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THE EQUALITY OF ARMS PRINCIPLE AND THE FIELD OF APPLICATION UNDER TURKISH JUDICIAL LAW REGARDING THE RIGHT TO LITIGIOUS TRIAL

Abstract:

Following the intense violation of human rights which occurred during WWII, a protective system for the human rights which arise due to their being human beings was attempted to be created and based on this enactment, the European Convention on Human Rights was prepared by the countries who are members of European Council. With the passing time, the member states of the European Council have signed the European Convention on Human Rights and they have made harmonious changes to the provisions of national regulations. European Convention on Human Rights which was signed by Turkey as well is also an integral part of our national regulations yet it is debatable how great an area of application it can find. The scope of the right to fair trials which is among the most essential parts of basic rights and freedoms enacted under article 6 of Human Rights Convention and what its parts were and the equality of arms principle governed under the same regulations and the observation and study of litigious right to trial concepts are the primary objective of this study.

Thus, in the first section of the study consisting of two parts, the scope of right to fair trial and its components are to be considered as mentioned in the 6th article of European Convention on Human Rights and Ruling Cases of European Court of Human Rights and the equality of arms principle which is among the most important milestones of fair trial and the litigious rights will be explained. In the second part, the area of application of the equality of arms principle and litigious rights and their areas of application under Turkish Law will be studied. The main reason beyond this study is attempting to understand whether a fair trial can be achieved between the administration having the upper hand and the individuals as stipulated by European Convention on Human Rights.

Keywords:

Right to Fair Trial, Equality of Arms Principle, Litigious Lawsuit Rights, European Convention on Human Rights, Witnesses of administrative justice, Judge and Public Prosecutor's Opinion in Administrative Litigation, Expert's Examination in Administrative Justice, Access to the Information and Documents in Administrative Justice.

JEL Classification: K30, K33

INTRODUCTION

This study is composed of two parts.

The first part is about article 6 of European Convention on Human Rights and the principle of equality of arms and the litigious right to trial which have been stated by European Court of Human Rights.

The second part is about the same principles under Turkish administrative jurisdiction procedure and Turkish laws. The examination in this part will be conclude if these principles find application area in Turkish administrative courts or not.

I. THE RIGHT TO A FAIR TRIAL AS PART OF EUROPEAN CONVENTION ON HUMAN RIGHTS

European Convention on Human Rights, has been submitted for signature so as to enhance a guard mechanism versus the violations of human rights by the Council of Europe of which Turkey also has been the cofounder on 4 November 1950¹. Turkey signed on European Convention on Human Rights and the protocol numbered 1 in 1954; but it has taken place on the top among the countries against which have been adjudged about violation. And unfortunately, the most of Turkey's violations are about the violation of "right to a fair trial"².

In accordance with Turkish Constitution article 90/5; European Convention on Human Rights is a part of our national legislation and because of being about fundamental rights and freedoms, if European Convention on Human Rights is contrary to any of our national laws; European Convention on Human Rights's acts will be implemented³. Besides, in accordance with Turkish Constitution article 36 entitled "*right to legal remedies*"; it has been stated that everyone has right to a fair trial and consequently subject concept has acquired constitutional assurance.

Right to a fair trial has been ensured in European Convention on Human Rights article 6⁴ and components of it take place in most of the countries' national legislation⁵.

¹ AKKURT, Kemal, **AİHM Kararları Işığında Adil Yargılanma Hakkında Makul Süre**, Unpublished Master's Thesis, Ankara University, 2012, p. 6.

² AKKURT, p. 7.

³ AKKURT, p. 20.

⁴ Article 6: " 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the

A. Covering And Components Of Right To A Fair Trial

Right to a fair trial's components can be summarized as, "access to court", "presence at the proceedings", "freedom from self-incrimination", "equality of arms and right to litigious trial"⁶.

Some of the components of right to a fair trial take place in European Convention on Human Rights article 6/1 and some has been ensured by the court practices of European Court of Human Rights⁷.

B. Equality Of Arms And Right To Litigious Trial

Equality of arms has not been taken place in European Convention on Human Rights article 6/1 but also this principle has been ensured by the court practices of European Court of Human Rights⁸.

Equality of arms⁹ was defined firstly in the court decision of European Convention on Human Rights' *Dombo Beheer BV Netherlands* trial dated 27 October 1993. Subject definition has taken place similarly in the next decisions of the court¹⁰.

European Convention on Human Rights evaluates the equality of arms according to every concrete cases' specialities¹¹.

opinion of the court in special circumstances where publicity would prejudice the interests of justice.2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.3. Everyone charged with a criminal offence has the following minimum rights:(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;(b) to have adequate time and facilities for the preparation of his defence;(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.."

⁵ MOLE, Nuala / HARBY, Catharina, "A Guide To The Implementation Of Article 6 Of The European Convention On Human Rights", Human Rights Handbooks, No. 3, p. 7.

⁶ AYDIN, Bihter, **Türk İdari Yargı Düzeninde Adil Yargılanma Hakkı**, Unpublished Master's Thesis, Gazi University, 2012, p. 4.

⁷ TOYDEMİR, Seçkin, **Adil Yargılanma Hakkı Çerçevesinde Türk İdari Yargı Sistemi**, Unpublished Master's Thesis, İstanbul Bilgi University, 2013, p. 28.

⁸ DİNÇ, Güney, "Avrupa İnsan Hakları Sözleşmesi'ne Göre Silahların Eşitliği", **Türkiye Barolar Birliği Dergisi**, N. 57, 2005, p. 283.

⁹ Equality Of Arms: "Everyone who is a party to proceedings must have a reasonable opportunity of presenting his case to the court under conditions which do not place him/her at a substantial disadvantage vis-a-vis his/her opponent."; MOLE / HARBY, p. 46.

¹⁰ YAVUZ, Zehra, **Silahların Eşitliği İlkesine İlişkin Avrupa İnsan Hakları Mahkemesi Kararları ve İç Hukukumuzdaki Dönüştürücü Etkileri**, Unpublished Master's Thesis, İstanbul University, 2009, p. 19.

¹¹ YAVUZ, p. 19-20; ULUTAŞ, Tefik Barbaros, **Adil Yargılanma Hakkı ve Yargılanmada Silahların Eşitliği Problemi**, Unpublished Master's Thesis, Ankara University, 2008, p. 42.

Right to litigious trial means; “ *in principle the opportunity for parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed*”¹².

II. EQUALITY OF ARMS AND RIGHT TO LITIGIOUS TRIAL IN TURKISH ADMINISTRATIVE TRIAL PROCEDURE

The court decisions in which European Court of Human Rights had identified contrariety to equality of arms principle at first were related with criminal procedure; but than the court began to use this standart in civil justice and administrative procedure, too¹³.

Equality of arms principle and right to litigious trial must be able to find field of application so that right to a fair trial can occur in administrative procedure¹⁴.

Equality of arms principle and right to litigious trial has been defined as same as European Court of Human Rights' definitions in Turkish council of state decisions.

A. Reaching To Informations And Documents

According to Turkish Administrative Jurisdiction Procedures Law article 3/3; litigator have to submit cause administrative decision and documents with the complaint. According to the same law's article; if the documents aren't submitted by the litigator in filing procedure, the court disowns the complaint in first examination and gives extra 30 days time to litigator so that he can complete the missing documents¹⁵. In the present case, arms aren't equal in the sense of litigator¹⁶. Because in Turkish administrative procedure, the term of litigation is 60 days for administrative courts and 30 days for tax courts. And also, individuals have difficulty about ensuring information and documents from administrative organisations. So, these are very short periods to be able to file using all of the documents and the extra 30 days time can't be able to remove the disadvantages.

When we look at the decisions of Turkish council of state, we can see that the council has some decisions to be able to remove the disadvantages. According to

¹² MOLE / HARBY, p. 46.

¹³ DİNÇ, Güney, **Sorularla Avrupa İnsan Hakları Sözleşmesi**, Türkiye Barolar Birliği Yayınları: 102, Sorularla Hukuk Dizisi: 4, Ankara 2006, p. 266.

¹⁴ AKINCI, Müslüm, “*İdari Yargılama Hukukunda Fırsat Eşitliği*”, **Türkiye Adalet Akademisi Dergisi**, July 2010, Y. 1 No. 2, p. 33.

¹⁵ GÖZÜBÜYÜK, A. Şeref / TAN, Turgut, **İdare Hukuku, İdari Yargılama Hukuku**, Vol. 2, Edt. 6, Ankara, 2013, p. 892.

¹⁶ Yavuz, p. 123.

one of the Plenary Session of Administrative Law Divisions's decision¹⁷; the court must not disown the complaint because of the missing document in first examination and also must ensure the documents itself in accordance with principle of ex officio examination¹⁸.

The article 16/1 of Turkish Administrative Jurisdiction Procedures Law is also another devising which is contrary to equality of arms principle and right to litigious trial. Accordingly, litigator has to garnish all of the documents with the complain to litigious administration; but litigious administration doesn't have to garnish all of the documents with the rebuttal petition to the litigator¹⁹.

Similarly, according to the article 20 of the same law; administrative courts can gather new evidences but they don't have to garnish them to the parties. Consequently, if the administrative court adjudges in terms of these new evidence, there will be violation of equality of arms principle²⁰.

According to jurisprudences of European Court of Human Rights; all of the informations and documents which are related with the basic of judgment have to be public in trial, and the only derogation of this is the incompatibilities which are directly related with national security²¹.

B. The Evidence Of Witness

The evidence of witness isn't carried into effect in Turkish administrative jurisdiction because of hasn't been noticed in Turkish Administrative Jurisdiction Procedures Law. So, the trial in which any evidence of witness is an direct element for the result; if the parties don't apply to witness declaration; the equality of arms principle won't find field of application²².

Besides, even the evidence of witness doesn't take place in Turkish Administrative Jurisdiction Procedures Law; it must be considered by the judges in the trial. With new jurisprudences of French Conseil d'Etat which has a very important

¹⁷ The Decision of Turkish General Assembly of Administrative Proceedings dated.07.03.2003, numbered 2002/1149 E. and 2003/103 K. ; <http://www.kazanci.com/kho2/ibb/giris.htm>, Access Date 03.04.2014.

¹⁸ YAVUZ, p. 123-124.

¹⁹ YAVUZ, p. 124.

²⁰ YAVUZ, p. 125; TOYDEMİR, p. 151.

²¹ YAVUZ, p. 126.

²² YAVUZ, p. 130.

place in our administrative jurisdiction, the evidence of witness has been incorporated to French administrative jurisdiction system²³.

C. Expert Examining

According to Turkish Administrative Jurisdiction Procedures Law, expert examining can be considered in Turkish administrative jurisdiction. But the judge chooses the expert *reciex officio* without receiving opinion of the parties²⁴.

Nothing vesting to the parties about choosing expert, firstly seems to be contrary for equality of arms principle. Nevertheless, there are a lot of decisions of Turkish Council of State aimed at preventing this case's prejudices²⁵.

According to one of the decisions of Turkish Council of State; it reversed the decision of court of first instance which had adjudged without garnishing the expert report to the parties²⁶.

There are decisions of Turkish council of state in the same way as expert reports don't have a binding force from the point of the component court²⁷ and if the component court disqualifies the expert report, it can desire a new report from a new expert and if the two reports are contradictory each other, the component can choose a new expert third time²⁸.

D. Council Of State Prosecutor And Council Of State Investigation Judge

In the trials at which Turkish Council of State is the first component court, on the back of submitting the claims and defences by the parties, case file is sent to council of state chief prosecutor. Thereon, chief prosecutor himself/herself or another prosecutor considers the case file and gives an opinion. During this considering, prosecutors are able to receive all manner of informations and documents via Prime Ministry²⁹.

In the decision of European Court of Human Rights dated 2007; the court adjudged that not to garnish the opinion of prosecutor is violation of right to litigious

²³ ULUTAŞ, p. 64.

²⁴ GÖZÜBÜYÜK / TAN, p. 951-952.

²⁵ YAVUZ, p. 132.

²⁶ The Decision Of Turkish Council Of State Office 8 dated 25.06.1997, numbered 1995/3742 E. and 1997/2289 K. ;<http://www.kazanci.com/kho2/ibb/giris.htm>, Access Date 03.04.2014.

²⁷ The Decision Of Turkish Council Of State Office 10 dated 09.02.2005, numbered 2002/3573 E. and 2005/367 K. <http://www.kazanci.com/kho2/ibb/giris.htm>, Access Date 03.04.2014.

²⁸ The Decision Of Turkish Council Of State Office 14 dated 15.02.2012 , 2011/15596 E. and numbered 2012/965 K., <http://www.kazanci.com/kho2/ibb/giris.htm>, Access Date 03.04.2014.

²⁹ GÖZÜBÜYÜK / TAN, p. 979; YAVUZ, p. 134.

trial. After this decision, a law amendlaw has occurred about Turkish Administrative Jurisdiction Procedures Law article 16/6 by the law numbered 6352. Accordingly, council of state prosecutor has to garnish the opinion about case file to the parties and also the parties are entitled to make statement in writing about the opinion³⁰.

As well as the subject law amendlaw is a positive development for Turkish administrative jurisdiction, I think that the same law amendlaw has to occur about garnishing the informations and documents which are received by prosecutor during the considering procedure to the parties.

In European Court of Human Rights *Van Orshoven-Belgium* trial dated 1997; the court adjudged that not to garnishing the documents which had submitted by chief prosecutor in appellate procedure had been the violation of right to litigious trial³¹.

When we evaluate subject decision from the point of Turkish positive law we can see that this topic has been arranged by Turkish Council of State Law article 62. Hereunder, in appellate procedure investigation judges present an opinion about the case file, but their opinions aren't garnished to the parties. Accordingly, our legal arrangement about the opinion of investigation judges offend against equality of arms principle and right to litigious trial³².

RESULT

Equality of arms principle and right to litigious trial, are the most important components of right to a fair trial. Subject notions have been ensured by the jurisprudences of European Court of Human Rights.

Since not to violate the principle of equality of arms and right to litigious trial, parties have to be able to be judged with equal arms and they have to be able to present an opinion about all of the informations and documents which are submitted to the case file.

Accordingly, both of subject notions have importance specially during the administrative jurisdiction in which state has public force prerogatives.

When we look at our administrative jurisdiction legislation, we can see that state and private individuals aren't on equal footing. So, it is necessary to regulate Turkish

³⁰ GÖZÜBÜYÜK / TAN, p. 980.

³¹ MOLE / HARBY, p. 87.

³² YAVUZ, p. 135; SANCAKDAR, Oğuz, "Avrupa İnsan Hakları Mahkemesi'nin Türk Yargı Sistemindeki Konumu ve Kararlarının İdari Yargı Hakiminin Vereceği Kararlara Etkisi", **Symposium, Danıştay ve İdari Yargı Günü 139. Yıl**, 2007, p. 264.

positive law to be able to actualize the principle of equality of arms and right to litigious trial in administrative jurisdiction.

Moreover, all of the articles of European Convention on Human Rights have to be carried into effect by administrative judges even if there are some deficiencies in our national legislation. Because the convention is a part of our national legislation and if it is contrary to any of our national laws; European Convention on Human Rights's acts will be implemented.

Consequently, both law makers and administrative judges have very important appointments so that right to a fair trial can occur in administrative jurisdiction.

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