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Project on Improving the Effectiveness of the Administrative Judiciary and Strengthening the Institutional Capacity of the Council of State

REPORT ON PROPOSALS FOR AMENDMENTS ON LAW NO 2577 ON ADMINISTRATIVE ADJUDICATION PROCEDURE– LAW NO 2576 ON ESTABLISHMENT AND DUTIES OF REGIONAL ADMINISTRATIVE COURTS, ADMINISTRATIVE COURTS AND TAX COURTS – LAW NO 2575 ON THE COUNCIL OF STATE

Activity A.1.1. In-Depth Administrative Justice System Review

Prof Dr Cemil Kaya
Assoc Prof Dr Dilşat Yılmaz
Assoc Prof Dr Fatma Ebru Gündüz

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The original Report was produced in Turkish by the Council of Europe local consultants Prof Dr Cemil Kaya, Assoc Prof Dr Dilşat Yılmaz, Assoc Prof Dr Fatma Ebru Gündüz.

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Preface

This Report on Proposals for Amendments on Law No 2577 On Administrative Adjudication Procedure– Law No 2576 on Establishment and Duties of Regional Administrative Courts, Administrative Courts and Tax Courts – Law No 2575 on The Council of State is produced in the framework of the Joint Project on "Improving the Effectiveness of the Administrative Judiciary and Strengthening the Institutional Capacity of the Council of State". The Project is implemented by the Council of Europe in cooperation with the Ministry of Justice of Turkey.

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1. Introduction

While the basic laws of the administrative judiciary enacted in 1982 and numbered 2575, 2576, and 2577 were reformative regulations under the circumstances of the time, at the end of the 40 years that have been completed they have become insufficient to respond to the needs of today. Within these 40 years, many provisions of the stated laws have been annulled by the Constitutional Court, and re-regulations have been made in accordance with these decisions or current requirements. This process has led to incoherence and vagueness in the systematic and content of the laws. These issues may lead to problems in terms of rights to access to court and fair trial and create challenges in adjudication activities to be conducted within certain standards and reasonable time. At this point, the main requirement is to re-regulate these three basic laws as a whole and the issues to be regulated until a study is conducted have been presented below. Undoubtedly, some of these require immediate regulations, while the rest are less urgent. In this study, articles of the laws 2577, 2576, and 2575 have been scrutinized respectively article by article, and proposals have been made.

2. Amendment Proposal on Law No 2577 on Administrative Adjudication Procedure (AAP)

1- Proposal for Cancelation of Clause 2/1/c of AAP

Current State:

Types of administrative actions and the limit of the administrative jurisdiction:

Article 2 – 1. (Amended: 10/6/1994-4001/Article 1) Types of administrative litigation cases are as follows:

a) (Repealed: Upon the Decision dated 21 September 1995 and Docket No 1995/27 and Decision No 1995/47 of the Constitutional Court; Re-regulated: 8/6/2000-4577/Article 5) Cases for annulment filed by those whose interests have been violated by the administrative decisions to cancel such decisions based on their illegality due to one of its aspects such as competence, form, reason, subject, and purpose,

b) Full remedy actions filed by those whose personal rights have been directly violated due to the administrative decisions and actions,

c) (Amended: 18/12/1999-4492/Article 6) Cases regarding disputes arising between the parties due to any kind of administrative contracts made for the performance of a public service except for disputes arising from the concession agreements and contracts for which arbitration is stipulated.

Proposal:

Clause 2/1/c is proposed to be cancelled.

Remarks:

There are two types of cases in the administrative justice procedure: 1) "annulment actions" 2) "full remedy actions". For this reason, the regulation of cases arising from the public service concession contract in the text of the article in such a manner as to mean a type of case other than those counted herein is not appropriate. Because cases arising from a public service concession contract are heard either in the form of an annulment case or in the form of a full remedy action.

2- Proposal for Replacing the Phrase "Tax Case" Found in Various Articles of AAP With the Phrase "Tax Dispute”

Current State:

The phrase “tax case” is mentioned in various articles of AAP. (See Art. 3/2-e, 17/1, 27/4, 28/6, 45/1, 46/1-b).

Proposal:

It is proposed that the phrase "tax case" in these articles be replaced as "tax dispute".

Remarks:

In administrative justice, there is no such “tax case”, except for annulment and full remedy actions. Therefore, it should be preferred to replace the phrases mentioned in these articles as “tax dispute”.

3- Proposal for Introducing Group /Pilot Cases in AAP

Current State:

There is no group / pilot case in AAP.

Proposal:

It is proposed to introduce group / pilot case applications in AAP.

Remarks:

The possibility of applying group /pilot cases in administrative justice will contribute to the completion of the trials within a reasonable time by reducing the workload in administrative justice, and this will also be an important step in the realization of the previously determined Judicial Reform Strategy. [1] Article 23 of Draft Law on Amendment of Certain Laws and Decree Laws to Reduce the Workload of Administrative Judiciary dated 2015 stipulates a regulation on group cases as stated in the footnote.[2] It is considered that a regulation like the one in the draft, considering possible impacts in practice, would be useful.

4- Proposal for Adapting Article 3 Of AAP to the “National Judiciary Informatics System” (UYAP) With Regard to Opening of Administrative Actions

Current State:

Filing administrative actions:

Article 3 – 1. (Amended: 10/6/1994-4001/Article 2) The administrative actions are filed with signed petitions written to the presidency of the Council of State, administrative court, and tax court.

2. The petitions shall include;

a) Names and surnames or titles and addresses of the parties and their attorneys or representatives if any, and the identification number of the real persons,

b) Subject and reasons for the action and the evidence on which the action is based,

c) Date of written notification of the administrative procedure that is the subject of the action,

d) The amount subject to dispute in the full remedy actions as well as the actions regarding taxes, duties,

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1 See. Ministry of Justice Judicial Reform Strategy Booklet, Ankara May 2019.

2 *“Group case:*

Article 20/B – 1. Cases with the same substantial and legal grounds and can be precedent to each other, and which are dealt by administrative and tax courts and by the Council of State acting as a first instance court may be considered as group actions and below stated adjudication procedure shall be applied thereto..

2. Court shall render primarily a judgment on one of the group cases. The decision of the relevant judicial authority that the case is a group case and the judgment on the substance of the case shall be submitted to the relevant litigation chamber of the Council of State along with the file upon appeal request. Judgment of the Council of State shall be awaited to finalise other cases falling under the same scope.

3. Board of relevant litigation chambers of the Council of State shall examine whether the cases with this quality are group cases. Following the decision that it is not a group case the relevant file shall be submitted to the appellate authority and a sample of the decision shall be returned to the relevant court. Should the case be recognized as a group case, final judgment on substance shall rendered within three months. It is compulsory for the head and two members of the relevant litigation chamber to attend the meeting on the judgment.

4. The Council of State shall publish electronically the applications falling under group cases and judgments rendered on such applications.

5. Courts shall finalise group cases in line with the judgment rendered by the Council of State. Legal remedies cannot be sought against decisions rendered by relevant judicial authority or other judicial authorities on group case decisions in accordance with the judgment issued by the relevant board of litigation chambers on the grounds of a group case. However, appeal can be made with claims that the finalised case is not under the scope of a group case or judgment has not been rendered in compliance with the group case. Appeal grounds that are not relevant to the substance of the group case are reserved..”

charges and similar financial liabilities, and the increases and penalties thereof,

e) Type and year of the tax or tax penalty related to the tax actions, date, and number of the letter of notification served, and the taxpayer account number if any.

3. The originals or copies of the relevant decision and documents shall be added to the lawsuit petition. Petitions and copies of the documents that accompany them shall be one more than the number of the other party.

Proposal:

Article 3 of AAP No. 2577, entitled "*filing administrative actions*", was written in 1982 based on the procedure of submitting petitions to the court at the time. However, today an action can also be filed through UYAP. From this point of view, it is proposed that this article is adapted to UYAP.

Remarks:

Making the proposed amendment to the article will ensure that the content of the article is in line with the application.

5- Proposal for Amendment of Article 4 Of AAP

Current State:

Places where the petitions will be filed:

Article 4 – Petitions, defence pleas, and any kind of documentation regarding the actions can be submitted to the presidency of the Council of State or the relevant court, or to the presidencies of administrative or tax courts to be sent to the presidencies of the Council of State or the relevant court. Where there is no administrative or tax court, they can be submitted to the civil courts of the first instance, regardless of whether they remain within the boundaries of the metropolitan municipality or to the Turkish consulates in foreign countries.

Proposal:

The issue of "whether they remain within the boundaries of the Metropolitan Municipality" contained in the article sometimes leads to uncertainties in practice. For this reason, it will be useful to regulate the boundaries of the mentioned issue in a more clearly, because in these places, the date on which the petition is registered is considered the date on which the action was filed in accordance with Article 6 of AAP. Since the calculation of the time of filing an action is related to the right to access to court, any problem that may happen at this point may also create troubles in the context of people's rights to access the court and therefore, their right to a fair trial. As a matter of fact, referring to the decisions of the ECtHR, the Constitutional Court expresses that: "*…36. Effective access to the court requires that there is a consistent system of application to the court and that people who want to file an action have clear, practical, and effective opportunities to access to the court. In particular, legal uncertainties or uncertainties in practice may violate people's right to access to court (For the ECtHR decision in the same direction, see Geffre v. France, B. No: 51307/99, 23/1/2003, § 34). Therefore, when applying procedural rules, the courts should avoid excessive formalism, which may violate the right to a fair trial, on the one hand, and excessive ignorance, which may result in the elimination of procedural rules regulated by law (For the ECtHR decisions in the same direction, see Walchli v. France, B. No: 35787/03, 26/7/2007, § 29; Eşim v. Turkey, B. No: 59601/09, 17/9/2013, § 21). 37. If the procedural rules become some kind of obstacle for people to have their actions heard by a competent court, rather than serving the manifestation of justice as a result of ensuring legal security and proper execution of the trial, then their right to access to court would be violated (For the ECtHR decisions in the same direction, see*

Efstathiou and Others v. Greece, B. No: 36998/02, § 24) …"[3] In this regard, it is proposed that petitions and defences and any document related to cases can be presented to any court including civil courts.

Remarks:

The ability to present petitions and defences and any document related to cases in the administrative judiciary to any court including civil courts will eliminate vagueness and contribute positively to the right to access to the court.

6- Proposal for Amendment of Article 5 of AAP

Current State:

Cases in which actions can be filed with the same petition:

Article 5 – (Amended: 10/6/1994-4001/Article 3) 1. A separate action shall be filed against each administrative procedure. However, an action can be filed with one petition against multiple procedures if there is a dependency or cause and effect relationship between the procedures in material or legal terms.

2. In order for multiple persons to be able to file an action with a joint petition, the plaintiffs must have a joint right or benefit and the material events or legal reasons that give rise to the action must be the same.

Proposal:

Article 5 of AAP is essentially a useful regulation brought to ensure "procedural saving". However, there are hesitations in practice regarding "***dependency in material or legal terms***" or "***cause and effect relationship***" between procedures that are conditions for a person to file an action against multiple procedures with a single petition or regarding "***joint rights or benefits of the plaintiffs***" and "***same material events or legal reasons that give rise to the action***" that are conditions for multiple persons to file an action with a joint petition. Besides, in addition to the conditions stipulated in the law, in both cases, additional conditions are imposed by administrative jurisdictions through case law, such as "*the defendant administration must be the same*". Both cases shall remove the predictability from the point of view of the individual in need of filing an action, and in the event of a dismissal of the petition or a repeat of the deficiency, this shall constitute a "dismissal of action" and shall impede the right to access to a court.[4] It is necessary to make arrangements in order to address these problems in this article.

Remarks:

[3] Constitutional Court, Application of Neriman Polat, D. No: 2012/1223, D.D.05.11.2014; In another decision, the Constitutional Court considered interpretation contrary to the provisions of Articles 4 and 6 of AAP as a violation of the right to access to court. Constitutional Court, Application of Nermin Aslan Başvurusu, D.N. 2018/7666, D.D. : 21.10.2020. See also TCC, Application of Bahadır Uçar . D. No. 2013/8045, D.D. 07.01.2016; TCC, Application of Muharrem Kılıç, D. No. 2012/1071, D.D. 11.03.2015; TCC, Application of Muhsin Karaca, D.2014/2211, D.D.09.06.2016; TCC, Application of İbrahim Can, D. No. 2012/1052, D.D. 23.07.2014; TCC, Application of Aktif Elektrik Müh. İnş. San. Ve Tic. Ltd. Şti., D. No.2012/855, D.D.. 26/06/2014; TCC, Application of Şener-Berçin, D. No. 2013/5516, D.D. 22.01.2015; ((Access to the decisions of the Constitutional Court in the text has been provided via the official website of the Constitutional Court).; For detailed information regarding right to a fair trial also see İNCEOĞLU Sibel, Right to a Fair Trial, Individual Application to the Constitutional Court, Handbook Series 4, Joint Project on Supporting the Individual Application to the Constitutional Court in Turkey, Ankara, 2018, (Available on the website of TCC); Also see YAMLI Mehmet Sadık, Decisions on Violation in Administrative Justice in Individual Applications, Joint Project on Supporting the Individual Application to the Constitutional Court in Turkey, Ankara, (Available on the website of TCC);

[4] See. Constitutional Court, Application of Neriman Polat, App.No.: 2012/1223, D.D. : 05.11.2014; See also. Constitutional Court, Application of Şener-Berçin, App.No. 2013/5516, D.D. : 22.01.2015; TCC, Application of Nermin Aslan, App.No. 2018/7666, D.D..21.10.2020; TCC, Application of Bahadır Uçar, App. No. 2013/8045, D.D. 07.01.2016; TCC, Application of Muharrem Kılıç, App.No. 2012/1071, D.D. 11.03.2015; TCC, Application of Muhsin Karaca, App No. 2014/2211, D.D. 09.06.2016; TCC, Application of İbrahim Can, App. No. 2012/1052, D.D. 23.07.2014; TCC, Application of Aktif Elektrik Müh. İnş. San. Ve Tic. Ltd. Şti., App. No. 2012/855, D.D. 26/06/2014.

It is well-known that there are hesitations in practice regarding "*dependency in material or legal terms*" or "*cause and effect relationship*" between procedures that are conditions for a person to file an action against multiple procedures with a single petition or regarding "*joint rights or benefits of the plaintiffs*" and "*same material events or legal reasons that give rise to the action*" that are conditions for multiple persons to file an action with a joint petition. Besides, in addition to the conditions stipulated in the law, in both cases, additional conditions are imposed by administrative jurisdictions through case law, such as "*the defendant administration must be the same*". Both cases shall remove the predictability from the point of view of the individual in need of filing an action, and in the event of a dismissal of the petition or a repeat of the deficiency, this shall constitute a "dismissal of action" and shall impede the right to access to a court. It is necessary to make arrangements in order to address these problems in this article.

7- Proposal for Adapting Article 6 Of AAP to the "National Judiciary Informatics System" (UYAP) With Regard to Opening of Administrative Actions

Current State:

Procedure to be applied upon the petition:

Article 6 – 1. After the postage and fees of the petitions submitted to the presidencies of the Council of State, administrative court, and tax court or to the institutions written in Article 4 are collected, they shall be immediately registered into the registry and the date and number of the registration shall be written on the petition. The action shall be deemed to have been filed on the date of registration.

2. A signed and sealed receipt without a stamp, which indicates the date and number of the registration shall be given to the plaintiffs.

3. The petitions given to the other institutions written in Article 4 shall be sent to the presidency of the Council of State or the relevant court with the registered letter within no later than three days. If transaction stamps are not available in these institutions, the amount of money collected for them and the date and number of the receipt shall be written on the petitions.

4. (Amended: 10/6/1994-4001/Article 4) If an action has been filed without paying the postage or fee or with incomplete postage or fee for any reason, the concerned person shall be notified by the head of the chamber or the investigating judge, the president of the court or a judge to be assigned by the head of the chamber that the postage and fee must be paid and completed within thirty days. If it is not fulfilled in spite of the notification, the same notice shall be sent another time. If the postage or fee is not paid or completed within the given period of time, it shall be decided that the action has not been filed and is the plaintiff shall be notified accordingly.

5. (Amended: 10/6/1994-4001/Article 4) If the postage rate is decreased after the action has been filed to the extent that it prevents the performance of the notification procedures, the concerned person shall be notified by the head of the chamber or the investigating judge, the president of the court or the judge to be assigned by the head of the chamber that the postage should be completed within thirty days. If the action required is not taken in spite of the notification, the same notice shall be sent another time. If the postage is not completed within the given period of time, the file shall be cancelled. If it is not requested to reopen the file by completing the fee within three months starting from the date of notification of this decision, it shall be decided that the action has not been filed and the plaintiff shall be notified accordingly.

6. (Amended: 10/6/1994-4001/Article 4) The notification mentioned in paragraphs 4 and 5 shall be made ex officio from the general budget.

Proposal:

Article 6 of AAP No. 2577, entitled " *Procedure to be applied upon the petition*", was written in 1982 based on the practice of submitting petitions to the court. This article still reflects the practices of 1982. However, today an action can also be filed through UYAP. From this point of view, it is proposed that this article is adapted to UYAP.

Remarks:

Making the proposed amendment to the article will ensure that the content of the article is in line with the application.

8- Proposal for Adapting The "Special Filing Time Limits", Which Lead to Loss of Rights Related to Filing of Administrative Actions, To The "General Filing Time Limits" Contained in Article 7/1 Of AAP

Current State:

The Time limit for filing an action:

Article 7 –

"1. The time limit for filing an action is sixty days in the Council of State and at the administrative courts and thirty days at the tax courts unless otherwise specified by the special laws."

Proposal:

There are special filing terms in the legislation arranged in the form of 7, 10, 15, 30 days and, 1 month in about 30 laws that fall within the scope of the administrative jurisdiction. It is necessary that these special time limits contained in these laws, which lead to loss of rights, are amended to 60 days It is not right to expect citizens to know such short filing time limits that are so fragmented and is challenging for even an attorney to know.[5] These different filing time limits restrict the citizen's right to access court and thus, ECtHR decides on the violation.[6] For this reason, and to make the right to access to court possible and applicable it is proposed to amend the filing time limits in the attached list:

Example 1: Procedure of Administrative Justice Act No. 2577 (1982) Art. 20/A: 30 days.

Example 2: Procedure of Administrative Justice Act No. 2577 (1982) Art. 20/B: 10 days.

Example 3: Council of State Law No. 2575 (1982) Art. 75/1: 15 days.

Example 4: Expropriation Law No. 2942 (1983) Art. 14/1: 30 days.

Example 5: Environment Law No. 2872 (1983) Art. 25/2: 30 days.

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[5] TCC, Application of Muharrem Kılıç, App.No. 2012/1071, D.D. 11.03.2015; TCC, Application of Neriman Polat, App. No. 2012/1223, D.D. 05.11.2014; Furthermore in a decision, after the Constitutional Court states that practices that make access to court extremely difficult/ impossible may violate the right to access to court, it underlines that the introduction of time limits for filing an action/ legal remedies will not contradict the right to access to court provided that the said periods are not of a nature (brevity) that makes it impossible to file an action. In the same decision, the Court refers to the ECtHR decision (Osu v. Italy, App.No. 36534/97, 11/7/2002, §§ 36-40) as an example, stating that the inability to use the right to file an action /apply to legal remedies as a result of improper application/calculation of the time limit conditions shall constitute a violation of the right to access to court. Constitutional Court, Application of Şener-Berçin, App.N. 2013/5516, D.D. 22.01.2015; TCC, Application of Remzi Durmaz, App.No. 2013/1718, D.D. 02.10.2013.

[6] See for example "*… 36. Right to access to court requires the existence of a coherent system in terms of application to a court and for those who would like to file a case to have open, practical and efficient opportunities in access to court. Especially legal uncertainties or practical uncertainties may violate the right to access to court (For an ECtHR decision on the same grounds see Geffre/France, App. No. 51307/99, 23/1/2003 § 34). Therefore, in the implementation of rules of procedure courts should avoid on one hand extreme formalism that can violate the right to a fair trial and on the other hand extreme impreciseness that can bear the result of complete elimination of rules of procedure that are regulated by laws (For an ECtHR decision on the same grounds see Walchli/France, App. No: 35787/03, 26/7/2007, § 29; Eşim/Turkey, App.No: 59601/09, 17/9/2013, § 21) 37. Right to access to court will be violated in cases where the rules of procedure serve as an obstacle before the cases of people to be handled by a competent court instead of serving for the interest of justice as a result of ensuring legal security and implementation of trials in a smooth manner. (For an ECtHR decision on the same grounds see Efstathiou and Others/Greece Yunanistan, App. No: 36998/02, § 24)…".* Constitutional Court, Application of Neriman Polat, D. No: 2012/1223, D.D.05.11.2014.

Example 6: Law on Transformation of Areas Under Disaster Risk No. 6306 (2012) Art. 6/9: 30 days.
Example 7: Law on Foreigners and International Protection No. 6458 (2013) Art. 53/3: 7 days; Art. 80/1-ç: 15 days and 30 days
Example 8: Turkish Petroleum Law No. 6491 (2013) Art. 23/4: 30 days.
Example 9: Law on Services Performed by the General Directorate of State Hydraulic Works No. 6200 (1953) Add. Art. 6/9: 30 days.
Example 10: Law on Tradesmen and Artisan Professional Organizations No. 5362 (2005) Art. 24/5: 15 days.
Example 11: Law on Police Duties and Powers No. 2559 (1934) Art. 6/2: 7 days.
Example 12: Law on Radio and Television Establishment and Broadcasting Services No. 6112 (2011) Art. 32/9: 15 days.
Example 13: Social Insurance and General Health Insurance Law No. 5510 (2006) Art. 102/4: 30 days.
Example 14: Fisheries Law No. 1380 (1971) Add. Art. 3/4: 15 days.
Example 15: Law on Consumer Protection No. 6502 (2013) Art. 78/2: 30 days.
Example 16: Turkey Union of Chambers and Commodity Exchanges and Chambers and Commodity Exchanges Act No. 5174 (2004) Art. 93/3: 30 days.
Example 17: Turkish Radio and Television Corporation Revenues Law No. 3093 (1984) Art. 5/f and 6/1: 1 month.
Example 18: Seed Law No. 5553 (2006) Art. 12/last: 7 days.
Example 19: Law on Collection Procedure of Public Receivables No. 6183 (1953) Art. 15/1: 15 days; Art. 20: 15 days; Art. 22/A-3: 30 days; Art. 58/1: 15 days.
Example 20: Tax Procedure Law No. 213 (1961) Duplicated Art. 49: 15 days; Add. Art. 7/4: 15 days.
Example 21: Law on Settlement of Some Applications Made to the European Court of Human Rights by Paying Compensation No. 6384 (2013) Art. 7/3: 15 days.
Example 22: Law on Construction Inspection No. 4708 (2001) Art. 8/4: 15 days.
Example 23: Law on Tobacco, Tobacco Products and Alcohol Market Regulation No. 4733 (2002) Art. 8/10: 15 days.
Example 24: Turkish Radio and Television Corporation Revenues Law No. 3093 (1984) Art. 5/f and Art. 6: 1 month.
Example 25: Law on Agricultural Chambers and Union of Agricultural Chambers No. 6964 (1957) Art. 33/3: 15 days.
Example 26: Municipal Law No. 5393 (2005) Art. 23/3: 10 days.
Example 27: Special Provincial Administration Law No. 5302 (2005) Art. 27/6: 10 days.

Remarks:

As mentioned in the above paragraph, when looking at the special filing time limits, it is observed that these limits are quite diverse. This also means envisaging of different filing time limits with regard to disputes of a similar nature.

Although there is a constitutional obligation (Article 40/2), considering that administrations may have a different attitude towards showing ways of application in administrative proceedings, providing many different filing time limits in the legislation will be a barrier with regard to determining the filing time limits and filing the action. Moreover, the filing time limits in administrative jurisdiction is in the quality of “foreclosure”. Given that, a mistake in the time of filing an action will result in the rejection of the case due to statute of limitations and this will create a significant obstacle in terms of the right to access to court, which is an important element of the right to a fair trial. For this reason, it would be very useful to make the filing time limits contained in these special laws as 60 days for administrative disputes and 30 days for tax disputes.

9- Proposal for Clarifying How The "Administrative Leave Period" Will Be Taken into Account in Calculating the Filing Time Limits by Adding Clause 4 To Article 8 Of AAP

Current State:

General principles related to the time limits

Article 8 – 1. Time limits shall start as of the day following the date of notification, publication, or promulgation.

2. The holidays are included in these periods. If the last day of the time limit coincides with a holiday, the time limit shall extend to the end of the working day following the holiday.

3. If the last day of the periods written in this Act coincides with the recess, these periods shall be deemed to be extended for seven days starting from the date following the day when the recess ends.

Proposal:

It has not been regulated in AAP No. 2577 how administrative leave periods will be taken into account in calculating the time limits of filing an action. Different State Council jurisdictions have emerged in this regard. A part of the jurisdiction of the Council of State stipulates that if the administrative leave period coincides with the last day of the filing time limit, there shall be a statute of limitations in the actions filed after the end of the administrative leave. In contrast, another part of the jurisdiction of the Council of State does not see a problem in terms of the time limit in actions filed after the end of the administrative leave. Making citizens face such uncertainty in important matters, such as the right to file an action, is incompatible with the principles of certainty and the rule of law. [7]

For this reason, it is proposed to add the following paragraph 4 to article 8 of the AAP titled "general principles regarding time limits":

"Administrative leave periods are included in the time limit for filing an action. So much so that when the last day of the time limit coincides with the administrative leave, the time limit is extended until the end of the business day following the administrative leave."

Remarks:

How administrative leaves will be taken into account in calculating the time limits of filing an action, which is a question often raised in practice and causes certain problems; for this reason, clarifying how these periods will have an impact in terms of trial periods is an important issue in terms of the right to access to court, which is part of the right to a fair trial.

10- Proposal for Abolishing Article 9/2 of AAP

Current State:

Applications to the institutions with no jurisdiction:

Article 9 – 1. (Amended: 5/4/1990-3622/Article 2) In case of dismissal, due to lack of jurisdiction, of the actions, filed too judicial (…) courts despite falling into the jurisdiction of the Council of State, administrative and tax courts, an action can be filed to the competent court within thirty days as of the day following the finalisation of the decisions on this matter. The date of application to the judicial authority that is not competent shall be considered as the date of application to the Council of State,

[7] For example for practises indicating that; different decisions of the Council of State (and the Supreme Court) with regard to the end of the recess period pose an obstacle to the right to access to court and in order to be able to talk about the right to effective access to court, it is necessary to have a consistent system of application to the court, and people must have clear, practical and effective opportunities to access the court and in this context, uncertainties in the legal/ practice may violate the right to access to court; (see ECtHR, Geffre/Fransa, D. No: 51307/99, 23/1/2003, § 34). See Constitutional Court, Application of Muharrem Kılıç, D.N. 2012/1071, D.D. 11.03.2015; See Also: Constitutional Court, Application of Şener-Berçin, D.N. 2013/5516, D.D. 22.01.2015; Constitutional Court, Application of Neriman Polat, D. No: 2012/1223, D.D.05.11.2014;TCC, Application of Aktif Elektrik Müh. İnş. San. Ve Tic. Ltd. Şti., D. N. 2012/855, D.D. 26.06.2014.

administrative, and tax courts.

2. In the actions filed to the judicial (…) courts and dismissed due to lack of jurisdiction, even if the thirty-day period written in the first paragraph has passed after the finalisation of the decision on the lack of jurisdiction, an administrative action can be filed within this period unless the time limit stipulated for filing an administrative action has expired.

Proposal:

It is proposed to abolish clause 2.

Remarks:

Clause 2 of the Article, which does not comply with the judicial process and practice, is proposed to be abolished.

11- Proposal for Amending the Last Sentence of Article 10/2 Of AAP, Which Neglects the Time to File an Action in The Tax Courts

Current State:

Article 10 –

Foreclosure of the administrative authorities:

"…2…In cases where no action is filed or the action is dismissed due to the time limit, if an answer is given by the competent administrative authorities after the expiration of the sixty-day period, an action can be filed within sixty days as of the notification of the answer."

Proposal:

Paragraph 2 of the Article is proposed to be amended as follows:

"In cases where no action is filed or the action is dismissed due to the time limit, if an answer is given by the competent administrative authorities after the expiration of the sixty-day period, an action can be filed within sixty days as of the notification of the answer."

Remarks:

The filing period in tax courts is 30 days according to Article 7 of AAP. Therefore, it is suggested to replace the phrase "sixty days" in the last sentence of the Article 10/2 of the AAP to "filing an action".

12- Proposal for Eliminating Ambiguities in Article 11 of AAP

Current State:

Applying to the senior authorities:

Article 11 – 1. Before filing an administrative action, the concerned persons may request from the senior authority, or in the absence of the senior authority, from the authority which has performed the procedure within the time limit for filing an administrative action, abolishment, withdrawal, amendment of the administrative procedure, or the performance of a new procedure. This application shall suspend the time limit for filing an administrative action that has started.

2. If no answer is given within sixty days, the request shall be deemed to have been dismissed.

3. If the request is dismissed or deemed to have been dismissed, the time limit for filing an action shall restart and the period elapsed until the date of application shall also be taken into account.

4. (Abolished: 10/6/1994-4001/Article 6)

Proposal:

It is proposed to amend the article as follows:

1. Before filing an administrative action, the concerned persons may request from the senior authority, or in the absence of the senior authority, from the authority which has performed the procedure within the time limit for filing an administrative action, abolishment, withdrawal, amendment of the

administrative procedure, or the performance of a new procedure. This application shall suspend the time limit for filing an administrative action that has started.

2. If no answer is given within sixty days, the request shall be deemed to have been dismissed.

3. If the answer given by the administration is not final within the sixty-day period, the concerned parties can file an action by considering this answer as a rejection of their request and can also wait for a final answer. In this case, the filing time does not work. However, the waiting period cannot exceed six months as of the date of application.

4. If the request is dismissed or deemed to have been dismissed, the time limit for filing an action shall restart and the period elapsed until the date of application shall also be taken into account.

5. Concerned parties may also apply in accordance with this Article upon the rejection of their application in accordance with Article 10.

Remarks:

There is a lot of uncertainty in the implementation of Article 11 of the AAP. First, it is unclear whether the clause covers regulatory processes. For this reason, the Council of State has contradictory jurisdictions in this regard. Secondly, "the answer which is not final" in Article 10 is not regulated in this Article 11. This causes confusion in practice. Thirdly, there are different jurisdictions of the Council of State on whether an application under Article 11 can be made in case an application made under Article 10 is rejected. It is proposed to amend this article to remove ambiguous situations before citizens' right to legal remedies and to prevent differentiation of jurisdictions.[8]

13- Proposal for Eliminating Ambiguities in Article 12 of AAP

Current State:

Actions for annulment and full remedy actions:

Article 12 –The concerned persons can directly file a full remedy action to the Council of State, administrative and tax courts due to an administrative procedure that violates their rights or file the actions of annulment and the full remedy actions together. They can also file the action of annulment first, and, upon the resolution of the action for annulment, bring the full remedy action as of the notification of the decision on this matter or from the notification of the decision to be taken if an action against this decision is filed. A full remedy action can also be filed due to damages arising from the performance of a procedure, within the time limit for the action starting from the date of performance. In this case, the rights of the concerned persons to apply to the administration, pursuant to Article 11, shall be reserved.

Proposal:

It is proposed that the last sentence of the article be amended as follows:

“In this case, the rights of the concerned persons to apply to the administration shall be reserved.”.

Remarks:

It does not make sense to refer to Article 11 with the last sentence of the Article, because Article 11 is related to the concerned persons request from the senior authority, or in the absence of the senior authority, from the authority which has performed the procedure abolishment, withdrawal, amendment of the administrative procedure, or the performance of a new procedure before the administrative action is performed. Secondly, there are uncertainties in practice as to whether this last sentence, which is proposed to be amended, means the sentence that precedes it or all the sentences that precede it.

[8] See Also. Constitutional Court, Application of Neriman Polat, App.No. 2012/1223, D.D.05.11.2014. See also. TCC, Application of Bahadır Uçar, D. N. 2013/8045, D.D. 07.01.2016; TCC, Application of Muharrem Kılıç, D.N. 2012/1071, D.D. 11.03.2015; TCC, Application of Muhsin Karaca, D.N. 2014/2211, D.D. 09.06.2016; TCC, Application of İbrahim Can, D.N. 2012/1052, D.D. 23.07.2014.

This also leads to differences in jurisprudence. As a result, the last sentence of the article creates uncertainties in practice. This, in turn, contradicts with the principle of legal security [9].

14- Proposal for Eliminating Ambiguities in Article 13/1 of AAP

Current State:

Directly filing a full remedy action:

Article 13 – 1. Those whose rights have been violated by the administrative actions must request, before filing an administrative action, for the fulfilment of their rights by applying to the relevant administration within one year from the written notification or as of the date when they become aware of these actions by other means, and within five years as of the date of the action in all cases. If these requests are partially or wholly rejected, an action can be filed within the time limit for the action as of the day following the notification of the procedure on this matter, or if no answer is given within sixty days about the request, from the end of such period.

Proposal:

With the amendment to be made in Clause 1 of the Article, it is proposed to make an arrangement that will eliminate the different interpretations in terms of the beginning of the 1 and 5-year periods envisaged in the article. The Council of State focuses on the criteria of "completion of administrative action and occurrence of damage" at the beginning of 1 and 5-year periods in some disputes, and "occurrence of administrative aspect of action" in some disputes. Although this is due to the Council of State's efforts to protect the right of individuals to file an action as much as possible, the current regulation should be addressed in a way that does not cause different interpretations to ensure certainty and predictability from the point of view of individuals and thus, facilitate the exercise of the right to access to court. The ECtHR also considers that the lack of concrete and clear start of the time for filing an action is an obstacle to the right to access to court [10]

Remarks:

Clarification of the beginning of the 1 and 5-year periods provided for in Paragraph 1 of the article is closely related to access to the court, hence the right to a fair trial, due to its relationship with the time limit of filing an action.

15- Proposal for Amending Article 14/3/a of AAP

Current State:

Initial examination of the petitions:

"3. (Amended: 5/4/1990-3622/Article 5) Petitions shall be examined by one investigating judge to be assigned by the head of chamber in the Council of State and the president of the court or a member to be assigned by the president of the court at the administrative and tax courts in terms of the

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[9] TCC, Application of Neriman Polat, D. N. 2012/1223, D.D.05.11.2014; TCC, Application of Bahadır Uçar, D. N. 2013/8045, D.D. 07.01.2016; TCC, Application of Muharrem Kılıç, D.N. 2012/1071, D.D. 11.03.2015; TCC, Application of Muhsin Karaca, D.N. 2014/2211, D.D. 09.06.2016; TCC, Application of İbrahim Can, D.N. 2012/1052, D.D. 23.07.2014; TCC, Application of Aktif Elektrik Müh. İnş. San. Ve Tic. Ltd. Şti., D. N. 2012/855, D.D. 26/06/2014.; Furthermore (In a decision where Article 12 of AAP was raised); For a Constitutional Court decision addressing the ECtHR case law that strict interpretation/practice should not be made in such a way as to prevent the right to file an action, where procedural conditions require interpretation: See. Constitutional Court, Application of Şener-Berçin D.N. 2013/5516, D.D. 22.01.2015; See also CCM, Application of Nuria Tapias Ship, D. 2014/4484, D.D 11.01.2017.

[10] ECtHR, De Geouffre de La Pradelle Decision, D.N. 12964/87, D.D.16.12.1992, §35 (Cited By; Doğru Osman/Nalbant Atilla, European Convention on Human Rights Statement and Important Decisions, Volume 1, Council of Europe- Supreme Court Publications, 2012, p. 628), The ECtHR states that the right of access to the court must be effective and concrete, and this requires a concrete and open possibility of objection to the procedure established. ECtHR, Bellet v. France, D.N. 23805/94, D.D. 04.12.1995, ECtHR, Zubac v. Croatia, 40160/12, D.N. D.D. 05.04.2018, For the last two decisions See. https://inhak.adalet.gov.tr/Resimler/Dokuman/301020201146166MaddeRehberiMedeni.pdf. (Guide on Article 6 of the ECtHR, Right to Fair Trial, Civil Law Aspect, 30.04.2020).

following aspects, respectively:

a) Duty and authorisation,

b) Encroachment on administrative authority,

c) Competency,

d) Whether there is any procedure that is final and must be executed, which shall be subject to an administrative action,

e) Statute of limitation,

f) Indication of the other party,

g) Compliance with Articles 3 and 5."

Proposal:

It is proposed to amend clause 3 of the article as follows:

3. **(Amended: 5/4/1990-3622/Article 5)** Petitions shall be examined by one investigating judge to be assigned by the head of chamber in the Council of State and the president of the court or a member to be assigned by the president of the court at the administrative and tax courts in terms of the following aspects, respectively:

a) Duty

b) Authorisation,

c) Encroachment on administrative authority,

Remarks:

Since the "authorization" issue in administrative actions can be determined after the "duty", both issues should be regulated in different clauses, provided that the "duty" has priority.

16- Proposal for Making an Addition to Article 14 Of AAP On the Nature of The Initial Examination

Current State:

Initial examination of the petitions:

Article 14 – 1. The petitions shall be registered by the Section of Documentation in the Council of State and referred to the competent chambers by the General Secretariat.

5. If those who carried out the initial examination do not observe any illegality on these points or the initial examination report is not upheld by the chamber or court, the notification procedure shall be performed.

6. If the above issues are found out after the initial examination, the provision of Article 15 shall be applied in every stage of the action.

Proposal:

Initial examination of the petitions:

Article 14 – 1. The petitions shall be registered by the Section of Documentation in the Council of State and referred to the competent chambers by the General Secretariat… 5. If the first investigators do not see any violation of the law from these points, or if the first investigation report is not deemed appropriate by the chamber or the court, the notification process is performed. 6. The first issues of investigation are related to public order, and if the above issues are determined after the first investigation, the provisions of Article 15 apply at each stage of the action".

Remarks:

The explicit statement in Clause 6 of the article that the initial examination subjects are related to public order will complement the existing Clause 6.

17- Proposal for Indicating the Issues Contained in Article 14 Of AAP Which Have Been Referred to in Article 15 By Name (Clearly)

Current State:

Decision to be taken upon the initial examination:

Article 15 – 1. (Amended: 5/4/1990-3622/Article 6) If any illegality is observed in the issues written in the third paragraph of the Article above by the Council of State or the administrative or tax courts, that the following decisions shall be taken.

a) dismissal of the actions filed on the issues under the jurisdiction of the judicial (…) court; dismissal of the action filed to the court that is not competent or does not have jurisdiction on the issues under the jurisdiction of the administrative court due to lack of competence or jurisdiction, and referral of the action file to the court that is competent or has jurisdiction in accordance with sub-paragraph 3/a of Article 14,

b) dismissal of the action in cases specified in sub-paragraphs 3/c, 3/d, and 3/e,

c) if the action has been filed without showing any defendant or by showing wrong defendant, referral of the petition to the actual defendant pursuant to sub-paragraph 3/f,

d) dismissal of the petitions to be rearranged or to complete the deficiencies in accordance with Articles 3 and 5 within thirty days in cases written in sub-paragraph 3/g, or to file an action in person or via an attorney within thirty days if the action has been filed by the non-attorney representative of the competent person in cases written in sub-paragraph (c),

e) referral of the petitions to the competent administrative authority in the case written in sub-paragraph 3/b

Proposal:

Instead of referring to the relevant paragraphs of Article 14 of the AAP by letters, clearly arranging the content of the cited paragraphs will facilitate the understanding of the article.

Remarks:

The amendment proposal aims to facilitate the comprehensibility of Article 15.

18- Proposal for Eliminating the Uncertainty in Practice by Making an Addition to Paragraph 2 Of Article 16/4 Of The AAP

Current State:

Notification and response:

“4. The parties may not claim any right based on the pleas or second petitions submitted after the end of the time limit. (Added sentence: 11/4/2013-6459/Article 4) However, in full remedy actions, the amount specified in the lawsuit petition can be increased for once by paying the fee until final decision is made, without observing the time limit or other procedural rules. The petition regarding the increase of the amount shall be notified to the opposite party, which will require a response within thirty days.”.

Proposal:

It is proposed that sentence 2 of paragraph 4 be amended as follows:

“4. The parties may not claim any right based on their defences or second petitions submitted after the end of the time limit. (Added Sentence: 11/4/2013-6459/4 Art.) However, in full remedy actions, the amount specified in the lawsuit petition may be increased or decreased, regardless of the time limit or other procedural rules, by paying the fee until the decision is finalized, and the petition for this shall be notified to the other party, which will require a response within thirty days”.

Remarks:

With the amendment to be made in the 2nd sentence of the 4th paragraph, it is aimed to eliminate the hesitations in practice about when the request for improvement can be made. It is also regulated that the time for improvement could also be reduced.[11]

19- Proposal for Adding Keeping of Minutes at the Hearing to Article 18, Which Regulates the Principles for Hearings, and Proposal for Repeating Hearings Conducted by Non-Competent or Unauthorized Courts

Current State:

Principles regarding hearings:

Article 18 – 1. The hearings shall be held open to the public. In cases where reasons of public morals or public security require, a part or all of the hearing shall be held secretly by the decision of the competent chamber or court.

2. The hearings shall be directed by the president.

3. In the hearings, the parties shall be called upon to speak twice. If only one of the parties appears, their statements shall be heard. If none of the parties appears, the hearing shall not be held, and an examination shall be made based on documentation.

4. It is mandatory for the prosecutor to be present in the hearings of the actions held in the Council of State. After the parties are heard, the prosecutor shall disclose their written opinion. Afterwards, the parties shall be asked for their last words and the hearing shall be ended.

5. In cases regarding a hearing, if the prosecutors' request that an inspection, expert examination, or evidence assessment is made or the procedure file is brought, and if these requests are not accepted by the competent chamber or board, they shall present their opinion about the essence of the matter separately in writing.

Proposal:

It is proposed to add the following provision as paragraph 6 to the article:

"The allegations and defences of the parties during the hearing are recorded in the minutes and signed".

"Hearings held by non-competent or unauthorized courts are repeated."

Remarks:

The fact that the statements in the hearings are recorded will contribute to the content of the trial within the framework of better evaluation of the statements and will contribute to the seriousness of the hearing by ensuring order. In addition, there are different jurisprudence on whether the hearings made by the non-competent or unauthorized courts will be repeated. For this reason, a provision should be added that the hearings held by non-competent or unauthorized courts should be repeated in order to obtain an opinion from the authorized and competent court.

20- Proposal for Amending the Phrase in Article 20/A/1-C of AAP Since the Supreme Council of Privatization Was Abolished on 09.07.2018

Current State:

Summary procedure:

Article 20/A – (Added: 18/6/2014-6545/Article 18)

1. The summary procedure shall be applied to the disputes arising from the procedures listed below:

a) Procurement proceedings except for the decisions for prohibition from procurement.

[11] Although old dated, in terms of the relationship between the issue of improvement and the right of access to court See. ECtHR, Erten v. Turkey, 2011/14674, D.D. 25.11.2014 (Legalbank Electronic Law Bank)

b) Urgent expropriation proceedings.
c) Decisions of the High Council for Privatisation.

Proposal:

It is proposed that the phrase “decisions of the Supreme Council of Privatization” contained in Article 20/a/1-c of AAP be changed as “decisions taken in accordance with the Law on Privatization Practices dated 24/11/1994”.

Remarks:

Article 3/1 of the Law on Privatization Practices No. 4046, which regulates the Supreme Council of Privatization, was repealed in accordance with Article 85/E of the Statutory Decree dated 02.07.2018 and no. 703, published in the Official Gazette dated 09.07.2018 and no. 30473. Therefore, it is proposed that the phrase “decisions of the Supreme Council of Privatization” contained in Article 20/a/1-c of AAP be changed as “decisions taken in accordance with the Law on Privatization Practices dated 24/11/1994”.

21- Proposal for Providing A Legal Basis for The UETS (National Electronic Notification System) Number Already Included in Court Decisions with The Amendment to Article 24 Of AAP In Order to Adapt to The Changes Made in The Notification Law

Current State:

Issues to include in the judgments:

Article 24 – The judgments shall include:

a) Names and surnames or titles and addresses of the parties and their attorneys or representatives, if any,

b) A summary of the events as alleged by the plaintiff and the legal basis of their claim, the result of the request and a summary of the defendant’s plea,

c) (Amended: 10/6/1994-4001/Article 11) Names and surnames and opinions of the investigating judge and prosecutor in the cases reviewed by the Council of State,

d) Whether any hearing has been held in the actions with hearing or not; if it has been held, names and surnames of the parties and their attorneys or representatives who were present,

e) The legal basis of the judgment, its justification, and the verdict; the amount of compensation decided regarding actions for compensation,

f) Litigation expenses and the party for which they are charged,

g) The date of the judgment and whether it has been taken unanimously or by a majority vote,

h) Names and surnames and signatures, and the dissenting votes, if any, of the president and members of the court or the judge that made the judgment,

ı) The name of the chamber or court that made the judgment and the docket and judgment numbers of the file.

Proposal:

It is proposed to make an amendment regarding the inclusion of the UETS (National Electronic Notification System) number in article 24 of AAP titled "issues to include in the judgments" in the court decisions of administrative jurisdiction. In addition, to eliminate the differences in the drafting process and duration of the judgments, a regulation should be made in the article regarding the drafting period of the judgments. Also, the explanation of the litigation expenses to be imposed on the parties in the article will provide clarity on the legal expenses, which is a complex issue in both civil and administrative proceedings.

Remarks:

Providing a legal basis for the UETS (national electronic notification system) number already included in court decisions with the amendment to article 24 of AAP in order to adapt to the changes made in the Notification Law is of great importance. In addition, clearly stating the drafting period of the judgments in Article 24 will be an important step in terms of both procedural saving and the realization of the right to a fair trial in terms of completing the trial within a reasonable time. Again, clearly stating the costs of the judgment in the article, which will be included in the judgments, will also prevent possible hesitations in this regard.

22- Proposal for Eliminating the Missing Rules in Article 26/1 Of AAP Titled "Change in Personality or Status of The Parties"

Current State:

Change in personality or status of the parties:

Article 26 – 1. If any change occurs in personality or status of the parties due to death or any other reason during the action, the file shall be deemed to have been repealed by the relevant court until the application of the person to whom the right of proceeding is passed on and, in case of the death of a party, who is a real person, until the renewal of the proceeding by the administration against the inheritors. If the renewal petition has not been given within four months, the decision for the stay of execution, if any, shall automatically become void.

Proposal:

Change in personality or status of the parties:

Article 26 – 1. If any change occurs in personality or status of the parties due to death or any other reason during the action, the file shall be deemed to have been repealed by the relevant court until the application of the person to whom the right of proceeding is passed on and, in case of the death of a party, who is a real person, until the renewal of the proceeding by the administration against the inheritors within 1 year. If the renewal petition has not been given within four months, the decision for the stay of execution, if any, shall automatically become void.

Remarks:

Article 26 of the AAP regulates an important issue regarding the termination of the action upon the change in the personality or status of the parties. In this respect, the article should not contain ambiguities in order to protect the rights of citizens. The most important lack in paragraph 1 of the Article is that in actions where the file is decided to be repealed, no regulation has been made on how long the heirs or those who have the right to follow the case should apply to the court. A period of 1 year is recommended in this regard. It is also clearly regulated that the administration's renewal of follow-up against the heirs is related to the real persons who filed an action against a tax debt.

In addition, stating which court is the "relevant court" in the paragraph will possibly prevent uncertainties and loss of rights in this regard.

23- Proposal for Eliminating the Missing Rules in Article 26/2 Of AAP Titled "Change in Personality or Status of The Parties"

Current State:

Change in personality or status of the parties:

Article 26

2. Petitions for actions that only involve the deceased shall be repealed.

Proposal:

It is proposed that the 2nd Clause should be amended as follows: "Petitions for actions that only involve the deceased and those whose status have changed shall be repealed."

Remarks:

There is the statement "petitions for actions that only involve the deceased shall be repealed (*actio personalis moritur cum personale*)" in the 2nd paragraph of the Article. Undoubtedly, this provision can only be valid in terms of annulment actions. Since full remedy actions are the subject of a request for pecuniary and non-pecuniary compensation, they are transferred to the heirs. In addition, whether the petition will be cancelled in cases where the plaintiff is not a real person, that he/she is a legal person and that only concerns that legal entity is not regulated in the article. According to the Council of State, if the transaction subject to the action is only related to the interest of the company whose registration is deleted from the trade registry; the rule "*petitions for actions that only involve the deceased shall be repealed*" is applied.[12]

Considering these issues, the 2nd paragraph is proposed to be amended as follows: "*Petitions for actions that only involve the deceased and those whose status have changed shall be repealed*."

24- Proposal for Eliminating the Missing Rules in Article 26/3 Of AAP Titled "Change in Personality or Status of the Parties"

Current State:

Change in personality or status of the parties:

Article 26

3. (Amended: 5/4/1990-3622/Article 9) If a notification cannot be sent to the address indicated by the plaintiff, the action file shall be repealed until the notification of the new address and the decision for the stay of execution, if any, shall automatically become void. If no request is made to renew the action by notifying the new address within one year starting from the date when the file is repealed, the action shall be deemed not to have been filed.

Proposal:

Change in personality or status of the parties:

Article 26

3. (Amended: 5/4/1990-3622/Article 9) If a notification cannot be sent to the address indicated by the plaintiff, the action file shall be repealed until the notification of the new address and the decision for the stay of execution, if any, shall automatically become void. If no request is made to renew the action by notifying the new address within one year starting from the date when the file is repealed, the action shall be deemed not to have been filed.

Remarks:

It is aimed to eliminate the hesitations that may arise by amending the article as suggested.

25- Proposal to Add A Sentence to Article 27/1 Of AAP

Current State:

Stay of execution

Article 27 – (Amended: 10/6/1994-4001/Article 12)

"1. Filing a case in the Council of State or in administrative courts shall not stay the execution of the sued administrative decision…"

Proposal:

Considering the characteristics of issues such as environment, forest, and zoning, to prevent the potential negative results of a delay in the decision on stay of execution; it is considered as useful if the annulment cases filed on these issues stayed the execution automatically. To this end a statement

[12] D8D, D. 2016/4464, D. 2017/3550, D.D. 03.05.2017, DD, iss. 145, p. 350-351.

as: “However, a case filed on issues of environment, forest and zoning shall stay the execution,” should be added to the paragraph.

Remarks:

Adding such a sentence to the 1st paragraph of the Article is important to automatically stay the administrative decision when such cases a are filed to ensure the outcome to be meaningful in case the decision is in favour of annulment. Hence, this would ensure prevention of irreparable damages in the very beginning of a trial. This, for example, will prevent cutting trees for mining activities or environmental demolition.

26- Proposal for Redrafting Article 27/2 Of AAP

Current State:

Stay of execution

Article 27 – (Amended: 10/6/1994-4001/Article 12)

2. (Amended: 2/7/2012-6352/Article 57) The Council of State or the administrative courts can decide to suspend the execution by showing justification after the plea of the defendant administration is taken or after the end of the time limit for the plea if the implementation of the administrative procedure both results in damage that are hard to recover or impossible to recover from and if the administrative procedure is expressly in contradiction to the law.

Proposal:

2nd paragraph of the Article is proposed to be changed as below:

Stay of execution

Article 27 – (Amended: 10/6/1994-4001/Article 12)

2. (Amended: 2/7/2012-6352/Article 57) The Council of State or the administrative courts can decide on stay of execution by showing justification after the plea of the defendant administration is taken or after the end of the time limit for the plea if the implementation of the administrative procedure both results in damage that are hard to recover or impossible to recover from.

Remarks:

Considering that the statement “expressly in contradiction to the law”, as one of the essential conditions of the stay of execution in the 2nd paragraph of the Article, eliminates the difference between the decision of annulment and stay of execution with regard to being an urgent / temporary measure; the aforementioned statement needs to be addressed. However, the fact that the aforementioned provision is a repetition of Article 125/4 of the Constitution entails a Constitutional amendment as well.

It should also be added to the article that if the request for stay of execution is rejected, the judgment must be justified. Because, for the person whose request is rejected, to be able to fully use the objection mechanism stipulated in the 7th clause of the Article requires knowledge of the reason for the rejection decision.[13] Otherwise, the opportunity to appeal against the decision will not mean anything other than a formal possibility.

27- Proposal for Making Guarantee an Exception in Requests for Stay of Execution in Order to Facilitate the Right to Legal Remedies

Current State:

Stay of execution

[13] See. Constitution Article 141, Constitutional Court, Application of, D.N. 2014/6011, D.D. 22.09.2016; Regarding the fact that the justified decision grants the parties the right to appeal; See. ECtHR, Armen Deryan v. Turkey, 2004/41721, D.D.21.07.2015 (For the final decision; See Legalbank Electronic Law Database).

Article 27 – (Amended: 10/6/1994-4001/Article 12)

6. The decisions for the stay of execution shall be taken in return for a guarantee; however, the guarantee might not be required depending on the conditions. The disputes arising between the parties with respect to the guarantee shall be settled by the chamber, court or judge taking the decision about the stay of execution. No guarantee shall be taken from the administration and the persons who enjoy judiciary assistance.

Proposal:

It is proposed that the 6th paragraph be amended as follows:

"A guarantee may be requested with regard to the decisions for the stay of execution. The disputes arising between the parties with respect to the guarantee shall be settled by the chamber, court or judge taking the decision about the stay of execution. No guarantee shall be taken from the administration and the persons who enjoy judiciary assistance."

A similar arrangement should be made in Article 52 titled "Stay of execution in appeal requests"; for this reason, it is proposed to remove the phrase "in return for guarantee" from the text in the 1st clause of Article 52 and amend the 2nd Clause as "Guarantee may be requested for the implementation of this Article".

Remarks:

In the current state, it is a "rule" to require a guarantee for stay of execution. However, this provision prevents the right to legal remedies. It is also known that the guarantee remains an exception in administrative judicial practice. In this respect, "guarantee" should be arranged as an exception.

28- Proposal for Eliminating the Ambiguity Regarding the Notification of Decisions Made on The Stay of Execution in Article 27/9 Of AAP:

Current State:

Stay of execution

Article 27 – (Amended: 10/6/1994-4001/Article 12)

…9. The decisions taken for the stay of execution shall be written and signed within fifteen days.

Proposal:

It is proposed that the provision be changed as follows:

Stay of execution

Article 27 – (Amended: 10/6/1994-4001/Article 12

9. The decisions taken for the stay of execution shall be written, signed, and notified within fifteen days.

Remarks:

This provision constitutes an assurance for citizens.[14] However, this assurance is lacking, because, although it is clear how long the decisions for stay of execution will be written and signed, there is no specified time limit for how long these decisions will be notified. In such a case, a stay of execution decision written and signed within 15 days can wait for months in the court.

29- Proposal for Adding a Statement to Article 28/1 Of AAP That the Decision Is Not Expected to Be Finalized for Execution of Court Decisions

Current State:

[14] The legal loophole in the notification process may cause problems in practice. ECtHR considers it a violation to cause loss of rights for the individual with regard to the application of notification legislation. ECtHR, Davran v. Turkey Kararı, 18342/03, D.D. 03.11.2019, (Cited By; Doğru Osman/Nalbant Atilla, European Convention on Human Rights Statement and Important Decisions, Volume 1, Council of Europe- Supreme Court Publications, 2012, p. 628, See Also https://hudoc.ECtHR.coe.int/tur#{%22fulltext%22:[%22t%C3%BCrkiye%20davran%22]

The 1st paragraph of Article 28 of AAP is as follows:
Article 28 – 1. (Amended: 10/6/1994-4001/Article 13) The administration must establish a procedure or take an action, without delay, as required by the judgments and stay of execution decisions of the Council of State, regional administrative courts, and administrative and tax courts. This period may not exceed thirty days starting from the notification of the decision to the administration under any circumstance.

Proposal:

It is proposed to add the following sentences to the 1st Clause of Article 28 of AAP.
"Applying for legal remedies does not prevent the execution of court decisions" or
"The court decisions are not expected to be finalized for their execution" or
"2nd Clause of Article 350 and 2nd Clause of Article 367 of the Code of Civil Procedure cannot justify the non-execution of court decisions."

Remarks:

According to Article 28 of AAP, the decisions of the administrative judicial bodies for stay of execution and the merits must be executed within 30 days at the latest. However, in practice, the defendant administrations do not execute the court decisions on the grounds that they resorted to legal remedies. The defendant administrations state that they will execute the court decisions only after they are finalized. They even cite the articles 350/2 and 367/2 of the Code of Civil Procedure (CCP). Unfortunately, this practice is widespread and leads to the defendant authorities to clearly violate the article. However, the execution of court decisions is a constitutional order.
Indeed, the execution of court decisions is a requirement of the "Rule of Law Principle" expressed in Article 2 of the Constitution and it is also a requirement of the following provision in the last paragraph of Article 138 of the Constitution: *"The legislative and executive bodies and the administration are obliged to comply with court decisions; these bodies and the administrations cannot change court decisions in any way and cannot delay their execution."*.
The ECtHR also considers that the guarantees in Article 6 of the Convention will have no meaning in the event that the court decisions are not complied with or even delayed, and in this way, Article 6 of the Convention will be violated.[15]. For this reason, adding one of the sentences suggested above to the continuation of paragraph 1 of Article 28 will prevent arbitrary action by the administrations.

30- Proposal for Removing the Phrase That Remained but Was Meaningless in The Article 28/1 of AAP After the Annulment Decision of The Constitutional Court

Current State:

Article 28 – 1. (Amended: 10/6/1994-4001/Article 13) …….. However, the disciplinary provisions shall be reserved.

Proposal:

The statement "…. However, the disciplinary provisions shall be reserved" is proposed to be removed from the Article.

Remarks:

The statement "…. However, the disciplinary provisions shall be reserved" that remained but was meaningless in the article 28/1 of AAP after the annulment decision of the Constitutional Court is proposed to be removed from the Article.

[15] See: ECtHR, 19.03.1997, 18357/91 Hornsby v. Greece, Cited By; Doğru Osman/Nalbant Atilla, European Convention on Human Rights Statement and Important Decisions, 2012, Volume 1, p.850.

31- Proposal for Amending the Phrase "Pecuniary and Non-Pecuniary Compensation" In Article 28/3-4-6 Of AAP.

Current State:

Clauses 3, 4 and 6 of Article 28 of AAP are as follows:

3. In cases where no procedure is established or no action is taken in accordance with the decisions of the Council of State, regional administrative courts and administrative and tax courts, an action for pecuniary and non-pecuniary compensation can be filed in the Council of State and at the relevant administrative court against the administration.

4. (Amended: 21/2/2014-6526/Article 18) If the judgments of the court are not fulfilled by the public officials within the given period of time, an action for compensation can be filed only against the relevant administration.

6. (Amended: 2/7/2012-6352/Article 58) In compensation and tax actions, the interest to be calculated at the deferment interest rate determined in accordance with Article 48 of Law no. 6183 dated 21 July 1953 on the Collection Procedure of the Public Claims shall be paid for the period between the date of notification of the court decision and the date of payment. However, no interest shall be charged for the period to elapse between the date of notification of the court decision to the plaintiff and the notification of the bank account number to the administration.

Proposal:

It is proposed that the expressions of "action for pecuniary and non-pecuniary compensation" and "action for compensation " in the 3rd, 4th and 6th clauses of Article 28 of AAP should be amended as "full remedy action".

Remarks:

According to Article 2 of AAP No. 2577, there are 2 types of actions in administrative jurisdiction: 1) Annulment action, 2) Full remedy action.

But still there are expressions of "action for pecuniary and non-pecuniary compensation" and "action for compensation " in the 3rd, 4th, and 6th paragraphs of Article 28 of AAP. It is proposed that these expressions are amended as "full remedy action".

32- Proposal for Eliminating the Repetition in Clauses 3 And 4 Of Article 28 Of the AAP and Making It a Single Clause in Accordance with Article 129/5 Of the Constitution and Eliminating the Hesitations in Practice

Current State:

Clauses 3 and 4 of Article 28 of AAP are as follows:

3. In cases where no procedure is established or no action is taken in accordance with the decisions of the Council of State, regional administrative courts and administrative and tax courts, an action for pecuniary and non-pecuniary compensation can be filed in the Council of State and at the relevant administrative court against the administration.

4. (Amended: 21/2/2014-6526/Article 18) If the judgments of the court are not fulfilled by the public officials within the given period of time, an action for compensation can be filed only against the relevant administration.

Proposal:

It is proposed that the 3rd Clause of Article 28 is amended as follows: “In the event that court decisions are not fulfilled by the administration or public officials in due time or are neutralized, a full remedy action can be filed against the administration and without applying to the administration.”

Remarks:

Clauses 3 and 4 of Article 28 regulate almost similar issues. It is stated in Article 129/5 of the Constitution that: “Actions for compensation arising from faults committed by civil servants and other public officials while exercising their powers can only be filed against the administration provided that they are recoursed and in accordance with the form and conditions prescribed by law.”
On the other hand, there is a serious uncertainty as to whether it will be compulsory to apply to the administration in full remedy actions to be filed if the court decisions are not fulfilled. This leads to the emergence of quite different jurisprudence. This ambiguity must be resolved. For this reason, it is proposed that these two clauses be merged in accordance with Article 129/5 of the Constitution and that the condition of applying to the administration should not be sought in full remedy actions to be filed due to the non-execution of court decisions.
At the same time, in practice, it is seen that judicial decisions are "formally" executed by the administrations and in this way, judicial decisions are "neutralized". In order to eliminate the victimization of individuals and to ensure the implementation of judicial decisions, it is recommended to introduce the phrase "or neutralized” after the phrase “are not fulfilled” in this paragraph, in which case it is possible to emphasize the responsibility of the administration.
The ECtHR also stated that the right to demand the enforcement of court decisions, regardless of the court making the judgment, is an integral part of the "right to legal remedy" [16], otherwise all the beneficial consequences of the guarantees of Article 6 § 1 will be lost [17] and the unreasonable delay in the execution of a binding court decision shall violate the Convention[18].
The ECtHR states that the execution of court decisions is of even greater importance in the context of administrative disputes.[19] The Court stresses that the litigant, by filing an annulment action before the highest administrative court of the State, requested not only the annulment of the rejected decision but also, above all, the annulment of the consequences of the decision in question[20], and therefore, the effective protection of the litigant and the restoration of lawfulness require administrative authorities to have an obligation to execute the decision. [21]

33- Proposal for Eliminating Uncertainties Leading to Loss of Rights in Article 29 Of AAP

Current State

Article 29 – 1. If the decisions taken by the Council of State, regional administrative courts and administrative and tax courts are not sufficiently clear or have paragraphs of the provisions which contradict each other, each party can request the clarification of each decision or the rectification of the contradiction.
2. The petitions of clarification shall be given in one copy more than the number of the opposite parties.

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[16] Hornsby v. Greece, § 40; Scordino v. Italy (no. 1) BD, § 196, For citation see; https://inhak.adalet.gov.tr/Resimler/Dokuman/301020201146166MaddeRehberiMedeni.pdf. (Guide on Article 6 of the ECtHR, Right to Fair Trial, Civil Law Aspect, 30.04.2020)

[17] Burdov v. Russia, §§ 34 and 37, For citation see; https://inhak.adalet.gov.tr/Resimler/Dokuman/301020201146166MaddeRehberiMedeni.pdf. (Guide on Article 6 of the ECtHR, Right to Fair Trial, Civil Law Aspect, 30.04.2020)

[18] Burdov v. Russia (no.2), § 66, For citation see; https://inhak.adalet.gov.tr/Resimler/Dokuman/301020201146166MaddeRehberiMedeni.pdf. (Guide on Article 6 of the ECtHR, Right to Fair Trial, Civil Law Aspect, 30.04.2020)

[19] Sharxhi and Others v. Albania, § 92, For citation see; https://inhak.adalet.gov.tr/Resimler/Dokuman/301020201146166MaddeRehberiMedeni.pdf. (Guide on Article 6 of the ECtHR, Right to Fair Trial, Civil Law Aspect, 30.04.2020)

[20] On environmental problems, see: Bursa Bar Association and Others v. Turkey, § 144, For citation see; https://inhak.adalet.gov.tr/Resimler/Dokuman/301020201146166MaddeRehberiMedeni.pdf. (Guide on Article 6 of the ECtHR, Right to Fair Trial, Civil Law Aspect, 30.04.2020)

[21] Hornsby v. Greece, § 41; Kyrtatos v. Greece, §§ 31-32, For citation see; https://inhak.adalet.gov.tr/Resimler/Dokuman/301020201146166MaddeRehberiMedeni.pdf. (Guide on Article 6 of the ECtHR, Right to Fair Trial, Civil Law Aspect, 30.04.2020)

3. The chamber or court which has taken the decision shall examine the matter and, if considered necessary, notify one copy of the petition to the opposite party to be responded within the period that it will designate, and the response shall be given in two copies. One copy shall send to the party that requests the clarification or the rectification of the contradiction.
4. The decision of the competent chamber or court on this matter shall be notified to the parties.
5. The clarification or the rectification of the contradiction can be requested until the fulfilment of the decision.

Proposal:

It is proposed to add the following phrases as paragraphs 6 and 7 to the Article.
"Requesting clarification does not suspend the periods to apply for legal remedies" and
"No hearing is held in requests for clarification".

Remarks:

The issue of "clarification" is regulated in Article 29. However, there is no provision in the clause as to whether requesting clarification will suspend the application period for legal remedies. The parties of the action think that when they request a clarification, the time for resorting to legal remedies will also be suspended. However, the case law of the Council of State is exactly the opposite.[22] Therefore, the parties who ask for clarification and think that the time to apply for legal remedies will suspend experience significant grievances. For this reason, it is proposed to add the following paragraph to the article "*requesting clarification does not suspend the period of resorting to legal remedies*".
In addition, the question of whether a hearing should be held if a clarification is requested is not regulated in the article. There is also a complete uncertainty about this issue. In practice, administrative courts do not accept requests for hearings.[23] In order for the parties requesting clarification not to unnecessarily request a hearing from the courts and to avoid unnecessary correspondence and notification, it is proposed to add the following paragraph to the article: "*No hearing is held in requests for clarification*".
On the other hand, these two important clauses should also be applied in the next article of Article 30 on "correction of mistakes". In this respect, it is proposed to replace the provision "*Clauses of Article 29 other than the last clause is also applied to these requests*" in the second paragraph of Article 30 with the provision "*Clauses of Article 29 other than the 5th clause is also applied to these requests*".

34- Proposal for Requesting Correction of Mistakes at All Times in Accordance with Article 30/1 Of AAP

Current State:

Article 30 – 1. Correction of mistakes regarding the names, surnames and titles of both parties and the result of their claims and the calculation errors made in the paragraph related to the ruling can be requested.

Proposal:

It is proposed to add "at all times" before the phrase "can be requested" in Clause 1 of Article 30.

Remarks:

In the 30th article of AAP numbered 2577, it is not clearly regulated until when the request for "correction of mistakes" can be made but reference is made to the previous article. It is proposed to remove this reference and add "at all times" before the phrase "can be requested" in Clause 1 of Article 30.

[22] A request for clarification does not constitute a reason that interrupts or suspends the time to apply for legal remedies. D3D, D. 1995/1874, D. 1995/1594, D.D. 22.05.1995, D.D. P. 91, P. 345-346.
[23] D10D, D. 1965/1287, D. 1965/27, D.D. None, Council of State, Decisions of Tenth Chamber, Ankara 1972, p. 109.

35- Proposal for Removing the Phrase “Cross-Action " From the Article 31/1 Of AAP

Current State:

Article 31 – 1. On the issues which there is no ruling in this Act, the provisions of the Civil Procedural Law shall apply to cases concerning the satisfaction and rejection of the judge for trying the action, competency, participation of the third persons in the action, counsels of the parties, waiver and admission, the guarantee, cross-action, the expert, inspection, obtaining evidence, litigation expenses, legal aid as well as the procedures to be carried out against the acts of the parties that will disrupt the peace and discipline of the court during the hearing and in the electronic procedures.

Proposal:

It is proposed to remove the phrase “cross-action” contained in paragraph 1 of Article 31.

Remarks:

In Article 31/1 of AAP No. 2577, the “cross-action” is also among the issues referred to in the Code of Civil Procedure. But since there is no cross-action in the administrative justice, it is proposed that this phrase be removed from the article.

36- Proposal for Redrafting “Participation of Third Parties in The Action" In Reference to Civil Code in Article 31/1 Of AAP In A Separate Article Under the Title “Intervention to The Case”

Current State:

Article 31 – 1. On the issues which there is no ruling in this Act, the provisions of the Civil Procedural Law shall apply to cases concerning the satisfaction and rejection of the judge for trying the action, competency, participation of the third persons in the action, counsels of the parties, waiver and admission, the guarantee, cross-action, the expert, inspection, obtaining evidence, litigation expenses, legal aid as well as the procedures to be carried out against the acts of the parties that will disrupt the peace and discipline of the court during the hearing and in the electronic procedures.

Proposal:

It is proposed that the intervention to a case to be drafted in a separate article considering the peculiarities of administrative trial procedures.

Remarks:

In Article 31/1 of AAP No. 2577, the “participation of third parties in the action” is also among the issues referred to in the Code of Civil Procedure. According to the Code of Civil Procedure, the participation of third parties in the action is performed in the form of “primary intervention” and “subsidiary intervention”. But primary intervention is not possible in administrative justice. In the case of subsidiary intervention there are some practical differences and therefore it will be beneficial to draft intervention to case as a separate article taking into account the peculiarities of administrative law.

There is also a regulation as stated in the footnote on intervention to case in Article 30 of Draft of the Law on Amendments in Certain Laws and Decree Laws to Reduce Workload in Administrative Judiciary dated 2015.[24]

[24] *“Intervention to the case:*
Article 31/A – 1. Persons that are notified with a case and third parties whose right or interest will be affected by the decisions taken in a case under consideration might;
a) At the first or second instance;
b) At the first or appeal instance in cases subject to summary proceedings, request to intervene to the case beside one of the Parties.
2.Third party requesting intervention shall apply to the court with a petition stating the reason and basis of intervention.

The provision that is in the draft can be regulated similarly. However, the person intervening to administrative judiciary must definitely be granted with the right to legal remedies. In practice the Council of State has parallel decisions.[25] Furthermore, in Article 260 entitled "Right to legal remedies" of Code on Penal Procedures No. 5271 [26], it has been explicitly regulated that the intervening party has the right to apply for legal remedies. It is proposed to include a similar regulation in the article regulating the intervention to the case.

37- Proposal for A Separate Regulation Of "Competency" Referred to The CCP In Article 31/1 Of AAP

Current State:

Article 31 – 1. On the issues which there is no ruling in this Act, the provisions of the Civil Procedural Law shall apply to cases concerning the satisfaction and rejection of the judge for trying the action, competency, participation of the third persons in the action, counsels of the parties, waiver and admission, the guarantee, cross-action, the expert, inspection, obtaining evidence, litigation expenses, legal aid as well as the procedures to be carried out against the acts of the parties that will disrupt the peace and discipline of the court during the hearing and in the electronic procedures.

Proposal:

Among the issues referred to the CCP with Article 31/1 of AAP, (objective) "competency" is also included. It is proposed that the competency be regulated separately in AAP.

Remarks:

Among the issues referred to the CCP with Article 31/1 of AAP, (objective) "competency" is also included. It is proposed that the competency be regulated separately in AAP. When the CCP provisions on the subject are examined, it is stated in article 50 of the CCP titled "party competence", that those who have "the right to enjoy civil rights", that is, "capacity to have rights", shall be deemed to possess "the competency to be a party in an action". In this respect, CCP has taken the concept of "capacity to have rights" in civil law as the basis for the determination of the party competence and according to the CCP, real and legal persons have the competence to be parties of an action. However, in administrative justice practices, "Bank branches without legal personality"[27], Union branches without legal personality"[28], "Chamber branches without legal personality"[29], "Financial offices without legal

3. Petitions for intervention request shall immediately be notified. Parties shall state their comments on the intervention request within seven days. Upon the termination of this period the court shall decide on the intervention request.

4. Request for intervention shall not suspend the examination of request for stay of execution and other procedural actions and the case cannot be postponed on this ground.

5. In case of admission of intervention request the intervening party can follow the case from the stage it is at and actions from then on shall be notified to the intervening party.

6.Intervention to the case shall not equip the intervener with the status of a party; intervener can take actions beside the party that they have been included in the case and only to help them.

7. Judgment resulted from the trial shall only be related to the parties."

[25] D17D, D. 2015/9316, D. 2015/1943, D.D. 08.05.2015, DD, no. 139, p. 114-118; D6D, D. 2017/915, D. 2017/2524, D.D. 12.04.2017, DD, no. 145, p. 24.

[26] Article 260 – (1) The public prosecutor, suspect, accused and party who according to this Code has acquired the position of intervening party, as well as parties whose motion of intervention was not decided, was denied, or parties who were aggravated by the crime in that manner that the position of the intervening party would be possible may file a motion of legal remedies against the decisions of the judges and of the court.

[27] D7D, E. 1987/3132, K. 1987/3104, KT. 22.12.1987, DD, issue 70-71, p. 362-365; D9D, E. 1991/2465, K. 1992/944, KT. 24.03.1992, DD, issue. 86, p. 499-500.

[28] D11D, E. 2008/3705, K. 2008/7974, KT. 22.09.2008, DD, issue. 120, p. 352-354; D11D, E. 2008/15062, K. 2010/523, KT. 27.01.2010, DD, issue. 124, p. 419-421.

[29] TMMOB Chamber of Civil Engineers Diyarbakır Branch > D6D, E. 1989/2264, K. 1991/1101, KT. 13.05.1991, DD, issue 84-85, p. 422-425; TMMOB Chamber of Architects İstanbul Büyükkent Branch > D6D, E. 2006/3763, K. 2007/702, KT. 09.02.2007, DD, issue 115, p. 235-239; TMMOB Chamber of Architects Ankara Branch > D8D, E. 2010/8614, K. 2013/7386, KT. 31.10.2013, DD, issue 135, p. 417-419.

personality"[30], "Neighbourhood headmen offices without legal personality"[31] and similar ones are accepted as having the competence to be a party. As can be seen, although article 31/1 of AAP has referred to the CCP on "objective competency", the provisions of the CCP regarding objective competency are not applied "exactly" in administrative justice.

In addition, in accordance with Article 2 of AAP, "breach of interest" is sought in order to file an action for annulment and "violation of rights", and "subjective competency" are sought in order to file a full remedy action. However, a regulation should be introduced that in cases that are closely related to the public interest such as the protection of environmental, historical and cultural values and zoning practices, being a pure citizen will be considered sufficient to file an annulment case. Undoubtedly, this issue can be added to article 2 of AAP.

In addition, there are different applications in the actions filed by associations and foundations in practice. In the regulation to be made on the competency to ensure unity and clarity in practice, it must be stated that there should be a provision in the bylaws of associations and in the deeds of foundations stating that they could file an action.

In order to eliminate the uncertainties regarding both objective and subjective competence in actions to be filed at administrative courts and to ensure unity in practice, a detailed regulation is needed by taking into account the characteristics of the administrative justice act.

It is accepted by the ECTHR that the capacity to file an action is directly related to the right to access to court and is evaluated within the scope of Article 6 of the Convention. The ECTHR concluded that the rejection of the action filed on grounds that a foundation or an association did not have a legal personality, damages the essence of the applicant's right to legal remedies.[32]

The Constitutional Court also emphasized this issue by expressing the following in a decision in which it referred to some of its former decisions: *"Right to access to court is among the guarantees of the right to a fair trial regulated in Article 36 of the Constitution. (Ahmet Yıldırım, D. No: 2012/144, 2/10/2013, § 28), This means being able to bring a dispute to court and ask for an effective remedy. Limitations that prevent a person from applying to a court or make a court decision meaningless, in other words, which significantly neutralize a court decision, may violate the right to access to court. (Özkan Şen, D. No: 2012/791, 7/11/2013, § 52)"* [33]

38- Proposal for a Separate Regulation Of "Waiver and Admission" Referred to The Ccp In Article 31/1 Of AAP

Current State:

Article 31 – 1. On the issues which there is no ruling in this Act, the provisions of the Civil Procedural Law shall apply to cases concerning the satisfaction and rejection of the judge for trying the action, competency, participation of the third persons in the action, counsels of the parties, waiver and admission, the guarantee, cross-action, the expert, inspection, obtaining evidence, litigation expenses, legal aid as well as the procedures to be carried out against the acts of the parties that will disrupt the peace and discipline of the court during the hearing and in the electronic procedures.

Proposal:

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30 D6D, E. 1996/4360, K. 1997/2148, KT. 06.05.1997, DD, issue 94, p. 401-402; D6D, E. 1997/5676, K. 1998/2051, KT. 16.04.1998, DD, issue 98, p. 342.

31 D13D, E. 2014/956, K. 2014/4507, KT. 24.12.2014, DD, issue 138, p. 158-163; D6D, E. 2015/3375, K. 2017/1778, KT. 09.03.2017, DD, 147, p. 452-456.

32 See: ECtHR, December 16, 1997, Canea Catholic Church v. Greece, Cited By; Doğru Osman/Nalbant Atilla, European Convention on Human Rights Statement and Important Decisions, Volume 1, p.623.

33 Gemak Gemi İnşaat Sanayi ve Ticaret A.Ş. App.No.: 2013/7698, 18/2/2016, For decision, see: bireysel-basvuruda-idari-yargiya-iliskin-kararlar.pdf (anayasa.gov.tr), Book of Violation Decisions Regarding Administrative Jurisdiction in Individual Application, p.238.

Among the issues referred to the CCP with Article 31/1 of AAP, “waiver and admission” is also included. It is proposed that the “waiver and admission” be regulated separately in AAP.

Remarks:

Among the issues referred to the CCP with Article 31/1 of AAP, “waiver and admission” is also included. There are different practices among judicial authorities regarding the application of waiver and admission, which are legal options that put an end to the action in administrative justice act, and there are also different opinions in the doctrine.

In the CCP, the waiver of the action is defined as "the plaintiff's partial or total waiver of the result of the request" (CCP Article 307). Although the waiver in the code of civil procedure is entirely dependent on the will of the plaintiff, it is controversial in the administrative justice act whether the waiver is dependent on the admission of the court and there are different decisions in this direction. For example, in many Council of State decisions, it has been stated that it is not possible to waive in actions that are closely related to the public interest such as the protection of environment, historical and cultural values, and zoning practices. Again, in many Council of State decisions, it has been stated that waiver is not possible at the legal remedies stage. As can be seen, although the CCP has been referred to in terms of "waiver and admission" with the article 31/1 of AAP, the provisions applicable to waiver and admission in the CCP are not implemented "exactly" in the administrative justice act.

Therefore, a regulation is proposed in the article with regard to the waiver indicating that it shall not be possible to waive in actions that are closely related to the public interest such as the protection of environmental, historical and cultural values, and zoning practices while it shall be possible to waive both at the first degree and at the legal remedies’ stages in annulment actions with individual consequences and in full remedy actions.

In the CCP, admission of the action is defined as "the defendant's partial or full consent of the result of the request of the Plaintiff" (CCP Article 308/1). Upon the admission of the action by the administration, the court of first instance decides that “there is no room for a decision due to admission”. In practice, there are hesitations as to whether the withdrawal of the administrative action has the same consequences as the admission. It shall be useful to regulate the "admission" separately, taking into account the characteristics of the administrative justice, in order to eliminate these hesitations.

For this reason, these two legal options need to be regulated separately, taking into account the characteristics of the administrative justice act.

39- Proposal for Making and Amendment Which Will Allow the “Notification of the Action” Contained in Article 31/1 of AAP to Be Made at the Request of one of the Parties

Current State:

The second sentence of the first clause of Article 31 of AAP is as follows:

“However, the notification of the action (…) shall be made by the Council of State, the court or the judge ex officio.”

Proposal:

It is proposed to change the 2nd sentence of the first clause of Article 31 as follows;

“However, the notification of the action shall be made by the Council of State, the court or the judge ex officio upon request of the one of the parties…”

Remarks:

In the current regulation regarding the notification of the action, it is regulated that the notification can only be made ex officio by the judicial authority. However, it is proposed that the phrase “upon

request of the one of the parties" should be added to the sentence, allowing the parties to request notification of the action.

The ECtHR also regards the denial of the right of persons to participate in a hearing whose rights may be affected thereupon as a violation of the right to access to the court and considers it within the scope of Article 6 of the Convention. In the case of "Menemen Chamber of Minibus Drivers v. Turkey"; the Court noted that the applicant was prevented from being heard in a case directly involving his personal rights, as the national authorities had failed to comply with their procedural obligations regarding the notification of the action, thus violating the applicant's right to access to court.[34]

40- Proposal for Making a Separate Regulation on Evidence in AAP

Current State:

In Article 31 of AAP, reference is made to CCP only with regard to the evidence of discovery. There is no reference to the evidence in general.

Proposal:

It is proposed to make a separate regulation regarding the evidence in AAP.

Remarks:

In the first clause of Article 31 of AAP, reference is made to CCP only with regard to the evidence of discovery. However, the evidence to be applied in the administrative justice act should be regulated separately. In particular, regulations should be made regarding the use of witness evidence in administrative justice, which is also included in the Judicial Reform Strategy Action Plan.[35]

41- Proposal for Clarification of The Reference to The Tax Procedural Law in AAP Article 31/2

Current State:

Clause 2 of Article 31 of AAP is as follows:

2. The relevant provisions of the Tax Procedural Law shall be applied in the settlement of the tax disputes, except for the cases referred to the Code of Civil Procedure pursuant to this Act and the above paragraph.

Proposal:

It is proposed to change the 2nd clause of Article 31 as follows;

"The relevant provisions of Articles 377, 378 and repeated Article 378 of Tax Procedural Law shall be applied in the settlement of tax disputes, except for the cases referred to in the Code of Civil Procedure pursuant to this Act and the above paragraph."

Remarks:

First of all, the phrase "Civil Procedural Law" in this provision should be changed to "Code of Civil Procedure". In addition, it is proposed to clarify the provisions referred to the Tax Procedural Law. In accordance with the case law of the Council of State, the articles referred to the Tax Procedural Law with this article are 377, 378 and repeated 378th articles of the Tax Procedural Law.[36]

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[34] See: ECtHR, December 9, 2008, Application no: 44088/04, Menemen Chamber of Minibus Drivers v. Turkey, Nakleden: Cited By; Doğru Osman/Nalbant Atilla, European Convention on Human Rights Statement and Important Decisions, Volume 1, p. 623-624.

[35] See. Ministry of Justice Judicial Reform Strategy Booklet, Ankara May 2019.

[36] See. DVDDGK, E. 1991/51, D. 1991/76, D.D. 25.10.1991. D.D, issue. 84-85, p. 111-112; DVDDGK, E. 2000/316, D. 2000/371, D.D.. 17.11.2000, D.D, issue. 105, p. 167.

42- Proposal for Replacing the Phrase “The Jurisdiction Shall Be Determined According to The Public Order” With the Phrase “Special Jurisdiction Cases Abolish the General Jurisdiction” In Article 32/2 Of AAP

Current State:

2. The jurisdiction in the implementation of this Act shall be determined according to the public order.

Proposal:

It is proposed to replace the phrase “The jurisdiction in the implementation of this Act shall be determined according to the public order” with the phrase “Special jurisdiction cases abolish the general jurisdiction.”.

Remarks:

It will appropriate to abolish the sentence *“The jurisdiction in the implementation of this Act shall be determined according to the public order”* in Article 32/2 of AAP No. 2577. Since all initial examination issues are according to public order in administrative justice act, it would be more appropriate to add a provision to Article 14 stating that all initial examination issues are according to public order.

It would be appropriate to add a provision stating that the special jurisdiction cases will abolish the general jurisdiction in article 32/2 of the AAP. In practice, there are some difficulties in this regard and the general jurisdiction is still applied despite the existence of special jurisdiction rules. Therefore, this amendment is proposed in the article.

43- Proposal for Adding “Refusal of Transfer Request” and “Non- Consent to Transfer Between Institutions” to Article 33/1 of AAP

Current State:

Article 33 – 1. (Amended: 5/4/1990-3622/Article 12) In the actions related to the appointment and transfer of public officials, the competent court shall be the administrative court where the public officials previously served or shall serve at present.

Proposal:

It is proposed to add the statements "refusal of transfer request" and "non-consent to transfer between institutions" to first clause of Article 33/1 of AAP.

Remarks:

In Article 33 of AAP, it is not clearly regulated where the action will be filed against "refusal of transfer request" and "non-consent to transfer between institutions". Therefore, sometimes Article 32, which regulates general jurisdiction, and sometimes the Article 33/1, which regulates special jurisdiction are applied for the actions filed against these transactions. With the amendment to be made in article 33/1 of AAP, it is proposed to apply special jurisdiction in both cases.

44- Proposal for Adding A Statement That the Special Jurisdiction Rule in Article 33/4 Of AAP Shall Also Be Applied to Court Personnel

Current State:

Article 33 – 1. (Amended: 5/4/1990-3622/Article 12) In the actions related to the appointment and transfer of public officials, the competent court shall be the administrative court where the public officials previously served or shall serve at present.

Proposal:

It is proposed to add the statements "refusal of transfer request" and "non-consent to transfer between institutions" to first clause of Article 33/1 of AAP.

Remarks:

In Article 33 of AAP, it is not clearly regulated where the action will be filed against "refusal of transfer request" and "non-consent to transfer between institutions". Therefore, sometimes Article 32, which regulates general jurisdiction, and sometimes the Article 33/1, which regulates special jurisdiction are applied for the actions filed against these transactions. With the amendment to be made in article 33/1 of AAP, it is proposed to apply special jurisdiction in both cases.

45- Proposal for Adding A Sentence to Address the Uncertainty Experienced in Practice Related to Article 35 Of AAP

Current State

Article 35 – (Amended: 5/4/1990-3622/Article 13)

In actions regarding movable assets, the competent court shall be the administrative court where the movable assets are located.

Proposal:

It is proposed to add a sentence in Article 35 stating that "The displacement of the movable property during the trial does not change the competent court".

Remarks:

There is uncertainty in practice as to whether the displacement of movable property during the trial will cause a change in the competent court. It is proposed to add a sentence stating that "The displacement of the movable property during the trial does not change the competent court" in order to eliminate this uncertainty.

46- Proposal for Adding "Animals" To the Jurisdiction Rule Contained in Article 35/1 Of AAP

Current State

Article 35 – (Amended: 5/4/1990-3622/Article 13)

In actions regarding movable assets, the competent court shall be the administrative court where the movable assets are located.

Proposal:

It is proposed to add the phrase "… and animals" to the provision in Article 35. Of course, the title of the Article should also be amended accordingly.

Remarks:

In practice, while the jurisdiction rules are determined in actions related to animals, animals are considered as movable property and evaluated within the scope of this article. However, as a result of the debate about the status of animals, if it is accepted that the status of animals is not an item in the legal regulations regarding the protection of animals; it may be appropriate to change the expression in this article to "In actions related to movable properties and animals". As a result of the recent developments in German law, the term "animals and goods" started to be used instead of "movable properties" by making changes in Article 90 and the following articles of the German Civil Code.

47- Proposal for Amending Article 36 Of AAP

Current State

Jurisdiction in full remedy actions:

Article 36 – In full remedy actions other than those arising from administrative contracts, the competent court shall be, respectively, the administrative court:

a) that has the power to settle the administrative dispute that caused the damage,

b) If the damage has arisen from a service such as public works and transportation or any action of the administration, which is located where the service is performed or the action is taken,
c) in other cases, which is located in the region of the plaintiff's residence,
Jurisdiction in tax disputes:

Proposal:

It is proposed to amend Article 36 as follows.

Jurisdiction in full remedy actions:

Article 36 – In full remedy actions other than those arising from administrative contracts, the competent court shall be, respectively, the administrative court located in:

a) The place where the administration that established the administrative proceeding is settled in actions filed with a request for compensation for damages arising from administrative proceedings,
b) The place where the action was taken in lawsuits filed with the request for compensation for damages arising from administrative action,
c) The place of residence of the plaintiff for damages occurred abroad,

Remarks:

Unfortunately, this article is carelessly written in AAP and is an article that contains ambiguities. In particular, clauses a and b of the Article need clarification. Full remedy actions arise from administrative actions or proceedings. The phrase "other cases" in Clause c of the article is also very ambiguous. In this respect, it is proposed to amend the article as stated above.

48- Proposal for Adding the Positive Jurisdiction Dispute Arising Within the Administrative Jurisdiction to Article 44/1 Of AAP

Current State:

Assignment of competent authority:

Article 44 – 1. In cases where any actual or legal obstacle arises for the competent court to try an action or any doubt arises regarding the boundaries of the judicial locality of two courts or if it is decided that both two courts have jurisdiction over the case, the case files shall be sent to:
a) the regional administrative court within the relevant judicial locality if the dispute arises between court(s) within the same judicial locality,
b) in other cases, the Council of State
for the assignment of competent authority upon the request of the parties or the courts.

Proposal:

It is proposed that the 1st Clause of Article 44 be amended as follows. "1. In cases where any actual or legal obstacle arises for the competent court to try an action or any doubt arises regarding the boundaries of the judicial locality of two courts, or if it is decided that both courts have jurisdiction and competence over the case, the case files shall be sent to:"

Remarks:

Disputes with regard to competency and jurisdiction arising within the administrative courts are regulated in the following articles,

- "negative competency dispute" in Article 43 of AAP;
- "negative jurisdiction dispute " in Article 43 of AAP;
- "positive jurisdiction dispute" in Article 44 of AAP.

But the regulation of the "positive competency dispute" within administrative justice itself has been forgotten. For this reason, courts sometimes apply Article 44, in which the "positive jurisdiction dispute" is regulated by comparison, and sometimes do not.
In this respect, it is proposed to add the phrase "competence" to Article 44/1 of AAP.

49- Proposal for Abolishing The 2nd Sentence of Article 45/1 Of AAP

Current State

The second sentence of Clause 1 of Article 45 of AAP is as follows:

"However, the decisions taken by administrative and tax courts about tax actions, full remedy actions and the actions of annulment filed against administrative procedures that does not exceed five thousand Turkish Liras shall be final and no appellate request can be made against these decisions."

Proposal:

This provision envisages that the decisions taken by administrative and tax courts about tax actions, full remedy actions and the actions of annulment filed against administrative procedures that do not exceed seven thousand Turkish Liras today shall be final and no appellate request can be made against these decisions. The way to apply for legal remedies has been closed, considering the amount of seven thousand TL as "insignificant". However, it is clear that an amount that seems insignificant for the legislator may be significant for the plaintiff. In this respect, it is proposed that this provision be removed.

Remarks:

It would be appropriate to remove this provision and ensure the right to access to court during legal remedies.

50- Proposal for Abolishing the Provision "The Appeal Shall Be Subject to The Form and Procedures of Revision" In Article 45/2 Of AAP and Detailed Regulation of The Procedural Rules Relating to Appeal, Conducting the Examination on The Decisions Made by Courts of First Instance Initially in The Appeal

Current State

The first sentence of Clause 2 of Article 45 of AAP is as follows:

"The appeal shall be subject to the form and procedures of the revision."

Proposal:

A proposal has been made for abolishing the provision "the appeal shall be subject to the form and procedures of revision" in article 45/2 of AAP and detailed regulation of the procedural rules relating to appeal, conducting the examination on the decisions made by courts of first instance initially in the appeal within 2 months at the latest as a requirement for concluding actions within a reasonable period of time, which is one of the elements of the right to a fair trial.

Remarks:

Appeals and revisions are different legal remedies. For this reason, instead of subjecting the appeal to the forms and procedures of the revision, it would be appropriate to regulate it separately and conduct the first examination in the appeal. Therefore, the abolition of the provision "*the appeal shall be subject to the form and procedures of revision*" from the article and detailed regulation of the procedural rules relating to appeal and conducting the examination on the decisions made by courts of first instance initially in the appeal within 2 months at the latest shall be appropriate.

51- Proposal For Making An Amendment To Eliminate The Uncertainty In Practice Regarding The Reasons For Reverse To The Court Of First Instance Contained In Article 45/5 Of AAP

Current State

Clause 5 of Article 45 of AAP is as follows:

“5. In cases where the regional administrative court considers that the appellate request made against the decisions, which are taken upon the initial examination, is valid and that the action has been tried by the court without jurisdiction or competence or which the judge dismissed or prohibited, the regional administrative court shall decide to accept the appellate request and the reverse the decision of the court of first instance. The regional administrative court shall also send the file to the relevant court. The decisions of the regional administrative court, taken pursuant to this paragraph, shall be final.”

Proposal:

It is proposed that the reasons for reverse to the court of first instance contained in clause 5 of Article 45 of AAP should be clarified in such a way as to eliminate uncertainties in practice.

Remarks:

Clause 5 of Article 45 of AAP stipulates that if the appeal request made against the decisions, which are taken upon the initial examination, is valid and that the action has been tried by the court without jurisdiction or competence or which the judge dismissed or prohibited; then the decisions can be reversed to the courts of first instance. But in practice, the decision is reversed to the court of First Instance for many reasons other than the reasons listed in the article (for example, failure to do so when a hearing should be held), Therefore, to eliminate ambiguity in practice, it is proposed that these matters be clearly stated in the relevant article. If no reverse is stipulated, except for those mentioned in the article, or if it is considered that there may be issues that must be reversed in accordance with the nature of the work other than those mentioned in the article, these matters should also be clearly stated in the relevant article

52- Proposal for Counting Issues That Cannot Be Appealed Instead of Issues That Can Be Appealed in Article 46 Of AAP

Current State

In the first clause of Article 46 of AAP, the issues that can be appealed are given in clauses within a certain limitation.

Proposal:

It is proposed that issues that cannot be appealed should be considered in the article instead of issues that can be appealed.

Remarks:

In Article 46 of AAP, the actions subject to appeal are listed one by one. With this method, the possibility of applying for appeal for the cases not listed in the article has been removed and the appeal remedy has turned into an exceptional legal remedy. On the contrary, it would be more appropriate in terms of right to legal remedies, to count the actions that are not subject to appeal and to make an arrangement in which all other matters will be subject to appeal. At this point, it is observed in Article 362 of the CCP as well that the decisions that cannot be subjected to appeal are listed.

53- Proposal for Making an Amendment to Determine the Monetary Limit Contained in Article 46/1-B of AAP Based on The Amount Requested by The Plaintiff in The Petition

Current State

Article 46/1-b of AAP numbered 2577 is as follows:

“Tax actions, full remedy actions and actions filed about the administrative procedures that exceeds one hundred Turkish Liras.”

Proposal:

It is proposed to introduce a provision stating that the monetary limit will be determined according to the amount requested by the plaintiff in the petition.

Remarks:

This provision that determines whether a decision can be appealed depending on the monetary amount causes uncertainty in practice. As a matter of fact, is this monetary limit the amount that the plaintiff requested in the petition? Or is it the monetary amount that the court ruled in its decision? From this point of view, it is proposed to clarify the issue.

54- Proposal for Amending the Phrase “By Joint Decree” in article 46/1-e of AAP

Current State

The Article 46/1-e of AAP is as follows:

"e) Actions of annulment filed about the appointment, appointment by transfer and dismissal procedures carried out with joint decree law and the appointment, appointment by transfer and dismissal procedures of the heads of chamber and senior public officials."

Proposal:

It is proposed to replace the phrase "by joint decree" in the article with the phrase "with the decree or approval of the President".

Remarks:

With the transition to the Presidential Government system in 2018, the joint decree application was abolished. With the "Presidential Decree Regarding Appointment Procedures in High Level Officials and Public Institutions and Organizations" no. 3, appointments to high-level public positions are conducted with the President's decision or the President's approval. Therefore, it is proposed to replace the phrase "by joint decree" in the article with the phrase "with the decree or approval of the President".

55- Proposal for Amending Article 52/1 Of AAP

Current State

Stay of execution in appeal or appellate requests:(3)(4)

Article 52 – 1. (Amended: 5/4/1990-3622/Article 21) An appeal or appellate request shall not suspend the execution of the decisions of the judge, the court, or the Council of State. However, the legal chamber of the Council of State, the board of the Council of State authorised to examine the appeal request, or the regional administrative court authorised to examine the appellate request can decide to suspend the execution of these decisions in return for a guarantee. (Added sentence: 10/6/1994-4001/Article 22) In appeals or appellants made against the decisions for the dismissal of the action, a decision for the stay of execution regarding the relevant procedure can be made if the condition stipulated in Article 27 is met.

Proposal:

It is proposed to change the 3rd sentence in the 1st clause of the Article as follows:

“In the case that an application is made for appeal or revision, the execution of a court decision may be suspended if two conditions are met at the same time; namely if damages that are difficult or impossible to recover arise with execution of the court's decision and the court's decisions are clearly contrary to the law.”

Remarks:

"Stay of execution in appeal or revision requests" is regulated in Article 52 of AAP No. 2577. In this article, it is unclear whether the stay of execution in the appeal or revision requests will be made by

the court ex officio or upon request. Therefore, it is proposed that this issue be clarified. It is also proposed that the third sentence of the first clause of the article be amended as stated above.

56- Proposal for Amending the Provisions Regarding the Guarantee in Clauses 1 And 2 Of Article 52 Of AAP

Current State

The second sentence of Clause 1 of Article 52 of AAP is as follows:

“However, the legal chamber of the Council of State, the board of the Council of State authorised to examine the appeal request, or the regional administrative court authorised to examine the appellate request can decide to suspend the execution of these decisions in return for a guarantee.”

Clause 2 of Article 52 of AAP is as follows:

“2. In the actions of annulment, guarantee might not be requested.”

Proposal:

It is proposed to remove the phrase "in return for a guarantee" in the second sentence of Clause 1 of Article 52 of AAP and abolish the existing sentence in Clause 2, and to introduce the statement "Guarantee may be requested by the competent administrative court".

Remarks:

As a result of these proposed changes regarding the guarantee for stay of execution in appeal and revision requests, the guarantee will no longer be considered an obligation and left to the discretion of the court.

57- Proposal for Amending Article 53/1-H Of AAP

Current State

The clause 53/1-h of AAP is as follows:

“The fact that a judgment in conflict with the previous judgment was taken by the same court or another court, while there is no legal basis that might result in a new decision being taken in conflict with the previous decision taken about an action the parties, subject and cause of which are the same.”

Proposal:

It is proposed that this clause be arranged as follows by adding the phrase "of which are same or different" to the article after the word "Parties"; “The fact that a judgment in conflict with the previous judgment was taken by the same court or another court, while there is no legal basis that might result in a new decision being taken in conflict with the previous decision taken about an action the parties of which are same or different, subject and cause of which are the same.”

Remarks:

In practice, different decisions can be taken from the same court or from different courts in cases that have the same subject and reason but are filed by different persons. In order to prevent loss of rights in this matter and to ensure unity of implementation; it is proposed to add the phrase "*of which are same or different*" to the article after the word "*Parties*".

58- Proposal for Adding Violation Decisions Issued by The Constitutional Court Upon Individual Application Among the Reasons for The Rectification of Judgment in Article 53 Of AAP

Current State

In Article 53 of the AAP, the reasons for the rectification of judgment are listed as a restriction. However, among these reasons, the violation decisions given by the Constitutional Court upon individual application were not included.

Proposal:

It is proposed to add the violation decisions given by the Constitutional Court upon individual application among the reasons for rectification of judgment in the article.

Remarks:

If the Constitutional Court decides on violation as a result of the individual application, it may decide to send the file to the relevant court for "rectification of judgment" to eliminate the violation and its consequences. Violation decisions by the European Court of Human Rights are accepted as grounds for rectification of judgment. Therefore, it is proposed to add the violation decisions given by the Constitutional Court upon individual application among the reasons for rectification of judgment.

59- Consideration of Judgments Rendered by The CoS ALCB / TLCB Pursuant to Clause 3/C/5 Of Law No 2576 As A Ground for Renewal of Trial

Current State:

In case of contradictions or discrepancies between the final judgments rendered by regional administrative courts and the article 3-C of Law No. 2576 or by different regional administrative courts, the CoS Administrative or Tax Litigation Chambers Board are in charge of resolving – eliminating such contradictions and discrepancies depending on the subject. Given that the judgment to be rendered by the ALCB/TLCB as a result of the procedure does not eliminate the judgment and consequences in question, it would be useful to ensure safety of parties to the case to consider the decisions taken by ALCB/TLCB as a ground for renewal of trial with an addition to be made to the article 53 of the AAP.

Proposal:

It is proposed to add the abovementioned clause to the Article 53/1 of AAP as subparagraph (i).

Remark:

It is proposed to add a statement to article 53/1 to the AAP allowing for renewal of trial as a result of decisions of ALCB/TLCB.

60- Proposal to Make an Addition to Paragraph 3 Of Article 53 Of the Law On AAP

Current State:

"…3. (Amended first sentence: 15/7/2003-4928/Art. 6) Duration for renewal of trial shall be ten years for the reason stated in subparagraph (h) of paragraph (1), one year following finalisation of the judgment of the ECtHR for the reason stated in subparagraph (ı) of paragraph (1) and sixty days for other reasons. These durations shall be calculated as of the following day when the grounds for request took place on the part of the applicant."

Proposal:

In accordance with articles 59 and 60 of the report, in parallel to the proposal for addition to article 53/1 of the AAP requires an amendment also to the paragraph 3 of the said article.

Remark:

It would be beneficial to regulate the provision of Article 53/3 of the AAP taking the proposals in account.

61- Proposal for Detailed Regulation Of “Abstention and Challenge in The Council of State and The Courts” In Articles 56 And 57 Of AAP

Current State:

The subjects of "Abstention and challenge in the Council of State" are regulated in Article 56 and "Abstention and challenge in the Courts" in Article 57 of AAP.

Proposal:

A proposal has been made for detailed regulation of “abstention and challenge in the council of state and the courts” in articles 56 and 57 of AAP.

Remarks:

The "abstention and challenge in the Council of State and in the Courts" is regulated in Article 56 and 57 of AAP. In addition, the reference to the CCP about the judge's satisfaction and rejection of the case with Article 31 should be removed and the necessary arrangements should be made in these articles.

62- Proposal for Amending Article 58/1 Of AAP

Current State

Preservation of evidence in the administrative cases:

Article 58 – 1. After an administrative case is filed, the parties can request for preservation of the evidence regarding such cases only from the Council of State, the administrative and tax courts that are hearing the action.

Proposal:

It is proposed that the provision in the article be amended as follows; “Before and after an administrative case is filed, the parties can request for preservation of the evidence regarding such cases from the administrative court hearing the action.”

Remarks:

Article 58 of the AAP regulates the subject of "Preservation of evidence in the administrative cases". At the same time, reference has been made to CCP with article 31 of AAP regarding the detection of evidence.

The preservation of the evidence is possible before the action is filed in the CCP. However, in practice, unfortunately, administrative courts do not accept the requests for preservation of evidence made before the action is filed. As a justification of this situation, it is expressed that there is no case under the name of "preservation" in the administrative jurisdiction or any authority for preservation of the evidence before filing an administrative action is not regulated in AAP.

These justifications of the courts are not correct, because "preservation of evidence" is not a separate case like a determination case, but a procedural action. Especially before filing an action, preservation of the evidence to be used in the case is of vital importance in terms of administrative disputes. Despite the reference to CCP with article 31 of AAP regarding the preservation of evidence, the failure of the administrative judicial authorities to accept the evidence preservation requests before the administrative action is filed clearly violates the rule of law.

For this reason, it is proposed to amend Article 58/1 of AAP as stated above.

3. Law Amendment Proposals on the Establishment and Duties of Regional Administrative Courts, Administrative Courts and Tax Courts No. 2576

1- Proposal for Removing the Term “General Authority” in Article 1 of Law No.2576

Current State:

Article 1 – Regional administrative courts, administrative courts and tax courts are independent courts of general jurisdiction established to fulfil the duties assigned by this Law.

Proposal:

It is proposed to remove the term “general authority” in the article and to amend it as follows: "Regional administrative courts, administrative courts and tax courts are independent courts established to fulfil the duties assigned by this Law."

Remarks:

In administrative jurisdiction, only the “administrative courts” have “general authority”. However, the Council of State, regional administrative courts and tax courts are the “courts with special authority”. While this is the case, the following provision is included in article 1 of Law no. 2576: “Regional administrative courts, administrative courts and tax courts are independent courts with general authority established to fulfil the duties assigned by this Law”. Therefore, it will be useful to remove the term “general authority” in this article in order to prevent any misunderstandings.

2- Proposal for Adding the Term “Authority and” to Sub-Clause d of Paragraph 1 of Article

Current State:

Sub-clause D of paragraph 1 of article 3/D of Law no. 2576 is as follows:

d) In cases where any actual or legal obstacle prevents the competent court of first instance within the jurisdiction from hearing a case or where hesitation arises with respect to the jurisdictional boundaries of two courts or where both courts decide that they are authorised to hear the same case, to decide on the referral of that case to another court within the jurisdiction of the regional administrative court or the assignment of the competent court.

Proposal:

It is offered to amend the related article as follows by adding the term “authority and” to sub-clause d of paragraph 1 of article 3/D of Law No. 2576:

“d) To decide on the referral of a case to another court within the jurisdiction of the regional administrative court or the appointment of the competent court in the event that there is a factual or legal obstacle that prevents the competent court of first instance from hearing a case or hesitation arises with respect to the jurisdictional boundaries of two courts or where both courts decide that they have authority and competency to hear the same case”.

Remarks:

In the Code of Administration Procedure no. 2577, the regulation of “affirmative conflict of venue” within administrative jurisdiction was forgotten. In order to remedy this, it is proposed to add the term “authority and” after the term “to hear” to article 44/1 of Law no. 2577.

In parallel to our proposal regarding article 44/1 Law no. 2577, it is proposed to add the term “authority and” after the term “to hear” to sub-clause d of paragraph 1 of article 3/D of Law no. 2576.

3- Proposal for Removing Clause 2 of Article 5 of Law. 2576

Current State:

Clause 2 of article 5 of Law no. 2576 is as follows:

2. The administrative courts shall resolve the cases that are specified by the Special Laws to be under the duty of the Council of State and the cases to which administrative courts are assigned under the Procedure of Administrative Justice Act.

Proposal:

It is offered to remove clause 2 of article 5 of Law no. 2576.

Remarks:

Clause 2 of article 5 of Law no. 2576 has authorized the administrative courts to conclude "the cases that are specified by the Special Laws to be under the duty of the Council of State".

However, Law no. 2576 was enacted in 1982, which is why this provision was meaningful at that time. Today, the Council of State is authorized as the first instance court only in 3 laws that were passed before 1982.

These laws are as follows:

1. Turkish Medical Association Law no. 6023 dated 23/1/1953, article 47/2: The right to apply to the Council of State is reserved regarding the decisions to be taken by the High Court of Honour upon the second decision taken by Chamber Court of Honour".

2. Law no. 6343 dated 9/3/1954 on Veterinary Surgeons, Establishment of the Union and Society of Turkish Veterinary Surgeons, article: 52/2: "A lawsuit may be filed against the Council of State by the concerned person or Union's Central Council regarding the decisions of the Council of State upon the appeal of the High Court of Honour, or against the Chamber Executive Board and any of its decisions taken directly".

3. Turkish Pharmacists Association Law no. 6643 dated 25/1/1956, article 45/2: "The right to apply to the Council of State is reserved regarding the decisions to be taken by the High Court of Honour upon the second decision of the Regional Board of Honour".

Pursuant to article 5/2 of Law no. 2576, any dispute among the aforementioned provisions of the 3 Laws shall be resolved by the administrative courts.

However, the main problem is that the Council of State has been authorized as the court of first instance in 6 Laws enacted after 1982 (2954 art. 23, 4046 art. 27, 6015 art. 6, 6087 art. 33, 6112 art. 7, 6491 art. 20). Any dispute related to these laws is resolved by the Council of State.

The current version of article 5/2 of Law no. 2576 is interpreted that the Council of State can resolve all disputes for which it is authorised by special laws without making any discrimination of before and after 1982.

For this reason, it is proposed to remove the expression "the cases that are specified by the Special Laws to be under the duty of the Council of State and" in clause 2 of article 5/ of Law no. 2576 and to amend the term "to the Council of State" in the aforementioned three (3) laws (6023, 6343 and 6643) as "to the administrative jurisdiction".

It is even possible to remove clause 2 of article 5 of Law no. 2576 completely, because there is no dispute to which the administrative courts are assigned by the Code of Administrative Procedure. The Code of Administrative Procedure only includes articles (articles 32-36) that regulate the competence of administrative courts. In short, there is not any dispute in the Code of Administrative Procedure for which administrative courts are authorized.

4. Proposals for Amendments to the Council of State Law No.2575

1- Proposal for Amendments to the Article 23/A of The Council of State Law with Regard to The Duties of The Council of State

Current State:

Duties of the Council of State

Article 23/a

"Examines and concludes the decisions taken by the Administrative Courts and tax courts and the requests of appeal brought against the decisions related to the actions heard in the Council of State as

the court of first instance. (Added sentence: 1/7/2016 – 6723/Article 6) The duty of the Council of State as the authority of appeal is limited to inspecting the contradictions to the law arising in the form of non-application or misapplication of a rule of law."

Proposal:

It is proposed that the first sentence of Article 23/a of the Law be amended as follows:

"The Council of State examines and decides on appeals against decisions made by administrative courts and tax courts in accordance with Articles 20/A and 20/B of the Code of Administrative Procedure no. 2577 and dated 6/1/1982 as well as decisions made on appeal by regional administrative courts expressed in Article 46 of the same law and decisions regarding the cases heard in the Council of State as a court of First Instance."

Remarks:

In this provision, it is understood that the Council of State is responsible as a legal remedy only against the decisions of the administrative and tax courts. However, with the enactment of the "appeal" in 2016, the duty of the Council of State to examine the appeals against the decisions of the administrative and tax courts has not been excluded from Articles 20/A and 20/B of the Code of Administrative Procedure.

In addition, in the cases mentioned in Article 46 of Code of Administrative Procedure, it has been made possible to appeal to the Council of State against the decisions made by the regional administrative courts. However, this issue is not included in the article.

2- Proposal for Amendment of Article 25 Of the Council of State Law

Current State:

Cases to be heard on appeal in the Council of State

Article 25:

"The final decisions made by the administrative courts and tax courts and the final decisions regarding the cases heard at the Council of State as the court of first instance are examined and concluded on appeal in the Council of State."

Proposal:

Article 25 of the Council of State Law No. 2575 has the following provision:

"The final decisions made by the administrative courts and tax courts and the final decisions regarding the cases heard at the Council of State as the court of first instance are examined and concluded on appeal in the Council of State."

However, this provision is already stated in Article 23/a of the Law.

Moreover, Article 25 (as explained above) contains incomplete and erroneous provisions in terms of duty of appeal.

In this respect, it is proposed to abolish the article in order to avoid repetitive provisions.

Remarks:

Article 25 of the Council of State Law is already stated in Article 23/a of the Law. Moreover, Article 25 (as explained above) contains incomplete and erroneous provisions in terms of duty of appeal. In this respect, it is proposed to abolish the article in order to avoid repetitive provisions.

3- Addition to Article 38 Of Law No 2575 Pursuant to Article 3/C/5 of Law No 2576

Current State:

Tasks of administrative and tax litigation chamber boards

Article 38 – (Amended: 22/3/1990 - 3619/Art. 6) 1. Administrative Litigation Chamber Boards shall examine in the position of appeal authority a) the decisions of insistence rendered by administrative

courts, b) decision rendered by administrative litigation chambers as first instance courts. Tax Litigation Chamber Boards shall examine in the position of appeal authority a) the decisions of insistence rendered by tax courts, b) decision rendered by tax litigation chambers as first instance courts.

Proposals:

It is suggested that the task of elimination and resolution of discrepancies and contradictions between the final judgments rendered by regional administrative courts or the final judgments rendered by chambers of different regional administrative courts in the position of an appeal authority assigned to the ALCB and TLCB to be added to Article 38 of the Law No 2575.

Remarks:

Making the suggested addition to Article 38 of Law No 2575 would ensure consistency in the legislation.

4- Proposal for Amendment of Article 42 Of the Council of State Law with Regard to Duties of The First Chamber of The Council of State

Current State:

Duties of the first chamber

Article 42 –

The First Chamber examines and concludes according to necessity and notifies its opinions about:

a) (Abolished: 2/7/2018 – DECREE LAW-703/Article 184)

b) (Abolished: 2/7/2018 – DECREE LAW-703/Article 184)

c) (Amended: 18/12/1999-4492/Article 3) The concession agreements and contracts related to public services,

d) (Abolished: 2/7/2018 – DECREE LAW-703/Article 184)

e) The requests regarding the opinions which are written in the Laws to be obtained from the Council of State,

f) (Abolished: 2/7/2018 – DECREE LAW-703/Article 184)

g) The disputes arising from the application of the thirtieth Article of the Land Acquisition Act No 6830,

h) The works assigned to the Council of State directly or by objection in accordance with the Provincial Act on General Administration of Provinces,

ı) The works assigned to the Council of State by the Municipality Law which are not the subject of an administrative action,

j) The proposals to be made for the associations to be deemed a public benefit association,

k) (Amended: 2/6/2004 – 5183/Article 11) The works to be dealt with pursuant to the legislation on the trial of civil servants and other public officials.

Proposal:

Expropriation Law No. 2942 has replaced the “Land Acquisition Act No. 6830” in clause “g” of the article. Therefore, this phrase is proposed to be amended.

Law of Special Provincial Administrations no. 5302 has replaced the “Code of Restructuring Special Provincial Administrations” in clause “h” of the article. Therefore, this phrase is proposed to be amended. In fact, since the First Chamber of the Council of State is not assigned a duty with the Special Provincial Administration Law no 5302, this clause may be abolished.

According to clause “j” the First Chamber examines “the proposals of the associations to be considered as public benefit associations”. However, according to Article 27 article of the new

Associations Law no. 5233, which is already in force; "Associations working in the public interest are determined by the President". Therefore, the First Chamber of the Council of State does not have any duty in this regard. It is proposed to abolish this clause.

Remarks:

It is aimed to ensure that Article 42 of the Law of the Council of State is harmonized with the current regulations by taking into account the amendments made in the legislation over the years.

5- Proposal for Amendment of Article 46/1/F of The Council of State Law

Current State:

Duties of the board of administrative affairs

Article 46 –

"1. The Board of Administrative Affairs examines and concludes according to necessity or notifies its opinion about:

a) (Abolished: 22/3/1990 - 3619/Article 12)

b) (Amended: 18/12/1999 - 4492/Article 4) The conditions and contracts related to public services under which concessions are granted,

c) The works designated to the Board of Administrative Affairs of the Council of State by the law,

d) The disputes of duty to arise between the administrative chambers and boards of the Council of State,

e) The works to be referred by the President of the Council of State from the administrative chambers other than those written above,

f) The non-suits taken at the first degree by the relevant chamber in accordance with the provisions of the Law on Prosecution of Public Servants automatically and the trial decisions, on the other hand, upon appeal…"

Proposal:

However, the “Law on the Trial of the Civil Servants” was repealed in 1999 and Law no. 4483 on the Trial of Civil Servants and Other Public Officials" entered into force. Therefore, this phrase is proposed to be amended.

Remarks:

It is aimed to ensure that article 46/1/f the Council of State Law is harmonized with the current regulations.

6- Proposal for Amendment of Article 81 Of the Council of State Law

Current State:

Cases in which the Code of Criminal Procedure will be applied

Article 81 – 1. In the investigations to be made and the decisions to be taken in accordance with the provisions of the Articles above, the provisions of the Code of Criminal Procedure regarding the investigation are applied in the cases where there is no provision in this Act.

2. The investigation boards have the powers of the investigating judge.

Proposal:

However, the "Code of Criminal Procedure" was repealed in 2005 and replaced by the Criminal Procedure Code no. 5271. Therefore, it is proposed to change the title of the article and the expression in the first paragraph.

Remarks:

It is aimed to ensure that Article 81 of the Council of State Law is harmonized with current regulations.

7- Proposal for Amendment of Article 82 of the Council of State Law

Current State:

"Prosecution in personal crimes

Article 82 – 1. In the prosecution of personal crimes of the President, the Chief Advocate General, the vice presidents of the Council of State and the chamber presidents and members, the provisions related to the prosecution of personal crimes of the President of the Council of State, Chief Public Prosecutor and members of the Court of Cassation are applied.

2. In accordance with the Martial Law no 1402, the prosecution of the President, the vice presidents, the Chief Advocate General of the Council of State and the chamber presidents and members is subject to the consent of the Board of Presidency.

Proposal:

Martial Law was abolished from the Constitution in 2018. Accordingly, the Martial Law No. 1402 was also abolished in 2018.

Therefore, it is proposed to abolish the 2nd paragraph of Article 82 of the Council of State Law.

Remarks:

It is aimed to ensure that Article 82 of the Council of State Law is harmonized with current regulations.

5. Conclusion

As we have mentioned in the introduction part of our report, re-regulating the said three laws in accordance with the necessities of the day would be most definitive solution. This is essential in terms of responding current needs, as well as protecting rights and performing adjudication activities in a certain order.

Should the laws in question be re-regulated or through the amendments on their current wording; it is a priority to address the reference to Code on Civil Procedure in Article 31 of the Law No 2577 and it is necessary to independently regulate the Law on Administrative Adjudication Procedures for the institutions referring to the CCP in this article, taking into account the peculiarities of administrative procedural law.

Furthermore, it is considered that the studies should take into account the new institutions that could respond to the needs as in the suggestion of Group Cases beside the issues resulting from technological developments such as integration of UYAP application to laws. Updating the wording of the mentioned laws is therefore an important requirement. For example, the statement “Supreme Council of Judges and Prosecutors” should be amended as “Council of Judges and Prosecutors”; names of ministries should be in compliance with the administrative organizational law; the statement “Code on Civil Trial Procedures” should be amended as “Code on Civil Procedures”; the statement “Code on Penal Trial Procedures” should be amended as “Code on Penal Procedures”. Moreover, names of the repealed legislation should be eliminated from the texts.