Strasbourg, 15 September 2011

CDL(2011)064*
Engl. only

Opinion No. 612 / 2011

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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Art. 6 deals with the composition of the Court in accordance with Art. 146 of the Constitution. Not only legal professionals such as judges, lawyers or professors can become members of the Court, but also persons from the fields of economics or political sciences are eligible for Court membership. This follows a tradition that can be found in other Constitutional Courts and similar organs. The professional requirements in the vast majority of European Constitutional Courts is restricted to judges that are lawyers. However, the question arises why persons specialising in other sciences should be excluded. As long as the prospective members of the Court have a comprehensive legal knowledge, they should be eligible for membership (as it is the case for the rapporteurs).

Art. 10: The term of office forms a good basis for independence. Judges are elected for a term of twelve years in combination with the prohibition of re-election. By this means, the judges' independence is sustained. Para. 2 seems to set the retirement age at sixty-five years. In general, this age limit is appropriate. However, para. 2 is not fully clear. The words "or before sixty-five years of age" must be read in a way that they refer to "cannot be removed". Perhaps this is a question of translation.

Art. 15 para. 1 lit e): The provision includes certain obligations of the members of the Court. The members must obtain permission from the President in order to attend national and international congresses, conferences and similar scientific meetings. This provision seems too restrictive. The members of the Court are already bound by their confidentiality obligation (see lit. c) and their obligation to act in accordance with their profession as a judge (see lit. a). Constraining the members' possibilities to attend scientific meetings cannot be justified by the function of the members alone; in contrast, scientific exchange and interaction – especially in human rights law matters – are essential for every legal professional, including members of Constitutional Courts from all European countries as well. It is therefore recommended that the attendance of the members in scientific gatherings does not depend on the President's approval. Otherwise, difficult questions of freedom of science (in the case of professors) or of free speech in general may arise, even under Article 10 ECHR.

Art. 19 para. 4 provides for resignation on "invitation". Obviously there is no choice on the side of the judge concerned. It is questionable whether it should be clarified as to the effect that there is no declaration of resignation is needed.

Art. 26: Rapporteurs are assigned or appointed in order to assist judicial and administrative tasks of the Court. It seems they are not part of the Court sitting on decisions. In view of their original (and important) role as assistants, and bearing in mind that Art. 6 ECHR may apply at least to certain types of proceedings, it astonishes that Art. 26 para. 2 and 3 contain the authorization to assign rapporteurs as hearing witnesses and in commissions. The collection of evidence, which includes the hearing of witnesses, can be seen as one of the principal items of a court's activity; therefore it should be exercised by a judge himself (or at least directly supervised by one). Tasks of such an importance should not be exercised by assistants.
Rapporteurs can also be assigned to commissions that are inter alia competent to examine the admissibility of individual applications (Art. 48). As an essential legal activity of the court, the examination of the admissibility should also be exercised by the judges themselves, rather than by assisting legal staff.

Art. 27 para. 2: Assistant rapporteurs can only be persons who are below thirty years of age in case they have completed higher and post graduate education, or below thirty-five years of age in case they have earned a doctoral degree. This provision does not take into account periods of time that a person might have dedicated to parenthood. These months or years, especially in the case of young women, can lead to a delay in a person's education or working life and might prevent somebody from being employed as an assistant rapporteur because of the above-mentioned age limit in Art. 27. In accordance with labour law

principles in the majority of the European countries, there should be an extension of the age limit for persons applying as assistant rapporteurs who exceed the age limit by reason of parenthood.

Art. 37 regulates the right to lodge a direct annulment case. It is permitted to submit a case within the ten days/sixty days following the date of the promulgation of the legal act (depending on the nature of the legal act). Ten/sixty days cannot be regarded as an appropriate period of time for the competent parties authorized to submit an annulment case. In Germany and Austria there is no time limit in this case at all. Especially parliamentary groups and the members of the Grand National Assembly might be in need of more time in order to make their decision. In view of the regulations of other European countries that grant periods ranging from three months to unlimited time intervals to submit cases, the time limit of Art. 37 should be revised in order to be prolonged.

In Art. 39 para. 3 taken together with para.1 there seems to be a time limit of ten days for completing a case petition. While such a time limit may be adequate in general in cases of this type it may turn out to be to short in particular cases, depending also on the nature of the missing parts of missing items.

Art 42: The provision excludes a list of national legal acts and international treaties in general from being contested on the grounds of unconstitutionality in the course of an annulment case before the Constitutional Court. The exemption of the enlisted legal acts does not find a legal base in the Constitution itself. The provision (as simple law) would therefore come in conflict with the constitutional provisions and its character as benchmark of constitutionality.

Art. 45: para. 3: The provision does not refer to an act as a result of proceedings, but it refers to „proceedings“. This terminology may lead to misunderstandings. In constitutional court proceedings it is usually the result that is subject to review (law, regulation, court decisions, administrative decisions).

Art. 46 Abs. 2 prohibits applications by public legal persons. Under the domestic law of a number of European states applications of public legal persons, such as municipalities, broadcasting companies, universities or churches are admissible under certain circumstances. For example, in Austrian and German Constitutional Law, the right of individual application before the Constitutional Court comes with the compulsive existence of a subjective right granted by the law. According to Article 19 para. 3 fundamental rights are guaranteed to legal persons as well as far as they are applicable to them according to their nature. Also a limited number of public legal persons comes under this provision (*Hillgruber/Goos*, Verfassungsprozessrecht, 3rd edition, 2010, § 117). Hence they may invoke rights under the constitution before the Constitutional Court.

The beneficiaries of the subjective rights may be natural persons or legal persons, thereunder public legal persons. Their right of individual application depends on the specific fundamental right that is claimed to be violated, and whether the nature of the right permits an application by a legal person. This is often true for property rights. Therefore, public legal persons in a number of European states frequently enjoy having access to the Constitutional Court – especially in cases where public legal persons undergo the same situations as natural persons do. They have also the right to file individual applications under Art. 34 ECHR to the ECtHR. It is therefore recommended to abolish or at least modify the blanket ban of individual application by public legal persons.

Art 47: 1) It has to be asked why the law does not provide for a system of legal aid. If it is intended to have such as system it should be reflected in the procedural provision.
2) A second point concerns para. 6. The reason for granting an extension of the time limit

seems clear. If it is the intention of the law not to build up artificial formal barriers it is questionable why Art. 47 para. 6 is limited to missing documents. It should be extended to other cases of minor mistakes that can easily be remedied.

Art 48: The law makes a difference between inadmissible applications and applications that are dealt on the merits. The admissibility criterion in para. 2 has the obvious aim to give the Constitutional Court the possibility to steer its work load. The instrument follows in a way existing examples by giving discretion to the Court in deciding which cases are of minor importance so that they do not need a decision on the merits of the Constitutional Court. However, one should reconsider the technique of filtering applications at the admissibility stage for at least two reasons:

It is true that also the European Court of Human Rights (like the former Commission) deals with the question of „minor“ or „irrelevant“ cases under the head of inadmissibility. If we look closer to the Strasbourg Case law we can see that only some of the inadmissibility criteria are admissibility criteria in the traditional sense of procedural law (like non-exhaustion of domestic remedies, expiration of the time limit for applications etc.). The criterion of „manifestly ill-founded“ and the new criterion introduced by Protocol No. 14, however, are „filtering criteria“. In many systems of constitutional justice, like in particular in the German and the Austrian system, a distinction is made between inadmissibility in the strict sense and the alternative of declining to deal with a case („Nichtannahme“ in Germany, „Ablehnung der Behandlung“ in Austria). I propose to introduce such a distinction for the reasons of clarity and of efficiency of Court proceedings (the Austrian Constitutional Court for instance has a number of cases where admissibility is doubtful and would need enquiry, but as it declines jurisdiction it may leave the question open; in such cases no „decision“ of the case is effected, so there is no need of publication of these cases; reasoning is shortened to formulas of only one or two pages). Bearing in mind the size of Turkey measures of reducing workload should be considered from the outset. Otherwise the new Court runs the risk of becoming a victim of its own success very soon.

Art. 48 does not contain a criterion that refers to the prospects to win a case. The System of the ECtHr and also of many constitutional courts have a criterion which enables the Court to decline jurisdiction in cases where there is a lack of prospects to get a positive decision. On European level this is the „manifestly ill-founded“ criterion, at national level there exist similar instruments. This instrument is important because the Constitutional Court can enter into an examination internally but can stop this when it reaches the conclusion that at the end the result will be negative without giving lengthy reasoning. The reason for such criterion is again efficiency.

Art. 49: para. 5: The system of interim measures follows other examples. However, the time limit of six months for revocation of such measures seems to general, sometimes to short, and not flexible enough. In norm control proceedings the Court may well need more than six months for a decision. On the other hand we often find individual applications against individual decisions where publication of the decision of the Constitutional Court would seem exaggerated. A clarification on that point seems advisable.

para. 6: The issue of effects of decisions finding laws unconstitutional is a delicate one and it touches upon the balance of powers between the judiciary, the legislature and the Constitutional Court. It is welcomed that Para. 6 does not contain any intervention by the Chambers towards the General Assembly for annulment of provisions anymore. Otherwise this System may have run the risk of undue length of proceedings, as the Strasbourg Court includes the time of norm control proceedings in the calculation of the length of a procedure. However, the present provisions do not regulate cases in which the violation of the fundamental right has arisen from the provision of a law or provision at all. Perhaps a comparative analysis of the German and Austrian system, as well as the Polish system

(which is in fact a mixture of the German and Austrian System) may be of some interest.
para. 6: I have the impression that this provision corresponds to the exhaustion requirement in Art. 45 para. 2. As W. Hoffmann-Riem points out in his comments, a material criterion on the border line between the competences of the ordinary courts and those of the constitutional court is common in Europe. Although rather general in most cases there exists large case law of the respective constitutional courts drawing the line more precisely. However, a general rule is needed as a starting point for the courts.

Art. 50 para. 5: It was suggested that the criteria for publication should be defined more precisely, perhaps by reference to the By-Law and a definition there. This remark is made with a view to Art. 6 of the Eur. Convention on Human Rights. It is welcomed that the present law stipulates a publication of the court's judgments on the website of the Court as well as a promulgation of selected judgments in the Official Gazette. Further provisions shall be found in the Internal Regulation of the Court. These regulations meet the requirements of Art 6 of the Eur. Convention on Human Rights and the need of information in a democratic society.

Art. 51: Payment of costs is the normal consequence of losing a case. The German and the Austrian System provide for fees or even fines in cases of abuse (Missbrauchsgebühr, Mutwillensstrafe). Although the instrument is not used very often it may serve as a deterrent instrument. Having said this, I am fully aware that all constitutional courts have to deal with cases where the applicant and/or the the lawyer must be aware of the fact that there is no prospect to win a case - even where such a fine for abuse of rights exists. It is therefore fully in line with European Constitutional practice that the law contains an additional disciplinary fine not exceeding 2.000 Turkish Liras in case of abuse of the right of individual application.

Art. 65 provides for a two thirds-majority in certain cases. While it is adequate to have a two thirds majority in cases of party dissolution and similar cases (and most necessary as the near past has shown), it is questionable with regard to constitutional laws. In party cases the qualified majority protects a political party often a minority group. In the case of constitutional amendments, however, the higher legitimacy of a two thirds majority in parliament is not matched by a higher majority in the Constitutional Court. It seems quite difficult why a constitutional law violation basic principles of a Constitution should remain in force although a (simple) majority of judges has voted in favour of unconstitutionality.