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## **OBLIGATION TO GIVE REASONS**

### **Abstract:**

Administration is obliged to notify the reasons of administrative act if the obligation to give reasons is explicitly regulated in the law. However, even if there is no explicit obligation to give reasons in positive regulations, in the rule of law, it is essential for the administration to notify the reasons of any administrative act on the basis of the justification principle. In other words, even though there is no explicit regulation regarding obligation to give reasons, it is accepted that administrative acts are required to be justified because of the principle of the rule of law.

In the light of these explanations, the obligation to give reasons, which does not fall within the implementation of Turkish Law very often while become an indispensable part of a modern administrative procedure, is tried to be examined in this study. Primarily, the definition of the obligation to give reasons, the relation between the reason and grounds for administrative act, and the basis of the obligation to give reasons are indicated. Following this, the functions of the obligation to give reasons, respectively, in terms of administrative, people who are subject to the administrative act and the judicial review, are addressed. Afterwards, the wording of the reasoning is touched upon. Under this title, after stated the requirement for reasoning to be explicit and clear, material and legal reasons and reasoning of administrative act based on discretion are mentioned. Finally, the obligation to give reasons and its breach in Turkish Law are evaluated.

### **Keywords:**

Justification, Obligation to give reasons, Material and Legal Reasons, Separation of Justification and Reason in an Administrative Act, Breach of Obligation to give reasons.

**JEL Classification:** K30, K30, K30

## INTRODUCTION

Although administration uses public force while taking an act, this doesn't authorize it to take unilateral act. Taking an administrative act must certainly be based on a legal reason. Administration must state the reason for that act in its justification and it is obliged to notify those whom it may concern. Thus, the addressee both learns the reason of that act and has the advantage in terms of exercising its legal rights

Obligation to give justifications originates from principle of the state of law and other principles covered by this principle. Although there is no clear regulation, it is accepted that administrative acts must be justified in the state of law. In other words, the state of law imposes an obligation on administrative authorities to explain the elementary ideas prompting the administration to take administrative act even in lawful acts.

## I- AS A CONCEPT

### A- JUSTIFICATION IN GENERAL

Justification is a text in which the factual or legal reasons leading to take an administrative action are exactly and clearly expressed. Justification may be both a part of resolution text and an appendix text attached to the resolution.<sup>1</sup>

The principle of justification which is a crucial principle in terms of the state of law is regulated in detail in all of the states of law having administrative procedure law. We also encounter the principle as IV. principle of Resolution on Protection of Individuals Against Administrative Acts, No: 77/31 of Committee of Ministers of the Council of Europe . According to this principle; "In the event of an administrative act to violate the rights, freedoms or interests of individuals , the reasons that are the bases of the relevant act are notified. This notification is also made to them in writing within a reasonable time either by giving the reasons of the administrative act in its text or upon request by the relevant persons."<sup>2</sup>

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<sup>1</sup> Gözler, Kemal: **İdare Hukuku**, Vol. 1, Bursa 2009, Edt.2, p. 839.

<sup>2</sup> Akyılmaz, Bahtiyar: **İdari Usul İlkeleri Işığında İdari İşlemin Yapılış Usulü**, Ankara 2000, p. 200.

According to the comment made in the appendix of this resolution; justification is not only dealt with as a requirement as to form to be observed; but as a right to be exercised by the relevant person, as well. Therefore, although there is no justification in the text of an administrative action, the justification must be notified in writing upon request by the relevant person within the term of litigation.<sup>3</sup>

Obligation to give justifications means a statement by administration as to the reasons for its disposal or information on the reason prompting the administration to take measure. In other words, it is the statement of administrative authority as to why, how and under what conditions it has taken that act and why it hasn't take any other action.<sup>4</sup>

## **B- JUSTIFICATION-REASON DISTINCTION**

As behaviors of a reasonable person are based on a reason, so all kinds of act of administration must be based on a legal reason.<sup>5</sup> Justification and reason of an act is generally confused. However, these are different concepts and distinction of justification and reason is important. Reason is a factor that prompts administration to take an act. Justification, on the other hand, is a text in which these factors are explained, that is justification of an act is a part of the text of this act.

Justification contains the wordings that helps the addressee of the act is convinced that the right resolution is taken.<sup>6</sup> While justification is a part of form of the act, "reason" is a factor of the administrative act on its own. In administrative act, principle of justification or obligation to give justifications is mentioned rather than principle of reason. There could be an act without a justification, but there cannot be an act without a reason.<sup>7</sup>

Function of justification is to notify the addressee of act with respect to the reason of the act. Reason factor of the act is aimed at the court; justification is generally on the addressee.<sup>8</sup>

## **II- BASIS OF THE OBLIGATION TO GIVE JUSTIFICATIONS**

<sup>3</sup> Akıllıoğlu, Tekin: "Yönetmelik İşlemlerinde Gerekçe İlkesi", **Amme İdaresi Dergisi**, Vol. 15, No. 2, Y. 1982, p. 17.

<sup>4</sup> Erkal, Atilla: "Türk ve Alman Hukukunda Gerekçe Yükümlülüğü", **Selçuk Üniversitesi Hukuk Fakültesi Dergisi**, Vol. 17, No.1, Y. 2009, p. 123.

<sup>5</sup> Duran, Lütfi : **İdare Hukuku Ders Notları**, İstanbul 1982, p. 409.

<sup>6</sup> Akyılmaz: p. 200.

<sup>7</sup> Akıllıoğlu: p. 7-8.

<sup>8</sup> Akyılmaz: p. 200.

As justification is to explain that an administrative act is taken for a reason, notifying the relevant persons of administrative acts with justifications is a must for a good and regular principle of administration and the state of law.<sup>9</sup>

If obligation to give justifications for an administrative act is clearly regulated by the law, administration must explain the justification of act by complying with this obligation. However, if there is no such obligation in positive regulations, then administration in a state of law must notify the relevant persons of the justifications of administrative act based on the principle of justification.

Considering the administrative procedure laws and special laws in which obligation to give justifications is regulated, regulations with respect to the principle are made in two ways. According to this; either the resolutions that need to be justified are taken into account or the acts that obligation to give justifications don't apply are stated.<sup>10</sup>

### III- FUNCTION OF THE OBLIGATION TO GIVE JUSTIFICATIONS

Justification is explanation of factual and legal reasons that play a part in taking an administrative act. Justification serves for taking lawful resolutions and for the purpose of fairness and accuracy of resolution. The principle of justification of administrative acts provide benefits in terms of both safety of law and easing the burden of justification by preventing undue actions; in addition it facilitates claiming rights as well as enabling transparency in administration.

There are a number of beneficial consequences of justification in administrative acts. We can categorize them in three groups as benefits in terms of administration, addressee of act and judicial review.

#### A- BENEFITS IN TERMS OF ADMINISTRATION

Justification compels an administrative authority to take a resolution to thoroughly investigate and enlighten about the factual and legal events to be the basis for resolution and prevents the administration from making a mistake.<sup>11</sup> The

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<sup>9</sup> Atay, Ender Ethem: **İdare Hukuku**, Ankara 2009, p. 69.

<sup>10</sup> Akyılmaz, Bahtiyar: "İdari İşlemlerde Gerekçe Yükümlülüğü", **Prof. Dr. A. Şeref Gözübüyük'e Armağan**, Ankara 2005, p. 24.

<sup>11</sup> Sezginer: p. 19.

authority to take a resolution must carefully investigate and find out the events and circumstances leading to the resolution and compare them with the points made by the relevant person. Thus, the factors apart from the event leading to the resolution are evaluated and waste of time is prevented.

Objectivity in opinions of administration is ensured by means of the obligation to give justifications and the administration is prevented from taking hasty and inconsiderate resolutions. Hence, the obligation to give justifications is encountered as a means of control enabling administration to avoid acting against law in the procedure of administrative act. Function of justification in this sense is also called as control function.<sup>12</sup>

## **B- BENEFITS IN TERMS OF ADDRESSEES OF ACT**

It is a principle aimed at the person subject to the act. Administration must convince the relevant person that the resolution complies with accuracy and material law. Therefore, we can call the obligation to give justifications as the function of persuasion and satisfaction.<sup>13</sup>

Principal function of obligation to give justifications is to enlighten the addressee of administrative act and to inform him on this matter.<sup>14</sup> Every citizen has a legal right to know factual, legal and judicial bases of an administrative act which he encounters. Therefore, one of the most important functions of the obligation to give justifications is legal support.<sup>15</sup> Purpose of the obligation to give justifications is primarily enabling legal protection and to protect individual against undue interference. Thus, justification is an important means in strengthening legal protection.

## **C- BENEFITS IN TERMS IF JUDICIAL REVIEW**

Giving justification of an administrative act brings about a number of beneficial consequences in terms of judicial body to review the act. The addressee is informed on the reasons being the bases of the act through justification. In justification, there are factual and legal events being the bases of the administrative act and their

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<sup>12</sup> Akyılmaz: p. 203.

<sup>13</sup> Akyılmaz: p. 204.

<sup>14</sup> Sezginer, Murat: "Usul Kanunlarında İdari İşlemin Dış Görünüşü", İdari Usul Kanunu Uluslararası Sempozyumu, Ankara 1998, p. 211.

<sup>15</sup> Akyılmaz: p. 204.

evaluation, so it is a notification in presence of both administrative authorities and judicial authority. In this sense, this function of justification is encountered as a function of clarification and proof.<sup>16</sup>

Justification enables investigation of the circumstances affecting the resolution and reveals their consequences, so it facilitates control of the administrative act. By means of justification, the review regarding particularly the reason factor can be easily conducted. Thus, it facilitates the work of jurisdiction and eases the workload.

However, there are disadvantages of the obligation to give justifications.<sup>17</sup> Obligation to give justifications places an extra burden for administration. This may cause delays in the decision-making procedure. It may compel administration to explain the confidential matters. Besides, the relevant person for which an adverse act is taken will try to look for deficiencies in the justification explained to him.

#### **IV- WRITING OF JUSTIFICATION**

In order to derive benefits expected from justification, justification must be written properly. Nevertheless, the exact form of justification is not provided for by laws and left to administration's discretion.

#### **A- CLARITY AND INTELLIGIBILITY**

Administration must explain the resolution intelligibly to the relevant person. Therefore, justification must be short and clear as much as possible. A comprehensible justification is also required for inspection of the authority. Mentioning the issues that are undisputed and matters of common knowledge or known by parties, explaining the whole case must be avoided; rather, significant points that aren't known by everybody must be emphasized.

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<sup>16</sup> Akyılmaz: p. 204.

<sup>17</sup> Kaya, Cemil: "İngiliz İdare Hukukunda Gerekeç Belirtme Yükümlülüğü İlkesi", **Prof. Dr. A. Şeref Gözübüyük'e armağan**, Ankara 2005, p. 218-219.

## **B- WRITING FACTUAL AND LEGAL JUSTIFICATIONS**

### **1- FACTUAL JUSTIFICATIONS**

Justification of an administrative act and the event causing the act must be set forth in concrete, short and clear way; that is incorrect and unclear wording must be avoided while the administration writes the factual justifications. In the justification, the reason or reasons leading to the act must be specified. Therefore, justification must contain all preparation stages and consequences of the act. In this context, significant circumstances regarding concrete events and characteristics must be considered; not all kinds of events constituting the factual justification. What is important can only be determined by handling the concrete event carefully.<sup>18</sup>

### **2- LEGAL JURISDICTIONS**

Legal jurisdiction indicates the legal consequence resulting from the act and the main reason on which it is based depending on the nature of resolution. Therefore, administration must include important legal basis in the section for justification of the act. Accordingly, administration must clearly explain the law supporting its resolution and the relevant article. Name of the law must be written without abbreviating. Because, the relevant person may unable to know what the abbreviations mean for his not receiving legal education. Further, adding a photocopy of the provision of law on which the administration is based to the justification may help the relevant person to benefit from legal protection more effectively. The administration must also specify the place of legal basis. Thus, the relevant person or his attorney can find the relevant legal basis quickly and without delay and review its compliance with law.<sup>19</sup>

## **C- WRITING THE JUSTIFICATION OF ACTS BASED ON DISCRETION**

Discretion which provides more freedom to administration in taking action, also imposes the burden of proof on the administration proportionally to this freedom in potential disputes. In other words, as the discretion extends, the burden of proof increase correspondingly.<sup>20</sup>

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<sup>18</sup> Erkal: p. 144.

<sup>19</sup> Erkal: p. 144-145.

<sup>20</sup> Tatal, Erhan: **İdari İşlemin Gerekçelendirilmesi**, Thesis of master, Gazi Üniversitesi Sosyal Bilimler Enstitüsü, Ankara 2006, p. 94.

In performing the actions taken by administrative authority based based on its discretion is important for its making a choice among different options. Therefore, even though there is no rule on justification in regulations providing discretion, administration must give a justification. In acts taken by exercising its discretion, the administration must clearly state at the beginning of the jurisdiction that it has discretion.<sup>21</sup>

In the event that giving justification is stipulated by the norm granting the authorization, the justification will be given as attached to the act, if not, it will be kept available in the preparation documents to be stated when necessary.<sup>22</sup>

## **V- IS THERE OBLIGATION TO GIVE JUSTIFICATIONS IN TURKISH LAW?**

In Turkish Law, giving justification for administrative acts is not a requirement as to form; that is, there is no general administrative procedure law to require administration to give justification of act to the relevant person as is in countries regulating the obligation to give justification. However, this case applies to the relevant person, that is administration is not obliged to notify the relevant person of justification of act; but in actions filed against the act taken in cases where the regulation states a reason, administrative courts may require the administration to give justification for the administrative act pursuant to Article 20 of Law on Administrative Jurisdiction Procedures No:277. According to this article; administration is obliged to give justification for its administrative act to the judicial body. As per the principle of ex officio investigation, administrative jurisdiction judge may request the justification for the administrative act from the administration. In accordance with the additional sentence added to this article by the Law No:4001; courts cannot render a judgment according to the defense based on the information and documents that aren't provided for whatever reason it is.

Despite the applicable legal regulations, obligation to give justification is the result of principle of "the state of law" set out in the Constitution as a general legal principle although it is not provided for.<sup>23</sup>

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<sup>21</sup> Akyılmaz: p. 211.

<sup>22</sup> Karatepe, Şükrü : "İdarenin Takdir Yetkisi", **Türk İdare Dergisi**, Y. 63, September 1991, No. 392, p. 103.

<sup>23</sup> Akyılmaz: p. 201-202.

According to the Constitution, all kinds of verdicts rendered by courts must be written with justification. However, there is no general regulation that absolutely requiring it to be written with justification for administrative resolutions to be valid,<sup>24</sup>

But some special laws may provide for writing administrative resolutions with justification. For example; according to Law on Exercising the Right to Petition No:3071; petitioners must be given a response with justification within thirty days at the latest.

However, the fact that Bill on General Administrative Procedure stipulating the rules to be followed by administration while carrying out its activities is issued is a promising development for Turkish Law. This bill stipulates the obligation to give justification for administrative acts.

## **VI-VIOLATION OF THE OBLIGATION TO GIVE JUSTIFICATION**

Almost all of administrative acts are taken in compliance with certain rules as to form. While principle of freedom of form is valid in the private law; adherence to form is fundamental excluding some exceptions.<sup>25</sup> Form indicates the ways and methods to be followed in taking act.<sup>26</sup> In fact, the concepts of form and procedure have different meanings; that is, form is used as a generic term.

Justification for administrative act reveals itself both as formal and procedural rule. If justification is regulated by law, it is a formal rule and it must be referred to in administrative act. However, if there is no such regulation, obligation to give justification in this case will be considered as a procedural rule. Therefore, for justification to be considered as a requirement as to form for all administrative acts, there must be a administrative procedure law regulating the general obligation to give justification in the administrative act.<sup>27</sup>

Taking the action which is subject to a justification rule without giving justification cause formal deficiency. This formal deficiency leads to cancellation of act without exception of principal-secondary. Because, justification rule is intended for protecting the addressee of the administrative act in such cases.

However, there are some verdicts of Council of State stipulating that failure to give justification for administrative acts is a requirement that doesn't affect the

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<sup>24</sup> Günday, Metin: **İdare Hukuku**, 10. Edt., Ankara 2011, p. 145.

<sup>25</sup> Özay, İlhan: **Günlükte Yönetim**, İstanbul 2002, p. 394.

<sup>26</sup> Gözübüyük, Şeref: **Yönetmelik Yargı**, Ankara 2001, p. 214; Gözübüyük, Şeref; Tan Turgut: **İdare Hukuku**, Vol. 2, Ankara 1999, p. 447.

<sup>27</sup> Erkal: p. 130.

consequence.<sup>28</sup> It would prevent protection of individual, so it is not to the point at all. Because, obligation to give justification is a requirement as to form for protection of right of defence of the relevant person, so it is a principal requirement as to form, not secondary according to its nature.

In practice, obligation to give justification is violated by either giving no justification or inadequate justifications.<sup>29</sup> According to our law, the fact that justification is not legally acceptable is a reason for cancellation of the administrative act.

## CONCLUSION

Principle of justification which is highly significant for the state of law is regulated in detail in all of the countries having administrative procedure law. In our country, there is no general administrative procedure law to obligate giving justification to the relevant person as is in the countries regulating the obligation to give jurisdiction. However, based on the principle of the state of law, obligation of administration to give jurisdiction driving the administration to take the action is mentioned even in legal actions.

Consequently, principle of justification of administrative acts is a principle that can be described as a general principle of law. In addition, obligation of administration to give justification makes more sense by taking into account such principles as legality of administration, fair trial, human dignity, legal assurance, discretion, right to defense, right to information which are considered among minimum requirements of the state of law.

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<sup>28</sup> Resolution D.17.10.1997, E. 1995/769 K. No: 1997/525 of Council of State, Plenary Sessions of the Chambers for Administrative Cases, *Danıştay Dergisi*, No. 95, p. 84.

<sup>29</sup> Kaya: p. 241.

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