

RIGHT TO FILE AN INDIVIDUAL APPLICATION TO CONSTITUTIONAL COURT IN TURKEY: ADMISSIBILITY CRITERIA*

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Özet

Anayasa Mahkemesi'ne bireysel başvuru, ülke içinde etkin olan tüm idarî ve hukukî süreçlerin tüketilmesinden sonra bireyler tarafından başvurulabilecek ikincil nitelikte bir yargı yoludur. İkincil nitelikte bir yargı yolu olan Anayasa Mahkemesi'ne bireysel başvuru, bir temyiz ya da yeniden yargılama yolu değildir; Avrupa İnsan Hakları Mahkemesi yolunda başvuru yapmak için tüketilmesi gereken iç hukuk yollarından birisidir. Avrupa İnsan Hakları Mahkemesi Mayıs 2013'de, 10755/13 başvuru numaralı, *Hasan Uzun/Türkiye* davasında oy çokluğu ile verdiği kararla, Anayasa Mahkemesine bireysel başvuru hakkının başladığı tarihten itibaren, bu hak kullanılmaksızın AIHM'ne yapılan başvuruları, “iç hukuk yollarının tüketilmemiş olması” gerekçesiyle kabul edilemez bulunduğunu ifade etmiştir. Bireysel başvuru yolunun, temel hak ve özgürlüklerin korunması konusunda birçok önemli işlevi yerine getirdiği kabul edilmektedir. Ancak, Türk hukuk sisteminde, bireysel başvuru yolunun tanınmasının ana sebebinin, temel hak

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ve özgürlüklere yeni bir kurumsal güvence kazandırmaktan önce, Avrupa İnsan Hakları Mahkemesine Türkiye aleyhine yapılan başvuru sayısını azaltmak olduğu Anayasa değişikliği sürecinden anlamak mümkündür.

Anayasal hakların kamu gücü tarafından ihlal edildiği iddiasında olan kişilerin diğer yasal başvuru yollarını kullanıp tüketikten sonra Anayasa mahkemesine yapacakları bireysel başvuru hakkı, 12 Eylül 2010 tarihinde kabul edilen anayasa değişikliği ile 23 Eylül 2012 tarihinde yürürlüğe konulmuştur. Bu değişiklik sonrasında, Anayasanın 148. Maddesinin 3.fıkrası uyarınca “ *Herkes, Anayasada güvence altına alınmış temel hak ve özgürlüklerinden, Avrupa İnsan Hakları Sözleşmesi kapsamındaki herhangi birinin kamu gücü tarafından, ihlal edildiği iddiasıyla olağan idari ve kanun yollarının tüketilmiş olması şartıyla Anayasa Mahkemesine başvurabilir*”.

Bireysel başvurunun kabul edilebilirlik kriterleri; taraf ehliyeti, dava ehliyeti, başvurunun konusu, hukuki yarar, diğer olağan hukuk yollarının tüketilmesi, dilekçe ve gerekçeli başvuru ile süre yönünden ele alarak incelenebilir. Bu çalışmada Anayasa Mahkemesine Bireysel Başvuru hakkı ve bu hakkın kabul edilebilirlik ölçütleri üzerinde durulacaktır.

Anahtar Kelimeler: Anayasa, Anayasa Mahkemesi, Bireysel Başvuru, Avrupa İnsan Hakları Mahkemesi, Kabul Edilebilirlik.

Abstract

Individual application to the Constitutional Court is a secondary judicial remedy to which individuals may resort following exhaustion of all administrative and judicial procedures applicable within the country. Individual application to the Constitutional Court is a secondary judicial remedy and is not a means for appeal or retrial; it is one of the domestic remedies which must be exhausted before an application to the European Court of Human Rights can be made. In its decision in the case of *Hasan Uzun v. Turkey* of May 2013 (application no. 10755/13), the European Court of Human Rights has, by a majority of votes, declared the application inadmissible on the grounds that “*domestic remedies had not been exhausted*”, stating that applications made before the European Court of Human Rights without first exercising one's right of individual application to the Constitutional Court as of the date on which such right had become accessible, would be inadmissible. Individual application is acknowledged to perform several important functions in terms of protection of fundamental rights and freedom. However, it is possible to infer from the constitutional amendment process that, the main reason for introduction of the right of individual application within the Turkish legal system, is to reduce the number of applications made before the European Court of Human Rights against Turkey, rather than to bring a new corporate assurance to fundamental rights and freedom.

The right to an individual application to be made to the Constitutional court by individuals who claim that their constitutional rights have been violated by public authorities after utilization and exhaustion of all other judicial remedies was introduced by the constitutional amendment



adopted on September 12, 2010 and entered into force on September 23, 2012. Following this amendment, pursuant to paragraph 3 of Article 148 of the Constitution, "Everyone who claims that any one of her/his fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities may apply to the Constitutional Court, provided that ordinary administrative and judicial remedies have been exhausted."

Admissibility criteria for individual applications may be examined under *ratione personae*, *ratione materiae*, legal interest, exhaustion of other ordinary judicial remedies, petition and justified application and *ratione temporis*. This study will focus on the right to individual application to the Constitutional Court and the admissibility criteria pertaining thereto.

Keywords: *Constitution, Constitutional Court, Individual Application, European Court of Human Rights, Admissibility.*

I-INDIVIDUAL APPLICATION TO ONSTITUTIONAL COURT

A- OVERALL

"Right to file an individual application" was accepted after "Law Amending Certain Articles of the Constitution of the Republic of Turkey" dated 7.5.2010 and numbered 5982 had been accepted and entered into force in the referendum held on 12 September 2010. (2010 May 13 date and issue 27580 R.G.)

Although right to individual application to Constitutional Court has been discussed in Turkish Law since 1961 Constitution Act and the necessary to bring this institution to Turkish Law in all discussions that have been made for approximately 50 years, and also Turkish law, a new ground on this topic has already broken.

With the first clause of 18th article of Law numbered 5982, in addition to other amendments, by including "and it finalizes the individual application" in the end of the sentence of first clause of 148th Article of Constitution, one more new duty has been included to finalize and conclude the individual applications among the duties and authorities of Constitutional Court. With adding more three clauses following the second clause of 148th article of Constitution, the constitutional limitations of individual application have been established.

18th provisional clauses added to Constitution by the 25th article of Law numbered 5982 amending in Constitution, it was resolved that the regulations relating to the individual application would be completed and the individual applications would be accepted from entry into effect date. We can describe the individual application as demands of the individuals whose rights were violated



about cessation of this violation due to any transactions conducted by public force.

On the one hand, individual application provides the judges to interpret the Constitution in accordance with the Constitutional Court Decisions, on the other hand; puts completely the principles of supremacy and cohesiveness of Constitution specified in the Article 11 of Constitution into practice (Göztepe, 2011: 14).

Individual application will be made to the Constitutional Court on charges of a fundamental right of public force. Individual application is an exceptional and secondary-quality remedy to eliminate the violation of fundamental rights and freedoms that have not been resolved in other ways. Individual application is neither continuation of current legal remedies nor extraordinary legal remedy that the application faults can be amended in law order. The application is an exceptional remedy and extraordinary legal remedy that the violation of a fundamental right will be able only particularly to be inspected (Sabuncu-Arnwine, 2004: 241-242).

The individual application procedure has dual-functions. The first function is an instrument for every individual to enjoy their fundamental rights and freedoms (which also implies its subjective aspect) and the second function is to conclude constitutional issues and a mechanism of protecting, interpreting and improving the constitutional order by the decisions given (Fendoğlu, 2011).

An existence of claim relating to violation of a fundamental right by public power for is required for individual application. This claim should be for violation of fundamental rights deemed in Constitution. Therefore, executing of this remedy will be achieved only in terms of these rights not all rights.

Individual application procedure is a type of case that has been entitled by Constitution to the individuals whose rights have been violated. Due to being a case, the place where the applications have been analyzed is Constitutional Court and Supreme Courts entrusted in protecting of fundamental rights. Individual application is a secondary-quality and an extraordinary legal remedy. Constitutional Court does not consider whether or not Trial Court has applied the rules correctly or evaluated the cases and evidences correctly as distinct from discrimination and appeal steps. Area of investigation of Constitutional Court plays a role in case that the general courts have violated a fundamental right as a result of misapplying a rule. Individual application does not cause enforcement of law applied out of countenance, enforcement of court decision or execution of administrative decision to be stopped. However, in the event that the



required rules and qualified majority have been provided, Constitutional court can stop the transaction applied out of countenance (Kılınç, 2008: 26-27).

In our day that protecting the human rights and democracy have come into prominence national and supranational level and the person has been accepted as basic value, Constitutional Court is the most efficient institutions at the phase of protecting of human rights at high level. Legal remedy of individual application for the individuals in most countries has actuated the protective role of Constitutional Court against the violations of right and liberty (Kurnaz, 2006: 116).

Even though application shape of individual application varies from country to country, it is applied on the countries such as Federal Republic of Germany, Russia, Hungary, Spain, Ukraine, Poland, Belgium and Chile (Kılıç, 2009). We can see that the scientists supporting to create individual application procedure have generally taken the system of Federal Republic of Germany in Turkey since the individual application regulated in the system of Federal Republic of Germany can be made against all legislative, executive and jurisdictional transactions and thereby appears as the most comprehensive individual application method. Differently form the system of “constitutional complaint” of Federal Republic of Germany, there is no directly individual application against legislative transactions and regulatory administrative transactions in Turkish Individual Application system. The experience that Constitutional Court of Federal Republic of Germany has about individual application institution has resulted that it should be accepted as one of competent authorities managing this institution by the least troubles in our day (Kılınç, 2008: 21). It is seen that the authors following the doctrine of German Constitution in doctrine have preferred the term “constitution complaint” instead of individual “application procedure” to Constitutional Court (Özbudun, 1993: 350; Kaboğlu, 2000: 73-74; Kılınç, 2008: 20; Aliyev, 2010: 10).

B- ADMISSIBILITY CRITERIA OF INDIVIDUAL APPLICATION

The Law on Establishment and Rules of Procedures of the Constitutional Court numbered 6216 published and entered into force in Official Gazette dated 3 April 2011 and procedures and principles relating to individual application of Constitution Article 148/V were prepared. The section relating to the topic added to the article 148 of Constitution says as follows: anyone who thinks that his/her constitutional rights set forth in the European Convention on Human



Rights have been infringed by a public authority will have a right to apply to the Constitutional Court. It follows from this that the right alleged to be violated should be included in both Constitution and European Convention of Human Rights in order to apply to Constitutional Court.

The right to apply to Constitutional Court is a way that provides collateral in terms of individual rights and liberties, and accepted by many governments. On the other hand, by establishing of a new internal judicial remedy, the number of applications that have been made by Turkey to European Court of Human Rights (ECHR) may substantially be able to be decreased. The applications made intensely to ECHR against Turkey each year have been put forward as a reason in order to bestow individual application to Constitutional Court in justification of the article of constitutional proposal. The applications will have been provided to be decreased by vesting of individual application and resolving the applications made to ECHR in internal authorities and an important step will have been taken for protecting of human rights and liberties in the manner of principle of the state of law (Göztepe, 2011: 14). 48th article of The Law on Establishment and Rules of Procedures of the Constitutional Court numbered 6216 and adjudicatory procedures carries the title of Admissibility Criteria and Analysis of Individual Application. As per the above-mentioned article, in order to decide admissibility of individual application, it should fulfill the terms set forth in the articles of 45 and 47.

In the next section of the study, admissibility criteria of individual application will be discussed and tried to be analyzed with regard to party competence, lawsuit competence; subject of application, legal interest and exhausting of other ordinary legal means and petition and duration.

1. PARTY COMPETENCE

It is stated in the article 148 of Constitution that “Everyone” fulfilling the other conditions will be able to file an individual application. Through this provision, it is possible that not only citizens and foreigners but also private law legal persons can use the individual application remedy relating to fundamental rights such as equality, liberty of labor and property right complying with their fields of activity. However, the foreigners will not be able to file individual application on consequence of violation of rights given only to the citizens. Besides, for example; due to violation of rights to vote and



stand for election or to found political parties, they will not be able to apply to Constitutional Court (Kılınç, 2008: 30; Kayhan, 20014 :102).

This provision is related to individual application competence. The competence to file individual application is the competence that the individual itself or a representative to be authorized by him can file an individual application and follow it. Meanwhile, individual application competence is used as correspondence of “party competence” in general court law. In case of violation of a right, right to sue this violation is belong to that right owner as a rule. Party competence, due to violation of right, is a concept relating to whoever can file an individual application. Individual application competence is a competence that the individual can file an individual application and the applicable law of Constitution has not imposed any limitation in terms of individual application capability.

In this regard, real persons, private law legal persons and political parties will be able to file individual application (Aydm, 2011: 151).

2. LAWSUIT COMPETENCE

All real and legal persons having a competence to dispose civil rights have not only an individual application competence but also lawsuit competence. So, it is possible that the individuals themselves who think that the fundamental right has been violated or through their legal representatives can file a suit. However, statutory bodies cannot make individual application, but it is not possible that the individuals cannot make individual application relating to the rights given to Turkish citizens. In conclusion, private law legal persons can make individual application for violation of the rights belonging to the legal entity.

3. SUBJECT OF APPLICATION

The individuals whose rights specified in Constitution have been violated can file an individual application. It has been resolved that individuals may file an individual application to the Constitutional Court upon violation of any of their fundamental rights and freedoms as protected by the European Convention on Human Rights (ECHR) and guaranteed under the Constitution. Therefore, It is required that the right to be violated has been regulating both in Constitution and European Convention of Human Rights (Kılınç, 2008: 48). The Constitution again has resolved that this violation should be established in care of public power in the same provision. All we understand from this public violation is legal regulations,



administrative activities and court decisions. It is required that this violation has directly affected the applicant. In addition, it is condition that the right should be personally and up-to-date.

4. EXHAUSTING OF OTHER ORDINARY LEGAL REMEDIES

Before filing an individual application, it should be applied to all remedies either administrative or judicial and achieved no result. Constitution says “ordinary legal remedies should be exhausted in order to file an individual application.” Otherwise, the application will not be accepted. Individual application is the last remedy given to the individuals to eliminate the violations of fundamental rights that have not been resolved by another means (Tülen, 2004).

The applicant should firstly exhaust the other application procedures and use the advantages to eliminate and solve the violation of fundamental right in hierarchical order of general courts. As long as the final decision is appeared, it cannot file this legal remedy.

5. THE CONDITION OF LEGAL INTEREST

The condition of legal interest is indeed a concept of procedural law. If a violation of right is litigated, it is required that the violation of right, that is, the legal interest, should be still continuing, a legal interest should be existed in litigation of the applicant. In order to avoid the violation of right, if another legal remedy is possible, it is not necessarily to file an individual application to Constitutional Court (for example another judicial body) (Kılınç, 2008: 35; Sabuncu-Arnwine, 2004: 240).

The individual application can be made by the individuals whose current and personal right have directly been affected, only due to transaction, action or neglect asserted to cause violation. The criteria of a “personal, direct and current” remedy that the supreme courts of the countries such as Germany and Spain have improved by their judicial decisions has been included in Law numbered 6216 as a rule. The presence of legal interest is considered not on the instant but date of the judgment rendered by Constitutional Court. The public interest in determination of contradiction against Constitution in public transaction cannot be adequately accepted in this respect. If the transaction relating to the application by complainant is removed later, the presence of a current and direct remedy that the statue has searched will not be in question.



6. PETITION AND REASONED REPORT

The individual applications to Constitutional Court should be filed by petition; that is, in written, in our country as in all countries. The applications can directly be made to Constitutional Court in accordance with the requirements specified applications law and to be indicated internal regulations, and submitted to Constitutional Court through other courts or by representatives in foreign countries. The reason should be stated while filing an individual application.

7. TERM

The individual application should be filed from the date of exhausted application remedies for the transaction or decisions set forth obligatory administrative or judicial application remedy in Laws; if the application remedy is not provided, within thirty days from the date of violation (Art. 47). If the subject of application is required to be announced for public transaction, these terms will start from that date or if pronounced, from pronouncing date. If notification or pronouncement is not at stake, it starts from the date of this situation learned by the applicant. (Kılınç, 2008: 34)

Due to valid excuse, if an application has not been filed, it is possible to file an application within fifteen days from the date of lifting of excuse and by the evidences documenting his excuse. In this case, the court firstly analyzes whether the excuse of applicant is valid or not, then accepts or rejects the request.

C- ADMISSIBILITY ANALYSIS OF INDIVIDUAL APPLICATION PROCEDURE TO CONSTITUTIONAL COURT

Admissibility analysis will be executed by the commissions. The issues relating to whether there are firstly application conditions in terms of person, subject and method will be analyzed by the commissions. As a result of this, the commissions will hand down admissibility or in admissibility decision.

Provided that application petition has not fulfilled the required formal conditions and these deficiencies are not overcome in an extension of time granted by the court, inadmissibility decision about the application will be settled on.

However, the applications that have not a vital importance in terms of applying and interpreting of Constitution or determining the scope and limitation of fundamental rights and that the applicant have not been incurred loss and the applications without clearly base may be rendered a decision for their inadmissibility. (The Law on



Establishment and Rules of Procedures of the Constitutional Court numbered 6216 Article 48/II.)

By this provision including in The Law on Establishment and Rules of Procedures of the Constitutional Court numbered 6216; it will prompt the applicant to be attentive to provide enough evidence in the subject of constitutional importance of the decision to be given in his petition and to justify his claims.

Especially in the applications rendered against to the court, it will show the reasons that the decision subject to application not only has violated the certain judicial norm but constitutional right guaranteed in European Convention of Human Rights.

CONCLUSION

Individual application to Constitutional Court has been accepted in many civil countries with the purpose of protecting fundamental right in our day. This remedy will provide the principle of state of law to be executed more terrifically and the individuals to be protected against the violations of fundamental rights, which are one of the most important issues of state of law, infringed by state bodies. While ECHR is researching whether internal legal remedies have been exhausted or not, it considers that if there is an individual application establishment in the related country and regards this means as an effective legal remedy in eliminating the violation of rights. Therefore, it is possible that a substantial part of the complainants who have alleged to be imposed to the violations of the rights will be able to be satisfied in the individual application phase; that is, before applying to EHCR. It cannot be said that the admissibility criteria mentioned above is not certain due to not enacting of a law specified in our study, but general theory of Constitutional Law provides us with those data. Even only acceptance of individual application is a step in the field of human rights in Turkey.

References

- Aliyev, Cabir (2010), *Anayasa Şikayeti*, Beta Yayınları, İstanbul.
- Aydın, Didem (2011), “Türk Anayasa Yargısında Yeni Bir Mekanizma: Anayasa Mahkemesi’ne Bireysel Başvuru”, *Gazi Üniversitesi Hukuk Fakültesi Dergisi* C. XV, Ankara, s.121-174.
- Fendoğlu, Tahsin Hasan (2011), “Anayasa Mahkemesine Bireysel Başvuru”, <http://www.sde.org.tr/kose-yazilari/267/-mahkemesine-bireysel-basvuru.aspx>, (2015 April 20) .



- Göztepe, Ece (1998), “*Anayasa Şikayeti*”, AÜHF Yayınları, Ankara, Göztepe,Ece (2011), “Türkiye’de Anayasa Mahkemesi’ne Bireysel Başvuru Hakkının (Anayasa Şikayeti) 6216 Sayılı Kanun Kapsamında Değerlendirilmesi”, *TBB Dergisi*, S. 95, s.14 vd.
- Kaboğlu, Ö.İbrahim, “*Anayasa Yargısı*”, Ankara 2000.
- Kayhan, Fahrettin, Anayasa Mahkemesine Bireysel Başvuru Hakkı", *Bursa Barosu Dergisi*, January- February- March ,İssue:90.
- Kılıç, Haşim,(2009). Anayasa Mahkemesi Başkanı Haşim Kılıç'ın 47. Kuruluş Günü Açılış Konuşması,
[http://www.anayasa.gov.tr/index.php?l=haber&id=1&lang,\(2015 May 5\)](http://www.anayasa.gov.tr/index.php?l=haber&id=1&lang,(2015 May 5)). Kılınç, Bahadır, (2008), “*Karşılaştırmalı Anayasa Yargısında Bireysel Başvuru(Anayasa Şikayeti)Kurumu ve Türkiye Açısından Uygulanabilirliği*”, Anayasa Yargısı 25, Anayasa Mahkemesi Yayınları, Ankara.
- Kurnaz, A.Haluk (2006), “Üye Seçimi ve Bireysel Başvuru ile Bazı Yetki ve Görevleri Açısından Anayasa Mahkemesi”, *Yasama Dergisi*, İ.2, s.116 vd.
- Özbudun, Ergun (1993), “*Türk Anayasa Hukuku*”, Ankara.
- Sabuncu, M.Yavuz, Arnwine, Selin Esen (2004), “ *Türkiye İçin Anayasa Şikayeti Modeli: Türkiye’de Bireysel Başvuru Yolu*”, Anayasa Yargısı 21, Anayasa Mahkemesi Yayınları, Ankara.
- Sağlam, Musa (2005), “Bireylerin Anayasa Mahkemesi’ne Başvurusu(bir reform önerisi)”, *TBB Dergisi*, issue: 60, s.144 vd.
- Sağlam, Musa (2008), “Anayasa Mahkemesinin “Anayasal Konumu” Üzerine Bir Değerlendirme”, *Niğde Üniversitesi İktisadi ve İdari Bilimler Fakültesi Dergisi*, December, C: 1,issue: 2.
- Tülen, Hikmet, (2004). “Anayasa Mahkemesinin Yeniden Yapılandırılmasına İlişkin Anayasa Değişikliği Taslağı Üzerine Açıklamalar ve Birkaç Öneri”, *e-akademi Hukuk, Ekonomi ve Siyasal Bilimler Aylık İnternet Dergisi*, İ.26, www.e-akademi.org/makaleler/htulen-1.html, (2015 May 15).