4th CONGRESS OF THE WORLD CONFERENCE ON CONSTITUTIONAL JUSTICE

THE RULE OF LAW AND CONSTITUTIONAL JUSTICE IN THE MODERN WORLD

I. The different Concepts of the Rule of Law

1. What are the relevant constitutional and important other texts, which establish the principle of the Rule of Law in the legal system of your country?

In Turkey "the rule of law" is regulated under the Constitution, which is the highest norm, and is recognized as a basic principle prevailing over the whole legal system.

This principle is cited in Article 2 of the Constitution among the characteristics of the Republic: *"**The Republic of Turkey is** a democratic, secular and social state **governed by rule of law**, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the preamble"*

Article 11 of the Constitution regulates the supremacy and binding characteristics of the Constitution and sets forth the obligation to abide by the Constitution and, therefore, the principle of the rule of law by all persons and at all levels: *"The provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, and administrative authorities and other institutions and individuals. Laws shall not be contrary to the Constitution. "*

The Constitution imposes a positive obligation on the State to realize the rule of law: *"The fundamental aims and duties of the State are … **to strive for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state***

***governed by rule of law**; and to provide the conditions required for the development of the individual's material and spiritual existence."* (Art. 5)

Besides, the President of the Republic (Art. 103) and the Members of the Grand National Assembly of Turkey (Art. 81) are required, on assuming office, to take oath *"…to remain loyal to the supremacy of law…"*

In addition to these Articles, there are specific provisions in the Constitution guaranteeing various aspects of the rule of law. The answers to the questions below will refer to such constitutional provisions as the context requires to do so.

2. What are the interpretations of the concept of the rule of law in your country? (e.g. formal, substantive)

The decisions of the Constitutional Court (TCC, the Court) makes no explicit distinctions between different meanings of the concept of rule of law. However, the Court does not adopt a formalist understanding of the concept of rule of law but a substantive understanding of the rule of law, i.e. *the law must have a certain substantive contents*. The Court defines the rule of law with a certain substantive content.

Accordingly, in the Court's opinion, "*As defined in Article 2 of the Constitution, state governed by rule of law abides by the law in all its acts and actions, respects the human rights, protects and strengthens these rights and freedoms, establishes and maintains a fair legal system in all fields of life, refrains from unconstitutional circumstances and attitudes, assumes itself bound by the constitution and the principle of the rule of law and is open to judicial review"* (AYM, E.2016/16 K.2016/16, 5/5/2016, § 5).

Another decision of the Court emphasizes the substantive content of the rule of law more explicitly and defines it as follows: "*Article 2 of the Constitution cites the "rule of law" among the basic characteristics of the Republic of Turkey. As stated in various decisions of the Constitutional Court, state governed by rule of law recognizes the "compliance with the laws" as a validation rule to all its acts and actions, aims to establish and maintain a fair legal system in all fields of life, makes the law sovereign to all state organs, refrains from unconstitutional circumstances and attitudes, respects the human rights and protects and further develops these rights and freedoms, pays*

due diligence to comply with the Constitution and superior rules of law and does not abandon the understanding that basic legal principles and the Constitution precedes the provisions of law which are open to judicial review and that such basic legal principles and the Constitution cannot be distorted even by the legislative organ itself. The State's compliance with laws in its actions requires respect to acquired rights. As every final judgment (res judicata) may lead to an acquired right, respect thereto means respect to the acquired right. A state governed by rule of law acts responsibly in protecting the acquired rights and, thereby, proves its commitment to laws by displaying such exemplary attitudes" (AYM, E.1988/36 K.1989/24, 2/6/1989).

3. In which main fields does your Court ensure the respect for the Rule of Law (e.g. criminal law, electoral law, etc.).

The Constitutional Court ensures that the principle of the rule of law is realized in all fields of law within the context of "constitutionalization of the law". With the practice of individual application remedy, introduced through the constitutional referendum in 12 September 2010 and actually implemented since 23 September 2012, the State's commitment to law has been realized on a larger scale by interpreting the Constitution on basis of fundamental rights and freedoms. The individual application remedy facilitates realization of fundamental rights and freedoms in interpersonal relations as well in conjunction with the positive obligations of the State.

4. Is there case-law on the content and on core elements of the principle of the Rule of Law?

In the Court's recent decisions where it reviewed the unconstitutionality of a legal norm with regard to the rule of law, the Constitutional Court has used a classic template definition and such template includes certain aspects of the principle of the rule of law.

"Article 2 of the Constitution states that the Republic of Turkey is a state governed by rule of law. A state governed by the rule of law abides by the law in all its acts and actions, based on human rights, protects and strengthens these rights and freedoms, establishes and maintains a fair legal system in all fields of life, refrains from unconstitutional circumstances and attitudes, assumes itself

bound by the supreme rules of the law and is open to judicial review." (AYM, E.2015/18 K.2016/12, 10/2/2016, § 9).

This paragraph explains certain principles of concept of the rule of law as recognized by the Court: *protection of human rights*, *judicial review*, *the state's commitment to law*, *being bound by the supreme rules of the law* etc.

In its other decisions, the Court has expanded the elements in the definition of the rule of law depending on the contents of the norm subject to review and explained certain other elements. These elements are as follows:

Independence of the courts and legal guaranty of judges: "*One of the key elements of the principle of the rule of law is that the judicial power is exercised by independent courts. … "legal guaranty of judges and prosecutors", which is a manifestation of the principle of judicial independence, falls within this scope as well."* (AYM, E.2015/18 K.2016/12, 10/2/2016, § 10).

The binding nature and execution of court judgments: "*As the protection of individuals' fundamental rights and freedoms is the basis of a state governed by the rule of law, the individual must be provided with the guarantees to ensure efficient legal remedies available to them … The binding nature of the court judgments and their execution without any delay are also among the minimum requirements of the rule of law*" (AYM E.2014/92 K.2016/6 28/1/2016)

Right to legal remedies: *"Right to legal remedies is one of the sine qua non elements of the rule of law and it must be guaranteed for all individuals to the broadest extent possible. On the other hand, if the legal acts and norms are under constant threat of being sued, then this also contradict with the principles of legal consistency and certainty which are elements of the rule of law as well. Therefore a reasonable balance must be struck between the right to legal remedies and the principles of legal consistency and security*" (AYM, E.2014/92 K.2016/6, 8/1/2016, § 15)

Enactment of laws for public interest and their contents of general, objective and fair norms: "*That the laws serve for the public interests, contain general, objective and fair norms and observe the equity criteria are among the requisites of being a state governed by the rule of law. Therefore, the legislature must enjoy its discretionary power in legislative activities by taking into*

account the criteria of justice, equity and public interest and within the constitutional boundaries" (AYM, E.2013/69 K.2014/118, 3/7/2014).

Judicial review of the administrative acts and actions: *"The principle of the rule of law requires that recourse to judicial review shall be available against all actions and acts of administration. The administration must enforce the judicial decisions. The administration's non-execution or late execution of judicial decisions is a service defect which requires its conviction to pay indemnification and it also constitutes a crime of negligence or misconduct in office"* (AYM, E.1992/13 K.1992/50, 21/10/1992).

Respect to the acquired rights: "… Respect to the acquired rights is one of the requisites of the principle of the rule of law. Respect to the acquired rights is an outcome of the principle of legal security. Acquired right is a right that arises from an individual's status, is already accrued, has become final with respect to the individual and gained the quality of a personal receivable*"* (AYM, E.2014/87 K.2015/112, 8/12/2015, § 64)

The principle of legal security and certainty: "*… One of the prerequisites of the principle of the rule of law is to ensure the legal security of individuals. The principle of legal security, which is an obligation to be fulfilled by a state governed by the rule of law, requires that the legal norms are foreseeable, that the individuals have full trust in the State in all their acts and actions and that the State refrains, in its legal regulations, from attitudes and methods which may injure such sense of trust.*

Another prerequisite of the rule of law is the principle of certainty. Principle of certainty represents not only the certainty of laws but also the legal certainty in its entirety. The legal certainty may be ensured through the case-law of the courts and the regulatory acts of the administrative provided that they are predicated on legislative regulations and meet such qualitative requirements as being accessible, intelligible and foreseeable. What really matters in the principle of legal certainty is that the outcome of applying a certain legal norm must be foreseeable in that legal order" (AYM E.2015/94 K.2016/27, 7/4/2016, § 16, 17)

The principle of natural judge*: "One of the sine qua non of the rule of law is the principle of natural judge. The previous decisions of the Constitutional Court defines the concept of natural judge*

as "the judicial authority with jurisdiction to try a case must be designated by law before the commitment of the crime or initiation of the case". In other words, the principle of natural judge prevents the establishment of judicial authorities after the arise of conflict or appointment of judges according to the parties of the case" (AYM E.2012/146 K.2013/93, 17/7/2013).

The principle of proportionality: *"… The legislature is bound by the principle of proportionality which is a requirement of the principle rule of law. This principle comprises of three sub-principles; as "sufficiency", "necessity" and "proportionality*." (AYM E.2016/6 K.2016/37, 5/5/2016, § 10).

The principle of equality: "As one of the basic functions of a state governed by the rule of law is to establish an equitable legal order on the basis of equality, it is self-evident that the principle of the rule of law cannot be realized without realizing equality before the law."(AYM, E.1998/58 K.1999/19, 27/5/1999).

General principles of law: *"… A state governed by the rule of law … refrains from unconstitutional circumstances and attitudes, assumes itself bound by the supreme rules of law, is open to judicial review and is conscious of the fact there are basic legal principles and the Constitution preceding over the provisions of law which must be abided by the legislature as well. In this context, the legislative organ is obliged to ensure not only the compliance of the provisions of law to the Constitution* ***but also the compliance of the Constitution with the universal principles of law as well****. The principle of equality, which is one of the basic principles of law, is included in Article 10 of the Constitution*" (AYM, E.1998/58 K.1999/19, 27/5/1999).

Principles of fairness and equity: *"… the fact that the provision of law subject to contention imposes an disproportionate and unreasonable administrative fine on the relevant persons contradicts with the principles of "fairness and equity" which are the requirements of the rule of law" (AYM, E.2015/109 K.2016/28, 7/4/2016, § 24 and 31)*

5. Has the concept of the Rule of Law changed over time in case-law in your country? If so, please describe these changes referring to examples.

Although definition of the principle of rule of law in the decisions of the TCC has been simplified and abbreviated in time, the principle did not undergo a significant change

with respect to its contents (see., the excerpts of the Court's judgments issued on different dates and provided under the answers to Question 2).

However, it must be noted here that *the elements which the concept is said to include explicitly* have expanded in time as well. For instance, the principles of fairness and equity, the principle of proportionality and execution of court judgments without any delay are explicitly declared in the Court's latter decisions among the elements of the rule of law (see., The decisions of the Court referred to in answering Question 4)

II. New Challenges to the Rule of Law

6. Are there major threats to the Rule of Law on the national level or have there been such threats in your country (e.g. economic crises)?

Like in other countries, the inflation of legal rules creates a problem with respect to the principle of certainty in Turkey as well. The individuals in all such mix of rules may not be able to fully foresee which rules shall apply to them and what consequences they may face. The Constitutional Court pointed out in part to this problem in one of its decisions.

The Court, in its decision no K.2012/2 dated 12/1/2012, reviewed the norm subject to contention with respect to its foreseeability and accessibility and noted that *"the text of a norm must be drafted to enable individuals – if need be, with appropriate legal advice – to foresee, to a certain degree of clarity and certainty, the legal sanctions or consequences which a given action may entail".* That legal norm must also be accessible as well.

The Court concluded in its relevant decision that, with respect to the actions described under Chapter 4 of the Law on Political Parties, "*it cannot be said that real persons can foresee clearly enough under which conditions would the actions stated in the relevant Article constitute a crime*" *"because these prohibitions addressing directly the legal personality of the political party have been transformed into regulations that enforce sanctions on persons by the contested provision "*.

The Court emphasizes that, although such norms may be considered foreseeable at the time they were enacted, with the amendments to the law on political parties it is no

longer the case: *"On the other hand, the field of political activity has expanded in time both through the constitutional and legal amendments and the practices. Accordingly, although the norm could be considered "foreseeable" at the time the Law including the relevant norm was enacted, it has been concluded that the norm lost its foreseeability in the result of the amendments to the Constitution and the laws which expanded the freedom of political activity and the practices parallel to such amendments*" (AYM, E.2011/62 K.2012/2, 12/1/2012).

From the point of the Constitutional Court, as Turkey is not member to a supranational organization as the European Union, the rule of law (especially within the context of legal security) is not subject to a serious threat in that sense. However, globalization (ever increasing impacts of the international companies in the economic sphere) may have negative effects on the rule of law.

Besides, the contraction of the State's means and effectiveness due to the economic crises and withdrawal of the public sector from the fields of public service to the favor of private sector may lead the rule of law lose grounds. It must be noted that, in certain areas, private sector can play as much pivotal role as the public sector on the fundamental rights and freedoms. In this scope, it must be mentioned briefly of a constitutional amendment which was made to increase the effectiveness of the private sector in the field of public services in the face of the former case-law of the Constitutional Court and the Council of State. With the amendment to Article 47 of the Constitution in 1999,"*it became possible that certain investments and services* –which were deemed public services previously and therefore had a much secure position – *could be performed by or delegated to persons or corporate bodies through private law contracts".* This expansion in favor of the private sector and the private law arises as a result of the attitude adopted by the Constitutional Court and the Council of State.

7. Have international developments had a repercussion on the interpretation of the Rule of Law in your country (e.g. migration, terrorism)?

In addition to being a transit country located on the international immigration routes, the political uncertainty and violence activities continuing for a long period of time in the

southern borders of the country exposes Turkey to an ever increasing and continuous influx of refugees and immigrants.

In order to provide better protection of the refugees' fundamental rights and freedoms in our country, the whole legislation have been reviewed and new protection mechanisms have been developed. In this context, Law No. 6458, dated 4/4/2013, on Foreigners and International Protection entered into force on 11/4/2014 and Directorate General of Migration Management was established with a view to ensure centralized implementation of policies and strategies related to migration and refugees by units and departments which have expertise in the area of migration and are open to international cooperation with close monitoring of relevant developments. The Constitutional Court provides a broad area of protection to this sensitive group of individuals through its judgments on individual applications related to interferences to the rights of the immigrants and refugees. If there is a threat against the right to life of immigrants of refugees or if they are under a serious threat of ill treatment when they are repatriated, the Court suspends their repatriation till the conclusion of the application by issuing interim measure decisions in the course of examining such individual examinations. (see., *Majid Mahmood Ahmed Aljamal*, Appl. No: 2015/15277, 11/9/2015). Of course, if the Court's examination on the merits of these applications reveals that repatriation of those applicants will lead to such results, then it cannot be possible to repatriate them under such circumstances.

Devastating and violence-inciting terror activities in a country constitute serious risks to the rule of law. The need to protect right to life and ensure the security may push the countries to take much severe measures than they would do under normal circumstances. This situation, of course, constitutes a risk to the rule of law. The Constitutional Court, acting as the guarantor of fundamental rights and freedoms, must adopt a more sensitive approach in establishing the balance between security and freedoms in such periods of time. The Court contributes to establishing the balance between security and freedoms in accordance with the requirements of the rule of law both by reviewing the constitutionality of legislative acts and examining the allegations of violation of rights in application of such norms to concrete cases.

In its decisions the Constitutional Court examines whether the legislature establishes a fair balance by taking into account the requirements of fighting against terrorism and the interference to the rights for that purpose. In one of its decisions, the Court examined the unconstitutionality of regulations related to personal data within the context of fighting against terrorism and established the following balancing: "*It is certain that Undersecretary of Public Order and Security, which develops strategies and policies on fighting against terrorism, needs certain information and documents including personal data so as to fulfill the duties assigned to it. The provision of law subject to contention of unconstitutionality explicitly states that such data and information shall be limited to fighting against terrorism. The said rule does not include a provision which contradicts the guarantees for the protection of personal data as stipulated under Article 20 of the Constitution. The penal clauses of Turkish Criminal Law on the protection of personal data apply to the Undersecretary's personnel as well. Therefore,* ***the authority given to Undersecretary of Public Order and Security to collect personal data and information solely for the purposes of fighting against terrorism cannot be considered a disproportionate interference to the right to demand protection of personal data under the scope of the privacy of personal life****. Besides, it is evident that the said regulation does not render the exercise of right to demand protection of personal data impossible or extremely difficult and, thereby, does not impair the very essence of the right.*" (AYM, E.2010/40 K.2012/8, 19/1/2012).

8. Are there difficulties in implementing judgments of regional / international courts (e.g. the African, the Inter-American Courts or the European) or international judicial bodies (notably the UN Human Rights Committee)? What is the nature of these difficulties?

Turkey is among the founding members of the Council of Europe and is a State party to the European Convention on Human Rights (ECHR). Turkey recognized the right to individual application to the European Court of Human Rights (ECtHR) in 1987 and the compulsory jurisdiction of the ECtHR in 1990. As it is known, the Committee of Ministers monitors the execution of judgments issued by the ECtHR. Although the ECtHR is an international court which issues its judgments many years after the actual occurrence of the concrete cases and some of its judgments may sometimes offend the State parties on certain sensitive issues, the international respectability and authority of the ECtHR in the field of

human rights ensure the execution of its decisions and judgments. Being a State party to the Convention, Turkey fulfills all its obligations.

In this respect, Turkey has prepared an action plan of the activities to be performed and the measures to be taken, including the legislative changes, on the basis of the decision of the ECtHR and such action plan was adopted by the Council of Ministers on 24 February 2014. The action plan is based on 14 main objectives. There are 46 targets determined to realize these objectives and the institutions and organizations responsible for achieving each target is determined as well. Besides, different time periods have been projected for achieving each objective and target.

Likewise, a national and independent human rights institution in accordance with the system and structure of the United Nations was established and came into operation in 2012 and was appointed as the National Prevention Mechanism by the resolution of the Council of Ministers dated 28 January 2014. The institution was named "Human Rights and Equality Institution of Turkey" with the law dated 20 April 2016 and the legal framework and the organizational structure related to prohibition of discrimination and equal treatment was reorganized in line with the main objective of increasing effectiveness of human rights protection mechanisms.

Besides, the mechanism of individual application to the Constitutional Court, which has been in practice since 23 September 2012, plays an important role in the national authorities' internalizing the case-law of the ECtHR. Although the individual applications are examined and concluded on the basis of the Constitution, the rights and freedoms which may be subject to individual application are determined taking into account the Convention and the case law of ECtHR as it says "*Everyone may apply to the Constitutional Court on the grounds that one of the 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.*"(Art. 148 of Constitution). In other words, as the application may be filed with regards to the rights protected under both the Constitution and the ECHR, - which is called '*common protection area'* doctrine – the case-law of the ECtHR is taken into account as well. Therefore, in making its decisions, the Constitutional Court meets the criteria of the

Convention and the ECtHR as minimum standards of human rights at European level and efforts to provide a stronger and guaranteed protection to such rights. Turkish Constitutional Court, despite its relatively short history of implementing the individual application remedy, has been promoted in many international meetings by the Council of Europe among the "best practices "of individual application and served as a model for other countries.

Being a constitutional organ whose decisions are binding upon all other domestic courts including the other high courts, the Constitutional Court makes references to other international human rights documents, including but not limited to the Convention, and the decisions of other international judicial authorities, thereby, contributes to adoption of them in the national legal order (e.g., for ILO agreements see., Yücel Başar, App. No.: 2013/7199, 25/3/2015; for International Covenant on Civil and Political Rights and Convention on Elimination of All Kinds of Discrimination Against Women see Sevim Akat Eşki, App. No.: 2013/2187, 19/12/2013, § 43; for United Nations Human Rights Committee and Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief see., *Tuğba Arslan* App. No.: 2014/256, 25/6/2014).

III. The Law and the State

9. Do the judgments of your Court have binding force on other courts? Do other / ordinary courts follow / respect the case-law of your Court in all cases? Are there conflicts between your Court and other (supreme) courts?

According to Article 153 of the Constitution, the decisions of the Constitutional Court *"…shall be binding on the legislative, executive, and judicial organs, on the administrative authorities, and on persons and corporate bodies*". This binding characteristics applies to the individual application decisions as well as the abstract and concrete norm reviews. Besides, Law no. 6216 on the Constitutional Court stipulates a special provision on the execution of individual application decisions: "*In case of a decision on violation, a judgment may be rendered on the actions to be taken in order to abolish the violation and its consequences… If the violation has been caused by a court decision, the file is forwarded to the concerned court in order to renew the judicial procedure so that the violation and its results will be cleared up… The court which is responsible for rendering the retrial procedure renders its decision on file to a possible extent as to*

remove the violation and its results which have been explained in the Constitutional Court's decision determining the violation. (Art. 50).

There are no specific problems in the execution of decisions given upon examination of abstract and concrete norm review (annulment action). As the decision of annulment removes the annulled norm out of legal order, that norm loses its validity and applicability automatically beginning from the date the Court's decision is published in the Official Gazette.

However, as the individual application is a relatively new remedy (started to receive applications on 23 September 2012) and most of the applications examined are related to judgments given by high courts, there arises certain problems naturally. Most of these problems stem from the hesitations and uncertainties on how these decisions are to be executed. Otherwise, the other high court are not reluctant to conduct necessary procedures in accordance with the decisions of the Constitutional Court. This problem is solved by organizing joint meetings with other high courts. On this matter, it must be mentioned about the Joint Project on Supporting Individual Application to the Constitutional Court carried out by the Council of Europe. This project aims to increase the capacity of judges, prosecutors and lawyers in Turkey on the mechanism of individual application to the Constitutional Court and the protection of fundamental rights. Within the scope of this project, the problems are discussed and solved by conducting joint meetings participated by judges and representatives of other high courts.

There has not been a strong resistance by other high courts against executing the decisions of the Constitutional Court. Furthermore, after the decision of the Constitutional Court, the Court of Cassation reviewed and even reversed its established case-law based on the explicitly provision of relevant law. The Constitutional Court, in its decision on application of Sevim Akat Eşki (App. No: 2013/2187, 19/12/2013), concluded that prohibiting married women from retaining their maiden names constitutes a violation of right and the Court of Cassation changed its case-law in line with this decision of the Constitutional Court. It must also be noted that some of the judgments by the courts of first instance were quashed by the Court of Cassation in line with the decisions of the Constitutional Court. Likewise,

after the decision of the Constitutional Court concluding that regulations on mandatory vaccination do not meet the legality criteria, the Court of Cassation adopted a similar approach in reviewing relevant cases. (Application of Halime Sare Aysal, App. No: 2013/1789, 11/11/2015)

10. Are judgments of all courts duly published?

In abstract or concrete norm review cases, the decisions on the merits of the applications are published in the Official Gazette and on the website of the Court. However, the decisions for rejection of application after the preliminary examination in such cases (decisions which terminate the application without carrying out examination the merits of the case) are published on the website of the Court only.

When it comes to individual application cases, all decisions of the Sections are published on the Constitutional Court's website. For the decisions by the Commissions on the admissibility of applications, only those of principal importance for admissibility are published on the website of the Court. A similar practice applies to decision on interim measure requests. On the other hand, the individual application decisions which are determined by the President of the relevant Section to bear pilot judgment characteristics or principal importance for exposing the case-law of the Court shall also be published in the Official Gazette.

11. Has your Court developed / contributed to standards for law-making?

The Constitutional Court, especially in its case law on the legal security, states that the norms must be foreseeable, drafted in a clear, simple and intelligible wording and include guarantees against arbitrariness: This principle is explained as follows: "*The legal regulations must be clear, intelligible and enforceable so as not to cause any hesitation on both the persons and the administration and they must have certain protective guarantees against the arbitrary practices of the public authorities. The principle of certainty is related to legal security and the individual must be able to understand from the law the legal sanctions or consequences which a given action or fact may entail and which authority of interference these regulations give to the administration. Only under these circumstances can the individuals foresee their responsibilities and*

regulate their actions accordingly. Legal security requires that the legal norms are foreseeable, that the individuals have full trust in the State in all their acts and actions and that the State refrains, in its legal regulations, from attitudes and methods which may injure such sense of trust" (*Application of Metin Bayyar and Halkın Kurtuluş Partisi*, App. No: 2014/15220, 4/6/2015, § 56; AYM, E.2009/51, K.2010/73, 20/5/2010; AYM, E.2009/21, K.2011/16, 13/1/2011; AYM, E.2010/69, K.2011/116, 7/7/2011; AYM, E.2011/18, K.2012/53, 11/4/2012). Accordingly, the legislature in its legislative acts must refrain from preferring a wording and expression of the regulations which may impede the foreseeability of the relevant rule and must deal with the relevant norm in a way consistent with the other rules of the legal order (see., explanations made on Question 6 within the framework of Court Judgment AYM, E.2011/62 K.2012/2, 12/1/2012).

In addition to being the assurance of the constitutional norms, the Constitutional Court is a guarantor of fundamental rights and freedoms. As a matter of fact, this second role is more important in Turkey as it is the case in all other countries implementing individual application remedy. In this regard, the principles on fundamental rights and freedoms must be paid due consideration in lawmaking procedures. Because, the legislative organ of a state governed by the rule of law must act with an understanding that *"…protects and promotes rights and freedoms… refrains from unconstitutional circumstances and attitudes, deems itself bound by the supreme rules of law,…"* (AYM, E.2015/18 K.2016/12, 10/2/2016, § 9).

12. Do you have case-law relating to the respect of the Rule of Law by private actors exercising public functions?

First of all, the Constitutional Court stated that complaints on the alleged degrading treatment incompatible with human dignity by the private security officers or third persons must be prosecuted effectively. In the Court's judgment on the case of *İrfan Yücesoy* (App. No: 2013/7625, 9/3/2016), the applicant complained that he was attacked by a group while he was attempting to talk to the mayor during an opening ceremony, that he was taken to a closed room and attacked by the people in that room (private security officers, high ranking municipal officials and representatives of political parties). The Court stated that it can be considered reasonable to move the applicant to a separate room for the purposes of protecting him from the outrage. However, it must be investigated whether the actions

against a passive waiting person constitute a crime, who the perpetrators are if it is a crime and whether those actions are proportionate or not. Accordingly, the Court concluded that the State's obligation prescribed in Article 17/3 of the Constitution to carry out an effective investigation was violated. Therefore, the applicant's access to judicial authorities is not sufficient and such investigations and prosecution must yield an effective result too. Here the Court protect the individuals' right of access to a court as well (for a judgment in a similar vein see., *Nebiye Merttürk and Neslihan Uyanık*, App. No.: 2013/6071, 14/4/2016).

Secondly, the Court ruled that the individual's physical integrity, which is one of the fundamental rights, must be protected against the private sector actors in the field of health services

"Within the scope of individuals' right to protect and develop their material and spiritual entity, the State must regulate the health services – regardless of being provided by public or private health institutions – so as to ensure taking of necessary measures to protect the patients' material and spiritual entity." (*Nail Artuç*, App. No.: 2013/2839, 3/4/2014, § 35). In this scope, in instances of death or impairing the physical integrity due to the negligence of health personnel, the relevant persons must be able to carry their claims before the competent courts and the courts must carry out a sufficient and effective examination to determine those responsible for such instances.

13. Are public officials accountable for their actions, both in law and in practice? Are there problems with the scope of immunity for some officials, e.g. by preventing an effective fight against corruption?

In Turkey, there are rules regulating the criminal and indemnity responsibilities of public officials for their acts and there are special regulations on their accountability as well. Law no. 4982 on Right to Information, Law no. 5018 on Public Finance Management and Control, Law no. 6328 on Ombudsman Institution, Council of Ethics for Public Officials established by Law no. 5176 etc. However, it must also be noted certain problems arise with respect to Law no 4483 on the Trial of Civil Servants and Other Public Officers and the application of this law.

The Constitutional Court, in its decisions and judgments, examines the material impediments before the accountability of public officers and may decide a violation of right on the grounds that accountability is not ensured. It can be said that such issues arise within the context of right to life and prohibition of torture and ill-treatment. Accordingly, the Constitutional Court requests the competent authorities to take certain steps to prevent that the public officers such acts go without any sanctions or to ensure that public trust to law is not impaired.

"If an individual has an arguable allegation that his right to life has been violated or he has been subjected to an unlawful treatment in violation of Article 17 of the Constitution, then Article 17 requires … conducting of an effective official investigation" (*Salih Akkuş*, App. No.: 2012/1017, 18/9/2013, § 30).

The Constitutional Court, in another decision, found a violation of right in a case where the investigation about the applicant's son found hanged on a tree in military zone was discontinued due to statue of limitations. Considering that the required due diligence and care was not shown in the course of investigation and the investigation was not carried out speedily, the Court concluded that discontinuing the case due to statue of limitations (which renders it impossible to reach a final conclusion) is a violation of Article 17. (*Yavuz Durmuş and other*, App. No.: 2013/6574, 16/12/2015).

The Constitutional Court stated that the public officers must bear the responsibility of their unlawful actions within the scope of the right to privacy (personal data) and freedom of communication: "*the public authorities have obligation to prevent disclosure of personal data and communication records and, if the privacy of communication is breached by publishing such records in the media, then the State has positive procedural obligation to conduct an effective investigation and ensure the punishment of those responsible*." (*Seyfi Oktay*, App. No.: 2013/6367, 10/12/2015, § 57)

IV. The Law and the Individual

14. Is there individual access to your Court (direct / indirect), against general acts / individual acts? Please briefly explain the modalities / procedures.

Turkey has adopted direct individual application remedy. As a rule, individual application can be filed against individual actions.

Individual application can be filed against the action of the public power alleged to have caused the violation. Such public power action to be applied against can be either a positive act or action or a negative action in the form of not performing an act or action which must be performed. The legislative acts (laws, rules of procedures of the parliament etc.) and the regulatory acts of the administration (statute, regulation esc.) cannot be subject to individual application directly. However, if the application of the legislative or regulatory acts to the circumstances of the individuals leads to a violation of a right, then the relevant persons may file an individual application against the said action (application of legislative or regulatory acts) by following due procedures of application.

Besides, individual application must be filed by the victims (those whose actual and personal rights are directly affected by the alleged proceeding) within thirty (30) days after the exhaustion of all administrative and judicial remedies provided in the laws. The application is filed by filling out an "application form" and is subject to a reasonable amount of application fee. The applications may be filed either directly to the Constitutional Court or through other courts and foreign missions abroad.

15. Did your Court develop case-law on individual rights related to the Rule of Law?

Taking into account the criteria of the rule of law as cited in the Venice Commission's Report (CDL-AD(2016)007), the case law of the Turkish Constitutional Court can be stated as follows:

The Constitutional Court, in its decisions on norm review (constitutionality review) and individual application, examines whether the rule interfering with the fundamental rights and freedoms is "*sufficiently accessible, certain and foreseeable in its application as a requirement of the rule of law and with a view to preventing arbitrariness"* (*Ramazan Aras*, App. No.: 2012/239, 2//7/2013, § 45).

As regards *the principal of equality before law and prohibition of discrimination*, the Court in its judgment on *Tuğba Arslan* application (App. No.: 2014/256, 25/6/2014) concluded that the principle of equality covers the prohibition of discrimination as well by stating "the principle of equality applies to *those who have the same legal situation. The legal equality rather than the actual one was prescribed with this principle. The aim of the principle of equality is to ensure that the individuals in the same situation be subjected to the same action before the laws, to prevent the discrimination and the granting of the privileges. … If the same legal situations are subjected to the same rules and different legal situations are subjected to the different rules, the principle of equality prescribed in the Constitution is not harmed"*. In the said application, the Court ruled for a violation of right by finding that there is no reasonable and objective reason to prevent applicant's participation to court hearings with the headscarf that she wears as a requirement of her religious belief and, therefore, she is put into a disadvantaged position against those not wearing headscarf.

Article 36 of the Constitution, which regulates the freedom to claim rights, does not explicitly about the independence and impartiality of the courts. However, the Constitutional Court recognized it as an implied element of the right to a fair tiral by referring to Article 138, 139 and 140 of the Constitution. In the Court's opinion, in determining whether a court is independent against the public authorities, the administration and the parties of the case, *"the appointment procedure and term of office of the judges, their guarantees against external pressures and whether the court demonstrates an independent display are important"* (*Yaşasın Aslan,* App. No.: 2013/1134, 16/5/2013, § 28). The impartiality of a court *"is explained on the basis of the institutional structure of the court to try the case and the attitude of the judge to hear the case. First of all, the legal and administrative regulations on the establishment and organization of the courts should not give the impression that they are not objectively impartial. Indeed, institutional impartiality in very much related to the independence of the courts. The independence is a precondition for ensuring impartiality and, additionally, an organization to give impression of being party must be avoided as well."* (AYM, E.2014/164, K.2015/12, 14/1/2015).

As *the right of access to a court* will be further elaborated below, this part dwells on the *presumption of innocence and the execution of court judgments*. In the Court's opinion, *The*

presumption of innocence guarantees that the person is not found guilty without a final court ruling that s/he committed a crime… no one may be declared guilty or may be treated like an offender by any of the judicial authorities and public authorities unless he is proven to be guilty" (*Kürşat Eyol*, App. No.: 2012/665, 13/6/2013, § 26). In this scope, those who acquitted in the result of criminal proceedings or if such proceedings are discontinued, are under the protection of the presumption of innocence even there is a pending action for damages of a disciplinary proceedings about them. These people should not be subject to treatment of "*being guilty*". In this respect, "*the language used by the decision makers*" in the latter procedure is of critical importance (*Mustafa Akın*, App. No.: 2013/2696, 9/9/2015, § 38). The Constitutional Court, in its judgment on application by *Sebğatullah Altın* (App. No: 2013/1503, 2/12/2015) ruled that the presumption of innocence is violated by finding that "*Although the applicant was not found guilty with a final court ruling that s/he committed a crime, the Administrative Court decision reflects the conviction that the applicant is guilty and committed the actions subject to proceedings".*

On the other hand, in the Court's opinion *"The right of access to a court also covers the right to take a dispute before a court and the right to request the execution of the decision delivered by the court as well." (Kenan Yıldırım and Turan Yıldırım,* App. No.: 2013/711, 3/4/2014, § 41 and 43). In other words, this right covers *"not just the right of litigation either as plaintiff or defendant before judicial authorities but the right to get one's due in the result of such proceedings as well" (*see., AYM, E.2009/27, K.2010/9, K.T. 14/1/2010; *Halil Canpolat*, App. No.: 2013/7662, 25/3/2015, § 39*). "Regardless of the issuing judicial authority, the execution of a judicial decision or judgment is considered as a complementary element of "the case" (Kenan Yıldırım and Turan Yıldırım,* § 41 and 43*).*

16. What is the role of your Court in ensuring the access to ordinary / lower courts (e.g. preconditions, including costs, subjective rights, representation by a lawyer, time limits)?

The Constitutional Court states that the right of access to a court is not absolute and may be restricted but such restriction must pursue a legitimate aim, must be clear and proportionate and should not amount to impair the very essence of the right. The ordinary courts, ***in cases when certain conditions are attached on the application,*** "*must refrain from*

an excessive formalism which may violate the right to a fair trial on one hand and must also avoid an excessive laxity which may lead to elimination of procedural rules regulated by laws on the other hand". In other words, *"the right of access to a court would be violated if the procedural rules turns into an impediment for the hearing of individuals' cases by a competent court"*. In the light of these principles, the Court ruled for violation of right of access to a court in one of the applications by finding that the judgment of the court of first instance misleads the legal remedies and that the applicants could not enjoy their right to appeal as the judgment was not notified in due procedure (*Kommersan Kombassan Mermer Maden İşletmeleri Sanayi ve Ticaret A.Ş. and Others*, App. No.: 2013/7114, 20/1/2016, § 38, 41, 56).

The Constitutional Court may rule for violation of right by considering that ***court expenses*** may lay an excessive burden on the applicants and, thereby, deter them from filing actions. In the Court's opinion *"although the regulations pertaining to ruling upon court expenses in favor or to the detriment of one of the parties based on the amount that is won or lost according to the degree of success in the trial constitute an intervention to the right of access to a court, proportionate interventions aiming to discipline requests that are excessive, far-fetched or lacking seriousness can be considered as legitimate. However … these restrictions shall not impair the essence of the right, must pursue a legitimate aim and the means that is used need to be proportionate to the purpose of restriction, burdens that are hard to bear should not be imposed to the detriment of the individual in such a manner as to disturb the fair balance that is tried to be struck between the requirements of public benefit and the rights of the individual.* (*Özkan Şen*, App. No.: 2012/791, 7/11/2013, § 61, 62).

Taking into account that a decision of legal aid was delivered in favor of the applicant and no reclamation opportunity during his bringing the action was available for him and accepting that the applicant's being forced to pay approximately 3/4 of the compensation to which he became entitled to back to the defendant administration in the form of counsel's fee renders the compensation case meaningless, the Constitutional Court concluded that the interference to the right of access to a court is disproportionate.

TCC also does not consider the **term of litigation**, *"unless these terms are too short to make a litigation possible … violating the right of access to a court*". However, *"it should be*

acknowledged that the right of access to a court has been violated if persons have not exercised their right to sue or to seek remedies due to manifestly misapplication or miscalculation of time conditions " (*Emre Kartal*, B. No: 2014/5020, 6/10/2015, § 33).

In one of its decisions on an annulment case the Constitutional Court found Article 13 of Law No. 6217, which prescribes payment of a 40 TL application fee for filing an appeal to the Court of Cassation, contrary to constitutional provisions regulating the rule of law and the right to legal remedies: "*The provision of law subject to contention does not regulate a system of effective legal aid to those who lack the financial means to pay the said fee and, also, there is no legal aid mechanism in the field of general criminal proceedings which provides an "exemption from court expenses" including the fees too. There is no reference to the relevant provisions of the Code of Civil Procedure (No. 6100), which is the only regulation in our law system on the legal aid mechanism, to render it applicable to the said application fee charged with the said regulation. Therefore, the provision of law subject to contention may obstruct the right of access to a court for those who lacks financial means to pay the fee."*(AYM, E.2011/54 K.2011/142, 20/10/2011)

17. Is the Rule of Law used as a general concept in the absence of specific fundamental rights or guarantees in the text of the Constitution in your country?

The Constitutional Court, by way of interpretation and relying on the principle of the wholeness of the constitution, can extract certain rights which are not cited in the second part of the Constitution titled "*fundamental rights and duties*". The concept of "*the rule of law"* is mainly used to manifest certain rights relying on Article 36 of the Constitution which regulates the *"freedom to claim rights (right to a fair trial)"*.

First of all, it must be noted that the Constitutional Court stated, by way of reference to the ECHR, the rule of law is sovereign to all rights and freedoms in the Convention. Therefore, the Court must take this principle into consideration while interpreting the rights within the context of the "*common field of protection*" theory (*Murat Çevik* (2), App. No.: 2013/3244, 7/7/2015, § 35; *İbrahim Oğuz and other*, App. No.: 2013/5926, 6/10/2015, § 78).

Article 36 of the Constitution (*right to a fair trial*) does not provide for a right which encompasses the execution of court judgments. Although Article 138 of the Constitution

under section of "*Judiciary*" mentions of the execution of court judgments without delay, this provision prescribes an obligation of the public authorities rather than granting the individuals such a right.

The Constitutional Court stated that, in a system where "*the rule of law*" prevails, one cannot accept the non-execution of court judgments and, therefore, Article 36 of the Constitution includes the right to execution of court judgments as well: *"In a state where the court judgments are not executed in due time by the relevant public authorities, it cannot be possible for the individual to fully enjoy the rights and freedoms provided to them through court judgments and decisions. Therefore, the State has the obligation to ensure timely execution of court judgments, to prevent the loss of individuals' rights and, thereby, to protect the individuals' trust and respect to public authorities and legal system. Therefore, in a state governed by the rule of law, it cannot be accepted that the court judgments are not executed in due time as execution of such judgments serves a critical function in protecting the individuals' trust and respect to public authorities and legal system*" (*Şenay Haylaz*, App. No.: 2013/3457, 25/2/2015, § 47).

Besides, by reference to the decisions of the ECtHR, the Constitutional Court *"recognizes the right of access to a court among the basic elements of the principle of the rule of law and states that the right of access to a court requires availability of a consistent system of accessing courts and existence of clear, practical and effective opportunities for those who are not file a suit before the courts"* (*Emre Kartal*, App. No.: 2014/5020, 6/10/2015, § 30).

On the other hand, although not explicitly stated, the Constitutional Court recognizes the strong ties between the principle of the rule of law and the "*right to a trial within reasonable time*" as deducted from Article 36. Although Article 141 of the Constitution states that it is a duty of the judiciary to conclude the cases as quickly as possible, this Article is not accepted to grant a certain right to the individuals. However, the right to a fair trial under Article 36 covers the right to a trial within reasonable time as well. In the Court's opinion, "*A trial which removes the benefits achieved from a judgment by extending the process of resolving legal disputes will damage effectiveness and security in the fulfillment of justice… that the trial be concluded as soon as possible in order to prevent the continuation of the damage incurred by the*

principle of confidence in the law, justice and court." (*Güher Ergun and others*, App. No.: 2012/13, 2012/13, § 38-40 and 71).