COMMENTARY

The Odyssey of the Turkish Constitutional Court into the World of Individual Application

ENGİN YILDIRIM*

ABSTRACT *Since the introduction of the individual application as a constitutional remedy, the Turkish Constitutional Court, which traditionally dealt with constitutional review of laws, constitutional amendments and political party dissolution cases, has embarked on the road towards transforming itself into a more effective rights adjudication body. It should be, however, kept in mind that this remedy is not, in and of itself, a magic panacea that will address Turkey's ingrained human rights problems.*

In the context of a discussion on whether Turkish Studies is a theory-consuming or a theory producing field of study, Murat Somer has succinctly articulated antagonistic features of the Turkish polity, existing side by side often in a way that breeds unabated political and societal strife: "Turkey is middle eastern and western, a strong and a weak state, democratic with a long history of democratization and authoritarian with a long history of oppressing dissent, all at the same time."[1] It is against this background that the Turkish Constitutional Court (TCC) has been undertaking constitutional review since 1962. As one of the oldest constitutional courts in the non-western world, its jurisprudence has reflected the ups and downs of the country's turbulent political history. Long seen as an uncompromising defender of the *status quo*, the TCC has recently begun to adopt a more rights-based adjudication. This shift has largely been due to the introduction of the individual application system, which has compelled the Court to reflect the case law of the European Court of Human Rights (ECtHR). Unlike abstract and concrete norm reviews where the Court deals with issues of more abstract nature, the individual application procedure calls for the Court to pinpoint alleged violations of constitutional rights by public power and provide the victim with effective remedies.

* Constitutional Court of Turkey

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Then President of the Constitutional Court, Ahmet Necdet Sezer, declaring the decision of the court to close the Welfare Party, considered the center of anti-secular activities, on January 16, 1998.

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This paper aims to explore the function of the individual application procedure in protecting and expanding fundamental rights and challenges posed by the operation of the system. To this end, we first offer a brief sketch of the TCC's role and place in the Turkish polity and its judicial attitude prior to the individual application procedure. We, then, move on to discuss the procedure and its effect on the Court's judicial behavior.

The Turkish Constitutional Court before the Individual Application

When the Democrat Party rule came to an abrupt end following the 1960 military coup, one of the first subjects that the coup's academic and political supporters brought to the fore was the making of a new constitution which would restrain legislative majorities through check and balance mechanisms. With this goal in mind, the 1961 constitution established a constitutional court as an independent supreme judicial body to review the constitutionality of laws. The structure and competencies of the new court were a combination of those of Italian and German constitutional courts. It had a membership of 15 judges drawn mostly from the ranks of the judiciary. The mandate of the TCC covered abstract and concrete reviews, dissolution and financial audit of political parties as well as acting as a supreme criminal court for the trial of certain high ranking public officials. Although it was initially hesitant about using its competencies, the Court soon became a powerful judicial and political actor to be reckoned with. During the 1961 constitution

period (1961-1982), the TCC rendered many controversial decisions ranging from the banning of socialist and Islamist political parties to extending the 1973 general amnesty to cover those convicted of communist activities who had been excluded from its scope by the Parliament. Not surprisingly, it frequently came under attack by the majority of main political actors either for going beyond its powers (liberal-conservative criticism) or not going far enough to implement the 1961 constitution's "progressive" provisions particularly in relation to planned economy and social rights (social democrat-socialist criticism). In spite of these denunciations, the Court was adamant in its strict defense of official state ideology and rigid interpretation of the constitution.

Since it was mostly the right-wing political parties which governed the country in the 1961 period, it was mainly left-wing opposition parties and associations that resorted to the Court for abstract review of promulgated laws. Many rulings of the Court were heavily criticized by these ruling actors who accused it of acting like an opposition party. More often than not, they and their supporters denounced the justices of the Court as "politicians in robes" and creating "a juristocratic government."[2] It is true that the TCC was generally seen as an activist court especially in abstract review cases.[3] Compared to concrete review cases, abstract review lawsuits involve highly political aspects since they necessarily entail a direct challenge to the government. As a sign of its activism, the TCC annulled 65 percent of all abstract review cases between 1962 and 1982.[4]

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The establishment of the TCC was often explained by reference to the hegemonic preservation thesis, which argues that constitutional courts come into existence to safeguard the interests of dominant political elites.[5] As a counter-majoritarian supreme judicial body, the TCC's behavior fitted well to the hegemonic preservation argument because it did not generally hesitate to protect hegemonic interests in the face of challenges against their power. In fact, it was designed not to restrict the powers of the state but to protect the state against unruly majorities deemed dangerous to the republican order.

The Court's activist behavior continued under the 1982 constitution, which preserved the structure and powers of the Court with minor changes. In this period, the TCC was particularly active in banning political parties with ethnic and re-

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ligious leanings. In addition, in the 1980s and early 90s, it took a very active stance against economic policies of center-right governments to privatize state-owned industries and assets. The TCC was also famous (or infamous) for the rulings that banned the wearing of headscarves by students within the premises of universities and for introducing new parliamentary rules for the election of presidents. This selective activism to protect the Establishment was condemned as the court carefully shunned the same activist attitude in cases involving human rights violations.[6] Another criticism directed to the Court was related to its zealously protective attitude towards civil servants and public officials, which fuelled the denunciation of the Court as a bastion of dominant bureaucratic elites.[7] For example, annulment actions regarding a provision requiring permission of the administration for bringing criminal charges against civil servants were rejected 16 times by the Court between 1962 and 2000.[8] Consequently, if the relevant authority withholds the permission, no criminal action against a civil servant can be taken.

The Court's annulment rate in abstract review cases was 82 percent between 1983 and 1999, while the corresponding rates were 54 percent between 1981 and 2000 in France, 53 percent between 1991 and 2000 in Germany, and 52 percent between 1981 and 1990 in Spain.[9] As can be seen from these figures, the TCC was a highly activist court with one of the highest annulment rates in Europe. Unlike many of its counterparts that were founded following the collapse of totalitarian political systems such as those in Germany, Spain, Eastern Europe and South Africa, the TCC largely failed to make a lasting contribution in consolidating democracy because of its adverse stance to human rights.[10] It was, in effect, an important component of "Turkish tradition of authoritarian constitutionalism."[11] It must be admitted that the authoritarian character of the Turkish constitution played a role in the TCC's rights-averse attitude but at the same time one should not overlook the fact that rights and freedoms in the constitution are codified in an ambiguous and vague manner that would pave the way for the Court to use its discretionary powers. It was not until the adoption of the individual application procedure that the TCC would undertake in earnest a rights-based review.

Individual Application as a Constitutional Redeemer

Although discussions about the introduction of an individual application system to the TCC dated back to the early 1960s, the first serious attempt was made by the Court itself in the form of a draft proposal submitted to the government in 2004. This endeavor failed to materialize mainly due to stiff resistance of the Court of Cassation and the Council of State.[12] These supreme courts feared that the new system would enable the TCC to act as a kind of super Supreme Court by reviewing their rulings. Nonetheless, the 2004 proposal became the backbone of the 2010 constitutional amendments with regard to the individual application procedure, the main aim of which was to decrease the number of applications against Turkey before the ECtHR. The procedure was expected to provide a domestic remedy for individuals in the case of violation of their rights by administrative acts and actions or judicial decisions.

The amended article 148 of the Constitution stipulates that anyone, who claims that his/her constitutional rights set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) have been violated by a public authority, has a right to apply to the Constitutional Court after exhausting all administrative and judicial remedies. This implies that the individual application has a relatively limited scope of protection against violations of rights as it is confined to protect fundamental rights also provided in the ECHR rather than all rights secured in the Turkish constitution. This does not, of course, mean that the procedure does not provide people with an effective remedy because it is mostly economic and social rights that are left out from the purview of the individual application.

The TCC had very little direct influence over the citizenry prior to the introduction of the individual application instrument but now it is expected to sit at the forefront of human rights protection. Thanks to the procedure, individuals and private legal persons have recourse to the violation of fundamental rights by administrative or judicial decisions, actions or omissions. Some acts of public power, however, are exempted from the confines of individual application. For example, direct individual applications against legislative procedures (laws, bylaws etc.), regulatory administrative acts such as internal rules and regulations, acts of the President of the Republic in his/her competence, the Constitutional Court judgments and some decisions of the High Council of Judges and Prosecutors and the Supreme Military Council are excluded from the scope of the individual application. On the other hand, if a specific implementation of a legislative act or regulatory procedure entails a violation of a fundamental right and freedom, an individual application can be brought against responsible public bodies. The individual application thus differs from constitutional or appellate review.

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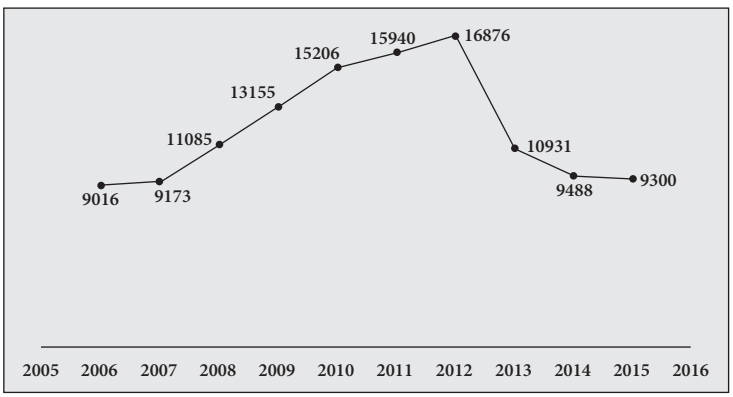
The complaints are evaluated through admissibility examination and merit review. The former procedure deciding whether the application falls within the jurisdiction of the TCC involves a review of *ratione personae, ratione materiae, rationae temporis*. The individual application system operates on the basis of the principle of subsidiarity, entailing that an application may only be initiated following the exhaustion of all other legal remedies. When the application is found admissible, it is reviewed by one of the two sections of the Court as a rule, which issue either a violation or non-violation judgment. In cases where there is a possibility of conflict between the sections' rulings or where the application has a special constitutional significance or may lead to a change in the precedent, the sections have the power to refer the application to the plenary of the Court. If the TCC concludes that a right or freedom of the applicant is violated, it may order retrial and/or award pecuniary and non-pecuniary damages to remedy the applicant's suffering. Unlike abstract and concrete reviews, the TCC does not have the authority of annulling laws in the individual application cases.

Prior to the introduction of the individual application procedure, Turkey was among the countries with the highest number of applications before the Strasbourg Court. Since then, the number of applications before the ECtHR has declined from an annual average of about 15,000 cases to a figure of around 1,500 applications.[14] This downward tendency may, however, change because there have been

Graph 1: Applications to the ECtHR from Turkey[13]



huge increases in the number of individual applications to the TCC as a result of administrative and judicial measures taken under the state of emergency declared in the aftermath of the July 15 coup attempt.

Although the number of the applications revolved around 20,000 in the last two years, this figure jumped to about 62,000 as of November 21, 2016 largely because of the petitions triggered by the ongoing state of emergency measures including pre-trial detentions, dismissals from public service, confiscations of private property and closing down and banning of various organizations and media outlets.[15] As a result, the Court has thus currently been burdened with an overloaded docket. The TCC has concluded about 40 percent of all applications (114,165 in total as of November 21, 2016) since the initiation of the individual application system in September 2012.[16] The great majority of the cases have been found inadmissible for not meeting the admissibility requirements including lack of standing, *ratione temporis*, lack of subject matter jurisdiction, non-exhaustion of all other remedies and being manifestly ill-founded.

Approximately 2 percent of all applications were reviewed on the merits and the Court has so far delivered 1,374 violation judgments, corresponding to a success rate of about 1.2 percent of all the applications.[17] At first glance, the very low success rate on the part of the applicants may lead us to conclude that the individual application has not been an effective remedy. This would, however, be

Table 1: Subject Matter of Violation Judgments of the TCC (2012-2016)

Types of Rights	Number of Violations Rulings
Right to Life	36
Torture and Degrading Treatment	38
Right to Liberty and Security	87
Right to Fair Trial	993
Principles concerning Crime and Punishment	11
Right to Property	53
Right to Physical and Mental Integrity	14
Right of Respect for Private and Family Life	35
Freedom of Expression	35
Right to be elected	6
Freedom of Religion	2
Right to Equality/non-discrimination	4
Freedom of Association (Trade union)	30
Freedom of Association	2
Freedom of Communication	24
Freedom of Assembly	2
Right to Have an Effective Remedy	2
TOTAL	**1,374**

The room where individual applications are discussed in the Turkish Constitutional Court.

Turkish Constitutional Court / Photo Gallery

an erroneous inference if we consider that many applicants' claims of rights violation are no more than demands of appellate review of lower courts' rulings by the TCC whose competencies do not allow conducting such a review. The Court has only the power to examine these claims on procedural grounds. Moreover, the success rates of other countries, notably Germany and Spain where the individual application instrument is effectively implemented, do not differ from that of Turkey.[18]

It appears that the TCC has strictly applied the admissibility requirements in order to dwell on more serious applications. As is evident from Table 1, more than two-thirds (about 72 percent) of all violation rulings emanate from contraventions of the right to fair trial. If we take the perennial structural problems of the Turkish justice system into consideration, this is hardly surprising. Especially protracted and pre-trial detentions exceeding maximum periods as stipulated in the Criminal Procedure Law and lengthy proceedings have been brought before the Court. The right to liberty and security and the right to property occupy the second and the third places respectively in the rank of violation decisions. The other judgments found in favor of the applicant tend to concentrate on the issues of torture and degrading treatment, the right to life, freedom of association, the right of respect for privacy, freedom of expression and freedom of communication.

The TCC's rulings concerning long and undue detention periods, excessive length of legal proceedings, freedom of expression, freedom of association and freedom of access to

the internet have been generally acclaimed.[19] The Court has established leading principles that have acquired a quasi-precedent status and its rulings have accorded well with the jurisprudence of the Strasbourg Court. For example, when the government blocked access to Twitter, it was on account of individual applications challenging the ban that the TCC delivered a unanimous verdict, finding the ban unconstitutional.[20] In *Twitter* and *YouTube* judgments, the Court found a violation of freedom of expression since the restriction was not prescribed by law.[21]

The individual application procedure has brought about an alteration in the long-standing case law of the Court in some issues. For example, the TCC on two occasions in 1999 and 2011 upheld a rule in the Civil Code which prevented women from using solely their maiden name after marriage and compelled them to take their husbands' surnames. In these judgments, the TCC ignored the relevant case law of the ECtHR, alluding to the weight of family values of Turkish society as its reasoning. The TCC, upon an individual application in 2013 on the matter, quashed its previous rulings, finding a breach of the Article 17 of the Constitution on the personal inviolability and corporeal and spiritual existence of the individual, which corresponds to the Article 8 of the European Convention.[22] Being fully aware of the importance of the adopting the ECtHR's jurisprudence for the success of the individual application, the Court did not hesitate to overrule its earlier verdicts on the subject.

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The individual application system was also put to test before the ECtHR in the *Hasan Uzun v. Turkey* case.[23] Closely examining the accessibility of the remedy, the modalities for its exercise, the remedial powers of the TCC, and the effectiveness of its rulings, the ECtHR came to the conclusion that it was satisfied with the individual application as a domestic remedy that needs to be exhausted by applicants prior to bringing a case before the Strasbourg Court.

While adoption of the individual constitutional complaint has enhanced the protection of individual rights and freedoms, some recent rulings of the TCC have drawn strongly worded criticisms both from government officials and opposition figures. For example, while the former accused the Court of overstepping its competency, especially in *Twitter, YouTube* and *Can Dündar* decisions the latter blasted the Court's dismissal of the

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request for the annulment of certain provisions of the *KHK*s (decrees with the force of law) on the grounds of lack of jurisdiction.

It seems that the future success of the individual complaint system depends on the implementation of an efficient filtering system and closely following the ECtHR jurisprudence. A relaxed and flexible application of admissibility criteria runs the risk of transforming the Court into a kind of super-appeal court. A much feared clash of the TCC and the other supreme courts has hitherto largely failed to materialize, though the latter tend to be reluctant to accept the binding force of the TCC's rulings beyond individual cases. Indeed, the TCC accords a significant degree of deference to the supreme and ordinary courts. The fact that only a small number of complaints are successful points to the careful stance adopted by the TCC in relation to quashing judgments of the other courts. The Court has so far strictly interpreted admissibility criteria to emphasize the principle of subsidiarity, meaning that it is, first and foremost, the duty of public authorities and other ordinary and high courts to ensure that their decisions and judgments are in tune with protecting rights and freedoms. As application numbers have been skyrocketing, the TCC's ability to deal with applications in a timely manner could run into serious risk. It may become a victim of its own success as attested by the experience of the ECtHR.

Concluding Remarks

Before the introduction of the individual application instrument, the TCC was widely conceived as a mainstay of state ideology with little interest in protecting and furthering fundamental rights and freedoms. It was often accused of judicial activism based on defending state ideological principles with complete disregard for basic rights and freedoms. The coming into existence of the individual application system has provided the Court with an opportunity to become an effective institution to remedy human rights violations. The Court has created high expectations amongst the public in addressing their human rights problems by setting human rights standards in Turkey in conformity with the ECtHR jurisprudence. It interprets the provisions of the Turkish Constitution by defining and conferring the rights and freedoms in light of the ECHR and the case law of the Strasbourg Court. It is cognizant of the fact

that if it dismisses an application in a way that is clearly at odds with the ECtHR case law, the judgment would be quashed if later brought before the Strasbourg Court.

The TCC has enhanced its popularity and prestige in the country thanks to the constitutional complaint system. The effective execution of its decisions, for example, immediate release of detained applicants, retrial of the cases, lifting the ban on internet access, and payment of non-pecuniary damages by the public authorities to victims have brought about increasing public awareness on the individual application as an effective constitutional remedy. The Court has been praised for assuming the role of a rights adjudicator.

On the other hand, it should be born in mind that granting direct individual access to the TCC will not, in and of itself, settle Turkey's human rights problems. It is not a magic panacea that will alleviate all shortcomings of the legal system and public administration. Unless public authorities and bodies including the judiciary vigorously observe human rights in their decisions and policies, the TCC alone cannot bear the burden of addressing deep-seated human rights problems. Constitutional courts can indeed contribute to democracy and the rule of law, if the institutional circumstances support their work.

The TCC is currently faced with an uphill challenge stemming from the declaration of a state of emergency during which constitutional rights are, by definition, approaching their limits. This challenge will, to a certain extent, determine whether the Court will continue to be seen as an effective guardian of constitutional rights.

Endnotes

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