

## 1. A BRIEF HISTORY OF THE CONSTITUTIONAL JUSTICE IN TURKEY

After the multi-party system was ushered in Turkey in 1945, the first democratic election was held in 1950, which culminated in the victory of the then the opposition Democratic Party. The developments occurred during the ruling of Democratic Party and the tension between the ruling and the opposition parties resulted in the necessity to review the acts of the Parliament. The need for the presence of constitutional justice was first put forward by intellectuals and academics and later supported by the opposition parties.

The founders of the 1961 Constitution agreed on the necessity of a constitutional court to review the constitutionality of laws. Despite the debates over the structure, composition, function and organization of the Court, methods of selecting its judges and over the review of constitutionality, there was widespread conviction on the need for constitutional justice. Some, examining the Turkish political system, tend to interpret the establishment of the Constitutional Court as the most radical characteristic of the 1961 Constitution. The Turkish Constitutional Court began to carry out its activities upon the promulgation of Law no 44, dated 22 April 1962.



After the Coup d'Etat of the Turkish Armed Forces in 1980, a new constitution was adopted and approved by the Turkish people by way of a referendum in 1982. The system of constitutional review established by the 1961 Constitution was preserved in the 1982 constitution with a few changes. Hence, the Constitution vested in significant powers to the judiciary with regard to the exercise of sovereignty. The power to resolve the claim of unconstitutionality by ordinary courts was annulled, and the new Constitution proclaimed that the Constitutional Court be the sole body in respect of constitutional review.

In the Constitution, the Constitutional Court is placed as the first judicial power among "The Fundamental Organs of the Republic". The Constitution lays down in detail the composition, duties, working method of the Constitutional Court and other issues concerning the constitutional review. Any amendment with regard to the structure and duties of the Constitutional Court requires an amendment in the Constitution.

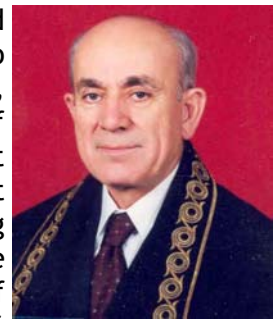
Today the supremacy of human rights has been of crucial importance in Turkey since the adoption of the 1961 Constitution. It is pointed out in the "Preamble" of the Constitution; "*Turkish nation shall act to safeguard the everlasting existence, prosperity and material and spiritual well-being of the Republic of Turkey, and to attain the standards of contemporary civilization as an honorable member with equal rights of the family of world nations*". According to Article 2 of the Constitution, "respect for human rights" is one of the fundamental characteristics of the Republic of Turkey. This article stipulates the fundamental characteristics of the Republic of Turkey as "democratic,

secular and social state governed by the rule of law...”. In this context, the establishment of the Constitutional Court on 25 April 1962, is a historic milestone, which has brought judicial guarantee mechanism for fundamental rights and freedoms and other fundamental characteristics of the Republic. The Constitutional Court is looked upon as a guarantor of the fundamentals of the Republic thanks to its important decisions based on universal rules of law and human rights.

## 2. COMPOSITION OF THE CONSTITUTIONAL COURT

Article 146 of the Constitution sets out the number, appointment procedures and qualifications of the members of the Constitutional Court. According to this;

- i. The Constitutional Court shall be composed of eleven regular and four substitute members.
- ii. The President of the Republic shall appoint two regular and two substitute members from the High Court of Appeals, two regular and one substitute member from the Council of State, and one member each from the Military High Court of Appeals, the High Military Administrative Court and the Audit Court, three candidates being nominated for each vacant office by the Plenary Assemblies of each court from among their respective presidents and members, by an absolute majority of the total number of members; the President of the Republic shall also appoint one member from a list of three candidates nominated by the Higher Education Council from among members of the teaching staff of institutions of higher education who are not members of the Council, and three members and one substitute member from among senior administrative officers and lawyers.
- iii. To qualify for appointments as regular or substitute members of the Constitutional Court, members of the teaching staff of institutions of higher education, senior administrative officers and lawyers shall be over forty and to have completed their higher education, or to have served at least fifteen years as a member of the teaching staff of institutions of higher education or to have actually worked at least fifteen years in public service or to have practiced as a lawyer for at least fifteen years.



**Chief Justice  
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Article 3 of the Law on the Establishment and Judgment Procedures of the Constitutional Court (Law no 2949, for short) spells out additional qualifications for the candidates to be nominated by the Higher Education Council and for the members to be appointed directly by the President of the Republic. According to this, candidates to be selected amongst the members of the higher education institutions shall be a lecturer in the field of “law, economics or political sciences” and candidates to be selected amongst the senior administrative staff shall practice as a “chairman or member of the Higher Education Council, or rector or dean of a higher education institution, or undersecretary, deputy undersecretary, general, admiral, ambassador, regional governor or governor”.

The persons to be selected as a Justice of the Constitutional Court shall comply with the qualifications stated above and shall neither be convicted of a criminal act, nor be subject to prosecution due to such crimes or shall not be in any condition preventing

them to work as a judge. Three regular members and one substitute member to be elected directly by the President of the Republic shall be elected by the President of the Republic without nomination from among senior administrative officers stated above and lawyers who have practiced at least for fifteen years.

Majority of the members of the Constitutional Court, that is seven out of eleven regular members and three out of four substitute members, are appointed among the presidents and members of the high courts. However, contrary to the 1961 Constitution, the 1982 Constitution lays down that it is the President of the Republic who chooses one of each three candidates of nominated by the high courts. In other words, in the 1961 Constitution, the high courts used to choose the said members on their own.

### 3. FUNCTIONS OF THE CONSTITUTIONAL COURT

The main function of the Constitutional Court is no doubt to review the constitutionality of laws and the other norms stated in the Constitution. However, in addition to its main function, the Constitution orders some other duties to the Constitutional Court irrelevant to the review of norms. Functions and duties of the Constitutional Court are as follows:

- i. to decide on the annulment actions brought before the court with the allegation of unconstitutionality of laws, decrees having the force of law and Rules of Procedure of Turkish Grand National Assembly (TGNA) or provisions thereof.
- ii. to decide on the contention of unconstitutionality of laws and decrees having the force of law asserted by the general courts.
- iii. The President of the Republic, members of the Council of Ministers, presidents and members of the Constitutional Court, of the High Court of Appeals, of the Council of State, of the Military High Court of Appeals, of the High Military Administrative Court of Appeals, their Chief Public Prosecutors, Deputy Public Prosecutors of the Republic, and the presidents and members of the Supreme Council of Judges and Public Prosecutors, and of the Audit Court shall be tried for offences relating to their functions by the Constitutional Court in its capacity as the Supreme Court.
- iv. to decide on the applications related to the dissolution of political parties.
- v. to audit the political parties under financial terms.
- vi. to decide on the applications by a member of the parliament for annulment of the decisions of the Parliament to waive the parliamentary immunity of a member or disqualify from membership or to waive the immunity of a minister who is not a member of the Parliament on the grounds that it is unconstitutional or contrary to the provisions of the Rules of Procedure of TGNA.
- vii. to appoint one of its members to the office of president of the Court of Jurisdictional Disputes.

The function of settling the disputes among the State organs has not been vested in the Constitutional Court, when compared with the Constitutional Courts in other countries. However, in some countries where the settlement of disputes arising between the legislative and executive organs is left to the Constitutional Court, the Turkish

Constitutional Court is not entitled with such power and duty. The Turkish Constitution does not grant any power to the Constitutional Court to express opinion or to conduct a preventive review with regard to the constitutionality of laws in the process of their preparation.

Finally, the Turkish Constitution does not include the procedure of “constitutional complaint”, just as in some European states, to be lodged under certain circumstances by individuals whose fundamental rights have been violated by means of legislative acts.

#### 4. SCOPE OF THE NORM REVIEW

The main function of the Constitutional Court is to review the constitutionality of certain acts of the legislative organ. According to Article 148 of the Constitution, “*The Constitutional Court shall review constitutionality, in respect of both form and substance, of laws, decrees having the force of law, and the Rules of Procedure of the Turkish Grand National Assembly. Constitutional amendments shall be examined and verified only with regard to their form.*”

As obvious, the review made by the Constitutional Court comprises both the examination of laws and the other norms subject to review in terms of due procedure, and the review of the constitutionality of these norms in respect of their rules. In this context, while laws, decrees having the force of law and Rules of Procedure of the TGNA are subject to constitutional review in respect of both form and substance, the laws related to constitutional amendments are subject to review only in respect of form; the Constitutional Court is not allowed to review these laws in respect of substance. Where the laws amending the Constitution are contrary as to form, three-fifth of votes is compulsory for the annulment of that law by the Constitutional Court.

The verification of laws as to form is restricted to consideration of whether the requisite majority is obtained in the last ballot; the verification of constitutional amendments is restricted to consideration of whether the requisite majorities are obtained for the proposal and in the ballot, and whether the prohibition on debates under urgent procedure is complied with.

#### 5. NORMS SUBJECT TO CONSTITUTIONAL REVIEW

According to Article 148/1 of the Constitution, “*The Constitutional Court shall examine the constitutionality, in respect of both form and substance, of laws, decrees having the force of law, and the Rules of Procedure of the Turkish Grand National Assembly. Constitutional amendments shall be examined and verified only with regard to their form. However, no action shall be brought before the Constitutional Court alleging unconstitutionality as to the form or substance of decrees having the force of law issued during a state of emergency, martial law or in time of war.*” According to this provision, the norms that are subject to constitutional review are as follows.

##### *a. Laws*

The main function of the Constitutional Court is to review the constitutionality of laws. The “law” mentioned herein is used not in respect of substance, but in form. In other words, laws, which do not create legal norms like budget laws and laws related to the execution of final death penalties, are in the scope of the review of the Constitutional

Court. The review power of the Constitutional Court comprises all laws save the Reform Laws (of the Republic) regulated in Article 174 of the Constitution.

***b. Decrees having the force of law***

As a rule, all decrees having the force of law are subject to the review of the Constitutional Court in respect of constitutionality, however, the decrees having the force of law issued during a state of emergency, martial law or in time of war in accordance with Article 148 of the Constitution are exempted from constitutional review. That the decrees having the force of law issued during a state of emergency and martial law could not be reviewed in respect of constitutionality is regarded as objectionable in the doctrine in terms of the principle of rule of law.

No action shall be brought before the Constitutional Court alleging unconstitutionality as to the form or substance of decrees having the force of law issued during a state of emergency, martial law or in times of war. However, the Constitutional Court checks whether the decree having the force of law is issued during a state of emergency in terms of the framework regulated in the Constitution. Following this examination, the Court decides whether that decree having the force of law will be subject to constitutional review.

Furthermore, decrees having the force of law issued in a state of emergency are submitted to the approval of Turkish Grand National Assembly on the date of its publication in the Official Gazette. As decrees having the force of law become a code of law following the approval of TGNA, they could be reviewed by the Constitutional Court.

***c. Rules of Procedure of Turkish Grand National Assembly***

Despite that the Rule of Procedure of Turkish Grand National Assembly is not a law, but a parliamentary decision in respect of its legal frame, it is subject to constitutional review by the Constitutional Court owing to the its peculiar political importance in terms of the participation of the party in power and the opposition parties in the works of TGNA under equal terms.

***d. Constitutional Amendments***

The scope of judicial review by the Constitutional Court on the constitutional amendments is restricted to review of constitutionality only in respect of form. Constitutional Court examines whether a constitutional amendment is adopted in accordance with the requisite majorities obtained for the proposal and in the ballot, and whether the prohibition on debates under urgent procedure is complied with. In this context, the proposal should be submitted by at least one third of the members of TGNA (which amounts to 184 out of 550), and accepted by a three-fifth majority of votes (which amounts to 330). Verification of the constitutional amendment in respect of form requires the compliance with the prohibition on debates under urgent procedure.

***e. Decisions of the Parliament***

Despite that the Constitution does not accept as a rule the transactions held by Turkish Grand National Assembly in the form of decision, two types of decision are exceptionally subject to the review of the Constitutional Court. The first one is the Rules of Procedure of Turkish Grand National Assembly and the other is the decision with regard to the annulment of the parliamentary immunity or disqualification from membership.

#### ***f. International Agreements***

International agreements are not subject to the review of the Constitutional Court. Article 90 of the Constitution regulates this rule: “International agreements duly put into effect have 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.” The norms and transactions, which are not subject to the review of the Constitutional Court, are stated above.

Enforcement of such a review on a legal norm subject to constitutional review depends on whether such a norm is effective or not. As mentioned in a decision of the Constitutional Court, “when a law or a decree having the force of law is annulled and becomes no more effective, it could not constitute the subject of an annulment case; therefore no decision can be taken on a case which doesn’t include a subject, because the norm should be effective in respect of an annulment case. If the rule, subject of a case, is no more effective, then the constitutional review will not have a subject, either.”

Where a transaction is to be determined whether it is subject to constitutional review, the Constitutional Court is not bound to the qualification of the transaction made by the authority concerned. The Constitutional Court itself considers the qualification of the transaction. Otherwise, a transaction being subject to constitutional review would be excluded from such a review by considering it is as if a transaction not being subject to review.

## **6. ACCESS TO THE CONSTITUTIONAL COURT**

Under the Constitution, access to the Constitutional Court can be made in two ways:

### ***a. Access to the Constitutional Court for the Constitutional Review of Laws and Other norms subject to review***

#### ***i. Action for Annulment (Abstract control of norms)***

The action for annulment is abstracted from any particular case; for that reason in Turkish law this method is called as “abstract control of norms”. The constitutional validity of laws, decrees having the force of law and Rules of Procedure of Turkish Grand National Assembly or the provisions thereof may be challenged directly before the Constitutional Court through an annulment action by persons and organs empowered by the Constitution.

The President of the Republic, parliamentary groups of the party in power and of the main opposition party and a minimum of one-fifth of the total number of members of the Turkish Grand National Assembly have the right to apply for annulment action to the Constitutional Court. If more than one political party is in power, the party having the greatest number of members exercises the right of the parties in power to apply for annulment action.

The right to apply for annulment directly to the Constitutional Court lapses sixty days after publication in the Official Gazette of the contested law, the decree having the

force of law, or the Rules of Procedure of TGNA.

**ii. Contention of Unconstitutionality (Concrete control of norms)**

Being different from the abstract control of norms, contention of unconstitutionality, can be initiated, without a time limit, by general, administrative and military courts and any party involved in a case being under scrutiny before a court.

According to Article 152 of the Constitution, if a court *a quo*, finds that the law or the decree having the force of law to be applied is unconstitutional, or if it is convinced of the seriousness of a claim of unconstitutionality submitted by one of the parties, it postpones the consideration of the case until the Constitutional Court decides on the issue. The Constitutional Court shall decide on the matter within five months of receiving the contention. If no decision is reached within this period, the trial court concludes the case under existing legal provisions. No allegation of unconstitutionality shall be made with regard to the same legal provision until ten years elapse after publication in the Official Gazette of the decision of the Constitutional Court dismissing the application on its merits.

**b. Application for the Dissolution of Political Parties**

According to Article 69/3 of the Constitution, the dissolution of political parties shall be decided finally by the Constitutional Court after filing of a suit by the Office of the Chief Public Prosecutor of the Republic. This regulation provides a security for the political parties.

Application for the dissolution of a political party is made to the Constitutional Court with the assertion of Chief Public Prosecutor of the Republic. The Constitutional Court examines the case on the basis of verbal hearing minutes including the defense made by the defendant party and assertions made by the Chief Public Prosecutor of the Republic; and on the basis of the report prepared in respect of merits by the appointed rapporteur judge.

The prohibitions that could lead to the dissolution of political parties are restricted with the constitutional amendments made in 1995 and 2001. The prohibitions concerned are as follows:

- The statutes and program of a political party being contrary to paragraph 4 of Article 68 of the Constitution.
- A political party being a center of actions contrary to paragraph 4 of Article 68 of the Constitution.
- A political party receiving financial aid from foreign countries, international institutions and from real persons and legal entities not belonging to Turkish nationality.
- A permanently dissolved political party being re-established under a new name.

Besides these, it is regulated in the Law on Political Parties that the a political party may be dissolved if it fails to comply with the decision of warning taken by the Constitutional Court upon the assertion of the office of Chief Public Prosecutor of the Republic. Terms and methods of the dissolution of political parties are regulated in the Law on Political Parties. Without prejudice to the provisions of the Criminal Procedural Law, dissolution of political parties is decided on the basis of file.

Instead of dissolving them permanently, the Constitutional Court may rule the concerned party to be deprived of State aid wholly or in part with respect to intensity of the actions brought before the court.

Members of a political party including its founders who are found by the Constitutional Court to be the persons causing the party be dissolved permanently with their statements and actions shall not be a founder, member, director or controller of any other party for five years as of the publication of the Court's decision in the Official Gazette. Possessions of a party dissolved upon the decision of the Constitutional Court are transferred to the Treasury.

## 7. FINANCIAL CONTROL OF POLITICAL PARTIES

Rules regarding the political parties, the indispensable elements of democratic political life, are regulated under a special law owing to their importance. The Constitutional Court is specifically authorized to carry out the financial control of political parties.

That the political parties use their income and expenditures for their aims in accordance with the laws and record these under generally accepted accountancy is necessary in respect of the protection and continuance of a democratic society.

The Constitutional Court may require assistance from the Court of Audits with regard to the financial control of parties. At the end of the control concerned, the Constitutional Court may decide that income and expenditure of that political party is in compliance with the legislation or decide on the transfer of the income obtained unduly to the Treasury and when necessary, apply for prosecution of the responsible persons. Publication of such decisions given by the Constitutional Court in the Official Gazette allows the public opinion to be informed of financial structures of political parties. There isn't any other mechanism to publicize the financial structures of political parties.

## 8. JUDGMENT PROCEDURE

According to Article 149 of the Constitution, the Constitutional Court convenes with its president and ten regular members. According to Article 41 of the Law no 2949 "the Constitutional Court convenes with its president and ten regular members. The President replaces the office of the regular members who have excuses for not participating in the conventions with substitute members according to seniority."

The Constitutional Court takes decisions by absolute majority. Decisions of annulment of the constitutional amendments and dissolution of political parties shall be taken by three-fifths majority. Decisions with regard to the applications for annulment on the ground of defect in form are taken with priority. The Constitutional Court examines cases on the basis of files, except where it acts as the Supreme Court. However, when it deems necessary, it may call on those concerned and those having knowledge relevant to the case, to present oral explanations. In lawsuits on whether to permanently dissolve a political party, it hears the defense of the chairman of the party whose dissolution is in process or of a proxy appointed by the chairman, after the Chief Public Prosecutor of the Republic. In this case, the cases related to the dissolution of political parties, which are considered according to Criminal Procedural Law arises as a peculiar sort of case where



the parties and those concerned with the case are heard and examinations are made on the basis of files and then a decision is given.

The Constitutional Court examines cases on the basis of files, except where it acts as the Supreme Court and hearings of the Court are secret. Decisions are taken by absolute majority. Voting begins from the least senior member. Seniority is acquired according to the date of appointment to membership of the Constitutional Court. The older members are deemed to be senior among the members appointed at the same date, and seniority among the members at the same age is determined by drawing lots.

Legislative, executive and judicial organs, and administrative offices of the state, all real persons and legal entities are liable to submit the information and documents required by the Constitutional Court within the duly period. The petitions which are not in the scope of the functions and duties of the Constitutional Court are refused. Petitioner is notified of the decision of refusal.

## 9. DECISION-TAKING PROCESS

### *a. Trial Procedure*

#### **i. Trial**

An annulment case is deemed to be brought before the Court when the petition, including the application for annulment on the ground of unconstitutionality of laws, decrees having the force of law and Rules of Procedure of TGNA, is transferred to the clerical office by the General Secretariat of the Constitutional Court, and the Secretary General submits a document to the applicants in respect that the case concerned is brought before the Court.

#### **ii. Preliminary Analysis**

Petitions and its annexes related to the annulment case are examined within five days as of the record date by the rapporteur judges appointed by the President.

Rapporteur judges submit their report to the office of President completing their examinations considering;

- a) whether the petitions are in the scope of the duties of the Constitutional Court;
- b) whether the case is brought by empowered persons or groups within the duly period;
- c) where the case is brought by at least one fifth of the full members of TGNA, whether the petition includes the name and family names of the members, their election regions and signatures, whether each signed document is controlled per names and approved by Chairman of TGNA or by the person appointed by the Chairman with signature and seal; and whether the petition concerned is submitted to the General Secretariat;
- d) where the case is brought by the groups of political parties, whether the petition is attached approved copies of the decisions taken by the general board, and approved copies of documents clarifying that the persons who

- signed the petition are chairman or member of that group;
- e) where the case is brought with the contention of unconstitutionality, whether the applicants comply with the obligation to explain which provisions they content are contrary to which article or articles of the Constitution and the grounds of unconstitutionality.

The Constitutional Court completes its works on the preliminary analysis report and takes decision within at most five days (totally ten days at most as of the date of record). Where the Constitutional Court finds under the methods stated in paragraphs a and b above that the case is not in the scope of its duties and powers or the case is not brought by competent persons or in duly period, it rejects the case before considering it on merits.

Where the Court finds defects in the petition in respect of paragraphs c, d and e, it takes a decision towards the completion of those defects. In case the defects are not completed, the case concerned is deemed not to be brought before the Court. When the Court finds at the end of the preliminary analysis that subject of case is in the scope of its duties and powers, it takes a decision towards the examination on merits.

### ***b. Contention of Unconstitutionality***

Contention of unconstitutionality is the review carried out by the Constitutional Court when a court which is trying a case, finds that the law or the decree having the force of law to be applied is unconstitutional and it is convinced of the seriousness of a claim of unconstitutionality submitted by one of the parties, or if the law or provision thereof is found unconstitutional *ex officio*.

#### **i. Application**

If a court *a quo* finds that the law or the decree having the force of law to be applied in a given case is unconstitutional or if it is convinced of the seriousness of a claim of unconstitutionality submitted by one of the parties, it applies to the Presidency of the Constitutional Court with case file and authenticated copies of the documents deemed necessary by that court.

#### **ii. Preliminary Review**

General Secretariat of the Constitutional Court registers the case and informs the court *a quo* of the current situation. The appointed rapporteur-judge submits a preliminary report to the Presidency within five days as of the date of registration in respect of whether formalities are fulfilled. This report indicates whether the court *a quo* is dealing with a “real” case, the challenged provision or the decree having the force of law is applicable, the grounds of unconstitutionality is serious; and whether that court is entitled to apply to the Constitutional Court.

The Constitutional Court performs a preliminary screening within five days (totally ten days at most as of the date of registration) as from the submission of the report prepared by the rapporteur-judge. Where the Constitutional Court, in its analysis, finds defects in the file, it decides to return the application to the court *a quo*. If it finds that the court is not authorized to apply, it decides on the strike-out of the case.

The courts are not demanded to complete the defects found in the documents. They are therefore obliged to renew their applications for the constitutional review by completing the formalities indicated by the Constitutional Court.

If the Constitutional Court does not find, at the end of its preliminary review, any defect in the case documents and decides that the court a quo is authorized, it decides to examine the case on merits. Rapporteur-judge begins to prepare his/her report on the merits of the case.

**c. Examination on Merits**

**i. Allocation of the case files to rapporteur-judges**

Case files are allocated to rapporteur-judges according to the order in the main registration form. This order may be changed by the President when deemed necessary in respect of the number of the cases being dealt by the rapporteur-judges and according to the peculiarities of the case.

Rapporteur-judges submit the results of their preliminary report accompanied with a section stating their own views. These reports are prepared within a month as of the decision towards examination on merits; or, in urgent circumstances, within the period determined by the President. The rapporteur-judges who could not prepare their report within the determined period inform the Presidency, in written, of the reasons and possible extension for the completion of the report. When necessary, time for preparation of the report may be extended by the Presidency.

Rapporteur-judges attend the hearing with regard to the case they deal and make the necessary explanations if required.

**ii. Agenda**

The Presidency is authorized to appoint the date of hearings and the agenda. Copies of the reports prepared and submitted to the Presidency by rapporteur-judges and copies of the agenda are distributed to each member at least ten days before the date of hearing. The Court may shorten this period by showing reasons. Where there are urgent cases or cases with drawbacks, without depending on the period concerned, the President may distribute the agenda, which shows the date of hearing. However, the Court may decide on the change of the date of hearing on the grounds that it does not agree with the Presidency and its opinions. Judges of the Court may request the files from Secretary General and examine, when they deem necessary.

**iii. Meeting and Hearing**

Members of the Constitutional Court attend and sit at the hearings in accordance with their seniority. The hearing is presided over by the President of the Court who arranges the sequence of assertion of views. The members who would like to talk about procedure are given priority. The hearing commences when the report is completely read. If one of the members asserts that s/he couldn't fully examine the case, then hearing of that case is left to another day.

The members express and assert their views without any restriction. However, the President may prevent the assertion of views out of the content of the hearing. The Court settles the dispute arising from the content of the views or speeches. One member may take permission for three times to explain and extend his/her views. If a Judge wants to take the floor more than three times, then the President votes this demand. If the Court

accepts, then that member takes permission to talk.

No suggestion could be made with regard to the sufficiency of the hearings and this issue could not be regulated under a decision. If no more permission is taken, the President announces that hearing is over and passes to voting. Voting starts from the least senior member, no member can use abstention vote. The members who use counter votes in respect of duties and procedure are obliged to participate in the hearing and voting on merits.

#### ***d. Judgment***

##### **i. General Principles**

The Constitutional Court takes resolutions by absolute majority. Resolutions of annulment of constitutional amendments and dissolution in the cases of the political parties are taken by three-fifths majority. Resolution taken at the end of the meetings and hearings are immediately written as a brief resolution and signed by the President and members who attend the meeting before the meeting is over. A brief resolution is written as a minutes and constitutes the judgment of the decision to be written. Dissenting votes are stated in the minutes.

Resolutions of the Constitutional Court are written with their reasonings. President, Deputy President or a member to be appointed by the President is responsible for writing the decision. However, draft resolution is prepared by rapporteur-judges and then given to the commissioned member within one month.

Detailed draft resolution is examined by the members. In case of a dispute, the President determines the final form of the decision. Decisions are signed by the president and members who have taken part in the examination and judgment processes. Dissenting members explain the grounds for their opinions by a decision prepared by other dissenting judges or separately. Resolutions which do not include dissenting opinions are published as such.

##### **ii. Quorum**

According to the constitution, there are two sorts of quorum for the decisions taken by the Constitutional Court.

###### ***1. Absolute majority***

The Constitutional Court takes decisions by absolute majority except for the decisions on annulment of Constitutional amendments and dissolution of political parties. Absolute majority is the first whole number exceeding the half of the meeting number of the Court, which convenes with one president and ten members. In circumstances requiring absolute majority, the Constitutional Court takes decisions by the votes of 6 members used in the same direction.

###### ***2. Three-fifth qualified majority***

It is required for the decisions of annulment of Constitutional amendments and dissolution of political parties. Three-fifth qualified majority is the three-fifth of the meeting quorum of the Constitutional Court, namely six. As the first whole number following this number is seven, at least seven members should vote in the same direction for the Constitutional Court to take a decision on the annulment of Constitutional amendments and dissolution of political parties.

### 3. *Dissenting vote*

According to Article 53/1 of the Law no 2949, “Decisions of the Constitutional Court are written with their grounds. Decisions are signed by the President and members who attend the meeting. Dissenting members explain their grounds for opposition in the decision. Decisions are announced in this form.”

The courts with many judges are required to discuss the case from different viewpoints and the viewpoint submitted by the majority should constitute the decision. Majority is “the dominant number of the votes summed for a person or a thought.” Counter vote is the one less in number. The minority voters in the decisions of the Constitutional Court express their views by “Dissenting Decision”.

Inclusion of counter views in the decision ensures the observance of debates in the decision-taking process. Court’s decision is complemented by the dissenting votes reflecting the minority views.

## 10. ‘FUNDAMENTAL NORMS’ IN THE REVIEW OF CONSTITUTIONALITY

Fundamental norm in the review of constitutionality is the Constitution itself. However, it is not so simple. In some countries, constitutions determine criterion norms rather than the constitution itself; and in some other countries judicial decisions rather than the provisions of the constitution constitute such norms. Therefore, whether restricted with the Constitution itself or comprise the other principles and rules added by the Constitution or judicial decisions, the whole of the criterion norms used in the review of constitutionality constitutes the norm groups named as “block of constitutionality” (bloc de constitutionnalité).

According to the Constitution in Turkey, except for the text of the Constitution (including the preamble according to article 176 of the Constitution), examination of the block of constitutionality may be conducted from three viewpoints: International laws, general principles of the law, principles and reforms of Atatürk.

### i. Principles of International Law

Contrary to most contemporary constitutions, the Turkish Constitution does not include a general rule related to the relation of domestic and international law. The sole provision with regard to this relation is the last paragraph of Article 90 stipulating that international agreements duly put into effect carry “the force of law”. Therefore, the position of international agreements in the hierarchy of rules of law is controversial in doctrine; and dominant viewpoint according to positive Turkish law is that these agreements do not prevail over the laws especially the Constitution, but are of equal standing. As a result, where a provision of an international agreement, in which Turkey is a party, is in conflict with the laws of the Land; this conflict shall be settled in the framework of the principles of *lex posterior* and *lex specialis*.

International law cannot be regarded as a general and independent criterion norm in the review of constitutionality in respect of positive Turkish law in force. However, the Constitution makes reference to international law in four articles (Articles 15, 16, 42 and 92). In these articles the supremacy of international law are affirmed only in cases enshrined in the said articles.

The inclusion of international law in the norms of constitutionality is controversial in doctrine, particularly the agreements on human rights to which Turkey is a party. Article 2 of the Constitution proclaims that Turkey is a human rights respecting country. Thus, human rights conventions are used as a supportive norm. Accordingly, there is an increasing tendency in the decisions of the Constitutional Court towards international human rights norms.

## ii. General Principles of Law

The Turkish Constitutional Court has applied the general principles of law as a subsidiary norm in its decisions ever since its establishment. Moreover, the Court has sometimes articulated views denoting precedence of those principles over the provisions of the Constitution. However, the Court, in its decisions, has not utilized general principles of law as independent criteria. Instead, it interprets general principles of law as inalienable elements of the concept of “the rule of law”.

## iii. Principles and Reforms of Atatürk

“The Principles and reforms of Atatürk” are mentioned in the preamble and Article 42, 58, 81 and 134 of the Constitution; and the Constitutional Court has practiced these principles and reforms as a criterion norm, and has sometimes used expressions towards the precedence of these principles over the provisions of the Constitution.

## II- NATURE AND FEATURES OF THE RESOLUTIONS

### 1. *Binding character of decisions*

According to Article 153/1 of the Constitution, “The decisions of the Constitutional Court are final. Decisions of annulment cannot be made public without a written statement of reasons.” Finality of decisions conveys that no legal allegation (appeal, correction of decision) can be lodged against the decisions. Finality of decisions also holds the meaning of “final provision”. “Namely, the dispute settled by that decision cannot be dealt as another case subject by the same parties on the same grounds.”

“Decisions of the Constitutional Court shall be published immediately in the Official Gazette, and shall be binding on the legislative, executive, and judicial organs, on the administrative authorities, and on persons and corporate bodies.” (Article 153/6). The norm annulled by the decision of the Constitutional Court shall not be in effect. Therefore, such a norm can not be applied any more.

According to Article 11 of the Constitution, the provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, and administrative authorities and other institutions and individuals. The laws can not be unconstitutional. In Turkey, only the Constitutional Court is allowed to interpret the Constitution officially which binds every person, and therefore the decisions of the Constitutional Court are binding upon legislative, executive and judicial organs, and administrative authorities and other institutions and individuals. Neither the legislative organ nor the executive organ has the power to amend or delay the decisions of the Constitutional Court.

## **2. Effect and Nature of Decisions**

Annulment decision of the Constitutional Court is binding on every person (*erga omnes*) as it eliminates a norm, which constitutes the subject of the case. The Constitution does not empower the Constitutional Court to take decisions “limited with the case and only binding on the parties”.

According to the Constitution, “In the course of annulling the whole, or a provision, of laws or decrees having the force of law, the Constitutional Court shall not act as a law-maker and pass judgment leading to new implementation.” (Article 153/2). Function of the Constitutional Court is to eliminate a situation contrary to law by the annulment of a norm that is unconstitutional. Decision of annulment does not mean that the Constitutional Court acts as a law-maker. For instance, where certain provisions of a law are annulled by the Constitutional Court on the ground of unconstitutionality and therefore incurred a new situation not in compliance with power of the legislative organ, it would be wrong to interpret that the Constitutional Court acts as a law-maker. If the Constitutional Court finds certain provisions of a law unconstitutional, it is the power and duty of the Constitutional Court to annul only those provisions. The situation incurred is not within the functions of the Constitutional Court, but the legislative organ.

## **3. Effectiveness of Decisions**

According to Constitution (Article 153/3), “Laws, decrees having the force of law, or the Rules of Procedure of the Turkish Grand National Assembly or provisions thereof, shall cease to have effect from the date of publication in the Official Gazette of the annulment decision. Where necessary, the Constitutional Court may also decide on the date on which the annulment decision shall come into effect. That date shall not be more than one year from the date of publication of the decision in the Official Gazette.” “In the event of the postponement of the date on which an annulment decision is to come into effect, the Turkish Grand National Assembly shall debate and decide with priority on the draft bill or law proposal, designed to fill the legal void arising from the annulment decision” (Article 153/4).

Undoubtedly, the Constitutional Court is not obliged under any term or condition to postpone the date on which the annulment decision shall come into effect. It is at the discretion of the Court whether to postpone the annulment decision and if it does, to fix a date for such a postponement not exceeding one year. Annulment decisions taken by the Constitutional Court shall not be announced without grounds.

## **4. Annulment Decisions are not Retroactive**

The Constitution stipulates that annulment decisions are not applied retroactively. However, it may be reasonable to think that annulment of an unconstitutional provision is deemed to have never been made. Hence, the annulment decision may be applied retroactively so as to completely eliminate that law.

Such a rule means that the annulled law shall be valid until the annulment decision of the Constitutional Court comes into effect, namely until that law ceases to have effect by the resolution of the Constitutional Court. Such a regulative system is totally different from the American system in that the judge does not annul a norm, which he reviews in terms of constitutionality but only announces that an unconstitutional law is void.

The Constitution does not regulate the effect of the annulled decisions on the decisions of definite condemnation taken on the grounds of that annulled law. As a result of the principle of non-retroactivity of the annulment decisions, execution of condemnations which became final prior to the annulment decision would be unjust and contrary to the provisions of criminal law. The same should apply for the necessity of the application of a law, which requires a lighter punishment as a result of the annulment decision.

## 12. SUSPENSION OF A STATUE

The Constitution does not contain any provision granting the Court to suspend the operation of a statute or law. However, in a decision numbered 1993/40-42, the Court displayed a judicial activism and empowered itself to decide for the laws or other norm subject to review to suspend its effects until final decision is reached. As to the grounds for such a decision, the Court viewed that such a power was a stage within the decision-taking process and “a means existing in the essence of the effectiveness of judicial review”; and where such a power was not given individuals and the public order would be lack of Constitutional protection; and as the Constitution and law neither stipulated any provision on such a power nor included a prohibitive provision, therefore this legal void would be fulfilled by the case-laws of the Court. Following this decision, the Constitutional Court reviews the applications of cease of laws to have effect and where deems necessary, it decides on the norms alleged to be unconstitutional to cease to have effect.

## 13. THE WORKLOAD OF THE CONSTITUTIONAL COURT

Having changed from year to year, workload of the Constitutional Court has significantly increased for the last two years. Average of the cases brought before the court between 1981 and 2001 has been 62. The number of applications in 1999 was (62), 97 in 2000 and (508) in 2001. The number of applications made in 2002 was 180. Such an increase is mainly due to the applications by criminal courts for the annulment of some rules existing in the Law on the Release on condition, Postponement of cases and punishments incurred as a result of crimes committed until April 23 1999; and the constitutional amendments made in October 2001 by the Parliamentary contributed to the workload of the Court.

In order to lessen this workload, there have been some considerations as to the enlargement of the organizational structure of the Court, however, no significant development has been achieved with regard to this subject.

## 14. THE COURT'S PERSONNEL

In the preparation of case files, several people help Judges. These personnel can be classified as follows

### 1. *Rapporteur-Judges (Law Clerks)*

Rapporteur-judges are appointed to the Constitutional Court to assist in judicial works. Rapporteur judges are appointed upon their will, approval of the President of the



Constitutional Court and by the authority of their institution among the judges and prosecutors described in Law no 2802 on Judges and Prosecutors, inspectors or head inspector or specialized inspectors from the Court of Audits having successfully worked in this field at least for five years. Associate professors, deputy associate professors and lecturers who completed their doctorate education in the field of law, economics and political sciences may be appointed as well under same terms and conditions.

Provisions of their own profession are applied to the personal status of rapporteur judges; and the period in which they work as a rapporteur judge is included in their own professional period. Promotion of rapporteur judges depends on the written approval of the President of the Constitutional Court. Transactions with regard to their permission rights and health are conducted by the Presidency of the Constitutional Court and their own institution is informed for the qualification records. In addition to their regular works, the rapporteur judges fulfill the duties ordered by the President and conduct scientific researches.

## ***2. General Secretariat***

A rapporteur judge appointed by the President presides the office of Secretary General in addition to his/her main duties. The following directorates within the court, function in connection with the Secretary General. In this context, the President upon the suggestion of the Secretary General appoints the personnel for general administration, technical and health services; and the personnel in assistant services are appointed by the Secretary General.

## ***3. Departments***

The directorates functioning in connection with the General Secretariat of the Constitutional Court are as follows: Decisions Department, Secretary's Office, Personnel and Training Department, Secretariat Department, Financial Works Department, Personnel Department, Informatics Department, Publications Department, Library. In these departments, there are slightly over one hundred public servants working full time.