

**Conference of European Constitutional Courts
XIIth Congress**

The relations between the Constitutional Courts and the other national courts,
***including the interference in this area
of the action of the European courts***

**Report of
the Constitutional Court
of the Republic of Turkey**

PART I.

I. The constitutional court, the other courts and the constitutionality review

A. The judicial organization of the State

1. The judicial system

1. Please give a brief presentation, using diagrams if necessary, of the different courts that exist in your State and the organization of their powers. This concerns the ordinary courts as well as the administrative or other courts, the courts of the Federal State as well as the courts of the federated States.

According to the 1982 Constitution of the Republic of Turkey, the high courts in Turkey are the Constitutional Court, the High Court of Appeals, the Council of State, the Military High Court of Appeals, the High Military Administrative Court of Appeals and court of and the Court of Jurisdictional Disputes.

Turkish Constitutional Court is authorized to examine the constitutionality of laws, decrees in the force of law and the Rules of Procedure of the Turkish Grand National Assembly; trying the offences related to the function of some senior officials including the President of the Republic (Constitution Article 148); the auditing of political parties and the dissolution of political parties (Constitution Article 69); taking decisions on the appeal of cases with regard to the waiving the parliamentary immunity of a member of the Parliament or disqualifying him from membership. The Constitutional Court does not have inferior courts.

The High Court of Appeals is the last instance for reviewing decisions and judgments given by the courts of justice and which are not referred by law to other judicial authority. It is also the first and the last instance for dealing with the specific cases prescribed by law (Constitution Article 154). The term 'Courts of Justice' comprises State Security Courts, Aggravated Felony Courts, Civil Court of First Instance, the Criminal Court of Peace, Peace Courts and some specialized courts (Labor Courts, Traffic Courts, Commercial Courts).

The Council of State is the last instance for reviewing decisions and judgments given by administrative courts and which are not referred by law to other administrative courts (Constitution Article 155). It is also the first and the last instance for dealing with specific cases prescribed by law. The term 'Administrative Courts' comprises Regional Administrative Courts, Administrative Courts and Tax Courts.

The High Military Court of Appeals is the last instance for reviewing decisions and judgments given by military courts. It is also the first and the last instance for dealing with specific cases designated by law concerning by law concerning military personnel.

The High Military Administrative Court of Appeals (Constitution Article 157) is the first and the last instance for the judicial supervision of conflicts arising from administrative acts and

actions involving military personnel or relating to military service, even if civilian authorities have carried out such acts and actions.

The Court of Jurisdictional Disputes is empowered to deliver the final judgments in disputes between courts of justice, and administrative and military courts concerning their jurisdiction and decisions (Constitution Article 158).

2. The constitutional court

2. What is the place of the constitutional court in the judicial organization of the State? If it is part of the judiciary, what is its status within the judiciary?

The Constitutional Court does not review the decisions of the five high courts stated above and the other inferior courts. However, it can make references to the case law of other high courts.

B. The respective jurisdictions of the constitutional court and the other courts in the area of constitutionality review

1. Review of laws and other acts

§ 1. Type of review

3. What acts (of domestic law and international law) are reviewed by the constitutional court in relation to the higher standards that are the Constitution, the principles of constitutional value and the provisions of international law?

The Constitutional Court in terms of constitutionality reviews Laws, decrees having the force of law and the Rules of Procedure of the Grand National Assembly of Turkey. During this review, constitutional values are considered in the format written in the Constitution. International agreements duly put into effect carry the force of law and no appeal to the Constitutional Court can be made with regard to these agreements, on the ground that they are unconstitutional.

4. Is this competence exclusive? If not, which are the other competent courts in this area? How about the other acts and decisions?

Only the Constitutional Court can review the constitutionality of laws, decrees having the force of law and the Rules of Procedure of the Turkish Grand National Assembly. The Constitutional Court does not review other decisions of the Assembly. However, there are other regulations in Turkey. These are the regulations and by-laws put into force by administrative authorities. The Council of State is authorized and empowered to review the constitutionality of regulations and by-laws and their conformity both with the laws and decrees in the force of law. The administrative decisions apart from these decisions are subject to the review of administrative courts.

5. Is the review carried out by the constitutional court a prior or subsequent review?

The Constitutional Court reviews the constitutionality of Laws, Decrees in the force of law and Rules of Procedure of Turkish Grand National Assembly after they go into effect.

6. Is the review carried out by the constitutional court an abstract or a concrete review?

The Constitutional Court both makes abstract and concrete norm review. The Constitutional Court makes abstract review in the annulment actions brought after the laws and decrees in the force of law and Rules of Procedure of the Assembly are put into force; and makes concrete review in the contention of unconstitutionality before other courts. If a court which is trying a case, finds that the law or the decree having the force of law to be applied is unconstitutional or if it is convinced of seriousness of a claim of unconstitutionality submitted by one of the parties, it shall postpone the consideration of the case until the Constitutional Court decides on the issue.

§ 2. Referral to the constitutional court

a. Types of referral

7. How can the constitutional court be accessed (action for annulment, preliminary question, constitutional appeal, etc.)? How many cases have there been for each type of referral?

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 the members of the Turkish Grand National Assembly shall have the right to apply for annulment action to the Constitutional Court, based on the assertion of the unconstitutionality of the laws in terms of procedure and merit, of decrees in the force of law, of Rules of Procedure of the Turkish Grand National Assembly or of specific articles of or provisions thereof and by the contention of unconstitutionality before other courts. According to average of the last twenty years, 10 annulment actions and 50 incidental proceedings, totally 60 cases have been brought to the Constitutional Court each year.

b. Actions for annulment

8. Does direct recourse exist to the constitutional court against statues? And against other regulations and acts?

Direct application can be made to the Constitutional Court against laws, decrees having the force of law and the Rules of Procedure of the Turkish Grand National Assembly. The Council of State is empowered to deal with the annulment actions brought for the administrative regulations apart from these.

9. Who can bring such actions and within what time limit?

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 shall 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 shall exercise the right of the parties in power to apply for annulment

action. (Constitution Article 150) The right to apply for annulment directly to the Constitutional Court shall lapse within 60 days after the publication in the Official Gazette of the contested law.

10. Can the constitutional court suspend statutes or other regulations and acts?

Though there is no regulation regarding the stay order of execution of the law, the decrees having the force of law and the Rules of Procedure of the Assembly asserted to be unconstitutional, the Constitutional Court can decide on the stay order of execution of such legal rules stated above in accordance with its case-law.

c. Preliminary issues- plea of unconstitutionality

Who can refer cases to the constitutional court?

11. Which courts can refer cases to the constitutional court? If any court can put a preliminary question, does that mean that a broad or a restrictive interpretation is given to the notion of "court"?

There is no restriction to the courts, which can bring an incidental proceeding to the Constitutional Court. Namely, if a court which is trying a case, 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 shall apply to the Constitutional Court.

12. Are the courts obliged to put the question?

If a court finds that the law or the decree having the force law to be applied is unconstitutional it shall postpone the case and apply to the Constitutional Court to decide on this issue.

13. Is it possible to oppose, by a procedure of objection, opposition or recourse, the submission of all or part of a case to the constitutional court by a decision of referral? If so, who can initiate this procedure and how does it proceed? What are the consequences?

Incidental proceedings can be made against the laws and decrees having the force of law to be applied in a case not against the case itself. Namely, if one of the parties claim that the law to be applied in the concerning case is unconstitutional and if the trial court is convinced of the seriousness of this claim it may apply to the Constitutional Court after taking the opinion of the other party. Furthermore, the trial courts can directly apply for the annulment of a law to be applied that is considered unconstitutional without taking the opinion of the parties of the case.

14. What is the procedure for referral to the constitutional court? What is the role of the parties in drawing up the preliminary question? Can the preliminary question be raised ex officio? In that case, are the discussions on the question reopened?

The authorities which have the capacity as the right to apply for an annulment action to the Constitutional Court should make the application with a petition. The courts that apply to the Constitutional Court, incidental proceedings, arising out of a pending trial, should also make

the application with a justified decision. As stated in the 13th answer, one of the parties can claim that the law to be applied is unconstitutional or the court can directly apply to the Constitutional Court with the justification that a law is unconstitutional.

15. Do the courts that put the question rule on the constitutionality or unconstitutionality of the regulation at issue?

Yes. The Court which is convinced of the seriousness of a claim of unconstitutionality of the law or the provisions of the decree in the force of law to be applied or which finds that the law to be applied is unconstitutional is obliged to explain the reasons for unconstitutionality (Law no 2949 on the organization and trial procedures of the Constitutional Court, Article 28).

Screening

16. Is there a screening procedure, which allows the constitutional court to limit the number of cases or to speed up the hearing of those cases (nonsuit, quick reply, demurrer, evident unfoundedness, identity or similarity of questions which the constitutional court has already answered)? What is the proportion of cases screened in this way?

Direct application for annulment action and application made by trial courts to the Constitutional Court is examined by the Court and the petitions regarding the issues which do not deal within the jurisdiction of the Constitutional Court are rejected (Law no 2949 and the law on organization and trial procedures of the Constitutional Court, Article 8). For example, applications related to some special laws that are not subject to constitutional review and the applications made by unauthorized persons are rejected.

Scope of referral of the constitutional court

17. What is the import of the considerations of unconstitutionality given by the court that puts the question (court a quo)? Must the constitutional court take these considerations into account or can it ignore them? Can it raise, ex officio or at the request of the parties, the arguments of unconstitutionality not envisaged by the court a quo or is it restricted by the decision of referral? Can the constitutional court review regulations not intended by the preliminary question yet linked thereto?

The Constitutional Court is not obliged to follow up claims concerning unconstitutionality of laws, decrees having the force of law and the Rules of Procedure of Turkish Grand National Assembly brought forward by the parties concerned. The Constitutional Court can also, on condition that it observes the initial claim, reach a decision concerning unconstitutionality that is based on another statement of reason (Law no 2949, Article 29/1).

In addition to this if the annulment of the specific articles or provisions lead to the question of whether only some or indeed all of the provisions or articles of law must be considered as annulled; in this case the Constitutional Court may decide, upon compliance with the condition of indicating the matter in its statement of reasons, annul the other provisions in question or annul completely a law, decree having the force of law and the Rules of Procedure of the Turkish Grand National Assembly (Law no 2949, Article 29/2).

18. Are all aspects, both in law and in fact, of the action pending before the court a quo referred to the constitutional court

The Constitutional Court decides only on unconstitutionality in the cases it deals with. Therefore, the Constitutional Court does not examine the evidences of the case but it reviews the matter of the unconstitutionality regarding the laws to be applied in that case.

Relevance of the question

19. Can the constitutional court dismiss the question on the grounds that it is not useful to the settlement of the action brought before the court a quo?

Yes. The Constitutional Court rejects the application of a court regarding the annulment of law that is not going to be applied in the specific case the court is handling (Law no 2949, Article 28/1).

Interpretation of the question

20. Can the constitutional court reformulate the question in order to make it clearer and to define the constitutional debate better? If so, what use is made of this option?

Yes.

Interpretation of the reviewed regulation

21. Must the constitutional court adhere to the interpretation of the reviewed regulation given by the court a quo?

No, interpretation of the trial court is not binding on the Constitutional Court. The Constitutional Court may decide on the annulment with other reasons apart from the reasons asserted by the courts.

Jus superveniens

22. What is the impact of a legislative amendment to the challenged regulation subsequent to the decision of referral?

In an annulment action, if the concerned law is annulled or amended by the legislative power prior to the decision of the Court and if a previously annulled law is asserted to be annulled once again, then the Constitutional Court shall decide that there is no need for a judgment with the justification that the case has no subject matter. However, in the cases brought by incidental proceedings it examines and decides on the merit of the case.

Parties

23. *Can the parties before the court a quo or third parties (individuals, institutions, other courts, etc.) participate (voluntarily or compulsorily) in the procedure before the constitutional court? If so, in what way? How are they informed of the procedure before the constitutional court? Can one intervene before the constitutional court on the mere grounds of being a party before a court deciding on merits in an action similar to the one that led the court a quo to put the preliminary question?*

Third parties do not have the right to attend a trial being held in the Constitutional Court. The Constitutional Court examines the cases on the basis of files or written records, and then takes a decision. However, when it deemed it necessary, it may call on those concerned to present oral explanations. Parties are informed when the decision is announced or published in the Official Gazette. While the Constitutional Court is trying a case, the party of a similar case can claim the unconstitutionality of the law to be applied in that case. However, application to the Constitutional Court by incidental proceedings can only be made with the reasoned application decision of the concerned court.

24. *Is there a counsel for the defense? If so, in what form? Is there a counsel for the prosecution with the constitutional court?*

There is no council for defense since incidental proceedings and annulment actions are examined on the basis of file. However, the Constitutional Court is given other duties apart from the examination constitutionality of laws, decrees having the force of law and the Rules of Procedure of the Turkish Grand National Assembly (see, reply 1). The Chief Public Prosecutor of the Republic acts as public prosecutor in the cases with regard to the offenses relating to the functions of specific officials and in the cases of dissolution of political parties. In such cases, the party in question itself or a representative of that party (an attorney) has the right to defense.

Points of law in the constitutional proceedings

25. *Does the withdrawal of suit before the court a quo or the death of a party before the same court subsequent to the decision of referral have an impact on the progress of the constitutional action?*

No, it doesn't have an impact. The case is concluded.

d. The constitutional appeal (for example reoccurs d'amparo, Verfassungsbeschwerde etc.)

Object of the constitutional appeal

26. *What is the object of the constitutional appeal? Against which acts can such an appeal be lodged? Once a constitutional appeal has been referred to it, can the constitutional court examine the facts of the case?*

There is not a constitutional appeal system in Turkey.

Allowability of the appeal

27. *Who can refer an appeal to the constitutional court? How?*

That system does not exist in Turkey.

28. *Is appeal to the constitutional court only possible once all other avenues of appeal have been tried?*

Individual application cannot be made to the Constitutional Court in Turkey.

Screening

29. *Is there a screening procedure which allows the constitutional court to limit the number of cases or to speed up the hearing of those cases(selection of cases, nonsuit, quick reply, demurrer, evident unfoundedness, etc.)? What is the proportion of cases screened in this way?*

No, there is not such a process.

Parties

30. *Does the plaintiff participate in the procedure before the constitutional court? If so, in what form? What about the other parties? Can or must certain public authorities intervene in the proceedings?*

Plaintiff does not attend the incidental proceedings and annulment actions.

31. *Is there a counsel for the defense? If so, in what form? Is there a counsel for the prosecution with the constitutional court?*

Parties cannot participate trials except for the cases in which the Constitutional Court acts as the Supreme Court and the cases of the dissolution of political parties.

2. Settlement of conflicts between courts

32. *Is in the task of the constitutional court to circumscribe the respective jurisdictions of the other courts? If so, how does it proceed?*

In Turkey, the Court of Jurisdictional Disputes is authorized to deliver final judgments in disputes between courts of justice, and administrative and military courts concerning their jurisdiction and decisions.

II. The relations between the constitutional court and the other courts

A. The organic link

33. What are the organic links between the constitutional court and the other national courts (conditions of admission, appointment procedure, etc.)?

There is no organic relation between the Constitutional Court and other courts. However, some members of the Constitutional Court are selected among from the members of higher courts. Eleven regular members are selected as follows; two regular members each from the High Court of Appeals and the Council of State, one regular member each from the High Military Court of Appeals, the High Military Administrative Court of Appeals and the Audit Court. Four substitute members are selected as follows; two from the High Court of Appeals, one from the Council of State and one from among senior administrative officers and lawyers (Constitution Article 146).

B. The procedural link

34. Are there procedural links between the constitutional court and the court referring the case to it or against which the appeal was lodged (for example, a judge to-judge meeting in order to clarify or refine the question)? If so, what use is made of this option?

No, there are no procedural links.

C. The functional link

§ 1. The review and its effects

35. Do the rulings of the constitutional court always constitute a binding precedent for the other courts?

Constitutional Court is not act as a court of cassation for the other courts. The 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 the persons and corporate bodies (Constitution Article 153/6).

36. What are the review methods of the constitutional court (annulment, dismissal, declaration of constitutionality, declaration of unconstitutionality, interpretative decisions, interpretation reserves, annulment of a judicial decision, establishment of deficiencies, establishment of limited validity, etc.)? If necessary, distinguish for the different types of referral (action for annulment, prejudicial question, constitutional appeal).

In the course of review, if the Constitutional Court finds that a law or decree in the force of law are unconstitutional, those laws or decrees having the force of law are annulled. If the Constitutional Court finds that those laws or decrees are constitutional, it rejects this claim.

However, in the course of annulling the whole, or a provision, of laws or decrees having the force of law, the Constitutional Court cannot act as a lawmaker and pass a judgment leading to new implementation.

37. What are the legal effects of the rulings of the constitutional court (ex nunc, ex tunc; erga omnes, inter partes; etc.), individually, on the original action and on all actions before common law courts, on other regulations, administrative acts- statutory or individual- or judicial decisions, etc. (for example, is there a re-examination procedure)? Can the constitutional court limit or sustain the effects in time?

Annulment decisions of the Constitutional Court cannot have retroactive effect. ‘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 the publication of the decision in the Official Gazette.’ (Constitution Article 153/3)

38. Is the authority of the rulings of the constitutional court always respected? Does it sometimes meet with opposition from institutions or courts? Do the other courts sometimes experience difficulties in implementing the rulings of the constitutional court?

Judgments and decisions of the Constitutional Court are always respected in Turkey and do not meet with oppositions from the other institutions. The other courts do not experience difficulty in implementing the rulings of the Court.

§ 2. Interpretation by the constitutional court

a. The case law of other courts accepted by the constitutional court in the exercise of its own jurisdiction

39. Does the constitutional court consider itself bound by the interpretations of the challenged act given by the Supreme Court or other courts (theory of living law, for example)? Can the constitutional court, however, give another interpretation?

The Constitutional Court may consider the case laws of other courts, however they are not binding for the Constitutional Court.

b. The effects of the interpretation of the constitutional court and the acceptance of the case law of the constitutional court by the other courts in the exercise of their own jurisdiction

40. Is the interpretation of the constitutional rules and the legislative rules given by the constitutional court binding on the other courts? What happens in case of non-adherence to the interpretation of the constitutional court?

Decisions of the Constitutional Court are binding on the other courts. However, sometimes its interpretations are disregarded.

41. Can the constitutional court declare that a rule is constitutional only in the exact interpretation given by it? Can this interpretation deviate from that of “living law”? If so, what use is made of this option?

Yes, it can declare that a rule is constitutional only in the exact interpretation given by the Constitutional Court.

42. What are the effects for the other courts of a purely interpretative decision?

In the Turkish Constitutional law there are no such effects for a purely interpretative decision.

III. The interference of the European courts

A. The constitutional court and the other courts vis-a-vis the European Convention on Human Rights and the case law of the European Court of Human Rights

43. Is the constitutional court bound by the case law of the European Court of Human Rights? If this case law is not binding, does it influence the course of action of the constitutional court?

No, the Turkish Constitutional Court is not bound with the decisions of the European Court of Human Rights. However, these case laws of the European Court of Human Rights effect the decisions of the Constitutional Court and are referred as a supportive norm in many cases.

44. Can the court base its decision on a provision of the European Convention and, in going so, possibly deviate from the action of the constitutional court?

The Constitutional Court examines and reviews the constitutionality of laws, decrees having the force of law and the Rules of Procedure of the Turkish Grand National Assembly according to the Constitution. In the course of reviewing the constitutionality of laws, it refers to the European Convention.

45. Must a lawsuit have been brought before the constitutional court before an appeal can be made to the European Court of Human Rights (after having tried all internal avenues of appeal)?

In Turkish judicial system there is no way to apply to the Constitutional Court against the decisions of other national courts. Therefore, the cases are not brought to the Constitutional Court before an appeal can be made to the European Court of Human Rights after having tried all internal avenues of appeal in terms of individual application. However, an individual may claim that a provision of a law that is being applied to his own case in a court is unconstitutional.

B. The constitutional court and the other courts vis-a-vis the case law of the Court of Justice of the European Communities

46. Is the constitutional court bound by the case law of the Court of Justice of the European Communities? If this case law is not binding, does it influence the course of action of the constitutional court?

Turkey is still a candidate country to European Union.

47. Has the constitutional court already referred, or could it refer, cases to the Court of Justice of the European Communities? What is the role of the constitutional court and the other courts in case of non- application of national regulations that are incompatible with Community law?

Turkey is still a candidate country to the European Union.

48. Do national courts have a choice between referring cases to the constitutional court and to the court of Justice of the European Communities?

Turkey is still a candidate country to the European Union.

PART II

IV. THE JUDICIAL ORGANIZATION OF THE STATE AND THE POSITION OF THE CONSTITUTIONAL COURT IN THIS ORGANIZATION

A. JUDICIAL ORGANIZATION

Turkish judicial system is mainly divided into three branches: Constitutional, judicial and administrative jurisdiction. Besides these, the Jurisdictional Conflict Court, which has a different function, is within the system. Functions and formations of these judicial branches are shortly as follows:

1. Constitutional Jurisdiction

The Constitutional Court examines 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 According to Article 148/1 of the Constitution; the Constitutional Court is authorized to fulfill this duty. 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 Prosecutor 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 (Constitution Article 148/3). The Constitutional Court deals also with the auditing and the dissolution of political parties (Constitution Article 69) and decides on the appeal regarding to waive the parliamentary immunity and the loss of membership of the Parliament (Constitution Article no.85). Constitutional Court fulfills these duties as the first and the last instance. It enforces its actions according to the Law no. 2949 regarding the organization and trial procedures of the Constitutional Court and the Provisions of the Rules of Procedure of the Constitutional Court. There are no inferior courts of the Constitutional Court.

2. Ordinary Jurisdiction

Ordinary jurisdiction is composed of the courts authorized to handle criminal and civilian cases. These courts called as courts of civil and criminal jurisdiction and for that reason they are divided into two parts: criminal courts and civil courts. Criminal jurisdiction is also divided into two fields: military criminal jurisdiction and general criminal jurisdiction.

Military criminal jurisdiction carries out the judicial activities in the field of military criminal law. Military criminal courts are the inferior courts in this area. **The Military High Court of Appeals** is the last instance for reviewing decisions and judgments given by military courts

(Constitution Article 156). Criminal Courts, which handle the general criminal cases, are the peace courts of criminal jurisdiction, courts of general criminal jurisdiction and aggravated felony courts. The competence of the criminal courts is distinguished due to the gravity of the crimes and punishments. **The High Court of Appeals** is the last instance for reviewing the decisions of these courts (Constitution Article 154). Furthermore, the High Court of Appeals is also authorized to deal with some criminal cases as the first and the last instance for dealing with specific cases prescribed by law. Judicial procedure in the field of criminal justice is enforced according to the Criminal Procedural Law.

Subject of the civil jurisdiction is related to the disputes in Private Law. The lower courts of civil jurisdiction are the courts of first instance, peace courts and specialized courts such as commercial courts. **The High Court of Appeals** is the last instance for reviewing decisions and judgments given by courts of justice (Constitution Article 154). Judicial procedure and the jurisdiction of courts in the field of civil law are enforced according to the Civil Procedural Law.

3. Administrative Jurisdiction

Administrative Jurisdiction is composed of judicial units authorized to handle the disputes arising from the acts and actions of public administration. This field of jurisdiction has also two parts: military and general administrative jurisdiction.

Military administrative jurisdiction comprises the disputes regarding the members of the army and military service. **The High Military Administrative Court of Appeals** is the first and last instance for judicial supervision of disputes arising from administrative acts and actions involving military personnel or relating to military service (Constitution 157). There are no first-instance courts in the field of military administrative jurisdiction. The jurisdiction and trial procedure in the field of military administrative law are enforced according to the Act on the High Military Administrative Court of Appeals.

General administrative jurisdiction is composed of the courts authorized to handle all administrative cases except for the administrative military cases. The inferior courts in this area are administrative and tax courts. Additionally, Regional Administrative Courts are authorized to act as an appeal authority against some decisions of administrative and tax courts. **The Council of State** is the last instance for reviewing decisions and judgments given by administrative courts (Constitution 155). The Council of State is authorized to deal with the appeal of inferior administrative courts (apart from Regional Administrative Courts) and is the first and the last instance for dealing with specific cases prescribed by law. Besides these duties, Council of State, being the high consultation body of the State, is given the authority to give its opinion on specific subjects. Adjudication in the field of general administrative jurisdiction is enforced according to Administrative Courts Procedure Act.

4. Jurisdictional Disputes

The Court of Jurisdictional Disputes is empowered to deliver final judgments in disputes between courts of justice and administrative and military courts concerning their jurisdiction and decisions (Constitution Article 158). There are no inferior courts of this high court. The

organization of the Jurisdictional Court of Disputes, the qualification of its members and the procedure for their election, and their election, and its functioning is regulated by law.

In accordance with the information given above, there are six High Courts in Turkish Judicial System: The Constitutional Court, the High Military Administrative Court of Appeals, the Court of Jurisdictional Disputes act as the first and last instance courts because these higher courts have no inferior courts; however the High Court of Appeals, the Military High Court of Appeals and the Council of State have inferior courts and act as a court of cassation.

B. The Status of the Constitutional Court within Judicial Organization

The Constitutional Court is placed in the Higher Courts section of the Constitution as an independent judicial institution. It has no inferior courts. It fulfills its duties given by the Constitution as the first and the last instance court. It has no review and appeal duty against the decisions of other courts. Similarly, Constitutional Court is not authorized to settle the conflicts regarding the jurisdiction and decisions of other courts. The Court of Jurisdictional Disputes is authorized to deal with the conflicts arising from the jurisdiction and decisions of courts each of which belongs to different branches and the higher court which is the highest authority in that judicial branch (appeals court) is authorized to settle the conflicts arising from the jurisdiction and decisions of courts each of which belongs to same judicial branch.

V. SCOPE AND FUNCTIONING OF CONSTITUTIONAL JUDGMENT

A. The Competence of the Constitutional Court regarding the Constitutional Judgment

Mainly judicial duty of the Constitutional Court is to 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. Competence of the judicial review of these norms belongs only to the Constitutional Court. Judicial review of other regulative norms (such as regulations and by-laws) is held by the Council of State. Some norms, which are basically under the review of the Constitutional Court due to their sort, are excluded from the review of the Constitutional Court by the Constitution. International agreements which carry the force of law (Constitution Article 90); decrees having the force of law issued during a state of emergency, martial law and in time of war (Constitution Article 148) and; Reform Laws (Constitution Article 174) constitute the legal rules which are excluded from the judicial review.

Access to the Constitutional Court can be secured in two ways: abstract norm review and concrete norm review. Abstract norm review means the review of laws, decrees having the force of law and the Rules of Procedure of the Assembly after these rules are published in the Official Gazette and put into effect. A government organ can institute the principal proceeding. Concrete norm review means the review made upon the application of the courts for the annulment of the law to be applied, as it is unconstitutional. In both conditions, the

review is carried out after the norms to be reviewed are put into force. There is not any control mechanism to be applied before the norms are put into force.

B. Types of Cases and Persons, Bodies Authorized to Bring an Action

1. Annulment Action (Abstract Norm Review; principal proceeding)

Annulment action means to apply for annulment directly to the Constitutional Court within sixty days as of the publication in the Official Gazette of the laws, decrees having the force of law and Rules of Procedure of the Assembly due to their unconstitutionality. According to the Constitution, the President, Parliamentary groups of the party in power and of the main opposition party and a minimum of one-fifth of the total number of the 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 right of the parties in power to apply for annulment action shall be exercised by the party having the greatest number of members (Constitution Article 150).

The Constitutional court can examine constitutional amendments only with regard to their form. Regarding these kinds of laws, the Constitutional Court is not authorized to make reviews in terms of merit. The verification as to the procedure is restricted to the consideration of whether the requisite majority was obtained in the last ballot; the verification of constitutional amendments is restricted to consideration of whether the requisite majorities were obtained for the proposal and in the ballot and whether the prohibition on debates under urgent procedure was complied with. Verification as to the procedure may only be requested by the President and by one-fifth of the members of the Turkish Grand National Assembly. Applications for annulment on the grounds of defect in procedure shall not be made more than ten days after the date on which the law was promulgated; nor shall objection be raised (Constitution Article 148).

If the President of the Republic brings the annulment action, a petition including the reasons for the unconstitutionality shall be sufficient and be submitted to the Constitutional Court. In a case the annulment action is brought by groups of political parties and a minimum of one-fifth of the total number of the members of the Turkish Grand National Assembly, related procedures to be complied with are stated in Article 27 of the Law no 2949 on the organization and trial procedures of the Constitutional Court. The Constitutional Court examines whether the petition is drafted according to the provisions laid down in the law. This examination must be done within ten days of the date of registration; the plaintiffs concerned are notified of any deficiencies so that they can complete their petition within a period of at least fifteen days. If the relevant deficiencies are not rectified within the time limit, the action for annulment is considered as if it has not initiated.

2. Contention of Unconstitutionality Before Other Courts (Concrete Norm Review; incidental proceeding)

Besides the annulment action brought directly the Constitution puts forward another review type that is exercised upon the application of courts. This review means that if a court which is trying a case, finds 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 shall postpone the consideration of the case until the Constitutional Court decides on this issue (Constitution Article 152). Following points should

be underlined in terms of the preliminary issues that the Constitutional Court comes up against such applications.

Only the bodies in the form of a court can apply for objection. Administrative authorities that do not carry the peculiarities of a court or persons do not have the capacity to apply for incidental proceedings. The term 'court' refers to the judicial function rather than the organic criteria.

A court can apply to the Constitutional Court for the annulment of only the law or the decree having the force of law to be applied in the case. In case the law that is asserted by a court to be annulled does not going to be applied in the case, the Constitutional Court rejects the application in the first preliminary analysis (declaration of inadmissibility). Constitutional Court doesn't examine concrete side of the case, namely the merit of the conflict and the Constitutional Court does not act as a court of cassation.

Constitutional Court itself examines the preliminary issues of incidental proceeding. Interpretations and applications of other courts are not binding on the Constitutional Court. For example, interpretation of the trial court regarding whether the law to be annulled is going to be applied is not binding. The Constitutional Court interprets it by itself.

If a court which is trying a case finds that provisions of a law or decrees having the force of law to be applied in this case are unconstitutional, this decision together with its reasons, or is convinced of the seriousness of a claim of unconstitutionality submitted by one of the parties, a decision explaining the claims and defenses of the parties concerned in relation to this subject matter and its own views which led to this conviction, the contents of the file together with certified copies of documents relating to this case are sent by the court concerned to the presidency of the Constitutional Court.

The court shall postpone the consideration of the case until the Constitutional Court decides on this issue. The Constitutional Court shall decide on the matter and announce its judgment within five months of receiving the contention. If no decision is taken within this period, the court shall conclude the case under the current legal provisions. However, if the decision on the merits of the case becomes final, the trial court is obliged to comply with it (Constitution Article 152/3).

No allegation of unconstitutionality shall be made with regard to the same legal provision until ten years elapse after the publication in the Official Gazette of the decision of the Constitutional Court dismissing the application on its merits (Constitution Article 152/4).

In the Turkish Constitutional law no person or institution have the right to apply to the Constitutional Court except for those who are authorized to bring an annulment action or incidental proceedings being referred by other courts. The parties of the case have the right only to claim the unconstitutionality of the law. Therefore, the court takes the final decision whether the case is going to be sent to the Constitutional Court. The Constitutional Court does not empowered to deliver judgment related to other courts' jurisdiction.

C. Decision Making Procedure and Trial Procedure of the Constitutional Court

1. Preliminary Examination (preliminary issues)

First the Constitutional Court makes a preliminary examination and then decides on whether to consider the contention of annulment action or incidental proceeding on the grounds of merit. In the preliminary examination, if some points are lacking they are completed. For example, if the content of the application is indefinite or reasons regarding the unconstitutionality is lacking, they are completed. A decision of the rejection of the application shall be taken if an annulment action is not brought by authorized persons or authorities on time; if a public institution not in the form of a court applies for incidental proceeding and if the law which is asserted by trial court to be annulled does not going to be applied in the case. Similarly, applications that have no bearing whatsoever on the functions of the Constitutional Court shall be refused (Law no 2949, Article 45).

2. Examination in terms of Merit (Review of Constitutionality)

After the deficiencies are completed or if the Constitutional Court decides to examine the constitutionality then the Court decides on the examination of the case in terms of substance. Examination in terms of merit comprises the constitutionality of the norm to be examined in terms of both form and substance of the contested law. The Constitutional Court examines cases on the basis of files, except where it acts as the Supreme Court. But where necessary, the Constitutional Court may call on those concerned to present oral explanations (Law no. 2949 Article 30). The Chief Public Prosecutor of the Republic acts as public prosecutor in the Supreme Court and cases with regard to the dissolution of political parties. In such cases, the party in question itself or a representative of that party (an attorney) has the right to defense.

Third parties do not have the right to attend a trial being held in the Constitutional Court. There is no rule, which prevent the persons to be influenced by the result of the trial being held in the Constitutional Court to submit their written opinions to the Court. If a decision is not taken yet with regard to the annulment of a law and if that law is to be applied in another case, then a new annulment action may be brought or consideration of the case may be postponed until the Constitutional Court decides on this issue.

To withdraw an action or to withdraw initiation of an incidental proceeding does not constitute an obstacle to the examination of the unconstitutionality. The case is continued and concluded.

The Constitutional Court shall convene with its President and ten members, and shall take decisions by absolute majority. Decision of annulment of Constitutional amendments shall be taken by a two-thirds majority (Constitution Article 149/1). The Constitutional Court reviews mainly the conformity of the norms to the rules in the Constitution on the grounds of merit and procedure; furthermore, in its unconstitutionality review, it shall consider the general principles of law recognized by civilized nations, the main principles and rules stated in international conventions, particularly the European Convention on Human Rights.

According to the result of the examination made in terms of merit, the Constitutional Court decides whether to annul the contested law or reject the case or the incidental proceeding. In an annulment action, if the contested law is annulled or amended by the legislative power prior to the decision of the Court and if a previously annulled law is contested to be annulled once again, then the Constitutional Court shall decide that there is no need for a judgment with the justification that the case has no subject matter to be concerned. The Constitutional Court is not obliged to follow up claims concerning unconstitutionality of laws, decrees having the force of law or the Rules of Procedure of the Turkish Grand National Assembly brought forward by the parties concerned. The Constitutional Court may also, on condition that it observes the initial claim, reach a decision concerning unconstitutionality that is based on another statement of reasons. However, if the request comprises claims of unconstitutionality concerning only specific articles or provisions of laws, the result may be that annulment of these specific articles or provisions may lead to the question of whether only some or indeed all of the provisions or articles of laws must be considered as annulled; in this case the Constitutional Court may decide, upon compliance with the condition of indicating the matter in its statement of reasons, to annul the other provisions in question or annul completely a law (Law no. 2949 Article 29).

The Constitutional Court is not bound to the interpretation of the norm made by the court that brings an incidental proceeding to the Constitutional Court. The Constitutional Court reviews the constitutionality of the norm in line with the interpretation it makes on the meaning and content of the norm.

Both in annulment actions and incidental proceedings, the Constitutional Court must observe the initial claim but is not bound to the statement of reasons. Namely, it cannot disregard the initial claim, however it may take a decision of unconstitutionality that is based on another statement of reasons.

The Constitutional Court may declare that a rule is constitutional only in the exact interpretation given by it.

Though it is not clearly stated in the Constitution whether the Constitutional Court is not authorized to issue a stay order of execution of the law before the final decision is taken; the Court accepted by a case-law that it possesses this authority. If the Court finds strong evidences that the contested law is unconstitutional, and if application of that law later might result in damages that are difficult or impossible then the Constitutional court may issue a stay order of execution of that law.

In the course of annulling the whole, or a provision, of laws or decrees having the force of law, the Constitutional Court must not act as a lawmaker and pass judgment leading to new implementation.

There are reporters (rapporteur judges) assigned to assist in the work of the Constitutional Court who are given the duty to prepare reports on the case.

According to the average of the last twenty years, ten annulment actions and fifty incidental proceedings, totally sixty cases have been brought to the Constitutional Court each year.

VI. RELATIONS BETWEEN THE CONSTITUTIONAL COURT AND OTHER COURTS

A. Organic Relations

There is not an organic tie between the Constitutional Court and other national courts, however, there is a relation in terms of the organization of the Constitutional Court. The Constitutional Court shall be composed of eleven regular and four substitute members. 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 High Military Court of Appeals, the Military High 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 Higher Education Council from among the 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 (Constitution Article 146). Six regular and three substitute members of the Constitutional Court are the persons selected from higher courts. The Constitutional Court shall elect a President and a Deputy President from among its regular members by an absolute majority of the total number of members. Their term of office is 4 years.

According to Article 158/2 of the Constitution, the office of the President of the Court of Jurisdictional Disputes shall be held by a member of the Constitutional court from among its own members (in addition to its office as the member of the Constitutional Court).

B. In terms of procedure

The Constitutional Court does not meet the representatives of other courts, which brought incidental proceedings to the Constitutional Court in order to negotiate on the matter. However, when the Constitutional Court deemed it necessary, it may establish a correspondence with those courts and request an explanation or to make clarifications regarding the claim of unconstitutionality.

C. In terms of Function (In terms of justification and interaction)

Decisions of the Constitutional Court shall be published immediately in the Official Gazette, and shall be binding on the legislative, executive, and judicial bodies, on the administrative authorities, and on persons and corporate bodies (Constitution Article 153/6).

Laws, decrees in 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 the publication of the decision in the Official

Gazette (Constitution Article 153/3). If the Constitutional Court decides that the legal void arising out of the annulment of laws, decrees having the force of law and the Rules of Procedure of the Assembly or specific provisions thereof is of such a nature as to endanger public order or violate public interest, the Court must decide on the date on which the annulment decision shall come into effect (Law no 2949 Article 53/4).

The decisions of the Constitutional Court are final. A re-review procedure cannot be applied to the decisions taken. Decisions of annulment cannot be made public without a written statement of reasons. The annulment decision cannot have retroactive effect (Constitution Article 153).

As the decisions of the Constitutional Court do not have retroactive effect, previously acquired rights arising from the annulled law are not influenced by the annulment decision and keep their validity. However, since the other regulative procedures such as by-laws and regulations that come into effect based on the annulled law lose their legal base, they should not be applied after the annulment decision comes into effect.

Decisions of the Constitutional Court are binding on the other courts and are of crucial importance in terms of judicial interpretation of the Constitution.

Decisions of other courts are not binding on the Constitutional Court, however, in the course of decision, the Court may consider the case-laws of higher courts and give references to these decisions in its judgments.

Decisions of the Constitutional Court are binding on the Legislative body. If the Legislative body enacts an annulled provision of a law again, then the annulment decision is considered to lose its effect and this situation constitutes a new reason for the annulment of the new law. Furthermore, in the event of the postponement by the Constitutional Court of the date on which an annulment decision is come to effect, the Turkish Grand National Assembly shall debate and decide with priority on the draft bill or a law proposal, designed to fill the legal void arising from the annulment decision (Constitution Article 153/4).

Decisions of the Constitutional Court are binding not only in terms of result but also in terms of its written statement of reasons. Therefore, the Constitutional Court can declare that a rule is constitutional only in the interpretation given by it.

VII. THE EFFECT OF EUROPEAN COURTS ON THE CONSTITUTIONAL JURISDICTION

A. The Effect of the Decisions of the European Court of Human Rights

According to the current constitutional provisions, both the provisions of European Convention on Human Rights and the decisions of the European Court of Human Rights are not binding on the Turkish Constitutional Court. However, decisions and judgments of the European Court of Human Rights particularly its judgments regarding the basic rights and freedoms effect the Constitutional Court and play a role in the formation of decisions. Though the provisions of the European Convention on Human Rights are not directly accepted as a

criterion of the Constitutionality in the judicial review, provisions of the Convention take place in the written statement of reasons of the decisions as a supportive norm.

In Turkish judicial system there is no way to apply to the Constitutional Court against the decisions of other national courts. Therefore, the cases are not brought to the Constitutional Court before an appeal can be made to the European Court of Human Rights after all domestic remedies have been exhausted according to the generally recognized rules of international law.

B. Effects of the Decisions of Supreme Court of European Union

The Court of Justice of the European Communities is an institution, which possesses competence of jurisdiction among the member states of European Union. For this reason, decisions of the Court of Justice are not binding on and do not have a legal effect. Turkey is still a candidate country for the membership to European Union.