Against that background it is to be stressed that the comments of the Court of Cassation concerning the relationship between its jurisdiction and that of the CC, characterizing the latter as "a super high court" (Opinion of 26 January 2011) would seem not to be justified. Providing a constitutional remedy by a specialized constitutional court with restricted jurisdiction is not in violation of the principle of *res judicata*. It could be compared with the possibility of an alleged victim of a final court judgment to apply to the ECtHR for violation of any of his or her rights or freedoms laid down in the ECHR. However, as holds true for the latter court, the CC should not act as a "fourth instance" and examine the facts and the law

of the case irrespective of their relevance for the constitutional issue put before it. Apart from the consideration that ignoring this limitation would overburden the CC – as indeed it has overburdened the ECtHR - this would lead the CC to overstepping its jurisdiction *ratione materiae.* This limitation has been laid down in Article 49, paragraph 7.

Article 47, paragraph 6

For all practical purposes it is recommended to add to this paragraph the words "or if an excuse proves to be warranted, within fifteen days after the excuse ceases to exist", by analogy of the fifth paragraph.

Article 48, paragraph 2

This provision is a "de minimis non curat praetor" provision that in fact creates a kind of certiorari procedure. One of the grounds for inadmissibility is the fact that the application does not involve significant damage sustained by the applicant. It is recommended to specify that this criterion concerns both material and immaterial damage.

Article 49, paragraph 3

With reference to one of the observations made under Article 45, paragraph 3, as well as to the wording of Article 49, paragraph 7, it is emphasized, here again, that the CC must restrict itself to examining the constitutional issue before it and the facts and law relevant thereto. Therefore, the words "all types of examinations and investigations" would seem to be too broadly formulated. It is recommended to make an express reference to Article 49, paragraph 6.

Article 49, paragraph 4

Even though the CC decides *ex officio* whether the holding of a hearing is necessary, it would seem appropriate to provide that the applicant may ask for a hearing.

Article 49, paragraph 5

The relationship between the "measures … for the protection of the applicant's fundamental rights" referred to here, and the "actions … in order to abolish the violation and its consequences" referred to in Article 50, first paragraph, are not totally clear. At first sight, the former would seem to refer to provisional measures to avoid any irreparable (further) damage for the applicant. However, the same provision provides that, in case a measure is rendered, the decision on the merits must be promulgated, which seems to allude to a final decision on the merits. This requires further clarification.

The provision that the decision on the merits must be promulgated within six months and that, by failing to do so, the decision on measures will be revoked *ipso facto,* is difficult to understand. First of all, a maximum period of six months for the publication of a judicial decision would seem to be unnecessarily long, and to violate – in case this provision is applicable - the requirement of "a reasonable time" of Article 6 of the ECHR.

The revocation provided for would seem even more remarkable, to say the least. A judicial decision may be revoked or rectified in case of an evident judicial error, and may be revised in case of a *novum*, if this is provided for by law. However, revocation of a judicial decision on the ground of delay of its publication, and so even *ipso facto*, would seem to violate the principle of *res judicata* as well as the principle of legal certainty. If the provision applies to provisional measures only, such measures may indeed by revoked by the court which decided on them or in appeal, but not *ipso facto* on such arbitrary ground as a delay of

publication. Therefore, it is recommended that their duration be fixed and that it be stipulated that, in all other cases, they will cease to apply at the moment the decision on the merits will be taken, or if they are revoked by the competent court on the ground that the reasons for the measures concerned no longer exist. Effective legal protection of the fundamental rights of the applicant requires that their protection does not depend on arbitrary action or negligence.

Article 49, paragraph 6

This provision also provides for the possibility that the Chamber concerned may determine in what way the established violation of a fundamental right can be removed. It is not clear of such a decision is limited to instructing the court or authority whose decision has been found in violation of a fundamental right or whether the Chamber may also annul (part of) the decision that is taken in violation of a fundamental right, or may even declare null and void the underlying regal regulation as is the case for applications of annulment. The previous draft law, in Article 49, paragraph 6, expressly provided for the annulment of a legal provision, be it by the General Assembly of the CC. It should, therefore, be clarified what the legal consequences of a decision of the CC may be.

Article 50, paragraph 2

Since the Law concerning the CC is not of higher ranking than the law on which the jurisdiction of the "ordinary" courts is based, the procedure of retrial in case a court decision has been annulled by a decision of the CC, should also be regulated in the latter law.

The second sentence does not make it clear whether it is the CC which decides if retrial serves any legal interest or rather the court which would be competent for the retrial. It is also not clear which court decides on the payment of compensation and by whom such compensation has to be paid.

Article 50, paragraph 4

Although it is provided for that the matter at issue here will be regulated by Regulation, it is of such importance that the main issues should be regulated in the Law itself. One could think, for instance, of the issue of who is in charge of supervising the conformity of the case law of the different commissions and Chambers, and indeed within the commissions and Chambers; who brings a difference of decisions among commissions to the attention of the Chamber concerned, and a difference of decisions among Chambers to the attention of the General Assembly; what kind of procedure is subsequently followed, and what is the role of the commissions or Chambers concerned in such a procedure; what kind of decision or measure may be taken if the conclusion is reached that there is a difference of decisions; what are the legal consequences of such a decision or measure; is there also a preventive procedure to avoid differences of decisions.

Article 50, paragraph 5

This provision means that the constitutional review by the CC on an individual application does not primarily serve the general interest of reviewing court decisions, and laws and regulations, for their conformity with fundamental human rights. One could well imagine that the CC should be given the power, if an important constitutional issue has been raised by the individual application, to continue its examination after the applicant has waived his or her application, in the interest of constitutional justice.

Article 52, paragraph 1

In view of the serious character of the cases involved and the required two-thirds majority, the term "attending members" would seem to require some further qualification by fixing a minimum quorum requirement.

Article 52, paragraph 3

It would seem to follow from this provision that the preliminary examination of the indictment, which may result in ending the dissolution procedure, is performed by the President alone. It is recommended that this be at least the Presidium, including the Vice Presidents.

Article 54, paragraph 1

The terms "deputy or non-deputy ministers" in the English translation are not clear. It may be assumed that the parliamentarian concerned will be the first one entitled to lodge an application for cancellation.

Article 58, paragraphs 1 and 5

The fact that the defence lawyer and the attorney, respectively, are mentioned next to the defendant and the intervening party suggests that the former may also apply for a re-examination without permission of the latter. Indeed, if the former act on behalf of the latter their entitlement needs no separate regulation.

The same holds good for paragraph 5 concerning the right to explain the claims.

Articles 55 and 56

These provisions raise the question of whether the financial control of political parties is not of a too strict and general character, limiting their freedom of association. But this is an issue that relates rather to the legislation concerning political parties.

Article 59

The list of cases in which the president or a member does not sit on trial seems to be a limitative one. However, a judge should also not sit in a case if the interests are involved of another person with whom he or she has a special connection.

Article 60, paragraphs 1 and 4

The words "which prove the partiality" are formulated too narrowly. According to the European Court of Human Rights the impartiality of the trial is also not guaranteed if one of the parties has an objectively justified fear of lack of impartiality (ECtHR [GC], *Kleyn and others v. The Netherlands*, judgment of 6 May 2003, § 194.

The same holds good for the word "required proof" in paragraph 4, which constitutes too strict a requirement.

Article 60, paragraph 5

It is not clear what the words "unacceptable on merits" mean. Since a disciplinary penalty may be risked, the transparency and foreseeability of the rule is especially important.

Article 61

In case the president or a member is of the opinion that his or her participation in examining the case is not appropriate, his or her participation is equally inappropriate. The ratio of this provision is not clear.

Article 62

It should be expressly provided for that all the information and material which the CC has at its disposal shall also be made accessible to the parties involved, except for the information to which the third paragraph relates. The principles of fair trial and equality of arms require this.

Article 66, paragraphs 3 and 4

Strict application of these provisions may create serious problems in certain cases, because the annulment of, for instance a penal law provision may create a loophole in criminal law that the legislator may not be able to fill in time. Therefore, it is recommended that in particular circumstances the CC may decide to delay the coming into force of the annulment decision beyond the period of one year.

Article 67, paragraph 3

It is difficult to see under what circumstances a request for retrial based on a judgment of the European Court of Human Rights which is deemed to have merits, is nevertheless considered inadmissible. This requires clarification.

Provisional Article 1

The fourth paragraph relates only to the continuation in office of the President and Deputy President. It does not take into account the transitional position of the other members of the CC, in connection with Article 10 of the Law.