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Comparing Constitutional Adjudication

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The "dialogue of judges" and the mutual influence of constitutional concepts in Europe : How the interpretation of national fundamental rights is influenced by the fundamental rights of the ECHR and the EC general principles as well as by a horizontal exchange of ideas of national constitutional courts.

Turkey

Dialogue of Judges - The impact of the European Court of Human Rights Judgements on Turkish Constitutional Court's Case-Law

Prepared by: Murat Arslan

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Murat ARSLAN*

Turkey is a party to the European Convention on Human Rights (ECHR) since 1954 and the Convention is a part of Turkish domestic law. According to Article 90 of the Constitution: «*International agreements duly put into effect carry the force of law. No appeal to the Constitutional Court can be made with regard to these agreements, on the ground that they are unconstitutional*». Turkey adopted monist system with this provision and international treaties are directly applicable in Turkish law.

In 2004 the Constitution was amended and the following sentence has been added to the last paragraph of Article 90: «*In the case of a conflict between the laws and international agreements duly put into effect in the field of fundamental rights and freedoms due to differences in provisions on the same matter, the provisions of the international agreements shall prevail*». The ECHR, by means of this provision, has been granted a place over ordinary laws. Thus, it is obvious that international agreements on human rights will find a broader field of implementation in Turkish law. The conflicts between domestic law and international agreements used to be solved by the rules of *lex posterior* and *lex specialis* before this amendment. Since the ECHR entered into the force in 1954, generally new law was applicable. After the amendment in 2004, the ECHR became applicable if there is a conflict between domestic law and the Convention.

The amendment granted a place for the international agreements in the field of human rights over domestic laws in the hierarchy of norms. But this does not mean that Turkish Constitutional Court can review compatibility of laws with the international

* Judge Rapporteur, Constitutional Court of Turkey.

agreements related to human rights. The competence of the Court is determined by the Constitution and the Law (Law No: 2949) regarding with review of compatibility of laws with the Constitution. Nevertheless, while assessing compatibility of a law with the Constitution, the Court sometimes makes reference to the Convention and judgements of the European Court of Human Rights as a subsidiary source of interpretation.

The Turkish Constitutional Court has so far made reference to international agreements in 75 decisions, 49 of those references were to the ECHR, and about ten references to the judgements of the ECtHR in 47 years since its establishment in 1962. But these figures show only references made in the constitutionality review cases and they do not include cases related to the dissolution of political parties. The Court has made references to the judgements of the ECtHR in almost every dissolution case since late eighties.

It can be said that judgements of the ECtHR has an indirect effect on the judgements of the Constitutional Court. The Constitutional Court made much more reference to the ECHR than the judgements of the ECtHR. The Court used the ECHR as a supportive criterion norm in some judgements. References to the judgements of the ECtHR are very rare and in some of those references, the Constitutional Court utilised the judgement of the ECtHR in order to justify restrictions.

Four examples of the references made by the Turkish Constitutional Court to the judgements of the ECtHR are given below.

a) In a judgement about *de facto* expropriation the Court referred to the judgements of the ECtHR.[1]

«… On the other hand, in Article 1 of Protocol 1 of the European Convention on Human Rights it is provided that "…". Likewise, under this rule, the European Court of Human Rights in different judgements found that the de facto expropriation violates the

[1] Constitutional Court, 10.4.2003, E.2002/112, K.2003/33: Official Gazette: 4.11.2003 – 25279.

right to property. In the judgements of Papamichalopoulos-Greece ((No: 14556/89) Carbonara&Venture-Italy (No: 24638/94) and Belvedere Alberghiera S.R.L.-İtaly (No: 31524/96 the European Court found that the de facto expropriation by Italian municipalities and by Greece Navy violated the right to property [...]»

b) In a judgement rendered by the Turkish Constitutional Court, it is stated that[2]:

«The right to judicial remedy in Article 36 of the Constitution has a characteristic of a fundamental right and it is one of the most efficient guarantees of the enjoyment of other fundamental rights and freedoms. The most efficient and guaranteed way of defending oneself is to exercise one's rights to go before the courts. To ensure individuals the right to have remedy before the courts constitutes a precondition of a fair trial.

Moreover, in the judgements of the European Court of Human Rights on a fair trial it was found that fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings (Golder v. United Kingdom, 21.02.1975, A18, p. 12, paragraph 35).

The challenged provision requires taxpayers to pay half of the imposed participation fees charged under the Law on Municipal Revenues, 2464, to the municipality in question before bringing an action. It is understood that the reasoning of the challenged provision is that municipalities must be able to collect the fees as soon as possible in order to accomplish their projects without delay, to minimise the number of cases and to alleviate the burden on the courts. However, according to Article 13 of the Constitution, fundamental rights and freedoms may only be restricted by law and for the reasons mentioned in the relevant articles without infringing upon their essence. In Article 36 of the Constitution, the freedom to claim rights is regulated but no reasons of restriction are mentioned in that article. For these reasons, the last paragraph of

[2] Constitutional Court, 28.3.2002, E.2001/5, K.2002/42: Official Gazette: 5.9.2002 – 24867.

Article 89(a) of the Law on Municipal Revenues is contrary to the Constitution. It should be annulled».

c) In another judgement of the Constitutional Court in which the ECtHR was referred in connection with the right to property, it is stated that[3]:

«*… It is clear that the uncertainness about existing forms of usage of the spots allocated for public services in city planning under Article 13 shall have a limitation for an indefinite period of time on the right to possess.*

The limitation on the right does not contradict with the requirements of a democratic social order when the public interest about the implementation of city planning is taken into account. However, the uncertainness caused by the objected provision has a characteristic that it touches on the essence of the right to possess and exceeds the limitation and thus it damages the balance between the individual and public interest.

The European Court of Human Rights in the Sporrong and Lönnroth judgement dated 23.9.1981 found that the adapting a long period of time for the permission of expropriation and prohibition to construct spoiled the balance between social and individual interest.

For those reasons, the objected provision is in conflict with Articles 13 and 35 of the Constitution. It should be annulled».

d) Moreover, the Constitutional Court in one of its judgements rendered in 1992 referred to the ECtHR's judgement[4].

«*Indeed, it is the basic principle that the right to fair trial should be used free from every kind of effects. Under this principle, the parties must be able to defend themselves freely, fearlessly and without any worry. … Constitutional provision*

[3] Constitutional Court, 29.12.1999, E.1999/33, K.1999/51: Official Gazette: 29.6.2000 – 24094.

[4] Constitutional Court, 16.6.1992, E.1992/8, K.1992/39: Official Gazette: 6.10.1992 – 21367.

"through lawful means and procedures" may only be achieved on that way. It is not possible to reconcile a situation that makes defenders and claimers worry and hesitate and thus make them refrain from expressing themselves with the immunity of the claim and defence.

The right to defence guaranteed by modern criminal procedures is based on the presumption of innocence.

…

When the objected provision of Article 12 of the Law no 3005 is taken into account within this framework, it is concluded that the limitation of three days on the right to defence is contrary to the principle "the requirements of the democratic order of the society" as provided in Article 13/2 of the Constitution. Moreover, under Article 6/3-b of the ECHR the accused has the right "to have time and facilities for the preparation of his defence". Likewise, the European Court of Human Rights has concluded that "what should be adequate time and facilities depends on the nature of the case and the circumstances surrounding it" (Golder, Silver, Campbell and Fell v. United Kingdom; Can v. Australia). If adequate time is not given or the case is concluded unnecessarily in a very short time, it will be clear that it has no value to put all the evidence before the defence».

There are some other references to the judgements of the ECtHR by the Turkish Constitutional Court. But these examples seem to suffice to give a general picture of references to the ECtHR case-law.

There are other indirect effects of the ECtHR case-law on the Turkish Constitutional Court. For example, it is observed that the first instance courts refer to the judgements of the ECtHR, more and more especially in recent years, when they apply to the Constitutional Court for concrete review. There are also some legal developments enforcing ordinary judges to be aware of the case-law of the ECtHR. Firstly, new laws making the judgements of the ECtHR as one of the reasons for retrial, both in ordinary and administrative courts have recently been introduced.

Secondly, as pointed out above, the Constitutional amendment of 2004, provided that international treaties duly put into effect in the field of fundamental rights and freedoms are superior to the ordinary laws (Article 90/5 of the Constitution). Therefore, the first instance courts of the ordinary, the administrative and the military justice and their appeal courts are under obligation to apply the mentioned Constitutional rule. The courts when dealing with this provision shall examine whether there is a contradiction between ordinary laws and international agreements and if they find contradictions between them, then they shall apply the provisions of the international agreements. However, when the text of the Convention is taken alone, it is difficult to determine whether the provisions of the Convention are in conflict with the ordinary laws or not. Because, the provisions of the Convention have a very abstract nature when compared with the ordinary laws. So, it is almost impossible for the courts to apply the Article 90/5 of the Constitution without taking into account the judgements of the European Court. So, the effect of the ECtHR's case-law on the Turkish judicial system has increased significantly in recent years.

Regarding with the horizontal dialogue between national Constitutional Courts, it is difficult to find a direct reference to the decisions of other national constitutional courts in Turkish Constitutional Court's decisions. But some indirect effects can be observed. Mostly, comparative law and comparative case-law are examined in the preparation of the case files and in the reports and Court panel considers such knowledge when reaching a decision. But there has been no reference to the decisions of national courts in the constitutionality review up to now. Nevertheless, when deciding closure of Socialist Turkey Party, the Constitutional Court referred to the judgement of the Federal Constitutional Court of Germany about dissolution of German Communist Party and the judgement of the Constitutional Council of the French Republic about constitutionality of the Law giving special status to Korsika.

But some tacit influences can be observed. For example, some concepts like "proportionality" have been imported into the Turkish law by the Constitutional Court without mentioning the source of the concept.

There are some occasions on which the dialogue of judges are formalised. For example, on the occasion of the anniversaries of the establishment of the Constitutional Court, symposiums are organised on 25th of April every year. In every five year these celebrations are conducted internationally and an international conference takes place. Presidents and judges of other Constitutional Courts are invited to these events. For example, in 2007 we celebrated our 45th anniversary and judges from almost 40 different countries and from ECtHR and ECJ participated that occasion. The Secretary General of the Venice Commission also participated to this celebration.

A delegation composed of judges and rapporteurs visits other Constitutional Courts and equivalent bodies every year to have information about the powers, composition and structure of other courts.

The Turkish Constitutional Court is a member of the Conference of European Constitutional Courts, also member of the Venice Commission.

Recently, the Turkish Constitutional Court has signed "Memoranda of Understanding" with a number of constitutional courts, aiming to deepen the cooperation between the Turkish Constitutional Court and other constitutional courts.

Despite these developments, there are still some problems before dialogue of judges. One of these problems is the lack of knowledge of foreign languages of judges. Only few of judges can speak some foreign languages, therefore they cannot follow case-law of other courts. Secondly, comparative law teaching in Turkey has not developed very well. Only few law schools have comparative law departments and there are very few experts on comparative law.

To sum up, despite some problems, there are some opportunities for dialogue of judges with national and supranational courts and in recent years such opportunities have been started to be utilised by Turkish judges.

Relevant Article of the Constitution

D. Ratification of International Treaties

Article 90.

The ratification of treaties concluded with foreign states and international organisations on behalf of the Republic of Turkey, shall be subject to adoption by the Turkish Grand National Assembly by a law approving the ratification.

Agreements regulating economic, commercial, and technical relations, and covering a period of no more than one year, may be put into effect through promulgation, provided they do not entail any financial commitment by the state, and provided they do not infringe upon the status of individuals or upon the property rights of Turkish citizens abroad. In such cases, these agreements must be brought to the knowledge of the Turkish Grand National Assembly within two months of their promulgation.

Agreements in connection with the implementation of an international treaty, and economic, commercial, technical, or administrative agreements which are concluded depending on an authorisation given by law shall not require approval by the Turkish Grand National Assembly. However, agreements concluded under the provision of this paragraph and affecting the economic, or commercial relations and private rights of individuals shall not be put into effect unless promulgated.

Agreements resulting in amendments to Turkish laws shall be subject to the provisions of the first paragraph.

International agreements duly put into effect carry the force of law. No appeal to the Constitutional Court can be made with regard to these agreements, on the ground that they are unconstitutional. In case of a conflict between the laws and international agreements duly put into effect in the field of fundamental rights and freedoms due to different in provisions on the same matter, the provisions of the international agreements shall prevail.