



Review and Way Forward for the Individual Application System, Seven Years On Istanbul, 23-24 September 2019

**Presentation by
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President of the Venice Commission**

Mr President of the Constitutional Court,
Mr Judge of the European Court of Human Rights,
Mr Ambassador,
Mr Director General,
Honourable Members of the Constitutional Court,
Excellencies,
Ladies and Gentlemen,

It is a great pleasure for me to address you today, at this important event, taking stock of the results of the individual application procedure to the Constitutional Court of Turkey, seven years after its introduction.

It is rare that such a new instrument is tested, from its inception, to such difficult conditions. The individual application procedure has seen turbulent times and proved to be a highly important institution for Turkey.

1. [2010 report]

In 2010, the Venice Commission adopted a major report on Individual Access to Constitutional Justice, in which it examined various types of access, covering some 50 countries, with the aim of analysing the merits of the various systems that exist.

This report looked into various forms of indirect and direct access to the constitutional court.

It went on to study preliminary requests from ordinary courts and thoroughly scrutinised *direct individual access*, which enables individuals to challenge the constitutionality of an act or a norm directly without the intermediary of another body or institution.

2. [primacy of constitution]

The basic idea of the primacy of the Constitution and of constitutional justice is that the constitutional court should “cleanse” the body of laws from laws – and other acts – that are in conflict with the Constitution, which has the highest rank in the legal order.

This purpose of constitutional courts as conceived by the famous scholar Kelsen, is increasingly supplemented by the role of constitutional courts to protect human rights.

As a constitutional court cannot take up cases at its own initiative, it needs sufficient occasion to perform this “cleansing” work. It needs appeals that allow it to identify unconstitutional laws and other acts to remove them from the legal order.

Often, access to constitutional courts is given to state powers, such as the president, government, parliament or minorities in parliament.

These public actors should indeed have access to a constitutional court, but whether they bring a case to the constitutional court also depends on political circumstances, which determine whether or not a case reaches the this court.

Obviously, government and the majority in parliament will very rarely appeal against a law that they have initiated or just adopted.

Even the opposition may have political reasons not to appeal to the Court, for instance when it obtains advantages for not appealing in other areas which need not even be related to the law in question.

3. [preliminary request]

Another important means of accessing constitutional courts is by preliminary requests from the ordinary courts.

Whenever the ordinary judges are in doubt as to the constitutionality of a legal provision that they have to apply, they can send – sometimes via the supreme court – a request to the constitutional court, which will either annul this provision or confirm its constitutionality.

These preliminary requests already significantly increase the caseload of constitutional courts and thus provide accession to the constitutional court to identify and remove unconstitutional provisions.

The only drawback is that ordinary judges are used to applying the law rather than doubting its constitutionality. Thus, there is no guarantee that an important case will reach the constitutional court.

4. [direct access]

Direct access is typically possible after the exhaustion of remedies, that is after having appealed to all available instances of the ordinary courts.

However, even direct individual access comes in various forms. We mainly distinguish the normative constitutional complaint from the full constitutional complaint.

5. [normative constitutional complaint]

With a normative constitutional complaint, individuals can claim before the constitutional court the unconstitutionality of a normative act, typically a law or an article of a law that has been applied in their case by the ordinary courts.

The Constitutional Court can annul the law or parts of it when it establishes that, indeed, the challenged provision or law is unconstitutional.

The Court then sends the case back to the last court that decided the case – the supreme court or a court of appeal - for a new trial.

In this way, the normative constitutional complaint addresses the unconstitutionality of the law itself.

6. [full constitutional complaint]

However, in practice, in all countries, most human rights violations are not due to unconstitutional laws, but to unconstitutional individual acts.

It is the other type of individual complaint, the 'full constitutional complaint', which is able to remedy such human rights violations. Therefore, the Venice Commission has always recommended the introduction of the full constitutional complaint.

A full constitutional complaint can be directed against an unconstitutional judgment of the last instance of the ordinary courts (supreme court or court of appeal), even if the applicable law is constitutional.

This complaint covers both the unconstitutionality of a law and the unconstitutional application of a law that is constitutional itself. Therefore, this full constitutional complaint provides the highest level of human rights protection.

European countries, which have introduced a full constitutional complaint, such as Croatia, Germany, Slovenia or Spain, have a significantly lower number of cases in front of the European Court of Human Rights in Strasbourg, because the Constitutional Court can filter these cases.

The constitutional court is not a "fourth instance". It does not deal with the merits of the case, it only examines its constitutionality.

In such proceedings, the constitutional court will not re-examine the legality of the case before it, but it will focus only on the constitutional aspects, including on the right to a fair trial.

A major advantage of the full constitutional complaint is that it can be an effective means to deal with human rights cases before they reach the European Court of Human Rights in Strasbourg. It is always better to deal effectively with human rights issues at home than at the European level.

More and more often, the constitutional courts have become the guardian of the constitution in individual cases.

They remove individual acts – manifested in ordinary court judgments - that apply ordinary legislation, but do not sufficiently take into account constitutional human rights.

The Constitutional Court thus directly implements the Constitution.

7. [filters]

The wide access provided by the full constitutional complaint can bring about an overburdening of the constitutional court and, as a consequence, the procedural mechanisms have to enable the Court to deal with this heavy caseload effectively.

But, the Venice Commission is convinced that by establishing a filtering system, a balance can be found to ensure individual access to constitutional justice and, at the same time, not overburden the Court.

8. [Turkey - individual application]

Mr President,

By introducing the individual application procedure, Turkey has strengthened the protection of fundamental human rights.

This was an important achievement for Turkey and its citizens. I personally and the Venice Commission warmly welcomed this development.

In doing so, Turkey has also followed the Venice Commission's recommendations in the 2004 and 2011 Opinions on the introduction of an individual application to the Constitutional Court.

This application is in effect a full constitutional complaint of the sort we recommend.

Notably, the 2011 opinion came to the conclusion that the individual application would not turn the Constitutional Court into what some feared would be a "super supreme court", since the scope of the Constitutional Court's jurisdiction is limited to constitutional issues.

9. [preparation]

Following the amendment of the Constitution and the Law on the Constitutional Court, you did your utmost to prepare for the new procedure through exchanges with other constitutional courts in Europe and beyond to broaden the knowledge on the issue.

Your Court had and continues to have fruitful relations with the European Court of Human Rights.

Within the framework of joint programmes with the Council of Europe, many rapporteur judges came on study visits to Strasbourg.

Seminars were organised by the Constitutional Court across Turkey with ordinary courts, academics, NGOs and other stakeholders to explain the procedure and how it offers an additional step in the protection of human rights in Turkey.

We can see the positive results this brought about and I do hope that these programmes will be pursued for the benefit of human rights protection in this country.

10. [effective remedy]

Already in 2013, the European Court of Human Rights found, in its decision in the case of *Hasan Uzun v. Turkey*, that the individual application procedure to the Constitutional Court of Turkey afforded an appropriate mechanism for the protection of human rights.

It declared that this procedure was an effective remedy to be exhausted before an application can be made to the European Court of Human Rights.

What is an effective remedy?

There are two main conditions that are required for an effective remedy. One concerns substance, the other concerns execution or effectiveness in the narrow sense.

11. [substantive condition]

The substantive condition is hard to pinpoint but it is essential. Let me define it in the negative.

An appeal to an apex court – a constitutional or supreme court - which systematically neglects the human rights set out in the European Convention will at some point be considered as non-effective,

because there is no point for the individual to make such an appeal which has no chance to prevail in the light of clear and constant case-law that does not respect human rights.

Finding the case-law of a national apex court as non-effective will take time because numerous applications need to be examined until the European Court can establish that there is coherent case-law that does systematically not respect human rights.

However, at one point in time the tipping point will be reached and the application to that highest court will be found to be non-effective, possibly in respect to specific rights or specific areas.

Once this is established, individuals can appeal directly to the Strasbourg Court, without applying to the national court before.

Such a development must be avoided because the country concerned loses control of human rights protection and – as long as the systematic non-respect prevails – the country will systematically lose cases before the European Court of Human Rights.

This is not only a question of the reputation of the country, but a question of sovereignty in the field of human rights. This is the end of subsidiarity.

12. [execution]

Mr President,

The other important aspect of effective remedies under the Convention is the execution of the judgments of constitutional courts or effectiveness in the narrow sense.

It is self-evident that an unexecuted judgment is not effective.

This may pass a few times, but when there is a series of unexecuted judgments it becomes obvious for everyone that execution is a systematic problem and the Strasbourg Court will eventually not require exhaustion of the national complaint any more.

Let me be clear. A year ago, we were very worried when we learned a Turkish assize court had not implemented a judgment of the Constitutional Court concerning the detention of journalists.

However, the Constitutional Court did an excellent job by insisting with these courts that the execution of constitutional court judgments is mandatory and that ordinary courts are fully bound by them.

I am pleased to learn that the execution of a recent judgment progresses well and that a number of ordinary courts have already acquitted persons who did not directly appeal to the Constitutional Court.

This is a strong sign that the execution of your judgments remains effective.

The Constitutional Court's judgments must be respected and executed by all State bodies, the executive, the legislative and the judicial powers.

13. [examination of evidence]

An argument that had been raised by the executive and even repeated by the assize court was that the Constitutional Court was not empowered to examine evidence.

This argument shows a clear misunderstanding of the nature of constitutional proceedings and the individual application procedure.

In constitutional complaint proceedings, it is certainly not the task of the Constitutional Court to hear each witness again and to re-examine each statement made in the ordinary proceedings.

However, it is the task of the Constitutional Court to examine constitutional arguments, including whether a certain type of proof can be the basis for criminal proceedings.

The right to a fair trial is a core part of the rights enshrined in the Constitution. Without the right to a fair trial, all other rights remain elusive.

An essential element of this right is the application of rules of evidence in conformity with the Convention. Basing a criminal trial on evidence which, by its paucity, cannot serve as the basis of a criminal conviction, obviously violates the right to a fair trial.

I am pleased that this was accepted by the ordinary courts.

14. [case-load / rule of law]

Mr President,

The individual application procedure introduced in 2010 became effective in September 2012 – and had the effect of decreasing the number of Turkish cases in Strasbourg.

The failed coup was a traumatic event for Turkey and its citizens. I was among the first to publicly condemn this heinous act, which has shaken your country.

As one of the many consequences, the caseload of the Constitutional Court of Turkey has increased dramatically.

However, after the end of the status of emergency, the time has come for a return to a normal state of the rule of law.

We have seen encouraging steps on this path and, recently, the Constitutional Court took important decisions that guaranteed the implementation of the rights and freedoms enshrined in the Turkish Constitution.

15. [Conclusion]

In conclusion, we see that the individual application procedure has served Turkey and its citizens well. It has been recognised as an effective remedy and this status must be safeguarded. This is a task for all of you.

A task first for the independent Members of the Constitutional Court – you all have given your oath to defend the Constitution.

Your judgments provide the essential substance for this effectiveness. Protecting human rights, constitutional rights is your noble task and you will not fail to uphold these rights, even in difficult circumstances.

A task also for all others in Turkey, for the prosecutors, for judges, for every civil servant.

You all apply the Constitution.

Your decisions respecting human rights ensure that cases need not go to the Constitutional Court in Ankara, even less to the European Court of Human Rights in Strasbourg.

Real subsidiarity ensures that human rights are respected from the outset, avoiding appeals and ensuring the rights at the very basis.

Thank you for your attention.