Individual Access to Constitutional Justice in Turkey

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Honorable President of the Conference of the Constitutional Jurisdictions of Africa (CCJA),
Honorable President of the Constitutional Council of Algeria,
Distinguished Colleagues,
Ladies and gentlemen,
It is a great pleasure for me to participate in this seminar and address such eminent participants.

I would like to express my gratitude to Chief Justice Mogeung Mogeung and President Mourad Mecelli for their kind invitation and warm hospitality. I would like to thank and congratulate Mr Mousa Laraba and his team for the successful organization of the seminar.

I also want to state that it is a source of great honour and pleasure for me and my colleagues that the Turkish Constitutional Court has recently acquired the status of an observer of the CCJA.

1. Aim of Constitutional Justice

Let me begin with a simple question. Why is it so important for individuals to have access to constitutional justice? The answer to this simple question lies in the purpose of constitutional justice itself.

The aim of constitutional justice is to uphold the principles of supremacy of constitution, rule of law and protection of human rights. Even though the form of constitutional means and institutions may vary depending on historical, political and cultural characteristics of countries, the gist of those principles is universal.

In fact, it is the concept of human dignity that lies at the root of the constitutional values such as rule of law, democracy and human rights.

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As well known, Immanuel Kant's moral philosophy has played a significant role in shaping modern idea of human rights. His categorical imperative that "you should treat man as an end, not only as a means" refers to the importance of human dignity. Today we believe that we are entitled to rights, simply because we are human beings.

Centuries before Kant, a philosopher by the name Mawlana Celaluddin-i Rumi who lived in Konya, a province in the middle Anatolia, declared that "the aim of the creation of universe is man".

This was the expression of human being as the "*eşref-i mahlukat*" (the most dignified creature) in the Islamic discourse. It is revealed in Quran that "We have created man in the best composition". Of course similar expressions may be found in Old and New Testaments.

What I am trying to say is that our aim is the same, that is to protect and promote human dignity as formulated in the form of basic rights and freedoms. The constitutional and supreme courts or councils operate to realise this aim through various means such as concrete and abstract review of constitutionality and individual or constitutional complaint.

2. Turkey's Experience in Individual Access to Constitutional Justice

Ladies and gentlemen,

After these introductory remarks, I want to talk over the Turkish experience in individual access to constitutional justice which is the main theme of this seminar.

The Turkish Constitution provides two legal means for individuals to have access to constitutional justice. First is the exception of unconstitutionality, which is also known as concrete review of constitutionality. The other legal means is individual application, also known as constitutional complaint. While the concrete review involves an indirect access, the constitutional complaint provides a direct access to the constitutional justice.

Today, I will first explain the main features of exception of unconstitutionality in the Turkish legal system. Then I will briefly touch upon the individual application or constitutional complaint which was introduced to our system by the 2010 constitutional amendment. As both

concrete review and constitutional complaint aim to facilitate individual access to constitutional justice, I will draw comparisons between these two legal means based on the Turkish experience.

2.1. Concrete review of constitutionality in Turkey

The constitutional review of laws was introduced into the Turkish legal system by 1961 Constitution. It established the Constitutional Court and incorporated both abstract review and exception of unconstitutionality. The 1982 Constitution preserved the legal regime of constitutionality review with minor changes.

Concrete review of constitutionality is laid down in Article 152 of the Turkish Constitution. Under the article, (a) if a court hearing a case considers that the law to be applied is unconstitutional, or (b) if it is convinced of the seriousness of a claim of unconstitutionality submitted by one of the parties, it shall refer the issue to the Constitutional Court. The hearing court must provide the grounds for unconstitutionality in its application. Also, it must suspend the case until the Constitutional Court decides on the issue.

Individuals are not entitled to direct access to the Constitutional court for concrete norm review. Their claims may reach the Constitutional Court only through the approval of the hearing courts. This rule is in place to prevent the parties from abusing the exception proceedings to prolong the case or for other purposes.

The Constitutional Court shall decide on the matter and declare its judgment within five months of receiving the contention. If no decision is reached within this period, the hearing court shall conclude the case in accordance with the existing provision.

One important feature of the Turkish concrete review is that only a legal provision that is applicable in an ongoing case can be contested before the Constitutional Court. In other words, it does not suffice that the law is merely relevant in the case but it must be applicable in order to proceed or terminate the case.

Unlike the abstract review, laws may be subject to concrete review without any time-limit after their enactments. In the Turkish system, however, a ten year bar is in place for reexamination of unconstitutionality of laws. Under the last paragraph of article 152, if the Constitutional

Court examined constitutionality of a law and dismissed the case on the merits, the claim of unconstitutionality against the same legal provision cannot be raised until after 10 years of the dismissal.

In principle, the Constitutional Court reviews the merits of a claim over the case file without holding a hearing. Accordingly, the parties of the original case are not allowed to intervene before the Constitutional Court. However, the Court may order an oral statement from the relevant public authorities or individual experts at its discretion.

In the concrete norm review, the Constitutional Court makes an abstract review of the contested provision; that is, the Court does not confine its analysis to the basis of the facts of the original case. Taking into account the facts of the original case, the Court exercises an abstract and general review concerning the constitutionality of the contested law. If the Court finds the contested law unconstitutional, it is declared null and void. Therefore, the effect of annulment decision is not specific to the concrete case, it is of general effect.

The concrete review cases hold a substantial portion of constitutionality review of the laws by the Turkish Constitutional Court. In 2016, the Court received 114 concrete review cases whereas the number of annulment action was only 21. In 2017, the Court received 18 annulment actions and 155 concrete review cases so far.

The concrete review, accordingly, provides an important and efficient way within our constitutional jurisdiction. This is true not only in terms of quantity but also in terms of substantive aspect.

Concrete review allows a wider access to constitutional justice along with wider perspective. Under the Turkish Constitution, only certain political actors are entitled to bring annulment action within limited time after the enactment of the laws or decree laws. In contrast, concrete review makes it possible to identify or raise possible constitutional defects by judicial actors who apply the rule and specialize on the relevant area of law or by individuals who have real bearing on the application of the rule.

Moreover, constitutional defects may become more visible over time through the implementation of the laws. Thus, concrete review opens the way for a thorough constitutional review along with the input of judges and individual litigants.

2.2. Constitutional Complaint

Individual constitutional complaint before the Constitutional Court is another major legal tool in terms of individual access to constitutional justice and protection of human rights. There exists certain differences between concrete review and constitutional complaint, which make them complementary to each other rather than alternative in terms of ensuring constitutional justice.

Constitutional complaint may be lodged only against public actions or inactions allegedly violating one of the constitutional rights and freedoms, not against the laws or decree laws. The constitutional complaint enables the Constitutional Court to conduct human rights review based on the facts of a specific case rather than making an abstract constitutional review. This aspect of individual application allows the Court to employ more right-based approach and protect the rights of individual against the state power.

Since 2012, the Constitutional Court has received thousands of applications and had dealt with them in an efficient manner. Despite the high volume of applications, the individual appeal remedy followed a very successful track until mid-2016. The Constitutional Court had reached the level of addressing the applications within about a year after the application date. Besides, the Court had addressed key human rights issues and rendered violation judgments in the areas such as freedom of expression, freedom of religion and the right to security and freedom.

With respect to the violation judgments rendered within the scope of individual applications, the Constitutional Court has found violations in about 2.400 cases. The bulk of violations concerned the right to fair trial and the right to be tried in a reasonable time.

This successful track of individual application remedy, however, faced a major setback in terms of substance and numbers due to recent coup attempt. In July 15, 2016, Turkey has experienced a heinous and bloody coup attempt which constituted a heavy threat against the very existence of the State and Nation. The key state institutions and civilians were attacked by armored

military vehicles, which resulted in bombing of the Parliament and Presidential Palace and thousands of casualties, including 249 dead and more than 2000 injured.

This violent attack was an assault on constitutional democracy, rule of law, and human rights. As the Council of Europe Commissioner for Human Rights has stressed in his Memorandum, "the success of (coup attempt) would have marked the end of democracy in Turkey and the defeat of all the values underlying the Council of Europe". Likewise, the Venice Commission indicated in its opinion on emergency decrees that "[a] military coup against a democratic government, by definition, denies the values of democracy and the rule of law".

The Republic of Turkey reacted swiftly against this deadly attack. The government declared state of emergency and derogated from the European Convention on Human Rights. Accordingly, the emergency measures were put in place in order to erase the existing threat against constitutional and democratic order.

The effect of these developments to constitutional complaint remedy had been drastic. First, the Constitutional Court faced a formidable challenge to maintain its well-established rights-based approach in terms of the protection of constitutional rights and liberties. This situation inevitably stemmed from the shift from default human rights protection regime of Article 13 of the Constitution to the emergency regime of Article 15. During the state of emergency, the Court adjudicate complaints relating the emergency measures under Article 15, which allows greater limitation of human rights and freedoms.

Second, the complaints to the Constitutional Court skyrocketed following the July 15 coup attempt. The day before the coup attempt, the number of pending individual applications before the Court was about 22.500. After the emergency measures were put in place, the numbers of applications reached over 107.000 in a year. Accordingly, the Court has received about 80.000 applications relating to the emergency measures. Those applications practically paralyzed the functioning of the individual application system, considering that even just reception and registration of them required a tremendous volume of work.

In order to deal with these challenges, new measures are introduced by the state authorities. A special Commission has been established to examine the complaints on the measures and administrative acts introduced by or taken under the emergency decrees, most notably

dismissals of public servants from office. Following this step, the Constitutional Court found over 70.000 complaints which remained within the jurisdiction of the Commission inadmissible, on the basis of failure to exhaust legal remedies. The Court thereby reduced the numbers of pending complaints to around 38.000.

The Constitutional Court makes a great effort to handle these cases in due time, as well as other non-emergency complaints.

Conclusion

In conclusion I would like to say that the individual access to constitutional justice is even more important during the state of emergency. This is so simply because individual rights and freedoms become more fragile during such times.

The heinous terrorist attack in Egypt during Friday prayer two days ago reminded us once again the fact that we live in an unfortunate age of terror. On the behalf of the Turkish Constitutional Court, I would like to share my sorrow and sadness with the Egyptian people and to strongly condemn this inhuman attack.

It goes without saying that terrorism has been a threat to democracy, rule of law and human rights. Therefore it is of paramount importance to fight against terrorism without destroying these values.

I think at this moment we should remember Jacques Derrida, who was born in the city of El-Biar, Algeria. In an interview made only a few weeks after 9/11 terror attack, Derrida said that "We must more than ever stand on the side of human rights." He continued to emphasise that "We need (il faut) human rights. We are in need of them and they are in need, for there is always a lack, a shortfall, a falling short, an insufficiency; human rights are never sufficient."

Yes indeed we need human rights. But we also need a universal moral revolution in line with the discourse of Rumi. Let me conclude by recalling Rumi, who is known as the sage of human dignity, justice, freedom and tolerance. In his words, "In anger and fury be like the dead/ In toleration be like the ocean".

Thank you for your attention.