

ENSURING CITIZENS' ACCESS TO CONSTITUTIONAL JUSTICE: THE CASE OF TÜRKİYE¹

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Honourable colleagues, I extend my warm greetings to all of you with utmost respect.

First and foremost, I would like to express my delight at being here for the Balkan Constitutional Courts Forum and having the privilege to join such esteemed participants.

I would also like to convey my gratitude to Ms. Pavlina PANOVA, President of the Bulgarian Constitutional Court, for graciously hosting this event.

Distinguished Participants,

The primary role of constitutional courts is to safeguard and pave the way for the advancement of pluralistic democratic political and legal institutions, including fundamental rights, free electoral systems, and party regimes, through constitutional review. In this capacity, constitutional courts not only act as guardians of fundamental rights, but also make a significant contribution to upholding the rule of law and political pluralism, which are the cornerstones of a pluralistic democracy.

Article 2 of our Constitution defines the Republic of Türkiye as a “*democratic state governed by the rule of law*”. Likewise, the preamble of the Constitution describes the political system as a “*liberal democracy*”. In the decisions and judgments of the Turkish Constitutional Court, the democratic state principle enshrined in the Constitution is interpreted as a *pluralistic democracy*.²

The Turkish Constitutional Court, established in 1962, is the fourth constitutional court founded in Europe after the World War II.

Within its jurisdiction of constitutional review, the Constitutional Court is responsible for reviewing laws, the internal regulations of the legislative body, and presidential decrees in terms of their form and substance. Constitutional amendments are subject only to formal review. The authority to apply for constitutional review is granted to the two political party groups within the

¹ **Hasan Tahsin GÖKCAN** – Vice-President, Constitutional Court of the Republic of Türkiye.

² See the Court’s decision no. E.2017/162, K.2018/100, 17 October 2018, § 34, 116. In addition, the Constitutional Court has emphasised in numerous judgments concerning fundamental rights that the democratic system envisaged by the Constitution is a pluralistic democracy. (See, for example, *Çağrı Yılmaz*, no. 2017/34463, 13 February 2020, § 31. For considerations in the same vein, see *Bekir Coşkun* [Plenary], no. 2014/12151, 4 June 2015, §§ 33-35; *Mehmet Ali Aydın* [Plenary], no. 2013/9343, 4 June 2015, §§ 42, 43; *Tansel Çölaşan*, no. 2014/6128, 7 July 2015, §§ 35-38).

legislative body with the highest number of members, members constituting at least one-fifth of the total membership, and the President of the Republic. This method is referred to as “action for annulment” (or abstract review).

Furthermore, courts at all levels of the judiciary may *ex officio* request constitutional review in disputes relating to laws or presidential decrees if they consider that the provisions are in violation of the Constitution. This procedure is referred to as the “contention of unconstitutionality” or “concrete review”. Additionally, courts may request constitutional review at the request of one of the parties involved in a particular case before them.

Citizens themselves do not have the direct right to request a constitutionality review of norms. However, during court proceedings, one of the parties may argue that the applicable law or presidential decree is unconstitutional. If the court considers such an argument to be substantial, it will request the Constitutional Court to annul the provision. In practice, a significant number of cases related to constitutional review are referred to the Constitutional Court in this manner.³ Consequently, individuals have an indirect opportunity to participate in constitutionality review within this framework.

In Türkiye, individuals gained the opportunity to engage in constitutional review directly through individual applications in 2012 following an amendment to the Code on Establishment and Rules of Procedures of the Constitutional Court.

Individual applications may be submitted after all available legal remedies have been exhausted with respect to the act or action of the public authority that has caused or failed to remedy the grievance. In principle, human rights violations caused by third parties do not fall within the scope of individual applications. Nevertheless, where a third party causes grievances under the positive obligations of the State, there must be a remedy to seek justice. Where such a remedy exists, the individual must be able to present their claims, evidence and arguments, and there must also be an authority in place that may make decisions to address the individual’s grievances. If the grievance caused by a third party remains unaddressed through legal remedies or litigation, an individual application can be submitted concerning the relevant decision.

The avenue of individual application is open to all, including legal entities, irrespective of their citizenship status. However, public entities are not entitled to submit individual applications. Furthermore, individual applications cannot be made for all fundamental rights enshrined in the Constitution. The right to lodge individual application is limited to those

³ For instance, as of 16 October 2023, out of the 158 cases opened for constitutionality review in 2023, 32 were initiated by authorities with the power to bring annulment actions, and 126 were referred to the Constitutional Court by lower courts. A significant proportion of the cases initiated by lower courts are based on the claims of the parties involved.

fundamental rights guaranteed by the Constitution and safeguarded by the European Convention on Human Rights. Although this situation has been criticised in legal doctrine, it is important to emphasise that even in its current form, the scope of individual applications is quite extensive. In fact, the number of individual applications to the Constitutional Court in Türkiye has exceeded one hundred thousand per year in the past two years.

Individual applications do not include the possibility of a “public action” (*actio popularis*). Individuals cannot make applications alleging that the rights of others or of society as a whole have been violated or are likely to be violated. The right of individual application is granted to those whose current rights have been violated.

For instance, in Türkiye, real estate records, such as land title records, are maintained by the Land Registry and Cadastre Administration. If someone claims to have lost their property rights due to an incorrect procedure recorded in the land title records of their land, they have the right to file a lawsuit to challenge this. If they have not been able to recover their property through the legal process, or if the court has not awarded them adequate compensation for their property, they can file an individual application after exhausting legal remedies and after the judgment has become final.

According to our Constitution, the State has both positive and negative obligations with regard to fundamental rights. Under the negative obligation, those exercising state authority are obliged not to interfere unjustifiably with the fundamental rights of individuals. The positive obligation of the State includes creating the necessary conditions for the effective exercise of fundamental rights.

In other words, the State must refrain from arbitrary interference with the exercise of rights and freedoms. In addition, the State should take necessary the measures, including protective measures, to ensure the effective exercise of these rights and freedoms, in particular to protect individuals against interference by others.⁴ These measures include the establishment of the administrative and legal framework necessary for the exercise of fundamental rights, the recognition of access to legal remedies and the provision of safeguards for fair trials in relevant cases. Furthermore, these measures require the adoption of measures such as protective measures against unforeseeable, real-life risks to protect the right to life.

Individuals may suffer harm due to the State’s failure to fulfil either its negative or positive obligations. For instance, an allegation that a law enforcement officer caused the death of an individual by using a firearm without the conditions for the use of force being met falls

⁴ See the Court’s decision no. E.2017/21, K.2020/77, 24 December 2020, § 45.

within the scope of negative obligations and pertains to the right to life in the context of an individual application.

To provide another example, if an employee claims that his trade union rights have not been respected and his grievance remains unaddressed even after pursuing the matter through the labour court, he can file an individual application after the court's decision to dismiss the case has become final. In such an application, he can directly allege a violation of his trade union rights. He can also argue that his right to a fair trial has been violated because, among other procedural irregularities, he was not given the opportunity to substantiate his claims during the judicial process or to discuss claims that could affect the outcome.

In individual applications, the Constitutional Court's examination is not primarily focused on questioning the underlying reason for the dispute or the verdict in the main case, or on determining the final outcome. Instead, the Constitutional Court's examination focuses on whether constitutional rights have been violated in connection with the dispute. For instance, if a criminal case or a compensation case relating to a death caused by intent or negligence did not undergo a thorough or diligent investigation necessary to protect the right to life, the Constitutional Court would conclude that the right to life had been violated. In such cases, a retrial order is issued to redress the violation.

Decisions of the Constitutional Court are binding on all administrative authorities, judicial bodies, and courts. Following a judgment finding a violation, the relevant court conducts a retrial to address the issues that led to the violation and issues a new verdict.

It is clear that individual applications serve to protect fundamental rights safeguarded by the Constitution. Therefore, this form of review, which requires the interpretation of constitutional provisions, constitutes a form of constitutional review. Furthermore, this form of constitutional review helps eliminate interpretations and applications that are contrary to the Constitution. In this respect, constitutional review serves the principle of the rule of law. Even though it is limited to matters concerning themselves, individuals contribute to the realisation of the rule of law through individual applications.

On the other hand, individual applications also examine matters concerning freedom of expression, the right of assembly and demonstration, freedom of religion and belief, and the prohibition of discrimination. These rights and freedoms are closely linked to the nature of a competitive multi-party political system and a pluralistic democratic regime.⁵ According to the

⁵ In some of the cases where the Constitutional Court examined the right of assembly and demonstration, it emphasised that this right ensures the emergence, safeguarding, and dissemination of diverse ideas, which are crucial for the advancement of pluralistic

Constitutional Court, for an interference with fundamental rights and freedoms to be considered *acceptable* in accordance with the requirements of a democratic society, it must fulfil a compelling social need and be proportionate.⁶ It is well known that constitutional review plays a crucial role in the establishment and maintenance of a pluralistic democratic system. In this sense, it should also be noted that citizens, through individual applications, contribute to pluralistic democracy by bringing their rights related to the democratic regime under constitutional review.

In Türkiye, from 23 September 2012 to 16 October 2023, a total of 557,042 applications were submitted. Out of these, 427,259 cases have been concluded, while approximately 129,783 cases remain pending.⁷

During the specific period, there have been a total of 15,085 judgments finding violations, resulting in a violation rate of approximately 3.5%.⁸

The significant number of individual applications in Türkiye over the past 11 years demonstrates a high level of citizen engagement in constitutional review. Citizens also hold indirect influence in constitutionality review. Hence, it can be stated that citizens play a significant role in upholding the principles of the rule of law and the democratic state by actively participating in constitutional review.

Distinguished participants, in this concise presentation, I have aimed to provide an overview of the Turkish experience related to our topic.

I wish to express my satisfaction at having the opportunity to address you and extend my warm regards.

democracies; see *Ferhat Üstündağ*, no. 2014/15428, 17 July 2018, § 40; *Dilan Ögüz Canan* [Plenary], no. 2014/20411, 30 November 2017, § 36.

⁶ See *Tayfun Cengiz*, no. 2013/8463, 18 September 2014, § 56; *Tansel Çölaşan*, no. 2014/6128, 7 July 2015, § 51; *Dilan Ögüz Canan* § 33, 56; *Ferhat Üstündağ*, § 48.

⁷ As of 16 October 2023, the number of applications received in 2023 is 86,104.

The Distribution of Judgments Finding Violations According to Specific Rights and Freedoms:

- Right to a fair trial – 3,604 - 23.9%
- Freedom of expression – 3,520 - 23.3%
- Right to property – 3,508 - 23.3%
- Right to hold meetings and demonstration marches – 1,391 - 9.2%
- Right to respect for private and family life – 1,166 - 7.7%
- Right to personal liberty and security – 293 - 1.9%
- Right to life – 223 – 1.5%

⁸ It is worth highlighting that the calculation of violation rate does not include decisions related to the right to a trial within a reasonable time and the judgments finding violations (56,443) related to this specific right.