

Impact of Constitutional Court Decisions on Ongoing Cases

I. Introduction:

Article 153 of the Constitution provides explanations on the qualification and feature of the Constitutional Court decisions. The content of this Article is as follows: *“The decisions of the Constitutional Court are final. Decisions of annulment shall not be made public without a written justification. In the course of annulling the whole, or a provision, of laws or presidential decrees, the Constitutional Court shall not act as a lawmaker and pass judgment leading to new implementation. Laws, presidential decrees, or the Rules of Procedure of the Grand National Assembly of Turkey 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 duration 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 Grand National Assembly of Turkey shall debate and decide with priority on the bill, designed to fill the legal void arising from the annulment decision. Annulment decisions cannot be applied retroactively. 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.”*

In this background, the impact of the Constitutional Court decisions on the ongoing cases is a controversial issue in all areas of law. It is possible to discuss the subject theoretically and practically in many sub-content. In addition to this, in terms of this article, the subject is limited to the impact of annulment and individual rights violation decisions, ruled by the Constitutional Court, on ongoing cases.

II. Constitutional Court Decisions

a) Annulment/ Violation of Right Decisions: Qualification-Impact on ongoing cases

The annulment decisions of the Constitutional Court can be defined as the determination of the illegitimacy of a provision by the Constitutional Court. Hereunder; annulment decisions are those that reveal the invalidity of a provision. In the doctrine; in contrast to the general theory of annulment, there are dictums suggesting that the annulment decisions established by the Constitutional Court are constitutive but not in the nature of indicator.¹

¹ For detailed explanations and evaluations on this subject, see AZRAK, Ülkü. **Anayasa Mahkemesi İptal Kararlarının Geriye Yürümezliği**, Anayasa Yargısı, Issue 1, 1984, p.151-168.

According to Article 153/4 of Constitution; in cases where the entry into effect date of the annulment decision is postponed, the Turkish Grand National Assembly is expected to fill the legal gap created with the annulment decision. However, as no sanction is envisaged for the cases where the legislator does not take action and fill the legal gap; the void of law arising from the annulment decision can actually leave the problems unsolved.²

Indeed; within the scope of ongoing cases, the court can establish a decision based on the provision which is abolished and annulled by the Constitutional Court based on the violation of the Constitution but of which the effective date is postponed to a later date.

For example, by the Constitutional Court's decision published in the Official Gazette in 2010³, a provision has been annulled and it has been stated that the annulment provision will enter in force six months later. In the case filed against the accrual form issued prior to the publication of the annulment provision in the official gazette, the annulment decision was not taken into consideration by the Tax Court. The first instance tax court stated that the decisions of the Constitutional Court shall be valid after the publication in the Official Gazette and otherwise application will be contrary to Article 153 of the Constitution that regulates the retrospectivity of the annulment decisions.

In other words, within the course of concrete case; the first instance tax court considers that the Constitutional Court decisions will have legal consequences as of the publication in Official Gazette or at the specified future date in cases where an effective date is determined.

In the case of the lawsuit; before the annulment decision of the Constitutional Court, an action has been brought against the accrual issued on the basis of the provision on annulment subject. As the case continues, the Constitutional Court ruled its decision on the annulment of the relevant provision. However, as the effective date of the annulment decision has been postponed, the lawsuit filed examined by the first instance tax court by considering the annulled provision as per Article 153 of Constitution regulating retrospectivity.

As seen, after the annulment decision of the Constitutional Court, a legal gap was created which needs to be fixed by the legislator and the taxpayer faced with damage based on the gap until the effective date of the annulled regulation.

Within the scope of the appeal application against the decision of the first instance tax court, 4th Chamber of Council of State has ruled that the decision of the first instance tax court is unlawful.⁴ By the 4th Chamber of Council of State it is based on the grounds that the postponement of the annulment decision shall not result with the implementation of the annulled provision to the controversies before the courts as they were annulled due to their violation to the Constitution.

In the decision of the 4th Chamber of the Council of State; although it is known that Constitutional Court has annulled all of or a part of a law or decree law by determining that they are against Constitution; resolution of ongoing cases based on these annulled rules is contrary to the principals of constitutional supremacy and rule of law.

² For detailed explanations and evaluations on this subject, see CANSEL, Erol. Anayasa Mahkemesinin Verdiği İptal Kararından Doğan Kimi Sorunlar, Anayasa Yargısı, Issue 9, 1992, p.87-104.

³ Constitutional Court decision dated 15.10.2009 and numbered 2006/95, 2009/144 published under Official Gazette dated 08.01.2010 and numbered 27456.

⁴ Decision of 4th Chamber of the Council of State dated 09.05.2011 and numbered 2011/2546, 2011/3384

Accordingly, it is concluded that it is mandatory to apply the annulment decisions of the Constitutional Court to the cases filed by the ones who wants to make an appeal application and to the cases filed by the ones who faced with the enforcement of the annulled provision/s.

In another decision of the 4th Chamber of the Council of State⁵ provided on the same issue; it was ruled that if all or a part of a law or decree law was annulled by Constitutional Court based on the contradiction of these rules to Constitution; it is not possible to accept that the ones who apply litigation against the implementation of this annulled decision cannot benefit from the legal results of the annulment decision where application of this annulled decision continues in cases like where the Constitutional Court decision has not been published under Official Gazette yet or where the implementation date is stated separately.

However; in a case that is subject to the decision of the 2nd Chamber of Council of State⁶; Regarding the provision of the law annulled by the Constitutional Court, it is stated that the legal consequences of the annulment provision should be taken into consideration in the case which has been opened before. First instance court concluded that, resolving the dispute in accordance with the rules determined as contrary to Constitution is against the principals of constitutional supremacy and state of law. This decision has been appealed by the administration. Subsequently, 2nd Chamber of Council of State ruled that the reasons for the appeal did not occur in the case and rejected the appeal application.

In another decision of Plenary Session of Administrative Chambers of Council of State⁷ below stated explanations are provided:

- Postponing the date of the application of annulment decision by Constitutional Court is based on the purpose of giving opportunity to the legislative body to make a new regulation in line with the justification of the annulment decision and prevent legal gap,
- In any case, it does not result with the implementation of the rules and the resolution of the disputes according to these rules that have been annulled based on the grounds that they are against to the law and the Constitution,
- The time provided for the enforcement of the annulment decision of Constitutional Court should be taken into consideration and interpreted together with the justification of the decision,
- The acceptance of the contrary means that the right of appeal will become virtually unenforceable for all applicants that has/will apply appeal process and it will result with the misapplication of the annulment decision,
- It also results in the legal protection of the application of a rule which is concluded to be contrary to the Constitution; and this will be contrary to the rule of the Constitutional Supremacy and the rule of law.
- Moreover, in the case of the annulment of a law by the Constitutional Court, it is accepted in the doctrine that even if this procedure is not subject to an administrative case, it will be affected by the annulment decision.

⁵ Decision of 4th Chamber of the Council of State dated 09.05.2011 and numbered 2011/2428, 2011/3386

⁶ Decision of 2nd Chamber of the Council of State dated 01.06.2005 and numbered 2004/1545, 2005/1886

⁷ Decision of Plenary Session of Administrative Chambers of the Council of State dated 30.10.2013 and numbered 2010/2292, .2013/3366

As can be seen, the opinion of the Council of State is that the legal consequences of the annulled provisions of the Constitutional Court shall be taken into account within the course of pending cases that initiated before annulment and which are ongoing during the period when the Constitutional Court ruled on annulment.

b) Violation Decisions of Individual Rights: Qualification-Impact Regarding Ongoing Cases

Constitutional Court may rule annulment decisions after individual applications.

Individual application is an institution in which the claim of infringement is examined in judicial decisions and transactions and actions of the public power. The right of individual application is based on the claim of infringement and the annulment decisions established by the Constitutional Court after the individual applications prevent unlawful transactions, actions or negligence in the protected area of fundamental rights and freedoms.⁸

At this point, the impact of individual application decisions on the other cases which has same party and same subject may be evaluated.

As a matter of fact, in the recent past, after the annulment application realized by a bank before Constitutional Court; it was ruled that; *“there was no legal remedy in the re-trial, there is a violation of property rights regarding the assessment and the amount collected shall be paid to the applicant as compensation with the accrued interest”*.⁹

The decision of the Constitutional Court has been submitted by the applicant bank to the cases regarding the same subject and which were pending before the different chambers of the Council of State and to which that the bank is a party of. The applicant bank requested that the decision of Constitutional Court to be taken into consideration on ongoing cases before the Council of State.

Although it may be argued that the decisions established by the Constitutional Court should be taken into account during the examination of pending cases; different evaluations were made on the subject by the different chambers of the Council of State.

Accordingly; subsequent to the individual application realized by the applicant bank regarding its another branch and following the finalization of unfavorable decision of the first instance court; 3rd Chamber of the Council of State concluded that;

- Upon the individual application, it is obligatory to abide with re-trial decision of Constitutional Court ruled with the justification of violation of rights,
- There is no regulation that obliges the enforcement of the violation decision within the course of other cases,

⁸ For detailed explanations and evaluations on this subject, see ACU, Melek. **Bireysel Başvuruya Konu Edilebilecek Haklar. Türkiye Barolar Birliği Dergisi**, Issue 110, 2014, p.403 -433.

⁹ Decision of Constitutional Court dated 12.11.2014 and numbered 2014/6192 and published under Official Gazette dated 21.02.2015 and numbered 29274

- However, if it is determined that the fundamental rights and freedoms guaranteed in the Constitution have been violated; not considering the violation decisions under the cases where the parties, subjects and reasons are same will be contrary to the constitutional supremacy and Article 2 of the Constitution covering supremacy and binding nature of Constitution and regulating the rule of law and universally recognized law principles.

In this context, with the decision of the 3rd Chamber of the Council of State¹⁰ it is ruled that the tax court decision on rejection of the case shall be revoked as the Constitutional Court ruled on the violation of the property right.

With the decision established by the 4th Chamber of the Council of State¹¹ it is ruled that the Constitution Court decision will not serve basis for revoke based on the below stated grounds:

- Although it was decided by the Constitutional Court on violation of property right; it is stated that the matter to be examined is whether the transactions or acts subject of the case are lawful or not subsequent to the annulment and full remedy action applications realized by the ones whose rights are violated by the administrative acts and transactions stated under Article 2 of the Administrative Jurisdiction Procedures,
- Accordingly, it is examined that whether the tax proceeding subject to controversy is lawful or not.
- Also, in the same decision it is ruled that there is no legal interest for the re-trial in elimination of violations and consequences,
- It is ruled by the Constitutional Court that the predictability to be provided as per Article 73/3 of the Constitution regulating the legality principle is not ensured,
- Decision of the Constitutional Court does not constitute a legal situation on re-evaluation of the Council of State decision which was requested to be revised in line with the Constitutional Court decision,
- There is no legal uncertainty in the case as of the inspection date and there is uncertainty on identification of the material fact,
- Therefore, it was concluded that the violation was not effective on the liability.

As seen, the impact of individual application decisions of the Constitutional Court to the cases where the parties and subject of the cases are same evaluated differently by the chambers of Council of State.

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¹⁰ Decision of 3rd Chamber of the Council of State dated 05.06.2015 and numbered 2015/31, 2015/4299

¹¹ Decision of 4th Chamber of the Council of State dated dated 04.03.2015 and numbered 2014/3101, 2015/677