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STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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COMMITTEE OF EXPERTS ON THE REFORM OF THE COURT
(DH-GDR)

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DRAFTING GROUP 'F' ON THE REFORM OF THE COURT (GT-GDR-F)

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Compilation of written contributions received in advance of the 3rd meeting

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CONTRIBUTION SUBMITTED BY BAHADIR KILINÇ

Possibilities for preserving (and reinforcing) the current system
Provisional list of issues identified by the GT-GDR-F at its 2nd meeting

(PART ONE)

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In addition to the opinions expressed during the Second Meeting of GT-GDR-F, please find in the following my additional personal perspectives for your consideration in respect of Item 5 of the Agenda.

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C. National Implementation: Remedies

- A new special domestic remedy, such individual constitutional complaint/application procedure on remedying human rights violations may be introduced at national plan. Around 20 Member States of the Council of Europe already enjoys such a domestic remedy.

  This approach is also elaborated in the relevant document of the Venice Commission, Draft Study on Individual Access to Constitutional Justice (CDL-JU(2010)018rev), as follows:

  "*5. In some Council of Europe member states, an individual complaint to the constitutional court or equivalent body is considered by the European Court of Human Rights to be an effective remedy against a violation of the European Convention on Human Rights and can thus be seen as a filter for cases before they come to the Strasbourg Court. The Court's statistics show that those countries in which such a full constitutional complaint mechanism exists have a lower number of complaints before the Court than others, which do not have such a mechanism. Such complaint mechanisms therefore help to avoid overburdening the European Court of Human Rights. The report shows which elements have to be taken into account if a country wants to establish such an effective remedy, especially if it is also to cover cases of excessive length of proceedings.*"

- Paragraph 4 of the Interlaken Declaration also supports such approach:

  "4. The Conference recalls that it is first and foremost the responsibility of the States Parties to guarantee the application and implementation of the Convention and consequently calls upon the States Parties to commit themselves to:
  …
  d) ensuring, if necessary by introducing new legal remedies, whether they be of a specific nature or a general domestic remedy, that any person with an arguable claim that their rights and freedoms as set forth in the Convention have been violated has

available to them an effective remedy before a national authority providing adequate redress where appropriate; …"

D. Relations between Strasbourg and national courts

- In order to maintain sustainable dialogue and positive interaction between national courts and the European Court of Human Rights (ECtHR), following the case-law of each other is a must. In this respect, it may be advised that research and case-law units may be established (if they do not exist yet) in national constitutional/supreme courts (or in the Ministry of Justice) which can regularly inform the constitutional/high court/s, instance courts and judges of the new case-law of the ECtHR. This unit may also submit the new national human-rights-related case-law to the Registry of the ECtHR, or to relevant contact points therein.

...

H. Introduction of cases/issues before the Court

- A symbolic amount of application fee may be requested from the individual applicant/s. However, if the applicant is not in a position to pay the application fee, he/she may benefit from legal aid on basis of a mere declaration. It should be admitted that this idea will have some negative implications on the concept of "free access to the ECtHR". On the other hand, it may have the positive function of deterring abusive applications, and of enhancing the budgetary means of the Court.

  Similar issue was dealt with in the relevant document of the Venice Commission, Draft Study on Individual Access to Constitutional Justice (CDL-JU(2010)018rev), as follows:

  "**II.1.3. Court fees**
  116. Court fees for proceedings before the constitutional court are exceptional amongst the states under consideration in this study. However, in the U.S., there is a fee of $300 for lodging a petition to grant a writ of *certiorari* before the Supreme Court; in Russia, the fee amounts to one minimum wage, in Armenia to five, and in Switzerland a minimum of 200 CHF and a maximum of 5,000 CHF and in Austria , the fee presently amounts to 220 euros. In Israel, there is a fee of approximately $400 to file a petition with the Supreme Court, sitting as the High Court of Justice, but the petitioner is entitled to file a request, supported by special circumstances, to receive a waiver or reduction of fees.
  117. 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. Their primary aim should be to deter obvious abuse."**[1]

[1] Individual application fee is about 100 USD for each individual application to the Turkish Constitutional Court with a possibility of benefitting from legal aid when the applicant has no means to pay that fee.

P. Execution of Judgments

- **In respect of (ii):** Member States may designate a (contact point/focal domestic body) at national plan for the supervision of execution of the judgments in order to centralise the work in one hand between the Committee of Ministers and themselves. The interaction and communication between the Committee of Ministers and Member States in respect of execution of the judgments may be carried out in a better and quick way, when the Department for the Execution of the Judgments can find a stable counterpart at national plan.

Possibilities for preserving (and reinforcing) the current system
Provisional list of issues identified by the GT-GDR-F at its 2nd meeting

(PART TWO)

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In addition to the opinions expressed in my previous contribution sent on 27 May 2014, please find in the following my additional personal perspectives for your consideration in respect of Item 5 of the previous Agenda.

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C. National Implementation: Remedies

In respect of repetitive violations (such as length of proceedings) which do not require any individual or general measure in the meaning of Article 46 of the Convention, indemnity commission may be a possible solution to decrease or eliminate the number of cases pending before the European Court of Human Rights.

INDEMNITY COMMISSION: THE TURKISH EXPERIENCE

I.GENERAL OVERVIEW

1. In the pilot judgment of *Ümmühan Kaplan v. Turkey* (no. 2440/07), the European Court of Human Rights (ECtHR) held that Turkey should put in place, no later than one year from the date on which its decision became final, an effective remedy affording adequate and sufficient redress in cases where judicial proceedings were not concluded within a reasonable time.
2. A solution should be envisaged for the applications related to the excessive length of proceedings submitted before 23 September 2012, the date when Turkish Constitutional Court began to admit individual constitutional complaints. Therefore, application to an indemnity commission is forseen as an additional domestic remedy to the individual constitutional complaint system. This new remedy was designed to cover the cases pending before the ECtHR and falling out of the scope of the new constitutional complaint system.
3. In February 2013, the Turkish Government ("Government") set up a Compensation Commission ("Commission") with the Law on the Settlement of Some Applications Lodged with the European Court of Human Rights by Means of Paying Compensation no. 6384 ("the Law no. 6384") in order to provide a domestic remedy

for cases concerning excessive length of proceedings and non-enforcement of domestic judgments in the context of the pilot-judgment procedure.

4. In this regard, in its judgments in the cases *Mudur Turgut and Others* ((dec.), no. 4860/09, 26 March 2013) and *Demiroğlu and Others v. Turkey* ((dec.), no. 56125/10, 4 June 2013), the Court held that the system, established by the Law No. 6384, was an accessible remedy capable of offering a reasonable chance of redress for complaints of excessive length of proceedings and partial, late or non-enforcement of finalized domestic court judgments.
5. The Court also noted that the Law No. 6384 was to apply to all applications pending before it, not yet communicated to the respondent State, submitted before 23 September 2012. Similarly, in its recent decisions such as Müge Sargın and Others (20236/06), Mahmut Bacak and Other 44 Applications (18904/09), the Court indicated that the Law no. 6384 was applicable for the cases that were communicated to the Government as well and found the applications inadmissible on account of the existence of the Commission as a new domestic remedy.
6. As the Court concluded that the Commission as an accessible remedy in Turkey, the Government initiated a process to enlarge the competence of the Commission pursuant to the Law No. 6384. The competence of the Commission was reformulated by a Decree of Council of Ministers dated 16 March 2014, and some other fields in addition to the excessive length of proceedings, and partial, late or non-enforcement of domestic court judgments are included.

II. GROUNDS FOR APPLICATION TO THE INDEMNITY COMMISSION

The law aims to create an effective system towards substantive relief for individuals who cannot benefit from the opportunity of submitting an individual application to the Constitutional Court and who applied to the European Court of Human Rights claiming that their rights to a fair trial were breached due to not reasonable length of proceedings, or that domestic court judgments were enforced lately or imperfectly.

III.COMPETENCE OF THE COMISSION

1. The Commission deals with complaints related with late execution/non-execution of court judgments or excessive length of proceedings within the scope of Article 6 of the European Convention on Human Rights. However, according to the paragraph 2 of Article 2 of the Law 6384, it is possible to **widen the scope of responsibility** of this commission in case of need. According to the Article, "*By means of taking into consideration the intensity of the violation judgments rendered against Turkey in line with the established case-law of the European Court of Human Rights on the rights guaranteed under the European Convention of Human Rights and the additional protocols to which Turkey is a party to, the provisions of this Law may be applied to* ***the other fields of violation*** *to be proposed by the Ministry of Justice, by the Council of Minister's decision."*
2. In accordance with that point In this regard, Council of Ministers issued a Decree that enlarges the current competence of the Commission by including additional violation fields, pursuant to Article 2/2 of the Law no. 6384.
3. The new fields that fall within the competence of the Commission are as follows;

"a) Applications claiming that in expropriation or establishment of the right of easement under the Expropriation Law no. 2942 dated 4 November 1983, the decrease in the value

of the expropriation or of the right of easement as a result of the lengthy proceedings or of the inflation has not been compensated.
b) Applications claiming that the right to defence has been restricted in objections that are filed against the disciplinary sanctions imposed on convicts and prisoners accommodated in penitentiary institutions and are examined under the Law on Enforcement Judges no. 4675 dated 16 May 2001.
c) Applications claiming that the right to communicate has been violated on the ground that a language other than Turkish has been used in penitentiary institutions.
d) Applications claiming that the right to communicate has been violated on the ground that the letters or similar messages written in a language other than Turkish have not been received or sent by the administration of the penitentiary institution.
e) Applications claiming that periodicals and non-periodicals have been forbidden for different reasons, which the convicts and the prisoners accommodated in penitentiary institutions, want to enjoy. ”

The Court, in its decision of 27 May 2014, *Cemalettin YILDIZ and Tevfik YANAK v. Turkey* (App. No. 44013/07), concluded that applicants have to exhaust the domestic remedy of application to the Indemnity Commission, thus recognising the new competence areas of the Commission.

IV.APPLICATION PROCEDURE

1. The application is made to the Commission with a letter of admission including application date and registry number of the European Court of Human Rights, copy of application form, other related information and documents and a signed petition including personal information of the applicant.
2. The Commission can be applied within in six months from the entry into force of the law. If the applicants cannot apply within that period, they can apply to the Commission in one month after they are given the inadmissibility decision of the European Court of Human Rights based on the ground that national legal remedies are not exhausted.
3. The application can also be made via Chief Public Prosecutor’s offices throughout Turkey. The offices send applications documents to the Commission immediately. In such cases, application date of Chief Public Prosecutor’s Office will be taken as basis.

V. PROCEDURES OF THE COMMISSION

1. The Commission, established under this Law, carries out its duties as an administrative board. The investigation process and application procedure are considered to be administrative and decisions of the Commission will be subject to judicial control.
2. On the condition that the Commission is authorized under the decision of Council of Ministers, as explained above, the Commission can deal with other types of applications based on structural and systematic problems within the scope of established case-law of the ECtHR.
3. The Commission is consisting of five people; four judges will be appointed by the Minister of Justice and one person is appointed by the Minister of Finance. The Secretariat services will be given by the Ministry of Justice. The Commission can

hold a meeting with absolute majority and the decisions will be given with absolute majority of the commission members.

4. The competence *ratione temporis* of the Commission set out in Article 9/1 of the Law no. 6384 have been extended for a period of six months and redetermined as 23 March 2013 by the Council of Ministers. In other words, the commission is not responsible for the applications made after this date inasmuch as the way to submit individual applications for complaints to the Constitutional Court is introduced and additional six months for the ECtHR is to be passed.
5. By taking leading cases of the ECtHR into attention, the Commission has given reasoned decisions in nine months. It can be appealed to Ankara Regional Administrative Court via the Commission against the decision in 15 (fifteen) days after the date of notification. If the Regional Administrative Court reverses the decision of commission, it can deliver final judgment related to the case. After the decision is finalized, the compensation will be paid by the Minister of Justice in three months.

CONCLUSION

The Indemnity Commission, as of 16 April 2014, has concluded 3737 applications from 5390 applications. The total amount of indemnity decided to be given to the applicants was 14.550.075 Turkish Liras (appr.6,5 million USD).

CONTRIBUTION SUBMITTED BY CHRISTOPH GRABENWARTER

Suggestions Drafting Group F: Written Contribution on Election and Quality of Judges

Introductory remark:

The following paper is written from a very personal perspective based on the official documents as well as on both personal experience in the process of election of judges and contacts with persons involved in that process at different levels. Its primary aim is to contribute to the internal analysis of problems in the drafting group, not to contribute to a public debate.

In the next two years a third of the judges of the ECtHR will be newly elected. This accumulation is the late consequence of the introduction of the on-renewability of terms of judges. It is clear that the result of these elections will strongly influence the quality and the character of the case law of the Court until the year 2025 and beyond. Any reform discussed now will not take effect before these elections take place. However, this perspective shows the importance of this field of discussion, as there will be another "wave" of retirements in a few years.

Therefore, any reform discussion must also focus on the quality of judges. Various questions have to be separated: The quality of persons interested in becoming a judge in Strasbourg and finally presented on the lists by Governments (1.), the procedure of election in the PACE (2.), the role and working conditions of the Advisory Panel (3.), and points for reform discussion (4.).

1. Quality of potential judges

One starting point for discussion on reform are the criteria in Article 21 ECHR. According to this Article the "judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence".

The following points can be defined under this head:

- The quality of lists has not been adequate in a number of cases. It is a widespread opinion among a number of Constitutional Court judges all over Europe that it is not attractive to become a judge in Strasbourg or at least less attractive than become a Constitutional Court judge.
- Small states face particular difficulties in establishing a list, even more so, if they try to do this with own nationals.

Possible reasons for that are:

- Government might have a favorite candidate and add other candidates, much younger or less qualified; the favorite candidate may not be ready to go into an „open“ race.
- Another reason could be that in some cases the „wrong“ type of persons may interested. While it must not be an absolute obstacle if someone has held an office in politics/government/parliament, it is not sufficient if someone has no judicial experience at all.
- A number of possible candidates who would have the quality for a good judge at the ECtHR are not available partly for private reasons, partly for professional reasons. As to professional reasons the obstacles mentioned are:
    - the unwillingness to leave a profession for 9 years in the middle of a career with limited prospects after return from Strasbourg
    - there is (unlike in some Constitutional Courts) no possibility to go on as a professor at his/her university to a limited extent.

In this context it seems that the limited length of the term plays a role. For highly qualified jurists in the late 40ies or the first half of their 50ies it may not seem desirable to go to Strasbourg.

While the obligation of residence and the full-time model of the Court seemed necessary for the credibility of the Court when it was established in its new form especially with a view to the salary provided, it keeps away possible candidates that are perhaps less driven by economic reasons.

2. Procedure of Election by the PACE Committee

According to Article 22 of the Convention the judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.

Points for discussion:

The system of a list with three candidates established by one organ (the Executive/Government or Parliament) and a selection by another organ (Parliament, Government, Head of State) is a procedure which is a widely practiced in European States in order to contribute to the principle of separation of power and/or increase democratic legitimacy of the judges elected. It has to be asked whether this idea is also true in an international context where an Assembly of (national) parliamentarians is not of the same quality.

It is submitted in discussions that the outcome of the election in the PACE committee is unforeseeable; critics in the procedure have been submitted; the establishment of a full committee of 20 members as from January 2015 will help to improve the quality of the selection procedure.

The same is true for the transparency of the procedure, additional information on the election procedure with a view to various new judges is made available on the internet.

A discussion on the adequacy of the procedure should take into account the preparation of the hearing and information made available to the committee.

3. Role and Working Conditions of the Advisory Panel

In November 2010 the Committee of Ministers established an Advisory Panel of Experts on Candidates for Election as Judge to the ECtHR. After three years the first experience has shown positive effects of this measure. A few points for discussion:

- Currently the panel only gives reasons when it finds that a list is not in conformity with Article 21. Should this practice be changed?
- The panel does not conduct interviews but decides on a written basis. Should this be changed?
- Should a negative decision concerning a candidate be binding on the state?
- There is currently no provision for cases where a candidate on a list has been rejected by the panel. It should be defined under what circumstances a State has to/may nominate a new candidate.
- Shall the panel also give information to the PACE committee on the differences in qualifications of candidates that clearly fulfil the criteria in Art. 21?
- At any rate, confidentiality of the information given by advisory panel seems absolutely necessary. Any publication of quality judgments on high ranking jurists may have a further chilling effect with a negative impact on potention applications.

Reform could also take into account:

- Introducing a legal basis for the panel in the Convention (parallel to the TFEU)
- Binding force of rejection of candidates by the panel.
- Adequate financial means for a proper functioning the committee. For the time being the committee does not have sufficient means for the travel expenses occurring in case regular meeting should be held.

4. Points for discussion:

Apart from the questions already raised the following general questions may be summarized:

- Is the procedure of a list with three candidates the optimum?
- To what extent is the election procedure contributing to the quality?
- What is the role of the advisory panel?

A reform discussion on this issue could focus on the institutional framework, in particular:

- Term of office – should it be extended to 12 years?
- Age limit: Should the age limit be modified (70 years/Protocol 15: 65 + 9 years)?
- Should there be a minimum age (40 years for the Constitutional Court in Germany/45 years in an international context?)?
- Should the term be renewable? There are strong reasons of independence against such a step.

- Should the obligation of residence be modified? Would a session system be acceptable, broadening the interest in becoming a judge, strenghtening the contact of the judges to their domestic systems, while changing the current system considerably with disadvantages for the daily handling of the cases?
- Would a system at national level to (automatically) nominate a judge whose term of office has expired for the next vacant position at the Constitutional Court after his return from Strasbourg help to raise the interest?