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ACTIONS FOR NULLITY WHICH HAVE BEEN FILED BY NON-GOVERNMENTAL ORGANIZATIONS IN TURKISH ADMINISTRATIVE PROCEDURE

Abstract:

The most important feature of non-governmental organizations is comprising of people consensually. Primarily, non-governmental organizations' force is related with that feature. So, communities which coexist readily and intended for the same aims are able to have a big energy. If like communities increase in number, different ideas will be able to find voice in the society and in this way democracy culture will be able to settle further in the society.

Non-governmental organization is a broad concept , which must examine in every respect. But this study is about only the non-governmental organizations which have legal personality in Turkey and theirs capacity to sue in the actions for nullities in administrative procedure.

In the first part of the study which is comprised of two parts; meaning, covering and activities of non- governmental organization will be clarify and non- governmental organizations in Turkey will be researched with their's legal and constitutional basis.

In the second part; firstly the concept of "advantage aggression" which is the prior condition of actions for nullities in administrative procedure will be explained. Besides, Turkish council of states decions in the actions which have been filed by the associations, the unions, the endowments and the public occupational organizations in Turkey will be researched.

Keywords:

Non-governmental organization, association, union, endowment, public occupational organization, actions for nullities, advantage aggression.

JEL Classification: K30, K30, K30

INTRODUCTION

This article is consist of a research about the actions for nullity filed by non-governmental organizations in Turkish administrative jurisdiction and have legal personality. The other non- governmental organizations and the other actions aren't the issues of this study.

We aim to present if unions, associations, endowments and public occupational organizations could resort to the administrative jurisdiction easily or not and also how often administrative jurisdiction places accept their cases

I.CIVIL SOCIETY

Civil society is a settlement which doesn't precondition in the administrative organization and is formed definite volunteer communities and specifies its own rules itself¹. From this definition forth, civil society is primrily an evolution in which individuals take turn on their own and there is no state impact about that evolution².

The interection of civil society and democray³ as well as civil liberty has been different in historical process and in several society structures.

A. THE SCOPE OF CIVIL SOCIETY

Associations, unions, endowments, groups, congregations and media constitute the civil society. And the major aim of all of them is to be able to affect state policies in the direction of their own benefits⁴.

From a different viewpoint, civil society wants to affect the decisions of administration in local and national levels as a "pressure group".⁵

¹ GÖNENÇ AKPINAR, Ayşenur, **Sivil Toplum Düşünsel Temelleri ve Türkiye Perspektifi**, April 2001, p. 8.

² SUNAY, Reyhan, "*İnsan Haklarının Korunmasında Sivil Toplumun İmkanları ve Sınırları*", **Mevlana Üniversitesi Hukuk Fakültesi Dergisi**, Vol. 1, No. 1, 2013, p. 110.

³ About the relationship between civil society and democracy, see, GÖNENÇ AKPINAR, p. 47-51; ODABAŞI, Funda, **Sivil Toplum**, Edt. 1, 2005 İstanbul, p. 56-59.

⁴ ATAR, Yavuz, "*Demokratik Sistemde Sivil Toplumun Fonksiyonu ve Sivil Toplum-Devlet Düalizmi*", **Yeni Türkiye Dergisi**, 1997, No. 18, 1997, p. 99-100,

⁵ ATAR, p. 100.

Capturing the competence of state or exercising power over the other benefit groups isn't the aim of civil society nothing of the kind⁶.

One of the most important functions of civil society is to be able to resort to the jurisdiction about the benefits of their groups. And this function ensures to gain apparent results specially in relation to protecting of human rights⁷.

Resorting to the jurisdiction by the non-governmental organizations and in that resortings, interpreting the criterias broadly as far as possible by the judicial authorities have a very important place in the scope of application about principles of the state of law⁸. Further property of principles of the state of law is being in charge of administrations' own acts and actions to the society⁹.

B. NON-GOVERNMENTAL ORGANIZATIONS IN TURKEY

Since the early 1980's, civil society has started to gain importance in our country¹⁰.

The process which had began with the constitutional amendlaw dated 1995 is specially important for the functions of civil society. Because by that amendlaw, ban to found youth and women section by political parties and ban to have political activity for public occupational organizations has been removed¹¹.

In our country, associations, unions, endowments and public occupational organizations are non-governmental organizations which have legal personality. ¹².

Primarily, considering the professional organizations with public institution status which take place in public occupational organizations as a fully non-governmental organization isn't a correct approach. Because, according to our contitution, the professional organizations with public institution status are semi-official organizations

⁶ SUNAY, p. 116.

⁷ SUNAY, p. 118.

⁸ ALİEFENDİOĞLU, Yılmaz, "*Hukuk-Hukukun Üstünlüğü-Hukuk Devleti*", **Ankara Barosu Dergisi**, No. 2, 2001, p. 32.

⁹ ALİEFENDİOĞLU, p. 33.

¹⁰ ÇAHA, Ömer, **Aşkın Devletten Sivil Topluma**, Edt. 5, İstanbul 2012, p. 267.

¹¹ GÖNENÇ AKPINAR, p. 117.

¹² http://www.e-devlet.com/sivil_toplum_kuruluslari/; d.a. 12/04/2014.

and in that organizations careerists are made obligatory for membership. But the major property of civil society is being formed by volunteer communities¹³.

1. THE UNIONS

In Turkey, the unions have legal personality according to the old Law on Trade Unions numbered 2821 article 2 and also according to the new Law on Trade Unions and Collective Bargaining Agreements numbered 6356 article 2/1.

In conjunction with, the unions are engaged in social, political and economic areas, all of these activities also affect each other. And any activity in an area is able to induce the intension of the activity in an other area¹⁴.

When examined the position of the unions in non-governmental organizations, it can be seen that their establishment aim is occupational benefits¹⁵.

In our country, the most important function of the unions is contracting collective labour agreement¹⁶.

2. THE ASSOCIATIONS

The associations can be established with different aims such as ideologic, artistic, religieus or literary aims¹⁷.

In accordance with Turkish Civil Code article 56; associations have legal personality and associations can't be established with illegal and immoral aims.

By the constitution amendlaws dated 1995, 2001 and 2010; a lot of constructive innovations have occurred about the associations. But it is hard to say that all of these innovations are at one with the international convents¹⁸.

¹³ ATAR, p. 98; GÖZLER, Kemal/KAPLAN, Gürsel, **İdare Hukuku Dersleri**, Edt. 14, Bursa 2013, p. 259; GÜNDAY, Metin, **İdare Hukuku**, Edt. 10, Ankara 2011, p. 567.

¹⁴ ERSİNADIM Hamza, "1961 Anayasası'ndan Bugüne Sendikaların Sosyal Faaliyetlerinin Hukuki Çerçevesi", **Kamu-İş**, Vol. 12, No. 4, 2012, p. 56-57.

¹⁵ NARMANLIOĞLU, Ünal, **İş Hukuku II, Toplu İş İlişkileri**, Dokuz Eylül Üniversitesi Yayınları, İzmir, 2001, p. 56.

¹⁶ ERSİNADIM Hamza, p. 58.

¹⁷ DÜNDAR SEZER, Tijen, "Dernek Kurma Özgürlüğünün İçeriği ve Gelişim Süreci Üzerine Karşılaştırmalı Bir İnceleme", **Dokuz Eylül Üniversitesi Sosyal Bilimler Enstitüsü Dergisi**, Vol. 10, No. 1, 2008, p. 5.

¹⁸ DÜNDAR SEZER, p. 37.

3. THE ENDOWMENTS

In accordance with Turkish Civil Code article 101; endowments have legal personality. And their aims can't offend against characteristic of republic, the main principles of our constitution, law, moral, national solidarity, and national benefits.

4. THE PUBLIC OCCUPATIONAL ORGANIZATIONS

In our country; there are different kinds of public occupational organizations. Some of them are unions, some are associations and the others are the public occupational organizations as public institution which are indicated in our constitution article 135¹⁹.

In accordance with article; the public occupational organizations as public institution have public entity. In other words they have public force as distinct from the unions and associations and thus they are privileged. But sometimes public entity can also be a disadvantage for them. Because, the central administration has authority of administrative tutelage²⁰ about them.

II. ACTIONS FOR NULLITY WHICH HAVE BEEN FILED BY NON-GOVERNMENTAL ORGANIZATIONS

A. "ADVANTAGE AGGRESSION"

The notion of "*advantage aggression*", has been clearly indicated in Turkish Administrative Jurisdiction Procedures Law article 2. Hereunder, advantage aggression is enough to be able to file an action for nullity in administration jurisdiction²¹.

According to Turkish Council of State; advantage aggression must be understood as a "*serious and reasonable connection*". In practise, Turkish Council of State has commented the notion of advantage aggression broadly²².

¹⁹ CANDAN, Ekrem, "*Türkiye'de Kamu Kurumu Niteliğindeki Meslek Kuruluşlarının Yeniden Yapılandırılmasına İlişkin Reform Önerisi*", themed "*Türkiye'de Kamu Kurumu Niteliğindeki Meslek Kuruluşları, Sivil Toplum ve Demokrasi*" project, Ankara 2012, p. 7.

²⁰ YILDIRIM, Ramazan, *İdare Hukuku Dersleri I*, Edt. 5, Konya 2013, p. 156.

²¹ GÖZÜBÜYÜK, A. Şeref/TAN, Turgut, *İdare Hukuku* Vol. II, Edt. 6, Ankara 2013, p. 326.

²² GÖZÜBÜYÜK/TAN, p. 327-328.

At the same time, advantage aggression must be “*personal*”²³. This is specially important for our study topic.

B. THE BEHAVIOUR OF TURKISH COUNCIL OF STATE ABOUT THE ELEMENT OF PERSONALITY OF ADVANTAGE

It has been settled that the advantage aggression must be related with a legitimate, current and personal advantage by the court practises of Turkish Council of State. As for that, in the actions for nullity filed by non-governmental organizations in administrative jurisdiction, Turkish Council of State commented the notion of advantage aggression narrowly in its old dated decisions . Hereunder, if it isn't stated in the law clearly, non-governmental organizations are not able to file action for nullity related with their memberships²⁴.

According to new dated decisions; Turkish Council of State has begun to comment the notion of advantage aggression broadly has agreed that associations can file actions for nullity not only about their legal personalities' advantage aggression but also about their memberships' advantage aggressions ²⁵.

With a decision of Turkish Council of State dated 2012; council has adjudged that unions can also file actions for nullity about all of their memberships' common advantages violated by administrative acts. But according to council, the advantage of memberships' must be common, the unions can't be file actions for nullity which are related only some of the memberships' advantages²⁶.

Accordingly, in respect of the endowments; while Turkish Council of State had decided that there had been not advantage aggression in the actions for nullity which

²³ GÖZÜBÜYÜK/TAN, p. 338; KALABALIK, Halil, **İdari Yargılama Hukuku**, Edt. 6, Konya 2013, p. 154.

²⁴ GÖZÜBÜYÜK/TAN, p. 356; KALABALIK, p. 157; The Decision Of Turkish Council Of State Office12 dated 24/02/1970, numbered 1969/2703 E.,and 1970/328 K.. ;<http://www.kazanci.com/kho2/ibb/giris.htm>, Access Date 14/04/0014.

²⁵ KAKIRMAN, Deniz, **İdari Yargıda İptal Davalarında Özne Dava Ehliyeti Olarak Menfaat İhlali Koşulu**, Unpublished Master's Thesis, İstanbul University, 2006. p. 87; The Decision Of Turkish Council Of State Office 13 dated 28/02/2006, numbered 2005/7150 E.,and 2006/1231 K.. ;<http://www.kazanci.com/kho2/ibb/giris.htm>, Access Date 14/04/0014.

²⁶ The Decision Of Turkish Council Of State Office 2 dated 16/10/2012, numbered 2011/10823 E.,and 2012/6186 K.. ;<http://www.kazanci.com/kho2/ibb/giris.htm>, Access Date 14/04/0014.; GÖZÜBÜYÜK/TAN, p. 366.

had been filed against privatization acts by “Developing Public Industry Endowment”; after reversal decisions²⁷ it has begun to accept advantage aggression²⁸.

And also, in the actions for nullity filed by the public occupational organizations as public institution, Turkish Council of State has begun to comment “advantage aggression” broadly. These decisions are mainly aimed at zoning law, protecting natural habitat and historic environment²⁹.

By the decisions of joint chambers of Turkish Council of State Plenary Session of Administrative Law Divisions, it has been judged that it is necessary to comment “advantage aggression” broadly regarding the aims of the public occupational organizations as public institution³⁰.

However, despite subject decision of joint chambers dated 2000, behavior of Turkish Council of State has been specially ranging in the actions for nullity filed by bar associations.

In the action for nullity filed by Balıkesir Bar Association which is about “Directive of Environmental Impact Assessment” and dated 2011, Turkish Council of State judged that Balıkesir Bar Association had not had “advantage aggression” by a large majority and dismissed the case. This decision is clearly in a contradiction with the decision of joint chambers dated 2000³¹.

By another decision of Turkish Council of State dated 2011, it has also judged that there had not been “advantage aggression” in the action for nullity filed by Bursa Bar Association³².

Whenas, Turkish Council of State Plenary Session of Administrative Law Divisions has judged that there had been advantage relation between the bar association and the directive remarking the actions where it had been judged that

²⁷ The Decision Of Turkish General Assembly Of Administrative Proceedings dated 04/02/2000 , numbered 1999/1261 E. , 2000/168 K., www.kazanci.com /kho2/ibb/giris.htm, e.t. 14/04/0014.

²⁸ GÖZÜBÜYÜK/TAN, p. 366.

²⁹ Azrak Ali Ülkü, “İptal Davalarında Meslek Kuruluşlarının Dava Açma Yeteneği”, İzmir Barosu Yargı Reformu 2000 Symposium, , p. 323.

³⁰ KAKIRMAN , p. 94-95.

³¹ The Decision Of Turkish Council Of State Office 14. Dated 21/09/2011 , numbered 2011/13742 E. , 2011/796 K., www.kazanci.com /kho2/ibb/giris.htm, e.t. 17/04/0014.

³² The Decision Of Turkish Council Of State Office 6. Dated 08/06/2011 , numbered 2010/12920 E. , 2011/2120 K., www.kazanci.com /kho2/ibb/giris.htm, e.t. 17/04/0014.

there had been “advantage aggression” filed by İstanbul, İzmir, Bursa, Balıkesir and Diyarbakır Bar Associations related with directives³³.

RESULT

In our country, associations, unions, endowments and public occupational organizations file actions for nullity about the administrative acts concerning their legal personalities’ and memberships’ advantages. This situation is in direct proportion to the principle of the state of law.

But, although Turkish Council of State comments “advantage aggression” broadly in any action for nullity filed by anyone, in the cases filed by non-governmental organizations it doesn’t exhibit the same attitude. In the similar cases, sometimes it judges there has been advantage aggression and sometimes it judges there has not been.

Though, it is a positive development that Turkish Council of State has commented broadly about associations, unions and endowments on behalf of gaining strength of non-governmental organizations. Likewise, commenting broadly by Turkish Council of State in the actions for nullity filed by public occupational organizations related with environment and zoning is positive, too.

But, although there is a lot of decisions of joint chambers, the decisions of Turkish Council of State which point that there has not been advantage aggression in the actions for nullity file by bar associations are clearly against the law.

Consequently, to be able to refer an actual democratic law state ,the necessity of non-governmental organizations is incontestable. So, non- governmental organizations must be encouraged in point of resorting to the jurisdiction and also, the places of administrative jurisdiction must reach stare decisis.

³³ The Decisioin Of Turkish General Assembly Of Administrative Proceedings dated 10/12/2009 tarih , numbered 2009/1005 E. ,[www.kazanci.com /kho2/ibb/giris.htm](http://www.kazanci.com/kho2/ibb/giris.htm), e.t. 17/04/0014.

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