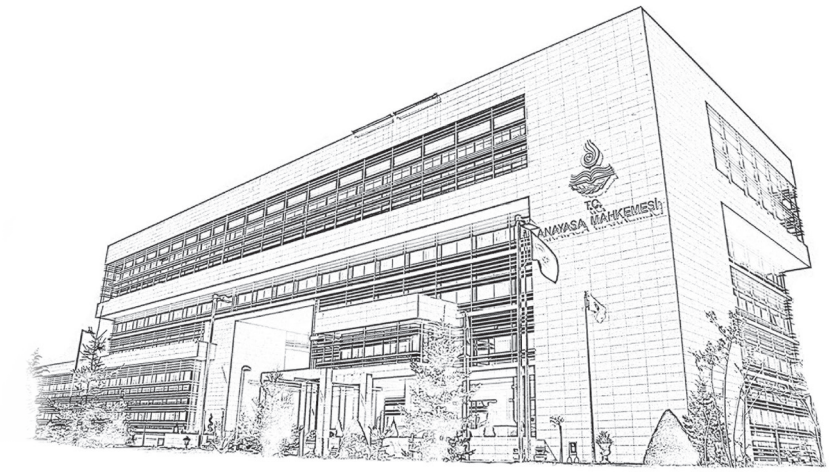
SUPPORTING INDIVIDUAL APPLICATION
TO THE CONSTITUTIONAL COURT OF TURKEY

Needs Assessment Report
on
The Individual Application to the Constitutional Court of Turkey



Key consultant: Mr Luca Perilli, Italian Judge

Contributing consultants:

Ms Christiane Schmaltz, Constitutional Court of Germany
Mr Erol Pohlreich, Constitutional Court of Germany
Mr Luis Pomed, Constitutional Court of Spain
Ms Eva Desdentado Daroca, Constitutional Court of Spain
Mr Juan Antonio Hernández Corchete, Constitutional Court of Spain

Mr Kerem Altıparmak, Ankara University
Mr Bülent Algan, Ankara University
Mr Serkan Cengiz, İzmir Bar Association

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The opinions expressed in this work are the responsibility of the author and do not necessarily reflect the official policy of the Council of Europe.

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THE INDIVIDUAL APPPLICATION TO THE CONSTITUTIONAL COURT

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Abbreviations

CC: Constitutional Court
CoC: Court of Cassation
CS: Council of State
ECHR: European Convention on Human Rights
ECtHR: European Court of Human Rights
GA: General Assembly of the Constitutional Court.
HYSK: High Council of Judges and Prosecutors
HMAC: High Military Administrative Court
IAO: Individual Application Office
MCC: Military Court of Cassation
MoJ: Ministry of Justice
HRDMoJ: Human Rights Department of the Ministry of Justice
JA: Justice Academy
UTBA: Union of Turkish Bar Association

Executive Summary

The report reflects the findings, considerations and recommendations issued by five international and three national consultants following three consecutive visits to Ankara and Istanbul performed by the consultants in January, February and April 2014.

The right to individual application to the Constitutional Court (henceforth: CC) was introduced by the constitutional amendment adopted on 12 September 2010 and entered into force on 23 September 2012. Following this amendment, Article 148 of the Turkish Constitution now stipulates that everyone who claims that one of her/his fundamental rights and freedoms, as protected by the European Convention on Human Rights and guaranteed by the Constitution, has been violated by public authorities may apply to the Constitutional Court. This remedy is only available where ordinary administrative and judicial remedies have been exhausted.

The main aim motivating the introduction of the new system was to guarantee the effective protection of fundamental rights by introducing a domestic remedy by providing adequate redress to the individuals in case of a violation of their rights by administrative or judicial decisions. Although the drafters of the new law on the CC also had expectations, as formulated in the reasoning accompanying the law, that the introduction of constitutional complaint would have resulted in a considerable decrease in the number of files against Turkey brought before the European Court of Human Rights (henceforth: ECtHR).

Before 23 September 2012, when the individual applications started to be received, the CC carried out an intense phase of preparation. The Rules of the Court were updated and two internal regulations adopted. In addition, the human resources were strengthened and judicial and administrative personnel were extensively trained in the framework of the EU/CoE Joint Project.Reporter Judges from the CC participated in six months trainings at the ECtHR and study visits were organised to the other European Constitutional Courts. Moreover, the CC Research and Case-law Unit was modelled after the correspondent unit of the ECtHR.

It then appears that the CC has done its utmost to be prepared for the introduction of the new system and to face the challenges of a heavy workload. The most problematic issues, as identified below, relate either to the legal framework or to structural problems of Turkish Justice and not to the capacity or the commitment of the CC to deal with the new mechanism.

As stated by the ECtHR in its *Hasan Uzun v. Türkiye* decision[1], the individual application to the CC is an **"accessible"** domestic remedy. Filing an application through regular courts or directly to the CC is not difficult, the 30 days time limit is reasonable and the level of courts' fees is not disproportionate, as it is demonstrated by the high number of individual applications filed during the first 16 months of implementation of the new tool. However, the individual application's accessibility can be further improved. National guidelines that guarantee uniformity throughout all court registries should be adopted and information desks in every court should be set up. Preventing applicants from filing their applications by regular post or certified e-mail is an unnecessary obstacle to the accessibility of the individual application system, especially for those who are in any way under control (prisoners, mental patients in hospitals, asylum seekers). Moreover there must be an alternative to the use of Turkish Language for those who do not have access to any legal assistance. The e-justice system UYAP should be regularly used by the CC Registry to retrieve *ex officio* the missing documents needed for the formal admissibility of the applications.

1 April 30, 2013 *(no. 10755/13.)*

As regards to **legal aid,** there seems to be no legal obstacle. However the appointment of a legal aid lawyer is problematic as the procedure is time consuming and could determine the expiration of the 30 days time limit to start an individual application. Provisions should be made to allow the assistance in the individual application proceedings by the same legal aid lawyer appointed in the previous process. Foreigners should have effective access to legal aid on equal footing as Turkish citizens.

As regards effectiveness of the new mechanism, at the time of the visits not enough information was yet available on how the CC handles the **inadmissibility** decisions. The statistics suggest that, as of 20 January 2014, the CC disposed of 4,138 files, delivered 37 judgments and found 35 violations. 2,837 applications were instead declared inadmissible and 909 struck down by the CC Registry because of formal reasons. The figures are in line with those of the ECtHR. However it has not yet been investigated how the CC deals with the inadmissibility ground of "lack of sufficient legal basis" in the individual application. What can be said is that Article 48 of the Law on CC does not expressly contain a criterion of inadmissibility that refers, as in the ECtHR or other European CC case law, to the applicants' prospects of success. During the meetings, the consultants were told that the Reporter Judges, in assessing the ill-founded claims, follow the criteria set by the ECtHR in its decisions.

Concerns must be clearly expressed about the **sustainability** of the individual application system, due to the increasing influx of cases. As of 20 January 2014, a total of 11,974 individual applications had been submitted to the CC. 9,897 cases were filed in 2013, more or less the same number of applications dealt with by the ECtHR in the same year. Though lower than expected, these figures show that the CC already faces a heavy workload and the pace of new files grows progressively, together with the general awareness about the new remedy. A steady increase in the influx of cases could pose a serious risk of disrupting not only the functioning of the individual application system, but also the sound accomplishment of the other functions assigned to the CC. Since the Members are reasonably capable of handling a limited number of cases, increasing the number of Reporter Judges would not be the solution to the problem of workload. It is indeed extremely important that the actual decision of the case rests with the CC Members. The efforts should be directed to reducing, or at least preventing from increasing, the influx of cases and to improving the Court's practices according to the best standards, to enhance the CC effectiveness.

The most problematic areas of individual application concern the length of proceedings. As of 20 January 2014, 10,454 out of 11,974 individual applications were related to *fair trial* as well as the length of detention on remand. As this requires structural and legislative measures, both issues must find an answer outside the CC. The Parliament should consider establishing remedies inside the ordinary judicial procedures to denounce the delays and to speed up the long proceedings; organisational measures to monitor and give priority to old cases in ordinary courts should be adopted; judges should be relieved of their administrative tasks; courts' presidents and managers should be introduced. Even though a preventive approach would be more efficient than *ex post facto* reparation (monetary compensation) of the violation, the Human Rights Compensation Commission, established within the Ministry of Justice to award compensation of damages for long duration of trials finalised before 23 of September 2012, should be generalised as an internal remedy to be exhausted before an individual application is filed. This would prevent unnecessary flow of cases to the CC.

As regards to the **CC internal organisation**, the workflow within the CC seems to be organised in an efficient way. The automatic assignment of cases guarantees the impartiality of the process.

The distribution and flow of cases among Commissions, Sections and General Assembly is rational and efficient. The CC practice to prioritise case according to their importance and urgency has to be appreciated. Internal control mechanisms allow sufficient supervision to prevent conflicting rulings among the Sections and previous Court's rulings. Moreover, establishing leading cases will enable Commissions and Sections to deal efficiently with serial/clone cases, especially with regards to inadmissibility criteria. The publication of all decisions and judgments on the CC's website makes its case law transparent and accessible to all potential applicants and the national and international legal community.

The CC should consider the establishment of a **press speaker** that is responsible for editing press releases on the Court's official website that pertain to important rulings. Contact with the press via a press speaker assures understandable news coverage on the Court's latest rulings and the spreading of the constitutional case law to a broad public. It also minimises the risk that the Court's rulings will be misunderstood.

Concerns must be expressed about the **effectiveness of the legal remedies** provided for by the Law**.** If the CC finds a violation, it may also decide what should be done in order to redress the violation and its consequences. When the violation has been caused by a court decision, the CC sends the file to the competent court for retrial in order to restore the fundamental rights of the applicant. However, if the CC foresees that no redress would come from re-trial, then it may decide on a pecuniary compensation for the applicant or it may ask the applicant to file a case before the competent first-instance court to seek compensation for the damages s/he suffered. There are, in principle, no problematic issues with regards to the ascertainment of a violation and compensation of damages awarded by the Court. Serious concerns relate instead to effects of the CC decisions to the concerned case and to similar cases.

First of all, the **lack of an express provision** that allows the CC to declare null and void the underlying legal regulation in individual application is very unfortunate. While it seems clear in view of the legislative history that the Sections do not have the competence to annul a law when delivering a violation judgment in individual application proceedings, the President and the Members mentioned the possibility that Sections would be allowed to refer the case to the GA for the annulment, according to article 150 of the Constitution and 40 of the Law on the CC. However it has not materialised as yet. Secondly, the effectiveness of the constitutional complaint as a human rights protection tool is heavily dependent on decisions by the ordinary courts implementing those made by the CC, especially when there is no binding legislative requirement obliging the ordinary courts to follow the legal reasoning of the CC. The lower courts acknowledge that they must do what is necessary to comply with the CC decisions, whereas the attitude of higher courts is different as they consider that the case has already been settled by a final decision and, furthermore, their legal interpretation cannot be modified until the unconstitutional legal provision is removed. Therefore, the lack of the CC power to quash the lower courts' judgments from which the violations of fundamental rights stem, does not guarantee the sound implementation of the new system and creates the risk that re-trial of cases will not be enforced. Moreover, the members of the High Courts showed reluctance in accepting a binding force of CC's rulings beyond the individual case whenever the legal situation was in contradiction with the constitutional standards.

Declaring null and void the underlying legal regulation and quashing contesting courts' decisions by the CC would provide a more effective protection to the victims of a violation and would erase every uncertainty about the interpretation of the legal framework by higher courts. Furthermore the CC should, through the reasoning of its judgments and through direct dialogue, persuade high courts about the binding force of the CC rulings in similar cases and should prevent them

from a conclusion that the CC is a super court of appeal which prevails over other high courts and supervises their decisions. To promote an attitude of compliance with the CC case law amongst lower and higher courts' judges, training and mutual consultation between CC and high courts' members should take place. It is important that the level of cooperation in the field of fundamental rights protection is rooted in mutual trust and willingness on both sides, on the part of the CC as well as on the part of the regular courts. Convincing regular courts to accept the binding effect of CC rulings beyond the individual case is a necessary step not only to ensure the effectiveness of CC rulings but also in order to minimise the caseload before the CC.

A further concern is related to the lack of formal mechanism for t**he enforcement of CC judgments**. The CC Members reported that the relevant Authorities tend to respect the CC rulings and to comply with them; they emphasised that this is clear sign of the effectiveness of the tool and of the CC Secretariat General capacity to monitor the execution of CC rulings. However such a formal mechanism should be established by the law. In particular, if the CC sends the applicant back before the competent first-instance court to seek compensation for the damages suffered because of the fundamental right violation, bearing in mind the excessive length of trials phenomenon in Turkey, this ruling must be closely monitored and a time limit should be set out as to the duration of such a second set of compensation proceedings.

Then concerns exist about the **awareness of the system amongst legal practitioners**. Before the individual application procedure became effective, an extensive campaign was launched to inform potential applicants about the new remedy. Brochures (*"How to submit an individual application in 66 questions")* were printed and 50,000 copies were distributed in prisons, to subscribers of legal journals, to universities and courthouses. Reporter judges appeared on national television explaining the newly introduced individual application procedure. The initial judgments of the CC, in particularly the ones concerning detained MPs and the *twitter ban* case were widely reported through the mass media and this contributed to increase the public awareness about this new remedy and the public perception about the importance of the CC' role. Nevertheless it is also apparent that the majority of lawyers have limited knowledge about technical aspects pertaining to the new mechanism. It is obvious that **training legal practitioners** about individual application is strongly needed. Training performed by the Bars is insufficient and the lack of sufficient training for the lawyers may result in inadmissible applications to the detriment of the applicants and may increase the workload of the CC as numerous applications are sent unnecessarily to the CC. Specific training should therefore be planned to target these concerns and individual application should be included in law school curricula. Trainee lawyers should receive dedicated training in the course of their pre-service training. Professional lawyers should be first trained in ECtHR and then CC's case-law on fundamental rights, to enable them to allege the relevant case-law before the first instance courts. In particular the training should be focused on the formalities required to correctly fulfil the application; the admissibility criteria used by the CC; the access to legal aid especially for foreigners; the CC power to sanction the abuse of the right to an individual application; the exhaustion of remedies before filing an individual application; inadmissibility criteria and the CC case law about inadmissible petitions.

Furthermore individual application should become a regular subject both for pre-service and in-service training of Judges and prosecutors. In this case, the training should mainly focus on CC remedies and the enforcement of CC rulings, the retrial and the scope of the binding force of the CC's judgments. The High Council of Judges and Prosecutors, the Justice Academy and the Union of Turkish Bar Associations would be expected to cooperate in order to organise common training open to judges, prosecutors and lawyers. Thereby, exchange of views, exchange of experiences and

a constructive dialogue can be realised. Given the high number of legal professionals to be trained, the use of the HELP methodology and platform is recommended.

Methodology

This report reflects the findings, considerations and recommendations issued by five international and three national consultants following three consecutive visits to Ankara and Istanbul performed by the consultants in January, February and April 2014.

FIRST VISIT:

The visit took place from 20 to 22 January 2014 in Ankara; the team of consultants was composed of:

Ms Christiane Schmaltz reporter judge at German Constitutional Court;

Mr Luis Pomed reporter judge at Spanish Constitutional Court;

Mr KeremAltıparmak professor from Ankara University;

Mr BülentAlgan professor from Ankara University;

Mr Serkan Cengiz from the İzmir Bar Association;

Mr. Luca Perilli, Italian judge and key consultant.

The team of consultants was accompanied by two CoE officers, Ms Natacha De Roeck and Mr Yücel Erduran.

The visit to Ankara consisted of three days meetings with the President, the Deputy President, Members, Chief Reporter Judges, Reporter Judges, Assistant Reporter Judges, members of the administrative staff of the Constitutional Court of Turkey (*AnayasaMahkemesi*).

SECOND VISIT:

The visit took place from 17 to 19 February 2014 in Istanbul; the team of consultants was composed of:

Mr. Erol Pohlreich reporter judge at German Constitutional Court;

Ms Eva Desdentado Daroca reporter judge at Spanish Constitutional Court;

Mr KeremAltıparmak professor from Ankara University;

Mr BülentAlgan professor from Ankara University;

Mr Serkan Cengiz from the İzmirBar Association;

Mr. Luca Perilli, Italian judge and key consultant.

The consultants were accompanied by two CoE officers, Mr Mahir Mustheidzada and Mr Yücel Erduran.

The visit to Istanbul consisted of three days meetings with lawyers from the Istanbul Bar Association (İstanbul Barosu); representatives of NGOs; representatives of the Justice Commission

(*Adalet Komisyonu*), criminal and civil judges, prosecutors, courthouse's registries at the Istanbul Courthouse in Çağlayan (İstanbul Adalet Sarayı).

THIRD VISIT:

The visit took place from 9 to 11 April 2014 in Ankara;the team of consultants was composed of:

Mr. Erol Pohlreich reporter judge at German Constitutional Court;

Mr. Juan Antonio Hernández Corchete reporter judge at Spanish Constitutional Court;

Mr. Kerem Altıparmak professor from Ankara University;

Mr. Bülent Algan professor from Ankara University;

Mr. Serkan Cengiz from the İzmir Bar Association;

Mr. Luca Perilli, Italian judge and key consultant.

The consultants were accompanied by a CoE officer, Mr Yücel Erduran.

The visit to Ankara consisted of three days meetings with the Members of the Constitutional Court (*Anayasa Mahkemesi*), of the Court of Cassation (*Yargıtay*), the Council of State (*Danıştay*), the High Military Administrative Court (*Askeri YüksekİdareMahkemesi*) and the Military Court of Cassation (*Askerî Yargıtay*). Furthermore, the delegation visited the Ministry of Justice (*Adalet Bakanlığı*) where it met members of the Department of Human Rights (İnsan Hakları Dairesi) and the Compensation Commission (*Tazminat Komisyonu*). Ultimately, the team had consultations with lawyers at the Union of Turkish Bar Associations (*Türkiye Barolar Birliği*) as well as with members of the High Council of Judges and Prosecutors (*Hâkimlerve Savcılar Yüksek Kurulu*) and the Justice Academy (*Adalet Akademisi*).

The team of consultants relied on information gathered during the official visits to Turkey and on documents provided by the Turkish authorities and the Council of Europe before and during the missions.

The main sources of Turkish Law consulted by the consultants for their assessment are the following: the Constitution of the Republic of Turkey; the Law No. 6216, adopted on 30 March 2011, on *The establishment and rules of procedure of the Constitutional Court of Turkey* (henceforth: CCL), published in the Official Gazette (no. 27894) on 3/4/2011; the Rules of Procedures of the Constitutional Court, published in the Official Gazette (no. 28351) on 12/7/2012 and not yet translated into English language; the criminal procedural code and the civil procedural code.

This assessment is guided by the reference to the European standards derived mainly from the European Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights (henceforth: ECtHR).

The consultants took further into account the "Opinion on the Law on the establishment and rules of procedure of the Constitutional Court of Turkey", adopted by the Venice Commission at its 88th Plenary Session, held in Venice, 14-15 October 2011 (Henceforth: Venice Commission Opinion).

This report has been made possible thanks to the constant, open and warm cooperation of the Turkish Authorities and the expertise and support provided by the Council of Europe.

I. Scope Of the Individual Application

➢ findings

According to Article 148 (3) of the Constitution of the Republic of Turkey, "*Everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities*".

Article 45 (1) of the CCL coherently establishes that "*Every person may apply to the Constitutional Court alleging that the public power has violated any one of his/her fundamental rights and freedom secured under the Constitution which falls into the scope of the European Convention on Human Rights and supplementary protocols thereto, which Turkey is a party to*."

As stated by Article 46 (2) and (3) of the CCL, "*public legal persons may not petition individual applications*" and "*foreigners may not petition individual applications concerning rights exclusive to Turkish citizens*".

Article 45 (3) of the CCL also states that legislative acts and regulations cannot be directly subject of individual application.

➢ considerations

The function of the constitutional complaint is the effective protection of fundamental rights by giving a remedy to the individuals in case of violation of their rights by administrative or judicial decisions.

According to the expectations of the drafters of the law on CC - as formulated in the reasoning accompanying the law- the introduction of constitutional complaint would have resulted in considerable decrease in the number of files against Turkey brought before the European Court of Human Rights. Thus one of the main aims supporting the introduction of the new tool was to provide a domestic remedy for the violation of fundamental rights. This purpose may also explain why the constitutional complaint procedure only formally relates to European Convention on Human Rights[2].

Fundamental rights and freedoms secured by the Constitution do not coincide, in number and contents, with those proclaimed by the ECHR and its Protocols. Although the reading of the Constitution lets it clear that there is no right and freedom of the ECHR excluded, there are doubts whether the protection provided by the individual application to the CC reaches all the fundamental rights recognised by the Constitution or only those rights protected by the ECHR and its Protocols. As stated in the Venice Commission "Opinion on the Law on the establishment and rules of procedure of the Constitutional Court of Turkey", the words "falls into the scope" of the ECHR can be construed narrowly, implying that the fundamental rights that may be invoked in an application to the CC are exclusively those secured by the Constitution and guaranteed by the ECHR and its Protocols. But it can be construed in a wider sense, and give way to the incorporation of the rights guaranteed by the ECHR and its Protocols into those secured by the Constitution. This second approach would facilitate the development of a Turkish theoretical framework of fundamental rights and would, at the same time, comply with Art. 90 of the Constitution, as amended in 2004, which establishes the primacy of the European Convention on Human Rights. For both cases, in order

2 See on this point the Venice Commission Opinion.

to avoid that the CC interpretation diverges from that given by the Strasbourg Court, a profound knowledge of the case-law of the European Court of Human Rights is essential.

Article 46.2 prohibits applications by public legal persons. The exclusion of public legal person's right to apply poses some theoretical problems. 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 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 or to property[3] has been infringed. Furthermore Turkey ratified in 1992 the European Charter of Local Self-Government. Municipalities or institutions of higher education —to mention only two public legal persons contemplated by the Constitution— could be owners of fundamental rights.

As regards to foreigners, the problem lies in determining what fundamental rights an alien does not have, just by being an alien. *According to Article 1 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.*[4]

It is recommended to interpret the Constitution's reference to "rights exclusive to Turkish citizens", by limiting them exclusively to the political rights and duties listed in part two, chapter four of the Constitution, insofar as the Constitution itself requires being a citizen to own and exercise these fundamental rights and freedoms.

RECOMMENDATIONS

- Articles 148 (3) of the Constitution and 45 (1) CCL about the scope of individual application should be interpreted in a way to ensure the incorporation of the rights guaranteed by the ECHR and its Protocols into those secured by the Constitution.
- The exclusion of public legal persons and foreigners from the right to apply should be construed in a very narrow sense in order to assure an effective protection of their fundamental rights and freedoms.

II. Accessibility

II.A.1 Accessibility of information about individual application by private parties

➢ Findings

The consultants were informed by the CC Reporter Judges that before the individual application procedure became effective (as of 23 September 2012), there was an extensive campaign to inform potential applicants about the new remedy. Brochures (*"How to submit an individual application in 66 questions")* were printed and 50,000 copies were distributed in prisons, to subscribers of legal journals, to universities and courthouses. Reporter Judges appeared on broadcasts in various

3 See on this point theVenice Commission Opinion.

4 See on this point theVenice Commission Opinion.

national channels explaining the newly introduced individual application procedure.

The initial judgments of the CC, in particularly the ones concerning detained MPs and the *twitter ban* case were widely reported through the mass media and this contributed to increase the public awareness about this new remedy.

Some lawyers and NGOs considered that there is still a lack of information about individual application. They pointed out that access to information is more difficult for prisoners and especially for foreigners because of the language barrier. Moreover, NGOs expressed their concerns regarding the situation of refugees that are in detention centres with no access to lawyers or staff with legal skills.

➢ **Considerations**

Whoever seeks information on the new remedy, can find it easily on the Internet[5].

However, considering that not every citizen has regular access to the internet, information desks at courts should be set up and equipped to provide practical instructions on how to file a claim and how to access legal aid.

On the whole, access to information about individual application should be improved in relation to those that are in a more vulnerable situations, especially foreigners that encounter a language barrier and may be in a condition (detention centres) that makes more difficult for them to access a lawyer or staff with legal skills.

recommendations

- Information desks at court houses should be set up and equipped to provide practical instructions on how to file a claim and how to access legal aid.
- Access to information about individual application should be improved in relation to potential applicants, who are in a vulnerable situation, especially foreigners who encounter a language barrier and may be in a situation, like the confinement in detention centres, which makes difficult for them to access a lawyer or other staff with legal skills.

II.A.2 Legal practitioners' awareness of the individual application

➢ **Findings**

Legal practitioners are well aware of the existence of the individual application before the Constitutional Court as a way to obtain protection for human rights in Turkey. However this awareness has not yet been entirely developed into technical knowledge about the procedure and the conditions for filing an admissible complaint.

The consultants acknowledged the existence of uncertainties, among lawyers and NGOs, about specific aspects of the individual application such as:

5 When *googling* its Turkish term ("*bireyselbaşvuru*"), the first entries shown are:
- a link to the brochure that was distributed at the time of the introduction of the individual application ("How to submit an individual application in 66 questions");
- a link to the application forms;
- and many other links to web sites with helpful information that is easy to understand even for people without any legal training.

- the formalities required to file correctly the application;
- the admissibility criteria used by the CC;
- the access to legal aid[6] especially for foreigners;
- the right of private legal persons to lodge an individual application;
- the possibility of getting a fine for abuse of the right to apply to the CC[7];
- the principle of exhaustion of further internal remedies;
- the need to file previously an individual application before the CC in order to access the ECtHR[8];
- the impact of the individual application inadmissibility decision by the CC on the access to the ECtHR.

Furthermore, there is a widespread perception among lawyers and representatives of the NGOs that the individual application to the CC is not an effective remedy against the violation of human rights and that, on the whole, constitutes an obstacle to access the ECtHR. They seem therefore to consider that the need to file an individual application before the CC is a process-delay instrument. They accepted however that they may be prejudiced as they haven´t seen yet clearly the effectiveness of the system and that there may be too little experience yet.

Istanbul judges and public prosecutors reported that individual application has not so far impacted their usual work. They seemed however to be aware of the system and showed themselves receptive to CC case law and willing to take it into account in their own decision-making. However, some doubts about the scope of the binding force of the CC's rulings and CC's power to nullify legal provisions still exist.

Members of the High Courts explained that the introduction of individual application in Turkey strengthened the protection of human rights; however they generally refused the binding force of CC's rulings in similar cases.

➢ Considerations

In general, considering the referendum stage, the public awareness campaign about the individual application before it came into force, academic activities and finally the conspicuous rulings of the CC, there is no doubt about the awareness of the system by the legal practitioners.

It further seems that the awareness of the individual application system among the lawyers has surged following the ruling by the CC to lift the *twitter* ban. Nevertheless, it is also apparent that the majority of lawyers have limited knowledge about the new mechanism.

Scepticism by some lawyers about the effectiveness of this new remedy might be a matter of prejudice and is not justified by real grounds. It could be overcome if legal practitioners, and in particular lawyers, regularly undergo dedicated training about individual application.

6 Please see chapter III.5 below.

7 Under Article 83 of the Rules of the Court, the CC has competence to impose a fine on an applicant up to TRL2.000 if the right to individual application was abused by the applicant.

8 ECtHR, decision of 30 April 2013, *Hasan Uzun v. Turkey*, no. 10755/13, § 69.

RECOMMENDATION

- Legal practitioners should regularly undergo dedicated training about the individual application.

II.A.3 The role of lawyers

➢ **Findings**

According to Article 61(1) of the CCL, an individual application can be filed by the applicant in person, by his/her legal representative or by his/her lawyer. Application by a lawyer is therefore not compulsory.

Until the end of 2013, 6854 applications were filed by lawyers, and, 4230 applications were made personally by the applicants.[9]

During the meetings held in İstanbul Bar Association premises, the consultants were informed that no special training programme have been organised on individual application by the Bar, and in general there was an absence of any compulsory professional in-service training for lawyers in Turkey.

➢ **Considerations**

Lawyers are one of the main pillars of the individual application since the CC receives the majority of the applications through lawyers. The figures show that applicants increasingly tend to get the support of lawyers for individual application. However, there is no data about the admissibility rates of the applications made with or without the assistance of lawyers.

Considering the importance of lawyers for the well functioning of the individual application, it has to be reiterated the recommendation for the organisation of devoted training for lawyers on individual application throughout Turkey.

II.A.4 Legal Aid

➢ **findings**

Legal aid concerning payment of the individual application Court's fee is available.

According to Article 62 (2) of the Rules of Court, legal aid claims shall be decided by CC Sections or Commissions that will decide over the case. The Section or the Commission, which decides on the request for legal aid, shall apply general principles concerning legal aid

Pursuant to Civil Procedure Law no.6100, Articles 334- 340[10], the legal aid claims must be based upon an indigence document issued by a head of the neighbourhood (*muhtar*) or mayor of the town where the applicant lives.

However, according to the information received from Reporter Judges working in the CC Individual Application Office, the applicant simply needs to submit a declaration that s/he is unable to pay the

9 See the statistics in http://www.anayasa.gov.tr/BireyselBasvuru/Istatistikler/index.html (last access on 5.3.2014).

10 The legal aid application for appointment of a legal counsel in a crime related matter is evaluated by prosecutors/police (if it is requested at the investigation stage) or court under Article 150 of the criminal procedure code.

court's fee and - if possible –support this declaration with documentary evidence. If the applicant is unable to submit this evidence, the CC will of its own motion request the information from the relevant authorities.

In the meeting with lawyers, uncertainties emerged about the procedure to have a legal aid lawyer appointed by the Bar. The consultants were informed that when a lawyer is appointed for legal aid, his/her mandate covers the trial before the court of first instance and court of appeal, but not the individual application process. Therefore the applicant has to apply again to the Bar for further assistance of a lawyer at the CC stage. The lawyers also stated that the assessment of such an application takes at least 15 days and makes it extremely difficult, if not impossible, for the applicant to respect the thirty days time-limit established by the law for filing the individual application.

The NGOs also mentioned foreigners, especially refugees and asylum seekers, who encounter the problems with receiving legal aid, because many refugees are illiterate and cannot speak Turkish language. According to the civil procedural code, legal aid is granted to foreigners pursuant to the principle of reciprocity[11].

However in the meeting with the lawyers, the consultants were informed that, according to a recent decision of the National Bar Association, dated 22.07.2013, application for legal aid is also possible for applicants that are not Turkish citizens. Until 22.07.2013 the legal aid applications by those who lack Turkish citizenship were not even registered by the Bar Associations in the relevant internet based legal aid ledger. On 22.07.2013, the Union of Turkish Bar Associations[12] announced that the procedure was amended to make it possible for foreigners to apply to the Bar Associations[13] for legal aid. However, this decision seems to be unknown to wider public.

One of the consultants collected the following information from the head of legal Aid Department of Izmir Bar Association: in today's practice (in particularly after the war in Syria), the Bars do not currently require foreign legal aid seekers to prove their financial status with relevant official documents; though Turkish citizens still have to submit an indigence certifying document.

- **Considerations**

There seems to be no obstacles for legal aid.

However, under domestic law and practice, legal aid is only provided to Turkish citizens. If an applicant is not a Turkish citizen, then the legal aid application will most likely be dismissed by the CC on the basis of the Law no.6100.

Therefore, room for those who are not covered by Turkish citizenship in any way must be made available. This is related only to the exoneration from the payment of the Court's fee.

Legal aid consisting of the appointment of a lawyer is possible for Turkish citizens but it is problematic because the procedure for the appointment is time consuming and could cause the expiration of the 30 days time-limit to start an individual application. Provisions should be made to allow the assistance in the individual application proceeding by the same legal aid lawyer appointed in the previous process; the applicant should be further allowed to ask for the suspension of the time-limit

11 Law on Foreigners and International Protection no 4658 published in the Official gazette no. 28615 on 13 April 2013 in the second paragraph of article 81 establishes those individuals who have *international protection statuts* only *are provided with legal aid.*

12 There are 79 Bar Associations throughout Turkey.

13 *The decision states: "In the National Bar Associations Network services delivered by our Union; obligation to enter "Turkish ID no" for individuals with foreign nationality who receive legal aid was removed only for individuals with Foreign Nationality and was replaced with "Passport No." field. If passport is unknown, this filed should be left empty".*

for filing an individual application, when legal aid has been claimed, until a lawyer is appointed or, at least, provisionally appointed.

Furthermore, the conditions and concrete possibility for the appointment of a legal aid lawyer to foreigners, especially those without direct access to a lawyer and those who are not able to use the Turkish language, are still unclear, even though the decision adopted on 22.07.2013 by the National Bar Association could solve the problem, if properly implemented.

RECOMMENDATIONS

- The scope of legal aid should be broadened in order to cover potential non-Turkish applicants.
- Legal provisions should be adopted to allow assistance in the individual application proceeding by the same legal aid lawyer appointed in the previous process.
- Applicants should be allowed to ask for the suspension of the time-limit for filing an individual application, when legal aid has been claimed, until a lawyer is appointed or, at least, provisionally appointed.

II.A.5 Fees

➢ **Findings**

According to Article 47 (2) CCL, "*a fee is payable for individual applications*".

Individual application is subject to the payment of a court fee, which was TRL 150 in 2012, became TRL 198,35 in 2013. The application fee for 2014 is TRL 206,10.

Some lawyers and NGOs criticised the existence of the fee and others said they considered the fee too high.

➢ **Considerations**

In its recent study on individual access to constitutional justice, the Venice Commission recommends that in view of increasingly more comprehensive human rights protection, court fees for individuals ought to be relatively low and that it should be possible to reduce them in accordance with the financial situation of the applicant. The primary aim of fees should be to deter obvious abuse.

Approximately 12000 applications to the CC, at the time of the third consultants' visit, reveal that the current fee have not dissuaded the applicants from filing individual applications to the CC so far.

Therefore, the current level of fees cannot be considered an excessive burden and a disproportionate obstacle to access individual application.

II.B.1 Filing an Application

➢ **Findings**

Article 47 (1) 1 of the CCL states that an individual application can be filed to the CC in three different ways:

- directly to the CC, or
- through any other court in Turkey or
- through representations of the Republic of Turkey abroad.

It adds that "*Procedures and principles for admissibility of applications through other modes shall be regulated by the Rules of the Court*".

It is not currently allowed, however, to file a case via regular mail, e-mail or fax. Nonetheless, it was stated in a meeting that there is an exception in practice: applications from prisons via mail are not refused, provided it is certified (i.e. a sign or a seal by the Prisons' officers).

The consultants were reported that approximately one fourth of the applications are submitted directly to the CC; the rest of the applications are filed via the local courts.

According to article 47 (5) of the CCL, the application must be lodged within 30 days after exhaustion of legal remedies and the notification of the last instance decision to the applicant. It has to be noted that "*those who fail to apply within due time as a consequence of a warranted excuse may apply within fifteen days after the excuse ceases to exist and must present evidence proving the excuse. The Court examines validity of the excuse first and then either admits or dismisses the claim.*"

According to Article 59 of the Rules Turkish is the only language by which an applicant can submit his/her/it application.

➢ **Considerations**

The fact that applicants are precluded from filing their individual application by post or certified e-mail (e-signature) or an alternative on-line application system is an unnecessary obstacle to the accessibility of the individual application system. This matter is likely to cause problems for those who are in any way under control (prisoners, mental patients in hospitals, asylum seekers or foreigners who live in a country where Turkey has no representative body). Furthermore, the application mode will give rise to problems in cases where the time limit runs out on a public holiday; this problem might become even more complicated when an interim measure is requested by the applicant. Hours, not even days, might be important for a person who, for example, is about to be extradited to a country where he/she might face torture.

There has been no clear answer on how prisoners or detainees can submit an (admissible) individual application. While the Reporter Judges informed the consultants that prisoners were allowed to file an application via mail with the prison stamp, it was observed that it could be difficult to get the prison stamp in practice[14].

There should be an alternative to the use of Turkish Language for those (in particularly foreigners who are awaiting deportation to a country where they may face violations of Article 2 and 3 of the ECHR) who do not have access to any legal assistance in order to prepare a Turkish application.

14 Recently the European Court of Human Rights communicated an application to Turkey pertaining efficiency of the individual application tool to the CC (Application no.20616/13, *Sakın v. Turkey*). The application concerns an applicant who is serving a prison sentence in İzmir F Type prison and whose individual application to the CC was dismissed on the basis of the fact the individual application was submitted to the CC by post rather than the local court or the relevant prison administration. The European Court asked the Turkish government to answer several questions concerning the effectiveness of the newly created constitutional application mechanism.

RECOMMENDATIONS

- The CC internal rules should be changed so as to allow the filing of the application via regular mail and, possibly, via certified e-mail or an alternative on-line application system.
- Ann alternative to the use of Turkish language should be provided for foreigners who are not able to have access to any legal assistance for preparation of a Turkish application.

II.B.2 Filing the claim through courts

➢ **Findings**

As regards filing of individual application trough regular courts, lawyers reported that, at the first stage of the implementation of individual application, they encountered problems in receiving by the Courts' registries the proper information on how to file the claim.

Although the clerks working at the local court registries play a major role in the individual application mechanism[15] and despite the extensive information campaign carried out before the individual application procedure had become effective, the Registry clerks at the Istanbul Courthouse stated they had received neither the brochures[16] that were distributed in the frame of the campaign nor any special training. The clerks considered the only source of information they received - a circular from the Ministry of Justice - to be insufficient for their preparation of the new task; they reported that they had to learn the application mechanism by practice.

Clerks and administrative staff of the Istanbul Courthouse admitted that, since there are no national guidelines, the formalities required by the court registries for accepting an individual application may vary from one court to another.

However, problems seem now to be mostly solved in the Istanbul Courthouse, where clerks informed the consultants that the procedure for filing the individual application through this court has become quick and easy.

It was pointed out that difficulty persists when the applicant is a foreigner or a legal person, since the National Judiciary Informatics System(UYAP) asks for a Turkish identification number. Some clerks said that foreigners and legal persons have to file directly at the CC, while others explained they could send the application through UYAP but using an electronic framework different than the specific one provided for individual application.

The clerks of the Istanbul Courthouse's Registry also said that, since the Registry already has busy workload, it may be better to create a specific front office to receive individual applications. This could also improve the information and service for the applicants.

Lawyers and NGOs complained that along with the application they have to provide all documents of the previous process officially certified[17] and that this is a disproportionate burden for the applicant, especially in respect of cases with voluminous case-files[18].

15 7434 of the applications filed between 1 January 2013 and 31 December 2013 were filed at a local court's registry, 2493 were files directly at the CC and 24 at a representation abroad, see http://www.anayasa.gov.tr/files/bireyselBasvuru/2013_istatistikler.pdf.

16 "How to submit an individual application in 66 questions".

17 I.e. the claims, decisions of the court and administrative bodies, minutes of the hearings

18 Like *Sledgehammer* and *Ergenekon.*

In addition, the clerks explained that the quality level of scanned documents is not the same all over the country, since not all the courts are equipped with the same resources. Furthermore, they explained, the scan-offices sometimes have too busy workload and insufficient staffing to complete all the work and this explains why applicants are sometimes requested to bring the certified documents along with the application form.

- **Considerations**

It is not difficult to access the local courts which can be found not only in city centres, but also in many towns[19]; however the necessary physical access to court will give rise to problems in cases where the time limit runs out on a public holiday; this problem might become even more complicated when an interim measure is requested by the applicant.

Different practices followed by registries of local courts would jeopardize the accessibility of the remedy. National guidelines that guarantee uniformity throughout all court registries, also providing information about the individual application formalities for applicants, should be therefore prepared and disseminated by the MoJ in cooperation with the CC. The Ministry of Justice must ensure that registry clerks receive adequate training about the new remedy, how to inform citizens about the individual application procedure, how to upload the claim and the documents in UYAP, and how to collect fees.

As regards lawyers' complaint about the need to submit certified copies of the relevant documents concerning their applications, it has to be noted that this obligation is provided by article 59/3 of the Rules of the Court. However, in the course of the first visit to the CC, the consultants were reported that the documents could be retrieved directly from UYAP. Lawyers and NGOs objected that instead they are often requested to provide certified copies of the documents already contained in the court's file. The problem seems to lie — based on the information clerks of the Istanbul Courthouse's Registry gave the consultants — in the fact that the documents are not always scanned and uploaded in UYAP by Courts' Registries.

To facilitate access to the remedy, the consultants recommend that the practice of the CC Registry to retrieve documents from UYAP be expressly regulated and prescribed in the Rules of the Court.

RECOMMENDATIONS

- The practice of the CC Registry to retrieve documents from UYAP should be expressly regulated in the Rules of the Court.
- National guidelines that guarantee uniformity throughout all court registries should be adopted.
- Clerks at the courts' registry/information desk should receive training about the new remedy, on how to inform citizens about the individual application procedure, on how to upload the claim and the documents in UYAP, and on how to collect fees.

19 Turkish civil administration is composed of 81 cities (il) and 919 towns (ilçe). Seethe web site of Ministry of InternalAffairs, https://www.e-icisleri.gov.tr/Anasayfa/MulkiIdariBolumleri.aspx. Thenumber of courthouses in Turkey is 708 in 575 districts. See http://www.e-justice.gov.tr/presentation/generalinformation.html. Courthouses can be found in everycitycentreandmost of thetownsexceptthose of a low-population.

II.B. 3 National Judiciary Informatics System- UYAP

➢ **findings**

UYAP is an e-justice system as a part of the e-government, which has been developed in order to ensure a fast, reliable, soundly operated and accurate judicial system. As a central network project it includes almost[20] all of the courts, public prosecutors services, prisons, other judicial institutions and government departments in Turkey[21].

This system can provide the CC in most cases with instant access to the lower court files and automatically retrieve the relevant documents from the court's file.

As mentioned above, under Article 59/3 of the Rules of the Court parties filing an individual application are required to submit copies of the relevant documents concerning their complaints (petitions, decisions of the courts and administrative bodies, minutes of the hearings etc.).

According to the information received from the Reporter Judges working in the CC Individual Application Office, where the individual applications are registered, the CC adopts a flexible approach regarding missing documents and UYAP is used to retrieve missing documents to complete the file.

According to information provided by Reporter Judges this flexible approach is followed in particular towards prisoners and people not represented by a lawyer.

➢ **Considerations**

The UYAP system is an advanced, modern and reliable tool that makes individual application easier and improves accessibility to the CC. However, the system has to be updated in order to overcome the problems when the applicant is a legal person or a foreigner.

Accessibility of documents through UYAP is advantageous both for the applicants, who do not have to attach a voluminous file to their application form, and for the CC officials as they can reach the lower court's files speedily, safely and easily.

If the system is in fact used *ex officio* to complete an otherwise incomplete - and thus inadmissible - individual application, it would help to improve accessibility of the CC. However not every court in Turkey regularly uploads all case file's documents to UYAP.

The improvement of resources to scan and upload documents in UYAP may therefore be necessary in some courts.

recommendations

- Within the applicable data protection rules UYAP should be used by the CC to retrieve information needed for an application if the applicant is unable to provide that information within the relevant time-limits.
- The Rules of the Court should be amended to establish the CC Registry duty to retrieve *ex officio* the missing documents from UYAP;
- UYAP should be adapted to overcome the problems that foreigners or legal persons may encounter when filing the individual application.

20 Military courts are not included into the UYAP system.

21 Information obtained from http://www.e-justice.gov.tr/presentation/generalinformation.html.

II.B.4 Role of Constitutional Court's Registry

➢ **findings**

When an individual application is lodged, it is firstly addressed to the Individual Application Office (hereinafter: IAO or Registry) of the CC, namely "*Bireysel Başvuru Bürosu*". Article 65 (3) of the Rules of the Court regulates the Registry responsibilities. There, software is assigning the individual application by a registration number. Then Individual Application Office must check whether the individual application form and its annexes are complete. When any incompleteness is found, applicants are informed so that they can complete necessary documents in time. Finally, the IAO is responsible for pursuit and forwarding the individual application to the competent units.

➢ **Considerations**

IAO conducts a merely formal examination of individual applications; the Registry cannot decide on admissibility or on the merits. The examination is limited only to the requirements enumerated in Articles 47 CCL and 59 and 60 of the Rules of the Court.

Article 59 (4) of the Rules of the Court sets out in detail the documents which an applicant must attach to his/her/its application form: i.e. power of attorney if there is a representative, the receipt which indicates payment of the court fee, a copy of the ID or passport (for foreigners), documents for legal persons including names of individuals who represent them, postal receipt which indicates the notification date of the final decision/judgment, the documents (originals or certified copies) upon which the application and violation allegations are based, the documents which support damage claims (if there is any), the documents which substantiate the excuse (if there is any) of an applicant for not submitting the application within the prescribed time limit (30 days).Pursuant to Article 60 of the Rules of the Court, if the application exceeds ten pages, an abstract shall be added to the application form that summarizes the facts of the case.

As regards the extent of the power of the Individual Application Office to complete the claim ex officio trough UYAP, please see the paragraph above (II.B.3).

II.B. 5 Completion of the Application

➢ **findings**

According to article 66 of the Rules of Court, if there are missing parts in the application form or in its annexes the Individual Application Office shall give extra time up to 15 days to the applicant or to his legal representative to complete the file. The applicant shall be informed that if the missing parts are not completed in the given extra time without a valid legal reason, the application would be rejected.

According to the information provided by the reporter judges the CC can, at any stage of the proceedings, correspond with the applicant with regard to missing documents and also request missing documents from the relevant authorities.

➢ **Considerations**

As to the completion of the application the question remains what exactly are the requirements regarding the submission of necessary documents for a constitutional review and whether the CC

will *ex officio* correspond with the applicant and ask for more information.

Furthermore it is unclear which missing documents would cause the rejection of the application and whether, in cases where the applicant is unable to have access to the documents listed by article 59 of the rules of court, s/he should raise this matter with convincing explanation in the relevant application form and whether, upon this information, the CC, on its own motion, would collect those documents from the relevant institutions.

RECOMMENDATIONS

- It should be officially clarified by the Individual Application Office what missing documents would cause the rejection of the application.

III. Internal Organisation and Procedures of the Constitutional Court

The internal organization and procedures of the CC are set out in the CCL and in the Rules of the Court[22] which have been adopted by the General Assembly (hereinafter: GA).

III.1. Preparation of the Court for the Implementation of the Individual Application

➢ **FINDINGS**

Following the constitutional amendment of 2010, an intensive preparation for the implementation of individual application immediately began.

The consultants were told by the President and Reporter Judges that the construction of the current building of the CC was conceived to include adequate facilities for the implementation of individual application.

The CC performed three groups of activities to be prepared for the individual application, as specified below.

The first activity was in the legal area. The Law on Establishment and Rules of Procedures of the Constitutional Court (Law nr. 6216)[23] was enacted and entered into force. In addition, the individual application procedure was regulated in detail in the Rules of the Court[24]. Finally, two regulations[25] were adopted on the employment and training of the assistant Reporter Judges candidates.

The second activity focused on strengthening human resources. As receiving individual application would greatly increase the workload of the CC, new personnel was necessary. A new position of "assistant Reporter Judge" was created to this end. For the recruitment of assistant Reporter Judges, as per a regulation published in the Official Gazette on 21 May 2011, a two-stage examination consisting of a central written examination followed by an oral one was implemented. The central examination was held by ÖSYM (Centre for Evaluation, Selection and Placement) on 30 October 2011. From 3,467 applicants, 2,883 attended the central examination and after the oral exam stage

22 The Rules of the Court are not available in English.

23 Published in theOfficialGazette (Nr: 27894) on 3/4/2011, articles 45-51.

24 Published in theOfficialGazette (Nr: 28351) on 12/7/2012, Articles 59-84.

25 See the Regulation on the Examination of Assistant Reporter Candidate ship of the Constitutional Court (Anayasa Mahkemesi Raportör Yardımcısı AdaylığıGiriş Sınavı Yönetmeliği), published in theOfficialGazette (Nr: 27940) on 21 May 2011 andtheRegulation on the Training of AssistantReporter Judges Candidates of theConstitutional Court (Anayasa Mahkemesi Raportör Yardımcısı AdaylarınınEğitimi Hakkında Yönetmelik), published in theOfficialGazette (Nr: 28286) on 8 May 2012.

performed by the CC, although 45 personnel were needed, only 26 were deemed successful and were offered positions in the CC as assistant reporters.

It is noteworthy that although assistant Reporter Judges are assigned to assist Reporter Judges in judicial and administrative matters[26], currently all of them are engaged in the individual application process.

49 of 68 Reporter Judges are employed in the individual application system.

The consultants were told that Reporter Judges are selected according to different backgrounds. Academics, judges and prosecutors from different levels are appointed as Reporter Judges. Since the cases are allocated to judges pursuant to their expertise, the Court aims to employ Reporter Judges from criminal, civil and administrative courts. In order to follow the ECtHR jurisprudence all assistant Reporter Judges had to pass the foreign language test.

Finally, the number of the other personnel, which was previously123, was increased to 142.

The CC also employs a software engineer and an analyst.

The third activity, which is in fact an ongoing process, relates to the training of the participants in the individual application procedure, including the judges of the CC, Reporter Judges, assistant Reporter Judges and other personnel of the CC.The administrative personnel at the CC were also trained and a specific computer program for the individual application system was developed.

Furthermore, the CC was supported by the EU/CoE Joint Project that aimed to enhance the role of the Supreme Judicial Authorities in respect of European Standards. The Project was amended to include a specific component dedicated to support the introduction of the individual application mechanism before the Turkish CC.

Also in the context of the above Joint Project, the complex range of activities organised to assist the CC to prepare the system played an important role in ensuring its smooth start. The study visits to the CC's of Spain and Germany, as well the placements of ten Reporter Judges from the CC to the ECtHR, allowed the CC to benefit from a rich international experience via the intensive training that was replicated at home institution at a later stage. Ten Reporter Judges formed the core group of professionals who prepared the new Rules of the Court, the guidelines and application form to the CC, in addition to serving as trainers of the junior staff of the CC engaged in running the individual application system.

- **Considerations**

Before 23 September 2012, when the individual applications started to be received by the CC, an intense phase of preparation was made by the CC. The experiences of other Constitutional Courts and of the ECtHR were considered and also their drawbacks in the face of heavy workload were analysed and solutions for similar problems were looked for.

26 Art. 27 (1) of the Law no. 6216.

III. 2 Assignment of Cases

➢ **findings**

While "Examination for admissibility of individual applications is conducted by the Commissions"[27], Sections are the boards "*authorized to render decisions on individual applications*"[28], which is ruling on the merits[29].

On the other hand, the CCL[30]attributes the CC General Assembly the competence to divide work among Sections and provides[31] that the President shall take the necessary measures to balance the distribution of workload among the Sections[32].

Upon registration, the cases are automatically and randomly assigned to a Commission within the Sections[33]. There is no division of work as to the area of expertise between the Commissions or Sections; however specialist competence is assured with the participation of the Reporter Judges, who give their advice on the admissibility of individual applications and draft the decisions in accordance with their professional background (i.e. criminal, administrative or civil law).

➢ **Considerations**

The automatic assignment of cases guarantees that filesare not arbitrarily assigned to Sections and Commissions but it is simply done by a random computer system that cannot be influenced from the outside. Random assignment of cases contributes to strengthen public trust in the impartiality of the Court.

Current lack of specialisation of Commissions and /or Sections is understandable, since the CC is still in the stage of setting its case law. Specialisation of Commissions and Sections would be an advantage in the long run, once the case law will be established and fast proceedings will be set for serial cases.

Art. 49.1 CCL prevents imbalances between the Sections.

recommendations

- Specialisation of the Commissions and Sections should be considered in the long run.

III. 3 Reporter Judges

➢ **findings**

Reporter Judges are indeed the crucial actors of the individual application process. Currently, 68 Reporter Judges work in the CC, 49 of whom are dedicated to the individual application. They take part in all stages of individual application proceedings; from registration of the case to the drafting of the final decision. They are assisted by 26 assistant Reporter Judges who were employed after the individual application was introduced.12 Reporter Judges including one Chief Reporter Judge work

27 Article 48 (3) CCL.
28 Article 2(1)ç CCL.
29 Article 49 (1) CCL.
30 Article 21(2)d.
31 Article 49 (1).
32 Art. 49.1 CCL.
33 Rules of the Court, art.67(1).

in each Section, 20 Reporter Judges in the Commissions, and 3 Reporter Judges at the Individual Application Office.

According to Article 37 of the Rules of the Court there shall be 4 Chief Reporter Judges, 3 of which work in the individual application system. One Chief Reporter Judge is to be assigned to the Commissions, one to the Sections and another one to the Research and Case law Department.

Reporter Judges are not assigned to a specific Commission; rather, they work in a pool and cases are assigned to them according to their expertise by the Chief Reporter Judges who coordinate the work of the Commissions.

- **Considerations**

The Reporter Judges play a fundamental role in the CC. Similar to ECtHR – with reference to the registry lawyers- the CC significantly relies on their work. Reporter Judges are highly qualified, have professional experiences as judges, prosecutors or professors with diverse backgrounds, which enable them to deal with all matters brought before the CC.

Each case is not automatically assigned to a Reporter Judge, but rather the Chief Reporter Judge assigns cases according to the expertise of the Reporter Judges. However, the final decision always rests with the elected Members of the CC. Long serving staff allows for the construction of an institutional memory conducive to greater consistency and continuity of the court's case-law.

Considering the huge amount of workload connected with the individual application, the important role played by Reporter Judges as to the finalization of individual application and the limited number of CC Members -who are entrusted with further competences- proper mechanisms should be introduced to ensure that the final decision not only formally but actually rests with the elected Members of the CC.

III. 4. Commissions, Sections, General Assembly

- **findings**

While the Commissions are solely responsible for decisions of admissibility of individual application, the Sections rule on merits. Sections decide on inadmissibility in some exceptional cases. However, so far almost all inadmissibility decisions have been rendered by the Sections in order to establish coherent case-law concerning inadmissibility criteria.

There are six Commissions —three in each Section— composed of 2 Members each. The two Sections are composed of 7 Members and chaired by a Deputy President. During each calendar year, the Section Members rotate within the three Commissions of their Section. The Sections convene with the participation of five Members (four Member plus 1 President)[34].

The GA hears cases and applications concerning political parties, actions for annulment and objections and trials where it acts as the Grand Tribunal. It convenes with the participation of at least twelve Members, presided over by the President or a Deputy President[35]. Under Article 25 of the Rules of the Court, the GA is empowered to maintain case-law coherence between judgments of the Sections.

34 Art. 149 of the Constitution, Art. 22.1 CCL.

35 Art. 149 of the Constitution.

The consultants were told that during the initial period of establishing the CC's case-law on individual application the cases are usually referred to the GA for a decision on the merits.

Article 72 and 57 of the Rules of the Court state that Sections and GA take their decisions by simple majority.

➢ **Considerations**

The division of cases between Commissions, Sections and GA does not raise any problematic issues. One might consider a specialisation of the Commissions for an even more effective workflow. However, there is too little information on the nature of the cases, which would allow the expert to assess whether such a specialisation would optimise the working methodology of the CC.

In practice, the Commissions refrain from deciding on the admissibility of individual applications. In other words, at this early stage of the individual application process, the Sections decide on both admissibility and merits. This is justified by the Members for the reason that the Court is still in the stage of establishing its case-law; not only relating to the merits but also to the admissibility standards.

recommendation

- In the future, after a period for the establishment of the case law, the specialisation of the Commissions should be taken into consideration.

III. 5 Evidence

➢ **findings**

According to Article 49(3) of the CCL, the CC "*may carry all types of examinations and investigations to find out whether a violation has occurred … Information, documents and evidence deemed necessary are requested from the concerned parties.*"

Article 49(3) of the CCL complements Article 47(3), which sets on the appellant the burden of providing "substantiating evidence".

If parties fail to provide evidence, the Court shall draw necessary consequences from this failure and decide accordingly[36].

➢ **Considerations**

Providing evidence by the applicant and *ex-officio* access to related information, documents and evidence by the CC is in line with rules governing other Constitutional Courts and the ECtHR.

However, article 26.2 CCL provides for the taking of evidence, such as the hearing of witnesses, by the Reporter Judges.

In practice this function does not relate to the examination of witnesses but the gathering of general information necessary in the preparation of a case for trial.

However, it should be noted that collection of any evidence should be carried out by the Members of

36 Rules of the Court Article 70 (3).

the Court themselves, since it requires "immediateness" (direct contact with parties and witnesses)[37].

RECOMMENDATION

- Collection of any evidence should be carried out by the Members of the Court.

III.6 Decision Drafting

➢ **FINDINGS**

Draft decisions are prepared by Reporter Judges. Their individual drafts are submitted to the consideration of other Reporter Judges specialized in the same field of law and of the Research and case-law unit. This tends to assure the consistency of the CC's case-law.

In *camera*, cases are reported to the Sections by the relevant Reporter Judge in detail. Then the Section's President gives floor to the Members. After the finalisation of the deliberations, Members cast their vote starting from the most junior Member. Then the draft is discussed by Members. If Members propose to make amendments to the draft, these proposals are voted separately.

➢ **Considerations**

The consultants consider that the current system heavily relies on Reporter Judges. Members of the Court should take more responsibility in decisions drafting, at least for leading cases.

RECOMMENDATION

- Members of the Court should take more responsibility in decisions drafting, at least for leading cases.

III.7 Research and Case-Law Unit

➢ **FINDINGS**

The Chief Reporter Judge of the Research and Case-law Unit provided the consultants with the following information: the Unit comprises seven staff members, among them one Chief Reporter Judge, three Reporter Judges with a judiciary background and three Reporter Judges with an academic background.

The tasks and duties of the Unit are the following:

- to review draft decisions from the Sections and the GA and comment on them within seven days;
- to prepare research reports for the Members and the Reporter Judges;
- to supervise the coherence of the CC's case-law;
- to monitor judgments of international Human Rights Courts;
- to supervise the coherence of the legal language and format of the decisions.

The comments and opinions on draft decisions are prepared by one staff member according to his

37 See Venice Commission Opinion.

or her expertise and are discussed within the Unit before being finalised. If there is established case-law available, the Unit will not prepare an opinion on the draft decision.

The Reporter Judge in charge of the case is not bound by the opinions of the Unit and is free to decide whether to adopt it or not. The Reporter Judge might add a cover letter to the draft decision, explaining why s/he is not following the opinion. The report regarding the merits is also forwarded to the Members of the CC. Furthermore, the Unit is represented at the deliberations through its Chief Reporter Judge. The Unit updates intranet documents regarding legal terms, grammar, format, editing.

Research reports can be requested by the CC President or the Deputy Presidents. Until January 2014, 20 research reports have been prepared. 10 of them were compiled in a book. While the Unit is not systematically following the case-law of other Constitutional Courts in Europe, it does review those courts' case-law when preparing research reports.

The Unit further prepares a case-law bulletin containing summaries of the CC decisions.

Currently, a case-law guide on certain rights is being prepared.

Finally, the Unit provides the CC with summaries of recent ECtHR judgments and decisions which could be of importance for pending cases[38]. These notes are currently for internal use only. In the future, this information might also be disseminated to the public.

The Unit is also responsible for the publication of scientific works, including workshop recordings which were held in 2012-2013.

- **Considerations**

The Research and Case-law Unit looks like it is modelled after the unit with the same name at the ECtHR; it could serve as a model for other Constitutional Courts.

The only concern relates to the limited number of staff members and their training.

The number of Reporter Judges should be increased to allow the Unit to properly deal with its many and vital tasks, although in the future the need for reports and opinions will most likely decrease as the case-law will be stabilised.

The staff members have not received any special training about summarising the judgments. However, the Unit follows the criteria published in this respect by the Venice Commission.

RECOMMENDATIONS

- The number of Reporter Judges working in the Research and Case-law Unit should be increased.
- Reporter Judges should receive dedicated training on how to summarize court's decisions.
- The Research and Case-Law Unit should share its best practices with other Constitutional Courts where individual application is in place.

38 As regards information on ECtHR decisions and judgments, the experts were informed that all decisions and judgments of the Strasbourg court against Turkey are published also in Turkish on the HUDOC website of the ECtHR. Some leading judgments of the ECtHR are also translated in to Turkish language.

IV. Inadmissibility of Applications

The formal requirements for an individual application are laid down in Art. 45 - 47 CCL. Art. 48.2 CCL provides for further reasons for inadmissibility.

IV. 1 Inadmissibility Rationae Temporis and Loci

- **findings**

CC Jurisdiction *ratione temporis* over individual application covers only the period after 23 September 2012; as indicated in article 74(8) of the Law nr. 6216: "*The Court deals with individual applications filed against final proceedings and decisions which are finalized after the date 23/9/2012*"[39].

Applications concerning the decisions finalised before 23 September 2012 but executed after that date were found as inadmissible by the Court.

There are not any provisions in the CCL relating to *ratione loci* inadmissibility of individual application.

- **Considerations**

At the early stages of the individual application, inadmissibility *ratione temporis* was applied frequently. In progress of time, by the increasing awareness of the public and following the directive decisions of the CC, inadmissibility decisions on that ground gradually decreased.

In the ECHR system, compatibility with *ratione loci* requires the alleged violation of the Convention to have taken place within the jurisdiction of the respondent State or in territory effectively controlled by it[40]. As to the individual application, the ECtHR case law could be relevant for complaints related to violations of fundamental rights placed in Northern Cyprus.[41]

IV. 2 Time Limits For Filing The Complaint

- **findings**

The applicants have to submit their applications within 30 days after the exhaustion of ordinary remedies[42]. The time begins from the date of notification of the final decision. If there is no ordinary remedy to be exhausted, the 30-day-limit starts from the date when the party has been informed of the violation. An additional time of 15 days can be granted in case of an acceptable and authenticated excuse[43].

As regards the date of notification of the final decision, the consultants were reported that the CC relies on the submissions of the applicant unless the lower court files prove otherwise.

39 Cf. Doğru, *Embryonic period of individual petition to the Constitutional Court*: September 2012 - September 2013, p. 10.

40 Problems concerning the jurisdiction of the *ratione loci* should be solved with the application of the criteria established by the ECtHR. Its Judgments *Drozd and Janousek v. France and Spain*, 26 June 1992, and *Loizidouv. Turkey* (preliminary objections), 23 March 1995, are of the utmost importance. In these resolutions the ECtHR recalls that by Article 1 (1) ECHR, the contracting States assume the responsibility of securing to everyone "*within their jurisdiction*" *the rights and freedoms proclaimed in the Convention*". This interpretation can be considered a European standard and has been applied by national courts (e.g., Judgment of the Constitutional Court of Spain 21/1997, 10 February; in this case the Court had to rule an "amparo appeal" lodged as a result of the apprehension, by the Spanish Navy, of a Greek ship that operated under Panamanian flag; the CC rejected the appeal into the merit because the apprehension took place with judicial authorisation).

41 See, forexample, *Case of Cyprus v. Turkey*, Application no. 25781/94, judgment of 10 May 2001, §§ 75-81.

42 Art. 47 § 5 1st phrase CCL.

43 Art. 47 (5) of the Law nr.6216 and art.64 of the Rules.

The lawyers from the Union of Turkish Bar Associations (henceforth: UTBA) expressed some uncertainties as to when the 30 days limit for lodging an individual application starts to run. This problem arises since -reportedly- sometimes a considerable lapse of time passes between the date of the oral declaration of a court decision and the date when the applicant receives the written decision with the reasoning.

In case the time limit is not observed, the application is rejected by the Chief Reporter of the Commissions. Any applicant may object to this decision within the 7 day limit. The objection is reviewed by the Commission and this decision shall be final.

- **Considerations**

Compared to individual application proceedings dealt with by other Constitutional Courts (e.g. the German Federal Constitutional Court) with similar provisions, the time limit appears to be reasonable. This is especially true because - other than for example in Germany - an additional time limit may be granted to submit missing documents.

However, the 30 days time limit seems to be too restrictive for parties who need to access legal aid and for foreigners who do not speak Turkish language and need special assistance.

The 30 days should be counted from the date when parties have full access to the written decision with the reasoning.

IV. 3 Exhaustion of Ordinary Remedies

- **findings**

Article 148 (3) of the Constitution states that in order to file an individual application, ordinary legal remedies must be exhausted by the applicant. According to Art. 45.2 CCL all administrative and judicial remedies must be exhausted[44] before filing an individual application[45].

- **Considerations**

Those provisions mirror Art. 35.1 ECHR as well as similar provisions in other European countries (e.g., Spain and Germany) and tend to assure the subsidiarity of individual application remedies.

According to Reporters Judges, CC case law on exhaustion of domestic remedies, pursuant to which final courts' decisions only can be challenged before the CC, complies with the case law of ECtHR. For example, the CC has ruled that, in case of pre-trial detention, every decision of dismissal of the detainee's appeal against the decision of detention[46], decision of continuation of detention[47], dismissal decision of request for release[48], is final and therefore subject to an admissibleindividual application.

44 However, under Article 45 (3) of the CCL, the decisions which cannot be challenged before Turkish Courts cannot be brought before the CC under IA (for instance decision of Supreme Electoral Board or some decisions of High Council of Judges and Prosecutors, please see judgment of ECHR rendered in the case of *Söyler v. Turkey*, appl.no. 29411/07, 17 September 2013, please also see Article).

45 Please see Doğru, *Embryonic period of individual petition to the Constitutional Court*: September 2012 - September 2013, pp. 4 ff.

46 Art. 101 of the criminal procedural code.

47 Art. 108 of the criminal procedural code.

48 Art.101 and 104 of the criminal procedural code.

IV. 4 Manifestly Ill Founded Applications

➢ **findings**

According to Articles 48(1) "*the requirements laid down in Articles 45 to 47 must be fulfilled for admissibility of individual applications*".

Pursuant to the second paragraph of article 48, "*the Court may decide inadmissibility of applications which do not bear significance for the enforcement and interpretation of the Constitution or for the determination of the scope and limits of fundamental rights, applications which do not involve significant damage sustained by the applicant and applications which lack of explicit basis*".

➢ **Considerations**

There is a substantial difference between paragraphs (1) and (2) of Article 48 CCL: while according to the former, the rejection of individual applications that do not fulfil the requirements laid down in Articles 45 to 47 is compulsory, the latter attributes (at least partially) a discretionary power to the Court, which should make a prudential an consistent use thereof.

Pursuant to Article 48 (1) CCL, the causes for the rejection of the files have a strictly procedural nature: lack of exhaustion of legal remedies or the time-limit exceeded. Some of the problems posed by the interpretation of the provisions contained in Articles 45 to 47 CCL have been mentioned in previous pages of this report[49].

Article 48 (2) CCL involves instead an analysis by the CC of the merits of individual applications and introduces substantive filtering criteria", that are common to the ECtHR[50] and some European Constitutional Courts[51].

This article mentions three causes of dismissal of applications: lack of explicit basis, applications that do not bear special constitutional relevance and those which do not involve significant damages. Although the number of the decisions of the CC is limited at the moment, the Court has found a number of applications inadmissible for lacking explicit basis.

The expression "lack of explicit basis" can be construed in two different ways. In a narrow interpretation, it would be equal to lack of a provision in the Constitution securing the alleged fundamental right or the lack of reasoning underpinning the petition. In a wider interpretation, it would mean evident lack of infringement of the fundamental right, i.e. absence of violation.

The consultants have not (yet) received enough information on how the CC handles the inadmissibility ground of "lack of sufficient legal basis" to be able to express an informed assessment. What can be said is that article 48 does not contain a criterion of inadmissibility that refers to the applicants' prospects to win the case and if the "lack of explicit basis" inadmissibility ground is applied extensively, the risk exists the individual application is rendered ineffective.

During the meetings, the consultants were told that the Reporter Judges, in assessing the ill-founded claims, follow the criteria set by the ECtHR in its decisions.[52]

49 But we must bear in mind that some of the causes have to do with substantive questions, such as, who is entitled to certain rights (public legal persons, aliens, etc.) or the scope of fundamental rights whose violation can be denounced in an individual application.

50 The criterion of „manifestly ill-founded"complaints and the new criterion introduced by Protocol No. 14.

51 German and Spanish Constitutional Courts.

52 Reasonsforthisinadmissibility can be found in "Practical Guide On AdmissibilityCriteria" of theECtHR, http://www.echr.coe.

Some applications were found inadmissible for being manifestly ill-founded as the applicant had ignored the rule that "*in the individual application, judicial review shall not be made on matters required to be taken into account during the process of legal remedies*".[53] Both the Reporter Judges and Members of the CC complained that the CC is wrongly considered by many applicants as a court of appeal.[54]

Note

The CC interpretation of Article 48 (2) should be further investigated.

IV. 5 Other Reasons for Inadmissibility

- **findings**

Other reasons for inadmissibility include "lack of constitutional significance" and "no significant disadvantage for the applicant" (Art. 48.2 CCL). The consultants were informed that, so far, there have been no decisions based on the two criteria.

- **Considerations**

As there are no decisions yet, there is not sufficient basis for an assessment[55]. The interpretation established by the Constitutional Court of Spain in Judgment 155/2009[56]could be of some use for the CC.

V. Workload and Sustainability.

The increase in applications will be one of the future biggest challenges for the CC.

V.1 workload/Statistics.

- **findings**

The CC provided the expert with current statistics.

As of 20 January 2014 a total of 11,974 individual applications had been submitted to the CC: 342 in 2012, 9,897 in 2013 and 735 in 2014. A total of 4,138 cases had been disposed of; 7,836 were still pending at the time of the first visit. They had been issued 909 administrative rejections, 2,710 inadmissibility decisions by the Commissions, 127 inadmissibility decisions by the Sections, 35 violation judgments and 2 non-violation judgments by the Sections. The Commissions referred 842 cases to the Sections.

The subjects of complaints predominantly relate to the right to a fair trial[57] (10,454 cases at the time of the first visit). The right to property was concerned in 3,277 cases; the right to equal treatment in 2,838 cases; the right to liberty[58] according to Art. 5 ECHR in 700 cases; the right to life in 523 cases;

int/Documents/Admissibility_guide_ENG.pdf.

53 App. No 2013/2767, judgment of 2.10.2013 of Section II.

54 SeeforexampleApp. Nr. 2012/1272, judgment of4/12/2013 of Section I, paras. 77-78.

55 It would be very desirable that CC were extremely cautious in interpreting this provision, since it is a tough matter the determination of "petty" violations of fundamental rights. The violation of a fundamental right involves always a significant damage, because it implies a violation of the highest law of the legal order.

56 Dated 25 June 2009.

57 Art. 6 of ECHR.

58 Art. 5 of ECHR.

the right to freedom of religion and conscience in 132 cases; in 200 cases the prohibition of torture and ill-treatment had been raised.

As regards the judgments establishing a violation, at the time of the first visit 13 rulings related to the length of detention, 12 the length of proceedings, 2 the right to life, 3 the right to access to court; 1 judgment had been adopted in each of the following fields: the presumption of innocence, the right to a fair trial, the right to personal inviolability, the right to private life and the right to property.

- **Considerations**

Although the statistical data show that the CC has received a huge amount of individual applications in the first 16 months of implementation of this new remedy, one should not forget that expectations were even worse.

On the other hand, it should be recalled that the number of applications dealt with ECtHR in 2013 concerning Turkey amounted to 9,198[59]; approximately a similar number of individual applications lodged to the CC in 2013.

Though lower than feared, these figures show that the CC already faces a heavy workload. A further increase in the influx of cases could pose a serious risk of disrupting not only the functioning of the individual application system, but also the sound accomplishment of the other functions assigned to the CC.

The workload related to the individual application system will be one of the main problems the CC will face in the future. Keeping in mind that the Members not only have to deal with individual application but also with applications for abstract and concrete norm review[60], the danger of huge backlog exists .

Since the Members are reasonably capable of handling a limited number of cases, increasing the number of Reporter Judges would not be the solution to the problem of workload. It is indeed extremely important that the actual decision of the case rests with the CC Members. It must be then ensured that the Members have enough time to study the case files and are in the condition to render a well informed decision.

To this respect, the efforts should be directed to reducing, or at least preventing from increasing, the influx of cases and to improving the courts practices according the best standards, to enhance the CC effectiveness.

The most problematic areas concern the length of proceedings as well as the length of detention. Both issues must find an answer outside the CC. The Parliament should consider the opportunity of establishing remedies inside the ordinary judicial procedures to denounce the delays and to speed up the long proceedings.

A preventive approach would be more efficient than *ex post facto* reparation (monetary compensation) of the violation.

59 Press Country Profile edited by the ECtHR; last updated: June 2014.

60 In 2010 the CC had to deal with 16 abstract and 105 concrete norm review cases, in 2011 with 48 abstract and 102 concrete norm review cases, seehttp://www.anayasa.gov.tr/en/Statistics/.

RECOMMENDATION

- The final decision not only formally but actually should rest with the elected Members of the CC.
- Effective remedies inside the ordinary judicial procedures should be established to denounce the delays and to speed up the long proceedings.

V. 2 Workflow

➢ **FINDINGS**

Upon registration, the case is automatically and randomly assigned to a Section and to one of the Commissions. Before being forwarded to the Commission the formal requirements of the individual application are examined by the Reporter Judges in the Individual Application Office. Missing documents might be requested; a time-limit of 15 days applies[61].

If the initial time-limit of 30 days is not observed, or the application does not meet the procedural requirements prescribed by the Rules of the Court, or the missing documents are not completed in the given time, the case is disposed of by way of an "administrative rejection" taken by the Chief Reporter of the Commissions. This rejection can be objected within seven days. One of the Commissions rules on the appeal.

After the documents have been completed, the file is physically and electronically sent to the Commission that the case has been assigned to. The case file is electronically attached, if available in UYAP.

The Chief Reporter Judge assigns the case to a Reporter Judge. The file is sent to the Reporter Judge for the preliminary examination of the admissibility.

If the application is deemed to be inadmissible, the Reporter Judge drafts the inadmissibility decision according to a specific template. Then the draft inadmissibility decision is first analysed by an experienced Reporter Judge and then by the Chief Reporter Judge, before the file is sent to the relevant Commission (and, for information, to the Section). In the Commission the draft decision is first examined by its junior Member followed by the senior Member. If they both agree, the decision can be finalized. If the Members do not agree the file is sent to the Section.

If the application is deemed to be admissible, either an admissibility decision is prepared or it is decided to examine the admissibility together with the merits. In this first period of implementation of the individual application, this latter method has been used to a great extent (approximately 3000 applications), to allow the Sections to establish the relevant case-law about admissibility of cases.

The application is then communicated to the Ministry of Justice for it to send observations within 30 days. The Ministry can request an extension of another 30 days. The Ministry's observations are sent to the applicant for possible further comments within 15 days.

The application is then ready for the decision if no documents are missing.

The case is generally examined on the basis of the documents contained in the file, but the Section

61 Article 66 of the Rules of Court.

can also hold oral hearings[62]. It may also request further documents from the relevant authorities.

The draft decision on the merits is prepared by the Reporter Judge and reviewed by the Chief Reporter Judge. It is then forwarded to the Research and Case-law Unit for comments within seven days. These comments are attached to the file and submitted to the Reporter Judge who might consider changing the draft according to the comments.

The finalized draft is presented to the Section or the GA for deliberation and decision. It is then put on the agenda for a Section/GA meeting. The agenda, which contains 10 to 15 cases, is prepared by the Deputy President together with the Chief Reporter Judge.

Deliberations take place every 15 days.

The Section/GA deliberates in the presence of the Reporter Judge and the Chief Reporter Judge for the Section, the Commissions and the Research and case-law unit.

- **Considerations**

The workflow within the CC seems to be organized in an extremely efficient way. It will become even more efficient once a body of case-law, especially with regard to inadmissibility criteria, is established.

V.3 Priority Policies

- **findings**

There is in principle no priority system in the examination of applications; first come first served is adopted under Article 68 of the Rules of the Court. However according to Article 73 (2) of the same Rules of the Court, Commissions shall give priority to cases where "*a serious threat to the right to life or bodily integrity*" exists.

The consultants were reported that the Court tends to give priority to cases according to the importance and urgency of the applications. Right to life as well as complaints about the length of detention have a high priority.

- **Considerations**

The CC practice to prioritise cases according to their importance and urgency has to be appreciated. Establishing leading cases, especially with regard to long detention and length and of proceedings cases will enable Commissions and Sections to deal efficiently with serial/clone cases.

V.4 Practices to Prevent Conflicting Rulings

- **findings**

The Research and Case law Unit is responsible for proposing suggestions to prevent conflicting decisions[63].

In addition, the President can convene the GA when conflicting rulings arise or when there is such

62 Art. 49 (4) of CCL.No hearings have been held up to date.

63 Rules of Court, art. 3.

a possibility[64].

The deputy President may also convene the Sections for the same reason[65].

The GA has the last word on conflicting rulings; it can unite the case-law[66].

➢ **Considerations**

The consultants were informed by Reporter Judges that the Research and Case-law Unit supervises the case-law and indicates whether a draft decision/judgment might be in conflict with existing case-law of CC and of ECtHR.

Furthermore, the draft decision prepared by the Reporter Judge is reviewed by the Chief Reporter Judge, a more senior Reporter Judge with more experience and possibly a more extensive knowledge of the case-law.

Considering the whole process, it may be accepted that the mechanism allows sufficient supervision to prevent conflicting rulings among the Sections and previous Court's rulings.

V.5Pilot Cases

Article 75 of the Rules of the Court states that when Sections determine that an application stems from a structural problem and this structural problem causes new applications, pilot judgment procedure might be initiated. When a pilot judgment is rendered, similar problems should be resolved by the relevant administration in line with the pilot judgment. As yet no pilot judgements have been decided.

V.6 Friendly Settlement

➢ **findings**

Neither the CCL nor the Internal Statute provides for a formal procedure regarding friendly settlements (as, for example, Art. 39 ECHR).

➢ **Considerations**

In view of the heavy workload of the CC which will most likely increase in the future, a formal procedure regarding friendly settlements might help to lessen that burden. However, the introduction of such a procedure should not be considered until there is a body of well established case-law. Then, a friendly settlement procedure might be useful, for example, to resolve repetitive/clone cases.

RECOMMENDATION

- Once there is a body of well established case-law, the CC might consider introducing a friendly settlement procedure.

64 Rules of Court, art.10 (1.1).
65 Rules of Court, art.11(1g).
66 Rules of Court, art.25 (1d).

V.7 External Remedies to Reduce the Influx of Cases

➢ **findings**

Similar to the statistics in the ECtHR, violations of the right to a fair trial (especially excessive length of court proceedings) on the one hand and right to property issues on the other are prominent problems in Turkey. Since there is no other effective remedy[67] in this respect besides the individual application to the CC, this consequently results in a large number of such applications to the CC.

➢ **Considerations**

To reduce the influx of cases to the CC, a remedy to speed up long proceeding pending before ordinary courts should be introduced which must be exhausted by the ordinary courts before a complaint to the CC[68] can be filed.

Furthermore ordinary courts should introduce organizational measures to monitor and give priority to old cases.

recommendations

- A remedy to speed up long proceedings pending before ordinary courts should be introduced to reduce the influx of cases to the CC.
- Organizational measures to monitor and give priority to old cases in ordinary courts should be introduced.

VI. Remedies-Effectiveness

VI. 1 Ascertainment of the Violation

➢ **findings**

At the end of the examination of an individual application, the CC decides whether the fundamental rights and freedoms of the applicant have been violated or not[69].If the CC finds a violation, it may also decide what should be done in order to redress the violation and its consequences[70].

When the violation has been caused by a court decision, the CC sends the file to the competent court for retrial in order to restore the fundamental rights of the applicant. However, if the CC foresees that no redress would come from re-trial, then it may decide pecuniary compensation for the applicant or it may ask the applicant to file a case before the competent first-instance court to seek compensation for the damages s/he suffered[71].

67 After the EctHR *Case of Ümmühan Kaplan v. Turkey*, the Law nr. 6384 published in the Official Gazette (Nr: 28533) on 19/1/2013establıshed a commission (Human Rights Compensation Commission) as a domestic body receivingapplicationsemanatingfromlongcourtproceedings, non-executionorpartlyexecutionorlateexecution of courtdecisionsoccurredbefore 23 September 2012.

68 In this respect the situation is similar to the situation in Germany at the time of the ECtHR's pilot judgment *Rumpf v. Germany,* ECtHR, judgment of 2 September 2010, no. 46344/06, and before the introduction of a new remedy in December 2011.

69 Arts.49(6) and 50 (1) of CCL.

70 Art. 50 (1) of CCL.

71 Art. 50 (2) of CCL.

➢ **Considerations**

There are no problematic issues with regard to the ascertainment of a violation.

VI.2 Interim Measures

➢ **findings**

The Sections, not the Commissions, have the competency to deal with interim measures. According to Art. 49.5 CCL, the Sections may *ex officio* or upon request decide on measures deemed necessary for the protection of fundamental rights. The Rules of the Court limit interim measures to the protection of "*physical and spiritual integrity*" of the applicant[72] , which was explained by the Reporter Judges in the meetings as "threats to right to life and physical integrity".Such measures can only be in place for a maximum period of six months. If the decision on the merits is not rendered within this time limit, the decision on interim measures is revoked *ipso facto*.

Until January 2014 there have been five requests, of which three were rejected and one granted. The fifth one had been discussed by the Members on 20 January 2014 and it was decided that more information should be obtained.

The only one request granted concerned the deportation of an Algerian national when the UNHCR case was still pending and the CC decided to order the suspension of the deportation.

➢ **Considerations**

It is too early to make a well founded assessment on the CC practice concerning interim measures. Also, the consultants have not received enough information on the details of the three requests that were rejected.

However, from the information the consultants received it seems that the CC might apply standards similar to those of the ECtHR: *"Although it does receive a number of requests for interim measures, in practice the Court applies Rule 39 only if there is an imminent risk of irreparable damage. While there is no specific provision in the Convention concerning the domains in which Rule 39 will apply, requests for its application usually concern the right to life (Article 2), the right not to be subjected to torture or inhuman treatment (Article 3) and, exceptionally, the right to respect for private and family life (Article 8) (..). The vast majority of cases in which interim measures have been indicated concern deportation and extradition proceedings".*[73]

Although it is early to assess the experience of the CC concerning interim measures, nevertheless we are already in time to identify some problems.

Firstly, it should be clear that even if the Court cannot annul a judicial decision on the merits, the CC can suspend its application. This is not a matter of validity but of avoiding irreparable damages. In some cases —e.g. short incarcerations— the denial of the interim measures of the suspension of the unlawful decision makes the eventual reparation of the violation illusory.

Secondly, the automatic time limit of six months for revocation of interim measures cannot be deemed fair. In difficult cases study and deliberation takes a long time, even longer in courts overwhelmed by workload. It seems advisable to make it necessary a renewal of the interim measure after the expiration of the six months-term.

72 Art. 73 (1) of the Rules of the Court.

73 ECtHR [GC], judgment of 4 February 2005, *Mamatkulov and Askarov v. Turkey*, nos.46827/99 and 46951/99, § 104.

RECOMMENDATIONS

- The CC should be empowered to decide to suspend, when necessary, the application of a judicial decision in the context of *interim* measures.
- The automatic expiration of interim measures after six months should be reconsidered.

VI.3 Compensation of Damages

➢ **FINDINGS**

As said above, the CC may decide compensation for the applicant or it may ask the applicant to file a case before the competent first-instance court to seek compensation for the damages the applicant suffered when re-trial would not allow reparation[74].

The consultants were told that compensation can only be awarded if it is requested by the applicant. However, it is not clear whether the applicant needs to ask for a specific amount of compensation for his/her/its material and non material losses with relevant substantiating documents.

As regards non-pecuniary damages, these are in principle based on the "pain and suffering" of the applicant; the CC exercises discretion in this respect. It has developed a "scale" for non-pecuniary damages (including long duration of trial), comparable to that which is used by the Registry of the ECtHR.[75]

The consultants were also told that when compensation requires a technical domestic law assessment, the Court might prefer to send the file to the Court that rendered the original decision.

➢ **Considerations**

There is too little information on the case-law regarding compensation to make a well founded assessment thereof.

Some Members of the CC stressed that awarding compensation, which is not common in other constitutional courts, may amount to an increase of individual applications, whereas some Members, however, deem compensation decisions necessary.

On the other hand, if the CC asks the applicant to file a case before the competent first-instance court to seek compensation for the damages the applicant suffered, bearing in mind the excessive length phenomenon in Turkey, reparation of an applicant who received a favourable ruling from the CC may take years[76]. Therefore such rulings must be closely monitored by the CC and a time limit should be set out as to the duration of such a second set of compensation proceedings.

74 Art. 50 (2) of CCL.

75 This "scale" used by the Registry in Strasbourg is not public.

76 Please also see judgment of the ECHR in the case of *De Wilde, Ooms and Versyp (Vagrancy) v. Belgium*, appl. nos. 2832/66; 2835/66; 2899/66, 10 March 1972.

RECOMMENDATION

- If the CC asks the applicant to file a case before the competent first-instance court to seek compensation for the damages the applicant suffered, this rulings should be closely monitored by the CC and a time limit should be set out as to the duration of the compensation proceedings.

VI.4 Annulment Of Underlying Laws And Regulations

➢ FINDINGS

Article 45 (3) of the CCL states that legislative acts and regulations cannot be directly subject to individual application.

As the Venice Commission noted in its Opinion No. 612/2011 on the CCL, Article 49.6 of the draft Law had expressly provided for the annulment of legal provisions by the CC in individual application proceedings. Unfortunately, this provision was not incorporated into the CCL as adopted.

The Constitution of Turkey contains a general rule which allows the CC to annul a law. This is article 150 of the Constitution that further provides that "*no claim of unconstitutionality shall be made with regard to the same legal provision until ten years elapse after the publication in the Official Gazette of the decision of the Constitutional Court dismissing the application on its merits.*"

During the visit to the CC the consultants received somewhat inconsistent information regarding the question of whether the CC has the power to annul the provision leading to a violation of a fundamental right, stemming from an individual application. The Reporter Judges confined themselves to declare the difference between the draft law and the one currently in effect, which does not formally empower the CC to annul laws and regulations in the context of individual application. It seems clear in view of the legislative history that the Sections do not have the competence to annul a law when delivering a violation judgment in individual application proceedings. If Sections are considered to be "courts" within the meaning of Art. 40 CCL, this will allow referring the case to the GA for the annulment, according to article 150 of the Constitution.

However, so far no cases have been referred to the GA for annulling the underlying law.

➢ Considerations

The lack of an express provision that allows CC to declare null and void the underlying legal regulation in individual application is unfortunate.[77]The "detour" suggested by the Members might be a feasible way to try to avoid situations in which the CC finds a violation but cannot effectively remedy that violation because it stems from a, formally valid, legal provision. However, there is not yet CC case law establishing that the Sections of the CC fall under the scope of Article 150 (1) of the Constitution.

It has then to be mentioned the further problem related to the time limit as spelled out in Art. 150 of the Constitution[78], as it can be exemplified as follows: in January 2014, in the context of an individual application, the CC ruled that preventing women from using only their maiden name

77 See also Opinion No. 612/2011, p. 16.

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

after marriage constituted a violation of Art. 17 of the Constitution[79]. However, as a reporter judge explained, objection proceedings could not be instituted for the annulment of the relevant legal provision, because the CC had formerly found the relevant law to comply with the Constitution and the 10-year period had not yet expired. Thus, unless and until the necessary amendments in the law are passed by the legislator, the judgment will not remedy the situation: the lower courts are bound by the still valid law.

RECOMMENDATION

The CC should be formally empowered by the law to annul legal provisions leading to a violation of fundamental rights.

VII. Publication of Constitutional Court's Rulings

- **FINDINGS**

According to Art. 153 of the Constitution, decisions of the CC "*shall be published immediately in the Official Gazette, and shall be binding on the legislative, executive, and judicial organs, on the administrative authorities, and on persons and corporate bodies*." From the context it follows that this only applies to rulings finding a violation.

Article 81(4) of the Rules of the Court indicates that all decisions of the Sections and those of the Commissions which are of principal importance for the admissibility process of individual application are published in the official web site of the CC. In addition, paragraph 5 stipulates that some decisions of the Sections may also be published in the Official Gazette. The President of the Section may decide publication of a pilot decision or decisions which are of special importance for setting the jurisprudence of the Section.

So far, all decisions of the Sections have been published in the Official Gazette since they were the first and guiding decisions.

Pursuant to Art. 50.3 CCL all judgments of the Sections on the merits are published on the website.

According to information given by the Reporter Judges, all rulings including inadmissibility decisions, are currently published on the CC's website.

- **Considerations**

The publication of all decisions and judgments on the CC's website makes its case-law transparent and accessible to all potential applicants and the national and international legal community.

The CC should further consider the establishment of a press speaker that is responsible for editing press releases on the Court's official website that pertain to important rulings. Contact with the press via a press speaker assures understandable news coverage on the Court's latest rulings and the spreading of the constitutional case-law to a broad public. It also minimizes the risk that the Court's rulings will be misunderstood.

79 Already on 16 November 2004 the ECtHR had delivered a similar judgment in the case of ÜnalTekeli v. Turkey, no. 29865/96; see also ECtHR, judgment of 3 September2013, *TuncerGüneş v. Turkey*, no. 26268/08.

RECOMMENDATION

- CC should establish a press speaker.

VII.1 The Search System of the CC Rulings

➢ **Findings**

Lawyers reported their difficulty to deal with the search system of the CC which is an indispensable tool for accessing the CC case law.

At the time of the three visits, systematic researches on the CC's website could be very time-consuming, since the search fields for rulings referred only to the application number, the date of the decision, the date of its publication in the Official Gazette and the number therein. It was also possible to perform a free text search but the search results were not weighed by relevance.

After the third visit, the search engine of CC's rulings on the Court's official website was updated in order to allow a free text search weighed by relevance.

VIII. Enforcement of Constitutional Court's Decisions.

VIII.1 Re-trial by Courts

➢ **Findings**

If the violation of the applicant's fundamental rights stems from a court's decision, the CC does not have the competence to quash the decision of the court in question. However, as pointed out above[80], the CC may send the file back to the "concerned court" to reopen the trial[81].

It seems that under art. 79 of the Rules of the Court, the CC sends always the case back to the first instance court.

If no legal interest is seen with the trial's renewal, monetary compensation is granted.

With reference to length of proceedings cases the CC, besides awarding compensation, indicates the violation to the relevant court.

As regards the attitude of Turkish Judges about re–retrial following a CC judgment, it is jeopardised, since the uncertainties implied by the present legal framework stir up dissensions among judges.

First instance judges from the Istanbul courthouse said that they consider the CC rulings binding and they will retry the cases accordingly and adopt the judicial decisions necessary to repair the violation of the fundamental right. This attitude is proven by the practice. Following a very recent decision of the CC about illegal pre-trial detention, *M. İlker Başbuğ* has been released by the competent court.

The attitude of judges of higher courts is instead different. All the members and reporter-judges who attended the meeting held at the Court of Cassation (henceforth: CoC) reported that the individual application system risks to enshrine a new appeal before the CC, because of the CC power to "*renew*

80 See also Art. 50.2 CCL.

81 CCL, art.50/1 and 50/2.Rules of Courts, art.79/1-a.

the judicial procedure so that the violation and its results will be cleared up" (art. 50.2 CCL). They also expressed the opinion that the only way the individual application system was not to become a further appeal is that the CC limits itself to declare the violation, without whatsoever removing –explicitly or implicitly- the concerned court decision which must be deemed final. Moreover one of the members of the CoC affirmed that this restrictive reading of the individual application system finds support in the last part of art. 49.6 CCL, according to which "*The sections may not examine issues that should be dealt with through legal remedies*".

The consultants were told by CoC members that their interpretation about some sensitive legal issues (i.e. calculation of pre-trial detention, use of maiden name after getting married) diverges from that established in the CC's case law and that CoC will keep on solving relevant files according to the former interpretation since it derives directly from the law that continues to be valid even though a CC`s decision on violation is made. All judges and courts are required to align themselves with the legal provisions in accordance with rule of law, human rights, Article 90 of the Constitution and judgments of the Constitutional Court.

The consultants acknowledged further dissensions among the members of the Court of Cassation on whether the case should be remitted to the Court of Cassation or to the first instance court for retrial; the majority of members said that even in the case that violation stems from one of CoC decisions, retrial must be done by the court of first instance; only one judge said that it would be better to remit the case to the CoC that would decide if the decision of the court of first instance is to be reversed or not; others spoke in favour of retrial to be done by the court that is responsible for the violation, regardless if it be the CoC or the court of first instance.

All members were uncertain whether the CoC could decide in cases, where the CC had found a violation stemming from a court decision and had sent the case back to the court of first instance for re-trial, if one party lodges an appeal against the new decision issued by this court. They stated that the CoC's decision on the appeal against the initial decision issued by the court of first instance would be final: since the CC has no authority to reverse court decisions, *causa iudicata* might constitute an obstacle for the CoC to consider an appeal lodged against the new decision issued by the court of first instance.

The members of the Military Court of Cassation accepted the authority of the CC to send the case back to the court of first instance, when it finds a violation of a fundamental right, yet they opposed that CC could remit cases to high courts, as this would result in the CC as being an additional court of appeals superior to the other high courts and this superiority is not envisaged by the Constitution.

Similar problems were found at the High Administrative Court. The members of this court reported that so far three court's decisions were successfully challenged by individual applications. After the cases were sent back by the CC to the High Military Administrative Court for retrial, the proceedings were reopened. Yet, the 1st Chamber of the High Military Administrative Court, which is competent for two cases, claimed that Art. 50 § 2 of CCL is unconstitutional, suspended the proceedings and applied to the CC for a declaration of unconstitutionality. According to the members of this Chamber, the original judgement is final and still in force and this constitutes an obstacle for retrial, because the CC does not enjoy the authority to reverse decisions. Furthermore, these members believe that even the authority of the CC to send cases back to other courts for retrial as laid down in Art. 50 § 2 CCL determines an improper interference by the CC into the competences of specialised courts and makes the CC superior to the other Turkish high courts, although the Turkish Constitution does not lay down a hierarchy between the Turkish high courts. The members of the 1st Chamber further

reported that shortly before the mission they just learned that one of the applications to the CC had been dismissed on procedural grounds, although the decisions had not yet been notified so far.

➢ **Considerations**

The fact that the CC does not enjoy the power to quash the courts' judgments, the violations of fundamental rights stems from is unfortunate. Quashing contesting courts' decisions by the CC would provide a more effective protection to the victims of a violation and would erase every uncertainty about the interpretation of the legal framework by higher courts.

The legislator should then clarify the legal framework by explicitly giving the CC the authority to quash court decision and to refer the matter to the court which is responsible for the violation.

Until this issue will be legally clarified, the risk exists that re-trial of cases will not be enforced.

Although lower courts acknowledge that they have to do the necessary in obedience to the CC decisions, the attitude of higher courts is different because they consider that the case has been already set by a final decision and, furthermore, that they cannot modify their legal interpretation until the unconstitutional legal provision is removed.

Moreover, the legal reason why the "concerned court", the case is referred to by the CC for retrial, is to be always the first instance court is not clear. The CC should be allowed to refer the case to the last instance ordinary court, if the unconstitutionality lies only in the unconstitutional interpretation of the law by that court and when there is no need to gather and examine further evidence. The CC practice to send the case back to the first instance court, irrespective of the -higher or lower - courts' decision the violation of the fundamental right stems from, further implies the risk of lengthy trial.

RECOMMENDATION

- The CC should be empowered to formally quash the decisions of lower courts.
- If the violation of fundamental rights occurred only at the level of a high court, the case should be returned to that court, not to the first instance court.

VIII.2 Binding Force Of Constitutional Courts' Rulings

➢ **findings**

The decisions of the CC are binding over legislative, executive and judicial organs, administrative authorities and persons and corporate bodies, as stated in Art. 153 of the Constitution. This provision does not exclude the decisions emanating from the individual applications, too. However, whether the individual application decisions of the CC are binding only *inter partes* or they have to be complied with in all similar cases is a matter of discussion.

First instance judges and prosecutors said that, even if the CC's decision about individual application has direct effects only in the individual case, they would take into consideration the principle established by the CC in their own decision-making about similar cases.

Civil judges explicitly remarked that the CC rulings are definitely binding in similar cases.

However criminal judges also stated that the principles established by the CC[82] may be closely referred to the specific characteristics of the individual case and that they would deviate from the CC's ruling when they deem it necessary.

The problem could particularly arise when the CC, in the context of an individual application, ascertains a violation of fundamental rights that derives from the legislation. In such a situation, judges and prosecutors are bound by the enacted legislation in so far as it is not annulled, abolished or amended.

The opinions of the high courts' members on the question of the binding force of the CC's rulings in similar cases have shown to be widely divergent.

Whereas the members of the Council of State reported to follow the CC's case-law and to take it into consideration in similar cases as they do for ECtHR judgments, most members of the CoC rejected the idea of binding force of CC rulings beyond the individual case of the applicant, since there is no clear legal provision stipulating that such rulings result in a general effect.

The members of the Military Cassation Court clearly refused to accept a binding force of CC's rulings beyond the individual case whenever the legal situation was in contradiction with the constitutional standards. According to the members, it was for the legislator in the first place to align the statutory framework with the constitutional standards whereas any jurisdiction was bound to the law only, not the constitutional standards. Feeling bound even to legal statutes that are unconstitutional and that the legislator has omitted to abrogate, the members of the Military Cassation Court considered it desirable to clearly give the CC the authority to nullify unconstitutional norms.

As to CC rulings pertaining to violations stemming from courts' decisions, the members of the Military Cassation Court, making reference to Art. 90 of the Turkish Constitution, disapproved a binding force in similar cases. The members indicated that, whereas this constitutional norm clearly lays down the principle according to which international agreements and the ECHR prevail in case of conflict with national legal statutes, there is no similar provision for the case of conflict between the Constitution and legal statutes.

On the other hand, the members of the High Military Administrative Court stated they would accept a binding force of the CC's rulings beyond the individual case wherever they are persuaded by the CC's rulings.

- **Considerations**

An individual application ruling formally applies to the parties in the procedure only.

A different question is about the general impact of the CC judgments.

As to the binding force in similar cases of the CC's rulings concerning the constitutionality of legal interpretation, it ultimately depends on the attitude and willingness of each representative of the judiciary to comply with CC case law and this compliance should be mainly guaranteed by the higher courts, when they finally adjudicate the appeals against lower courts' decision.

Although in general, concerned courts seem to have complied with the judgments by taking individual measures, in the case of MP's detention the Diyarbakır Assize Court declared that

82 For example in *Balbay* case.

decisions taken under constitutional complaint system[83]are only binding in the relevant case.

The attitude of lower and higher courts' judges to comply with the CC case-law should be promoted trough training and mutual consultation among CC and high courts' members.

The high courts should be persuaded by the CC about the binding force of the CC rulings in similar cases. Art. 11 § 1 of the Turkish Constitution could serve as one argument for affirming that it is for the CC only to interpret the provisions of the Constitution in an authoritative way. The CC will likely succeed in this endeavour by reasoning its decisions in a persuasive way.

The argument opposed by members of the Military Court of Cassation (*Askeri Yargıtay*), according to which, unlike ECtHR decisions, no specific provision in the Turkish Constitution sets that the CC decisions are binding and applicable to all similar cases, could be overcome by observing that article 90 of the Turkish Constitution obliges courts to adapt their decisions to the ECHR -that is an international Treaty-[84]; art. 90 of the Constitution does not explicitly refer instead to the interpretation given by the ECtHR. Nonetheless, it is unanimously accepted that not only the wording of the ECHR, but also its interpretation by the ECtHR has to be taken into consideration by Turkish courts. The same should be for the CC ruling, the CC being the only judicial body entrusted by the Constitution with interpreting the provisions of the same Constitution in an authoritative way.

However, it has to me remarked that the CC should be empowered to annul the underlying law, in order to allow the ordinary courts to adopt their decision on the basis of the new legislative situation.

Convincing regular courts to accept the binding effect of CC rulings beyond the individual case is a necessary step in order to minimize the caseload before the CC. The caseload of the CC will only be at a reasonable level if cooperation in the field of fundamental rights protection is rooted in mutual trust and willingness on both sides, on the part of the CC as well as on the part of the regular courts.

RECOMMENDATIONS

- The attitude of lower and higher courts' judges to comply with the CC case-law should be promoted trough training.
- In cases of violations stemming from courts' decisions, the CC should make every endeavour to persuade the regular courts to accept the binding effect of CC rulings beyond the individual case.

VIII. 3. Dialogue Between the Constitutional Court and Turkish High Courts

➢ Findings

The members of the CoC and the Council of State reported that they follow constantly the case-law of the ECtHR.

The CoC has established a special human rights unit with the aim of raising awareness of court's members about the human rights standards and aligning its case law to that of ECtHR case law. The

83 *Balbay*case.

84 The lastsentence of article 90 of the Constitution of 1982, added on 7 May 2004 is as follows: "*Inthecase of a conflictbetweeninternationalagreements, duly put intoeffect, concerningfundamentalrightsandfreedomsandthelawsduetodifferences in provisions on thesamematter, theprovisions of internationalagreementsshallprevail.*"

unit invites the chambers of the Court of Cassation to publish their decisions referring to ECtHR case-law on the courts' websites and on its *intranet*. This openness to the Convention System is strengthened by regular dialogue discussions the members of the CoC and the Council of State carry out with members of the ECtHR.

The members expressed their wish to carry out similar discussions with the members of the CC.

The lawyers from the UTBA expressed their wish that regular meetings of members of the CC, judges, prosecutors and lawyers are organised in order to allow every perspective be heard.

Many members of the CoC, the High Military Court and the High Administrative Court deem the structure of the CC to be an obstacle for a successful implementation of the human rights standards as laid down in the ECHR, as there is no legal provision stating that the members of the CC have to be jurists and because the CC members have no specialisation in the subjects of individual application. They clearly expressed their concern that the CC might become a "super appeal court" by improper intervention into the competences of the Turkish high courts that are instead highly specialised. They referred to Art. 49 § 6 2nd phrase of CCL according to which in individual application, no examination may be conducted on matters which need to be dealt with at the stage of legal remedies[85].

Some CoC members proposed to entrust the specialised high courts, instead of the CC, with the authority to decide on individual application.

➢ Considerations

There is some reluctance amongst regular courts in Turkey to accept intervention from the part of

85 Similar problems arose quite shortly after the establishment of the Federal Constitutional Court in Germany and the Court has taken many steps in order to define its position vis-à-vis the regular courts and other constitutional organs. These steps could serve as example for the CC as well.

One step consisted in clarifying the delimitation of competences between the Federal Constitutional Court and the regular courts. In one of its first decisions, the Court explained that the constitutional complaint, which is the German equivalent to the individual application in Turkey, is not an additional appeal but a remedy aiming at the enforcement of fundamental rights ((Decisionof September 27, 1951, reg. nr. 1 BvR 61/51, BVerfGE 1, 4)). Therefore, the Federal Constitutional Court described its role in Germany's judicial system as "guardian of the Constitution" ((Judgment of March 20, 1952, reg. nr. 1 BvL 12 and others, BVerfGE 1, 184 (196)). In its famous *Lüth*-judgment, the Court reminded civil judges that in deciding every judge has to take account of the effect of fundamental rights in the relevant provision of law (see Art. 1 § 3 of the Basic Law). Accordingly, the Court explained in detail that and why it has the authority to verify whether a judge has fallen short to his obligation to properly assess the scope and the effect of the fundamental rights in the relevant area (Judgmentof January 15, 1958, reg. nr. 1 BvR 400/51, BVerfGE 7, 198 (204 et seq.). This, as the Court has clarified in a later ruling, does not entitle the Federal Constitutional Court to an unlimited examination of rulings issued by the regular courts, the organisation of the procedure, the assessment of facts, the interpretation of ordinary law and its application to the individual case being a task for the competent regular courts. Of course, this does not exclude any examination of regular court decisions by the Federal Constitutional Court. The Court has emphasized that it can intervene in case of a violation of constitutional law which means that it cannot intervene in cases where a regular court has simply misinterpreted a provision stemming from ordinary law, but only if the regular court has failed to take into account a fundamental right. The boundaries to the Federal Constitutional Court's possibilities of intervention cannot be drawn fixedly. The judges at the regular courts enjoy a certain margin of discretion allowing them to take into account the characteristics of the individual case. In general, as the Court has put it, the application of ordinary law to a specific case can only be reviewed for constitutionality if a regular court's decision demonstrates an error of interpretation that is not simply questionable but dwells on a fundamentally wrong perception of the importance of a fundamental right, particularly of the scope of its area of protection, and that is significant for the individual case ((Decisionof June 10, 1964, reg. nr. 1 BvR 37/63, BVerfGE 18, 85 (92 et seq.)). Furthermore, the Court has explained that it can intervene in cases where a regular court has decided in an arbitrary fashion, i.e. that the application of the law to the individual case and the procedure are incomprehensible in the light of the principles of the Basic Law and one cannot but conclude that they dwell on irrelevant considerations ((DecisionofJuly 1, 1954, reg nr. 1 BvR 361/52, BVerfGE 4, 1 (7)). It must be noted that, in order to assess whether it can intervene or not, the Federal Constitutional Court must examine the reasons given in the regular court rulings that are challenged.

The Federal Constitutional Court's authority to verify whether a regular court has taken into account the fundamental rights of the applicant includes the examination of federal court rulings as well, because these rulings are acts of public authority, any person alleging that one of his or her fundamental rights has been infringed can challenge with a constitutional complaint before the Federal Constitutional Court (cf. Art. 93 § 1 N° 4a of the Basic Law). Though, at the outset, the Basic Law does not explicitly determine a specific relation between the federal courts and does not set out a hierarchy, the Federal Constitutional Court considers anybody of the judiciary, including the federal courts, bound to fundamental rights which imply that their decisions can be subject to examination by the Federal Constitutional Court.

the CC. This reluctance should be taken seriously, as the individual application system will never acquire full effectiveness if the CC does not succeed in persuading regular courts to take into account its case-law on fundamental rights.

The CC should, through its rulings and through direct dialogue, persuade the high courts not come to a conclusion that the CC is a super court of appeal which prevails over other high courts and supervises their decisions.

During the meetings with the CC officials and members in the first visit in January, the delegation of consultants was told that the CC members were well aware of the limit on their power in respect of ordinary courts, as established by art. 148 paragraph 4 of the Constitution[86]. They further stated that they would not like to exceed their limits as it would inevitably increase the number of individual applications which would endanger the sustainability of the individual application system[87].

However, the perception of other high courts cannot be ignored; as such a negative perception could result in a resistance against the CC and its decisions.

Therefore the need for dialogue among the CC and the high courts is of vital importance, because, as it has been said above, the effectiveness of the new remedy ultimately depends on the regular courts' willingness to cooperate in the protection of fundamental rights. Dialogue between the CC and the regular courts within the frame of regular discussion meetings on different human rights issues can contribute to the willingness of the latter in this respect, and in compliance with the subsidiarity principle[88].

Furthermore the high courts can play a crucial role in steering the courts of first instance to harmonise their own case law with that of the CC. In sum, when the Turkish high courts embrace the CC case law, it would also motivate the lower courts to do so.

When consultation meetings are organised among CC and high courts' members, it would be important for the CC to make it clear that the CC's jurisdiction does not cover facts definition. Therefore the CC should conduct its assessment based on the facts as they were considered by the ordinary courts and that the CC is not enabled to decide the right interpretation of the legal provisions, since this competence pertains exclusively to the ordinary courts; however establishing whether a certain legal interpretation brings to the violation of a fundamental right belongs to the competence of the CC.

86 According to which "*in the individual application, judicial review shall not be made on matters required to be taken into account during the process of legal remedies*".

87 Another important milestone in the history of the Federal Constitutional Court was reached when *Gerhard Leibholz*, one of the first members of the Federal Constitutional Court who was commissioned by his colleagues to develop a theory on the Court's status, published his so-called "status report" in 1957 ((*Gerhard Leibholz*, Der Status des Bundesverfassungsgerichts: Gutachten, Denkschriften und Stellungnahmen mit einer Einleitung, Jahrbuch des öffentlichen Rechts der Gegenwart 6 (1957), 109-221)). In his 111 pages report, *Leibholz* explained convincingly the way the Court sees himself and prepared the foundations of its self-confident jurisprudence. According to the report, all constitutional organs must cooperate in harmony and omit everything that might put another constitutional organ's reputation – and hereby of the Constitution itself – at risk. Any constitutional organ, that by words or by doing belittles another organ, would fall short of the "self-evident" obligation to show the respect every constitutional organ has a right to. Even though Leibholtz's report could not avert every opposition, it resulted in the acceptance of the Federal Constitutional Court as a constitutional organ that vis-à-vis the other organs enjoys equal rights.

88 According to the Federal Constitutional Court, the rule regarding the exhaustion of remedies found in Art. 90 § 2 1st phrase of the Federal Constitutional Court Act also expresses the principle of procedural subsidiarity according to which the Court only examines the claims that the applicant has already raised properly before the regular courts. A strict application of this principle does not only result in an efficient and rational division of labour between the Federal Constitutional Court and the regular courts; it also gives the regular courts, who in general have more profound experience and knowledge of the realities in the respective field, the opportunity to explicitly take into account the claims of the applicant in the reasons of their rulings and to explain why those claims do not alter the outcome of the case.

RECOMMENDATION

- The CC should envisage holding regular dialogue meetings with high courts' judges to discuss recent developments in its case-law.

VIII.4 Enforcement of CC Judgments. Effectiveness of the Monitoring Mechanism Implemented by the Constitutional Court

➢ **FINDINGS**

Pursuant to article 23 of the Law no. 6216, the Secretariat General of the CC is authorised and responsible for execution of the judgments of the Constitutional Court. In this context the Secretariat General follows up the execution of every settled file by monitoring the enforcement of the decisions by the courts or by the relevant Institutions. For example, if the local court has ruled compensation of damages a copy of that decision is forwarded to the CC.

➢ **Considerations**

The enforcement of the CC rulings in the context of the individual application is monitored by the Secretariat General of the CC. However, no formal mechanism is envisaged for the enforcement of CC judgments. This mechanism should be established and the law should formally provide for enforcement action plan and enforcement report by the concerned administrative Authorities.

Nevertheless, the consultants were reported by the CC members that the concerned Authorities tend to respect the CC rulings and to comply with them; they emphasised that this is clear sign of the effectiveness of the tool.

Yet, the *Twitter* case is paradigmatic. This case originates in the Turkish government's decision to block access to the social networking and micro blogging service Twitter. After Ankara's 15th administrative court had issued a stay of execution ruling on March 26, the TİB - Turkey's telecoms authority- should implement the administrative court's ruling within the following 30 days. The Minister of Justice reportedly said that he expected to read the ruling, to establish whether "implementing the court orders is contrary to the Constitution".[89]In the aftermaths of the administrative court's stay of execution ruling, the CC ordered the Turkish authorities on April 2 to lift the ban on Twitter.[90] The Prime Minister harshly slammed the decision and said publically that the government would not oppose to it but that he personally did not "respect it". He furthermore criticised the CC for having handled the case with urgency whereas "a number of cases are pending" and for having decided although all legal remedies had not been exhausted yet.[91]

RECOMMENDATION

- A formal mechanism should be introduced for the monitoring of the implementation of CC rulings that provides for enforcement action plan and enforcement reports by the relevant Authorities.

89 http://www.hurriyetdailynews.com/ankara-court-grants-stay-of-execution-for-governments-twitter-ban.aspx?pageID=238&nID=64121&NewsCatID=339

90 CC, decisionof April 2, 2014, *Yaman Akdeniz* et al., no. 2014/3986.

91 http://www.hurriyetdailynews.com/constitutional-court-ruled-to-unblock-twitter-before-elections-chief-judge-reveals.aspx?pageID=238&nid=64639

VIII.5 The Role of the Ministry of Justice's Department of Human Rights in Individual Application Proceedings and In The Enforcement Of The Constitutional Court's Rulings

➢ **Findings**

The Human Rights Department (HRDMoJ) of the Ministry of Justice (*Adalet Bakanlığı İnsan Hakları Daire Başkanlığı*) in an important component of the individual application procedure. It expresses opinions on admissible individual applications. The HRDMoJ may express opinion with regard to the content of an admissible individual application when it is delivered to the MoJ by the CC according to article 49 of the CCL and article 71 of the Rules. Although the MoJ can submit its observations within 30 days and apply for an additional 30 days[92], most observations are submitted within 30 days. There is an internal practice within the HRD to refrain from expressing observations in cases of CC well established case-law. The Ministry considers its role in the individual application mechanism before the CC to be an objective one, aiming at facilitating the CC's decision-making process. Therefore, the observations submitted to the CC are not written from a defendant's perspective.

Furthermore it monitors the enforcement of ECtHR rulings and organises activities, such as seminars and conferences, and conducts projects for preventing violations of human rights.

➢ **Considerations**

Whether, according to the current legal framework, the HRD should monitor the enforcement of the CC rulings is questionable. Art. 50 § 3 CCL simply provides that the judgments of the Sections on the merits together with their reasons are notified to the MoJ.

IX. Protection of Human Rights by Prosecutors, Criminal and Civil Judges

IX.1 Duration of detention on remand. Impact of the 3rd and 4thPackage of Judicial Reforms

➢ **Findings**

One of the main reasons for human rights violations in Turkey is prolonged detention on remand[93]. The length of such detention has often been subject to the scrutiny of the ECtHR that repeatedly found a violation of Art. 5/4 of the Convention.[94]

The criminal judges and public prosecutors met by the consultants said that the recent CC decisions

92 Art. 71 § 2 1st and 2nd phrases of the Rules of the Court.

93 The term "detention on remand" is intended to relate to the time spent in detention by the suspect from the police arrest until the first instance conviction and to the further period spent in detention during first instance retrial, when the first instance decision is quashed by the Court of Cassation.

94 See the Case of *Kalaylı v. Turkey*, Application no. 43654/05, judgment of 11 October 2011, para. 21.

related to remand detention, such as the *Balbay*[95] ruling and the decisions of 4 July 2013[96] about detention on remand in terror related cases, are not entirely clear and not offer sufficient guidelines to establish in what cases the duration of pre-trial detention violates fundamental rights.

The criminal judges also added that a clear guidance in CC judgments may potentially create a unity of practise among judges concerning detention periods. However they also said that prosecutors and courts tend to prioritise cases if the defendants are kept in remand detention.

The 3rd Package of Judicial Reforms, adopted in June 2012[97], and the 4th Package of Judicial reforms, adopted in April 2013[98], were aimed at aligning prosecutors and judges' practices with the ECtHR case law. Judges were requested to substantiate their detention on remand orders on concrete grounds and to use detention on remand as an *extrema ratio*, by resorting to "protective measures" alternative to pre-trial detention in compliance with the principle of proportionality

Istanbul judges and prosecutors released controversial statements about the impact of the 3rd and 4th packages on their works; in particular for the matters originated from structural problems of the Turkish judicial system, such as lengthy detention on remand periods. Some prosecutors said that the two packages had basically not produced any consequence on their activity. According to a different prosecutor, instead, following the two packages, the rate of remand detention orders was significantly reduced, because judges tend to reject, much more than in the past, the prosecutors' requests for pre-trial detention.

In general, criminal judges and prosecutors complained about their heavy workload and asserted that the workload prevents them from following the case law of the ECtHR.

- **Considerations**

Judges seemed not be entirely acquainted with the recent case-law of the CC about detention on remand and the case-law of the ECtHR in the criminal field.

This may be a reason why the 3rd and 4th Packages of Judicial Reform, aimed at harmonising practices and decisions of criminal judges and public prosecutors with the ECtHR case law, had limited impact on their daily work.

95 See CC, decision of 4 December 2013, *Mustafa Ali Balbay*, no. 2012/1272. In its decision the CC referred to Article 19 par.7 (corresponding to Article 5 par. 3 of the European Convention) and Article 67 (partly corresponding to Article 3 of Protocol no.1 of the European Convention) of the Turkish Constitution. The applicant in that case had been detained for 4 years and 5 months on terrorism related accusations. However, the CC indicated in its decision that the applicant may have been subject to legal control mechanisms as a result of the amendment of the Criminal Procedure Code by virtue of the Law no.6352 which was entered into force on 5 July 2012. Accordingly, the CC found that the legal control mechanisms were not duly taken into account by the trial court which eventually violated the principle of proportionality (see paragraph 118 of the said judgment) with regard to the applicant's right to freedom in conjunction with the applicant's right to carry out political activities as an MP. Indeed, the CC also took into account the applicant's status as an MP since he was elected as an MP on 2 June 2011, having he being detained since 6 March 2009. However in the relevant judgment, the CC did not clearly refer to any maximum time limitation concerning detention periods.

96 See CC, judgment of 4.7.2013, no. E:2012/100, K:2013/84. The CC annulled a legal provision contained in the Anti-terror Law which allowed long pre-trial detention, up to 10 years. Although the CC found that 10 years in detention is disproportionate time, it gave the Parliament 1 year time to amend this rule, according to Article 153 (3) of the Constitution. The CC made also clear that detention time cannot exceed five years, even if a person is tried for more than one criminal offence in a single case. In a number of individual cases (amongst others, see CC, First Section, no. 2012/239, k.t. 2.7.2013, para. 54), the Court has stated that if the detention time, pending trial, is separately assessed for every single criminal charge , the total detention period becomes unforeseeable for the accused. Thus, it is also a violation of the principle of proportionality. The principle of proportionality can been infringed, according to the CC ruling, also if total pre-trial detention time does not exceeds five years. As to latter category of cases, the CC leaves a certain margin appreciation to the first instance courts (B. No: 2012/239, para. 49). However, the Court also stated that if the first instance court decides to extend detention period, the reasons for the extension must be relevant and sufficient with reference to the concrete conditions of the case (B. No: 2012/1137, 2/7/2013, para. 63). When the Court uses stereotype reasons for extension, these criteria are not met (No. 2012/1158, 21.11.2103, para. 56.).

97 Law No. 6352 published in the Official Gazette of Turkey on 5 June 2012.

98 Law No. 6459 published on 30 April 2013.

This proves that criminal judges and prosecutors need to be trained about human rights protection and individual application mechanism.

RECOMMENDATION

- Prosecutors and criminal judges should be trained about human rights protection and individual application mechanism.

IX. 2 Long-duration of Civil Trials – Remedies to speed up Long Proceedings

➢ Findings

The civil judges met by the consultants were well aware of the problem of long trials.

They admitted that Turkish justice system has some systemic problems such as "length of proceedings", that is mainly due to size of their workload. Judges explained that they have not only too many cases to deal with, but they find themselves compelled by many administrative and time-consuming tasks, also because judicial clerks are not sufficiently qualified and trained to support their work.

Civil judges are aware that, if these problems are not solved at first instance level, a huge workload of individual applications will be produced. Some civil judges adopt individual methods in order to prevent long trials, such as the prioritisation of old-dated case files.

➢ Considerations

The problem of long trials in Turkey is a structural issue. In this situation, the existence of the individual application will not help to solve the problem at its root cause. It will enable the party to be granted pecuniary compensation; but cases will massively flow to the CC bringing the risk that the Court will be paralysed.

Therefore, structural measures should be taken.

First of all judges should be relieved of their administrative tasks.

The courts should be managed according to modern organisational criteria. Presidents of the courts and courts' managers should be introduced to this respect.

The High Council of Judges and Prosecutors (henceforth: HYSK) should promote and disseminate good practices for the smooth case-management by judges, who should systematically monitor and give priority to old cases.

A judicial remedy to speed up long proceedings could be introduced.

RECOMMENDATIONS

- judges should be relieved of their administrative tasks.
- Courts should be managed according to modern organisational criteria.
- Presidents of the courts and courts' managers should be introduced.
- The High Council of Judges and Prosecutors should promote and disseminate good practices for the smooth case-management by judges, who should systematically monitor and give priority to old cases.
- A judicial remedy to speed up long proceedings should be introduced.
- Further training on Art. 6 ECHR should be organised for judges and prosecutors.

IX.3 Long-duration of Trials – Compensation of Damages

➢ Findings

Consultants were reported that Turkey lacks a remedy for citizens to claim for compensation in case of long trials.

The only general remedy seems to be the individual application to the CC that could grant direct compensation or send the case to the relevant first instance court for the determination of the amount of money to be awarded. If this second path is taken the citizen may find himself again with the problem of long-duration of proceedings.

➢ Considerations

A specific and speedy remedy to recognise compensation of damages for long trials should be introduced, to be exhausted before the individual application is filed, with the aim to disburden the CC. For example the Human Right Compensation Commission (please see the following paragraph) could be stabilised and its competence could be extended to cover all claims related to long duration of trials.

RECOMMENDATION

- A specific and speedy remedy to grant compensation of damages for long trials should be introduced with the aim to disburden the CC.

IX.4 Long Duration of Trials and Compensation of Damages. The Role of the Human Rights Compensation Commission of Ministry of Justice

➢ Findings

There have been some uncertainties about which authority would be the debtor of lawyer's fees and of any pecuniary compensation an applicant was awarded by the CC[99]. In the first months of implementation of individual application, the Ministry of Finance supported the idea that the authority responsible for the violation should effectuate the payment. The position adopted by the Ministry of Finance created serious practical problems, as many authorities, lacking an autonomous

99 Art. 50 § 2 2nd phrase CCL.

budget, were not in a financial condition to pay and because it might be that more than one authority was responsible for the violation of a fundamental right. In the course of the third visit, the consultants were informed that, following a recent meeting between the Ministry of Finance and the CC's Secretary-General on the issue of payment, the Ministry of Finance declared that it would have assumed the responsibility to pay.

The Human Rights Compensation Commission of Ministry of Justice was established by the Law nr. 6384 as a domestic remedy for paying compensation as a result of lengthy trials and non-fulfilment of court decisions. The ECtHR case of Ümmühan Kaplan v. Turkey[100], a pilot-case that identified long duration of trials as a systemic problem in Turkey, was the basis for the establishment of this domestic remedy. The ECtHR's ruling in *MüdürTurgut and Others v. Turkey*[101] confirmed that application to that commission was a domestic remedy to be exhausted before filing an application to the ECtHR.

This Commission is empowered to render compensation of damages in long trial cases in relation to applications which were directed to the ECtHR before the individual application entered into force.

The Commission is composed of 5 members, 4 of which are judges and one is lay member appointed by Ministry of Finance. The President of the Commission stressed that it is an independent body and is not subject to the hierarchy of the MoJ. The decisions of the Commission are subject to judicial scrutiny.

Until the beginning of April the Commission received 5,400 applications and 3,800 of them were concluded. The Commission found violation in 3,081 applications and rejected 651. So far, 560 rulings of the Commission were objected by the applicants before Ankara District Administrative Court that found 10 objections rightful; 467 were instead rejected and 84 cases are still pending.

The Commission operates and concludes an application on an average of 150 days; the compensation is paid approximately 15 days later.

The President of the Commission said that the amount of the compensation awarded by the Commission is intended not to be symbolic; it is established in compliance with the ECtHR standards and was increased following a ruling of the Ankara administrative court. However it does not cover attorney fees.

- **Considerations**

The uncertainties about the Authority in charge with the payment of pecuniary compensation awarded by the CC could seriously undermine the effectiveness of the remedy. For this reason, the declaration of the Ministry of Finance that it will take the responsibility to effectuate the payments in the future is welcomed. The follow up of this statement should be closely monitored.

The Human Rights Compensation Commission of MoJ can be seen, both for the duration of the proceeding and the amount of liquidated compensation, as an effective domestic remedy for redressing the consequences suffered by parties for long trials, although it should be extended to fully cover attorney fees, in order to ensure the right of access to the remedy.

However, the Commission has been set up as a temporary remedy only and not as a general one, as it relates only to a limited number of applications and, in particular, to those applications that were

100 Application no. 24240/07, judgment of 20 March 2012.
101 Application no. 4860/09, judgment of 26 March 2013.

filed to the ECtHR before the individual application entered into in force.

The remedy should instead be generalised and should be exhausted before an individual application is filed, until the systemic problem of long trials is solved in its origin, by the adoption of organisation structural measures.

Until then, and without an effective internal domestic remedy in place, the CC runs the serious risk to be blocked by an enormous number of claims for compensation of damages for long trials.

RECOMMENDATION

- The work of Human Rights Compensation Commission of the Ministry of Justice should be extended to become a general internal remedy for claims of compensation of damages in case of long trials and should also cover the repayment of attorney fees.

X. Training

X.1 Legal Practitioners' Training about Human Rights Protection and Individual Application

➢ Findings

Lawyers from the İstanbul Bar Association (IBA) in February insisted that the facilities aimed at increasing the awareness of the individual application system by the CC were not sufficient. The vast majority of the lawyers had not received any information and training on this issue.

Lawyers from the UTBA (*Türkiye Barolar Birliği*) also reported a similar situation. The local bars and UTBA carried out a number of training courses for lawyers including training on individual application system, but only a limited number of legal practitioners have benefited from them so far.

The UTBA officials informed the delegation about previous and planned training facilities i.e.:

- a protocol was signed by the Ankara Bar Association and UTBA in March 2014 for an individual application training and a 16-hour-training was provided for lawyers;
- a 26-hour certificate programme is to be held with Eskişehir, Bursa and Manisa Bar Associations; on 7 October 2013, a meeting on individual application system was held in Ankara Bar Education Center (*Ankara Barosueğitim Merkezi*- BEM);
- additional training courses will be pursued with the cooperation of UTBA and Ankara Bar Association.

The Human Rights Office at the Istanbul Bar Association reportedly receives many calls from both young and experienced lawyers that mainly concern questions about individual application procedure and admissibility criteria.

Lawyers were also concerned about the insufficiency of courses on Human Rights in the Law faculties and during the lawyers' traineeship: currently only 8 hours of human rights training is included in the programme for trainee lawyers.

The members of the Justice Academy (henceforth: JA) stated that the Academy has not planned any

training for lawyers because no Bar Association has asked for this service. Since, as stated, the JA can only organise training programmes upon request, its members deemed it is the responsibility of the Bar that no training programme for lawyers has been planned or carried out so far by the JA

Prosecutors said that they had attended a three-day seminar on human rights, but no special training on individual application. One of them also said that periodically they receive a booklet with the last human rights decisions; however their allegedly high workload does not allow them to keep updated reading the booklets

Judges also said that they did not receive any specific training on individual application and, when the first applications were filed through their court, as they were not fully aware of the scope of their task, they started to learn how to deal with this new tool by themselves. They assumed that the control on the formalities should be done by the CC and that they only had to undersign the application and to control that fees were paid.

High Court judges were never involved in training about individual application.

The JA has a four-hour course on individual application for initial training but has not organised any in-servicetraining on individual application so far.

- **Considerations**

The consultants acknowledged in the course of the three visits that there is a strong need to train legal practitioners about individual application.

Although lawyer's perception of the CC's role in individual application process changed very quickly since the first visit in İstanbul with the İstanbul Bar, thanks to popular judgments like that on *Twitter* case, however, concerns about lawyers' awareness and knowledge of technical issues pertaining to individual application are continuing.

Training performed by the BAR is not sufficient.

The lack of sufficient training for the lawyers may result in inadmissible applications to the detriment of the applicants. Furthermore it may increase the workload of the CC as numerous applications unnecessarily are sent to the CC.

Specific training should therefore be planned to target these concerns.

Individual application should be included in Law Schools curricula.

Trainee lawyers, as well as judges and prosecutors, should receive dedicated training in the course of their pre-service training.

Professional lawyers should be first trained in ECtHR and CC's case-law on fundamental rights, to enable them to allege the relevant case-law from the initial proceedings before the first instance courts.

Lawyers need to learn more regarding admissibility requirements. This training should focus on the formalities required to correctly fulfil the application; the admissibility criteria used by the CC; the access to legal aid[102] especially for foreigners; the CC power to sanction the abuse of the right

102 Please see chapter III.5 below.

to an individual application[103]; the exhaustion of remedies before filing an individual application; inadmissibility criteria and the CC case law about inadmissible petitions[104].

The Bar should then regularly organise in-service training for lawyers about human rights and individual application.

Furthermore individual application should become a regular subject both for pre-service and in-service training of Judges and prosecutors. The training should mainly focus on CC remedies and the enforcement of CC rulings, the retrial and the scope of the binding force of the CC's judgments[105].

The CC, the JA and the UTBA are expected to jointly conceive training programmes for serving lawyers that should cover the constitutional standards of human rights protection as set in the CC's case-law. The JA should invite academics specialised in the field of Constitutional Law to take part in the preparation of the trainings.

It must be assured that legal practitioners from all over the country are reached by the training.

RECOMMENDATIONS

- Training on individual application should be included in Law School curricula and in the pre-service training of trainee lawyers, judge and prosecutors.
- Specific training on individual application should be carried out for legal practitioners.
- The training of lawyers should focus on the formalities required to fulfil correctly the application; the admissibility criteria used by the CC; the access to legal aid specially for foreigners; the CC power to sanction the abuse of the right to an IP; the exhaustion of remedies before filing an IP; the inadmissibility criteria and the CC case law about inadmissible claims.
- The training for judges and prosecutors should mainly focus on CC remedies, the enforcement of CC rulings and the scope of the binding force of the CC's judgments.

X.2 Specific Recommendations about Training of Lawyers, Judges and Prosecutors in terms of Individual Application: Subjects and Training Methods

A) Common pre-service and in-service training for judges, prosecutors and lawyers.

(i) **The ECtHR case law**: according to article 90 of the Turkish Constitution, ECHR bounds Turkish judges. The CC has so far proved that it follows the decisions of the ECtHR in similar cases. A good knowledge of the ECtHR by lawyers, judges and prosecutors would both help the effective protection of individual rights in early stages of the judicial procedure and the reduction of the number of the individual applications to the CC.

(ii) **The CC case law**: Although the number of the decisions of the CC is limited at the moment, training on its decisions including admissibility requirements and merits would contribute to the well-functioning of the judicial procedure as a whole

103 Under Article 83 of the Rules of the CC, the court has competence to impose a fine on an applicant up to TRL2.000 if the right to individual application was abused by the applicant.

104 For specific training please see the following chapter.

105 For specific training please see the following chapter.

and would increase the protection of fundamental rights, as for the training on ECtHR case law. This training could include case-law of other European Constitutional Courts dealing with individual application systems.

(iii) Specific training on **criminal issues** that are important for the protection of human rights such as: grounds for pre-trial detention and long pre-trial detention; presumption of innocence; principle of equality of arms.

(iv) Specific training on **civil issues** that are important for the protection of human rights such as: prioritisation of old cases by civil judges; case-management; property rights.

B) Dedicated training for lawyers about the following specific aspects of individual application:

- The scope and the subjects of the individual application.
- Ways to lodge the individual application. Peculiarities if the applicant is not a Turkish citizen.
- Accessibility conditions, including the criteria for the calculation of the time-limit.
- Fees and legal aid.
- Principle of subsidiarity: remedies to be exhausted before lodging an individual application and exceptions.
- How to compile the application form and what documents to attach to it.
- Fines in case of abuse of individual application. Cases.
- Conditions and criteria to apply for an interim measure.
- Inadmissibility decisions: cases and procedures
- Applications which do not bear significance for the enforcement and interpretation of the Constitution or for the determination of the scope and limits of fundamental rights" (48.2 CCL)[106].

106 This issue could be construed more or less widely. For instance see Constitutional Court of Spain, Judgment No. 155/2009, of June 25. "Although the appellant is required to satisfy, in accordance with the terms of art. 49.1 in fine OLCC, the burden of justifying in the claim the special constitutional relevance of the appeal (OCC 188/2008 of 21 July; 289 and 290/2008 of 22 September) it is this Court which is responsible for perceiving in each case the existence or non existence of that "special constitutional relevance", that is, when, according to the terms of art. 50.1 b) OLCC, "the content justifies a substantive decision by the Constitutional Court, due to its special constitutional relevance" addressing for these purposes the three criteria which are described in the precept: "for its importance for the interpretation of the Constitution, for its application or for its general effectiveness, and for determining the content and scope of fundamental rights". […] This Court considers it appropriate, given the time which has elapsed since the reform of the appeal for protection, to put forward an interpretation of the requirement of art. 50.1.b) OLCC]. In this sense it considers that it is appropriate to note that the content of the appeal for protection justifies a decision on the substance, based on its special constitutional relevance in cases referred to below, without that relation being understood as a definitively closed range of cases in which an appeal for protection of fundamental rights has special constitutional relevance, since that understanding is logically opposed to the dynamic nature of the exercise of our jurisdiction, the performance of which, on the basis of casuistry presented, cannot rule out the need to describe or distil concepts, redefine cases considered, and add other new ones, or exclude any which had been initially excluded. Such cases would be the following; a) that of an appeal which raises a problem or facet of a fundamental right subject to protection on which there is no case law of the Constitutional court, a case already declared in JCC 70/2009 of 23 March; b) or that the occasion requires that the Constitutional Court clarify or change its doctrine, as a consequence of a process of internal reflection, as occurs in the case in question, or due to the new social realities which have arisen, or regulatory changes relevant for the configuration of the content of the fundamental right, or a change in the doctrine and theory of the guarantee bodies entrusted with the interpretation of the international treaties and agreements referred to in art. 10.2 SC; c) or when infringement of the fundamental rights claimed originates from the law or another provision of a general nature; d) or if the violation of the fundamental right derives from reiterated case law interpretation of the law that the Constitutional court deems to be damaging to the fundamental right, and on which it believes it necessary to declare another interpretation pursuant to the Constitution; e) or when the Constitutional Court case law on the fundamental right alleged in the appeal is not being complied with in a general and reiterated manner by ordinary Jurisdiction, or there are contradictory judgments on the fundamental right, either by interpreting the constitutional doctrine in a different manner, or by applying it in some cases and not recognising it in others; f) or in the event that a court clearly declines its duty to respect the case law of the Constitutional Court (art. 5 OLJ); or, in short when the matter raised, despite the fact that it is not included in any of the aforementioned cases, transcends the case in question because it raises a legal

- Manifestly ill founded applications. Cases.
- Procedure on the merit of the case. Hearings. Evidence.
- CC remedies in individual application cases.
- Compensation of damages: conditions, criteria and standards.
- Binding force and effects of CC ruling in the concerned case and in similar cases
- Enforcement of CC judgments.

C) Dedicated training for prosecutors and judges about the following specific aspects of individual application:

- The scope and the subjects of the individual application.
- CC remedies in individual application cases.
- Compensation of damages for violation of fundamental rights.
- Retrial of cases following a CC ruling.
- The scope of the binding force of the CC's judgments
- The enforcement of CC rulings.

RECOMMENDATION

Lawyers, judges and prosecutors should be specially trained in the field of individual application including training at least pertaining to the issues enumerated in this report.

X.3 Training Methodologies. HELP

The HYSK, the JA and the UTBAwould be expected to cooperate in order to organise, at least for some of topics listed above, a common training open to the attendance of judges, prosecutors and lawyers. Thereby, exchange of views, exchange of experiences and a constructive dialogue can be realised.

Given the high number of legal professionals to be trained, the use of the HELP methodology and platform is recommended in close coordination with the national training institutions (the JA and the UTBA). Synergies are to be created with UYAP, especially for judges and prosecutors. HELP is based on the principle of open education, which gives trainees the opportunity to develop a sense of ownership over their education. The HELP methodology takes into account the heavy time pressure imposed on legal professionals in their daily work. Its added value is that curricula are drafted on a tailor-made basis, meeting participants' specific training needs and learning pace, allowing flexibility. Turkish judges, prosecutors and lawyers will have the possibility to attend a distance-learning course if they wish to do so. A blended approach can also be adopted, which would include both distance-learning and traditional face-to-face training sessions. Training materials will be designed by Turkish experts, who are familiar with the individual application system and have a deep knowledge of the ECHR and European human rights standards. The curriculum will have to allow legal practitioners to put into practice the acquired knowledge in concrete situations, through interactive and practical case studies.

issue which has general and relevant, social or economic repercussions, or has general political consequences, effects which above all could lead in particular, although not exclusively, to specific electoral or parliamentary protection of rights".

Initially a pool of trainers/tutors will be trained and then will have the opportunity to further train judges, prosecutors and lawyers in different regions of Turkey. The aim is to ensure a large dissemination of the curriculum and training materials on individual application.

In order to prevent divergent practices and case law; to establish informal confrontation and dialogue; and to transfer knowledge and experience, consultation meetings should be organized at regular intervals of time among the members of the high courts: CC, CoC, Council of State, High Military Court and High Administrative Court. The most fitting methodology for those meeting would be, instead of programming traditional training, to foster scientific meetings with the view of commenting on the CC's decisions or CoC's related judgments with these stakeholders accomplishing an active role.

RECOMMENDATIONS

- Common training should be organised by the HYSK, the JA and the Bar open to the attendance of judges, prosecutors and lawyers.
- HELP methodology and platform should be used for training judges, prosecutors and lawyers on individual application system, also through distance-learning courses and "train the trainers" modules.
- Judges from the CC and the high courts should be involved in "consultation meetings" in order to prevent divergent practices and case law, to establish informal confrontation and dialogue and to transfer knowledge and experience.

X.4 Training of Judges and Prosecutors: The Role of the Constitutional Court, the High Council of Judges and Prosecutors and the Justice Academy

➢ Findings

According to an amendment to art. 119 of the Law on Judges and Prosecutors, adopted in February 2014: "*The vocational training of judges and prosecutors, which is both their right and duty, shall be exercised by Justice Academy of Turkey. The procedures and principles regarding this training shall be specified in a regulation prepared by Justice Academy of Turkey having received the opinion of the High Council of Judges and Prosecutors*" (art. 119).[107]

The previous version of the same article 119 of law on *Judges and Prosecutors*, as amended by Law 6494 adopted by the Parliament on 27 June 2013 and published on Official Gazette on 7 July 2013[108], provided that the in-service trainings should *be conducted by the High Council of Judges and Prosecutors* and the *procedures and principles for in-service trainings of judges and prosecutors* should *be regulated by a by-law* to *be issued by High Council of Judges and Prosecutors receiving the opinion of Turkish Justice Academy.*

The *regulation* mentioned in the amended article 119 of the Law on Judges and Prosecutors has not been introduced yet.

Members of the HYSK expressed their wish to support in-service training courses for judges and prosecutors in the field of the protection of fundamental rights but regretted that the last

107 Article 119 of Law no. 2802 was amended by article 3 of Law nr. 6524, which was published in the Official Gazette on 27 February 2014.

108 By Law 6494, the Parliament replaced the provision introduced by a Governent legislative decree and annulled by the Constitutional Court.

amendments to the statutory framework of judicial training prevents the Council from carrying out such courses, being it the sole responsibility of the Judicial Academy . The only task of HYSK in relation to judicial training is the designation of judges and prosecutors who will take part in the JA training[109].

In February 2004 the Law on JA was changed as well and the control of the MoJ on the academy was reinforced. Following this change, the President of the Academy and the main directors were replaced by new incomers. Contrary to the HYSK, the new President of the JA assumed that, following the recent legal amendments, the JA has simply become the exclusive provider of in-service training for judges and prosecutors, whilst the competence to plan and decide the subjects of in-service training still belongs to HYSK. The President said that the budget for the organisation of the in-service training would be transferred from HYSK to the JA before the end of 2014.

➢ Considerations

The aim of in-service judicial training is to enhance professionalism of judges, public prosecutors and lawyers through high quality education. Judicial Training is considered by the European Commission a fundamental tool for the constitution of a "European Legal Culture" [110].

Large and increasing caseloads; frequent changes in legislation due to the process of approximation of Turkey to the EU; the emergence of complex legal issues connected to the complexity of the society, and the increasing media scrutiny of judicial decisions have increased the demand and need for continuing judicial training in Turkey. In this context, the independent and effective exercise of jurisdiction -which is required both by the EU standards and by the Turkish Constitution- confers the right and the duty on judges and prosecutors to undergo judicial training, in order to acquire, maintain and consolidate professional ability and develop their proficiency.

The last amendments to the Law on Judges and Prosecutors and to the Law on JA caused uncertainties in the interpretation and implementation of the legal framework about judicial in-service training. In the current situation, a serious risk exists that the individual application system will be implemented without the necessary training support being provided to judges and prosecutors by the main judicial stakeholders. However, at the moment there is no planned programme for individual application training.

In this situation JA is expected to ensure that the curricula about Human Rights protection, developed under the past JA management, are used and adapted to the recent ECtHR and CC case-law and to the needs of legal practitioners. The JA is further expected to cooperate in the framework of future EU/Coe Projects on individual application and with the HELP Programme to ensure a proper training on individual application for legal professionals.

RECOMMENDATIONS

- The JA is should ensure that the curricula about Human Rights protection, developed under the past JA management, are used and adapted to the recent ECtHR and CC case-law and to the needs of legal practitioners.
- The JA should cooperate in the framework of future EU/Coe Projects on individual application and with the HELP Programme to ensure a proper training on individual application for legal professionals.

109 Art. 9 of the Law No 6087 on the *High Council of Judges and Prosecutors*

110 Communication from the Commission to the European Parliament and the Council on judicial training in the European Union.

List of Recommendations:

Scope of the individual application

- Articles 148 (3) of the Constitution and 45 (1) CCL about the scope of individual application should be interpreted in a way to ensure the incorporation of the rights guaranteed by the ECHR and its Protocols into those secured by the Constitution.

- The exclusion of public legal persons and foreigners from the right to apply should be construed in a very narrow sense in order to assure an effective protection of their fundamental rights and freedoms.

Accessibility of individual application system

- Information desks at courts should be set up and equipped for providing practical instructions on how to file a claim and how to access legal aid.

- Access to information about individual application should be improved in relation to potential applicants who are in a vulnerable situation, especially foreigners who encounter a language barrier and may be in a situation, like the confinement in detention centres, which makes difficult for them to access a lawyer or other staff with legal skills.

- CC should establish a press speaker.

Legal aid

- The scope of legal aid should be broadened in order to cover potential non-Turkish applicants.

- Legal provision should be adopted to allow the assistance in the individual application proceeding by the same legal aid lawyer appointed in the previous process.

- Applicants should be allowed to ask for the suspension of the time-limit for filing an individual application, when legal aid has been claimed, until a lawyer is appointed or, at least, provisionally appointed.

Filing an individual application

- The CC internal rules should be changed so as to allow the filing of the application via regular mail and , possibly, via certified e-mail or an alternative on-line application system.

- An alternative to the use of Turkish Language should be provided for foreigners who are not able to have access to any legal assistance for preparation of a Turkish application.

- National guidelines that guarantee uniformity throughout all court registries should be adopted.

- Within the applicable data protection rules UYAP should be used by the CC to retrieve information needed for an application if the applicant is unable to provide that information within the relevant time-limits.

- The CC rules should be amended to establish the CC Registry duty to retrieve *ex officio* the missing documents from UYAP.

- UYAP should be adapted to overcome the problems that foreigners or legal persons may encounter when filing the individual application.

- It should be officially clarified what missing documents would cause the rejection of the application.

Internal organisation and procedures of the Constitutional Court

- Specialization of the Commissions and Sections should be considered in the long run.

- The taking of any evidence should be carried out by the members of the Court.

- Members of the Court should take more responsibility in decisions drafting, at least for leading cases.

- The number of Reporter Judges working in the Research and Case-law Unit should be increased.

- Reporter Judges working in the Research and Case-law Unit should receive dedicated training on how to summarize court's decisions.

- Once there is a body of well established case-law, the CC might consider introducing a friendly settlement procedure.

External remedies to reduce the influx of cases to the CC

- Effective remedies inside the ordinary judicial procedures should be established to denounce the delays and to speed up the long proceedings.

- A specific and speedy remedy to grant compensation of damages for long trials should be introduced with the aim to disburden the CC.

- The work of Human Rights Compensation Commission of the Ministry of Justice should be extended to become a general internal remedy for claims of compensation of damages in case of long trials and should cover the repayment of attorney fees also.

- Organizational measures to monitor and give priority to old cases in ordinary courts should be introduced.

- Judges should be relieved of their administrative tasks.

- Courts should be managed according to modern organisational criteria. Presidents of the courts and courts' managers should be introduced.

- The High Council of Judges and Prosecutors should promote and disseminate good practices for the smooth case-management by judges.

Interim measures

- The CC should be empowered to decide to suspend, when necessary, the application of a judicial decision in the context of *interim* measures.

- The automatic expiration of interim measures after six months should be reconsidered.

Compensation of damages

- If the CC asks the applicant to file a case before the competent first-instance court to seek compensation for the damages the applicant suffered, this rulings should be closely monitored by the CC and a time limit should be set out as to the duration of the compensation proceedings.

Annulment of underlying laws and regulations

- The CC should be formally empowered by the law to annul legal provisions leading to a violation of fundamental rights.

Retrial

- The CC should be empowered to formally quash the decisions of lower courts.
- If the violation of fundamental rights occurred only at the Court of Cassation level or at the level of another high court, the case should be returned to that court, not to the first instance court.

Binding force of CC rulings and dialogue among CC and high courts

- The attitude of lower and higher courts' judges to comply with the CC case-law should be promoted trough training.
- In cases of violations stemming from courts' decisions, the CC should make every endeavour to persuade the regular courts to accept the binding effect of CC rulings beyond the individual case.
- The CC should envisage holding regular dialogue meetings with high courts' judges to discuss recent developments in its case-law.

Enforcement of CC rulings

- A formal mechanism should be introduced for the monitoring of the implementation of judgments trough enforcement action plan and enforcement reports.

Training of legal practitioners

- Legal practitioners should regularly undergo dedicated training about the individual application.
- Clerks at the courts' registry/information desk should receive training about the new remedy, on how to inform citizens about the individual application procedure, on how to upload the claim and the documents in UYAP, and on how to collect fees.
- Training on individual application should be included in Law School curricula and in the pre-service training of trainee lawyers, judges and prosecutors.
- The training of lawyers should focus on the formalities required to fulfil correctly the application; the admissibility criteria used by the CC; the access to legal aid specially for foreigners; the CC power to sanction the abuse of the right to an individual application; the exhaustion of remedies before filing an individual application; the inadmissibility criteria and the CC case law about inadmissible claims.

- The training for judges and prosecutors should mainly focus on ECtHR case law, CC remedies, the enforcement of CC rulings and the scope of the binding force of the CC's judgments.

- Lawyers, judges and prosecutors should be specially trained in the field of individual application including training at least pertaining to the issues enumerated in paragraph X.2 of this report.

Training methodologies

- Common training should be organised by the HYSK, the JA and the UTBA open to the attendance of judges, prosecutors and lawyers.

- The JA is should ensure that the curricula about Human Rights protection, developed under the past JA management, are used and adapted to the recent ECtHR and CC case-law and to the needs of legal practitioners .

- The JA should cooperate in the framework of future EU/Coe Projects on individual application and with the HELP Programme to ensure a proper training on individual application for legal professionals.

- HELP[111] methodology and platform should be used for training judges, prosecutors and lawyers on individual application system, also through distance-learning courses and "train the trainers" modules.

- Judges from the CC and the high courts should be involved in "consultation meetings" in order to prevent divergent practices and case law, to establish informal confrontation and dialogue and to transfer knowledge and experience.

111 http://helpcoe.org/sites/default/files/uploads-by-country/HELP%202014%20leaflet.pdf

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Avrupa Konseyi Program Ofisi / Council of Europe Programme Office

R.Tagore Cad. No: 10/8 Yıldızevler Mahallesi 06550 Çankaya, Ankara, Türkiye
Tel: (0) 312 468 84 64 • Faks: (0) 312 468 84 06

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