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(VENICE COMMISSION)

OPINION ON THE DRAFT CONSTITUTIONAL AMENDMENTS WITH REGARD TO THE CONSTITUTIONAL COURT OF TURKEY

On the basis of comments by

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INTRODUCTION

1. By letter dated 2 April 2004, the President of the Constitutional Court of Turkey, Mr. Mustafa Bumin, invited the Venice Commission to assist the Court in the reform of the Court as envisaged by a draft constitutional amendment (CDL(2004)033) drafted by the Court and submitted to Parliament.

2. In the same letter, Mr Bumin invited the Commission to participate in the Symposium on the occasion of the 42nd anniversary of the Constitutional Court (Ankara, 26-27 April 2004), which was devoted to the restructuring of the Court and the introduction of the individual appeal. The Commission asked Mr. Paczolay to present his comments on the draft at the Symposium. The reports presented there and the discussions – including replies to Mr. Paczolay's comments, which had been distributed to the participants – are taken into consideration in the present opinion.

3. This opinion has been adopted by the Venice Commission at its 59th Plenary Session in Venice on 17-18 June 2004.

I. GENERAL

4. The proposed amendments would result in changes in two main areas. First, the organisation of the Court would be restructured. In that respect articles 104, 146 and 147 of the Constitution would be amended. Secondly, a new jurisdiction of the Constitutional Court would be established, the adjudication of constitutional complaint. That would require the amendment of articles 148, 149, 152 and 153 of the Constitution.

5. The present report is commenting on the proposed constitutional amendments taking into consideration of the related experiences of other European constitutional courts.

6. The Constitutional Court was established by the Constitution of 1961. The original concept of the Constitutional Court was preserved and upheld by the new, modernised Constitution adopted in November 1982. The constitutional reform of 2001 resulting in major amendments did not affect the basic regulation on the Constitutional Court. [1]

7. The draft proposal presented by the Court contains also an explanatory memorandum (reasoning) for the proposed provisions. We do not know for the moment the text of the necessary amendments to the Law of the organisation and trial procedures of the Constitutional Court.

8. The restructuring of the organisation of the Court is a consequence of the introduction of the constitutional complaint and the heavy workload of the Court. However, due to the

[1] The powers, composition and procedure of the Constitutional Court have been regulated in a detailed way in Articles 146 to 153 of the Constitution. The organisation and trial procedures of the Court have been determined by the Law of the Organisation and Trial Procedures of the Constitutional Court (No. 2949, dated December 3, 1983) and the method of work and the division of labour among its members have been described by the Rules of Procedure made by the Court (dated December 3, 1986).

structure of the Constitution, the first part of the comments is related to the organisational questions, while the second part deals with constitutional complaint. This opinion is limited to comments on the proposed articles, and it is not so ambitious to offer ideas and solutions for the missing details.

II. ORGANISATION OF THE CONSTITUTIONAL COURT

9. The currently valid text of the article on the organisation of the Court – Article 146 – is going to be amended in two important aspects:

first, the composition of the Court, regarding the number of the judges, and dividing the Court into two chambers;

secondly, the appointment procedure of the judges.

10. Presently, the Constitutional Court is composed of eleven regular and four substitute members. The Court assembles *en banque* with the participation of the president and ten regular members who in case of absence can be replaced by substitute members (Law on the Constitutional Court, Art. 41). The amendment raises the number of the judges to seventeen. It deletes the position of substitute members. The position of substitute members is quite rare in the organisation of Constitutional Courts, the most well-known example is that of the Austrian Constitutional Court. The number of the judges sitting on the Court (seventeen) will be – in international comparison – high, though this fact should be evaluated with view to the composition of the Court by two chambers.

11. The main objective both in determining the number of the judges and the composition of the court is to guarantee the effective operation. In the present case this is the main reason to modify the composition of the Court. In the recent years due to the intensive legislative activity of Parliament the number of the cases filed to the Court increased five times higher than the average. A peculiarity of the Constitutional Court of Turkey is that it has to deal often with the dissolution and the financial supervision of political parties.

12. In order to effectively manage the increasing workload, the draft proposal divides the court into two chambers, reserving certain jurisdiction to the plenary assembly. These competences include the examination of constitutional amendments, dissolution of political parties and trials to be performed in capacity of the Grand Court. In this latter capacity the Constitutional Court tries 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 other files shall be distributed to the chambers equally. According to the reasoning of the proposed amendment, this approach would be advantageous in respect of decreasing the workload. The two chambers consisting of eight members would be led by the two deputy presidents, respectively.

13. However, we can see the dangers of splitting the Court into two chambers. The possible problems are: development of diverging interpretations and lines of

jurisprudence, the distribution of the docket between the chambers, and the resolution of conflict of competences between the two benches. It was thought by the drafters that the possible inconsistencies between the case-law of the chambers can be settled by the plenary session of the Court. The detailed procedural rules should pay attention to the just distribution of files. The supervising role of the plenum can similarly resolve the conflict between the chambers on the question which bench is competent in the concrete case.

14. The reasoning of the article in question can be misleading when stating that the transformation of the court into two chambers is the case in most of the European constitutional courts. We could rather state that constitutional courts generally consists of one single plenum. However there is a clear model of splitting the court into two benches (senates, etc.), such as in Germany, Spain, or Portugal. A third model is the establishment of more small panels, and the division of the caseload among the plenary session and the panels. The different models can be combined, too.

15. The independence of the judiciary is main point in regulating the appointment of constitutional judges, and in setting the criteria of eligibility of judges.

16. The present system of appointing judges is a direct appointment system[2]. The President of the Republic has so far the power of appointing all members of the Constitutional Court but on the basis of specific quotas from particular pools of professions, namely judges, professors and senior civil servants. When appointing members of the Constitutional Court from other courts, the President makes a selection from three candidates nominated by the courts concerned. The draft proposal would shift this system to a hybrid solution combining election and direct appointment. It preserves the specific quotas from particular professional groups. Elective and appointment powers are distributed among the judiciary, the parliament and the head of State. 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.

17. One of the advantages of the proposed system is that it guarantees the gradual replacement of judges that may deserve the continuity of the interpretation.

18. The great proportion of Constitutional Court members recruited from the judiciary can serve well the independence of the Court. Nevertheless, this proportion is unusually high compared to other European constitutional courts. This might influence the interpretative methods used by the court as constitutional and statutory interpretation may differ in some aspects. It would be advisable to increase the representation of law professors.

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[2] This terminology is used by the Venice Commission report on the composition of Constitutional Courts, Science and Technique of Democracy, N° 20.

19. The shift from the system of exclusive direct appointment by the President to the mixed system providing elective or appointment powers to the three main branches of power has more democratic legitimacy[3] while it is based on the successful experiences of the previous system.

20. The number of the constitutional judges to be elected by the Parliament is relatively low, nevertheless Turkish legal experts expressed concerns about the possibility of the "politicization of the judiciary". Though the parliamentary election of judges opens the way to political influence, the election of judges by Parliament gives the Court also added legitimacy in reviewing legislative acts.

21. A Provisional article in respect of the amendments will be added to the Constitution. As the amendments will abolish substitute membership, according to the 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.

22. The Constitutional Court elects its president and the 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. Two Deputy President positions are provided in order that the Deputy Presidents can preside the two chambers. The President shall represent the Court and be responsible from the general management of it and presides its plenary session.

23. The amended First Paragraph of Article 149 regulates the functioning of the Court. The Constitutional Court shall sit in plenary and in two chambers. The President of the Constitutional Court presides the plenary session and the Deputy Presidents preside the Chambers. The quorum at the plenary session is its president plus twelve members and shall take the decisions by absolute majority. The quorum at each Chamber is its president and six members. The decisions at both chambers and at the plenary session shall be taken by absolute majority, except decisions of annulment of Constitutional amendments[4] and decisions on the dissolution of political parties. In the latter cases a three-fifths majority is required (as in the presently valid text of the Constitution).

24. Presently the term of office of the judges is not limited, and they remain in office until reaching the age of sixty-five. According the proposal the term of office for membership is limited to 12 years.

25. The minimum age requirement is used by several countries in order to guarantee professional and life experiences. The proposal elevates the minimum age requirement

[3] This is suggested by the Venice Commission report on the composition of Constitutional Courts, Science and Technique of Democracy, N° 20.
[4] Constitutional amendments can be reviewed only with regard to their form (Art. 148 of the Constitution).

from forty to fifty years. This is by our knowledge the highest minimum age requirement in Europe, and it might be considered exaggerated. The amended Article 147 will increase the retirement age up to sixty-seven. If the aim is really to maximize the profit from the knowledge and experience gained during the membership of the Constitutional Court, the retirement age could be increased even more, for example to the quite common seventy years. With a view to the relatively long term of office (12 years), the relatively low maximum age requirement (67 years according the proposal), and the high minimum age requirement (fifty years), the circle of the possible candidates could be unreasonably restricted.

III. CONSTITUTIONAL COMPLAINT

26. Individual access to constitutional courts is an important feature of constitutional justice.

27. Individual access to constitutional courts has two main ways.
First, *actio popularis*, or popular complaint when as a rule a legal provision can be challenged by individuals.[5]
The other way is constitutional complaint. A constitutional complaint is an individual remedy against the violation of constitutional rights. Usually it is directed against individual administrative or judicial acts.

28. The institutions of *Verfassungsbeschwerde* in Germany and *recurso de amparó* in Spain are the most well-known examples of constitutional complaint.[6] Other European countries have also established some procedures for the adjudication of constitutional complaint (among others Russia, Czech Republic, Slovakia, Slovenia, Macedonia, Croatia, Portugal, Hungary, etc.).

29. Recent tendencies in constitutional adjudication can rightly be described as a path from the review of the constitutionality of laws to the review of the application of laws.[7] This means a shift from the review of legislature to the review of the judiciary.

30. A similar line of development can be outlined in opening up the possibility of individual access to constitutional courts.

31. So far, the constitutional review system in Turkey has not allowed for individual complaints. The Draft Proposal (paragraph 6 of article 148) introduces a new regulation of individual application procedure (constitutional complaint):

"All individuals, claiming that one of their constitutional rights and freedoms in the scope of the European Convention on Human Rights has been violated by public power,

[5] For example in Hungary there is an excessively wide opportunity of *actio popularis*: individuals can challenge the constitutionality of any legal provision without having any personal interest in it. Thus in these cases the individual claims result in abstract norm control.
[6] The reasoning of the Turkish draft Proposal is referring also to Austria, but in Austria constitutional complaint is restricted against administrative acts.
[7] Louis Favoreu, Les cours constitutionnelles, Paris, PUF, 1992.

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."

32. There are two tendencies in the European countries regarding the regulation of constitutional complaint. Those countries that do not have in their constitutional system individual complaint, are seriously considering to introduce it (for example Italy). The Turkish amendment would fit into this line. The efforts of those countries that have in their system constitutional complaint tend to reduce the scope of its application, or at least to reduce the "flood of cases" (this is especially the case in Germany where a special commission was set up to deal with the reform)[8].

33. We should examine the proposed regulation in comparison with the regulations of other European countries.[9]

34. Constitutional complaint occurs in very different forms in the jurisdiction of European Constitutional Courts. Nevertheless, its main features can be defined as follows:
a constitutional complaint is
- a legal remedy
- subsidiary (after exhausting other legal remedies)
- it can be invoked on account of violation of basic rights and liberties
- against individual judicial or administrative decisions.[10]

35. The function of constitutional complaint is in principle the effective protection of fundamental rights by giving remedy to the individuals in case of violation of their rights by administrative or judicial decisions. This is the main justification for introducing constitutional complaint in Turkey, too. But besides this justification in principle, there is a more practical consideration in this case. According the expectations of the drafters – as formulated in the reasoning – "*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"*. Thus the aim of the new regulation is to provide domestic remedy for the violation of fundamental rights.

36. Therefore the scope of protected rights is unusually defined in the Draft Proposal. Constitutional complaint in general is used to protect the rights defined in the national constitution. In the case of Turkey (as written in the English translation of the Draft) the constitutional rights and freedoms regulated in the European Convention on Human

[8] Entlastung des Bundesverfassungsgerichts. Bericht der Kommission. Bundesministerium der Justiz.
[9] The subject of the 12th Conference of European Constitutional Courts was the relation between the Constitutional Courts and the other national courts. The general report thoroughly analysed also the institution of constitutional complaint. 23 HRLJ 317-321 (2002).
[10] 23 HRLJ 317 (2002).

Rights are protected by this institution. This results in a limited scope of protection compared to the rights enumerated in the Constitution of Turkey.[11]

37. The Constitution of Turkey differentiates among three groups of rights: individual rights, social and economic rights, and political rights. According to the reasoning of the draft the implementation scope of constitutional complaint should be limited to "classic rights". In order to avoid misunderstandings in defining the scope of affected rights, 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.

38. As explained by the drafters of the amendment[12] the very broad regulation of fundamental rights made it necessary to restrict the rights that can serve as basis for constitutional complaint to those regulated by the European Convention on Human Rights (ECHR). The two sets of rights should be considered synoptically together. This solution uses the ECHR as a selection criteria and does not elevate it to constitutional rank. Thus, constitutional complaint can be filed not against the violation of the rights comprised in the ECHR but against the violation of constitutional rights but with regard to the ECHR.

39. The procedure is not regulated in details by the constitutional text which is understandable. The proposed amendment refers only
- to the application conditions; it mentions the violation by public power as the ground for launching a constitutional complaint;
- to the subsidiary character of the procedure, requiring the exhaustion of legal remedies;

40. Other admissibility conditions, the establishment of pre-review commissions and the scope and content of the judgments are referred to, and they will be regulated by a separate law. Further problems have to be settled by the law on the Constitutional Court. It is obvious that regulating such details in the Constitution exceeds the scope of a constitution. But the evaluation of the newly implemented institution in its entirety requires the knowledge of the detailed rules.

41. It is important to distinguish the real constitutional complaint from other types of review. According to the reasoning *"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."*

42. First, what is the object of this type of review? Although constitutional complaint is not the review of an administrative act, neither a review of judicial decisions, I suppose that - similarly to the procedure before the ECHR it will be directed against

[11] In Austria the European Convention of Human Rights has constitutional rank, while in Switzerland it is the basis for a domestic constitutional complaint.
[12] The Constitutional Court prepared the text of the amendment. It has been on the agenda for years to introduce individual complaint.

administrative and judicial decisions that violate individual rights regulated in the European Convention. However this question has to be clarified.

43. Secondly, the effects of the procedure should be defined. In the present case, several questions remain as to the effects of a successful complaint: will the Court decide on the merits or annul the decision of the ordinary court and send the case back to this court for a new decision? What are the effects of the decision on other cases (e.g. persons imprisoned who have been sentenced on the basis of a law which has been found to violate the Constitution).

44. Some constitutional courts having implemented the review of constitutional complaints faced the problem of interference with ordinary courts. The possibility to review the decisions of ordinary courts may create tensions, and even conflict between the ordinary courts and the Constitutional Court. Therefore it seems necessary to avoid a solution that would envisage the Constitutional Court as a "super-Supreme Court". Its relation to "ordinary" high courts (Court of Cassation) has to be determined in clear terms.

45. Finally, two provisions of the amendments should be mentioned that are not related to the two main topics.

46. The last Paragraph of Article 152 of the Constitution shall be amended providing that no allegation of unconstitutionality can 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. This is a peculiar provision ("cancellation clause") of the Constitution of Turkey. After the Court has rejected a claim of unconstitutionality on its merits a new petition cannot be filed against the same provision within a certain time limit. This time restriction under the present rules is ten years. The rather long period has been criticised, therefore the amendment would reduce it to five years.

47. A new provision would be added introducing the "stay of implementation". Such ruling would temporarily suspend the implementation of a legal provision under review by the Constitutional Court. This institution aims at to prevent situations and damages that can not be recovered after implementation of the related provisions. Its introduction, according to the experiences of other constitutional courts would be very useful.

IV. CONCLUSIONS

1. The constitutional amendments outlined in the Draft Proposal are justified, and follow solutions already known in other European countries and they meet European standards.

2. The solutions and changes proposed serve the effectiveness of the Court, especially in protecting fundamental rights.

3. The amendments are limited to those questions that are necessary for guarantees at the constitutional level in order not to overburden the basic law (which in Turkey is quite long and detailed). A full evaluation of the newly introduced organisational and jurisdictional measures would require to be acquainted with the proposed solution also at statutory level.

4. At organisational level special attention should be paid to the plenary control over the two chambers, in order to avoid diverging jurisprudences and interpretations.

5. In order to decide on the admissibility of a constitutional complaint, three-judge panels should be established.

6. The minimum and maximum age requirements might be considered too high and too low, respectively.

7. The scope of constitutional complaint as limited to protect fundamental rights regulated in the European Convention of Human Rights is unusual. It should be considered, at least at a later stage, to widen the scope of protected rights to those regulated in the constitution (to political rights and the classical freedoms).