CONFERENCE ON "THE LEGAL REMEDY OF INTERMEDIATE APPEAL (*"İSTİNAF KANUN YOLU"*) AND THE INDIVIDUAL APPLICATION BEFORE THE CONSTITUTIONAL COURT"

(İstanbul, 01 June 2017)

Esteemed guests,
Distinguished participants,

I would like to express my gratitude towards you for your attendance in the conference themed "the Legal Remedy of Intermediate Appeal and the Individual Application before the Constitutional Court" and I greet you with all my heart and respect.

The constitutions include certain articles in respect of which all other articles included therein constitute an annotation. Article 5 of the Turkish Constitution is this kind of a provision. This article which is entitled "the fundamental aims and duties of the State" and which amounts to the essence and spirit of the social contract principally places emphasis on the security and liberty which are, in principle, *raison d'être* of the State.

Pursuant to Article 5 of the Constitution, the fundamental aims and duties of the state are, on one hand, to "ensure the welfare, peace and happiness of the individual and society" and on the other hand to "strive for the removal of … obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by rule of law and to provide the conditions required for the development of the individual's material and spiritual entity".

The review conducted by the Constitutional Court in the processes of the constitutionality review and the individual application is, in fact, concerning the implementation of Article 5 of the Constitution. In this provision, reference is made to the negative and positive obligations of the State within the meaning of the protection of the fundamental rights and freedoms. The review conducted by the Constitutional Court in concluding that there is a violation of a constitutional right and freedom in an individual application is also, in one sense, directed at determining the sphere and limits of the negative and positive obligations of the State.

Under extraordinary circumstances, the establishment of the security and the protection of fundamental rights and freedoms by the State become important more than ever. The reputable French philosopher Jacques Derrida stated immediately after the terrorist attack of 11 September "We must support the human rights more than ever. (As a matter of fact), we are in need of the human rights".[1]

Indeed, the human rights built on human dignity are the most important values determining the ontological status of human being. Subject of the human rights is human being who is deemed to be "the most glorious of those created by Allah (*eşrefî mahlukât)*". Centuries ago, Hz. Mevlana Celaleddin-i Rûmi explained the place of human being in the universe as follows: "You are the essence, foundation of the universe. The universe was created by virtue of you".[2]

In spite of the central significance of human being and his rights, the security concern has gradually spread over the world especially following 11 September, and as a result, the Islamophobic attitudes have expanded especially in the West. In the period following 11 September, counter-terrorism has led to excessive restrictions imposed on the fundamental rights and freedoms in certain countries.

In the same period, the relation between liberty and security followed a different course. Only 22 days after 11 September, the constitutional amendments of 2001 were materialized, and the scope of the fundamental rights and freedoms was thereby expanded. The same tendency also continued through the constitutional amendments taking place in 2004. A sentence was added to Article 90 of the Constitution. Accordingly, it is envisaged therein that in case of a conflict between international agreements concerning fundamental rights and freedoms and the laws, the former one shall prevail. By this amendment, the supremacy of the international law on human rights over the laws has been acknowledged in the domestic law.

Distinguished participants,

The individual application mechanism emerged as the continuation of this liberalistic tendency. In this scope, one of the most significant changes in the Turkish constitutional jurisdiction is undoubtedly investing the Constitutional Court with the duty to examine

[1] Jacques Derrida, "Autoimmunity: Real and Symbolic Suicides – A Dialogue with Jacques Derrida", in Giovanna Borradori, *Philosophy In a Time Terror: Dialogues with Jürgen Habermas and Jacques Derrida*, (Chicago: The University of Chicago Press, 2003), p. 132

[2] Mevlânâ, *Rubâîler*, Translated by Şefik Can, (İstanbul: Kurtuba Kitap, 2009), No. 345, p. 74.

individual applications by the constitutional amendment of 2010. A paragraph was added to Article 148 of the Constitution in 2010, and thereby it is enabled that "everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities".

Upon the introduction of the individual application mechanism in our legal system, a new era started in the protection of the constitutional rights and freedoms. Since 23 September 2012 the date when the Constitutional Court started receiving individual application, it has been performing this duty in a meticulous and effective manner, which has been also confirmed in the international arena. It is known that the individual application mechanism operating in Turkey is shown to be a successful and good practice which must be also taken into consideration by the other countries.

As is known, the individual application mechanism has brought along crucial improvements both in the functioning of the Constitutional Court and, in general terms, in the Turkish law. Upon the introduction of the individual application mechanism, the Constitutional Court is no longer an institution merely making constitutional review of the laws and has become a judicial tribunal which has a bearing on the daily lives of the individuals, directly deals with the incidents and thereby influences the society.

On the other hand, the individual application mechanism has also led to a paradigm shift in the constitutional jurisdiction. The Constitutional Court started rendering decisions and judgments both in the constitutionality review and the individual application processes within the "right-based" paradigm which gives priority to the protection of the fundamental rights and freedoms. As a matter of fact, very nature of the individual application entails such a paradigm shift. This is probably because the legislative intention of the constitutional amendment includes the following sentence "by virtue of the new legal arrangement, the Constitutional Court has been entrusted with the duty of protecting and developing freedoms by means of being entitled to examine individual applications".

As is known, the individual application mechanism has also a practical aim. This aim which is also mentioned in the legislative intention of the constitutional amendment reduces the number of applications lodged and the number of violations found against Turkey before the European Court of Human Rights ("the ECtHR"). This practical aim inherent in the individual

application system was materialized to a large extent until the coup attempt of 15 July. Thanks to the effective implementation of the individual application mechanism, the number of applications lodged and violations found against Turkey before the ECtHR has decreased significantly. However, the number of pending applications before the ECtHR has shown an increase due to the applications lodged subsequent to 15 July.

As in the countries where the individual application mechanism is implemented successfully, namely Germany and Spain, it is explicit that there are certain problems resulting from the implementation of the individual application mechanism also in our country. A significant part of these problems stems from the inability to sufficiently comprehend the principle of "subsidiarity".

It should be once again indicated that the individual application before the Constitutional Court or the constitutional complaint is not an ordinary remedy. The individual application mechanism is an extraordinary remedy of a secondary nature which may be resorted to in the event that the alleged right violations could not be eliminated through the ordinary remedies. As is also emphasized in the judgments of individual applications, respect for the fundamental rights and freedoms is a constitutional obligation entrusted to all bodies of the State, and the elimination of right violations occurring due to non-fulfilment of this obligation is the duty of administrative and judicial authorities.[3] What is principal in the individual application system is the respect for the rights and freedoms by public authorities and the elimination of any possible violation through ordinary administrative and/or judicial remedies.

Therefore, the principle of subsidiarity of the individual application essentially requires the assertion and the elimination of the right violations primarily and especially before the inferior courts. When it is not possible, the review by the Constitutional Court comes into play. Through the individual application process, the Constitutional Court establishes whether there is a right violation, and in case of finding a violation, it also determines how the violation in question may be eliminated. For instance, if the elimination of the violation requires a retrial, the Constitutional Court may decide that a retrial would be held, or if it does not find a legal interest in a retrial, an amount of compensation is awarded. The Constitutional Court does not have an authority to annul the decisions of the inferior courts or to render a decision/judgment by means of substituting itself for the inferior courts. In this sense, the review of the Constitutional Court in the individual application process is neither a first

[3] Ayşe Zıraman and Cennet Yeşilyurt, no. 2012/403, 26/3/2013, § 16.

instance trial nor an appellate examination. It should be known that the individual application mechanism does not offer a new and "super" appellate opportunity following the ordinary legal remedies.

It should be also known that the individual application is not a means for the elimination of all right violations one by one. Even if it is a desired situation, it is not possible to materialize it. Substantially, the objective aim of the individual application is to establish the situations leading to right violations and to ensure the elimination of these violations by public authorities and the prevention of new violations. In this regard, the success and future of the individual application mechanism depend on not only the Constitutional Court but also proper functioning of the judicial system.

At this stage, I am of the opinion that follow-up and assessment, by the public authorities, of the decisions and judgments on the individual applications especially by the judicial organs are of great importance. To that end, we are holding symposiums, round-table meetings, workshops and case-law fora together with the parties concerned and the shareholders, such as the conferences we have just inaugurated today.

Apart from this, we are publishing summary of the judgments that are in the nature of principle judgment (*"ilke kararı"*) or that are followed closely by the public on our web-site. All of the decisions and judgments rendered by the Plenary Assembly and the Sections are available on our web-site. Moreover, we are compiling the outstanding decisions and judgments rendered every year in a book entitled "Selected Decisions and Judgments" and transmitting this book to those concerned. Once more, the "Annual Report" in which the summary of the decisions and judgments are included is published and distributed to those concerned, in order to ensure easy follow-up of the Constitutional Court's decisions and judgments.

Esteemed guests,

The main problem posing a threat for the future of the individual application mechanism is the increasing workload. By today, there are over 103.000 individual applications pending before the Constitutional Court. Even if the cyclical increase taking place in an extraordinary period following 15 July is left aside, the individual application system must be implemented in a way which would enable rendering of judgments directed at preventing right violations by means of ensuring structural and systematic changes in the medium and long terms.

Among the Constitutional Court's judgments finding a violation, the lengthy proceedings take an important place. The Constitutional Court has so far rendered 2219 judgments finding a violation. Out of these judgments, 1757, in other words, 79,2%, concern the right to a fair trial. Out of the violations concerning the right to a fair trial, 84% is related to the right to a trial within a reasonable time. In 55% of these judgments finding a violation, the length of proceedings is between 5 and 10 years whereas in 21% of these judgments, the length of proceedings is between 10 and 15 years, and 15% of them the length of proceedings exceeds 20 years.

The main obstacle before the establishment of justice is the increasing workload and, in conjunction therewith, the problem of lengthy trial. The increasing workload and lengthy proceedings continue to be probably the most important structural problem of the judicial system in Turkey.

The failure to conclude the cases within a reasonable time leads to problems not only within the scope of the right to a fair trial but also, regard being had to the conflicts that are subject-matter of the cases, may tarnish the aim of effective protection of all other fundamental rights from the right to life to the right to property.

When examined from the perspective of the fundamental rights, we must keep in mind that the judiciary has the functions of protecting the rights from the unlawful interventions, remedying the improper practices and redressing the damages occurring in respect of the fundamental rights. In this respect, conclusion of the conflicts in a more effective manner and within reasonable periods is important for the protection of all fundamental rights and freedoms.

As is known, the most important reason for the prolongation of the proceedings is probably the heavy workload. I would like to reiterate that we welcome the steps taken for the settlement of this problem. As is known to all, the intermediate appellate practice has been in use with the thought that the judiciary must be re-organized in accordance with its main aim and the characteristics of its works for ensuring its functioning in a more productive manner.

In this sense, we hope that the courts of intermediate appeal ("*istinaf mahkemeleri*"), which started operating on 20 July 2016, will make contribution to more effective functioning of the judiciary. As a matter of fact, short-term experience gained by the courts of intermediate appeal strengthens our hope in this direction.

According to data provided by the Ministry of Justice, the courts of intermediate appeal have handled the criminal cases and civil cases before them at the rates of respectively 78% and 68%. The fact that the average period of handling a case before the courts of intermediate appeal has been so far 73 days in criminal cases and 121 days in civil cases is really pleasing and promising for us. I congratulate all members of the judiciary serving in the courts of intermediate appeal for their impressive performance and wish them a continued success.

It is beyond any doubt that we do not just now have sufficient data for making an assessment about the courts of intermediate appeal in respect of the individual application. Until today since the date when the courts of intermediate appeal started functioning, a total of 164 individual applications was lodged with the Constitutional Court in respect of the cases which were finally concluded by these courts. Six out of these applications were concluded with an inadmissibility decision. In respect of the final decisions rendered by the courts of intermediate appeal, there is no individual application which has been subject to an examination on the merits yet.

As I have expressed above, the principle of subsidiarity of the individual application mechanism requires the elimination of the right violations primarily and especially before the inferior courts. I would like to share my belief that the courts of intermediate appeal would make contribution thereto.

Before ending my speech, I wish this meeting, where the academicians and the members of the judiciary as the practitioners have been ensured to convene, will be successful and fruitful. I would like to express my thanks in advance to those taking role in the organization, especially those who will make contributions to the conference through their presentations and questions, and to all participants.

I greet all of you with respect and extend my wishes of health and prosperity to all of you.

Zühtü ARSLAN
President of the Constitutional Court