



Conférence des Cours constitutionnelles européennes
Conference of European Constitutional Courts
Konferenz der europäischen Verfassungsgerichte
Конференция Европейских Конституционных Судов

**CONSTITUTIONAL JUSTICE:
FUNCTIONS AND RELATIONSHIP WITH
THE OTHER PUBLIC AUTHORITIES**

*National report prepared for the XVth Congress
of the Conference of European Constitutional Courts by
The Turkish Constitutional Court*

I. THE CONSTITUTIONAL COURT'S RELATIONSHIP TO PARLIAMENT AND GOVERNMENT

- 1. The role of Parliament (as the case may be, of the Government) in the procedure for appointing judges to the Constitutional Court. Once appointed, can judges of the Constitutional Court be revoked by that same authority? What could be the grounds/ reasons for such revocation?**

In Turkey, some amendments to the Constitution were introduced in 12 September 2010 with a public referendum. Before the amendment, the Parliament (Turkish Grand National Assembly) did not have any role in the appointment of the members of the Turkish Constitutional Court.

According to the amendments, the Constitutional Court is composed of seventeen members. Turkish Grand National Assembly shall elect two members among the nominated three candidates for each vacant seat from among the president and members of the Plenary Assembly of the Court of Accounts, and one member from among the three candidates of lawyers nominated by bar presidents with a secret ballot. In this election to be held in the Turkish Grand National Assembly, two thirds of the total number of members in the first voting for each vacant seat shall be required and for the second voting absolute majority of the total number of members shall be required. When absolute majority can not be provided in the second voting, the third voting shall be held for the top two candidates in the second voting; the candidate who shall receive the highest votes shall be elected as the member.

Currently, two judges were elected by the Turkish Grand National Assembly and they have started to function as the members of the Constitutional Court. Remaining 15 members of the Constitutional Court are selected by the President of the Republic from different sources including members of High Courts (the High Court of Appeals, the Council of State, the Military High Court of Appeals, the High Military Administrative Court) and high public officials.

The Government does not have any role in the appointment procedure of the judges of the Constitutional Court.

The members of the Constitutional Court are elected for a term of twelve years. A member may not be re-elected. Once elected, the members may not be revoked by the same authority. But there are some other conditions on the termination of the membership in the Constitutional Court. It shall terminate automatically if a member is convicted of an offence requiring his dismissal from the judicial profession, it shall terminate by a decision of an absolute majority of the total number of members of the Constitutional Court if it is definitely established that he is unable to perform his duties on account of ill-health.

2. To what extent is the Constitutional Court financially autonomous – in the setting up and administration of its own expenditure budget?

The budget of the Constitutional Court is regulated within the Central Administration Budget, i.e. the general budget. In the administration of the Constitutional Court Budget, the President of the Court and the Secretary General have competence according to the necessities of the court administration.

The Constitutional Court actively participates in the preparation procedures of its budget. It is drafted by the Court itself and the Secretary General is present in the Parliament during the deliberations in the Commission of Planning and Budget as well as during the General Assembly meetings. Until now, the Constitutional Court did not encounter with any problem either during the setting up of the budget and during its administration.

3. Is it customary or possible that Parliament amends the Law on the Organization and Functioning of the Constitutional Court, yet without any consultation with the Court itself?

Theoretically, it is possible for the Parliament to amend the Law on the Organization and Functioning of the Constitutional Court. But in practice, at least oral consent of the Constitutional Court is taken into account in the amendment of the organizational law. Since the Constitutional Court reviews constitutionality of laws, it is regarded as a delicate issue. It is likely that the law amending the Law on the Organization and Functioning of the Constitutional Court may be brought before the Constitutional Court. For that reason, the Constitutional Court avoids expressing its views on bills.

4. Is the Constitutional Court vested with review powers as to the constitutionality of Regulations/ Standing Orders of Parliament and, respectively, Government?

According the Constitution, the Turkish Constitutional Court has competence on the examination of the constitutionality of the Rules of Procedure of the Turkish Grand National Assembly.

Since, in Turkey we have a separate administrative justice system; the Regulations/Standing Orders of the Government are under judicial review of the Council of State. Under Article 125/1 of the Constitution, recourse to judicial review is available against all actions and acts of administration. In other words, against the regulations of the Government, i.e. the decisions of the Council of Ministers, it is possible to apply to the Council of State. Then, the Constitutional Court does not have any competence on Regulations/Standing Orders of Government.

5. Constitutionality review: specify types / categories of legal acts in regard of which such review is conducted.

In Turkey it is possible to review the constitutionality of a number of legal acts:

a- Laws

b- Decrees having force of law: In Turkey, a law introduced by the Parliament may give competence to the Council of Ministers to issue “Decrees having force of law”. However, there are some exceptions on that empowerment. Fundamental rights, individual rights, and duties included in the First and Second Chapter of the Second Part of the Constitution and the political rights and duties listed in the Fourth Chapter cannot be regulated by decrees having force of law except during periods of martial law and states of emergency. When the Council of Ministers issues a decree having the force of law, the competent bodies may apply to the Constitutional Court with the allegation of its unconstitutionality.

c- Constitutional amendments: They are examined and verified only with regard to their form while laws and decrees having the force of law are examined in respect of both form and substance.

6. a) Parliament and Government, as the case may be, will proceed without delay to amending the law (or another act declared unconstitutional) in order to bring such into accord with the Constitution, following the constitutional court’s decision. If so, what is the term established in that sense? Is there also any special procedure? If not, specify alternatives. Give examples.

The provisions of the law that have been annulled by the Constitutional Court cease to have effect from the date of publication of the annulment decision in the Official Gazette. If the Court deems it necessary it may also decide on the date on which the annulment decision shall come into effect. That date shall not be more than one year from the date of publication of the decision in the Official Gazette. This provision has been brought in order a new law to be introduced by the Parliament. Other than that procedure, we do not have any special procedures following the Constitutional Court’s decision.

In the event of the postponement of the date on which an annulment decision is to come into effect, the Turkish Grand National Assembly shall debate and decide with priority on the draft bill or a law proposal, designed to fill the legal void arising from the annulment decision.

There is no a special procedure in this issue. Although, the Parliament should debate and decide with priority on the draft bill or law proposal on the legal void, but in practice this always in not the case.

6. b) Parliament can invalidate the constitutional court's decision: specify conditions.

No. There is no such a way in Turkey. If the Parliament introduces the same provisions that have been annulled by the Constitutional Court and if it is brought to the Court, it shall be annulled since the decisions of the Constitutional Court is binding on the legislative, executive, and judicial organs, on the administrative authorities, and on persons and corporate bodies.

7. Are there any institutionalized cooperation mechanisms between the Constitutional Court and other bodies? If so, what is the nature of these contacts / what functions and powers shall be exerted on both sides?

Between the Constitutional Court and other domestic public bodies there is no permanent cooperation mechanism. But, the Constitutional Court cooperates from time to time with a number of national public bodies including Judicial Academy, Universities, some international organizations and other high courts (the High Court of Appeals, the Council of State). Generally these contacts are limited to symposiums, some projects etc.

II. RESOLUTION OF ORGANIC LITIGATIONS BY THE CONSTITUTIONAL COURT

- 1. What are the characteristic traits of the contents of organic litigations (legal disputes of a constitutional nature between public authorities)?**

There is no legal procedure on that issue in Turkey. Under Turkey's constitutional review system, only the President of the Republic, Parliamentary groups of the party in power and of the main opposition party and a minimum of one-fifth of the total number of members of the Turkish Grand National Assembly have the right to apply for annulment action to the Constitutional Court. In addition to that, a court which is trying a case may apply to Constitutional Court against the law or the decree having force of law to be applied on the case.

- 2. Specify whether the Constitutional Court is competent to resolve such litigation.**

The Constitutional Court has no competence on this issue.

III. ENFORCEMENT OF CONSTITUTIONAL COURT'S DECISIONS

1. The Constitutional Court's decisions are:
 - a) final;
 - b) subject to appeal; if so, please specify which legal entities/subjects are entitled to lodge appeal, the deadlines and procedure;
 - c) binding *erga omnes*;
 - d) binding *inter partes litigantes*.

The decisions of the Turkish Constitutional Court are final and they are not subject to appeal to any authority. They are binding on the legislative, executive, and judicial organs, on the administrative authorities, and on persons and corporate bodies. From that point of view, they have *erga omnes* effects.

2. As from publication of the decision in the Official Gazette/Journal, the legal text declared unconstitutional shall be:
 - a) repealed;
 - b) suspended until when the act/text declared unconstitutional has been accorded with the provisions of the Constitution;
 - c) suspended until when the legislature has invalidated the decision rendered by the Constitutional Court;
 - d) other instances.

The legal texts i.e. laws, decrees having force of law, or the Rules of Procedure of the Turkish Grand National Assembly declared unconstitutional by the Constitutional Court, those provisions cease to have that effect from the date of publication in the Official Gazette of the annulment decision. Where necessary, the Constitutional Court may also decide on the date on which the annulment decision shall come into effect. That date shall not be more than one year from the date of the publication of the decision in the Official Gazette.

3. Once the Constitutional Court has passed a judgment of unconstitutionality, in what way is it binding for the referring court of law and for other courts?

In Turkey, any court may bring provisions of laws to the Constitutional Court under certain conditions. If a court which is trying a case finds that the law or the decree having force of law to be applied is unconstitutional, or if it is convinced of the seriousness of a claim of unconstitutionality submitted by one of the parties, it shall postpone the consideration of the case until the Constitutional Court decides on this issue.

The Constitutional Court should decide on the matter and make public its judgment within five months of receiving the contention. If no decision is reached within this period, the trial court shall conclude the case under existing legal provisions.

However, if the decision on the merits of the case becomes final, the trial court is obliged to comply with it.

- 4. Is it customary that the legislature fulfills, within specified deadlines, the constitutional obligation to eliminate any unconstitutional aspects as may have been found- as a result of *a posteriori* and/or *a priori* review?**

Constitutional review in Turkey is a *posteriori* review. If the Constitutional Court annuls some provisions of a law, the legislative body should issue a new law taking into account the reasoning of the decision of the Constitutional Court. In some cases, the legislative body issues new legal provisions following publication of the decision in the Official Gazette. But, this is not the case every time. For some reasons, the legislative body issues a new law after lapse of a long period or even it does not act a new law at all in some cases.

- 5. What happens if the legislature has failed to eliminate unconstitutional flaws within the deadline set by the Constitution and/or legislation? Give examples.**

It totally depends on the case. If the legislature has failed to act a new law, in some cases, a very big number of citizens may be affected from the inactivity of the Parliament. Since some cases are not so important for the public opinion, omission of the legislature on the issue may not constitute a big problem.

- 6. Is legislature allowed to pass again, through another normative act, the same legislative solution which has been declared unconstitutional? Also state the arguments.**

No. The legislature should act according to decisions of the Constitutional Court. If it passes the same legislative provision and if it is brought before the Constitutional Court, then, the Constitutional Court will declare it again unconstitutional stating that its decisions bind on the legislative, executive, and judicial organs, on the administrative authorities, and on persons and corporate bodies.

- 7. Does the Constitutional Court have a possibility to commission other state agencies with the enforcement of its decisions and/or to stipulate the manner in which they are enforced in a specific case?**

No. At the moment in Turkey there is no legal mechanism in the enforcement of the decisions of the Constitutional Court. With the constitutional amendments on October 2010, constitutional complaint was introduced in the Constitution. Under new provisions, anyone, who claims that any of their fundamental rights and freedoms guaranteed under the Constitution and falling under the European Convention of

Human Rights has been violated by the public authorities, can apply to the Constitutional Court. Within 2 years time limit, constitutional complaint will be accepted by the Constitutional Court after necessary provisions are introduced by the legislature. It is probable that an enforcement mechanism shall be introduced on its decisions relating to constitutional complaint.