T.C.

MARMARA ÜNİVERSİTESİ

AVRUPA BİRLİĞİ ENSTİTÜSÜ

AVRUPA BİRLİĞİ HUKUKU ANABİLİM DALI

THE RIGHT TO TRIAL WITHIN A REASONABLE TIME BY AN INDEPENDENT AND IMPARTIAL TRIBUNAL IN THE LIGHT OF THE EUROPEAN COURT OF HUMAN RIGHTS JUDGMENTS AND TURKISH LAW

YÜKSEK LİSANS TEZİ

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Danışman: Prof. Dr. Sibel İNCEOĞLU

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ONAY SAYFASI

Enstitümüz AB Hukuku Anabilim Dalı Yüksek Lisans öğrencisi Recep BAKIRCI'nın "***THE RIGHT TO BE TRIALED WITH IN A REASONABLE TIME BY AN INDEPENDENT AND IMPARTIAL TRIBUNAL UNDER THE LIGHT OF THE DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS AND TURKISH LAW SYSTEM***" konulu tez çalışması **04 Mayıs 2010** tarihinde yapılan tez savunma sınavında aşağıda isimleri yazılı jüri üyeleri tarafından oybirliği / oyçokluğu ile başarılı bulunmuştur.

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Müdür

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ABSTRACT

The right to trial within a reasonable time by an impartial and independent tribunal, which takes place in the first sentence Article 6/1 of the European Convention on Human Rights (ECHR), will be examined comparatively for both judgments of ECtHR and Turkish law. Matter will be investigated under three main titles: I- Independent Court; II- Impartial Court; and III- the Right to Trial within a Reasonable Time.

Main starting point will be the judgments of the European Court of Human Rights in our thesis. Article 6/1 of the Convention says: "...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

It will be handled and considered that how the Convention is interpreted and implemented and its place, effects in, and position across to domestic law. While doing this will be referred to judgments of the European Court of Human Rights and they will be taken as a guide.

ÖZET

İnsan Hakları Avrupa Sözleşmesi madde 6/1'de yer alan tarafsız ve bağımsız mahkeme tarafından, makul sürede yargılanma hakkı, İnsan Hakları Avrupa Mahkemesi (IHAM) kararları ışığında ve Türk hukuku mukayeseli olarak incelenecektir. Tez, konuya göre üç ana bölüm altında islenecektir: I-Bağımsız Mahkeme; II-Tarafsız Mahkeme; III- Makul Sürede Yargılanma Hakkı.

Tezimizde asıl hareket noktamız İnsan Hakları Avrupa Mahkemesi kararları olacaktır. İnsan Hakları Avrupa Sözleşmesi madde 6/1; "……..herkes yasayla kurulmuş tarafsız ve bağımsız mahkeme önünde ve makul sürede yargılanma hakkına sahiptir." demektedir.

Sözleşmenin yorumlanması, uygulanması, iç hukuktaki yeri ve etkisi ile iç hukukumuz karsısındaki konumu ele alınarak değerlendirilecektir. Bu islem yapılırken Insan Hakları Avrupa Mahkemesinin kararlarına sık sık atıf yapılacak ve adı geçen mahkemenin kararları rehber alınacaktır.

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ABBREVIATIONS

a.m.d.: Above-mentioned Decision

AMKD: Anayasa Mahkemesi Kararları Dergisi

AÜHFY: Ankara Üniversitesi Hukuk Fakültesi Yayınları

AÜİHMY: Ankara Üniversitesi İnsan Hakları Merkezi Yayınları

ibid: In the same book

Art.: Article

CCP: Code for Criminal Procedure [CMK: Ceza Muhakemeleri Kanunu; formerly CMUK]

CEPSP: Code on Execution of Punishment and Security Precautions [CGTİHK: Ceza ve Güvenlik Tedbirlerinin İnfazı Hakkında Kanun]

CJP: Code for Judges and Prosecutors

Const.: Constitution [Anayasa]

"Court": European Court of Human Rights

ECtHR: European Court of Human Rights [İHAM: İnsan Hakları Avrupa Mahkemesi]

ECHR: European Convention on Human Rights [İHAS: İnsan Hakları Avrupa Sözleşmesi]

HCJP: High Commission for Judges and Prosecutors [HSYK: Hâkimler Savcılar Yüksek Kurulu]

İÜHFY: İstanbul Üniversitesi Hukuk Fakültesi Yayınları

p.: Page

par.: Paragraph

SSC: State Security Courts [DGM: Devlet Güvenlik Mahkemeleri]

TPC: Turkish Penal Code [TCK: Türk Ceza Kanunu]

PREFACE

In this study, the right to trial within a reasonable time by an impartial and independent tribunal, which takes place in the first sentence Article 6/1 of the European Convention on Human Rights (ECHR), will be examined comparatively for both judgments of ECtHR and Turkish law. Matter will be investigated under three main titles: I- Independent Court; II- Impartial Court; and III- the Right to Trial within a Reasonable Time.

Main starting point will be the judgments of the European Court of Human Rights in our thesis. Article 6/1 of the Convention says: "...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

It will be handled and considered that how the Convention is interpreted and implemented and its place, effects in, and position across to domestic law. While doing this will be referred to judgments of the European Court of Human Rights and they will be taken as a guide.

Hereby, I thank a lot to my advisor Prof. Sibel İNCEOĞLU, altruistic person, who didnot grunge her valuable aids and opinions for this work.

Recep BAKIRCI

Istanbul, 2010

INTRODUCTION

One of the most important duties of a rule of law is to establish the justice within society. Undoubtedly, one of the main requirements for fulfillment the justice is the presence of independent and impartial judiciary.

In the case law, balancing the clashing interests can only be possible owing to adjudicate fairly by judge. Fairness of the judgment is primarily obtained by judge's not being affected externally. This is provided by "principle of independence and impartiality of the judge".

Independence of the judge who occupies that office means that he or she is not exposed to any coerce or influence and not to receive orders from anybody or authority while performing his/her duty.[1] Principle in question takes place in Turkish Constitution and many international regulations because of its importance. Thus, it is said "judges are independent in their duties" in Const. Article 138/1.

On the other hand, the courts are not formed of single judge every time. For this reason, it is also given place to conception of courts' independence in the Constitution, in order to express the independency of each member of the court. It is said that "judicial power is used by independent courts in the name of Turkish Nation" in the Article 9 of the Constitution. Judicial independence notion is used to express independence of judges and courts in collaboration.[2] Judge makes a judgment according to law and his/her own opinion of conscience. It cannot be given orders or indoctrinated to a judge in the stage of making a judgment. For judge must make a judgment only according to law and self-conscience.

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[1] Gölcüklü and Gözübüyük, İnsan Hakları Avrupa Sözleşmesi ve Uygulaması, 3rd ed., p. 281; Centel Nur, Ceza Muhakemesinde Hâkimin Tarafsızlığı, Kazancı Kitap, İstanbul, 1996, p. 6.

[2] Centel Nur, Ceza Muhakemesinde Hâkimin Tarafsızlığı, Kazancı Kitap, İstanbul, 1996. p. 6-7.

The concepts of independence and impartiality of the judge are like two rings engaged aimed at achieving the same basic goal, although they seem different.

It is not expected a fair judgment from a judge who is really independent. As a matter of fact, European Commission of Human Rights has indicated that the arbitration court couldnot be independent and impartial because of not having necessary conditions to be counted as independent; consequently its judgment couldnot be fair in the case of Bramelid and Malmström v. Sweden.[3] A similar is the case of Demikoli. In this case, two parliamentary members act judicial function. They occupied both prosecution and judge positions. So, impartiality of trial office was discredited. Therefore, ECtHR concluded that the right to tirial by an independent and impartial tribunal in the Art. 6 of ECHR was violated.

The ultimate aim of judicial independence is to make possible that the society have a fair and quicker trial system.

Undoubtedly, judicial independence has a separate importance for everyone, from oldest to youngest and from richest to poorest living in society. Court is the last door to knock at who aggrieved. So, protecting and reinforcing of the judicial independence is for the benefit of all society.

It is inadequate that a judgment is right and fair, and judge is independent and makes judgments proper to law, on the other hand, it is necessary to make those judgments at the proper time. For “justice which is late is not justice” aphorism clearly expresses this situation. It is observed that “everyone is entitled to (…) hearing within a reasonable time by an independent and impartial tribunal established by law” in the Article 6/1 of the Convention.

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[3] Decision of Bramelid and Malström v. Sweden, Council of Europe, Strasbourg, 1985.

And we examine the judge's independence and impartiality, and the right to trial within a reasonable time in the light of ECtHR judgments, ECHR and Turkish law comparatively. While doing this, we'll use "The Court" phrase to refer the ECtHR. When we intend another court, we call it by its whole name.

CHAPTER I

2. INDEPENDENT TRIBUNAL

2.1. Concept

There are various definitions regarding to independence of tribunal. For Kunter, judges' independence means that they are free and no under external pressure and influence while making a judgment. Even the possibility of judge's being under pressure injures the independence of a judge, as well as pressure itself.[4] For Kunter again, judge will establish the balance justice named in that lawsuit.

Tosun defined the judge's independence in the way that the judge's not receiving orders from anyone and making judgments founded the law and his/her own conscience.[5] Kuru and Çavuşoğlu explain the independence of judge as the judicial authority not to depend on both legislative and executive powers[6], and these two powers not able to give orders and instructions or advices to the judges.[7]

Independence of a court means that it makes judgments according to law and its opinion of conscience without remaining under influence of any person, institution or force especially executive, or receiving any order, instruction or a directive from any

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[4] Kunter Nurullah, Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku, 9th ed., Istanbul 1989, p. 347.

[5] Tosun Öztekin, Suç Muhakemesi Hukuku Dersleri, 3rd ed., p. 355.

[6] ÇAVUŞOĞLU, NAZ, İnsan Hakları Avrupa Sözleşmesi ve Avrupa Topluluk Hukukunda Temel Hak ve Hürriyetler Üzerine, Ankara, 1994, Ankara Üniversitesi İnsan Hakları Merkezi Yayınları, s. 31

[7] Kunter Nurullah, ibid, p. 6.

person or institution.[8] In this point, the main issue dwelled upon has always been independence from executive. For the actual pressure on juridical has nearly always derived from executive. Therefore, independence had usually been got as independence from executive and used in this sense.

Independence does not mean giving the privilege or freedom of arbitrary act to judges. Adversely, independence of judges implies that they have freedom of giving a fair judgment. In this sense, the independence is necessary for society's interest, and means judges not to be bound up nothing but law and their own conscience.

On the other hand, judge's independence and depending on law only are not contradiction with each other. For the real independence is to be bound up with law alone. That is, judges in fact are independence as long as they depend on law. Depending on law alone is a requirement of providing independence, not limiting.

The independence of judges is primarily an issue of constitutional law. However this has also a great importance for judicial law. In fact, independence of judges takes place among basic principles of judicial law in a rule of law. Even we can say that the biggest success of rule of law idea is to ensure the independence in judgments of judge[9].

It was cited that the judge is bound up with Constitution, codes and law in the Constitution.[10] As is seen, it is pointed out that the independence of judges is not only

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[8] Kapani Münci, İcra Organı Karşısında Hâkimlerin İstiklâli, Ankara, 1956, p. 4; Kunter Nurullah, Hâkimlerin Göreve Getirilmesi Konusundaki Sistemler, p. 180.

[9] DEMİRKOL, Ferman, Yargı Bağımsızlığı, Kazancı Yayınları, İstanbul 1991, s. 53

[10] Constitution, Art. 138/1, sentence 2: "Judges shall be independent in the discharge of their duties; they shall give judgment in accordance with the Constitution, law, and their personal conviction conforming with the law."

limited with codes, but also with the law, in the Constitution. This is an appropriate statement, because the aim is being obligatory of codes as long as they are suitable to general principles of law, and judge's being bound up with outside the substantive law (case law or general principles of law).

Art. 6/1 of ECtHR says: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to (…) hearing (…) by an independent and impartial tribunal established by law". This provision of the Convention is applied only in determination of civil rights and obligations and of any criminal charge. As the Court stated in its many judgment, there are a lot of cases no taken place within these categories and so outside the Art. 6/1 of the Convention.[11]

Proceeding of honor, as a rule, does not lead to a disagreement for civil rights and obligations, but in some exceptional conditions this can be.[12] Similarly, proceeding of honor is not a criminal proceeding, but can be regarded as so in some circumstances.[13]

Court must be independent from parts and administration.[14] Independence of judge is not an aim in itself, only an instrument for realization of judicial peace and justice. The aim of trial is always to find out crude facts, determination of rightful, and to arrive at a fair judgment. Independence of the judge, from past to present day, was

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[11] Le Compte, Van Leuven and Meyere v. Belgium, 23.6.1981. par. 41.

[12] A.m.d., par. 42.

[13] See, Engel and Others v. Netherlands, 8.6.1976, par. 80-85. (Cited by Doğru, Osman, İnsan Hakları Avrupa Mahkemesi İçtihatları, V I, Beta, 2002, p.531).

[14] Ringeisen v. Austria, 16.07.1971, par. 95. (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Ringeisen%20%7C%20v.%20%7C%20Austria&sessionid=50823305&skin=hudoc-en)

admitted an indispensable requirement for first and main condition to arrive at a fair judgment. In the law of trial, independence of judge who occupies that office means that he/she is no under any pressure or influence and not receive orders and instructions from any person or authority. This expresses the very rule of "judge makes judgments in accordance with law and his/her own conscience" we mentioned above, that is, the absolute independence of judge within the framework of laws.[15] This rule has also a ground in our Constitution. Cons. Art. 138/1 states that "Judges are independent in their duties" and later counts guarantees of independence in the Arts. 139 and 140. According to Act of Judges and Prosecutors numbered 2802, Art. 4/1, "Judges serves in accordance with principles of the independence of courts and guarantee of judgeship. No organ, post, authority or person can give any order and instruction, send circular, and give any advice or inspiration". Art. 4/2 has constitutionally and legally secured the independence of courts, by following statement: "Judges are independent in their duties; they decide according to their opinion of conscience, in accordance with constitution, acts and law". However, the duties of judges divide two parts, as judicial and administrative. It is alleged that the judges are being attached to the Ministry of Justice in their administrative duties would not agree with their positions.[16]

On the other hand, it is mentioned that the judges could not be given orders while they use judicial powers in the Constitution. So, in regulation of administrative procedures such as carrying out correspondence activity and governing personnel, it is argued that the Ministry of Justice could send circulars to the courts and take measures.[17] Thus, Constitutional Court says that "the all treatments implemented by

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15 Kuru Baki, Hâkim ve Savcıların Bağımsızlığı ve Teminatı, Ankara, 1966, p. 6.

16 Tanör Bülent, Türkiye'nin İnsan Hakları Sorunu, İstanbul, 1990, p. 393.

17 Kuru Baki, ibid, p. 9.

judges in the capacity of a judge are consequences of their use the judicial power. Those which have administrative qualification are also based on this power" and adds that "judges perform transactions for carrying out correspondence activity and governing personnel too. However they act as an administrative authority, not a judge for these procedures. These are performed in the name of Ministry of Justice and have nothing to do with title of judgeship".[18]

Independence requires not only no receiving orders, but also not being under any pressure and influence while performing trying act and making a judgment. Pressure and influence can stem from executive, parts, external forces (such as media) or other individuals, as well as legislative.

In addition, courts always do not consist of single judge. For this reason, both Constitution dated 1982 and the ECtHR hold about independence of tribunals, not of judges. Because for the courts which consist of judges serve as a board, the court is not regarded as independence, even there is a doubt about independence of only one judge. Thus, Art. 9 of our Constitution pointed out that the judicial power would be used by independence courts. ECtHR also did not regard as independent and impartial the Martial Law Courts which had some members who were not a judge, and the State Security Courts which had military members because of their legal statue. ECtHR takes into account various criteria while determining whether the organ hearing is independent and impartial. They are as follows:[19]

Manner of members' appointment

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[18] Özkul, E. A, Anayasa Yargısı II, Ankara, 1981.

[19] Cengiz Serkan, Demirağ Fahrettin, Ergül Teoman, McBride Jeremy, and Tezcan Durmuş, Avrupa İnsan Hakları Mahkemesi Kararları Işığında Ceza Yargılaması Kurum ve Kavramları, Türkiye Barolar Birliği, 2008, Ankara, p. 104

Term of office and dismissal

Guarantees against to external interventions

Quality of court members

Whether it gives an independent appearance.[20]

Important point for the last criterion is the confidence which should be given by the courts to the people and especially to the accused in the criminal proceedings related to hearing course in a democratic society.[21]

ECtHR gives weight to manner of judicial members' appointment in determining independence of a court.[22] Appointment of judges by executive power is a matter which deserves a particular examine.[23]

Another important point in determination of independence is qualification of judges.[24] When we briefly speak to conditions laid down for the judges by ECtHR, it found that even one is military member of judges of Martial Law Courts and State Security Courts (DGMs) founded according to Constitution and Act numbered 2845

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[20] Gölcüklü Feyyaz, İnsan Hakları Avrupa Sözleşmesinde Adil Yargılanma, Ankara, 1994, 3rd ed., p. 211.

[21] Şahiner v. Turkey, 25.09.2001, p. 44.

[22] Campbell and Fell v. United Kingdom, 28.6.1984, A. 80 (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=campbell%20%7C%20and.%20%7C%20fell%20%7C%20v.&sessionid=51002628&skin=hudoc-en); Sramek v. Austria, 22.10.1984, A 84; Gölcüklü, ibid, p. 211; Manisa Barosu Dergisi, 2002/2, Year: 21, Issue: 81, p.78.

[23] This topic will be handled more detailed later (under Appointment of Judges by Administration).

[24] Details for this are included under "Qualification of Judges".

contradictory to the guarantee of independent and impartial tribunal in the Art. 6/1, although independence and impartiality precautions are present, first in the case of Incal v. Turkey, and later both in the case of Mitap and Müftüoğlu v. Turkey and in the case of Çıraklar v. Turkey, and in many other cases. ECtHR hold that "We should not keep out of sight that a civilian had been tried in a court which had military judges even if partly", and stated this is a violation of Art. 6.[25] Being of an accused before such a court will give justifiably cause of apprehension that the court could be act with other considerations for him. Republic of Turkey first excluded the military judge in the DGMs[26], later abolished these courts and founded the specially authorized High Criminal Courts according to the Art. 250 of Code for Criminal Procedure.

ECtHR takes into consideration the powers granted to the military persons, as well as taken precautions to ensure the independence and impartiality, while examining the Martial Law Courts and in general military courts for independence and impartiality.[27] As is seen, the Court attaches great importance to the quality of court members in determining of independence and impartiality.

Since I regard as necessary equally the independence of judges and prosecutors, in my opinion, both must equally be independent. For prosecutors can also lead to breach of personal rights or removal of a punishment, as judges. A judgment of

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[25] Case of Cyprus v. Turkey, 10.05.2001, par. 359.(http://cmiskp.echr.coe.int/tkp197/view.asp?item=5&portal=hbkm&action=html&highlight=cyprus%20%7C%20v.%20%7C%20turkey&sessionid=50944899&skin=hudoc-en)

[26] Gölcüklü Feyyaz, İnsan Hakları Avrupa Sözleşmesi ve Uygulaması, Ankara, 1994, 3rd ed., p. 282.

[27] Findlay v. United Kingdom, 25.12.1997; **(Mole Nuala, and Harby Catharina, Adil Yargılanma Hakkı, Directorate General of Human Rights Council of Europe F-67075, Strasbourg, Cedex, 2001, 1st ed., October, 2001, p. 31 (İnsan Hakları Avrupa Sözleşmesinin 6. Maddesinin Uygulanmasına İlişkin Kılavuz).** and Hood v. United Kingdom, 18.2.1999.

prosecutor relating to any needless for proceedings (“no suit” with the former phrase) puts an end to the course of case, as well as that of a judge. This can lead to grievances. In addition, a prosecutor actively joins in hearing process and affects the outcome, by participating in audiences during the hearing, and offering opinion about the essence of the case in the end of the trial.

At the same time, it is argued that the prosecutors should not be regarded as independent by citing their administrative duties. Sharing this view is impossible. Because the prosecutors like judges get a grade which provides his promotion, according to appropriateness of his/her no suit judgment or opinion offered, not according to how well he represents the complainant or administration. Therefore, it is impossible to share the majority view of prosecutors must be dependent on the Ministry of Justice. Honestly, to understand this view is also impossible.

Public prosecutor will be obliged to be a servant of the Ministry of Justice and to implement its orders and demands, if he/she is dependent on that Ministry. In this instance, in a case which is favored by the Ministry, the prosecutor will be obliged to make a no suit judgment. For otherwise promotion of prosecutors who did not meet such demands of Ministry will be impossible as a result of Ministry inspectors’ reports. If this view accepted, the case that Minister ordered to open would be opened, others would not.

An object to this view is as follow: if the prosecutor makes a no suit judgment, the person concerned has a right of objection. But a similar situation is also available for judgment of the judge. Because the way to appeal (sometimes objection) against to judge’s judgment is open. In fact, our Constitution and laws cited the judges and prosecutors together, by taking into account these realities.

2.2. Short History of Judge Independence

2.2.1. In the International Law

The notion of judge's independence has a roughly three-century history in international law. We see that this notion had emerged and appeared in the constitutions for the first time in Europe. Notion of judge's independence found its real meaning in the famous "separation of powers" theory of Montesquieu for the first time. But the steps to the judicial independence goes back earlier from this, to the Act of Settlement dated 1701. By this act, England has abolished the power of king alone to dismiss the judge, and laid down the parliamentary approval as a condition.

Notion of judicial independence has begun to take place in constitutions of different countries a long time ago. 1848 German Constitution is a clear example for this. Besides, 1947 Italian Constitution points out that the judges are attached only to law and they are autonomous and have an independence position from other powers. The Constitution of Ireland dated 1937 cited that the all judges are independent while fulfilling their duties and only bound to the constitution and laws. Portuguese Constitution mentioned that the courts are independent and mere dependant to the laws, and 1958 French Constitution stated that President is the guarantor of independent juridical and entrusted this to a protective and top-level institution.[28]

The European Convention on Human Rights embraced that everyone is entitled to hearing within a reasonable time by an independent and impartial tribunal established by law (Art. 6/1). And the European Court of Human Rights also agreed that the courts should be independent from parts and executive. On the other hand, the ECtHR adopted that the judges should appear independent in consideration of their manner of

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[28] http://www.msb.gov.tr/ayim/Ayim_makale_detay.asp?IDNO=75; and Aşçıoğlu Çetin, Doğru ve Güvenli Yargılanma Hakkınız Var, Adalet Matbaacılık, p. 73.

appointment, term of office, protection against outside influences, and external appearance in its judgments.[29]

Moreover, Art. 8/1 of the American Convention (on Human Rights), Art. 14/1 of the UN International Covenant on Civil and Political Rights, and Art. 26 of the African Chart arranged the right to trial by an impartial and independent court founded by law. It has been determined what the principles of judge independence are in UN Congress convened in Milano in 1985.

2.2.2. In the Turkish Law

We meet with the judicial independence in the Constitutional sense by 1876 Kanun-i Esasi (Basic Law) for the first time. The Constitution in question expressed that the judges would not be dismissed and their personal benefits would be regulated by laws, and so got the judicial independence under constitutional protection[30] and, at the same time, showed the guarantees of independent judiciary by its Art. 81. It was cited the independence of judges in this Constitution, but the judicial independence was left to appreciate of legislative, indicating that the personal benefits of judges would be regulated by legislative. In my opinion, this power could be left to an independent and impartial organ.

The Constitution of 1924 regulated this principle taken place in Kanun-i Esasi more detailed, in addition, Acts of Judges numbered 766 and 2556 included provisions regarding to guarantees of judgeship. However, the independence of judges could not be secured de facto in this period, and they complained that the regulations which would

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[29] Gölcüklü Feyyaz, İnsan Hakları Avrupa Sözleşmesi ve Uygulaması, Ankara, 2003, p. 281.

[30] DAVER, Bülent, Anayasa Mahkemesi Yargıcı, Anayasa Yargısı, Anayasa Yayınları, Ankara 1987, s. 21

lead to them to feel themselves under pressure taken place in laws, especially with respect to personal benefits.[31]

1961 Constitution acknowledged the principle of judge independence, also created the High Commission for Judges in order to protect this most efficiently. It was tried to secure the judge independence especially against to executive, stipulating that this commission meet the personnel benefits of judges.

1982 Constitution has given place to the principle of judicial independence and its guarantees (Arts. 138 and 139), and put together the High Commission for Judges and High Commission for Prosecutors founded by Constitution of 1961 to form High Commission for Judges and Prosecutors (HCJP).

2.3. The Concept of Tribunal

2.3.1. ECtHR Praxis

ECtHR, saying "everyone is entitled to (…) hearing (…) by an independent and impartial tribunal established by law", talks about an impartial and independent tribunal established by law.[32] The tribunal mentioned by the Convention expresses a wider definition, as an autonomous notion, that includes boards have a power of making ultimate judgment, as well as those which known by a general sense and accepted in domestic law.[33] ECtHR declares that all disagreement is not necessary to hear in an ordinary national court in the case of Bramelid v. Sweden. It indicates that the Art. 6 does not ban hearing of a first-order disagreement in an independent and impartial

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[31] See, Kunter, Türkiye'de Kaza Kuvveti, 1987, ed., p. 53-54.

[32] European Convention on Human Rights, Art. 6.

[33] İnceoğlu Sibel, İnsan Hakları Avrupa Mahkemesi Kararlarında Adli Yargılanma Hakkı, Beta, 2002 , p. 154. İnceoğlu, Sibel: Adil Yargılanma Hakkı ve Yargı Etiği, November 2007, Şen Printery, p. 30

organ, even it is not a court, and that important it is to be reviewed before an superior court with regard to both procedure and essence within a reasonable time. For ECtHR again, it is not an obstacle that the authorities who execute a judicial duty take place outside the general and usual group of juridical organs or carry out this job together other duties for them to regard as a court.[34]

ECtHR, in its own praxis, also counts some other institutions function as judicial organs (for example discipline committees, professional associations, and so on) as tribunals within Article 6/1, as well as institutions technically regarded as courts in domestic law.[35]

ECtHR counts the phrase of "tribunal" in the Art. 6/1 as an authority which was established by law and has the guarantees of proceedings independently and impartially before the executive and parts of case. Taking the disagreement or accusation to an organ which has these qualifications is one of the basic and constructive elements of the guarantee of the right to a fair trial provided by the Art. 6/1 for an individual.[36]

In this context, the European Court of Human Rights regarded as a tribunal sometimes a board[37] or a commission[38]. Similarly, arbitration committees are also deemed as tribunals in this sense. ECtHR decided that the Belgian Physicians Chamber

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34 http://www.anayasa.gen.tr/baslar-045-058.pdf

35 Campbell and Fell v. United Kingdom, 28.6.1984, par. 32.

36 Gölcüklü and Gözübüyük, İnsan Hakları Avrupa Sözleşmesi ve Uygulaması, 3rd ed., p. 279.

37 Campbell and Fell v. United Kingdom, 28.6.1984, par. 32.

38 See, Ringeisen v. Austria, 16.7.1971, par. 95-97.

which tries the disciplinary offenses in the level of appeal[39] and the Committee of Inspectors for Jails which function as discipline committee of prisons and the Upper Austria Regional Commission of Commercial Transactions for real estate are all "tribunals" for clause of Article 6. ECtHR put in order some criteria necessary for a board to be regarded as a tribunal as follows:[40]

It must be established by a law

It must follow a legal method

It must take a judicial part

It must have a power of making an obligatory judgment.[41]

The last item expresses that the judgment is able to put into effect using state's power in case of necessity.[42] ECtHR accepted that a discipline committee is a tribunal because of its judgment, although it is not a court in classical sense in the case of Campbell and Fell v. United Kingdom.[43] ECtHR approved that a decision of an administrative board could be deemed as a court judgment and also that those who are not professionally a judge could be make a judgment by this case. For the board

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[39] Le Compte, Van Leuven, and De Meyere v. Belgium, 23.6.1981, par. 57.

[40] Sramek v. Austria, 22.10.1984, par. 36 (Gölcüklü Feyyaz, İnsan Hakları Avrupa Sözleşmesi ve Uygulaması, 3rd ed., p. 280).

[41] Campbell and Fell v. United Kingdom, 28.6.1984, par. 76; judgment of Sramek v. Austria, 22.10.1984; Gölcüklü Feyyaz, A.İ.H.S.'de Adil Yargılanma, Ocak-Haziran 1994, V. II, Ankara, 1994, p. 210

[42] See, İnceoğlu Sibel, ibid, p. 155.

[43] Campbell and Fell v. United Kingdom, 28.6.1984, par. 32.

members who made that judgment were not professionally judges in case point at issue.[44]

In the case of Ringeisen v. Austria, the qualification and composition of Land Commission which was founded to solve disagreements related to real-estate transactions and whose members is appointed for five years was examined and finally was decided that the commission was independent from the parts and executive. ECtHR stated that this commission has a character of an independent and impartial tribunal, since the necessary guarantees have been ensured for trial of this commission.[45] ECtHR did not regard as a tribunal the authorities which are responsible for only delivering opinion.[46] In the trials before national courts, in case of lack of a complete judicial power of the courts about the facts of case and legal matters, this can be regarded as the violation of the right to resort to a court.[47]

It is necessary that the judgment of court is absolute and that it does not need to approval of another authority. Such an approval may not always and de facto exists. But (as in the judgment of Findlay v. UK) even being of a risk to be subject to such an approval can damage the independence. In other words, the presence of probability of

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[44] See also, for another judgment example in the same character, Ringeisen v. Austria, 16.7.1971, par. 95-97.

[45] Ringeisen v. Austria, 16.7.1971, par. 95-97.

[46] Benthem v Austria, 22.5.1984 A 78, par. 40 (Cited by Gölcüklü, Feyyaz, İnsan Hakları Avrupa Sözleşmesi ve Uygulaması, 3rd ed., p. 280).

[47] İnceoğlu Sibel, ibid, p. 133.

such an approval of a judgment was also considered as injurious for independence.[48] The judgment of Beaumartin v. France which is a case in such character is relating to sharing out sales revenue of a company which was nationalized in Morocco. Allocation would be realized by France as required by an agreement between Morocco and France. Applicant has objected to the judgment of a board which made the allocation according to this agreement, and the French State Council (**due to necessary consultative**) demanded from Ministry of Foreign Affairs of France to interpret this agreement on account of fact that it has no power of interpreting an international agreement. And it has denied the claim for indemnity by the applicant, by making its judgment according to Ministry's comment. Since the Ministry's **decision is obligatory, not in a character of consultative in the conventional sense,** there is no a legal path against to this. For ECtHR, an institution which meets many requirements such as independence from parts and executive and is fully authorized gains the character of being a tribunal. French State Council does not possess these qualifications in question in this case. Consequently, this case was not resolved by a fully authorized (…) tribunal.[49]

ECtHR did not commented tight the coverage of rule of being established of a court by law, allowed that an administration have a part in foundation of a court by regulating its content within the framework of law.[50] But in this instance, the overall framework must be regulated by a law. Executive's contribution must be limited with arranging the details within the framework of law. ECtHR again stipulated not only defining the scope of a court by law, but at the same time arrangement of judicial power

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[48] Beaumartin v. France, 24.11.1994. par. 38. (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Beaumartin%20%7C%20v.%20%7C%20France&sessionid=50833577&skin=hudoc-en)

[49] İnceoğlu Sibel, ibid, p. 173.

[50] Zand v Austria, par. 70-73.

by law on account of establishment and location of the courts.[51] That is, duty, power and foundation must be by law. Establishment by law makes sense only as long as the practice is also in accordance with the law. In this regard, it was not considered sufficient alone presence of a legal arrangement.[52]

The court must be established by a law. In the case of Lavens v. Latvia in which this provision was checked, The ECtHR noted that the order of 27 October 1999 for Mrs Šteinerte to withdraw had been revoked on 14 December 1999 by the Senate of the Supreme Court, at the prosecution's request. Contrary to the instruction given by the Senate in its order, the case was referred to the same bench of the Riga Regional Court that had already withdrawn. The Court further noted that after the judgment by the two non-presiding judges had been revoked; those judges had been disqualified by law from sitting in the case. The bench of the Regional Court had accordingly not been constituted in accordance with the law, and there had therefore been a violation of Article 6/1 on that account.[53]

2.3.2. In the Turkish Law

Article 142 of 1982 Constitution noted that the courts must be established by law, saying "it is arranged the establishment, duties and powers, operation and proceedings of courts by law". Similarly, the Article 37 reinforced the Article 142, saying "no one can be drawn before a court other than which he is legally subject to". Article 145/3 accepted that this principle is also valid for military courts, including the

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[51] Zand v Austria, par. 68. (Mole Nuala, and Harby Catharina, Adil Yargılanma Hakkı, Directorate General of Human Rights Council of Europe F-67075, Strasbourg, Cedex, 2001, 1st ed., October, 2001, p. 31 (İnsan Hakları Avrupa Sözleşmesinin 6. Maddesinin Uygulanmasına İlişkin Kılavuz)

[52] İnceoğlu Sibel, ibid, p. 161.

[53] Lavens v. Latvia, 28.11.2002, par. 41.

periods of war and martial law, saying “it is arranged by law that the military courts are authorized for what offenses and persons in the cases of war and martial law”.

In addition, Constitution stipulated that the powers of courts concerning their duties and districts are specified in laws as well as their establishment by law. The principle of regular judge was emphasized by this way. Its aim is to prohibit the possible arbitrariness and to prevent establishment of a court for persons and events. ECtHR expressed this criterion saying “everyone is entitled to (…) hearing (…) by a(n) (…) tribunal established by law” in its Article 6. But the appointment system of judges impoverishes the strength, applicability and guarantees of these provisions. Namely, a judge who is not desired for any case can be assigned to another place and another judge who is desired for this case can be substituted. Its path is open.

2.4. Extent of Independence

For Yekta Güngör Özden, the ex-chairman of Turkish Constitutional Court, the independence of judge which divides into two parts as “objective independence” and “personal independence”, expresses the functionality of adjudication according his/her own hearty opinion and basing on his/her mind, knowledge and experience, without any concern, fear or risk. Objective independence is related duty, and is to think of and to make a decision independently during judicial activity. Personal independence includes not be able to dismiss, pension and deprive from personal benefits, and counts as the guarantee of objective independence. In this context, independent jurisdiction underlies both the court’s independence and judge’s independence (guarantee) which in fact belongs to the people.[54]

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[54] http://www.turksolu.org/133/ozden133.htm

Judicial independence is possible by providing the independence of courts, by implication, judges from legislative, executive, jurisdiction and other people and institutions.

2.4.1. Independence from Legislative

Legislative organ in which the national will represents is one of three powers of the state. There is need some precautions to prevent the possible influences on jurisdiction of this power which functions as legislator for state.

Most important guarantee against the legislative organ is Constitution itself. For the Constitution is obligatory for the parliament too, as well as for judges. Thus, the Constitution has forbidden the legislative to legislate against the independence of judges.[55] Constitution of 1982, while laying the principle of independence of judges, did not leave entirely the protection of this to the legislator, unlike the Constitution of 1924. The independence of judge can be compromised by legislative organ. Therefore, no organ, office or authority, including legislative, can give orders or instructions, send circulars, make recommendations or suggestions to courts or judges relating to exercise of judicial power, according to constitutional regulation (Const. Art. 138/II). Laws may be obligatory or optional for judges. That is, some laws can grant a judicial discretion to judges, while others are obligatory for them. Laws which have imperious character enacted by legislative are obligatory for judges. But the legislative cannot give orders to judges. Consequently, a ban which may injure the independence also cannot be put on judges.

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[55] Keskin Serap, Yargıç Bağımsızlığı, Present to Prof. Nurullah Kunter, İÜHF Yayınları, İstanbul, 1998, p. 36

It cannot be interrogated, treated with, and made a statement interested in exercise of judicial power in parliament with respect to a continuing case (Const. Art. 138/III). The legislative organ is in charge of following the court's judgments, on the other hand. Indeed, change of court's judgments or delay of their implementation is not legally permissible (Const. 138/IV). On the other hand, influencing of court's judgments by the parliament through forgiving or parole is regarded as permissible by the Constitution.

Additionally, Article 37 of the Constitution prohibited establishment of extraordinary courts which may cause the retaining of persons to go before a regular judge, and so was reinforced the independence of judges from the legislative.

2.4.2. Independence from Executive

Executive power, by direct or indirect means, has the capability of influence the judges or keeping them under its thumb by putting in its hand the power of regulation their personal benefits. For this reason, it is supposed that the true danger for judge's independence is coming from executive power, and guarantees are introduced such as judgeship assurance and execution of their personnel affairs by an independent board.[56] We can deal with the independence of judges from executive power in two main points: One is independence in their appointment, and the other is independence in the course of performing of duty. ECtHR emphasized the latter and did not find contradictory to rule of independent juridical by oneself judge's being appointed by executive.

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[56] http://www.turkhukuksitesi.com/showthread.php?t=5136; Centel, ibid, p. 16. Judges must not have an expectation from government in an independent judicial system. Being in a strategic attitude of government in a manner that would influence judges' expectations will lead to a lookout of judges to get a utility or suffer from government and that this would be influenced on their judgments. See, Oğuz Fuat, Hukukun Üstünlüğü ve Ekonomik Gelişme, Demokrasi Platformu Dergisi, 2005, Issue: 2, p.177.

No organ, authority (**includes the executive power**), office or individual may give orders or instructions to courts or judges, send them circulars, or make recommendations or suggestions, relating to the exercise of judicial power.[57] In addition, the executive organ has to follow the court's judgments[58]. To change these judgments or to delay fulfilling of them is impossible for it. Judge's decisions must not be bound up with approval of administrative agencies, on the other hand. Indeed, ECtHR stressed that the court orders should not be subject to approval of administration or another institution, in its many decisions.[59]

Executive organ may intervene to judicial independence in two ways. One is passive intervention. Most prominent example of this is that not to implement the court judgments by executive. On the other hand, it may leave the jurisdiction beholden to executive or state facilities in its hands by not devoting funds necessary for judicial budget. Executive organ has the opportunities, directly or indirectly, to influence the judges and to keep them under its thumb by putting the power of regulation of their personnel affairs in its hand. Moreover, it is supposed as a passive intervention that no submitting the information and documents requested by courts to the jurisdiction on time.[60]

Judges' decisions are not be able to check by judicial inspectors serving for Ministry of Justice in terms of legitimacy or accuracy. They may check only the correspondence affairs of judges. This inspection is not regarded as an administrative

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[57] Article 138/2 of the Turkish Constitution of 1982.

[58] ERZURUMLUOĞLU, Erzan, Hukuk Devleti ve Yargı Bağımsızlığı, ABD, İssue.1, Ankara 1989, p. 7

[59] Findlay v. UK, 25.02.1997; Beaumartin v. France, 24.11.1994, par. 38.

[60] Ünal Şeref, Anayasa Hukuku Açısından Mahkemelerin Bağımsızlığı ve Hakimlik Teminatı, p. 21.

intervention by executive to independence of courts. Indeed, the Constitutional Court stated that "all transactions performed by judges in the capacity of a judge are concomitants of exercise of judicial power, and those which are in administrative qualification are based on same power" in its judgment dated 1964. Constitutional Court, by it's a judgment of 1964, in the capacity of Supreme Court, canceled a provision which takes place in Article 5 of Act numbered 825 and titled "Related to Laying Implementation of Penal Code" and gives the parole to approval of Ministry of Justice on account of a contradiction to the Article 132 of the Constitution.[61]

On the other hand, judges' are being inspected and prosecutors by inspectors serving for Ministry of Justice is an effective mechanism which leaves the control of judges and prosecutors to the Ministry and is always useful to keep them under control of government. Therefore, it is supposed that the true danger for judge's independence is always coming from executive organ. Thus, it was said that "It must be resorted to linking the Chairmanship of Inspectors Commission to the High Commission for Judges and Prosecutors (HSYK), taking from the central organization of Ministry of Justice by an urgent legal regulation, and to implementing of appointments to judicial inspectorate entirely by HSYK instead of Ministry of Justice" in a declaration dated 01.07.2005 by Chairmen of the Court of Cassation.[62]

2.4.3. Independence from Jurisdiction

In the frame of overall provision that "No organ, authority, office or individual may give orders or instructions to courts or judges, send them circulars, or make recommendations or suggestions, relating to the exercise of judicial power" of the

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[61] Constitutional Court, judgment of 13.05.1964 date, and 1963/99 reg., and 1964/38 dec. Numbers; Constitutional Court Decisions Magazine, Issue: 2, 1965, p. 117-118; Official Gazette, 14.7.1964/11753;

[62] http://www.haberler.com/haberf.asp?haber=179064.

Constitution (Art. 138/2), it is obvious that a judicial organ would need to protection from the other judicial organs.

Since the courts exercise the judicial power by the name of nation, it will not be suitable that these give orders or instructions to each other. It is also necessary to protect the courts from influences of other courts during their own judicial activities.[63]

It is not sufficient that the judicial organ is independent from legislative and executive. The judge must also be independent from judicial organs, namely from other judges. However, able to file an appeal against judge's decisions does not injure the independent. Way to appeal is necessary for ensuring the sameness in legal practice throughout the country and to discover the truest. The Constitutional Court stated that the Supreme Court is the latest review authority and this aims to obtain the consensus in a judgment.[64] The latest decision maker is the General Assembly for Civil Actions or General Assembly for Penal Actions of Supreme Court, if a disagreement arises between the local court and the particular bureau of Supreme Court. The orders of these General Assemblies are obligatory for both local court and particular bureau. This restrictiveness is not contradictory to judge's independence. For rise of inconsistent decisions for the same case can be avoided only by this way. There is a negative outcome of rising inconsistent decisions for the same case in the following way: People lose their faith of justice and making decisions of, for instance, both punishment and acquittal, sweeps away the people's faith of justice. Besides, at occurring different judgments in similar cases, whispers about various expediency relationships may appear.

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[63] Yurtcan Erdener, Ceza Yargılaması Hukuku, 3rd ed., Kazancı Yayınları, İstanbul, 1994, p. 55.

[64] judgments of Const. Court, dated 18.2.1971, 1970/30E, 1971/12K, p. 315; dated 20.10.1977, 1977/112-128E-K, p. 549.

2.4.4. Independence from Media and Public Opinion

Although media and public opinion are different concepts, we will together examine them, since they are closely link up with each other. Media is a fundamental factor in manufacturing of public opinion. It cannot be talked about efficiency of media without public opinion, on the other hand. The feature sets apart the jurisdiction from the other powers is not being a political institution. Insomuch, the jurisdiction and politics cannot coexist. Legislative and executive may not be uninterested with public tendencies and demands, but jurisdiction is not so.

Several rules were laid down to protect the independence of judges from media and public opinion in our law. One of these is trials' are being open to public, but debates hidden. The Article 183 of Code for Criminal Procedure (CMK) numbered 5271 that has come into effect in 01.06.2005 put a ban on getting audio-visual recording in courthouses and in addition courtrooms after trials began. It was emphasized that this ban would be valid for judicial events that occur in or outside the courthouses. Independence from media which is assumed fourth power in Turkey is a main necessity. It was accepted that would be drawn certain boundaries for media in order to function the judicial mission properly by the Constitution (Const. Art. 26/2). Press Law numbered 5187 and dated 09.06.2004 also laid down a similar provision. According to Article 19 titled "influencing juridical" of this Law, "Within the time from beginning of preliminary investigation to making a no suit judgment or to suing a public lawsuit, it is forbidden to publish the content of documents related public prosecutors, judges, proceedings and investigation. Until being concluded of a continuing lawsuit by a final judgment, a reading cannot be issued with respect to judges or proceedings of this lawsuit".

The matter more important than these forbidding provisions is to be able to implement these bans and agreeing of members of the press to media ethics. For in today's Turkey, they are undeniable events that people are exposed to sever imputations

based on a tiny suspicion by media, and introduced immediately and carelessly by saying “here killer!” by photos from end to end. To what degree can a judge thinks independently and impartially of a suspect who has already taken place as a guilty in the eyes of people? Judge will also have to take into account the decision made by media and ratified to the people. Even the judge probably will have to confirm the media’s and public opinion’s decision made by media’s effect.

I think the following example is adequately illustrative for media’s influence: The grandchild of a significant businessman is kidnapped in France. A young man who works for the businessman is arrested as suspect. Media immediately stamps him as “kidnapper”. He is released for lack of evidence and spits fire to media, saying “You have convicted me extrajudicial, so I’ll bring to account you all”. However, he is seized while trying to get rid of the body, as a result of tracing. Media goes into action again, and the accused is tried by charge of execution, since the guillotine was in force in those days in France. Media gives start a campaign in the fashion “This enemy of humanity deserves death”, reminding his early threatening expressions. In the end of trials lasted three days, the chief justice, announcing the court’s judgment, says to accused: “I actually believe that you deserve the guillotine, but the media gave start so campaign in this direction that if we made a decision of guillotine, the people would apprehend that the justice remained under an influence. Such an apprehension would do much more permanent harm to country than the harm done by surviving of a person such you. So, we donot punish you by guillotine”.[65]

2.5. Criteria and Guarantees of Independence

There are two senses of guarantee of judgeship, as narrow and broad. Guarantee in narrow sense implies that the judges are not able to dismiss. Guarantee in

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[65] Aşçıoğlu Çetin, ibid, p. 93.

broad sense includes that they are dismissed even if temporary excluding the conditions and methods defined by law, not being able to appoint to other services without their own consent, not being able to pension off, and not being able to deprive from their salary. Judge can feel powerful and independent against the executive only by these guarantees. ECtHR also states that the actual indicator of guarantee of independence is centered in the item of being entirely independent from executive power.[66]

For Sami Selçuk, Ex-Chairman of Supreme Court, in order to ensure judicial independence;

Judiciary should be administered by itself, not by political power.

Appointment, promotion and control of judges must be independent from executive.

Political power must not be able to dismiss the judges.

Judges should acquire the same salary as members of executive.

The budget of jurisdiction must be separate.

Jurisdiction must appoint and train its own auxiliary staff.

The position of judiciary in state protocol must be in accordance with the principle of separation of powers.

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[66] Neumeister v. Austria, 27.6.1968, par. 22.(http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Neumeister%20%7C%20v.%20%7C%20Austria&sessionid=50833577&skin=hudoc-en)

Judge should be independent in his/her own court.

Individuals and political milieu, and others must flee from interpreting about a lawsuit continuing.[67]

ECtHR takes some criteria following into account while determining if a tribunal heard a case is independent:

Appointment method of judges.

Term of office of judges and not be able to dismiss.

Guarantees for external interventions.

Qualification of tribunal members.

whether the body presents an appearance of independence .[68]
These criteria will be respectively examined below.

2.5.1. Appointment Methods of Judges

In determining if the tribunals are independent, ECtHR has regarded the appointment method of judges as an important criterion, and ever has taken into account this.[69] ECtHR expressed that appointment method of judges is important in determining

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[67] Opening speech of court year of 2001-2002 by Sami Selçuk, Chairman of Chancery.

[68] See, İnceoğlu Sibel, ibid, p. 163; and Gölcüklü Feyyaz, ibid, p. 211.

[69] ECtHR did not evaluate as a contradiction to independence that the appointment of one of court members by a decree or advice of minister or the government. Campbell and Fell v. United Kingdom, 28.6.1984 A. 80; Sramek v. Austria, 22.10.1984, A 84; Gölcüklü, ibid, p. 211; Manisa Barosu Dergisi, 2002/2, Year: 21, Issue: 81, p. 78.

whether the independence is present, but this is not sufficient alone[70], in its many judgments.[71] For ECtHR, the judges are appointed by which organ does not determine alone whether they are independent. ECtHR evaluates this together with other factors and thus decides whether the tribunals are independent.[72] Hence, appointment of judges by executive alone is not regarded as a contradiction to independence. Accepting the reverse would mean that the some contracting states to change their own law, and ECtHR to establish a new law. For appointment of judges by executive is a method applied currently in some contracting countries (such as United Kingdom and Belgium).[73] ECtHR stressed that the actual important point is the appointment system, in determining of whether the judge is independent.[74]

There are four main methods for appointment of judges. These includes the appointment of a judge by other judges, appointment by executive, appointment by an independent board founded by Constitution, and being selected by people.[75] Since the final has many disadvantages, it scarcely obtained fields of application. The actual aim

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[70] Cengiz Serkan, Demirağ Fahrettin, Ergül Teoman, McBride Jeremy, and Tezcan Durmuş, Avrupa İnsan Hakları Mahkemesi Kararları Işığında Ceza Yargılaması Kurum ve Kavramları, Türkiye Barolar Birliği, 2008, Ankara, p. 105.

[71] Sramek v. Austria, 22.10.1984, par. 38; Campbell and Fell v. United Kingdom, par. 79.

[72] See, İnceoğlu Sibel, ibid, p. 167.

[73] See, İnceoğlu Sibel, ibid, p. 167.

[74] According to the ECtHR, appointment of a judge by a minister or as a result of suggestion of a minister is not against the independence of the judge. Campbell and Fell v. United Kingdom, 28.6.1984, A. 80; Sramek v. Austria, 22.10.1984, A 84; Gölcüklü, ibid, p. 211; Manisa Baro Dergisi, 2002/2, Year: 21, Issue: 81, p .78.

[75] Kapani Münci, ibid, p. 24.

of giving the right of choice to the institutions except executive is to ensure the independence of juridical against the executive.

2.5.1.1. Election of Judges by People

The main field of application of this method is the United States of America. We have to point out that this method is applying in only appointment of federated judges, not in that of federal judges. This method was also applying in France after revolution. However, in course of time, the people lost its confidence to court judgments. On the other hand, authorize itself of National Assembly with change the court orders and no implement them, and intervene to juridical frequently caused to entirely abandoning of this method.[76]

This method is criticized by some features.[77] Accordingly, the judges selected by this method cannot be impartial towards their voters and voters against them or at least such an image arises, and these judges may not be impartial in apprehension of not being selected once again, and politics intervene to juridical.[78] Therefore, this method has not found support enough and opportunity to apply.[79] Especially in countries where the democratic tradition is absent or not settled, healthy choosing cannot be done; participation becomes very low; a limited number politician party member may have control over elections, and inefficient party members may also stir up trouble.[80]

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[76] Kapani Münci, ibid, p. 34.

[77] Kapani Münci, İcra Organı Karşısında Hakimlerin İstiklali, A.Ü.H.F. Yay., 1956, p. 28.

[78] Ünver Yener, Yargı Bağımsızlığı Açısından Hakimler Savcılar Yüksek Kurulu, p.156.

[79] Kapani Münci, İcra Organı Karşısında Hakimlerin İstiklali, AÜHF Yay., 1956, p. 28.

[80] Postacıoğlu, İlhan E. Medeni Usul Hukuku, Istanbul University Faculty of Law Publications, 1966, p. 33.

2.5.1.2. Appointment of Judges by the Executive

This method finds opportunities of apply from place to place in Western democracies, mainly to the United Kingdom. This is the method which is dwelled on and is disputed utmost, at the same time. For the executive organ enters into close relations with other powers while functioning as administrator. Consequently, various disagreements arise between executive and other powers as well as between executive and individuals.

These are put forward as advantageous aspects of this method:[81] Executive organ may collect salutary and sufficient information about those who will be received to this profession and will promote in it. In addition, since the executive would be accountable for juridical, it will have to be sufficiently careful in appointing the judges by this sense of responsibility. The main reason of this search for trying various methods for appointment of judges is that to assure the independence of judges against executive, and it has been attached a great importance to this. However, in my opinion, being appointed by executive is not so important for independence. For the point has actual importance is independence of judge while doing his/her job. This is interested that whether the judge has sufficient guarantee in doing his/her job. Ensuring of this guarantee is possible only by lacking of any tie between the judge and the executive after appointment.

Thus, the United Kingdom is one of the countries where the judiciary is the most powerful, although the executive is completely free in appointing the judges.[82] For the judges are broken with the executive shortly after the appointment. Such that, the

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[81] Postacıoğlu, ibid, p. 34-35.

[82] Kapani Münci, ibid, p. 65.

judge is appointed as lifelong, and since a system of promotion is absent, he/she does not worry for this. Moreover, the ECtHR stated that the appointment of judges by executive alone would not eliminate the independence in its judgments.

In the case of Campbell and Fell v. United Kingdom, Mr. Campbell alleged that the Board of Visitors which heard his case was not an "independent" tribunal against the executive power, within the meaning of Article 6, par. 1. The ECtHR examined all the allegations one by one. Members of Boards are appointed by the Home Secretary, who is himself responsible for the administration of prisons in England and Wales. The Court does not consider that this establishes that the members are not independent of the executive: to hold otherwise would mean that judges appointed by or on the advice of a Minister having responsibilities in the field of the administration of the courts were also not "independent". Moreover, although it is true that the Home Office may issue Boards with guidelines as to the performance of their functions, they are not subject to its instructions in their adjudicatory role[83].

ECtHR did not see that the members of tribunal are appointed by the executive as a contradiction to the Convention, in its other judgments. For ECtHR, the appointment of judges by the executive in itself is not a contradictory to the independence and impartiality.[84] Moreover, selection of judges by the parliament was also debated by the Commission in the case of Crociani. Commission did not see this appointment method as a contradictory to the Article 6 too, appreciating the other guarantees.[85]

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[83] Campbell and Fell v. United Kingdom, 28.6.1984, par. 79.

[84] Belilios v. Switzerland, 29.04.1988, par. 66 (İnceoğlu Sibel, ibid,. p. 169).

[85] Appl. no. 8603/79, Crociani v. Italy, a.m.d, pp. 220-221 (İnceoğlu Sibel, ibid, p. 169).

Various practices have been in our country for many years. For the Constitution of 1924, judges are independent during their judicial function, and they cannot be intervened in any way. They are limited only by law. Legislative and executive powers have to follow the judicial decisions and to implement them without any change (Art. 54 of Const. dated 1924). In the term in which the Constitution of 1924 was in force all sorts of personnel affairs of judges, including appointment and promotion, was fulfilling by the executive. This point had been arranged by the Act of Judges numbered 2556 enacted according to Article 56 of the 1924 Constitution. To the Article 79 of this Act, the power of appointment and change of station of judges belonged to the Minister of Justice. Although this Act included various provisions under the name of guarantees of judgeship for the purpose of securing the independence of judges, it was criticized owing to inadequacy of these provisions, the executive has entirely a right to say in these points, and presence of probability of many abuse.[86]

2.5.1.3. Election of Judges by Other Judges

Election of judges by other judges appeared as an attractive option for independence of judges against the executive. It is undoubted that a judge appointed by other judges and has no expectations of appointment and promotion from the executive would have a carefree independence against the executive.[87] In this practice named "co-optation system", the principle of separation of powers is realized in the topmost level, and even the judiciary is completely separated from the other powers with regard to personnel policy. It is counted as advantageous aspects of this system that it would ensure the independence of judges ideally, that neither the legislative and nor the executive would have a right to say in the affairs of appointment, promotion and other

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[86] Ünver Yener, ibid, p. 171.

[87] Kapani Münci, ibid, p. 52.

personnel matters, that the justice would be manifested ideally[88], and would disappear the disadvantages of intervening of politics to the judiciary and the election of those who are deprived of occupational competence.[89]

However, this system was also exposed to criticisms that the judges would be forced to a relationship of subjection, that their ability of make a decision by himself would diminish, the board electing the judges may go towards politics in a manner of contrary to judicial independence even though as a personnel policy, that would not be made a contact between the judges and the people,[90] that such a system would not be reconciled with the fundamentals of democracy and the principle of national sovereignty.[91]

On the other hand, this system will cause emergence of a privileged class of judges in which a mentality of clan is dominant, closed to life and social activities and all sorts of reform and improvements. So, judgeship soon will become a profession devoted to particular families and a withdrawn body, as a result of a tendency of favoritism of relatives and kith and kin, which would probably arise and flourish in such a clan.

2.5.1.4. Appointment of Judges by an Independent Board

Judges had been appointed by the executive until the High Commission for Judges was founded by the Constitution of 1961. Their other personnel affairs such as change of station and promotion were also carrying out by Ministry of Justice. It was

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88 Öztekin Tosun, Türk Suç Muhakemesi Hukuku Dersleri, V: I, İstanbul, 1984, p. 466.

89 Postacıoğlu, ibid, p. 34.

90 Ünal Şeref, ibid, p. 66.

91 Kapani, ibid, pp. 53-55.

got the power of determination relating to judges' personnel matters from the executive and submitted to the High Commission for Judges by this constitution. It was delivered the power of determination relating to prosecutors' personnel matters to the High Commission for Prosecutors by the amendment dated 20.9.1971 and numbered 1488 too. One of the actual reasons of establishment of the High Commission for Judges is that the use of power of determination relating to judges' personnel matters as a pressure means on the judges by the Minister of Justice up to come into effect of Constitution of 1961. By then, the power has arbitrarily retired the judges, and tried to use the judiciary as a tool for its activities, resorting to punish the judges who did not make decisions in favor of its desires by some arbitrary procedures.[92]

The Article 159 of the Constitution dated 1961 has put a stop to arbitrariness in the appointment and removal of judges, transferring this duty to a board independent from the executive through pointing out that would be done the procedures of appointment (…) and removal of judges by HCJP. In addition, the Article 13 of Code for Judges and Prosecutors says: "Appointment (…) is done by the High Commission for Judges and Prosecutors"[93].

The appointment of judges by a commission founded by the Constitution was approved in our country. However, it is difficult to say that these appointments were carrying out by a commission which has this qualification in the proper sense, because this commission has some composite properties. The two members of this commission of seven members are belonging to the executive, since its chairman is the Minister of Justice and a member is the permanent secretary (a judge, in the same time) of the

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[92] Postacıoğlu, ibid, p. 36.

[93] Detailed information will be given in the corresponding article (under the title of "HSYK (HCJP: High Commission of Judges and Prosecutors) and Judicial Independence p.65").

Minister. Other members are appointed by the President of the Republic from among the candidates presented by Supreme Court and State Council. In other words, members remained of HCJP are judges, but they are appointed by the President of the Republic, that is the person who is executive's chief. This renders the composition of commission rather complex. The appointments done by this commission fit to method of "Election by Other Judges", since all the members are judges except for one, and to the method of "Appointment by an Independent Board", since this is an independent board established by the Constitution, and also to the method of "Appointment by the Executive", since the members of executive take place in the commission. Namely, it is a composite appointment method in which the qualification of the method of appointment by an independent board predominates.

On the other hand, the function of this commission yields results like to approve the appointment in the practice. For enfranchisements to candidacy for judge are done by the Ministry of Justice, and 99 percent of these candidates are appointed by the Commission as judges. Consequently, it may be said that the appointments are de facto done by the Ministry of Justice.

Yet the ECtHR did not see as a contradiction to independence that the appointment of judges by this commission (in spite of path to take judicial proceedings against decisions of this commission is off). ECtHR concludes by evaluating in conjunction with appointment manner, guarantees against external pressures, and having an independent appearance.[94]

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[94] Campbell and Fell v. United Kingdom, par. 78 (See, İnceoğlu Sibel, ibid, p. 168).

2.5.2. Term of Office and Dismissal of Judges

The guarantee provided for the judges serves to reach a goal. It must not be expected that a judge who bears apprehension to lose his/her job would properly perform his/her duty. Even the possibility of fall into such situation of a judge is sufficient for injury of the principle of court's independence.[95]

Guarantee for dismissal was adopted for manifestation of justice. The courts acting under external pressures cannot reveal the justice. Within the framework of guarantee for not to be dismissed, the term of office of the judge may be unlimited or can be bounded by years of office or age. In fact, guarantee not to be dismissed is not for him/her to remain in office for life,[96] but rather means that he/she cannot to be dismissed before the term or age previously determined by law. Accordingly, requirement of not to be dismissed is that the judges and prosecutors not to encounter a removal or retirement before the term or age previously determined by law.

2.5.2.1. Approach by ECtHR

ECtHR accepted the term of office of judges as an important factor in determining independence too, with the appointment method. It adopted different criteria in terms of office according to qualification of the court in question. Sometimes counted enough a term of three years, while another time saw insufficient a four-year

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95 A.Y.M.K, 15.05.1963 dated, 1963/125 E-1964/112K (RG, 28.6.1964, p. 1144).

96 Cengiz, Serkan; Demirağ, Fahrettin; Ergül, Teoman; Jeremy, McBride; Tezcan, Durmuş; Avrupa İnsan Hakları Mahkemesi Kararları Işığında Ceza Yargılaması Kurum ve Kavramları, Türkiye Barolar Birliği, 2008 Ankara, p.. 105

term.[97] The very reason of this is that whether the term of office is explainable by reasonable causes.

The Commission, in its report for the case of Zand v. Austria, said that the judges might not necessarily for life for their independence, and then accepted that this term might be five or even three years if necessary. The Commission, on the other hand, adopted that it is necessary that the judge is appointed for a certain term and is irremovable within this term for securing the independence especially against the executive in order to talk about independence in the sense of Article 6/1.[98]

The ECtHR also tends to adopt that the fixed terms of office forms a guarantee. It was stated that a six-year term determined for the members of the court of appeal was a guarantee.

ECtHR referred the importance of terms of office of the judges for their independence, but no stipulated that there is a special provision regulating the irremovability in domestic law. The Court showed flexibility in this respect, emphasizing that the important is irremovability of judge apart from exceptional instances in practice. Thus, the ECtHR accepted the practice of irremovability of judges apart from extremely exceptional circumstances as a sufficient guarantee for independence of judges in the case of Campbell and Fell. As is understood, the Court saw the actual circumstances as sufficient, and no accepted as harmful to independence

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[97] ECtHR find insufficient the four-year term of office of judges of State Security Courts (DGM) for other reasons, examining the case of İncal (www.idealhukuk.com/makaleler/yasayla kurulmuş bağımsız mahkemede yargılanma hakkı).

[98] Zand v Austria, par. 70-73. (Mole Nuala, and Harby Catharina, Adil Yargılanma Hakkı, Directorate General of Human Rights Council of Europe F-67075, Strasbourg, Cedex, 2001, 1st ed., October, 2001, p. 31 (İnsan Hakları Avrupa Sözleşmesinin 6. Maddesinin Uygulanmasına İlişkin Kılavuz)

the absent of legal regulation alone. For the fundamental criterion accepted by ECtHR is the confidence that the tribunals have to give to the people. The Court sees enough an appearance that gives to people the impression of being trustworthy.

2.5.2.2. In the Turkish Law

The removal of judges was under the power of execution up to Constitution of 1961 in Turkey. Constitution of 1961 granted this power to the High Commission for Judges and Constitution of 1982 to the High Commission for Judges and Prosecutors. First clause of Article 139 of the Constitution dated 1982 says: "The judges are irremovable, cannot be retired before the age indicated in the Constitution unless they wish, and cannot be deprived from their wages, pays and other personnel benefits even though because of abolishment of their court or cadre", and the second clause counts the exceptional instances in which the judges may remove.

These are as follows:

Being convicted for a crime that requires the removal.

Being in a position that not able to serve for the reasons of disease.

Being determined not to be suitable for remaining in occupation.

Fourth clause of Article 140 of the Constitution of 1982 laid down a constitutional regulation for civilian judges, and then referred the regulation for military judges to the law, saying "the judges and prosecutors serve up to age of sixty-five; the limit of age (…) and retirement of the military judges is arranged by law".

The Article 44 of Code for Judges and Prosecutors (HSK) numbered 2802 repeats the provision in the Article 140/4 of the Constitution of 1982. According to this Article, "The judges are irremovable, and cannot be deprived from their wages, pays

and other personnel benefits even though because of abolishment of their court or cadre, and cannot be retired before the age of sixty-five, unless they wish".

The Article 21 of Code for Military Judges numbered 357 made the military judges dependent on the regulation to which the officers are subject, saying "officers in the class of military judges are like the other officers with respect to retirement and limit of age regardless their station or title".

According the Article 159/3 of the Constitution of 1982, "The High Commission for Judges and Prosecutors (…) performs the transactions of making decisions, imposing disciplinary punishments and removal from office about those who are not deemed suitable for staying in occupation"[99]. But, as a criticism it is pointed out that the facts such that HCJP has no its own building and an autonomous budget, and its decisions not subject to judicial review render the judicial independence suspicious,[100] besides the other events such that inquiries about the judges and prosecutors made by inspectors working for Ministry of Justice also endanger the judicial independence.[101]

The instances in which the duties of the judges and prosecutors would come to an end are counted in the Article 53 of the Act for Judges and Prosecutors. According to this article:

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[99] "Those who are not deemed suitable for staying in occupation" are defined as follows in the last clause of the Article 69 of Code for Judges and Prosecutors: "Even if the act which requires the disciplinary punishment does not constitute a crime or no requires being sentenced, in the event that it is seen as in a character that would injure the dignity and honor of occupation or authority and esteem of official duty, the punishment of removal is imposed".

[100] Ibid, p. 171.

[101] Ibid, p. 171.

"In the following instances, the duties of judges and prosecutors come to an end:

Being determined that they are removed from the occupation or they are not suitable to remain in the occupation according to the provisions of this act.

Being proved that they do not possess one of the conditions necessary to enter to this occupation later, except the instances of availability of an inquiry or proceedings about them.

Losing one of the qualifications written in the clauses of (a), (d), and (g) of the Article 8 while on duty.[102]

Removal by themselves or to be accounted as so from the occupation.

To retire by one of the causes of request, limit of age or being disabled.

Death".[103]

Again, the Article 62 of the Act for Judges and Prosecutors counts the conditions for imposing a disciplinary punishment to the judges, and then stated that the High Commission for Judges and Prosecutors would impose these punishments.[104]

As is seen, the ECtHR indicated that it is not necessary the legal regulations for irremovability of judges as a guarantee of judicial independence by interpreting the

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[102] The Article 8 of the Act for Judges and Prosecutors: a) Not being a citizen of the Republic of Turkey, d) Not being not deprived of public rights e) Not being married with a foreigner.

[103] See, Act for Judges and Prosecutors numbered 2802, Art.53.

[104] See, Act for Judges and Prosecutors numbered 2802, Art.62.

rules flexible, while this point was secured regulating by the constitution and laws in our country.

2.5.3. Qualification of Judges

2.5.3.1. Approach by ECtHR

We can see that the notion of tribunal has a sense different from the institutions hearing a case and regarded as a court in technical sense in our domestic law, and the notion of judge includes the judges who are not regulars too.[105] In other words, the phrase of "tribunal" takes place in the Article 6/1 of the Convention expresses an authority that established by a law, impartial and independent from the parts and the executive and has the guarantees of proceedings in the jurisprudence of Strasbourg.[106] The ECtHR, not stipulating being regular of judge, said "the important things are that the tribunal is founded by law, that it follows a legal method and finally that its decision is ultimate". If a fully authorized tribunal which meets the requirements of Article 6/1 is present, it would not be an infringement, since the failure in question could be repaired by appealing against that decision to it.[107]

ECtHR did not see as a contradiction to the independence and impartiality that a board which did not consist of judges as a whole assumed a judicial function. The Court did not find as a contradictory to the independence and impartiality that the

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[105] For example, in the cases of Campbell and Fell v. United Kingdom and Van Leuven and De Meyere v. Belgium, the agencies of trying were disciplinary committees committed the trying function, not courts (such as a criminal court of first instance or a criminal court of peace) in a technical sense. However, they assumed judicial roles and acted as courts.

[106] Gözübüyük Şeref, Gölcüklü Feyyaz, İnsan Hakları Avrupa Sözleşmesi ve Uyulaması, 4th ed., p. 279.

[107] British-American Tobacco v. Netherlands, 20/11/1995, par. 58; See, İnceoğlu Sibel, ibid, p. 166.

persons who was civil servants were on the bench in many cases in which some of the judges are public servant.[108] It was accepted by the ECtHR that there are important justifications to hand pick several special judicial boards for some technical fields as in the case related British-American Tobacco Company.

ECtHR emphasized that it is not necessary that the tribunal is regarded as a court in the domestic law, and then said that the important matter is that the tribunal is an institution which established by a law and makes a decision using a legal method in the case of Le Compete, Van Leuven, and De Meyere v. Belgium. The council was regarded as a regular court by ECtHR, since the Court of Appeal reviews the judgment only with regard to procedure and does not make a decision with respect to main issue, although there is a possibility of appealing against the decision of the council in the case in question.[109]

ECtHR looked for presence of the following points concerning the independence of the juridical organ: independence from the parts and administration, term of office of the members, guarantees provided by the rules of procedure, and finally qualification of judges. For ECtHR, it is not an infringement in itself that the presence of officials who assumed a judge role in the board. ECtHR pointed out that this

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[108] Le Compte, Van Leuven and De Meyere v. Belgium, 23.6.1981, par. 57 (The members of Belgian Physicians Chamber which tries the disciplinary offenses in the level of appeal assumed the judges' roles); Campbell and Fell v. United Kingdom, par. 77 (The inspectors for jails assumed the judges' roles); Ringeisen v. Austria,16.7.1971, par. 95 (The members of Upper Austria Regional Commission of Commercial Transactions for Real Estate assumed the judges' roles).

[109] Campbell and Fell v. United Kingdom, par. 78 (See, İnceoğlu Sibel, ibid, p. 168).

would not violate the independence alone, even if the number of officials exceeds the number of judges.[110]

Also in this case, the Court did not see sufficient as a sign of absence of impartiality that the one of the parts was of the same occupation with some of the court members. Much more direct relationship between one of the parts and the judicial members should be present to allege the lack of impartiality, but once a rightful doubt arose, would not be enough the presence of judicial members or being taken a legal vote.

In the military trial, the hierarchical connection between the military members of the Martial Law Courts and top level officers of army caused to the problems, even if the civilian judges took place in the board, and the Commission thinks to be heard of civilians by the boards of military trial automatically creates a problem of independence.[111]

If a judicator tribunal has two roles colliding with each other, as a judicial authority, its independence and impartiality may run a risk. In the case of Procola v. Luxembourg related a controversy of a milk quota, four members of the Conseil d'Etat (Belgium State Council) carried out both advisory and judicial functions in the same case. This revealed a situation that suitable to begin to suspect about the structural impartiality and independence of the judicial board, since this arose the rightful doubts that the members would feel bound to their previous opinions even if little.[112]

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[110] Ettle and others v. Austria

[111] Mitap and Müftüoğlu v. Turkey, 25.3.1996, R.J.D 1996-2, No.6 (Rep). (see Cyprus v. Turkey judgment).

[112] Four of five members who previously gave an opinion about the regulation concerning point have joined the session.

2.5.3.2. In the Turkish Law

It is a constitutional rule that the courts customarily consist of regular judges in our country.[113] However, people and boards who are not regular judges may impose punishment in the associations and organizations fall outside the courts by classical meaning and are accepted as courts by ECtHR.[114] Decisions made by a number of boards can be reviewed by courts fully authorized to examine within the Article 6/1 upon an objection, while there is no such path to objection against other boards'. For example, path to objection is off against the decisions of the High Commission for Judges and Prosecutors (HSYK)[115] and The High Military Council (YAŞ). According to the ECtHR this is infringement of the article 6/1 of the convention.[116]

Besides this, officer members take place in the military courts together with regular judges and join trying assuming the role of judges. This point is regulated in the Article 2 under title of "Foundation of the Court" of the Code for the Foundation of Military Courts and their Proceedings as follows: "The military courts are founded by two military judges and an officer member. However, when the military court attached to General Staff tries the generals and admirals, it is formed by three military judges together with two generals or admirals".

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[113] The Constitution of 1982, Article 140/1, sentence 2.

[114] Some of them are Disciplinary Committees for Jails, Disciplinary Committee of Physicians Chamber, Disciplinary Committee of Pharmacists Chamber, Union of Notaries Disciplinary Committee, The High Military Council (YAŞ), and the High Commission for Judges and Prosecutors (HSYK).

[115] The Constitution of 1982, Article 159/4.

[116] For the Case of Kayasu v. Turkey, see. http://www.tumgazeteler.com/?a=4341115

2.5.4. Guarantees Against to External Interventions and not to Receive Orders

The judge also must independent against all sorts of other force might have influence upon him/her as well as other powers. This is the logical consequence of being only attached with law.

2.5.4.1. Approach by ECtHR

ECtHR considers that if the court has a protection enough against the external interventions directed towards its members important, in determining juridical independence and impartiality. In this context, the Court supervises that if this protection is virtually provided rather than whether a legal regulation is present.[117] Likewise, the Court's overall tendency in nearly all cases has been regarded the actual circumstances as essential, although it accepted the legal regulations as a guarantee.[118] The ECtHR found as contradictory to the independence and impartiality that, for example in many cases, foremost the cases of İncal, and Çıraklar, Müftüoğlu, and Okçuoğulları v. Turkey,[119] the keeping of efficiency records of military judges by their commanders in practice by force of legal regulation, and likewise in the case of Ringeisen v. Austria, that the applicant was masterful of one of the officials who has taken on the judgeship task and is exposed to external pressures.[120]

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[117] See, İnceoğlu Sibel, ibid, p.172.

[118] See, İnceoğlu Sibel, ibid, p.172.

[119] Mehmet Ali v. Turkey, 25.09.2001, par. 35 (http://www.mazlumder.org/haber_detay.asp?haberID=293); Gülşen and Halil Yasin Ketencioğlu v. Turkey, 25.9.2001.

[120] Ringeisen v. Austria, 16.7.1971, A13, par. 95.

ECtHR repeated its opinion that is necessary to pay attention the manner of appointment of its members, their time of office, protection of them against the external pressures, and that if it presents independent appearance in order to decide that a tribunal is "independent" according to first paragraph of the Article 6.[121]

To be concerned about an authority is deprived of independence, the base relied on by those who argue that it is not impartial. Yet, this is not certain. The important thing is being of that concern is acceptable.[122]

It is an understandable situation in which it is concerned about the impartiality and independence of a military judge attached to the Armed Forces in a judicial board with three members, where a civilian as Çıraklar prosecuted against him by charge of actions constitutes crimes (according to the Article 143 of the Constitution and to the Article 1 of the Act numbered 2845) such as opposing to the indivisible national unity of the Republic of Turkey, to democratic order and to the national security was tried in a State Security Court (See, the judgment of İncal, mentioned above, par. 72).

Similarly, the applicant was tried by the State Security Court in the case of Selçuk Yıldırım v. Turkey. The court mentioned consisted of two civilian and two military judges and an officer member. ECtHR stated that there was no a reasonable doubt of independence and impartiality of civilian judges, but referred being subject of promotion of the military members to the positive efficiency record given by their masterful and to military discipline. The Court emphasized that the right to trial by an

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[121] See, amongst many other judgments, judgment for Findlay v. United Kingdom, 25.02.1997, reports 1997-I, p. 281, par. 73.

[122] See, for example, the judgment of Gautrin and others v. France, 20.05.1998, reports 1998-III, p., par.

independent and impartial tribunal was violated and that presence of two civilian judges in the board would not change the result.[123]

It is true that the position of judgeship provides a number of guarantees of independence and impartiality. For instance, the military judges are subjected to a parallel professional education with their civilian counterparts who obtain the status whom the military law gives its own members. Military judges take advantage of constitutional protection just as the civilian judges, while functioning as the members of State Security Courts. In addition to this, they are irremovable and cannot early retire unless they wish, apart from some exceptions. These members are also independent according to the Constitution, and no public authority can give instructions them in terms of their legal duties and nor pressurize about their works.

However, other aspects of their status are arguable. First, the judges in question are military members, who receive orders from their seniors. Secondly, they are subject to military discipline and to the efficiency records kept by their commanders about them for this aim. Many of decisions about their appointment are made by administrative authorities and army. And lastly, their term of office as the member of State Security Court is only four years, and they can be substituted.

As is seen, ECtHR found the presence of military judges in State Security Courts as contradictory to the independence from two points. First is being the army members of these judges, who receive orders from their superiors, and the second is being subject to efficiency records kept about them. These records underlie the promotion of judges and at the same time the disciplinary actions, and so it is regarded as reasonable the expectation of the influence of these on the decisions of judges.

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[123] The case of Selçuk Yıldırım v. Turkey, 25 September 2001, par, 48 (Adalet Bakanlığı Yargı Mevzuatı Bülteni, Issue: 188 p. 54); Mitap and Müftüoğlu v. Turkey, 25.3.1996.

Although being a guide concerning general application of a Minister is not considered as contradictory to the independence, neither member in the judicial board in question must be in a situation in which they receive orders or instructions.[124]

In the case of Campbell and Fell, the applicants described the Disciplinary Committee for Jails functioned as a court as a nothing, and then argued that they regards these committees as weapons of the executive, that the committees are under the control of jails administrations with regard to their duty and have to follow the instructions of Home Secretary, and so these committees would not be independent.

The ECtHR hold "It is necessary to look at the manner of members' appointment and term of office (see, the judgment of Lee Compete, Van Leuven and De Meyere, dated 23.06.1981, par. 55), the presence of guarantees against the external pressures (see, the judgment of Piersack, dated 01.10.1970, par. 27) and whether this organ presents an independent appearance (see, the judgment of Delcourt, dated 1970, par. 31), in determining the independence of an organ especially from the executive and parts of case",[125] and later handled these criteria one by one.

Although it accepted as an important factor that "the applicants have had such impressions", stressed that such sensibilities of them alone are not sufficient to acknowledge that the court is independent and impartial. Consequently, it said "the ECtHR does not see a reason to conclude that the committee in question is not an independent tribunal in the sense of Article 6/1". Whereas, the ECtHR stated that it is necessary to be not regarded as impartial and independent of a tribunal in the event of presence of such rightful doubt, saying "being impartial of the judgment is not enough,

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[124] Campbell and Fell v. United Kingdom, 28.6.1984, par. 79.

[125] Campbell and Fell v. United Kingdom, 28.6.1984, par. 78.

it has to seen such too" in its many judgments. In my opinion, the ECtHR could not explain the doubts of applicants are why not reasonable by satisfactory justifications, and could not interpret the relationships between the committee and administration in a proper frame. For ECtHR defines the fair trial as securing and protection of the trust to be had by the defendants in criminal proceedings in a society. This criterion seems not to be account of in this case, and it was regarded as only a subjective impression of the applicants, not common opinion of all defendants. Therefore, as for me, ECtHR had to conclude that a violation was present, by applying the same criterion here.

In the case of Sramek v. Austria dated 22.10.1984, the applicant claimed that, it has to be shown that the Regional Authority exhibits the independence and impartiality which are required by Article 6, par. 1 (Art. 6/1).

In the submission of Mrs. Sramek, this condition was not satisfied on account, inter alia, of the composition of the Authority and the manner of appointment of its members; of the position of the Transactions Officer —representing the Land Government, in their capacity as a party to the case— vis-a-vis the civil servant members; of the brevity of the members' term of office (three years); and of the three-fold fact that the Authority has its headquarters in the Office of the Land Government, that the Land Government lays down the Authority's rules of procedure and that the Land Government remunerates the Authority's members.[126]

The Commission considered sufficient not being subject to an authority while working as a judge of a member of court, who was appointed by government for three years, and did not see the hierarchical connections outside the judgeship as damaging to the independence in its decision of Sutter related being tried of a military personnel by a

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[126] Sramek v. Austria, par. 37.

military court.[127] Although the Court does not make trial of a soldier by a military court into a big issue, in the event that a civilian is tried by a military court, it finds this as a contradiction to the Article 6, and concludes that the Article 6 is violated. The ECtHR did not find that the presence of a military judge in the judicial board as a contradiction to the independence and impartiality in the case of Yavuz v. Turkey, because the killer of Yavuz was a soldier. However, Turkey was condemned to compensation because of submitting a gun to the killer of Yavuz, who was an ex-convict killer.[128]

2.5.4.2. In the Turkish Law

This point is particularly regulated in our Constitution dated 1982. The Article 138/2 of the Constitution says: "No organ, office or authority, can give orders or instructions, send circulars, make recommendations or suggestions to courts relating to exercise of judicial power". And according to the Article 138/3, "It cannot be interrogated, treated with, and made a statement interested in exercise of judicial power in parliament with respect to a continuing case". As is seen, the independence of judges is protected at top level by the Constitution in exercise of judicial power.

It is not regarded the situation of a judge's decision being reviewed by another judge as an order. For the judge whose judgment is reviewed makes his/her decision independently. Since the Court of Appeal review comes true after the local judgment, it is not said that the judge remained under an influence and lost his/her independence. Judicial independence cannot be explicated as the judges have to be uncontrolled. We see the Court of Appeal review as a tool which would prevent the abuse of independence. And judicial similarity and accuracy in judgments, on the other hand, will increase owing to this review. However, the problems stem from the practice are

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[127] Sutter v. Switzerland, 01.03.1979, 16 DR 166, cited by İnceoğlu Sibel, ibid, p. 181.

[128] İnceoğlu Sibel, ibid, p. 180.

also undeniable. Namely, it is true that the Chancery seriously breaks the insistence of the judges on their judgments by giving them a bad grade. This is normal, but provided that there is similarity and uniformity in its own judgments of Chancery. The judicial uniformity, whereas, cannot be obtained even at the level of Chancery in our country. Disagreement both among the sections and even among the members of the same section, and finally changes of jurisprudence arose over time may occur. Therefore, notwithstanding it is necessary to taken for granted the insistence of the local court members on their judgments, unfortunately the best judgeship has become to adopt the Chancery's judgments of overrule, instead of thinking of and making the decisions independently by the local judges, because of fear of receiving a bad grade. This prevents both the independence of juridical against the juridical, and to improve of the law by judges.

The Chairman of Chancery in that time, in his speech for the opening ceremony of 1987 Court Year, stressed that the juridical was not independent in the proper sense by an implicit expression, saying "We have experienced an era in which the judicial independence and the guarantee of judgeship were existed near nineteen years without interruption. And now, we are living in a term in which the judicial independence and the guarantee of judgeship were more restricted".[129]

The military judges working at the military courts and State Security Courts are in a different situation from the civilian judges with regard to independence from the executive power. Indeed, the guarantee of judgeship of the military judges is inadequate, as well as their personnel affairs is not carried out by the High Commission for Judges and Prosecutors[130]. First of all, their independence was regulated by reducing on

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[129] Aşçıoğlu Çetin, ibid, p. 84.

[130] ÖZTEK, Selçuk, "Türkiye'de Hakim Bağımsızlığını Sağlayan Hukuki Tedbir, Teşkilat ve Kurumlar" MÜHFD, C. 7, S. 1-3, İstanbul 1993, s 280 vd.

account of the fact of "requirements of military service" in the Constitution of 1982, and so, their independence was still regressed in comparison to the Constitution of 1961.[131]

The Chairman of Supreme Court in that time, in his speech for the opening ceremony of 1988 Court Year, emphasized that the military juridical was not independent, saying "Just as the chain of order-command constitutes the essence of the soldiery, so not to receive orders from anywhere, any institution or anyone constitutes the essence of judgeship".[132]

The Act for Foundation of Military Courts and their Proceedings numbered 353 and The Act for the Military Judges numbered 357 involves the provisions that would make the military judges dependent to the executive power, on the other hand. In addition, it is a structuring method that would make a pressure on the military judges that the establishment of the military courts ex officio by the Ministry of National Defense as well as upon suggestion of military departments. For there is no guarantee of not being deprived from the personnel benefits such as salary, extra allowance in the case of removal of a court or a staff for the military judges. On the contrary, they may be retired before the limit of age due to lack of cadre as well as when they exceed the age limit of their own rank, although the limit age of retirement is sixty-five for judges in the Constitution.[133]

The military judges, on the other hand, receive achievement-state grades from their commanders in order to be base to promotional and rank priority, as required by

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[131] Kardaş Ümit, Hâkim Bağımsızlığı Açısından Askeri Mahkemelerin Kuruluşu ve Yetkileri, İstanbul, 1992, p. 46.

[132] Aşçıoğlu Çetin, ibid, p. 85.

[133] Centel Nur, Ceza Muhakemesinde Hâkimin Tarafsızlığı, Kazancı Kitap, İstanbul, 1996, pp. 24-25.

the Article 12 of the Act for Military Judges numbered 357. According to Article 23 of the same Act again, the inspectors attached to the Ministry of National Defense decide that whether an inquiry is necessary for the military judges in terms of their duties or crimes they committed during their duties. All these are potential to put indirectly pressure on the judges, even if not direct.

2.5.4.2.1. Promotion

The guarantee of job for judges is not sufficient alone in order to protect their independence. It is also necessary to secure a trust and a guarantee on the promotion, as well as irremovability and the other guarantees in order to secure the independence entirely. The importance of promotion appears as a deniable reality particularly in such countries as ours, where the promotion have great significance as economically (e.g. high salary) and to be elected for top offices and membership of superior courts.

There are authors who say that the expectation or concern for promotion that continually occupies the mind of a judge further injures the independence of the judges and prosecutors than the fear of removal.[134] It may even be that is to remove the problem of promotion the shortest and the most appropriate way to eliminate this concern and therefore reinforce the independence. Indeed, there is no a promotion problem in some countries.[135]

Various views were put forward in the matters of whether it is necessary for judicial members to subject to a promotion system and which system would render the independence of a judge more guaranteed, by evaluating with other criteria. Absence of a promotion system for judges and to equate all judges and prosecutors means that the

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[134] Kapani Münci, İcra Organı Karşısında Hakimin İstiklali, p. 115.

[135] Demirkol Ferman, Yargı Bağımsızlığı, Kazancı Hukuk Yay., 1991, p. 116.

difference between those who are successful and who are not would disappear. Appointments to be done to higher offices from the outside will break the desire for working of the judges.[136]

If so, what to be done is to fixate the promotion to the objective criteria, since its complete removal is impossible. First of all, the promotion should not be left to the hands of the execution. For the promotion per se makes the judge a person, who is timid, bureaucratic and not able to adjudicate for the benefit of parts and society in general.[137] The promotion of the judges has to be fixated to the sound criteria as far as possible. The most salutary method for this is that the promotion of the judge is in the hands of independent boards.

The problem of promotion is closely related to judicial independence. It is impossible to talk about the judicial independence, if the promotion is in the hands of the execution or other non-independent boards, since the rising to the higher classes, steps and stations of the judgeship is possible by only promotion. The promotion and advance of judges is implemented by the High Commission for Judges and Prosecutors authorized by the Act for Judges and Prosecutors according to the Constitution of 1982. A system that put certain criteria for promotion and advance was approved.

The Article 18 and the following articles show the essentials of judges' promotion. According to the Article 18, "those who are on the office of judge and prosecutor are entitled to advance of one step annually and one degree biennially. Advances of step and degree are implemented by the HSYK". According to the Article

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136 Kapani Münci, ibid, p. 115.

137 Demirkol Ferman, İbid, p. 117.

19, “those who are on the office of judge and prosecutor can advance from one step to the next in their own degree, provided that

they served at least one year in the step they are in,

they received a passing grade”.

According to the Article 20, “those who have the conditions in the Article 19 are counted as automatically advanced to the next step at the date when they completed the one-year term of advance without any further procedure”. And the Article 21 is also regulated the conditions of degree-advance. Accordingly, “those who are on the office of judge and prosecutor

must stay two years in their own degree and receive a salary relative to second step of that degree virtually,

must not have a court judgment or disciplinary punishment that may block their advance,

must have the conditions counted among the principles of rising of degree proclaimed by the HSYK taking into consideration their moral situation, occupational knowledge and penetration, effort and assiduity, if caused to accumulation of files by them, qualification and quantity of pieces they accomplished, loyalty and regularity to their job, papers of achievement-state drawn up by their supervising authorities and inspectors about them, grades given by Chancery and State of Council for them, their exemplary judgments and view point, and professional works and writings,

for they can advance to the next degree”.

The Article 12 and the following articles of the Act for Military Judges and Prosecutors numbered 357 regulate the conditions of promotion for the military judges. We see the similar conditions in that article too. In addition, the military judges are

promoted in accordance with the grades given by their administrative superiors along with the other criteria. Then, the independence of these judges will be in the extent of the faith and respect to the justice of their superiors.

As is seen, the promotion of the judges is attached to the strict conditions, and some of these are extremely subjective. In such a case, the independence of judges is left to the conscience of those who would draw up the papers of achievement-state for them. However, the justice is so much sacred and important that it cannot be left to anyone's conscience.

2.5.5. Other Guarantees

The guarantees secured for judges are devoted to an aim. The aim of these is not to place the judges to the summit of a cast system through giving privileged positions to the judges and prosecutors. These are not given to them as privileges.[138] The aim of these is to setup the most suitable environment for them in order to meet the case of their duty.[139] These guarantees provide an assurance as well as several privileges. The guarantee of judgeship is an assurance for the society, not a privilege on account of legal property.

The privileges given to the judges and prosecutors in democratic regimes are laid for establishment of justice in society, not for the members of juridical themselves, and is predicated the benefits of society on, not that of the members of juridical. The aim is that the members of juridical make a decision according to the constitution, laws and opinion of conscience, not that the increasing of their authority. Therefore, the goal

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[138] Demirkol Ferman ibid, p. 134.

[139] Kapani Münci, ibid, p. 85-86.

is that the distribution of justice to the people far away all sorts of pressure and influence.

The guarantees for judges are requirements for being a rule of law. The judges who are the implementer of law, first of all, must be independent against the other powers of the state in order to talk about the rule of law.

2.5.5.1. Financial Guarantees

Probably the most important is the financial guarantee among the others that would provide the judicial independence in the literal sense. For this reason, it was secured by the constitution. The financial guarantee of the judges is secured by a regulation that "The judges (…) cannot be deprived from their wages, pays and other personnel benefits even though because of abolishment of their court or cadre" in the Article 139 of the Constitution dated 1982. The Constitution of 1982 approved that the wage of judges would be determined by the legislative according to the principles of the guarantee of judgeship and judicial independence.

The financial guarantee is one of the most important guarantees that make the judge and prosecutor independent and impartial against everyone and especially the parts of the lawsuit.[140]

2.5.5.2. Geographical Guarantee

Geographical guarantee, by its other name, station guarantee for judges is not be able to appointed a judge or prosecutor from a place where he/she works to another place without his/her own willing.

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[140] Demirkol Ferman ibid, p. 129.

Geographical guarantee which is also defined as a judge is not be able to displace except his/her own demand is a sort of guarantee that places in the Constitution of 1982.

This guarantee is necessary, although it seems as impossible to implement by reason of geographical conditions and interregional development differences in our country. Way to this must be providing attractive facilities to the judges and prosecutors for non-attractive regions. To provide high salary, public housings, health service sufficient and educational facilities for their children are only a few conveniences for this.

Although the Constitution dated 1961 more obviously regulated in this respect, yet it is not sufficiently clear and powerful. This constitution stated that the geographical guarantee would be regulated by law based on the independence of judges. As is seen, the Constitution of 1961 provided for judges to have a geographical guarantee, but left the power of regulation in this respect to the legislative. At the same time, it limited this power by criterion of judicial independence. On the other hand, the Constitution of 1982 decided on that the duties and stations of the judges and prosecutors would be regulated by law, even though it did not directly mentioned the geographical guarantee for judges.

The Code for Judges and Prosecutors (HSK) adjudged that the places have organizations of judicial and administrative courts would be classified as regions by their geographical and economical conditions, social, cultural and healthcare facilities, destitution degree, and transportation facilities, and so on, and would be determined the terms of office for judges and prosecutors in each region to concretize the provision related in the constitution (The Article 35/2 of HSK).

2.5.5.3. Professional Guarantee

The judges and prosecutors cannot be employed in other jobs dismissing from their own jobs except their consent as a requirement of the professional guarantee. The jobs in which the judges and prosecutors can be employed are counted in the Article 48 of the Act numbered 2802 —amended by the Article 21 of the Act numbered 5435 and 22.12.2005 dated— as follows: "The judges and prosecutors may make and publish scientific researches. They may join in the national and international boards, congresses, conferences and similar scientific meetings they are delegated by authorities or invited on condition that they do not make limp. To join in such meetings in working days and hours is subjected to permission.

The provisions about civil servants are applied in this respect. Judges and prosecutors may hold a course and give lectures on occupational matters in justice academies and courses of training pre-service, in-service and preparation to a higher office on condition that permission of Minister of Justice.

Judges and prosecutors cannot take any office either official or private and take place in an activity profitable. They are obliged to declare the continuous actions profitable by their spouse and children under statutory age or under the care of a guardian to the Ministry of Justice within fifteen days". They cannot do the jobs apart from these.

However, the Ministry of Justice can appoint the judges and prosecutors to the judgeship of examination in the ministry, which is an administrative office on condition that getting their consent. Those who work in administrative offices in Ministry of Justice as judges or prosecutors are subjected to the provisions of judges and prosecutors. They are classified and graduated in the principles concerning judges and

prosecutors, and take advantage of all rights accepted for judges and prosecutors.[141] Another matter is that the judges and prosecutors are appointed to the office of judicial inspectorate. Judges and prosecutors who served successfully at least eight years in their job can be appointed to judicial inspectorate by getting their consent, according to the Article 37 of the Act for Judges and Prosecutors.

Transfers between the judge and prosecutor are possible, since no major difference among them at the present time in our country. However, these transitions have been done by a decision of High Commission for Judges and Prosecutors. This has a great importance in the light of the guarantee of judgeship. The transfers between the judicial and administrative courts are impossible.

2.5.6. Appearance of the Tribunal

2.5.6.1. Approach by the ECtHR

ECtHR considers important that if the tribunals presents an independent appearance as well as the subjective impartiality of judges in determining the independence and impartiality of the tribunals. It is stipulated anymore that the courts reflect their impartiality and independence to their appearance in addition to truthful of this beyond the independence and impartiality of juridical and judges, as a consequence of advancement of law in the modern world. And ECtHR examines that whether tribunals presents an appearance of independence appearance alongside it supervises that if they have guarantees concerning independence and receive instructions from public authorities while they function. No presentation an independent appearance can be accepted as an indicator of violation even if the guarantees related the appointment method, terms of office; irremovability and protecting against the external interventions

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[141] The Constitution of 1982, Article 140/7.

of court members are secured.[142] However, the point to be taken into account here is that how the appearance is determined and which criteria is grounded on for an independent appearance. ECtHR, although gives weight to suspicions of parts of the case, stated that this is not determinative alone. It puts the criterion, saying "The important point is that the suspicion is reasonable by objective criteria and the confidence that the people must have to the justice in a democratic society". It frequently made a reference to the aphorism that "To distribute justice is not sufficient, it also has to appear".

İn the case of Piersack v. Belgium, the Judge Van de Walle who acts as a chairman in the Barabant High Criminal Court formerly has been served as chief assistant of Public Prosecutor in the Brussels Attorney Generalship. He served as the chairman of Section B, the section which examines the crimes and faults against persons and to which was referred the applicant Mr. Piersack's case up to be appointed to the superior court in Brussels. ECtHR concluded that there was no sufficient reason for worrying about the personal independence of the judge, but emphasized that to be contended with the subjective test is not enough in this case.[143] It said in its case of Delcourt that even the appearance in this respect has importance to some extent.[144] The Court continued that "Thing being at risk is the confidence that the courts have to give to the people in a democratic society" and so reinforced the importance of the appearance of courts it attaches to. Although the judge never heard the case of applicant

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142 See, İnceoğlu Sibel, ibid, p. 174.

143 Mole Nuala, and Harby Catharina, Adil Yargılanma Hakkı, Directorate General of Human Rights Council of Europe F-67075, Strasbourg, Cedex, 2001, 1st ed., October, 2001, p. 31 (İnsan Hakları Avrupa Sözleşmesinin 6. Maddesinin Uygulanmasına İlişkin Kılavuz).

144 Delcourt v. Belgium, 17.01.1970,

par.31.(http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Delcourt%20%7C%20v%20%7C%20Belgium%2C&sessionid=51006165&skin=hudoc-en)

Piersack during the period of his being a prosecutor in the case related, ECtHR concluded that the Article 6/1 of the Convention was violated, stating as "Such criterion does not completely meet the requirements of the Article 6/1 of the Convention. The problem of internal organization also must be taken into account so that the courts deliver the confidence to the people. The people have the right to worry about having the guarantees of impartiality enough in the event that anyone served as a prosecutor in an office there he might deal with a particular case during his job following served as a judge in the same case. This is the happened in this case. It was no necessary to look for the factors argued by the applicant. The important is that the reasonability of being worried about these".[145]

In the case of Campbell and Fell which was about a decision by Disciplinary Committee, the Commission, although it accepted that these committees have incumbency of acting independently and impartially as required law, stated that this was insufficient alone. For Commission, an organ has to be independent from the executive in its duties and body so that it is really independent. This independence chiefly must secure that the justice seems to be delivered. The ECtHR stated that the allegations by the convicts in the manner that the disciplinary committee is not just, and said "being close of the relationships between the committee and the jail administration, which was the support of convicts arouse from the composition of the committee and such relationships was present between the committee and the convicts, and so they are not reasonable doubts. Consequently, the appearance of court adequately provides the confidence must present in a democratic state, and those doubts objectively cannot be considered as reasonable".

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[145] See, for judgment mentioned, Doğru Osman, İnsan Hakları Avrupa Mahkemesi İçtihatları, V. I, pp. 498-501.

The committee of borough police adjudicated for some petty crimes as judge consisted of one person in the case of Belilos, and this person was a policeman acting by his own police identity. Even though he was not subject to any orders and was irremovable, and he took an oath, since a security man might be seen as a loyal member of the security forces and was under the heel of his superiors, and he would come back to his former job later, this situation would injure the confidence must be given by a tribunal. For this reasons, ECtHR saw this as a contradiction to the Article 6/1.[146]

In the case of Sramek v. Austria, the ECtHR stated that it could not confine itself to look after results that would be yielded by the inferiority statue of a reporter member in the Regional Land Register Commission against the recording officer, that the appearance also has a particular significance in order to determine whether a judicator tribunal was independent for the Article 6/1 of the Convention.

It emphasized the importance of a court's appearance in many cases related Turkey, such as case of Çıraklar.[147] The Court, examining the independence of the Martial Law Courts in this and other a few cases, handled the impartiality together with the independence. The applicants argued that the Martial Law Courts were not independent since they have two military judge members and an officer in these cases. Commission observed that the official member in those courts is not independent from the military authorities because he is hierarchically attached to the Martial Law and/or Army Corps Commandership. The Commission, for this reason, concluded that the concerns mentioned by the applicant about the independence and impartiality of the

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[146] Belilos v. Switzerland, 29.04.1988, par. 67.

[147] Çıraklar v. Turkey, 28.10.1998, Selçuk Yıldırım v. Turkey, Öcalan v. Turkey, Mitap and Müftüoğlu v. Turkey. ((Adalet Bakanlığı Yargı Mevzuatı Bülteni, Issue: 178, p. 31).

Martial Law Court are objectively justified, and that the Article 6/1 of the Convention was violated.[148]

The Court saw contradictory to the guarantee of "an independent and impartial tribunal" in the Article 6/1 of the Convention that one of the judges is an officer in the State Security Courts of three members, which was founded by the Constitution and the Article 5 of the Act numbered 2845, and yet that two of judges in the Martial Law Courts are officers, in spite of the independence and impartiality precautions stipulated first in the case of İncal v. Turkey (09.06.1998), secondly in the case of Çıraklar v. Turkey (28.10.1998) and later in many cases. For the Court, it must be kept out of sight that a civilian was heard by a court that consists of military judges even if partly. Being of a defendant before such a court will seriously and justifiably arouse concerns on him that the court would act by other considerations irrelevant with the case. It decided that decree of the article was violated since this situation caused an obstacle to considering the State Security Courts as independent and impartial courts with regard to appearance; Turkey has excluded the military judges from the SSCs, amending the legal decrees in question upon many similar judgments of ECtHR.[149] Nevertheless, in the case of Öcalan, ECtHR concluded that the Article 6/1 was violated, although no significant decision was made in the episode when the military judge was present, and the applicant acknowledged the power of court.[150] For ECtHR, acknowledging the power of court means to acknowledge the power granted by law, the applicant's statement cannot be interpreted as an unequivocal waiver of his right to an independent and impartial

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[148] See, the case of Selçuk Yıldırım v. Turkey, 25/09/2001, par. 35.

[149] Gölcüklü Feyyaz, AİHS'de Adil Yargılanma, January-June, 1994, V. II, Ankara, 1994, pp. 281-283.

[150] Öcalan v. Turkey, 12.03.2003, par. 34 (TC Adalet Bakanlığı Adli Yargı Mevzuatı Bülteni, Issue 210, p. 37).

tribunal since his lawyers actually challenged the independence and impartiality of the court on account of the presence of a military judge..[151] ECtHR, on the other hand, concluded that the Article 6/1 was violated, pointing out that the lawyers have objected to this court, so there was no an unequivocal waiver of his right to an independent and impartial tribunal . In my opinion, ECtHR did not impartially comment the waiver of the applicant. In addition, the military member has not joined in the conclusive hearing, and it was decided to continue by a civilian judge after the military judge was excluded from the court by amendment and ECtHR already did not consider the allegation that the military judge could influence the civilian members in the period when he was on duty, and even did not examine this allegation.[152]

The Court has called attention to that the military judges have received the same occupational training as their civilian counterparts, and they also utilize the same constitutional guarantees as them in terms of presence of guarantees that protect the members of the Martial Law Courts from external pressures. During the term when they are members of Martial Law Court they are irremovable and cannot be retired unless they wish.[153] ECtHR has arrived at the same judgment about the military judges in both Martial Law Courts and State Security Courts.

However, the other aspects of the military judges' statue cause to interrogation about their independence and impartiality. First, the military judges are under the heel of executive and attached to the army. Second, as pointed out by the applicant rightfully, they are subject to the military discipline and the papers of achievement-state of their commanders. Consequently, they need passing grades by their both administrative and

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151 Amd, par. 116 (ibid, p. 116).

152 Amd, par. 118 (ibid, pp. 55-56).

153 Selçuk Yıldırım v. Turkey, 25/09/2001, par. 42.

judicial superiors to promote.[154] The official members are already independent by no means, since they are under heel and authority of the martial law and/or army corps commandership.

For the Court, even the impressions may be important. This is the confidence whom the courts arouse at people, more importantly at defendant when the criminal proceedings are in the question in the democratic societies which are in danger.[155] In a particular case, viewpoint of defendant is important, but no decisive in determining if there is a rightful reason regarding a concern about the independence or impartiality of a tribunal. The decisive matter is objectively being considered as reasonable of defendant's doubts.[156]

The ECtHR thinks that the defendants could have reasonable doubts about the independence of court judges when there are some members who are subject to a hierarchy of one of the parts for their duties and service organization among them. Such a situation will affect the confidence must be in a democratic society.[157]

ECtHR additionally takes into consideration the guarantees secured for military judges together with the precautions taken for securing the independence and impartiality of the tribunal while evaluating the martial law courts and military

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154 Mitap and Müftüoğlu v. Turkey, 25.3.1996, par. 104; Selçuk Yıldırım v. Turkey, 25.09.2001, par. 43.

155 See, the case of Hauschild v. Denmark, 24.05.1989, Serial A, No: 154, p. 21, par. 48.

156 The judgment of Gautrin and others v. France, 20.5.1998, reports 1998-III, par. 58.

157 Sramek v. Austria, 22.10.1984, par 42.

courts.[158] The Court found as contradictory to the principle of independent and impartial tribunal that a civilian was being tried by a board contained military members even if partly.

In the case of Şahiner v. Turkey has such character, ECtHR, taking all these points into account, concluded as following: "The applicant has a rightful concern about whether the court was independent and impartial, since he was heard by a board that consisted of two military judges and an officer member who was attached to the martial law commander. Being of two civilian judges about whom there is no a doubt their independence and impartiality in that board would not change the result; therefore the Article 6/1 was violated".[159]

The Commission found as contradictory to the principle of independent and impartial court that the presence of military judges in the Martial Law Courts in the case of Mitap and Müftüoğlu, and ECtHR had so in the cases of Kızılöz, Selçuk Yıldırım, Yalgın, and Şahiner; and both made similar judgments for the presence of military judges in State Security Courts in the cases of İncal, Mehdi Zana, Çıraklar, and Gerger v. Turkey.[160]

Let's take a glance at one of these briefly. The applicant was taken into custody by security forces by accusation of becoming a member of illegal armed organization called Dev-Yol, and was arrested by the Martial Law Court. This court consisted of two civilian and two military judges, and an officer member who has no right to vote.

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[158] See, Findlay v. United Kingdom, 25.02.1997; Cable and others v. United Kingdom, Hood v. United Kingdom, 18.02.1999.

[159] Şahiner v. Turkey, 25.9.2001.

[160] See, for details of judgments mentioned, Adalet Bakanlığı Eğitim Dairesi Başkanlığı, Yargı Mevzuatı Bülteni, Issue no: 173,178,188,170.

Applicant alleged that he was not heard an independent and impartial tribunal, by reason of presence of military judges in the board. For him, the military judges are officers who were at service of army, and they receive orders from it. These members are subject to military discipline, and are drawn up papers of achievement-state for them.[161] The Court, since there was no a doubt about the independence and impartiality of civilian judges, did not examine this.

The Court dwelled on the appointment method of judges, their term of office, guarantees against external pressures, and finally if the tribunal give an independent appearance and impartial tribunal by a general assessment in determining its independence and impartiality. Turkish government alleged that the military judges in the Martial Law Courts completely suited to the criteria determined by interpretation of ECtHR relevant in respect to their appointment methods, employment records, and guarantees they had in their judicial duties, and therefore that the denial of the claim was necessary.[162]

ECtHR, in its assessment, recalled that the Commission had to examine similar claims in the case of Mitap and Müftüoğlu v. Turkey dated 08.12.1994, and that the Commission called attention that the legal rules regulating the structure and working of martial law courts caused many problems related the independence of these courts, especially their military members' appointment and employment record methods in its report drawn up in accordance with the Article 31 of the Convention. It said "the Commission observed that the official member in those courts is not independent from the military authorities because he is hierarchically attached to the Martial Law and/or

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[161] Yalgın v. Turkey, 25.09.2001, par. 33.(http://www.inhak-bb.adalet.gov.tr/aihm/aihmtkliste.asp?start=76)

[162] Yalgın v. Turkey, 25.09.2001, par. 34.

Army Corps Commandership. Therefore, the Commission expressed that the concerns verbalized by the applicant about the independence and impartiality of the martial law court are objectively rightful and that the Article 6/1 of the Convention was violated",[163] and continued that:

"For the Court, even the impressions may be important. This is the confidence whom the courts arouse at people, more importantly at defendant, when the criminal proceedings are in the question in the democratic societies which are in danger. In a particular case, viewpoint of defendant is important, but no decisive in determining if there is a rightful reason regarding a concern about the independence or impartiality of a tribunal. The decisive matter is objectively being considered as reasonable of defendant's doubts".[164]

ECtHR, examining the Martial Law Courts, stated that the other aspects did not arouse a doubt about the independence and impartiality but that the military judges are subject to the army which is under the heel of executive, that, secondly, as pointed out by the applicant rightfully, the military judges are subject to the military discipline and employment records, therefore, they need to positive employment records of their both administrative and judicial superiors to promote, and lastly that the decisions of appointment are made by administrative authorities and army. Relating to the officer member in the board of Martial Law Court, the Court observed that this member was under the heel of command-and-control of the administrative and/or the army corps commander related, and that he was by no way independent from these authorities.[165]

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[163] Mitap ve Müftüoğlu v. Turkey, par. 35.

[164] Yalgın v. Turkey, 25.09.2001, par. 34. 46.

[165] Yalgın v. Turkey, 25.09.2001, par. 34. 36.

The ECtHR thinks that the defendants could have reasonable doubts about the independence of a court's judges, when there are some members who are subject to a hierarchy of one of the parts for their duties and service organization among them. Such a situation will affect the confidence must be in a democratic society. The Court additionally considers important that a civilian is compelled to gain a hearing before a court consists of members of armed forces even if partly.[166]

Consequently, the Court accepted that the applicant had reasonable doubts to distrust the independence and impartiality of the Martial Law Courts.[167]

As is seen, the Court stressed that it was a reasonable cause that the Martial Law Courts were not seen as independent and impartial courts, not they were so, namely, that the violation stemmed from their appearance.

Another case relating hearing of civilians by military authorities is the case of Cyprus v. Turkey, which was tried upon the application by Cyprus Greek Region as a state. The State of Cypriot Greek alleged that the civilians were also tried by military courts owing to some acts counted as crime in Turkish Republic of Northern Cyprus in this case. ECtHR concluded that the Article 6/1 was violated by admitting that the applicant has right on his side in this case.[168]

ECtHR did not see as a contradiction to the Article 6/1 that the soldiers were heard by a military court, although it did not find acceptable that a civilian was tried by

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166 Yalgın v. Turkey, 25.09.2001, par. 34. 47.

167 Yalgın v. Turkey, 25.09.2001, par. 34. 49.

168 The case of Cyprus v. Turkey, par. 357 et seq.

a board consisted of military men even if partly. It found acceptable that the soldiers were heard by military courts thinking that ensuring the military discipline.[169]

2.5.6.2. In the Turkish Law

Matter of requirement for seeming independent of the courts is attached great importance in our law. Even a minimum conduct given cause of apprehension about impartiality is awarded a disciplinary punishment even if it does not constitute a crime. This point is regulated by clauses (b), (c), and (e) of Article 68 of the Act for Judges and Prosecutors numbered 2802. According to the Article 68, judges and prosecutors are awarded punishments of disciplinary and displacement in the following instances:

To arouse a conclusion that he would not do his job exactly and impartially by his works and conducts (clause b).

To cause to belief that he is doing his job with regard to kith and kin's wishes or giving way to his own feelings (clause c).

To arouse a conclusion that he is accepting a bribe or getting unjust gain even if there is no a material evidence (clause e).

The Act attaches importance to courts and judges having a reassuring appearance for appearance and operation by penalizing the condition and conduct that arouses this conclusion even if these instances do not indeed exist.

The Act for Judges and Prosecutors demonstrates that how it does attach importance to this fact by pointing out that those who were punished by displacement two times on account of instances counted in clause (e) of Article 68 would be removed from the occupation by its Article 69.

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[169] Engel and others v. Netherlands, 08.06.1976, par. 15.

Also, the Article 77 makes a regulation intended for establishing a trust that is necessary to be given by juridical to the people in a democratic society. Accordingly, "if a belief that maintaining of a judge to his job, who is made an inquiry about occurs that it would damage to authority and dignity of juridical, the High Commission for Judges and Prosecutors can remove temporarily that judge"

Additionally, the presence of military members in the State Security Courts (DGMs) caused too many problems, and first the military members in the DGMs were excluded,[170] upon the ECtHR made a great number of decisions of violation, and later the DGMs were transformed to the high criminal courts by the Act numbered 5910.

ECtHR saw as a contradictory to the rule of independent and impartial tribunal that a civilian is heard by a board consisted of military members even if partly, on the other hand. Therefore, the phrase of "The military courts are also assigned to hear the crimes interested in soldiering indicated in special act or while doing his jobs indicated in act, or in military zones indicated in act and against the military men, which were committed by non-military people" in the Article 145/2 of the Constitution means a potential violation for the Article 6/1 of ECHR.[171]

2.5.6.3. HSYK (HCJP: High Commission of Judges and Prosecutors) and Judicial Independence

The role of the executive for the independence of judges has always stood in the forefront, and executive's intervention to juridical has mostly come into question. Even the independence of judge was almost perceived as against the executive. For this reason, the independent boards were established for the purpose of eliminating the

[170] Gölcüklü Feyyaz, A.İ.H.S'de Adil Yargılanma, January-June, 1994, V. II, Ankara, 1994, pp. 281-283.

[171] See, İnceoğlu Sibel, ibid, pp. 181-182.

influence of the executive on juridical or at least reducing to a minimum level, and in consequence of efforts of rendering independent the recruitment of judicial members, regulating of their personnel matters, promotion, appointment, discipline, and judicial mechanism from the executive as possible.

In this direction, the High Commission for Judges and Prosecutors was established about to carry out the recruitment of judges and prosecutors and regulate their personnel matters in our country too. Leaving of all personnel matters of the judges to an independent board that we may call as preferred application for modern democracies was accepted first by the Constitution of 1961. The board mentioned was first established as two different boards named the High Commission for Judges and the High Commission for Prosecutors by the Constitution of 1961, and then they were combined to form High Commission for Judges and Prosecutors.[172]

Both the board founded by the Turkish Constitution dated 1961 and the independent board established by Italian Constitution after the World War II have the remarkable specifications for securing the independence of judges. First, let's look at Italian independent board: it has some differences from that of French Constitution although is patterned after it. According to Italian Constitution, President of Republic presides to High Council for Judges. The Chairman and Director of Public Prosecutors of Chancery are inherent members of this council. Two third of the other members is selected from among judges belonging to various categories by judges population, and one third is from among law professors in ordinary and among lawyers those who

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[172] Çelik Adem, Adil Yargılanma Hakkı (Avrupa İnsan Hakları Sözleşmesi ve Türk Hukuku), Adalet Yayınları, Ankara, 2007.

completed fifteen-year service term in occupation by the Parliament (Italian Constitution, Article 102-104).[173]

The High Commission for Judges established by the Constitution of 1961 was as follows: The High Commission for Judges was formed by eighteen full members and five alternate members. Six of these members were selected by General Assembly of Chancery and six by first-class judges among them by secret vote. National Assembly and Senate of the Republic selected three each members from among those who served as judge in the superior court or who had a right to be member of these courts by secret vote and by absolute majority of their total number of members. The High Commission for Judges selected its chairman by absolute majority of their total number of members from among them. The Minister of Justice could join in the meetings, but had no right to vote (Constitution of 1961, Article 143). The power of decision about the all personnel matters of judges belonged to the High Commission for Judges. The Minister of Justice could apply to the High Commission for Judges to open a disciplinary proceeding about a judge when he thinks it necessary. The inspection for judges was carried out by top-level judges nominated by the High Commission for Judges for certain issues (Constitution of 1961, Article 144).

The composition of this Commission was alternated as follows, by a constitutional amendment in 1971: "The High Commission for Judges is formed by eleven full members and three alternate members. Members are selected by General Assembly of Chancery from among its own members by secret vote and by absolute majority of its total number of members. The High Commission for Judges selects its chairman and chiefs of department by absolute majority of their total number of

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[173] http://www.msb.gov.tr/ayim/Ayim_makale_detay.asp?IDNO=75, and Aşçıoğlu Çetin, ibid, p. 45. Özay, İlhan :"Yargı Güvencesi-Bağımsızlığı ve Anayasa Mahkemesi", Anayasa Yargısı, Constitution Publication, Ankara 1991

members from among them. The term of office of the members is four years. Those who complete their term can be selected again. Members cannot be appointed for another job during their term. Founding, working ways, departments and their duties, and qualification number and decision number for meetings, chairmen's and members' salary and pay of the High Commission for Judges is regulated by act. The Minister of Justice presides to the High Commission for Judges when he thinks necessary".[174]

Presence of High Commission for Judges and Prosecutors and transferring of personnel matters of judges to this Commission automatically means that judicial independence is further secured against the other two powers, since empowering of juridical would come to mean that the powers of other two powers reduce. However, by the Constitution of 1982, executive was strengthened, while the powers of juridical were almost placed under the guardianship of the executive, unlike the Constitution of 1961. Today, by the Constitution of 1982, the statues of judges were nearly brought down under the statue the prosecutors had according to the Constitution of 1961.[175] The Constitution of 1982 almost placed the juridical under the guardianship of the executive, although it frequently repeats the notions such as judge independence and guarantee of judgeship.[176]

The Article 159 of Constitution dated 1982 regulates the High Commission for Judges and Prosecutors. Accordingly, "The High Commission for Judges and

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[174] The Article 143 amended at 20.09.1971 of the Constitution of 1961 (http://www.tbmm.gov.tr/anayasa/anayasa61.htm).

[175] Not being of the right to objection by juridical against the judgments of High Commission for Prosecutors was seen as contradictory to the Constitution by Constitutional Court, and canceled in 1977. Whereas, the right to objection by juridical against the decisions of High Commission for Judges and Prosecutors is unavailable today.

[176] See, Aşçıoğlu Çetin, ibid, p. 45.

Prosecutors is formed and serves appropriately to principles of independence of judges and guarantee of judgeship. Chairman of the Commission is Minister of Justice. The Permanent Secretary of Minister of Justice is the inherent member of the Commission. Three full members and three alternate members of the Commission from among three candidates for each membership presented by General Assembly of Chancery from its own members, and two full members and two alternate members from among three candidates for each membership presented by General Assembly of State Council is selected by the President of Republic. Those who complete their term can be selected again. The Commission selects a vice chairman among from its selected full members".

As is seen, the two of seven members of Commission are belong to the executive and one has the statue of chairman. Therefore, it is always questioned that if the Commission can function[177].

Even if the members coming from both the Chancery and State Council are top-level judges, ultimately being selected of them by the President of Republic may cause that the executive dominate this awfully Commission. For the President of Republic who was selected by a political party may always make a choice that would render doubtful the independence and impartiality of the Commission from the list sent to him by Chancery and State Council.[178] It is seen as one of the elements which cast shadow on judicial independence that the President of Republic assigns one of three candidates who were already elected by members of supreme courts directly;[179] because the probability of being made this choice by political concerns cannot be pass over.

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[177] SAV, Önder, "1989-1990 Judicial year Opening Speech", Yargıtay Dergisi, Issue .16, 1990, p. 22

[178] Mumcuoğlu Maksut, Hukuk Devletinde Bağımsız Yargının Yeri ve Bağımsız Yargının Türkiye Gelişimi, ABD, Year: 46, Issue: 2, March, 1989, p. 264.

[179] Centel, ibid, p. 23.

As is seen, forming way and composition of the HCJP do not reflect sufficiently the qualification of being an independent board. So, there is need for a regulation for nature of this commission similar to that of the Constitution of 1961.

HCJP performs the transactions such as recruitment, appointment, move to another office, grant a temporary authority, promote and classify as first-degree, grant cadres, decide about those who were not seen as suitable to maintain the job, impose disciplinary punishments, and remove about the judicial and administrative judges and prosecutors. It is impossible to apply to juridical against the decisions of the Commission.[180]

The HCJP has no a secretariat, on the other hand. A new space to work in outbuilding of Ministry of Justice was created for the Commission for providing its independence for at least workplace, which up to recent times used the building of Ministry. Procedures of appointment and promotion become final and is issued after that the draft prepared by Personnel Management of Ministry of Justice is offered to HCJP and corrections required is carried out in accordance with the Article 20 of the Act for Judges and Prosecutors. This course means that the appointments and promotions is realized by the executive in practice, because HCJP has no an independent secretariat. Actual circumstances appear unlike the Constitution, since the HCJP cannot prepare the list of stations of judges and prosecutors alone. In the event, the draft prepared by the Ministry almost has to be accepted by HCJP.

Serving of judicial inspectors as attached the Ministry of Justice and simply as officers of Minister is a problem that seriously injures the independence of judges, on the other hand. For the report of judicial inspector has a primary role in appointment

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[180] The Constitution of 1982, Article 159/4.

and promotion of judges and prosecutors. Therefore, the phrase of "all personnel matters of judges and prosecutors is regulated by HCJP" is not to be realized.

An important point attracts attention is the identity of the Permanent Secretary who is an inherent member of the Commission. Permanent Secretary is a person who has an important role in appointment and promotion of judges and prosecutors. Even he has a share in all personnel matters of judges and prosecutors in practice. Then, the Permanent Secretary must be one who is working in conformity with the Minister, but will be able to say no to him in case of necessity at the same time. Way out of this is as following: the Permanent Secretary of Ministry of Justice should be appointed from among the members of Chancery and State Council —to be sure by receiving his own approval— by adding a paragraph to the Article 37 of the Act for Judges and Prosecutors. In that case, the lack of guarantee and untrustworthiness for judicial independence of the Commission existing will be largely removed.[181] The Permanent Secretary, thus, will not be obliged to obey to the Minister and will have no a concern to get along with the other commission members and to go against them, since he would not have to be selected for membership of supreme court that is unique desirable office to which he would return when he rejected by Minister in the future. Consequently, the Permanent Secretary will be rid of being a man who endeavor not to go against on one hand Minister and against the commission members on the other hand and so a man who is doing his job with difficulty or rather not able to do in concern for the future, and will do his job as independent and impartial against both the Minister and the commission members.

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[181] İbrahimhakkıoğlu Uğur, http://www.dusunenadam.com.tr/v1_yedek/hukuk6.htm

CHAPTER II

3. IMPARTIAL TRIBUNAL

3.1. Overview

The concepts of independent and impartial tribunal are lap streaked, but they have different meanings, even though the ECtHR uses them together as if they are synonym for each other.[182] They sometimes have the same meaning like rings lap streaked, sometimes differ. Impartiality is defined as judge's not being takes a stand[183], having no a prejudice that would be able to influence the solution of case, and able to wriggle himself out of his own personality,[184] and especially having no a feeling or interest in favor of or against one of the parts of case.[185] ECtHR divides the impartiality two parts as subjective and objective.

For ECtHR, the subjective impartiality means the lack of a prejudice that would be able to influence the solution of case, and especially that the tribunal or one of its member's having no a feeling or interest in favor of or against one of the parts of case.[186] The subjective impartiality is the personal impartiality of the tribunal's judge as an individual, which is in fact a psychological concept. It rather expresses that the judge

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[182] Vehbi Ünal v. Turkey, App. No: 48264/99, Strasbourg, 9th November, 2006. (http://www.inhak-bb.adalet.gov.tr/aihm/aihmtkliste.asp?psearch=Vehbi+%DCnal+&psearchtype=AND)

[183] Centel Nur, ibid, p. 29.

[184] See, Kunter Nurullah, p. 18.

[185] Manisa Barosu Dergisi, 2002/2, Year: 21, Issue: 81, p. 78.

[186] Piersack v. Belgium, 01.10.1992, par. 30. (Mole Nuala, and Harby Catharina, Adil Yargılanma Hakkı, Directorate General of Human Rights Council of Europe F-67075, Strasbourg, Cedex, 2001, 1st ed., October, 2001, page 29 (İnsan Hakları Avrupa Sözleşmesinin 6. Maddesinin Uygulanmasına İlişkin Kılavuz)

can act by identity of judge as isolated from his own civilian personality namely as freed from feelings waved aside the civil life and isolated himself from individuals and groups who are the part of case; and it means that the judge decides only in the light of crude facts and law.[187]

The objective impartiality is the impression given by the tribunal as an institution to the people, namely it's having an appearance of impartiality giving those who demand justice the impression of being trustworthy, and being of measures taken for securing the impartiality in a property that remove the all reasonable doubts about its impartiality.[188] It is a necessary that the tribunals give the public and especially defendant in criminal proceedings the impression of being trustworthy for the objective impartiality in a democratic society. ECtHR pointed out that the viewpoint of defendant is important, but not determinative in providing the objective impartiality. For ECtHR, the decisive point is that whether the defendant's concern in this respect is objectively reasonable.[189]

The doubts related impartiality must be based on objectivity in some degree. The committee of borough police adjudicated for some petty crimes as judge consisted of one person in the case of Belilos v. Switzerland[190], and this person was a policeman acting by his own police identity. Even though he was not subject to any orders and was

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[187] See, Aşçıoğlu Çetin, ibid, pp.72-73.

[188] Gölcüklü and Gözübüyük, ibid, p. 282.

[189] Hauschildt v. Denmark, 24.05.1989, par. 48 ; Fey v. Austria, par. 30.(http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Hauschildt%20%7C%20v.%20%7C%20Denmark&sessionid=50833577&skin=hudoc-en)

[190] Belilos v. Switzerland, 29.04.1988, par. 67.

irremovable, and he took an oath, since a security man might be seen as a loyal member of the security forces and was under the heel of his superiors, and he would come back to his former job later, this situation would injure the confidence must be given by a tribunal. The requirements in the Article 6/1 were not met, since the doubts concerning impartiality of police committee were legitimate[191].

ECtHR hold , "Subjective concerns are not determinative elements, notwithstanding they are understandable. Therefore, they have to be demonstrated so that they are regarded as objective, above all" in the case of Vehbi Ünal v. Turkey.[192]

ECtHR looks for how the system operates in the crude fact, not the theoretical and abstract circumstance.[193] However, this practice of ECtHR is not absolute. It also found contradictory to independence and impartiality the probability of different implementation of the system practicing in the case of Van De Hurk v. Netherlands.[194] It seeks the independence and impartiality for non-regular judges and jurymen[195] as well as regular judges.[196] It is not a point that per se injures the impartiality the substitution of a judge or chief justice without informing the defendant during trial. However, it is

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191 Kostka v. Poland, 16.02.2010, App. No. 29334/06, Par. 62

192 Vehbi Ünal v. Turkey, App. No: 48264/99, Strasbourg, 9th November, 2006.

193 Hauschildt v. Denmark, 24.05.1989, par. 30.

194 Van De Hurk v. Netherlands, 19.04.1994, par. 45.(http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Van%20%7C%20De%20%7C%20Hurk%20%7C%20v.%20%7C%20Netherlands&sessionid=50833577&skin=hudoc-en)

195 This topic is explained under the title of "The Court".

196 Pullar v. United Kingdom, 10.06.1996, pars. 31-32.(http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Pullar%20%7C%20v.%20%7C%20United%20%7C%20Kingdom&sessionid=50833577&skin=hudoc-en)

necessary to search that if this substitution influenced the impartial quality of trial on presence of such situation.[197]

The Court has attached a special importance to the impartiality, saying "thing being at risk is the confidence that the tribunals have to give to the people, more importantly to defendant when the criminal proceedings are in the question in a democratic society" while it emphasizes the objective impartiality. The Court, although attaching a great importance to the concern of defendant, pointed out that this is not determinative for establishing objective impartiality and said, "Determinative point is that whether the suspicion is objectively verified".[198] ECtHR has obviously stated that all judges must withdraw if there is a reasonable cause about their impartiality.[199] The Article 30/2 of CCP [Code for Criminal Procedures, CMK] also includes a regulation in the same direction.

Our Constitution does not mention the impartiality of judges, though it regulates the independence of them. However, the principle of rule of law takes place in Constitution (Art. covers the right to trial impartially. This right entails being tried by an impartial judge. Therefore, the impartiality of judges is also under the constitutional guarantee just like the independence. Yet, we can call this an indirect guarantee. The Code for Criminal Procedures [CCP: CMK], on the other hand, has given place to regulations on securing the impartiality of judges under the titles of challenge, withdrawal, and prohibition of judges. In addition, the Code for Judges and Prosecutors [CJP: HSK] includes regulations on securing the impartiality of judges.

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[197] Mah. K. Barbera Messague and Jabardo v. Spain, 06.12.1998, A 146; and Academy Trading and others v Greece, 04.04.2000 (Cited by Gölcüklü and Gözübüyük, ibid, p. 283).

[198] Nortier v. Netherlands, 24.08.1993, par. 50.

[199] Piersack v. Belgium, 01.10.1982, par. 30.

CCP [CMK] also laid some guarantees for securing the independence of judges as earlier CMUK. These are challenge, withdrawal and prohibition of judges. Prohibition of a judge stipulated for instances in which it is definitely anticipated that the judge would not impartial. It is, in fact, forbidden that a judge displays a judicial activity, who himself suffers from a crime or being a prosecutor, judiciary police, advocate of defender or victim, or being heard as a witness or expert in the same case, along with a judge has a relationship of kinship to some degree, marriage, of tutelage or adoption, even if ended later with the defendant or victim in our law.[200]

Likewise, a judge who joined in making a decision of a case against which was appealed cannot join in its Court of Appeal review.[201]

In the instances in which the Act did not lay a provision about the independence of judge but left it to parts to decide, it accepted a right to challenge the judge for the parts.[202]

In addition, the Act has given the right to withdrawal for judge when he felt he would not be able to be impartial, and left the final decision to another authority in this respect (CCP, Article 30).

3.1.1. Subjective Impartiality

Subjective impartiality expresses that a judge does not take a stand and have no a prejudice in a particular case. For ECtHR, it is regarded and assumed that a judge is

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200 CMUK numbered 1412, Art. 21 (CMK numbered 5271, inured at 01.04.2005, Art. 22).

201 CMUK numbered 1412, Art. 22 (CMK numbered 5271, inured at 01.04.2005, Art. 23).

202 CMUK numbered 1412, Art. 23 (CMK numbered 5271, inured at 01.04.2005, Art. 24).

impartial until appearing an evidence regarding he is not so.[203] Also the Court, roughly in its no decision, adjudged that the Article 6/1 was violated on account that the judge is not personally impartial when was appealed by claim of subjective impartiality in practice. For the judge must withdraw from that case, if there is a plausible doubt about his subjective impartiality.[204]

It was not regarded as prejudices the comments and interferences made by the judge during trials, by taking into account the judicial duration as a whole.[205] ECtHR accepts that the appearance and objective impartiality are damaged by applying the objectivity test when there is no sufficient evidence about subjective impartiality of the tribunal or its one member.[206]

3.1.2. Objective Impartiality

3.1.2.1. Approach by ECtHR

The important matter in this respect is that the mechanism of tribunal and the confidence given by it to the parts, and the appearance on if it is an institution that works impartially, not the personal condition (impartiality) of judge.[207] Namely, the important criterion is the confidence given by the tribunals to the citizens, especially to defendant in the criminal proceedings in a democratic society.[208] For example, in the

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203 Le Compete, Van Leuven and De Meyere, par. 58; Piersack, par. 30.

204 Piersack, par. 30.

205 İnceoğlu Sibel, ibid, p. 183.

206 İnceoğlu Sibel, ibid, p. 184.

207 Aşçıoğlu Çetin, ibid, p. 73.

208 Mehmet Ali Yılmaz v. Turkey, (22286/95), par. 35.

case of De Cubber v. Belgium, the judge serving as an examining judge and who questioned the defendant several times before the trial phase decided about the main issue of the lawsuit by hearing the same case later. ECtHR adjudged that the Article 6/1 was violated by taking into account this fact.[209] Similarly, it decided that there were objectively legitimate reasons for being in doubt about the impartiality and the Article 6/1 was violated since the chief justice of the court of appeal previously had an authority on office of prosecutor in the case of Piersack v. Belgium.[210]

In the case of Remli v. France, a third person had heard that a juryman said "So what? I'm a racist". The national court had decided that it officially would not be able to deal with the facts alleged to occur without its knowledge. ECtHR stated that the national court did not make any control in order to confirm the impartiality, so deprived the applicant from opportunity of correcting a situation would contradict the provision of the Convention. ECtHR concluded that the Article 6/1 was violated in this case.[211]

The ECtHR will abstain in seeking the results in the cases the national court did necessary investigation and decided that the trial was impartial across the prejudices. In the case of Gregory v. United Kingdom,[212] the jury had sent a note written

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209 De Cubber v Belgium, 26.10.1984, par. 36.(http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=De%20%7C%20Cubber%20%7C%20v%20%7C%20Belgium&sessionid=50833577&skin=hudoc-en)

210 Piersack v. Belgium, par. 31.

211 Remli v. France, 30.03.1996.(http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Remli%20%7C%20v.%20%7C%20France&sessionid=50833577&skin=hudoc-en)

212 Gregory v. United Kingdom, 25.02.1997.(Mole Nuala, and Harby Catharina, Adil Yargılanma Hakkı, Directorate General of Human Rights Council of Europe F-67075, Strasbourg, Cedex, 2001, 1st ed., October, 2001, p. 31 (İnsan Hakları Avrupa Sözleşmesinin 6. Maddesinin Uygulanmasına İlişkin Kılavuz).

on “There is an image something like that racism predominates, a juryman will be dismissed” to judge. He had showed the note to both respondent and prosecution. In addition, he had warned the jury that they appreciate the case according to only evidences and put aside all their prejudices. ECtHR concluded that all this is sufficient for the Article 6/1. ECtHR saw meaningful that defense counsel did not repress for dismissing of jury, or, facing to jury, did not ask about if they will continue or if they are in a position to decide only basing to evidences. The judge of court of first instance had given the direction that “they clean their mind all sorts and forms of think and prejudice” to the jury, by a clear, detailed and strong expression. ECtHR, comparing this case with the case of Remli v. France, said: “In that case (Remli), the judges of criminal court of first instance have been unresponsive to claim of being heard of a juryman of known identity saying he is a racist. Whereas in this case (Gregory) the judge encountered with a claim of presence a racism in the jury even if it was ambiguous and indefinite. Even under these circumstances, the judge has taken sufficient steps about to control if a court was constituted according to Article 6/1 of the Convention, and secured adequate guarantee to remove the suspicions in this respect”.[213]

The ECtHR decided that the Article 6/1 was violated, since the judge’s responsive was insufficient to a similar sign relating racism of a juryman in the case of Sanders v. United Kingdom subsequent. ECtHR hold : “…the judge had to react harder than looking for ambiguous guarantees regarding the jurymen would interpret the case only basing to the evidences leaving aside their prejudices. The judge, not doing this, did not provide the sufficient guarantee to remove the legitimate suspicion based on objectivity and concerning the impartiality of the tribunal. In this instance, we

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[213] Amd, par. 49.

concluded that the court convicted the applicant was not objectively impartial" in this case.[214]

The Court stated that administering justice is not enough, but also this must meet the eye in its many decisions. It stressed that objective impartiality is directly proportional with the guarantee provided for judge, by saying "It recalls that this must be determined by taking into account an objective test, namely whether the judge was given sufficient guarantee without giving rise to any doubt".[215] The Court assesses the objectivity by the establishment and method of operation of the court.[216] Therefore, the ECtHR regarded as a contradiction to objective impartiality that a person who was the chief of a prosecutors group carried out the prosecution although he personally did not occupy the counsel for the prosecution has taken place in the court as judge of trial later,[217] that the examining judge taken office in the preliminary hearing joined in the decision about the main issue of the lawsuit as judge of trial later,[218] and that the people who were closely connected by a political party joined in the trial as jurymen.

For ECtHR, taking place of a judge in the court making a decision about the main issue of a lawsuit later is not a contradiction to the Article 6/1, even if the same judge opened an investigation about defendant before the trial, he made an arrestment decide upon application of prosecutor, he nominated an expert for determining of certain points regarding the questionnaire, or he requested information from various

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214 Sanders v. United Kingdom, 09.05.2000.

215 Mehmet Ali Yılmaz v. Turkey, (29286/95), par. 36.

216 Piersack v. Belgium, 01.10.1982; De Cubber v. Belgium, 26.10.1984.

217 Piersack v. Belgium, 01.10.1982.

218 Pfeifer and Plankl v. Austria, 25.2.1992.

authority such as banks or he adopted some measures, made researches and determinations and decides like that not regarding directly accusation of defendant or responsibility of defendant with the crime, since they are not transactions that arouse an absolute suspicion about his objective impartiality.

ECtHR did not find contradictory to the principle of impartiality the face-to-face trial by a court after a trial in absentia, since the court no how would not bound up with its former judgment.[219] It said: "The important point in such instances is that the extent and character of precautions taken (e.g. arrestment) or decisions made, namely whether these have a sense of prejudice regarding guiltiness of defendant".[220] In the controversy of impartiality, it must be consulted to the practice and how the system works and is implemented especially in crude facts and practice, not to theoretical and abstract situation.[221] It is insufficient the presence of occupational relationships between the applicant and a board of judges for being suspicious about the impartiality of that board, even if is supposed there is a potentiality of conflict of interests.[222]

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[219] Thommann v. Switzerland, 10.6.1999, par. 30. (Mole Nuala, and Harby Catharina, Adil Yargılanma Hakkı, Directorate General of Human Rights Council of Europe F-67075, Strasbourg, Cedex, 2001, 1st ed., October, 2001, (İnsan Hakları Avrupa Sözleşmesinin 6. Maddesinin Uygulanmasına İlişkin Kılavuz)

[220] Kingsley v. United Kingdom, 07.11.2000; Hauschildt v. Denmark, 24.05.1989, par. 49.

[221] Hauschildt v. Denmark, 24.05.1989

[222] In the case of Le Compete, the council of medical Council of Appeal consisted of doctors and judicial members fifty-fifty, and the Commission decided that the doctors would not be impartial, since they exhibit a connection. However, the Court denied this judgment, by determining that the composition of council and a chairman who was a judicial member and has a weighted voting power were an absolute guarantee for impartiality. It also has been determined that the complaints were abstract and there were not a specific proof indicated that any member treated hostile the defendant.

On the contrary, it was seen as contradictory to the objective impartiality one of the court members' being subordinate of one of the parts owing to its negative image. Similarly, it was seen as contradictory to impartiality that a person acting as a judge would return to the under heel at the end of his judicial office. For example, in the case of Belilos v. Switzerland[223], one of the police officers was not under heel, has taken an oath and was irremovable. However, there was a condition that weakened the trust had to be given by the courts, since he was an official, who would return to his job in the department, and there is an inclination of seeing the police forces as ones who are obliged to obey their superiors and to remain true to their colleagues.

Once a legitimate suspicion appeared, the presence of regular members may also not be sufficient. In military area, hierarchical subjection between the members of Martial Law Courts and top level soldiers was made difficulties even if there were civilian judges in the board, and Commission takes into consideration the hearing of civilians by military judicial boards makes per se problems of independence and impartiality.[224]

ECtHR has to examine wide range of elements determining impartiality in its judgments. We can put in order them as follows:[225]

Acting as a superior court judge of a judge of criminal court later (Oberschilk v Austria).

Having part as a prosecutor of a judge in the absence of a prosecutor in a trial (Thorgeir Thorgeirson v. Island).

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223 Belilos v. Switzerland, 29.04.1988, par. 67-68.

224 Mitap and Müftüoğlu v. Turkey, 25.3.1996.

225 Generated by utilizing from Doğru Osman, ibid, pp. XXIX-XLV.

Serving as a judge of the prosecutor (Piersack v. Belgium).

Serving as the judge in trial of an examining judge (Fey v. Austria; Bulut v. Austria; Nortier v Netherlands; Cubber v. Belgium).

Serving as the judge in trial of a judge who examined the objection to accusation (Castillo Algar v. Spain).

Serving as the judge in trial of a judge who examined the accusation (Mills v. United Kingdom).

Citing of the applicant as a guilty in the verdict of conviction regarding companion defendant (Ferrantelli and Santengelo v. Italy; Rojas Morales v Italy).

Being assigned of the judges of superior court by the chief justice of the court which appealed the judgment (Daktaras v. Lithuania).

Serving as court of first instance of the superior court (Coeme and others v. Belgium).

Serving as the trial judge of the judge who made the verdict of arrestment (Saint Marie v. France; Hauschildt v. Denmark; Padovani v. Italy).

Serving as a member of high board, at the same time, of a member of disciplinary committee (Diennet v. France).

Not be able to appeal against judgments of lower courts (Gautrin and others v. France).

Hearing by the same court to both to civil lawsuits and penal actions (Gillow v. United Kingdom).

Serving as a judge of superior court of a judge of civil court (DeHaan v. Netherlands).

Having a connection of the judge with the case (Morel v. France).

Revealing his vote by the judge of trial before making decision (Buscemi v. Italy).

Doing both advisory and trying job by a judge (Procola v. Luxemburg).

Trying of the civilians by military judges (Cyprus v. Turkey).

As is seen, ECtHR tries to determine that whether the judicial organ is impartial by assessing a wide range of instances. Rather, it tries to fix the tribunal is an impartial judicial organ or not. Indeed, the Court did not make a verdict of conviction because of the subjective partiality of a judge by this time in spite of many applications.

3.1.2.2. The Criteria Adopted by ECtHR to Assure Objective Impartiality of Judiciary

3.1.2.2.1. Judge's Duties that Show Variety

Having formerly various parts of the court members regarding fact case at bar is not determinative alone for the impartiality. The Court cares for the character and extent of this role.[226] If the role had by the judge in the lawsuit reflects the opinion of judge about the main issue of the case, namely if it leaves an impression that the judge was convinced about the main issue of the case, the impartiality of the judge was damaged. We cannot say that it was damaged, if the judge confined himself to only routine. The important one is the character and extent of the precaution taken and

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[226] İnceoğlu Sibel, ibid, p. 185.

decisions made for the Court. In other words, it is if they have a sense a prejudice about the criminality of defendant.[227] The important one here again is that if the judge is objectively seen as impartial, not if he is subjectively impartial.

One of the cases in which ECtHR laid down the main tenets is the case of Piersack v. Belgium. The Court examined the objective impartiality following emphasized the subjective impartiality of the judge of case, Van De Walle in the case of Piersack. Walle, the judge of the case was the chairman of the section where the case of applicant was dealt in the phase of questionnaire, but he was not the person who heard the case in this lawsuit. The applicant claimed that the judge of the case was not impartial for this reason. The Court said: "a judge's who formerly taken office in the phase of questionnaire of the case in question serving as the judge of case later gives rise to emerging a justifiable and objective suspicion in a democratic society".[228] As is seen, the Court did not guess that the judge was partial while concludes. Contrarily, it emphasized there was no a reason for suspecting the judge's subjective impartiality.

The probability of appearing of such problem always exists in mainland Europe where the judges also take on the task of prosecutor or they serve as bridges between the prosecutors and courts. Participating of a judge only in a questionnaire relating re-putting in prison of a sentenced is not sufficient to say he has no an objective impartiality. The important one is presence of other conditions than judge's information about case record, namely, that if the judge had an opinion about the main issue of the

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[227] Hauschildt v. Denmark, 24.05.1989, A. 154, par. 49 et seq.; Padovani v. Italy, 26.02.1993.; Fey v. Austria, 24.2.1993, par. 30, (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Fey%20%7C%20v.%20%7C%20Austria&sessionid=50833577&skin=hudoc-en)

[228] Piersack, pars. 30-31.

lawsuit. If a judge did not perform transactions to have an opinion about the main issue of the case, his impartiality does not be damaged.[229]

The Court accepts as a reason for violation that a judge who formerly was an examining judge and so had information about the content of case record or served as a prosecutor serves as the judge of trial later, on the other hand.[230]

Another case in which was examined that a judge had an opinion about the case is the judgment of Hauschildt v. Denmark. In this case, the chief justice repeatedly had made decisions of arrestment, but all these judgments had a common feature: he had mentioned a specially approved suspicion relating that the accused committed this crime, which is one of the reasons for arrestment necessary for domestic law in these nine judgments about continuing of arrestment status; namely, it is understood that the judge was clearly convinced about the criminality. The justification of the chief justice for arrestment was based on a suspicion specially confirmed on the accused committed the crime. Namely, the chief justice had still believed in the phase of questionnaire that the defendant had committed the crime, and this was clear. So, the ECtHR decided that

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[229] Fey v Austria, 24.02.1993 ; (Mole Nuala, and Harby Catharina, Adil Yargılanma Hakkı, Directorate General of Human Rights Council of Europe F-67075, Strasbourg, Cedex, 2001, 1st ed., October, 2001, p. 29 (İnsan Hakları Avrupa Sözleşmesinin 6. Maddesinin Uygulanmasına İlişkin Kılavuz) and Nortier v. Netherlands, 24.08.1993.

[230] See, Piersack v. Belgium, 01.10.1982; De Cubber v. Belgium, 26.10.1984; Hauschildt v. Denmark, 24.05.1989; Ferrantelli and Santangelo v. Italy, 07.08.1986 ; Oberschlick v. Austria, 23.05.1991; De Haan v. Netherlands, 26.08.1997. (Mole Nuala, and Harby Catharina, Adil Yargılanma Hakkı, Directorate General of Human Rights Council of Europe F-67075, Strasbourg, Cedex, 2001, 1st ed., October, 2001, (İnsan Hakları Avrupa Sözleşmesinin 6. Maddesinin Uygulanmasına İlişkin Kılavuz)

the suspicion concerning the chief justice who made the verdict of conviction was not impartial was objectively reasonable.[231]

ECtHR does not count, as a rule, as contradictory to the impartiality that the judge who made the decision arrestment makes a decision about the main issue of the case. However, if it is able to understand that the judge had an opinion about the main issue of the lawsuit by examining the reason of arrestment decision, then we can conclude that the judge is not objectively impartial.[232] ECtHR, in the cases of the judge who made the decision of arrestment is the person, who passed the sentence at the same time, realizes that the judge had an opinion on main issue of the case in the phase of questionnaire, if the reason of arrestment and the reason of conviction are the same. The best example of the cases in such character is the case of Karakoç v. Turkey. The applicants and twenty-one people who were representatives of various trade unions, associations and newspapers have come together, and held a press conference in which they protested the South-Eastern region policies of government on May 27th, 1993. From the applicants Karakoç and Alpaslan signed the declaration as governors of DİSK-Genel İş and Türk Harb-İş respectively, and Akyol representative of Newspaper of Medya Güneşi.

The board of trial convened by the chairmanship of the judge of DGM (State Security Court) O. Karadeniz and consisted of Colonel T. Gözen and Judge C. S. Ural as members decided that the applicants will be arrested.

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231 Mole Nuala, and Harby Catharina, Adil Yargılanma Hakkı, Directorate General of Human Rights Council of Europe F-67075, Strasbourg, Cedex, 2001, 1st ed., October, 2001, p. 31 (İnsan Hakları Avrupa Sözleşmesinin 6. Maddesinin Uygulanmasına İlişkin Kılavuz).

232 Karakoç v. Turkey, 15.10.2002.(Adalet Bakanlığı Yargı Mevzuatı Bülteni, Issue: 161, p. 29).

Advocates of the applicants challenged to the judges, O. Karadeniz and C. S. Ural, and claimed that the judges previously mentioned delivered opinion on decision of arrestment of the applicants on September 17th, 1993.

The court denied the challenge to the judges, basing on the Article 26 of the Act numbered 2845 concerning proceedings of the State Security Courts by its judgment of November 10th, 1993.

The board of trial of DGM consisted of Judge O. Karadeniz, Judge Major M. Yüce and Judge C. S. Ural penalized each of applicants by jail sentence of twenty months and penalty of 208.333.000 TL by reasons of making separatist propaganda aimed the indivisible integrity of Turkish Nation and Turkish State and creating discrimination among the people by its judgment dated April 13th, 1994.

The applicants claimed that Diyarbakır DGM was not independent and impartial, basing on presence of a military judge in that court, and that the judges who signed the decision of arrestment dated September 17th, 1993 subsequently delivered opinion on public lawsuit brought against them too. There are two criteria to be taken into consideration in determining the impartiality in accordance with the Article 6/1 of ECHR: first, whether the private view of the judge was decisive in judgment in a particular case, and second is that if the legal statue of the judge gives sufficiently guarantees to remove suspicions on his impartiality. There is no disagreement on necessity of applying of second criterion in this case.

O. Karadeniz (chief of justice), the military judge, T. Gözen, and the judge, C. D. Ural made a decision of arrestment before a public lawsuit was brought against the applicants yet. According to this judgment, arrestment was done by reason of presence of strong signs regarding a crime was committed in that speech.

ECtHR stated that the judges mentioned signed the verdict of conviction of the applicants too, and that there is no a difference between the reasons of the arrestment

decision and that of the verdict of conviction dated April 13th, 1994. Yet, duty of the judges is to interpret the evidences submitted to them for determining the presence of strong signs regarding the crime. However, a fine distinction appeared between the evaluation of judges and conclusion of the case in this point. In addition, O. Karadeniz, the chief of justice convicted the applicants by decision of reprieve dated 16 November 1995 too. ECtHR concluded that the points mentioned above verified the concerns of applicants that Diyarbakır DGM was not an independent and impartial tribunal.[233] It also arrived at the same conclusion in many recent cases again, such as Bülent Zengin v. Turkey,[234] Bedri and Raşit Aslan v. Turkey,[235] Budak and Others v. Turkey,[236] Benli v. Turkey,[237] Canseven v. Turkey,[238] and Çelik and Others v. Turkey.[239]

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[233] Karakoç v. Turkey, 15.10.2002.

[234] Bülent Zengin v. Turkey, App. No: 60848/00, Strasbourg, 29 November 2007.(http://www.inhak-bb.adalet.gov.tr/aihm/aihmtkliste.asp?psearch=B%FClent+Zengin+&psearchtype=AND)

[235] Bedri and Reşit Aslan v. Turkey, App. No: 63183/00, Strasbourg, 22 December 2005. (Çelik, Adem; Adil Yargılanma Hakkı, (Avrupa İnsan Hakları Sözleşmesi ve Türk hukuku), Adalet Yayınları, Ankara 2007 p. 60)

[236] Budak and Others v. Turkey, App. No: 57345/00, Strasbourg, 10 January 2006.(Adalet Bakanlığı Yargı Mevzuatı Bülteni, Issue: 176, p. 35).

[237] Benli v. Turkey, Strasbourg, 20 February 2007.(Çelik, Adem; Adil Yargılanma Hakkı, (Avrupa İnsan Hakları Sözleşmesi ve Türk hukuku), Adalet Yayınları, Ankara 2007 p. 62)

[238] Canseven v. Turkey, App. No: 70317/01, Strasbourg 15 February 2007.(Çelik, Adem; Adil Yargılanma Hakkı, (Avrupa İnsan Hakları Sözleşmesi ve Türk hukuku), Adalet Yayınları, Ankara 2007 p. 61)

[239] Çelik and Others v. Turkey, App. No: 56835/00, Strasbourg, 20 April 2006.(http://www.inhak-bb.adalet.gov.tr/aihm/aihmtkliste.asp?psearch=%E7el&psearchtype=AND)

The ECtHR discovered a violation in the case of Ferrantelli and Santangelo v. Italy,[240] because of the judge who previously convicted the applicants in another case in which they were tried together was the chief of justice of the court of appeal. Many references had been made to the applicants and to their connection to the lawsuit in the verdict of conviction mentioned. In addition, the court of appeal had given place to much quotation from previous verdicts of conviction of the applicants in its verdict of conviction. ECtHR concluded that these conditions were sufficient for justifying the applicants' concerns objectively.

It was evaluated that three judges taken place in the trial in the court of appeal previously participated in hearing in lower court in the case of Oberschlick v. Austria.[241] ECtHR concluded that this violated the right to trial by an impartial tribunal. In the recent case of Wettstein v. Switzerland [242] which was brought against the Switzerland, in which the applicant was heard by a board of trial consisted of five judges, ECtHR concluded that the Article 6/1 was violated by similar reason. Two of judges in this case were people who represented the other part in another case brought by the applicant, and they were administering justice only part-time. ECtHR stated that the laws and practices of part-time judicial mission in general can be positioned in a frame suitable to the Article 6, but a worrying situation appeared only because of form of implementation of the trial in this case. Although there is no a tangible connection between the case of applicant and other case in which two judges were lawyers, a time coincidence occurred. Therefore, the Court decided that the concerns of applicant about the judges

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240 Ferrantelli and Santangelo v. Italy, 07.08.1996.

241 Oberschlick v. Austria, 23.05.1991.

242 Wettstein v. Switzerland, 21.12.2000.
(http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Wettstein%20%7C%20v.%20%7C%20Switzerland&sessionid=50833577&skin=hudoc-en)

of trial in question would still continue to regard him as the opposite side is right, and this condition would lead to a legitimate fear that the judges would not deal with the case by an impartiality needed.[243]

3.1.2.2.2. Professional Tribunals

ECtHR stated that there is a valid reason to trial by judicial organs when a technical expert knowledge is needed. A tribunal expert in area in question can be assigned. For example, the medical area tribunals are in such character. Bilateral relationships frequently can take place between court members and parts in such tribunals. When a direct connection exists between court members and one of the parts, these members have to withdraw.

When is made a legitimate suspicion a current issue, presence of regular judges in such tribunals[244] or chief of justice's having a decisive vote in the event of tie may not be sufficient. A trial was in the question in a housing and tenancy tribunal in the case of Langborger v. Sweeden.[245] This board of judges consisted of two regular judges and two experts of real estate who assigned by the associations of estate owners and renters each of them. Two experts in board had close relationship with two associations that wanted persisting of ruling to which the applicants objected. ECtHR did not see adequate that the chief of justice had a decisive (superior) vote while it admitted the

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243 Mole Nuala, and Harby Catharina, ibid, pp. 31-32.

244 Şahiner v. Turkey, 25.09.2001 (Adalet Bakanlığı Yargı Mevzuatı Bülteni, Issue: 178, p. 31).

245 Langborger v. Sweeden, 22.06.1989. (Mole Nuala, and Harby Catharina, Adil Yargılanma Hakkı, Directorate General of Human Rights Council of Europe F-67075, Strasbourg, Cedex, 2001, 1st ed., October, 2001, (İnsan Hakları Avrupa Sözleşmesinin 6. Maddesinin Uygulanmasına İlişkin Kılavuz)

legitimate suspicion of the applicant regarding two members have an opposite interest to his, and concluded that the Article 6/1 was violated.

In terms of compulsory arbitration, ECtHR evaluated that the members of arbitration tribunal is not nominated before the lawsuit, unlike the regular courts whose members are nominated before the lawsuit was not brought and consists of judges who are completely unconnected with the case. It found as contrary to the guarantee of impartiality in the Article 6/1 by reason of one of the parts would be advantageous, by expressing that there is no equality between the parts in terms of formation of the board and affecting this formation.[246] These criteria are equally applied for juries.[247]

3.1.2.2.3. Various Duties of Courts

Problems may also arise for impartiality of a tribunal in the event that tribunals take on various roles as in the event of judges. This is much more possible, particularly in cases that a tribunal takes on role of both an advisory and a trial body.[248]

In the case of Procola v. Luxembourg which was an administrative case and related milk quota, four members of French State Council (Conseille D'Etat) have taken on roles of both advisor and judge one after another. This created a situation convenient to appearing of a doubt regarding structural impartiality of the judicial board, since it

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[246] See, İnceoğlu Sibel, ibid, p. 196.

[247] See, the judgments of Gregory v. United Kingdom, 25.2.1997; Holm v. Sweden; 25.11.1993; Remli v. France, 23.4.1996; Sanders v. United Kingdom, 9.5.2000; Pullar v. United Kingdom, 10.06.1996, pars. 31-32; Langborger v. Sweden, 22.06.1989.

[248] See, İnceoğlu Sibel, ibid, p. 195.

arouse objectively rightful fears and a legitimate suspicion, even if slight, relating to that members would feel them bound with their previous opinions.[249]

Such a problem is not probable in our country, since the litigation chambers and chambers of administrative proceedings are dissociated in Supreme Court.[250]

3.1.2.2.4. Judges' Being Connected with the Case (with its parts)

Having a tie or an interest of a judge with the case is one of the main facts that affect the objective impartiality of a tribunal. This also can be any tie that would prevent making an impartial judgment by the judge objectively as it may be an economic one. However, as a rule, this tie has to be direct. An indirect tie may not always be doubt-rousing about impartiality. Having a former relationship of a judge with the parts does not imply violation of the Article 6/1 alone. This relationship and its appearance also must be suitable to creating an objective suspicion in the parts.[251]

ECtHR examined the case of Vehbi Ünal v. Turkey,[252] in such character. The applicant has undertaken a project of structural job of 360 housing for a building cooperative (SS İstanbul Hukukçular ve İdareciler Yapı Kooperatifi) of which members mostly consisted of personnel of Ministry of Justice and judges in 1980.

As a result of conflicting relating proceeding of project, cooperative has canceled the contract. Parts have mutually brought suits against each other before the

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249 Four of five members who previously delivered their opinions about regulation relevant have joined in the trial.

250 See, İnceoğlu Sibel, ibid, pp. 195-196.

251 The case of Vehbi Ünal v. Turkey, App. No: 48264/99, Strasbourg, 9 November 2006.

252 The case of Vehbi Ünal v. Turkey, App. No: 48264/99, Strasbourg, 9 November 2006.

courts in İstanbul. In the end of suits put together later, it was adjudicated that is paid compensation with a default interest in the ratio of rediscount applied by Central Bank to the applicant by a judgment dated 3 March 1993. 15th Civil Section of Chancery approved this conclusion. The claim of Court of Appeal review by the applicant was rejected on June 28th, 1994. Applicant made a complaint about that his property right was violated as a result of his receivable was intentionally decreased by the judges.

For ECtHR, it was not encountered with a physical fact that was suitable to creating a doubt in the care taken by judges to fulfill their duty or in attitudes assumed by them in this case, although it is true that a risking of impartiality is created for the judge who tries the case in the event that the close professional relationship between the judges plays a decisive role on the benefit of a judge. Subjective concerns, while they are understandable, do not constitute a determinative element. It said "Therefore, concerns in question, first of all, have to be demonstrated for being considered as objective", and exemplified mutatis mutandis the judgments of Nortier v. Netherlands (dated 24 August 1993, par. 33), and Remli v. France (dated 23 April 1996, par. 46).

In the case of Wettstein v. Switzerland mentioned above, two of judges were people who represented the other part in another case brought by the applicant, and they were administering justice only part-time. ECtHR stated that the laws and practices of part-time judicial mission in general can be positioned in a frame suitable to the Article 6, but a worrying situation appeared only because of form of implementation of the trial in this case. Although there is no a tangible connection between the case of applicant and other case in which two judges were lawyers, a time coincidence occurred. Therefore, the Court decided that the concerns of applicant about the judges of trial in question would still continue to regard him as the opposite side is right, and this

condition would lead to a legitimate fear that the judges would not deal with the case by an impartiality needed.[253]

ECtHR examined a similar claim in the case of Sigurdssion v. Iceland. The applicant has lost a lawsuit against Iceland National Bank on April 1997. The husband of lady judge who heard the case of the applicant is a member of the court of appeal would make the appeal review, and he had an economic relationship of considerable amount with the bank mentioned. He has stood surety for a loan taken up from this bank, and when this loan was not paid back he has taken up some mortgage bonds, and had another financial company sold these next month. After that, this judge has signed a write-off contract with the bank, and was written off 75 percent of this loan. As a result, the judge of lower court and her husband were in a powerful economic relationship with the bank. The applicant claimed that the judge of lower court would not be impartial on all these grounds. ECtHR has stressed that there is no evidence for personal partiality of the judge of lower court, then examined the case on account of objective impartiality, and concluded that the concerns of applicant about the impartiality of judge was reasonable in respect of the character and size of the financial relationship of trial judge and her husband with the bank, and course of events.[254]

Also, in the case of De Haan v. Netherlands, the judge who chaired the court of appeal was asked for deciding about the objection to judgment himself to be responsible. ECtHR concluded that the concern of applicant regarding objective impartiality of judge at the office of chairmanship was reasonable.[255]

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253 Mole Nuala, and Harby Catharina, ibid, pp. 31-32.

254 The case of Sigurdssion v. Iceland, 10.04.2003 (www.humanrights.coe.int).

255 De Haan v. Netherlands, 0673, 26.08.1997.

One of the judgments exemplifying is the case of Langborger v. Sweden. In this case, a trial in the tribunal of housing and tenancy was discussed. This board of tribunal consisted of two regular judges and two experts of real estate who assigned by government from among the candidates nominated by the associations of estate owners and renters. Two experts in board had close relationship with two associations that wanted persisting of ruling to which the applicants objected. These experts receive a commission from these associations by debating with them. The applicant claimed that these members would not be impartial under these circumstances. The Court emphasized that there is no a doubt on personal impartiality of the experts, then examined the case in the light of objective impartiality and independence. It stated that the presence of regular judges as members did not turn the scale and stressed as follows: "Concerns about that the tribunal would not be impartial in its judgment are in objectively reasonable character. Therefore the Article 6/1 was violated".[256]

In another case, Holm v. Sweden, the applicant who was one of the founders of an organization named Contra which aimed at closely search the communist regimes and Social Democrat Labor Party of Sweden personally has brought a libel action against the author of a book and its publishing house, in which, he claimed that there are some expressions (concerning he had relationships with the groups of Nazi supporter and fascist) against him. The Commission has determined that the book was published by Labor Party, and the author served at publishing house and at the same time offered an ideological consulting service to Labor Party. ECtHR, adjudicating the appeal of applicant, determined that more than half of jury members are active members of Labor Party at the same time, and relevant paragraphs of the book at issue have a political content. Jury was formed pursuant to Sweden Law. Attempts by applicant to be removed of members of political party in question from jury failed. ECtHR emphasized

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[256] Langborger v. Sweden, 22.06.1989, pars. 32-35.

that the relationships were in such character that would create a suspicion about the independence and impartiality of jury members.[257]

3.1.2.2.5. Presence of a Regulation on Impartiality in Domestic Law

The domestic law of contracting state may be acknowledged that particular instances jeopardize the impartiality. Notwithstanding this instance has come true, if a tribunal makes a decision to continue the hearing, this is automatically a cause of violation of the Article 6/1 for ECHR. It is not necessary for ECtHR to examine additionally. The mainstay for the Court here is the hypothesis that although impartiality of tribunal is accepted as doubtful in domestic law, being decided to continue trials would create a doubt about the tribunal's impartiality.

For example, in the cases of Oberschlick and Pfeifer and Planck against Austria, ECtHR stated that there are arrangements in domestic law and so no need to evaluate if ECHR was violated additionally. Let's handle these individually:

The case of Oberschlick v. Austria: Austrian law prohibits that an appealing authority which made a decision about the case in an earlier phase remake a decision by the same members later. This arrangement aims to remove every kind of reasonable doubt about the tribunal's impartiality. And this means that being adjudicated and making a decision by a tribunal which is accepted as impartial by domestic law.[258]

The case of Pfeifer and Planck v. Austria: According to the Austrian law, it is banned that a judge who acted as an examining judge makes a decision about the main issue of the same lawsuit. ECtHR stated that this arrangement automatically makes the

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257 Holm v. Sweden, pars. 32-33 (İnceoğlu Sibel, ibid, p. 198); Gözübüyük and Gölcüklü, ibid, p. 283.

258 See, İnceoğlu Sibel, ibid, pp. 200-201.

local court's judgment contradictory to Convention, so there is no need to investigate the role of judge in investigation phase separately.[259]

3.1.2.2.6. Judgment by Default and Re-trial for the Judgments which Overruled by Court of Appeal

If the local court's judgment is overruled by Court of Appeal and sent back to the same court, being tried the case and made a decision by the same or different judge (or board) automatically does not violate the Article 6/1. Likewise, ECtHR did not approve that an applicant who lost a lawsuit claimed a new trial by a different court by arguing that the trial was performed by default, because of lacking an instance contradictory to the impartiality.

Therefore, in the case of Diennet v. France in which a judgment given by a medical judicial board was denied by Court de Cassation (French Supreme Court) due to an error of procedure, it was not counted as enough for a legitimate doubt three's of the same members being joined second trial in which the same decision was made.

In the case of Ringeisen v. Austria, when the case of applicant who was tried by default was overruled by the superior court, the local court made the same decision again by a board including some members joined the former judgment. Applicant asserted that these members' were being joined to the former judgment is contradictory to the Article 6/1, but ECtHR decided that there is no a violation, stating that the judgment's being overruled would not impose on the court such obligation.[260]

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259 Mole Nuala, and Harby Catharina, ibid, pp. 31-32.

260 Ringeisen v. Austria, 16.07.1971, par. 97.

In the case of Thomann v. Switzerland, the applicant was tried by default and then the judgment was overruled by Court of Appeal and was adjudicated again by the same court. The applicant argued that the court has had a certain opinion while making the former judgment and therefore would not be impartial. ECtHR stated that the court was not bound up to its former judgment, and it would consider the new conditions and evidences as a whole, and would make a decision accordingly. ECtHR, therefore, did not find as contradictory to the impartiality that a judge who made the former decision to retry and make a decision again.[261] Additionally, ECtHR hold that the judges were aware of lacking of sufficient evidences while making their former judgment, and now they will handle the case over again and more comprehensively.[262]

If the composition of court, on the other hand, is modified for each defendant tried by default, these people will be in a more advantageous position according to other defendants, and the defendants who were absent in the first trial will have a chance to trial by other judges.[263]

Likewise, providing an opportunity to be heard by another court once again for those who were tried by default when they appeared will mean to encourage defendants to escape from their first hearing, and nobody will desire to be present at the court will hear them first time. Eventually, both trials will be taken long and courts are imposed by heavy duty and those who were sentenced will be gotten a second right because of their abuse of a right.

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261 Thomann v Switzerland, 10.06.1996.

262 Mole Nuala, and Harby Catharina, ibid, p. 31.

263 See, İnceoğlu Sibel, ibid, pp. 202-203.

3.1.2.3. Regulation Relating to Impartiality of Judges in Turkish Law

The Article 159 of Turkish Constitution was regulated to ensure both independence and objective impartiality. Leaving the power of making a decision about judges' personal affairs such as appointment, promotion, change of station and annual leave to the High Commission Judges and Prosecutors (HCJP: HSYK) which is an independent entity from legislative and executive by Article 159 aims at ensuring the objective impartiality.[264] However, this is a provision that ensures the impartiality by indirect means, not directly. In fact, our Constitution has no any regulation that directly aims the impartiality. This is not an imperfection. For special regulations were made to ensure the objective impartiality between the Articles 22-32 of CCP (CMK) numbered 5271 (and between the Articles 21-30 of former CMUK). These are as follows:

Challenge: The law, sometimes, accepts the parts' opinions as deterministic for impartiality of judges. It is possible to claim challenge when there are grounds for being doubtful of judge's impartiality or in circumstances in which the judge was prohibited to perform his duty.[265] In this instance, the court decides if the judge challenged could hear the case. The judge challenged cannot join the discussion in this respect. If the claim of challenge is accepted, another judge or court is nominated to hear the case.[266]

Retiring of Judge: It is called retiring of judge, a judge's who observed the grounds entails his prohibition or discredits his impartiality automatically asserting this. Some writers comments this as a judge's automatically bringing a refusal suitcase.[267]

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[264] Manisa Barosu Dergisi, 2002/2, Year: 21, Issue: 81, p. 78.

[265] Centel Nur, Hakimin Tarafsızlığı, p. 31 (The Code for Criminal Procedures numbered 5271 also introduced similar regulations).

[266] CCP (CMK) numbered 5271, Art. 27.

[267] Kunter N, 183 V (Centel Nur, Hakimin Tarafsızlığı, p. 31).

When the judge retires by virtue of grounds entails his prohibition, authority nominates another judge or court to hear the case. If the judge retires asserting grounds for presence of grounds for doubtful of his impartiality, authority decides whether retire is suitable. If it is found acceptable, another judge or court is nominated for the case.[268]

Prohibition of Judge: Judge is prohibited by law, in the instances of judge's impartiality would be jeopardized is predicted by the law. In such a case there is nobody's evaluation, but judge is prohibited for hearing the case by law. Everyone related the case can set forth this. The Article 22 of CCP (CMK) counts the instances of judge's prohibition. Accordingly, if the judge himself is suffered from the crime or being acted as a prosecutor, judiciary police, advocate of defender or victim, or being heard as a witness or expert in the same case, or has a relationship of kinship to some degree, marriage, of tutelage or adoption, even if ended later with the defendant or victim, he cannot hear the case.

According to the Article 32 of CCP (CMK), same provisions are applied to the court stenographers. Chancery said: "X's taking office as court stenographer, who had heard as a witness in same case before is contradictory to the law and procedure".[269]

The Article 68 / (a) and (b) of CJP (HSK) numbered 2802 were enacted for the purpose of ensuring the judicial impartiality. This article was prepared intended for assuring the people an image of impartial juridical and ensuring a maximally impartial juridical. For this article explains the sanctions to be applied to those who overshadow the objective impartiality of judiciary by their improper actions. Accordingly,

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[268] CCP (CMK) numbered 5271, Art. 30.

[269] judgments of 6th Criminal Section of Chancery, 10.03.1998, 2249/2153; 6th Criminal Section of Chancery, 24.02.1998, 1686/1515; 6th Criminal Section of Chancery, 25.02.1997, 1444/1756.

The Article 68 / (a) says: "To give idea of would not perform his duty impartially and correctly by his works and behaviors"

The Article 68 / (b): "Losing occupational reputation and prestige or personal honor and dignity by bad or improper behaviors and relationships entails punishment of replacement".

Article 77 of CJP (HSK) numbered 2802 also made regulations intended for providing confidence needed by people in a democratic society. Accordingly, if it is convinced that maintaining of duty by a judge or prosecutor about whom an investigation is continued would injure prestige and dignity of judicial power, HCJP (HSYK) may decide that judge or prosecutor concerned is dismissed as a temporary expedient or employed in another district by adopted authority until investigation is concluded.

However, guaranteeing of impartiality in only legal context alone is not enough; practice must be also in this direct. This will establish the objective impartiality and will make contribution to realization of objective impartiality. Today, however, confidence to justice in our country is below expected. According to "Supervise the Justice Project" carried out by Research and Execution Center for Human Rights Law of Istanbul Bilgi University for determining how the justice is seen in the eyes of citizens, 48 percent of 3,172 people confide in courts while 26 percent do not. And resting 26 percent is not sure in this respect.[270] Main reason for this is not that judgments are partial, but not being taken steps which would show the impartiality, that is, not being ensured the objective impartiality of the courts. One of the most important causes of this that the implementers especially judges and prosecutors did not

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[270] http://www.tumgazeteler.com/?a=4082132

comprehend the significance of the appearance, and they find satisfactory that their own judgments are accurate and forming of their own opinion of conscience.

There is no a regulation for challenge or prohibition of prosecutors in Turkish Code for Criminal Procedures. Some writers pointed out the legal position of prosecutors as cause for this. According to these writers, a prosecutor spontaneously can replace by another prosecutor, or can be applied to the Court of Appeal, or prosecutor of the case can be replaced by his superior.[271] However, it was given place to retiring from office of a prosecutor in the Code for the Foundation of Military Courts and their Proceedings numbered 353. According to the Article 46 of this Code, the prosecutor has the grounds for retiring in the Articles 37 and 39 must retire from the office.[272]

On Judge's Duties Vary:

As mentioned before, a judge is prohibited to hear a case, if he was acted as a prosecutor, judiciary police, advocate of defender or victim, or was heard as a witness or expert in the same case, or being heard as a witness or expert in the same case, because these states are accepted as prohibition causes and in contemplation of he would not be impartial.[273] Some Chancery's judgments are cited below.

The decision made about Nuri Uğur Güven, defendant by misconduct in office, was reviewed by General Assembly for Penal Actions of Chancery (YCGK) upon defendant's appeal. Since the complainer Prosecutor M.K. was taken statements by the judge of Edirne 1st Criminal Court of First Instance, S.O. who testified as a witness during both investigation and proceedings as contrary to the Article 21/5 of CMUK was

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271 Centel Nur, Hakimin Tarafsızlığı, pp. 34-35.

272 Centel Nur, Hakimin Tarafsızlığı, p. 35.

273 Article 22 of CMK (CCP) (Art. 21 of former CMUK).

in force in that time and contained same regulation as the Article 22 of current CMK, General Assembly decided to reverse the judgment simply because without reviewing its other aspects.[274]

Since it was understood that E., who delivered opinion when he acted as a Prosecutor in Chancery by drawing up a written notice, took office and voted subsequently as a court member of 2nd Criminal Section of Chancery when he was a member of Chancery, that judgment was found as contrary to method and law, because a person who acted as a prosecutor would not have a part in court board according to the Article 21/4 of former CMUK.[275]

A judge's concluding a case in the Criminal Court of First Instance, who earlier made a non-jurisdiction decision in the Criminal Court of Peace hearing the same case has entailed reverse the judgment, because of contradiction to the Article 22 of former CMUK.[276] However, Chancery does not interpret every decision of non-jurisdiction as the judge's making clear his opinion. According to Chancery, if a judge makes a decision of non-jurisdiction attaining an opinion about the case by collecting evidences, he cannot hear the case in the subsequent stages. However, if a judge makes a decision of non-jurisdiction coming to the conclusion that his own court is out of work only according to the indictment's statement, without attempting to any investigation or collecting evidences about the case, he may later hear and conclude it. For since he did

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274 Decision of General Assembly for Penal Actions of Chancery, 02.07.1995, 444/185 (Erol Haydar, İçtihatlı Ceza Muhakemeleri Usulü Kanunu, 2002, p. 150).

275 judgment of YGCK, 08.07.1991, 194/1051.

276 judgment of Chancery 9th Criminal Section, 8.5.1984, 1540/3835.

not obtain any opinion about the case, he did not attempt to hearing the case and did not collect evidences.[277]

Chancery formalized this point first by its judgment of Grand General Assembly for Combination of Jurisprudences dated 05.12.1977 and numbered 2/3 and later by its judgment of General Assembly for Penal Actions dated 09.03.1992. According to latter judgment, disagreement between local court and section related is regarding whether the judge who made a decision of non-jurisdiction for nature of crime in the indictment would join the trial of court hearing the case. It was found as undesirable and prohibited according to the Article 22 of CMK that the judge who articulated his opinion by hearing the case, collecting the evidences, and attaining an opinion about the case join the decision.

However, a judge who made a decision of non-jurisdiction realizing his court is out of work because of crime's nature taken place in the indictment or in decision of opening an investigation, not by obtaining an opinion in trial or changing of crime's nature cannot be counted as heard the case in this situation. Performed work by the judge here consists of sending the case which was brought to his court by an error of fact to the court it belongs to by a decision of non-jurisdiction, and he cannot be counted as attaining an opinion or making his opinion clear.

This was accepted as a principle by decision of Grand General Assembly for Combination of Jurisprudences. When this judgment is examined, it will be seen that there is no a legal obstacle for the judge who made a decision of non-jurisdiction to join and adjudicate for the subsequent trial, because he made a decision of non-jurisdiction by reason of the power of hear the case belonged to the superior court for the nature of crime in the indictment (in the light of indictment's expression), he did not made a

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[277] judgment of Chancery General Assembly for Penal Actions, 09.03.1992, 7/46-71.

decision of non-jurisdiction by explaining the crime's nature and section of the law to be applied to after he got a particular opinion about the case hearing the case in the earlier trial.[278]

The law stipulated more comprehensive regulation taking the parts' conviction into consideration with respect to challenge, although it stipulated more limited number of instances for prohibition. Indeed, it says: "The challenge can be demanded by virtue of other reasons would endanger the impartiality of judge".[279] However, the matter is that the doubts about the judge's impartiality are objectively reasonable.

As is seen, a consistency is present between Turkish Law and the criteria of European Court of Human Rights.

A point regarding arrest to be emphasized here is that the first condition for arrest in Turkish law is presence of facts establishing strong doubt for crime and a reason for arrest.[280] These reasons for arrest are counted in the Article 100 of CCP (CMK) in detail. Arrest is not accepted as reason for challenge or prohibition and is argued that the judge's decision would change with the evidences.[281] The judge who makes an arrestment decision is someone who concluded that there are strong doubts regarding the defendant really committed the crime. For this is the prerequisite for the arrest decision. However, this is a decision that was given according to the evidences on

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[278] CGKK, 09.03.1992, 7/46-71 (Erol Haydar, İçtihatlı Ceza Muhakemeleri Usulü Kanunu, 2002, p. 154).

[279] Art. 24/1 of CMK.

[280] Code for Criminal Procedures numbered 5271, Art. 100/1.

[281] See, Önder, Ceza Muhakemeleri Usulü Kanununun 22. Maddesine Göre Hâkimin Davaya Bakamayacağı Haller, p. 529.

the instant of demand for arrest. The opinion in this respect can vary with the evidential instance in the future stages of trial.[282]

For anticipating judge's making an arrest decision without obtaining a strong opinion regarding the crime was committed by defendant on the instant of demand for arrest will pose a great danger for correctness of the arrest decision. So, either the decision of arrest would be made without based on sound grounds, or different judges would hear many of the cases arrived at courthouse. When we compare with the judgment of Hauschildt v. Denmark, condition of "presence of a strong doubt of crime" can be seen as a potential violation, but, in my opinion, such condition is necessary for arrest.

Likewise, for our law, to hear an objection against a proceeding such as arrest or confiscation does not remove the impartiality of judge. However, Chancery, making an interpretation in this respect, found as contrary to the Article 22 of former CMUK that a judge who reviewed the objection to the arrest by giving reasons and explaining evidences hear the case in the stage of conclusion.[283]

In its judgment dated 1988, Chancery said: "It was concluded to reverse the judgment, since the Judge Ö. F. B. who heard and concluded the case about the crime for violation of immunity of domicile by an acquittal decision, while he giving a notice for perjury about witnesses, gave reasons in character of making clear his opinion and

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[282] Centel Nur, Ceza Muhakemesinde Hakimin Tarafsızlığı, 1996, p. 96.

[283] See, Y 5. CD, 09.04.1976, 1072/1150 (Yurtcan, Ceza Muhakemeleri Usulü Kanunu Şerhi, p. 436).

made an arrest decision, and since he is prohibited for hearing this case according to the Article 22 of [former] CMUK".[284]

According to the Article 23/2 of CMK numbered 5237, a judge who has taken office in investigation stage cannot serve in proceedings. According to the Article 163/1 of the same Code, "In the red-handed instances or in the instances in which delay is undesirable, if the Public Prosecutor cannot be reached or the case exceeds the Public Prosecutor's workload as its extent, the judge of criminal court of peace may also perform all transactions". Again, according to the Article 11 of The Code on Way of Operation and Implementation of Code for Criminal Proceedings, numbered 5320, 'second clause of the Article 23 of Code for Criminal Proceedings is not applied in instances of except the provision of the Article 163 of the Code'.

Likewise, according to the Article 7/1 of CMK, 'Performed transactions except that their renewal is impossible, by judges or courts are out of work are invalid".

Judges' Being Connected with the Case (with its parts):

The instances in which the judges absolutely cannot hear the case are stated making special regulations in this respect by the Article 22 of CMK numbered 5271, as well as the it is expressed that judges can be challenged in all instances that compromise the impartiality of them in the Article 24. According to this provision, the judge cannot act as a judge in the following instances:

If he is personally suffered from the crime;

If he has a relationship of marriage, of tutelage or trustee with the suspicious, defendant or victim, even if ended later;

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[284] Chancery 4th Criminal Section, 01.03.1988, 1292/1641.

If he has a relation by lineal descent or a direct line with the suspicious, defendant or victim;

If he has a relationship of adoption;

If he has a blood tie, including third degree, with the suspicious, defendant or victim;

If he has an affinity relationship by marriage, including second degree, with the suspicious, defendant or victim, even if the marriage is ended;

If he acted as a prosecutor, judiciary police, advocate of defender or victim in the same case;

If he has heard as a witness or expert in the same case.

A particular proximity of judge with the defendant or victim that would entail prohibition of judge may raise a reasonable doubt about his impartiality.[285] Similarly, close friendship, partnership or so forth between the judge and defendant may endanger the impartiality of judge. However, only the societal relationships are not accepted as reason for challenge. Similarity of private life of judge and that of one of the parts is not also accepted as reason for challenge.[286]

Not only good relations, but also bad relations between the judge and one of the parts may endanger the impartiality and so are accepted as reason for challenge.

Presence of Regulations about Impartiality in Domestic Law:

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[285] Kunter Nurullah, p. 131.

[286] Centel Nur, Ceza Muhakemesinde Hakimin Tarafsızlığı, 1996, p. 91.

Such regulation is present in the Article 22 of CMK. We have already counted these conditions above. If one of these conditions is present, judge cannot hear that case.[287] Since these conditions are decisive and restrictive, break to them constitutes contradiction to domestic law. Indeed, 2nd Criminal Office of Chancery said in its judgment dated 09.01.1985: "Reversing of judgment is entailed by reason of the Judge T.B. who was heard as a witness in a case which was brought against one of the defendants before the Criminal Court of Peace by virtue of an event between the parts opposed to the Article 21 of CMUK (currently Article 22 of CMK) by means of conducting and concluding a hear of another private case numbered 1983/1394 about other defendants".[288] ECtHR accepts it as opposition to the Convention in the event of opposing to a provision of law obviously arrangement like this.

Judgment by Default and Re-trial for the Judgments which Overruled by Court of Appeal:

In the event that a judgment is overruled by Chancery and re-sent to the local court, there is no a legal obstacle for the judge who made the first judgment to re-trial the case and conclude in our law. However, for some writers, this may be a reason for challenge. For the judge who confirmed the first judgment has had an opinion about the case. It is impossible to get rid of former decision's influence for him completely.[289] Although a judge who heard the case and decided about it as a first instance judge can rehear the case and remake the decision overruled by Court of Appeal, a judge who made a decision in the first instance court cannot join the trial in the Court of Appeal phase of the same case. Indeed, Article 23 of CMK says: "A judge who has joined a

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287 Article 22 of CMK.

288 Chancery 2nd Criminal Office, 09.01.1985, 12297/212.

289 Centel Nur, Ceza Muhakemesinde Hakimin Tarafsızlığı, 1996, p. 101.

judgment or a judgment cannot join the decision or judgment which to be made by responsible superior court for that decision or judgment".

It is not a violation that the same judge re-examine the judgment overruled by Court of Appeal. For this may be considered as a hearing by default. ECtHR does not see the hearing by default as a violation.[290] In addition, to stipulate that a judgment overruled by Court of Appeal must be re-examine by another judge would impose a workload which is impossible to overcome to the courthouses. The case, on the other hand, would be necessary to re-examine by a new judge who is no aware of the case. And this would endanger the right to trial within a reasonable time.

The Article 193/1 of CMK says: "…excluding instances excepted by law, cannot be conducted a hearing for the defendant is absent", and the Article 195 states this exception as follows: "If the crime only necessitates judicial fine and/or confiscation, hearing can be conducted even if the defendant is absent".

3.1.2.4. The Possibilities to Remove Infringement

3.1.2.4.1. Waiver

Although ECtHR accepted that a defendant would abandon his right to trial by an independent and impartial tribunal, it did not establish clear principles regarding degree for this. ECtHR, nevertheless, explained that the possibility of this kind of waiver has to be limited and minimal guarantees must be kept, and the waiver would not depend only on the parts. ECtHR is recalled that a waiver – in so far as such a waiver is permissible – must be established in an unequivocal manner. The parts have to be informed about the doubts regarding impartiality and were given an opportunity to

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290 Ringeisen v. Austria, 16.07.1971, par. 97.

make the matter a current issue, and they must be expressed their satisfaction about formation of court. Lacking of an objection does not mean unequivocal waiver alone.[291]

One of the judgments in which the Court obviously established this principle is the decision of Pfeiffer and Planck v. Austria. Two members who questioned the applicant are at the same time those who tried him in this case, and the current state is a reason for demanding judges' retiring from office according to Austrian law. The applicant was taken in hearing room without his lawyer and was reminded his right to challenge in this case. Applicant did not clearly state that he abandoned this right, notwithstanding he did not exercise his right. Lacking of objection to the presence of judges taken office being opposite to domestic law was not regarded as sufficient for waiver by the Court.[292]

In this case again, ECtHR expressed that the impartiality of tribunal is very important and this would not depend on the parts' will, and said that even if the applicant would obviously accept the court board, waiver would be invalidated, that is, the impartiality would be still violated. For since the applicant's legal information is inadequate, he is not in a position to understand sufficiently meaning of this alone. For his lawyer did not accompany him. So, ECtHR has obviously emphasized the necessity for keeping of minimal standards about impartiality.

Likewise, in the case of Oberschlick, another case against Austria, ECtHR has indicated criteria. A judge who has taken office in the Court of Appeal stage cannot hear the same case later according to Austrian law. In this case, the judge who was chief justice has also joined the subsequent trial and this was a reason for challenge. This

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[291] Mole Nuala, and Harby Catharina, ibid, p. 33.

[292] Pfeiffer and Planck v. Austria, 25.02.1992, pars. 37-38.

right was reminded to the applicant, but he had no exercised this right, that is, no objected. However, he was ignorant that two other members were in the same position. ECtHR has decided on the tribunal was not impartial that no reminded both this is not an unequivocal waiver and he could also challenge these members to the applicant, and that the applicant has not abandoned this right.[293]

We had mentioned above that the opinion of ECtHR was that the impartiality and independence were injured even if from the point of view of appearance in the trials conducted by DGMs (State Security Courts) in which the military judges have a part. In the case of Öcalan v. Turkey, one of these, the military judge has joined some parts (first two months) of trials,[294] but prior to be reached to the conclusion stage, he was substituted by a civilian judge, and the final judgment was made by participation of this civilian judge. In this case, ECtHR has asked to the applicant about if he demanded to be retried for part of up to that stage of trials, the applicant has expressed that he accepted the judicial power of the court on his own.[295] However, ECtHR has no regarded the applicant as abandoned the right to trial by an independent and impartial tribunal. For the lawyers of applicant have essentially raised an objection to the independence and impartiality of the tribunal by objecting to the presence of a military judge. They have accepted the judicial power of the court, but this cannot be interpreted as a waiver and is a different thing from waiver.[296] ECtHR found as contradictory to the principles of independence and impartiality that the military member has joined the trials even if partly, and did not accepted that the applicant has obviously abandoned his

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[293] Mole Nuala, and Harby Catharina, ibid, p. 33; D. J. M. O'Boyle, C. Warbrick, Law of the European Convention on Human Rights to Administrative Law, The British Yearbook of International Law, p. 239.

[294] Öcalan v. Turkey, 01.07.2002, par. 118.

[295] A.m.d, par. 34.

[296] Öcalan v. Turkey, 01.07.2002, par. 116.

right to trial by an impartial tribunal.[297] ECtHR, for these reasons, concluded that the Article 6/1 was violated.

3.1.2.4.2. . Review of a Judgment by a Fully Authorized Superior Court

(Falling outside the criminal actions) In the cases of civil law, if there is an authority which can review and conclude the decisions made by the local court, ECtHR concludes that being independent and impartial of this superior board is sufficient. However, this superior decision maker must be fully authorized as well as being impartial. That is, it must able to conclude reviewing the case not only in terms of judicial, but also in point of main issue of it. ECtHR, in the case of Kinsley v. United Kingdom, has decided that being able to apply to the superior court against a decision made by an administrative body in which the power of administrative discretion was also exercised but in a judicial character did not remove the violation, because its supervisory power was limited.[298] For the superior authority to which was applied against this decision has no power of overruling or return it to the same or a different lower organ to retry, when it reviewed and accepted applicant's allegations about impartiality.[299] The Court thus finds that, in the particular circumstances of the case, the High Court and the Court of Appeal did not have "full jurisdiction" within the meaning of the case-law on Article 6 when they reviewed the Panel's judgment.

ECtHR reviewed the matter in the case of Le Compete v. Belgium. The applicant who is a doctor was forbidden to exercise his profession for 6 weeks by the Chamber of Physicians by virtue of his declaration disagreeing with seriousness and

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297 A.m.d, par. 34.

298 Kingsley v. UK, 07.11.2000, par. 59.

299 A.m.d, par. 59.

honor of the profession in a newspaper. Applicant has applied to High Commission and to Superior Court, but the results were against him.[300] Applicant did not abide by these judgments and was punished several times more following this, but applied to remedies each time. ECtHR stated that important is to determine if the High Commission and Superior Court were independent and impartial, not the Chamber of Physicians. And it concluded that the Article 6/1 is not violated emphasizing that this Commission and Superior Court met the conditions of independence and impartiality.[301]

If the superior court is not a fully authorized court that would review the case for both procedure and main issue, presence of a superior authority that would review the case does not carry weight. In this situation, whether the first instance court is independent and impartial comes into prominence, and then, if it is not independent and impartial, the Article 6/1 is regarded as violated. In the case of Belilos v. Switzerland, ECtHR had assessed the situation of the court member who is a policeman and concluded that this member would not be independent and impartial by considering his office he would return later. ECtHR did not confine itself to this, and searched if the Court of Appeal is fully authorized and has qualifications to remove the violation, and concluded that this authority has no a power of adjudication reviewing the main issue of the case, that is, it is not fully authorized, consequently the violation of the right to trial by an impartial tribunal was not removed.[302]

ECtHR accepts that the violation could be removed when an superior court review the case, if it has a power of adjudication about the main issue of the case. In the case of De Cubber v. Belgium in this respect, ECtHR has said: “Even in such situation,

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300 Le Compete v. Belgium, 23.06.1981, pars. 41-50.

301 A.m.d, pars. 56-58.

302 Belilos v. Switzerland, 29.04.1988.

it does not follow from that the lower courts necessarily does not have essential guarantees. Such corollary does not accord with the intention of establishing courts in multiple levels or with the intention of strengthening of further protection secured for the parts of disagreement"[303]

However, it stated that the violation would not be removed in the instances of source of violation is internal organization of the court, since the superior court has no power to compensate this. In the case of De Cubber v. Belgium in such character, ECtHR hold : "A superior or a topmost court, of course, has a possibility for removing an original violation of one of the provisions of Convention in some conditions. This is the reason of presence of rule of exhaustion of domestic law remedies in the Article 26 of Convention" (see, judgment of Guzzardi dated 06.11.1980, par. 72; and judgment of Van Oosterwijck, par. 34). Therefore, it was noted that Austrian Supreme Court has abolished the applicant's "guiltiness determined" by a local court without agreeing to the principle of presumption of innocence in the Article 6/2 of the Convention in judgment of Adolf dated 26 March 1982.[304]

However, the conditions of current case are different. The fault in question here did not rely on only running of the first instance trial; the source of fault is in the composition of Oudenaarde Criminal Court and involves the internal organization. Superior court did not remove the fault, since it did not overruled the judgment dated 29 June 1979 for this reason.[305]

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303 De Cubber v. Belgium, par. 32.

304 See, judgment of Adolf v. Austria, 26.03.1982, pars. 38-41.

305 De Cubber v. Belgium, pars. 32-33.

Establishing of courts of appeal, therefore, will provide a great benefit (provided that with the exception for the problem stems from an internal organization) for both providing opportunity for removing the violation occurred in the first instance court and to ensure for Chancery to work as a real jurisprudence court. Indeed, legal workings for establishing of these courts were accomplished and proceedings such as supplies of facilities and personnel were reached to the terminal stage. Code for Establishing, Duties and Powers of First Instance Court of Judiciary and Regional Courthouses Courts numbered 5252 was enacted on September 26th 2004. This Code was judged to be come into effect on June 1st 2005, but then it was postponed first to 2008, and to 2010 later. Groundwork and districts of some regional courts were determined, but they were not gone into operation yet.

It is necessary to seek for independence and impartiality in every stage for criminal cases. Indeed, ECtHR did not find sufficient for Court of Appeal to be fully authorized to remove violation in the case of Findlay v. United Kingdom.[306] ECtHR did so, taking the character of a criminal case and magnitude of an interest to be protected into account in some degree.

ECtHR, on the other hand, assessed the topic, and accepted that being skeptical about the impartiality of DGMs is objectively reasonable by virtue of presence of military members in judgment of İncal. ECtHR, not staying with it, has decided that the Court of Appeal has no powers to satisfy this need, therefore this lacking of impartiality was not removed, and the Article 6/1 was violated.[307]

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306 Findlay v. United Kingdom, par. 79.

307 See, İnceoğlu Sibel, ibid, p. 206; Kingsley v. United Kingdom, par. 52 (İnceoğlu Sibel, ibid, p. 205).

CHAPTER III

4. THE RIGHT TO TRIAL WITHIN A REASONABLE TIME

4.1. Concept

According to the European Convention on Human Rights, Article 6, "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing within a reasonable time by an independent and impartial tribunal ..."[308]. The delays on the judicial process cause complaints in many countries. The saying that "Late justice isnot justice" emphasizes the importance of justice to be distributed quickly. Therefore, it is must for the contracting states which undertakes just trial to bring a solution to this problem. According to ECtHR, Article 6/1 of the Convention, attaches the states the responsibility to organize their judicial systems depending on this paragraph[309]. As a matter of fact, Article 141/4 of the Constitution clearly states that trails to be ended with the lowest expenses and within the shortest time as possible as is the responsibility of the judgment. The rule of ending the trials within a reasonable time is practiced in trials about both penalty and civil rights and responsibilities[310].

The right to trial within a reasonable time may be called as a right that is violated by many countries lead by Italy. As a matter of fact, while the other rights are

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[308] Micallef v. Malta, App no. 17056/0, Judgment Strasbourg, 15 January 2008, par. 21.(http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Micallef%20%7C%20v.%20%7C%20Malta%2C&sessionid=50833577&skin=hudoc-en)

[309] Tutsa v. Italy, 27.2.1997, A 231& 57; Bunkate v. Netherlands, 26.5.1993 & 20-23 (Gözübüyük Feyyaz and Gölcüklü Şeref, Avrupa İnsan Hakları Sözleşmesi ve Uyulaması, 4th press, p. 484); Tamkoç v. Turkey, 25.09.2001, par.31. (Adalet Bakanlığı Yargı Mevzuatı Bülteni, 12.03.2002, number 172, p. 54)

[310] Karen Reid, Adil Bir Yargılamanın Güvenceleri, Avrupa İnsan Hakları Sözleşmesi Rehberi, 3rd Book, SCALA Yayıncılık, 2000, p. 149.

improving, seeing that the judgments that reached conclusion are mostly related with the violation of this right, it is clearly understood that there isnot any effective improvement in the field of right to trial within a reasonable time. The Court does not determine a certain amount of time for cases to be concluded. Every single incident is evaluated separately. The basic of this right is to prevent both the interests of persons to be violated and[311] person's expectations about the trial turn into worry, anxiety and grief. These situations are more evidently observed in penal cases. Because, while in civil cases preparing the court for the conclusion depends on the parties, in penal cases this responsibility belongs to the national courts. In addition, in penal cases, the interest under risk is generally greater. It is more obvious in cases of limitation of liberty such as detention. But also a concrete majority lives through the negative effect of the delayed law cases.

The Court explains this aim in one of its first judgments, in Stögmüller v. Austria case in 10.11.1969: "The aim of this judgments which is valid for all right demanders is to protect these persons against the delays in trial processes; especially in penal cases to prevent the accused or the person who waits for a conclusion for any reason to live, for a long time, with the anxiety about how the case would be concluded[312]."

As a matter of fact, Bock v. Germany case ECtHR invites attention to this point: during the divorcing case the mental health of the applicant also tried as a matter

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311 Aşçıoğlu Çetin, ibid, pp. 150-151.

312 Stögmüller v. Austria, 10.11.1969, A 9 & 5 (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=St%F6gm%FCller%20%7C%20v.%20%7C%20Austria&sessionid=50833577&skin=hudoc-en) and Gguincho v. Portugal, 10.07.1984, A 81 & 38.

of case and a guardian is assigned. This case lasted 9 years. Applicant suffered for a long time because of this claimed that is later proved to be false.[313].

The reasonable time in article 6/1 carries a different meaning from the reasonable time mentioned in article 5/3. Because the reasonable time mentioned in article 5/3 pays attention to the duration of detention to be whether reasonable or not. But the reasonable time in article 6/1 covers the duration starting with the beginning of the case until the end. This duration starts with attribution of a person until the case ends with a definite conclusion[314]. But the situation of detention constitutes a special reason for the case to be ended in a short period of time and in such cases the two concept of reasonable time is relation. Also according to CMK, in cases that the suspected is under detention the case should be re-examined in at most a month.[315].

It is observed that the most applications to the commission about the delayed trails are against Italy. According to ECtHR, article 6/1 of Convention considers the states responsible to establish and run a judicial organization capable to fulfill this rule. The situation of cases not being ended within a reasonable time is not only damaging the effectiveness and esteem of judgment but also hindering the superiority of law.

Let us mention once that ECtHR does not determine a constant period of time for cases to be ended. Every case is decided on depending on particular conditions. That

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313 Bock v. Germany, 29.03.1989, A 150 & 48 (İnceoğlu Sibel, ibid, pp. 357-358)

314 Coşkun v. Turkey Application No: 620/03, Strazburg 21 April 2009, (http://www.inhak-bb.adalet.gov.tr/aihm/aihmtkliste.asp?psearch=co%FEkun&psearchtype=AND)

315 Turkish Code for Criminal Procedures, Art. 112.

is why while 3 years and 11 months is considered as a long term in one case[316] 15 years may be considered as suitable in another.[317]

4.1.1. Criminal Cases

In the case of Dobertin v. France, the applicant was charged with espionage activities. After being revoked of State Security Courts, the case was heard by the civil court and concluded in 12 years[318]. In the case of Kamache v. France the applicant was charged with counterfeiting. This case was concluded in 8 years and 6 months[319]. In the case of Abdoella v. Netherlands the applicant was charged with being accessory of murder (to get someone to murder a person), the case was concluded in 4 years and 4 months[320]. The ECtHR decided that, in all of these cases the article 6/1 of the Convention was violated.

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316 Zana v. Turkey, 25.11.1997.

317 Ciricosta and Viola v. Italy, 4.12.1995, Series A, No. 337 (Applicant has made a claim for postponing the case just 17 times and not objected to the claims for postponing 6 times by other part).(http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Ciricosta%20%7C%20Viola%20%7C%20v.%20%7C%20Italy&sessionid=50833577&skin=hudoc-en)

318 Dobertin v. France, 9.3.1993, p. 30 et seq.

319 Kemache v. France, 29.11.1992, p. 19 et seq.

320 Abdoella v. Netherlands, 17.11.1992, p. 22 (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Abdoella%20%7C%20v.%20%7C%20Netherlands%2C&sessionid=50833577&skin=hudoc-en)

4.1.2. Civil Cases

The case of Wiesinger v. Austria[321], which subject of hearing was getting title deed to a piece of land, lengthened 9 years, after taking into consideration to the complexity of case and attitude of the applicant, the ECtHR found out that the main reason of lengthening of the process is the bureaucratic procedures between municipality and the local land commissions, therefore the article 6/1 of the convention was violated. Suchlike, in the case of Silva Portes v. Portugal, lengthening of the indemnity case for 10 years, which welded from a traffic accident, was found against the article 6/1 of the convention by the ECtHR. Likewise, the case of Estima v. Portugal, which was a simple law personal action, lengthened 13 years and the ECtHR decided that, the article 6/1 of the convention was violated. In the case of Darnell v. United Kingdom, the applicant brought a case against the company's dismissal decision from the profession and the lengthening of the case for 9 years was found a violation of article 6/1 of the convention[322].

4.1.3. Administrative Cases

The ECtHR applies the article 6/1 of the Convention on administrative cases like civil and criminal cases and clearly emphasizes that the administrative cases must be concluded in a reasonable time under the meaning of the article 6/1 of the convention. In the case of König v. Germany, the ECtHR hold that reasonableness of process of the cases that before an administrative court are interpreted under the special

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321 Wiesinger v. Austria, October 1991.

322 Ünal Şeref, İnsan Hakları Avrupa Sözleşmesi İnsan Hakları Uluslar Arası İlkeleri, p. 182.

circumstances of each case[323]. In the case of Scuderi v. Italy, because of the accounting system of the monthly salary the applicant brought a case against the Finance Ministry and the hearing lasted 4 years and 5 months. In the case of Massa v. Italy, this was about being different of salaries of women and men despite doing the same work, lasted 6 years before the government accounting bureau. In the case of Pailot-Richard Henra and Leferme v. France[324], applicants were ill; while blood was transferring to the applicants the virus HIV was infected to the applicants, therefore the applicants brought indemnity cases against the ministry of healthy and the cases lasted about 4-6 years. The ECtHR decided that the article 6/1 of the Convention was violated in each one of these cases[325]. Suchlike in the case of X v. France, while blood was transferring to applicant the virus HIV was infected; therefore the applicant brought an indemnity case against state. The ECtHR took into consideration to the individual situation and probable life expectation of the applicant and decided that 2 years lasting of the trial is not a reasonable time process[326].

In order to fulfill their burden on the right to trial within a reasonable time, the contracting states must make necessary harmonization studies on their national law. In case of infringing this burden and violation of the convention is frequently criticized by

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[323] König v. Germany, 28.06.1978. para 37, (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=K%F6nig%20%7C%20v.%20%7C%20Germany%2C&sessionid=50833577&skin=hudoc-en)

[324] Amd, 20 April-12 May 1998.

[325] Ünal Şeref, İnsan Hakları Avrupa Sözleşmesi İnsan Hakları Uluslar Arası İlkeleri, p. 183.

[326] X v. France, 23 March1991, pars. 47-49.

the ECtHR and in these circumstances the ECtHR generally gives its judgment without detailed examination[327].

In Turkish law system there is no definite provisions on the right to trial within a reasonable time. Article 141/4 of the Turkish Constitution says: "finishing of cases in way of cheapest and fastest hearing is the burden of the judiciary." According to the numbered 3005 statue (Code for Red-Handed, law that is applied on cases involving persons caught in the act of a crime) some specific cases in mass media they have to be brought before the court by an indictment. In case infringe to this obligation there is no law sanction and this code is almost never applied in practice. It is easily available understand that there is no definite criterion. As a matter of fact setting a definite time period is impossible. Because specific characteristics of each case requires different time processes. Nevertheless due to finish the cases in a reasonable time occasionally changing are made in procedural regulations[328]. Like this there is a regulation aims to bring the press cases before court in 6 months from the beginning of the investigation. Like this to finish in the shortest time to the investigations against the judges and public prosecutors in the code of judges and prosecutors some regulations have been made. According to this regulation: public prosecutor has to write and send the indictment to

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[327] İnceoğlu Sibel, ibid, p. 358).

[328] 18.11.1992 date and 3842 numbered Code, in case of lengthening of hearing aimed to prevent being victim of the suspected who under arrest, by bringing a limitation to the status of arrest. According to the article 110 of the Turkish Code for Criminal Procedure, today the arrest term is limited with the 6 months of time period at the preliminary investigation except the private circumstances. In case of bringing the case to court, this term cannot exceed 2 years. Due to special difficulting characteristics of investigation or hearing or extensive characteristics of the case, if at the end of the term the case cannot be brought to court or the judgment cannot be settled, in case of less than 7 years of the sub limit of the punishment the arrest can be finished. If the sub limit of punishment of the crime is 7 years or more than seven years or death penalty, under the light of the evidences, the reason of the arrest and private position of the accused, the arrest can be finished or continued or can be finished under the stipulation of being given of a cash bail.

criminal court in 5 days for the judgment of the criminal court whether a hearing is necessary or not.

The judges and public prosecutors have to conclude a proportion of cases in 2 years promotion term. These proportions are; 80% for judges and 85% for prosecutors.

Like these there are prescription terms in criminal cases to prevent the unjust treatments as a result of lengthening of hearing[329]. If the judicial authorities cannot give a judgment, the authority of state hearing and sentencing is over. Likewise main aims of the definite (absolute) terms for each process that accepted by procedural codes are to provide ending of hearing in a reasonable time. These are indirect regulations to finish hearings in a reasonable time. The aim of these regulations is finishing the trials in a reasonable time. Due to fast hearing these kinds of regulations may occasionally cause unjust decisions, therefore hardness of these regulations can make difficult reaching a fair hearing that main aim of a hearing. For this reason, although accepting a definite term for each process is not appropriate, but on the other hand the lengthening factors of the hearing must be removed. In case remove these factors the hearing automatically will be fasten and fair. These factors can be listed as follows:

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[329] See article 102 of Turkish Criminal Code (TCC), (outside of the legal exceptions at the end of following prescription terms a public case discontinues. These are:

a) For some crimes that requires penal servitude 30 years.

b) For some crimes that requires lifelong imprisonment punishment 25 years.

c) For some crimes that requires no less than 20 years imprisonment 20 years.

d) For some crimes that requires a punishment between 5-20 years imprisonment 15 years.

e) For some crimes that requires only judicial fine penalty or less than 5 years imprisonment.

Ignorance and neglect of some of judges and prosecutors[330],

Inadequateness of quantity of expert institutions for examine the subject of hearing

Inadequateness of specialization of the judges[331].

Collecting the evidences one after another instead collecting concurrently.

Having not applied of the procedural rules exactly to make the hearing fasten.

Evil behaviors of parties and inadequateness of legal provisions against these behaviors.

Extremely heavy workload of some courts.

Inadequateness of technical tools and equipments[332].

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330 Ramazanoğlu v. Turkey, 10.06.2003, par. 24

331 According to the present Turkish trial system a judge can be appointed to any court without his permission and this authority is applied very widespread. As a result of this application at the end of 10 or 20 years criminal judgeship a judge can be appointed as a civil court judge. Under these circumstances a judge forgets all his information and he has to learn the civil law once more and he has to postpone the hearings. The same problem occurs in case of appointment of a civil law judge as a criminal court judge at the end of a long term. This both causes to lengthen of trial process and prevents the specialization and finally causes to be given wrong judgments. Furthermore specialization of courts as criminal court, court of first instance etc. can help to be ended of trials in a reasonable time.

332 Nowadays Turkey has just settled the computer system in law courts and there is yet no network system between courts, between courts and other public institutions, and between local courts and Supreme Court. This is a sorrow example. But nowadays there are very studies on this point. In this context a notebook for each judge and public prosecutor and a computer for each secretary were delivered. In the context of national judiciary net project called shortly NJNP (UYAP), very serious technological studies have been being done.

Lowness of judge's spirit for different reasons[333].

Lowness of interest rates under the inflation in law personal action and indemnity action.

The imbalance on appointment of the judges to different place[334].

4.2. The Status of Victim

In order to apply the ECtHR, the applicant has to finish domestic law remedies. But if the allegation of the applicant is on the infringement of the right to trial within a reasonable time the applicant do not has to finish all domestic remedies.

The result of the hearing is not important in way of evaluation of the right to trial within a reasonable time. Finishing a hearing by an acquittal judgment does not remove to the applicant from status of victim in way of the violation of the right to trial within a reasonable time[335]. Namely, even in case of a case's being finished by an acquittal judgment the right can be violated. Because in this circumstance, the aim of the article 6/1 of the Convention that finishing the case in a reasonable time assumed could not be protected. Namely even in case of acquittal the applicant endures to sorrow and suffer. Nevertheless if the local authorities practically or indirectly accept the infringement of the right and satisfy the applicant, the victim status of the applicant

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[333] The basic reason of these is inadequate and unsuitable working conditions of judges.

[334] Despite existence of about 50 criminal files in a small district, two judges and two prosecutors are appointed and these judges and prosecutors just sit and wait for completing the compulsory service term of these districts, in some big cities each prosecutor sometimes has to examine about 5-6 thousand files. In 2004, 237 this kind of law court were closed but still there is more this kind of courts.

[335] Karen Reid, Adil Bir Yargılamanın Güvenceleri, Avrupa İnsan Hakları Sözleşmesi Rehberi, 3rd book, SCALA Yayıncılık, 2000, p. 152.

can be removed. Because the aim of bringing a case before the ECtHR is get rid of the unjust treatment against the applicant. In case of being get rid of the victim status of applicant by the related state, the aim of the application removes namely the application becomes unnecessary and in this circumstance the ECtHR will have to repeat the decision of the national authorities[336]. In order to get rid of the victim status of the applicant the fault must be explicitly accepted. This can be provided by an obvious reduction in punishment. In the case of Eckle, the Switzerland national authorities indirectly accepted the violation of the article 6/1 of the Convention in such a way that, according to the national authorities there is a notable lengthening and the national authorities took down the penalty from 30 months to 18 months and they did not apply the deportation decision[337]. Like this in the case of Neubeck v. Germany the courts did not determine the quantity of reduction, but they emphasized only on extreme lengthening of the process, therefore the applicant was still in status of victim. The obscure expression of the Commission on that a longer hearing term would be required for this case was not found enough explicate by the ECtHR [338].

According to the Commission, if courts cannot success to find out the violation of the convention or they explicitly deny the violation, the applicant claim that he is still in victim status. On the evaluation of the reasonableness of the time, the manner of

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[336] Eckle v. Germany, n. 246, par. 66.

[337] Eckle v. Germany, n. 46 par. 6, 9299/81.(http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Eckle%20%7C%20v.%20%7C%20Germany&sessionid=50833577&skin=hudoc-en)

[338] Neubeck v. Germany, 12.12.1983.

court on reduction of the punishment for criminal cases is taken into consideration by the ECtHR [339].

In the case of Van Laak v. Germany, local court sentenced the applicant for 2 years and 6 months imprisonment penalty, but due to violation of the right to trial within a reasonable time despite the approval of the sentence the imprisonment penalty were taken down to 8 months by the court of appeal. The aim of taking down the penalty is remove the victim status welded from violation of the right to trial within a reasonable time. For these reasons the Commission found the application inadmissible[340].

4.3. Assessment of the Reasonable Time

4.3.1. The Term to be Taken into Consideration

Beginning of the process: The rule of hearing in a reasonable time is applied for both civil and criminal cases. Beginning of the term is different for these case groups[341].

Principally the beginning of the term is being brought of a case related civil rights and obligations[342]. If there is a special stipulation like being have to take a decision to bring a case before the court the term is counted from this date. In order to blame a state for delay of a suit, examination of the case should be start by any organ of the state in accordance with the national procedures.

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[339] 18905/91, R. B. v. Switzerland, (rep) 24 May 1995; because of complexity of case and being reduced of the punishment from 24 months to 16 months, the ECtHR decided that there is no violation.

[340] Appll. No. 17669/81, Van Laak v. Netherlands, 31.03.1993,74 DR 156; (İnceoğlu Sibel, ibid p. 362).

[341] Gözübüyük Şeref and Gölcüklü Feyyaz, ibid p. 285.

[342] Gözübüyük Şeref and Gölcüklü Feyyaz, ibid, p. 285.

In the criminal cases beginning of the term is being done of the official accusation[343]. If this time cannot be known, being negatively affected date of the applicant because of being under suspicious is accepted as the beginning of the term. Being brought of case before the national court is not necessary stipulation like civil cases. The accusation can be defined like following[344]: being officially communicated, which is a kind of imputation, of a person by an authorized expert person on that the suspected committed a crime under the provision of criminal code[345]. This is at the same time fits the being affected of the suspected. This date can be the date of custody, the date of official communication on an accusation for a crime, the date of opening the preliminary investigation or the date of beginning of the criminal investigation[346]. In the case of Neumeister v. Austria, the ECtHR hold that; "the beginning of the term is the date of imputation of a person for committing a crime[347]." In the case of Wemhoff v. Germany the ECtHR decided that beginning of the term is the date of first imputation and the date of given of the judgment of being taken into custody of the accused[348].

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[343] Ayla Özcan v. Turkey Application No: 36526/04 Strazburg 03 February 2009, (http://www.inhak-bb.adalet.gov.tr/aihm/aihmtkliste.asp?psearch=ayla&psearchtype=AND)

[344] Karen Reid, Adil Bir Yargılamanın Güvenceleri, Avrupa İnsan Hakları Sözleşmesi Rehberi, 3rd book, SCALA Yayıncılık, 2000, p. 150.

[345] Corigliano v. Italy, 10.12.1982, par. 34. (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Corigliano%20%7C%20v.%20%7C%20Italy&sessionid=50833577&skin=hudoc-en)

[346] Corigliano v. Italy, 10.12.1982, par. 34.

[347] Neumeister v. Austria, 27.6.1968.

[348] Wemhoff v. Germany, 27.6.1968. par. 43 (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Wemhoff%20%7C%20v.%20%7C%20Germany&sessionid=50833577&skin=hudoc-en)

In the case of Corigliano v. Italy, the Reggio public prosecutor after receiving complain of the applicant about two judicial officials, asked for being showed another law court from the court of cassation to investigate the case. The applicant was not informed about this progress. The court of cassation without listening the public prosecutor and defendant gave a judgment in two July to show another law court to investigate the case. The judicial notification of the public prosecution that depends on the Messina Court was notified to the applicant on 7 December 1973. The judicial notification was a new procedural application for Italian law that aims to inform the accused about a criminal trial was started about him and he has the right to retain a defense lawyer in three days. Therefore on 7 December 1973 was accepted as the date of being learned of the accusation by the applicant and the date of beginning of the process for the right to trial within a reasonable time[349], because the applicant was affected after learning the accusation.

On the other hand the ECtHR finds out the date of being given the right of personal application by the state to the citizens to bring a case before the ECtHR (for example this date is 28 January 1987 for Turkey and 1 August 1973 for Italy) and it takes in to consideration to this date for beginning of the process[350]. The ECtHR takes in to consideration to the condition of a case at the date of being given the right of

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[349] Corigliano v. Italy, 10.12.1982, par. 60.

[350] İnan v. Turkey, 30 October 2001, par. 21(http://www.inhak-bb.adalet.gov.tr/aihm/aihmtkliste.asp?psearch=inan&psearchtype=AND) ; Akçam v. Turkey, 30 October 2001 pa. 43 (http://www.inhak-bb.adalet.gov.tr/aihm/aihmtkliste.asp?psearch=ak%E7am&psearchtype=AND); Genç v. Turkey, 30.10.2001, par. 22 (http://www.inhak-bb.adalet.gov.tr/aihm/aihmtkliste.asp?psearch=gen%E7&psearchtype=AND); Ramazanoğlu v. Turkey, 10.06.2003 par. 24 (Adalet Bakanlığı Yargı Mevzuatı Bülteni, 28 October 2003, number 228, p. 90); ; Pretto and Others v. Italy, 08.12.1983, par. 35/a.(http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Pretto%20%7C%20Others%20%7C%20v.%20%7C%20Italy&sessionid=50833577&skin=hudoc-en)

personal application[351]. In the case of Yalgın v. Turkey the ECtHR attracted attention on the following points. The trial has been started at the date of being captured of the applicant 6 march 1981 and the trial was finished on 27 December 1995 by the ratification decision of the court of cassation. Consequently the hearing lengthened 14 years and9 months. In addition to this, the ECtHR took in to consideration to the 8 years and 11 months trial term from the date of being given the right of personal application on 28 January 1987. The ECtHR attracted attention that the trial was continuing for 5 years and 10 months on 28 January 1987. According to the ECtHR this lengthening could not be explained with reasonable excuses. Therefore article 6/1 of the convention has been violated[352].

Preliminary investigation can be the investigation of police office[353]. Despite being not notified of the accusation to the suspected if the national authorities open an investigation file and start to collect evidences about suspected the date of opening the file is assumed as the beginning of trial process, because the suspected will be definitely affected by this investigation. But the suspected must be aware of the investigation. As a matter of fact the ECtHR examined the case of Eckle v. Germany, on determination of whether the right violated or not the ECtHR decided that; the beginning of the process is the date of being learned of the accusation by the suspected not the date of being taken the statement of witnesses. Consequently, in the case of Eckle v. Germany the ECtHR decided that; article 6/1 of the convention was not violated, because the date of being learned of the accusation by the suspected and the date of being affected of the suspected could not be found out. The ECtHR decided that; under these circumstances

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351 Şahiner v. Turkey, 25.10.2001, par. 22.

352 Yalgın v. Turkey, 25.10.2001, pars. 24, 32.

353 Foti v. Italy, 10.12.1982, A 56, par. 52.

beginning of the process is the date of officially being learned of the accusation (01.01.19961) by the suspected[354].

End of the process: the end of the process, including probable legal remedies, is the date of ending of the trial by a definite judgment[355]. This does not mean to be has to apply all legal remedies, but the judgment may be ended without apply to any legal remedy like ending of trial by finishing of term. This is possible because to be able to apply the ECtHR an applicant does not have to finish all legal remedies. In a more clear expression, in order to apply the ECtHR due to violation of the right to trial within a reasonable time a suit is not has to be ended by a definite judgment.

The applicant does not have to apply all legal remedies[356]. On the other hand definition way of judgment is not important. In case of being brought of the judgment before the Constitutional Court, principally the hearing term passed before this court is not accounted on the determination of the process, because the Constitutional Court cannot give a decision on the subject of the case[357]. Although the ECtHR reached that conclusion, the term passed before the Constitutional Court is not taken into consideration on determination of the process, but I think this term should be accounted. Because whatever the excuse is not important, lengthening arises from fault of related state and there is no fault of applicant on lengthening of case. But according to the

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354 Eckle v. Germany, 15.07.1982, par. 74.

355 Pekdaş v. Turkey, 30.10.2001, par. 21 (http://www.inhak-bb.adalet.gov.tr/aihm/aihmtkliste.asp?psearch=pekda%FE&psearchtype=AND); Monet v. France, 27.10.1993, A 273, par. 26.

356 Neubeck v. Germany, 12.12.1983.

357 Zumbotel v. Austria, 29.09.1993, par. 30 (Gözübüyük Şeref and Gölcüklü Feyyaz, ibid, p. 285); Buchholz v. Germany, 6.5.1981, pars. 47-48.

ECtHR, in case of being directly affected of the suit by the process before the Constitutional Court, this term is taken into consideration on determination of the process. In the case of Wemhoff v. Germany the ECtHR hold that: "in criminal cases until the definite judgment of acquittal/sentence, even in case of being given of the judgment at the end of an appeal, whole process is taken into consideration. Putting into practice of a judgment is assumed a part of trial so; sometimes the term of practice is taken into consideration on accounting of process. Therefore the date of being practiced of judgment is assumed as the ending date of trial. In the case of Büker v. Turkey, at the end of two years of assistantship working term at university, because of being not renewed of contract by the university the applicant brought a case against the university. In this case the ECtHR took in to consideration to the date of putting into consideration of the judgment by the university as the date of ending of the process, not the date of Council of State is annulment to the decision of the administrative court[358].

If a case is examined more than one national authority and then a definite judgment was give, the whole process, which passed before all these authorities, is taken in to consideration on accounting of the process[359]. Like this, if a case is cancelled by the Court of Cassation and the case is examined once more by the same court, the whole process that passed before these two courts is taken in to consideration[360]. Function of each institution cannot be considered independently from others and the decision cannot be given under this mentality. In the case of Ramazanoğlu v. Turkey, the judgment was given by the Ankara local court (Ankara martial court) and then it was appealed, after being revoked of the martial law, Ankara

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358 İnceoğlu Sibel, ibid, p. 363.

359 Pekdaş v. Turkey, 30.10.2001, par. 23.

360 Neumeister v. Austria, 27.6.1968.

martial court was replaced with martial court that depend on 4th army corps. This court sentenced the applicant on 19.07.1994. The applicant brought the sentence before the military court of cassation to appeal. After being come into force of the law dated 27.12.1993, which abolished the martial court, the authority to make the hearing of the case passed to the court of cassation and the file was sent to the court of the cassation. On 27.12.1995 the Court of Cassation cancelled the judgment of the local court and then sent the file to the Ankara criminal court. On 16 July 2002 the Ankara criminal court sentences the applicant. The case was at the court of cassation for appeal examination while the ECtHR gave its judgment on 10 June 2003. The ECtHR took in to consideration to all trial process and decided that, the right to trial within a reasonable time has been infringed[361].

If a case is examined more than one judicial authorities and the applicant complained about the lengthening of the term passed before just one authority, the ECtHR takes into consideration only this term on the account of the process to decide whether the article 6/1 was infringed or not. The commission limits its decision in accordance with this complains of applicant[362]. The case of Zimmerman and Stainer v. Switzerland is an administrative law case. The case was heard both by Federal Estimating Commission and Federal Court and then the applicants complained only about the lengthening of process that passed before the Federal Court. The Commission gave an admissibility decision dated 18 march 1981 only from this point of view[363]. The term passed before the federal court is approximately 3 years and 6 months. The

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[361] Ramazanoğlu v. Turkey, 10.06.2003, pars. 12-18, 27.

[362] Guzzardi v. Italy, 0041, 06.11.1980, par. 106. (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Guzzardi%20%7C%20v.%20%7C%20Italy&sessionid=50833577&skin=hudoc-en)

[363] Doğru Osman, ibid, p. (Zimmerman and Stainer v. Switzerland, 13.7.1983, par. 23).

ECtHR emphasized that, this much lengthening that passed before only one authority is important and needs to be examined closely. With the other criterions the ECtHR takes in to consideration to the complexity[364] of case from the concrete event and legal questions point of view, attitudes of the applicant and national authorities, the importance of the subject of the case for the applicant and then it gives the decision on reasonableness of lengthening[365]. As we mentioned above, the ECtHR takes into consideration to the whole phases of trial while It apply the reasonable time criterions.

Evaluation of Reasonable Time

On determination of reasonableness of the process, the ECtHR has not accepted any definite time limit. The ECtHR gives its decision under the light of each concrete case. In the case of Buchholz v. Germany, which was about working law, the ECtHR had to examine the details of the concrete case. The statistics show that, between 1975-1976 years these kinds of cases were exceptionally lengthened more than three hearing in Germany and according to the German law provisions this kind of cases must be finished in one hearing despite these realities this case was lengthened for six months; therefore according to the ECtHR at first sight this process is surprising. But, in third hearing that is a processed stage of trial; the applicant claimed that he did not receive the official notification related with being dismissed from the job; therefore the local court had to take the statements of the witnesses about the notification. Not to take these statements would be able to cause violation of the right to defense. On the other hand despite the serious accusations of the applicant about the administrators of the company, the effort of the local court for a friendly settlement is an understandable

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[364] Aras v. Turkey Application No:1895/05, Strazburg, 17 February 2009, (http://www.inhak-bb.adalet.gov.tr/aihm/aihmtkliste.asp?psearch=aras&psearchtype=AND)

[365] Zimmerman and Stainer v. Switzerland, 13.7.1983, par. 24.

situation. The need of making the hearing occurred after the understanding of impossibility of solving the case by friendly settlement. The lengthening reason of demand the expert report was understood, in such a way that the court had to wait the testimony of the witnesses[366]. But according to the ECtHR, there is no sign that show the need of separation like this for the administration of justice[367].

About the reasonableness of the time before the administrative court, in the case of König v. Germany, the ECtHR determined that; under the meaning of the article 6/1 of the convention, the reasonableness of the time must be decided under the light of each case. On the reasonableness of the term, with the other criterions the ECtHR gives its decision under the light of the complexity of case, attitude of the applicant, attitude of the national court and other institutions[368]. Occasionally there arise different opinions on the beginning of the term. One of these is König v. Germany. The applicant of this case is a doctor. On 16 October 1962 Regional Healthy Association brought a lawsuit against the Healthy Occupation Institution of Frankfurt Administrational court. On 9 July 1964 this council decided that; the applicant did not behave in accordance with the rules of the occupation. The Regional Vocational Healthy Institution that depends on the Hassen Senior Administrational Court on 14 October 1970 rejected the objection of the applicant against this decision. A suit was brought against the applicant in 1972 due to illegally performing the profession of doctor. The applicant brought a law suit for nullity of judgment that forbidden to the

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366 Buchholz v. Germany, 6.5.1981, par. 50.

367 Neumeister v. Germany, 27.6.1968, par. 21.

368 König v. Germany, 28.6.1978, par. 99.

applicant to perform the profession of doctor and the applicant claimed that, this case would not be able to finish in a reasonable time by the national court[369].

According to the Commission and the government beginning of the process is the date of the appeal to the firs degree administrative court. The ECtHR did not accept to this opinion. The ECtHR like in the case of Golder, it said, "About the personal rights under some circumstances the process of reasonable time may start before the date of official write of court to start the hearing"[370]. The position of the applicant is like this. Because the applicant cannot provide being examine of the case before the examination of the case in point of appropriateness and legality by the administrative authorities as a preliminary investigation. Consequently in this case the proceeding that under the meaning of the article 6/1 started from the date of objection of the applicant against the judgment[371]. Under the meaning of the article 6/1 of the convention, the decision on reasonableness of the time must be given under the circumstances of each concrete case. In criminal cases with the other criterions the ECtHR attaches importance to the complexity of case, attitudes of both parties and the national authorities[372]. In the personal right related administrative cases with these criterions the ECtHR takes into consideration what kind of benefit of applicant is in danger[373]. The ECtHR accepted that it must approach to this case in the same way. The ECtHR added

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369 König v. Germany, 28.6.1978, pars. 15-18.

370 Golder v. United Kingdom, 21.02.1975, par. 32. (http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=50833577&skin=hudoc-en&action=request)

371 König v. Germany, 28.06.1978.

372 See, 27.06.1968 dated Neumeister judgment, pars. 42-43; and 16.7.1971 dated Ringeisen judgment, par. 110.

373 König v. Germany, 28.06.1978, pars. 99, 102-105, 107-111.

that, a state could be blamed only in case of being caused the delay by the government[374].

Additionally in the case of König, the ECtHR attracted attention that; in the German law system there is a principle; a working law case is carried on by the parties. On the other hand, the German laws encourage the parties for a friendly settlement in labour cases. But all these rules do not remove the obligation to finish a case in a reasonable time[375].

If the trial process is continuing, because of violation claim of the right, the applicant does not have to finish the national law alternatives for bring the case before the ECtHR. On the determination of the claim of violation of the right to trial within a reasonable time the result of case is not important. Namely the claim; "if the judgment was given in time, the result would not be different" cannot be put forward by governments as an excuse[376]. For example being ended of a trial by acquittal judgment or because of inadequateness of evidence or abatement of a suit because of prescription or prosecutions decision of non-suit cannot be mania for the claim of violation of the right.

4.4. The Criteria for Assessment of the Reasonable Time

The ECtHR gives its judgment in the light of special circumstances of each case about the reasonability of proceeding. On the determination of the reasonableness

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374 Buchholz v. Germany, 6.5.1981, par. 49.

375 König v. Germany, 28.06.1978, par. 50.

376 H. v. United Kingdom, 08.07.1987, A 120, par. 81 (Gözübüyük Şeref and Gölcüklü Feyyaz, ibid, p. 286).

of the proceeding the ECtHR has accepted some criterions. These criterions can be listed as follows:

The characteristics of the case (it should be emphasized once again that; these characteristics are complexity of case, majority of suspected / defendant, majority of accusation to each suspected and the special importance of case for applicant).

Attitude of applicant whereas the trial before national authorities

Attitude of national hearing authorities[377].

4.4.1. Character of Case's Subject

These are the difficulties, obstacles and complex situations whereas obtaining the evidences to solve a case[378]. Besides the personal importance of topic of the case for applicant namely, the dimension of the spiritual and physical damages of lengthening of the trial has a great importance[379]. The ECtHR takes in to consideration all these criterions and then gives its decision. For example in case of complexity of case if the main fault of lengthening of the case is belong to state the ECtHR can find a violation of article 6/1 of the convention. Like this in case of majority of the defendant number, if the main reason of lengthening of the case is belong to the national authorities the ECtHR can find a violation of article 6/1 of the convention.

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[377] Gözübüyük Şeref and Gölcüklü Feyyaz, ibid, p. 286; İnceoğlu Sibel, ibid, p. 366; Neumeister v. Austria, 27.6.1968.

[378] Gözübüyük Şeref and Gölcüklü Feyyaz, ibid, p. 286; Foti and Autres v. Italy, 10.12.1982, par. 58.

[379] Buchholz v. Germany, 6.5.1981, par. 52.

4.4.1.1. Complexity of Case

The ECtHR always takes into consideration to the complexity of case as an important subject whereas examining the admissibility of trial proceeding. On the determination of complexity of a case different factors may have affect like whether the topic of case is controversial or not, majority of suspected, international factors[380], majority of witnesses, clutter of evidences, quantity of written evidences[381] and all of other characteristics of case. Affect of each one of these factors may change in accordance with the special characteristics of case[382]. Due to the complexity of case, sometimes a short lengthening of can be acceptable, because complexity of case has been balanced with the fair hearing principle. In the case of Boddaert v. Belgium, six years and about three months trial term was accepted as a reasonable time by the ECtHR, because the case was about a complex murder[383]. In the case of Katte- Klitsche v. Italy, which was a civil lawcase (on title deed), despite the three abnormal delay and eight years lengthening of the case, the ECtHR find no violation of article 6/1 of the convention, because according to the ECtHR the case was very complex from the events and relevant law point of view and the judgment was important both for environment pollution and Italian common law[384].

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380 Neumeister v. Austria, 27.6.1968, par. 21.

381 Neumeister v. Austria, 27.6.1968, par. 21.

382 Gözübüyük Şeref and Gölcüklü Feyyaz, ibid, p. 286.

383 Boddaert v. Belgium, 12.10.1992, Series A, No. 235.(http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Boddaert%20%7C%20v.%20%7C%20Belgium&sessionid=50833577&skin=hudoc-en)

384 Karen Reid, ibid, p. 154.

If the above mentioned reasons are not the only reason of lengthening of case and if there are other reasons, complexity of case may not be accepted as an excusing reason for the lengthening of case. For example despite a case has international characteristics, if the reason of lengthening of case is inadequate communication between related national authorities, complexity of case cannot be put forward as an excuse of the lengthening of the proceeding. In the case of Mansur v. Turkey, some evidences related with the suspected, who was being heard of drought crime, were brought from Greece, but because of inadequate communication between national authorities, being not found of an translator, who under oath, and being not interpreted of the evidences in time in to Turkish, they could not be used as evidence and local court wrote a paper to Ankara Criminal Curt for interpretation of the evidences but it gave its judgment before the returning of the paper[385].

In 2003 dated Demirel v. Turkey lawcase, which had similar characteristics, the ECtHR took into consideration to the seven years, seven months and fourteen days lengthening of the case and said that; lengthen of the case cannot be explained only with the complexity excuse of the case and article 6/1 of the convention has been violated[386].

In the case of Ramazanoğlu v. Turkey the government claimed that, in this case there were 723 suspected, including the applicant, therefore it was very extensive and majority of the crimes was very high namely the case was very complex therefore the trial was lengthened. According to the ECtHR, majority of suspected and crimes can make the case complex. But the trial was continued more than twenty-one years. More than sixteen years of this term is in the check of the ECtHR. This term is so long

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[385] İnceoğlu Sibel, ibid, p. 367; Mansur v. Turkey, par. 64; Ünal Şeref, ibid, p. 185.

[386] Demirel v. Turkey, 28.01.2003, Appl. number: 39324/98.(Adalet Bakanlığı Yargı Mevzuatı Bülteni, Issue: 159, p. 43).

that cannot be explained by the complexity excuses. Consequently lengthiness of proceeding of the case depends on the neglect of the national courts. For these reasons the ECtHR unanimously decided that; the article 6/1 of the convention was violated[387].

If the lengthening of proceeding rises from the heavy work load, the ECtHR sometimes accepts this as an excuse and it adds that, related state must take the necessary measures in a reasonable time to fasten the trial. In the case of Buchholz v. Germany, the ECtHR examined whether the right to trial within a reasonable time was violated or not. The government claimed that, because of the economic stagnation, work load of the related court was increased and the ECtHR emphasized that, in case of temporary increasing of the work load, if related state takes the necessary measures in a reasonable time it cannot be blamed for lengthening of proceeding[388]. Under these circumstances the ECtHR examined the lengthening of proceeding and said that; at first sight lengthening of the case, which little more than 4 years and 4 months, seems as if an abnormal lengthening, but because of the mentioned reasons this lengthening is acceptable. According to the ECtHR, in case of increasing the work load related state must take the necessary measures in a reasonable time.

In the case of Corigliano v. Italy the government claimed that, the hearing was done (made) out of the jurisdiction of the applicant's natural court, therefore the case was complex. According to the ECtHR the case was complex too, but complexity of the case cannot be enough by itself to excuse the lengthening of the proceeding. According to the ECtHR on the lengthening of the proceeding, fault of the national authorities was also affective. The ECtHR examined the lengthiness of the proceeding of the case and

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387 Ramazanoğlu v. Turkey, 10.06.2003, Appl. number: 39810/98.

388 Buchholz v. Germany, 06.05.1981, par. 51.

said there was violation of the article 6/1 of the convention[389]. Despite the complexity of cases because of extreme lengthening of proceeding, some another example judgments about violation of the right to trial within a reasonable time were given by the ECtHR. In the case of Ferrantelli-Sentangelo v. Italy, which the sentence was given at the end of 16 years trial term, the ECtHR find the lengthiness is not acceptable. However this case was about a complex murder and in this case due to being intervenes of children there were some sensitive points[390].

Mitap and Müftüoğlu v. Turkey is this kind of a lawsuit. This case lengthened 15 years. According to the government the case was complex. The government especially put forward that, the case includes 607 crimes, which lots of them are in the trial of criminal court, and 703 suspected. Then the government added that, the court made three hearing in each week and totally made 512 hearing and the lawsuit consists of approximately one thousand files. Despite being accepted the complexity of the case by the ECtHR, It said that; the government could not show any reason to excuse the extreme lengthiness of the case and additionally the hearing before local court took 8 years and 6 months. Consequently so lengthening of the case cannot be explained on the ground of complexity excuse, the article 6/1 of the convention has been violated[391]. Despite being not claimed the violation of the right to trial within a reasonable time the in a case Commission and the ECtHR claimed that, they can examine the whether the right violated or not and examined the subject automatically. In the case of Foti and others v. Italy, the government claimed that, the applicant did not allege the violation of the right to trial within a reasonable time, therefore the ECtHR and the Commission

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389 Corigliano v. Italy, 10.12.1982, pars. 38, 45-47, 50.

390 Ferrantelli V. and Santangelo v. Italy, 7.8.1996, RJD: II; No: 12.

391 Mitap and Müftüoğlu v. Turkey, 20.03.1996, pars. 36-37.

cannot automatically examine whether the right violated or not. Acceptance of the ECtHR is the same; the applicant did not bring any allegation on the lengthening of the proceeding whereas they made the first application to the Commission[392]. According to the ECtHR the international protection system of the convention does not give the right of automatically examine to subject, which the applicant did not allege and they aware of the subject indirectly, to the commission and ECtHR. But on the other hand, under the integrity of provisions of the convention the conventional authorities can examine the subject automatically in case of not being brought to the ECtHR by applicant[393]. If there are some signs, which show lengthening of proceeding, the ECtHR can automatically examine whether the right violated or not. In the case of Foti and others v. Italy, the ECtHR had knowledge from the applicant's letters that the case was continuing for a long time, therefore it automatically checked whether the right was violated or not[394]. In the case of Foti and others v. Italy the government put forward the complexity of the case, but the ECtHR hold ; first of all the accusations are resistance and insulting against police, keeping bomb to shed the tear, putting barriers on to the main roads, gathering illegally and the crime of demonstration. These do not automatically make the case complex by themselves. Except Foti's second case, all of the other cases hearing were made by only one degree court; therefore the case definitely cannot be accepted as complex[395].

According to the ECtHR and the Commission on determination of the reasonable time, in case of being not complex of concrete events if a complex law

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392 Foti and Others v. Italy, 10.12.1982, par. 44.

393 Ibid, par. 44.

394 Ibid, pars. 44/3-5.

395 Ibid, par. 58.

interpretation problem arises, this situation also may carry weight. In the case of Pretto and others v. Italy is this kind of a case. In this case the judicial authorities had to apply a new law, which did not have detailed provisions, to determine whether the stipulations of the right of preemption have to be fulfilled for obtain the right of reselling or not. On the other hand the judicial authorities were in contradictory attitudes. For these reasons the 3th Chamber for Civil Cases postponed its decision until the judgment of the Grand Chamber of Cassation in the hope of remove the contradictory situation. Despite the probable lengthening of the proceeding, attitude of national authorities and as a conclusion the lengthening of the proceeding were found reasonable by the ECtHR [396]. The ECtHR took into consideration to the whole trial proceeding of the case and at the end of taking in to account of the attitude of the applicant, attitude of the national authorities and complexity of the case and decided that; the article 6/1 of the convention was not violated[397].

4.4.1.2. Importance of Case's Subject for the Applicant

In the determination of the right to trial within a reasonable time, the ECtHR takes into consideration to the importance of the lawsuit like illness[398] or detention[399]. Case of Katte- Klitsche v. Italy is a civil law trial. In this case official authorities made a plan, which includes a woody field of the applicant, so the applicant claimed indemnity because of the limitation of usage of the field by the plan that a kind of nationalization and the trial lasted more than eight years. In this case despite fixing

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396 Pretto and Others v. Italy, 08.12.1983, pars. 13, 32.

397 Ibid, pars. 36-37.

398 A and Others v. Denmark, 08.02.1996, 20826/92.

399 H. v. United Kingdom, 08.07.1987, A 120, par. 85; Buchholz v. Germany, 06.05.1981, A 42, par. 52 (Gözübüyük Şeref and Gölcüklü Feyyaz, ibid, p. 286).

three abnormal delaying periods, the ECtHR hold that; the judgment of the national court is about very sensitive topics like city planning and protection of environment, on the other hand this judgment will have very important affect on interpretation law of Italy about the separation of personal rights and legal benefits[400].

The case of Buchholz v. Germany, which was about working law, lasted four years and four months. The applicant worked at the same company during the 25 five years but finally he was dismissed. According to the ECtHR this term seems very long and the topic of the trial is important for the applicant. The topic of the trial was either returning to the occupation or being had to pay an indemnity to the applicant in case accepts the finishing of the working act. Therefore the ECtHR examined the trial term on the basis of these criterions and factors[401].

4.4.2. Applicant's Conduct

In order to blame the state because of violation of the right to trial within a reasonable time the delay should be welded from the fault of the national authorities. For example, national authorities can be blamed because of delaying to bring a case before court or the delay of transferring the case to another court or other attitudes of the court that causes a delay. Although in civil cases the burden of bringing evidences before court belongs to the parties, but according to the ECtHR, this burden does not eliminate the obligation of the state to finish a trial in a reasonable time[402]. Nevertheless, parties of a case should do the necessary endeavors to speed the trial and

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400 İnceoğlu Sibel, ibid, p. 368, par. 2.

401 Buchhoz v. Germany, 06.05.1981, par. 52. (Doğru Osman, ibid, p. 406)

402 Gözübüyük Şeref and Gölcüklü Feyyaz, ibid, p. 286.

they must abstain from using delaying tactics and they must take pains on the usage of the procedural rights. If there is enough evidence, which indicate that the parties do not take the necessary pains to speed the process, the state cannot be blamed. If the applicant does his burden properly to fasten the process, this may be a factor in the applicant's favor, but opposite situation is not always against him[403].

One of the well known cases that could not be ended in a reasonable time due to the attitude of the applicant is Ciricosta v. Italy. This case lasted fifteen years and it was continuing to trial while the ECtHR examining the case. The main characteristic of this case was the extreme attitude of the applicant to longer the process of the case. Because, during the fifteen years the applicant seventeen times demanded of postponing the case and did not object the six times postponing demands of the other party of the case. The ECtHR examined the case under these circumstances. According to the ECtHR main fault of delaying the case belongs to the applicant, therefore there was no violation of article 6/1 of the convention because[404].

In criminal cases the accused is not has to actively collaborate with the national authorities. But despite this reality on the determination of the length of the process, attitude of the applicant is taken in to consideration[405]. In the case of Yağcı-Sargın v. Turkey, the applicant claimed that; his trial was not finished in a reasonable time. The government claimed that; the lawyers of the applicant left the hearing hall for a few times to protest the security measures and they did not obey the time limits for giving their replay against the evidences in the file. The ECtHR emphasized that, the accused is not has to collaborate with the national authorities. The ECtHR noted, like

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403 İnceoğlu Sibel, ibid, p. 369 (Karen Reid, A Practitioner's, ibid, p. 113).

404 Ciricosta and Viola v. Italy, 4.12.1995, Series A, No. 337.

405 Eckle v. Germany, 15.07.1981, par. 82.

the Commission did, that; attitudes of the applicants and their lawyers do not have any preventive function on the hearings. In any case, the applicants cannot be blamed because of using the advantages of the national law. Furthermore, if there are lots of lawyers in a hearing, and even their attitudes against the security measures get slow the hearing, lengthening of the case cannot be explained by only these arguments. Finally the ECtHR decided that, the article 6/1 of the Convention has been violated[406].

The ECtHR takes into consideration to the affects of applicant's attitude on lengthening of trial process. Suchlike, using the advantages of the national procedural law to defend him, principally cannot be used against the applicant[407]. In the case of Corigliano v. Italy, the government claimed that; the results of the appeals of the applicant are available known before the appeal; therefore the appeals of the applicant are just a misuse of the right of appeal. Especially for the last two appeals this claim is true. Furthermore the government claimed that; the applicant caused the lasting of the process by not retaining a defense lawyer on the 17 December 1973 prosecution defense statement[408]. The ECtHR did not feel the need for examining the misuse claim of the right to appeal. The ECtHR contented itself, like the commission did, only by noting the limited affect of the appealing on the lasting of the process. Actually these appeals did not prevent the prosecution investigation. The Messina Court did not completely stop its activity during the second appeal that took the longest term. The evidences of these nonstop activities of court are as follows ; during this appeal, the file was sent to the Reggio Calabrio Court, hearing summons was notified and the defense statements of the applicant were taken by the court. In connecting with not to be retained a lawyer by

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406 Ünal Şeref, Avrupa İnsan Hakları Avrupa Sözleşmesi İnsan Hakları Uluslar Arası İlkeleri, p. 184.

407 A.P v. Italy, 24.07.1996; Erdoğan v. Turkey, 09.07.1992, 72 D.R., 81.(Adalet Bakanlığı Yargı Mevzuatı Bülteni, Issue: 167, p. 45).

408 Corigliano v. Italy, 10.12.1982, par. 40.

the applicant, the ECtHR hold that, the article 6/1 of the convention does not force the applicant to actively collaborate with the national authorities[409]. Consequently the trial of the applicant could not be ended in a reasonable time due to the fault of national authorities[410].

In civil cases, principally to bring the evidences before the court is belong to the parties of a case. But, existence of this burden on the parties in civil cases does not mean that; the state can never be blamed because of the lasting of process[411]. In this kind of cases the parties are under the liability of painstaking behavior. If the party of a case do not behave under the necessary pains while he acting his liability, the state may not be blamed for lasting of a case. Namely, the applicant must prove that; to be finished of the case in a reasonable time he did his pains properly[412].

Although, in criminal cases management of a trial is principally belongs to national authorities, but if the main reason of delay is welded from attitudes of the parties, despite the fact that; this situation is weakens the position of the applicant before the ECtHR, the applicant does not have to collaborate with the national authorities.

The commission examined the case of Pretto v. Italy and decided that, "there is no evidence, which show that: the applicant did not pay necessary attention. The government does not think the same. According to the government, lawyers of the

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409 Ibid, par. 41.

410 Ibid, par. 50.

411 İnceoğlu Sibel, ibid, p. 369.

412 Preto and Others v. Italy, 8.12.1983, A 71, par. 33 ; Monet v. France, 27/10/1993, A 273 pars. 27-30. (Gözübüyük Şeref and Gölcüklü Feyyaz, ibid, p. 287)

parties including the applicant's lawyer, three times demanded postponement of hearing during the appeal stage. Besides they gave the necessary documents to the national court just about to time over. For example in the case of Pretto v. Italy, the applicant gave the additional petition to national court just six days before the hearing dated 18 February 1976. Finally it must be expressed that; according to the Italian civil law system, bringing a case before a court and carrying out of the case is belongs to the parties, not national authorities[413]. The ECtHR noted that, Mr. Pretto has the right to use the time periods completely, which was given by the national law, and he has never passed these time periods. According to the ECtHR, despite absence of any fault of the applicant, the applicant is responsible for the delay of the process. From this point of view, Mr. Pretto cannot behave in a reproachful way against the government. The ECtHR decided that, the person or institution, which caused a delay, should be responsible for the delay, because the ECtHR blames a state only because of the delay that caused by the national authorities.

If the reason of delay is the usage of opportunities of the national law by the applicant, the applicant cannot be blamed because of the delay. In similar situations the ECtHR takes in to consideration to the wicked intentions of applicant[414]. According to the ECtHR, in the case of Eckle v. Germany, systematically challenging of the applicant against judges more than assisting the preparation of the court was caused the delay of process. Some of these may be considered as deliberately prevention. In addition to this

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413 Amd, par. 33.

414 Capuano v. Italy, 25.06.1981, par. 28; Lechner and Hess v. Austria, 23.04.1987, par. 49 (Gözübüyük Şeref and Gölcüklü Feyyaz, ibid, pp. 286-287).

the ECtHR hold that, the article 6/1 of the convention does not give the responsibility to collaborate with the national authorities[415].

Violation of the right to trial within a reasonable time may not be explained only by the attitude of the applicant. In these circumstances responsibility of the state continues. Despite accepting the existence of malignant intention of the applicant in the case of Eckle v. Germany the ECtHR hold that, length of the trial is so much that cannot be explained only by the attitude of the applicant. Additionally the ECtHR decided that, six months after the beginning of the investigation the public prosecutor felt the need for investigating some other subjects, but in order to investigate these points withdrawal of the indictment was not the only option but was done, and therefore the judicial authorities waited more than one year to transfer the new cases to the Cologne public prosecutor. Therefore the behavior of national authorities caused the lengthening of the case more than behavior of the applicant; consequently the article 6/1 of the convention was violated[416]. Another similar law case is the Beaumartin v. France. First of all in this case the applicants brought the case before an unauthorized court and gave their defense four months after the bringing the case, therefore they have influence on the lengthening of the trial, but the national court made its first hearing five years after bringing of the case and the defendant ministry gave its defense twenty months later, from this point of view, fault of the national authorities on the lengthening of the case is more than applicants'. Consequently the article 6/1 of the convention has been infringed[417].

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415 Eckle v. Germany, 15.07.1982, par. 82.

416 Ibid, pars. 83-84.

417 Baumartin v. France, 24.11.1994, Series A, No. 296-B.

In the case of Foti and others v. Italy the ECtHR accepted that, only Mr. Foti used the right to appeal in the second case. Mr. Cenereni made an application for annulment of the judgment, which was the reason of the lawsuit, and the Potenza Court let the application and this application caused five months and twelve days lengthening of the trial. According to the ECtHR, owing to this lengthening the applicant cannot be blamed[418].

If the applicant escaped from the trial and then came back, this term would not be taken in to consideration on accounting of the reasonable time. Suchlike if the applicant escapes during the trial and does not comes back and therefore if the trial lengthens forever[419], the state cannot be blamed because of lengthening of the trial[420].

The ECtHR hold that, as a result of applicant's fault, in case of lengthen of a trial, if the applicant did not deliberately cause the lengthening, he cannot be blamed for the lengthening. In the case of Lavens v. Latvia the reason of the lengthening of the trial was illness of the applicant. Despite the lengthening of trial for six years and seven months the ECtHR did not blame the applicant because of his objectively acceptable excuse. Therefore the ECtHR hold that, there is a violation of the article 6/1 of the convention[421].

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[418] Foti and Others v. Italy, 10.12.1982, par. 59.

[419] Proszak v. Poland, 16.12.1997. par. 42, (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Proszak%20%7C%20v.%20%7C%20Poland&sessionid=50833577&skin=hudoc-en)

[420] İnceoğlu Sibel, ibid, p. 370 (Girolami v. Italy, par. 13; Erdoğan v. Turkey, inadmissible decision of the Commission 09.07.1992);

[421] Lavents v. Latvia, 28.11.2002.

4.4.3. National Authorities' Conduct

The ECtHR blames a state only in case of its neglect or fault[422]. Namely according to the ECtHR, if a state causes a delay in a case, it can be blamed for the delay. In the case of Ramazanoğlu v. Turkey, the government claimed that, the case was complex and the numbers of suspected were great, for these reasons the case delayed. But the ECtHR hold that, complexity of case and multitude of accused may cause a delay of process. But the case has been continuing more than 21 years. More than 16 years of the case were in the examination of the ECtHR. This term is so long that cannot be explained only by the thoughts of complexity of case. The real reason of delay of the process is fault of the state. In addition, the government did not bring any claim that; the real fault of delay was belonging to the applicant. Eventually, the real reason of delaying of the case is welded from neglect of the domestic court[423]. But the state is responsible for the faults and neglects of all of national (administrative or judicial) authorities[424]. Judicial institutions can be responsible because of their attitudes like to cause a delay in a public case because of bringing a case before a court or transferring a case from one court to another[425]. In addition despite the institutions did their duty, if the trial could not be finished in a reasonable time because of some other reasons like inadequate numbers of judges and prosecutors or plenty of cases, the state

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[422] Gözübüyük Şeref and Gölcüklü Feyyaz, ibid, p. 287 (B. v. Austria, 28.03.1990, A 175, par. 54; Monet v. France, 27.10.1993, A 273-a, pars. 32-34).

[423] Ramazanoğlu v. Turkey, 10.06.2003, par. 24 (Adalet Bakanlığı Yargı Mevzuatı Bülteni, 28 October 2003, number 228, p. 90)

[424] Mole Nuala and Harby Catharina, Adil Yargılanma Hakkı (Adil Yargılanma Hakkı El Kitapları 3), p. 24.

[425] İnceoğlu Sibel, ibid, p. 371.

is responsible for the delay of process[426]. Meaning of this explanation is that, the state is responsible for only its neglect and fault, but despite the care and hard working of national institutions, if the structural reasons cause any delay the state can be blamed because of the delay of process. For example in the case of Zimmerman and Steiner v. Switzerland, Switzerland accepted a temporary speeding formula like examining the cases alternately. Basis of this method was not the date of bringing a case before the court, but the criterion of this regulation was the importance and urgency of cases and especially the individual importance of the topic of case for the applicant. But if cases cannot be finished in a reasonable time and if it becomes a structural organization problem, these methods cannot be enough for solution and the state cannot any more postpone taking necessary measures[427]. In order to blame a state for a case related to civil rights, the person or institution that causes a delay, must be working on behalf of the state[428].

In some cases related to the right to trial within a reasonable time, ECtHR attaches importance providing justice in accordance with the equity and It emphasizes that, a tribunal has to examine a case properly[429]. The meaning of these words is that. Just for provide a speed hearing, the state must not pay insufficient attention to the right to a fair trying and the main aim always must be to provide the fair trying. Because of some definite reasons or owing to collecting evidences the postponement decisions may have an extra importance. In the case of Ewing v. United Kingdom, three cases were

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426 Gözübüyük Şeref and Gölcüklü Feyyaz, ibid, p. 287 (Zimmerman and Stainer v. Switzerland, 13.07.1983, A 66, par. 24; Martins Moreira v. Portugal, 26.10.1988, A 143, par. 52).

427 Zimmerman and Stainer v. Switzerland, 13.07.1983, par. 29.

428 İnceoğlu Sibel, ibid, p. 375.

429 Boddaert v. Belgium, 12.10.1992, par. 39.

joined with each other. This joining caused a delay of process of the case, but this delay was not accepted as an arbitrary or unreasonable delay, and it was not accepted against the fair hearing by the ECtHR. The ECtHR clearly said that, the effort of judicial authorities to speed the hearing process has a great importance for protection of the applicant's rights that was given by the article 6/1 of the convention from point of view[430]. Consequently another important role of the national authorities is, to take the necessary measures to prevent any neglect of any institution or person charged with trial, and to provide the hard working of all institutions that charged with trial. Besides in the case of Reilly v. Ireland the Commission attracted attention that, trials can be finished in a short time by separating the murder and theft files, but the damage of separating the files may give more harm to fair hearing than probable harms of finishing the cases in a long term of period[431].

From these two cases to find out that conclusion is possible; if this kind of decisions causes a delay, which is given to provide the justice, cannot be accepted as an infringement of the right to trial within a reasonable time. But judicial authorities should take into consideration to the probable results of this kind of delays and they should take necessary measures to fasten the trial process at other stages of trial[432].

According to the Strasburg authorities, a state can be blamed because of the following reasons. For the civil cases these are as follows : in order to wait the result of another law case postponement of hearing of a case; attitude of court during the hearing; a delay that caused at the giving or constructing stage of the evidences by the state; a delay that caused by the court secretary or other administrative institutions. In the case

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430 Vernilo v. France, 20.02.1991, par. 38.

431 Ireland, 21624/93 (Rep), 22.02.1995.

432 İnceoğlu Sibel, ibid, p. 373.

of Neumeister v. Germany, lots of trial and investigation reasons were affective on the lengthening of the process. For instance from 12 July 1962 until the date of the end of the interrogation (04 November 1965), namely during the 15 month of time period, the interrogation judge did not cross-examine to the suspected and did not made any confrontation. The judge of interrogation did not interrogate the accessory and did not do anything about the interrogation in the same year from 24 June to 18 October. From the end of the first interrogation until the date of starting of the investigation (the 9 November 1964) one year time period passed. The decision to make the other necessary investigations was given months after the beginning of the hearing[433]. According to the ECtHR 7 years of trial period is not acceptable. But according to the ECtHR only these factors cannot be diagnostic. The ECtHR takes in to consideration to all of these factors and then gives its judgment. As a matter of fact in the case of Neumeister v. Germany the ECtHR added that, despite all these circumstances, the right to trial within a reasonable time was not infringed, because the national court was have to wait the replay of the correspondence from foreign countries, secondly there was no reason to separate the files of applicant and the accessories from the providing the equity point of view[434] and the to read lots of the papers were necessary for national court[435].

For criminal cases, the reasons of delay are as follows s: transfer of cases between courts; some times to be have to exercise the hearings of two or more accused with each other; notification of decision to the accused and the appeal examination of

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[433] Neumeister v.Germany, 27.06.1968, par. 21.

[434] If non-separation of files is necessary for a fair hearing, despite the price of the lengthening of hearing the files must not be separated.

[435] See, Doğru Osman, ibid, p. 33.

the judgment[436]. For example in the case of Yağcı-Sargın v. Turkey, to be have to wait the State Security Court to give the acquittal judgment about the accused, who were accused under the article 141-143 of the Turkish criminal code, during the 6 months of period because of invoking of the article 141-143 of the Turkish criminal code by the Code of Fighting Against the Terror dated 12 April 1992, was accepted as one of the infringement reason of the article 6/1 of the convention[437].

In criminal cases the benefit of the accused that under danger is generally more important than civil cases, therefore judges must exercise to criminal cases faster than the civil ones and it is accepted that, judges must be more sensitive on the evaluation of the right to trial within a reasonable time for criminal cases[438]. But this is not a definite rule. If the subject of the civil case is important, the ECtHR attracts great importance to the civil cases. For example, in some cases that are brought against the decisions on giving a child to an institution or on adopting of a child, the time period of trial is very important, therefore the ECtHR attaches importance to this term. Because this kind of cases regulates the relations of parents and child for the future and they enter a rode without any return. Besides in some cases that on procedural delay, the ECtHR sometimes gives its decision as de facto. Therefore in the case of H. v. United Kingdom, the ECtHR decided that; 2 years term of trial infringed the article 6/1 of the convention[439].

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436 Zimmerman and Stainer v. Switzerland, 13.07.1983, Guincho v. Portugal, 10.07.1984; Buchholz v. Federal Germany, 06.051981.

437 İnceoğlu Sibel, ibid, p. 373.

438 Ibid, pp. 373-374.

439 Ibid, p. 359.

In the case of Zimmerman and Stainer v. Switzerland the ECtHR expressed that, the states have to make the necessary harmonization studies on their legal systems and tribunals, including the right to trial within a reasonable time, with the article 6/1 of the convention[440]. Meaning of these words is that. The state has to take the necessary measures to get rid of the delaying reasons. As a matter of fact in the case of Zimmerman and Stainer, the ECtHR decided that; the reason of the delay of trial is heavy work load of courts has been continuing for a long time (and the state did not take the necessary measures to solve this problem), so the article 6/1 of the convention was infringed. The phrase of "necessary measures" includes appointment of extra judges and administrative staff. But in case of heavy work load is temporary and exceptional, if the state rapidly takes the necessary measures the state cannot be blamed. In the fact of doing this interpretation, the ECtHR is ready to take into consideration of the social and political past of the state[441]. Once more in the case of Tamkoç v. Turkey the ECtHR, as it expressed times and times, repeated that, article 6/1 of the convention gives a responsibility for making the necessary harmonization studies on their legal systems, including the obligation of finishing the cases in a reasonable time. At the end the ECtHR decided that; the responsibility of delaying of a criminal trial should be belonging to the national authorities[442].

Even in case of absence of any delay at other stages of trial, if there are some definite delaying reasons arising from national courts, namely if the delay of hearing is welded from the transfer of files between national authorities or from the delay of

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440 Zimmerman and Stainer v. Switzerland, 13.07.1983, par. 29.

441 Jablonski v. Poland, 21.12.2000.

442 Tamkoç v. Turkey, 25.09.2001, par. 31.

composing the decision, the state can be blamed[443]. The ECtHR considers huge importance to the length of the period between hearings. But if these delays can be explained by reasonable excuses, the ECtHR sometimes accepts the reasonableness of length of trial term. For example in the case of Buchholz v. Germany, the national court had a 5 months break after the first hearing. During this term the Supreme Court studied on lawcase for a friendly settlement and the applicant found its recommendation realistic and positive. According to the ECtHR, after the retirement of the judge, in order to examine the file having a long break by the new appointed judge is acceptable. In this case, because of existence of reasonable excuses for length of terms between hearings, the ECtHR decided that the article 6/1 of the convention was not violated[444].

Additionally the ECtHR hold that, the delay of trial, which is welded from the studies of providing the public order, may not violet the article 6/1 of the convention. An example case is the Mr. Foti and Others v. Italy. In this case the ECtHR reminded the disorder in the state between 1970-1973 in the Reggio Calabrio (like fighting against the police, bombing and general strikes) before examining the each hearing one by one. According to the ECtHR these disorders affected the case in two ways. Firstly it created an extraordinary atmosphere. Under these circumstances the national authorities may worry to give fast and severe punishments because the disorder atmosphere may arise again. Secondly this disorder negatively affected the working of the criminal court. These affects were mostly affected by the Reggio Court. The Potenza court that cases

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[443] Reilly v. Ireland (The Supreme Court made its judgment in 12 months and the local judge approved the evidence list in 14 months).

[444] Buchhoz v. Germany, 06.05.1981, par. 60 (Doğru Osman, ibid, p. 406).

were transferred to was under heavy work load. Therefore the time missing that welded from the transfer of the cases did not violate the article 6/1 of the convention[445].

In order to be not responsible, the state should take the necessary measures in a reasonable time to prevent the delaying. As a matter of fact in the case of Buchholz v. Germany the ECtHR hold that, if the state takes the necessary measures because of temporary work load it cannot be blamed for delay of trial. But if the necessary measures for prevent the delay of trial are not in accordance with the administration of equity, due to not taking the necessary measures the state cannot be blamed. For example in the case of Neumeister v. Germany the ECtHR take into consideration if the necessary measures could fasten the trial. In this case, more persons than one were tried as accessory. In this case the ECtHR decided that, if the files of the accessories separated from the others the trial would be able to finish in a reasonable time. But according to the ECtHR there is no sign to show the benefit of separation of files for the administration of equity[446]. Therefore the ECtHR decided that there is no violation of the article 6/1 of the convention.

In case transfer the jurisprudence of a court to another, if the delay is welded from this transfer, the state can be blamed for the delay. In the case of Tamkoç v. Turkey the ECtHR observed that, one of the delaying reasons of this case is the transfer of the case from military court to civil court as a result of the transfer of jurisprudence[447].

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445 Foti and others v. Italy, 10.12.1982, par. 61 (Doğru Osman, p. 525).

446 Neumeister v. Germany, 27.6.1968, par. 21.

447 Tamkoç v. Turkey, 25 September 2001, par. 30 (Adalet Bakanlığı Yargı Mevzuatı Bülteni, 12.03.2002, number 172, p. 54)

The ECtHR attaches importance to the majority of stages of hearing on evaluation of the reasonable time. According to the ECtHR if a trial was concluded after passing three different hearing stages, because of the majority of the stages the term can be acceptable, but if the same term was passed only before one hearing stage this term can violate the article 6/1 of the convention. For example in the case of Zimmerman and Stainer v. Switzerland the Federal Court after asking the opinion of The Federal Assess Commission on 27 April 1977, it received the opinion of the commission and the administrative organs of the Zurich Canton in may and then it did nothing except replaying the letters of the applicants. The Switzerland law empowered the Federal Court to give its judgment in accordance with the evidences in the file. But the Federal Court did not give its judgment during the half and 3 years. The government reminded the judgment dated 6 May 1981 of the ECtHR that before the last judgment of national court 5 years had passed but the ECtHR decided that there is no violation of the 6/1 of the convention. But the ECtHR emphasized that; the mentioning law case was tried by three different trial stages, but this case tried by only one trial stage and 5 years term of period can be acceptable only in exceptional circumstances[448].

4.5. The Right to Trial within A Reasonable Time in Turkish Law

There are no definite provisions about how soon the cases will be ended in Turkish law. However, sometimes the provisions are encountered relating to ending the cases within a reasonable time in certain regulations. It is impossible that these provisions ensure the concluding of the cases within a reasonable time. They are still playing a coercive role for this. For example, the Article 141/4 of our Constitution says: "ending of the cases by a minimal cost and as soon as possible is a duty for Judiciary".

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[448] Zimmerman and Stainer v. Switzerland, 13.07.1983, par. 27 (Doğru Osman, ibid, p. 612).

The Code for Red-Handed numbered 3005 that was ceased to be effective [449] was stipulating certain cases to be come before the court by editing indictment immediately. However, it has scarcely been complied these provisions in practice, since they have no any sanction. As is seen, a definite criterion was not stipulated for ending of the cases. This is already impossible too. For characters of each tangible fact will change the conclusion term of case.

Notwithstanding, conclude of some processes of investigation and prosecution can be stipulated within a fixed term by law. For instance, according to the article 26 of the press law numbered 5187, "It is obliged that the penal actions about the crimes committed by publications or others mentioned in this Code to be brought within two months for daily periodicals and within four months for other publications".

Likewise, regulations were made in the Code for Judges and Prosecutors for the aim of ending of investigations against the judges and prosecutors as soon as possible. Accordingly, "The Public Prosecutor presents his indictment to the High Criminal Court to decree for either opening a final investigation or being no necessary, by editing it within five days".[450]

Judges and Prosecutors are obliged to accomplish a certain percentage of files on their tables within their promotional term of two-year. This percentage is 80 for judges and prosecutor who will get an "eminent promotion".[451]

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[449] This Code was ceased to be effective on July 1st 2005 by the Article 18 of the code numbered 5320 and dated 23.03.2005.

[450] The Article 89/2 of the Code for Judges and Prosecutors numbered 2802.

[451] The Articles of 6/a-4 and 6/b-3 of Leading Decision by HSYK (HCJP) Regarding Principles of Promotion of Degree Determined in Accordance with the Articles 21 and 118 of the Code for Judges and Prosecutors numbered 2802 about the judges and prosecutors at both judiciary and administrative courts.

Another institution is the timeout stipulated for the aim of troubleshooting the problems that are caused by long term trials. Periods of timeout for suing and punishing in penal cases were stipulated to prevent the grievances could be caused by long term trials.[452] If a decision is not made for the case within the timeout period, the power of trying and sentencing of the state disappears. Likewise, the aim to stipulate certain periods for some procedures in procedural laws is to ensure ending of the cases within reasonable times. They are indirect regulations made for ending the cases within reasonable times. These regulations aim to be concluded the trials as soon as possible. However, being very strict of them can injure the right to a fair trial , the essential aim, since they sometimes could cause the false decisions due to impetuousness. For this reason, other factors prolonging the trials must be removed, although not to determine a definite term is suitable. If these factors are removed, the cases anyway will be able to conclude in a short time and fairly. These factors having influence on prolonging of the cases are as follows:

Knowledge deficiency and carelessness that many of judges, prosecutors and lawyers have.[453]

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[452] See, the Article 66 of Turkish Penal Code dated 26.09.2004, "1)With the exception of instances specified in this Code, a public case is prescribed by expiring

Thirty years for crimes require the weighted life sentence,

Twenty-five years for crimes require the life sentence,

Twenty years for crimes require the prison sentence not less than twenty years,

Fifteen years for crimes require the prison sentence of above five years and under twenty years,

Eight years for crimes require the prison sentence not to exceed five years or judicial fine".

[453] Ramazanoğlu v. Turkey, 10.06.2003, par. 24.

Scarcity of expertise institutions (forensic medicine or criminals) that would make technical examinations about the case.

Not specializing of judges completely.[454]

Collecting the evidences successively, not all together.

Not complying with the rules entirely which would accelerate the trial.

Ill disposed attitudes of the parts and deficiency of precautions that would prevent these.

Extreme workload in some centrums.

Deficiency of equipment and technical supplies.[455]

Being low-spirited of judges for various reasons.[456]

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[454] In our current judicial system, a judge can be assigned in all courts without his consent, and this power is very frequently exercised. As a consequence, a judge who served in a criminal court for 8-10 or even 20 years can instantly be assigned as a judge of civil court. Then, the judge who has forgotten his civil jurisdiction knowledge in the meantime is obliged to relearn everything and so continually postpone the trials, and vice versa. This both protracts the cases and seriously reduces the proportion of making a fair judgment because inhibits specialization. Therefore, specialization of criminal court judges as criminal court of peace judges, criminal court of first instance judges and high criminal court judges and of civil court judges similarly will contribute concluding of the cases within a reasonable time.

[455] Nowadays, computer application was recently started in the courthouses in Turkey, but Project of National Juridical Net called UYAP established between courthouses and between local courts and the superior court did not go into operation at full strength yet. If it is done soon, failing in this respect will be eliminated. Delivery of laptops to each judge and prosecutor, and desktops to every court stenographer largely accelerated the jobs, on the other hand.

[456] Leading of these is insufficiency and inconvenience of judges' work environment.

Legal interest rates' being considerably under inflation for actions of debt and actions for damages.

Imbalance at judge distribution.[457]

Deficiency of number of judges, prosecutors and other personnel.

Insufficiency of buildings.

[457] It is caused to be without a job for judges by assigning two judges and two prosecutors to a very small town which has a workload of 30 files annual. On the other hand, a judge or a prosecutor is obliged to try up to 6000 case in a year in big cities. Critical projects in this respect are in the design stage, and one these is closing up such small courthouses.

5. GENERAL ASSESSMENT AND CONCLUSION

The state has many obligations of activity and duty to perform. It accomplishes them by its organs called by various names. Duties would be carried out by these organs constitute their functions at the same time.

Separation of powers (checks and balances) expresses that the activities and duties to be performed by the state are separated and performed by different and independent agencies. The power of the state, in fact, is unique and it is the national will. This power is used by organs that have no any superiority to each other and that perform activity in a certain division of work and cooperation.

People have to know that they would no encounter with a treatment but the laws stipulate, even to be sure of this. And they must have necessary guarantees and mechanisms for asserting their rights acknowledged by the laws when a contrary instance appears. Laws' supremacy and restrictiveness for everyone is an important principle for preserving of rights.

Sui generis character of judiciary leads us to an independent and free of every kind of intervention juridical. Justice, first of all, has to be organized outside every kind of political disagreement to be manifested in a cool environment.

One of the most important duties of a rule of law is to establish the societal justice. Presence of independent and impartial judiciary is first in importance of necessary conditions for distributing of justice equally to the all individuals, namely for realizing the societal justice.

Judiciary constitutes one of the states' sovereignty fields. However, even the sovereignty fields of the states were started to be included to the common international areas because of certain political or economical concerns by globalization of today's world. One of these, definitely, is judiciary. For going towards a unity in a global magnitude for judiciary is in an undeniable degree at least for basic rights and freedoms.

Studies for a European Constitution and international conventions are prominent examples for this. Turkey has paved the way for sharing its own sovereignty with other states even if partly by signing European Convention on Human Rights that appeared as a consequence of this process. Turkey has acknowledged “the right to trial by an independent and impartial tribunal within a reasonable time”, our topic, for its citizens in accordance with Convention in question, and accepted that it will abide by judgments of ECtHR, an international institution. And finally, it has approved that this Convention would be dominant on its own laws when they are in conflict with each other.

Turkey has guaranteed the right to trial by an independent and impartial tribunal within a reasonable time at the highest level, which is one of the touchstones on the road to the rule of law by signing this Convention in this way.

However, Turkey has many deficits in practice in this respect. Completely removing of these is not possible only by conventions or laws. It must be accepted that, additionally, rule of law concept as a whole is a necessity by people nationwide, executive and legislation and must be conducted accordingly. I have to say regretfully that we did not come to this point.

Republic of Turkey has repeatedly condemned to damages by ECtHR for its many practices by force of being contracting states of European Convention on Human Rights. Consequently, Turkey has obliged to change its regulations towards ECtHR and judgments of ECtHR.

However, judiciary ignored for many years is ill by its inadequate infrastructure. Even if it is not mentioned, judiciary is seen as almost a hindrance by legislation and executive, and is behaved by an understanding of how much the judiciary is poor things will go so much right. It is given the impression of everything is fine for judiciary of which problems are known by everybody. Although it is taken some positive steps such as constructing of new courthouses, coming of e-signature studies to the final stage, becoming widespread of computer system and its use, and increase of judges’ and prosecutors’ numbers recently, all of them falls behind the desired level. For

procedures were increased by new CMK system, written order or decree is stipulated for each treatment, UYAP makes the jobs difficult in its current form (due to preparing papers both imaginary and physically), regional courts did not go into operation yet, operation of Chancery was not able to accelerated, terms of trial was further prolonged because of amendments and many of them were either abated or about to because of timeout.

Judiciary, nevertheless, gives itself some guidance towards judgments of ECtHR and predicates ECtHR interpretations on its judgments. Consequently, it is made changes in definitions of crimes and procedures as well as changes concerning structure of judiciary that constitutes an impediment. Additionally, the court authorities interpret the laws according to the ECtHR judgments. These interpretations give birth to more easily adaptation of domestic law to the ECHR. There are important deficiencies as well as many changes.

Conformity between the ECHR and domestic law was largely provided in today's Turkey. This conformity was further substantially obtained by coming into effect of Turkish Penal Code (TCK) numbered 5237, and Code for Criminal Procedures (CMK), and Code on Execution of Punishment and Security Precautions (CGTİHK) on 1st June, 2005.

6. BIBLIOGRAPHY

AŞÇIOĞLU, Çetin : Doğru ve Güvenli Yargılanma Hakkınız Var, Adalet Yayınları,

AYKONU, Mustafa S./ ÖZKUL, E. Aydın: Anayasa Yargısı, Anayasa Yayınları, Ankara, 1981

CENTEL, Nur : Ceza Muhakemesi Hukukunda Hakimin Tarafsızlığı, Kazancı Yayınları, İstanbul 1996

CENTEL, Nur : Avrupa İnsan Hakları Sözleşmesine Göre Mahkemelerin Bağımsızlığı İle Tarafsızlığı ve Türk Hukuku, Presents to Prof. Dr. Nurullah Kunter, İÜHFY, İstanbul 1998

CENTEL, Nur : "Dürüst Yargılama ve Medya Bakımından Demokrasi Kültürü" –Present to Prof. Dr. Yılmaz Günal , Siyaset Bilimi Dergisi Ankara Üniversitesi Hukuk Fakültesi

CENGİZ, Serkan/ DEMİRAĞ, Fahrettin/ ERGÜL, Teoman/ MCBRİDE, Jeremy and TEZCAN, Durmuş : Avrupa İnsan Hakları Mahkemesi Kararları Işığında Ceza Yargılaması Kurum ve Kavramları, Turkey Bar Association, 2008, Ankara

ÇELİK, Adem : Adil Yargılanma Hakkı (Avrupa İnsan Hakları Sözleşmesi ve Türk Hukuku), Adalet yayınları, Ankara, 2007.

ÇAVUŞOĞLU, Naz :İnsan Hakları Avrupa Sözleşmesi ve Avrupa Topluluk Hukukunda Temel Hak ve Hürriyetler Üzerine, AÜİHMY , Ankara 1994

DAVER, Bülent : "Kuvvetler Ayrılığı İlkesinin Yargı Açısından Anlamı ve Türkiye Örneğine dair Yorum", AMKD, Ed. 5, Ankara 1984

DEMİRKOL, Ferman: Yargı Bağımsızlığı, Kazancı Yayınları, İstanbul 1991

DEMİRKOL, Ferman: Bağımsız Yargının Fonksiyonları, Kazancı Yayınları, İstanbul 1992

DOĞRU, Osman, **:** İnsan Hakları Avrupa Mahkemesi İçtihatları, VI, Beta, 2002,

DOĞRU, Osman **: İnsan** Hakları Avrupa İçtihatları, Beta , İstanbul 1996

EROL, Haydar **:** İçtihatlı Ceza Muhakemeleri Usulü Kanunu, 2002

ERZURUMLUOĞLU, **Erzan** : Hukuk Devleti ve Yargı Bağımsızlığı, ABD, Ed.1, Ankara 1989

FENDOĞLU, **Hasan Tahsin** :Yargı Bağımsızlığı, Bilgi Serisi 2, Ankara 1997

GÖLCÜKLÜ, Feyyaz/ GÖZÜBÜYÜK, Şeref **:** İnsan Hakları Avrupa Sözleşmesi ve Uygulaması, 3rd ed.

GÖLCÜKLÜ, Feyyaz/ GÖZÜBÜYÜK, Şeref **:** İnsan Hakları Avrupa Sözleşmesi ve Uyulaması, 4th ed.

GÖLCÜKLÜ, Feyyaz **:** İnsan Hakları Avrupa Sözleşmesi ve Uygulaması, Ankara, 1994, 3rd ed.

GÖLCÜKLÜ, Feyyaz **:** AİHS'de Adil Yargılanma, January-June, 1994, V. II, Ankara,

İBRAHİM HAKKIOĞLU, Uğur **:**
http://www.dusunenadam.com.tr/v1_yedek/hukuk6.htm

İNCEOĞLU, Sibel **:** İnsan Hakları Avrupa Mahkemesi Kararlarında Adli Yargılanma Hakkı, Beta, 2002

İNCEOĞLU, Sibel **:** Adil Yargılanma Hakkı ve Yargı Etiği, Şen Matbaa, November 2007

KARDAŞ, Ümit **:** Hâkim Bağımsızlığı Açısından Askeri Mahkemelerin Kuruluşu ve Yetkileri, İstanbul, 1992

Adalet Bakanlığı Eğitim Dairesi Başkanlığı, Yargı Mevzuatı Bülteni, Issue no: 170.

Adalet Bakanlığı Eğitim Dairesi Başkanlığı, Yargı Mevzuatı Bülteni, Issue no: 173,

Adalet Bakanlığı Eğitim Dairesi Başkanlığı, Yargı Mevzuatı Bülteni, Issue no: 178

Adalet Bakanlığı Eğitim Dairesi Başkanlığı, Yargı Mevzuatı Bülteni, Issue no:188,

KAPANİ, Münci **:** İcra Organı Karşısında Hakimlerin İstiklali, AÜHFY, Ankara 1956

KAPANİ, Münci **:** İcra Organı Karşısında Hakimlerin İstiklali, AÜHFY , 1956,

KESKİN, Serap **:** Yargıç Bağımsızlığı, Present to Prof. Nurullah Kunter, İÜHFY , İstanbul, 1998

KUNTER, Nurullah : Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku, 9th ed., İstanbul 1989,

KUNTER, Nurullah :Türkiye'de Kaza Kuvveti, 1987, ed.

KURU, Baki **:** Hâkim ve Savcıların Bağımsızlığı ve Teminatı, Ankara, 1966,

KESKİN, Serap **:** Yargıç Bağımsızlığı, Present to Prof. Nurullah Kunter, İÜHFY , İstanbul, 1998

MOLE, Nuala/ and HARBY, Catharina **:** Adil Yargılanma Hakkı, İnsan Hakları El Kitapları no: 3, Directorate General of Human Rights Council of Europe F-67075, Strasbourg, Cedex, 2001, 1st ed., October, 2001, (İnsan Hakları Avrupa Sözleşmesinin 6. Maddesinin Uygulanmasına İlişkin Kılavuz).

MUMCUOĞLU, Maksut : Hukuk Devletinde Bağımsız Yargının Yeri ve Bağımsız Yargının Türkiye Gelişimi, ABD, Year: 46, Issue: 2, March, 1989

OĞUZ Fuat, Hukukun Üstünlüğü ve Ekonomik Gelişme, Demokrasi Platformu Dergisi, 2005, Issue: 2

ÖZTEK, Selçuk : "Türkiye'de Hakim Bağımsızlığını Sağlayan Hukuki Tedbir, Teşkilat ve Kurumlar" MÜHFY, V. 7, Ed. 1-3, İstanbul 1993

ÖZAY, İlhan : "Yargı Güvencesi-Bağımsızlığı ve Anayasa Mahkemesi", Anayasa Yargısı, Anayasa Yayınları, Ankara 1991

ÖZTEKİN, Tosun : Türk Suç Muhakemesi Hukuku Dersleri, V: I, Istanbul, 1984

ÖZBUDUN, Ergun : Türk Anayasa Hukuku, op. cit,

POSTACIOĞLU, İlhan E. : Medeni Usul Hukuku, İÜHFY, 1966

REİD, Karen : Adil Bir Yargılamanın Güvenceleri, Avrupa İnsan Hakları Sözleşmesi Rehberi, 3rd Book, SCALA Publication, 2000

SAV, Önder : "1989-1990 Adalet Yılının Açılışında Konuşma", Yargıtay Dergisi, V.16, Ed. 1-2, 1990

SELÇUK, Sami : Chairman of Chancery. Opening speech of court year of 2001-2002

TANÖR, Bülen :Türkiye'nin İnsan Hakları Sorunu, İstanbul, 1990,

TEZCAN Durmuş/ ERDEM, Ruhan Mustafa/ SANCAKDAR, oğuz :Avrupa İnsan Hakları Sözleşmesi ve Uygulaması, (Republic of Turkey Ministry of Justice Education Department), Ankara Açık Cezaevi, 2004

ÜNVER, Yener : "Yargı Bağımsızlığı Açısından Hakimler Savcılar Yüksek Kurulu", İÜHFY., C.LIII, S.1-4, İstanbul 1990

ÜNAL, Şeref **:**Anayasa Hukuku Açısından Mahkemelerin Bağımsızlığı ve Hakimlik Teminatı, TBMM Basımevi, Ankara 1994

ÜNAL, Şeref **:**Avrupa İnsan Hakları Sözleşmesi : İnsan Hakları Uluslararası İlkeleri / Ankara : TBMM Basımevi, 2001

http://www.anayasa.gen.tr/baslar-045-058.pdf

http://www.echr.coe.int

http://www.tbmm.gov.tr/anayasa/anayasa61.htm

http://www.msb.gov.tr/ayim/Ayim_makale_detay.asp?IDNO=75

http://www.turksolu.org/133/ozden133.htm

http://www.turkhukuksitesi.com/showthread.php?t=5136

http://www.haberler.com/haberf.asp?haber=179064.
(arşivarama/01.07.2005/Yargıtay'dan yargıda siyasallaşma uyarısı)

http://www.idealhukuk.com/hukuk/hukuk.asp?mct=duyurudetay&x=makale&y=Makaleler&id=42&tit=Yasayla-Kurulmus-Bagimsiz-Mahkemede-Yargilanma-Hakki

http://www.tumgazeteler.com/?a=4082132

YURTCAN, Erdener **:** Ceza Yargılaması Hukuku, 3rd ed., Kazancı Yayınları, İstanbul, 1994

7. RELATED JUDGMENT LIST OF THE ECtHR

1. **Ayla Özcan v. Turkey Application No: 36526/04 Strazburg 03 February 2009** (http://www.inhak-bb.adalet.gov.tr/aihm/aihmtkliste.asp?psearch=ayla&psearchtype=AND)

2. **Oberschlick v. Austria, 23.05.1991,11662/85;** (Mole Nuala, and Harby Catharina, Adil Yargılanma Hakkı, Directorate General of Human Rights Council of Europe F-67075, Strasbourg, Cedex, 2001, 1st ed., October, 2001, p. 31 (İnsan Hakları Avrupa Sözleşmesinin 6. Maddesinin Uygulanmasına İlişkin Kılavuz)

3. **Öcalan v. Turkey,46221/99, 12.03.2003,** (TC Adalet Bakanlığı Adli Yargı Mevzuatı Bülteni, Issue 210, p. 37).

4. **Ringeisen v. Austria,2614/65, 16.07.1971,** (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Ringeisen%20%7C%20v.%20%7C%20Austria&sessionid=50823305&skin=hudoc-en)

5. **A and Others v. Denmark, 08.02.1996, 20826/92.** (http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/2422ec00f1ace923c1256681002b47f1/963b9ca7740179afc1256640004c2e9c?OpenDocument)

6. **Abdoella v. Netherlands,12728/87, 25.11.1992,** (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Abdoella%20%7C%20v.%20%7C%20Netherlands%2C&sessionid=50833577&skin=hudoc-en)

7. **Akçam v. Turkey,32964/96, 30 October 2001;** (http://www.inhak-bb.adalet.gov.tr/aihm/aihmtkliste.asp?psearch=ak%E7am&psearchtype=AND)

8. **Aras v. Turkey Application No:1895/05, Strazburg, 17 February 2009** (http://www.inhak-bb.adalet.gov.tr/aihm/aihmtkliste.asp?psearch=aras&psearchtype=AND)

9. **B. v. Austria, 28.03.1990, A 175, par. 54;** (Gözübüyük Şeref and Gölcüklü Feyyaz, ibid, p. 287)

10. **Barbera Messague and Jabardo v. Spain, 06.12.1998, A 146; and Academy Trading and others v Greece, 04.04.2000** (Cited by Gölcüklü and Gözübüyük, ibid, p. 283).

11. **Baumartin v. France, 24.11.1994, Series A, No. 296-B.** (Mole Nuala, and Harby Catharina, Adil Yargılanma Hakkı, Directorate General of Human Rights Council of Europe F-67075, Strasbourg, Cedex, 2001, 1st ed., October, 2001, p. 31 (İnsan Hakları Avrupa Sözleşmesinin 6. Maddesinin Uygulanmasına İlişkin Kılavuz)

12. **Beaumartin v. France,15287/89, 24.11.1994.** (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Beaumartin%20%7C%20v.%20%7C%20France&sessionid=50833577&skin=hudoc-en)

13. **Bedri and Reşit Aslan v. Turkey, App. No: 63183/00, Strasbourg, 22 December 2005**. (Adalet Bakanlığı Yargı Mevzuatı Bülteni, Issue: 166, p. 37).

14. **Belilios v. Switzerland, 29.04.1988**, (İnceoğlu Sibel, İnsan Hakları Avrupa Mahkemesi Kararlarında Adli Yargılanma Hakkı, Beta, 2002 , p. 169).

15. **Benli v. Turkey, Strasbourg,65715/01, 20 February 2007.** (Çelik, Adem; Adil Yargılanma Hakkı, (Avrupa İnsan Hakları Sözleşmesi ve Türk hukuku), Adalet Yayınları, Ankara 2007)

16. **Benthem v Austria, 22.5.1984 A 78**, (Gölcüklü, Feyyaz, İnsan Hakları Avrupa Sözleşmesi ve Uygulaması, 3rd ed., p. 280).

17. **Bock v. Germany,11118/84, 29.03.1989, A 150 & 48** (İnceoğlu Sibel, ibid, pp. 357-358)

18. **Boddaert v. Belgium,12919/87, 12.10.1992, Series A, No. 235.** (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Boddaert%20%7C%20v.%20%7C%20Belgium&sessionid=50833577&skin=hudoc-en)

19. **British-American Tobacco v. Netherlands,19589/92, 20/11/1995, (**See, İnceoğlu Sibel, ibid, p. 166.)

20. **Buchholz v. Germany,7759/77, 6.5.1981,** (Gözübüyük Şeref and Gölcüklü Feyyaz, ibid, p. 285);

21. **Buchhoz v. Germany, 06.05.1981,** (Doğru; Osman, ibid, p. 406)

22. **Budak and Others v. Turkey, App. No: 57345/00, Strasbourg, 10 January 2006.** (Adalet Bakanlığı Yargı Mevzuatı Bülteni, Issue: 176, p. 33).

23. **Bülent Zengin v. Turkey, App. No: 60848/00, Strasbourg, 29 November 2007.** (http://www.inhak-bb.adalet.gov.tr/aihm/aihmtkliste.asp?psearch=B%FClent+Zengin+&psearchtype=AND)

24. **Campbell and Fell v. United Kingdom,7819/77;7878/77, 28.6.1984;** (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=campbell%20%7C%20and.%20%7C%20fell%20%7C%20v.&sessionid=51002628&skin=hudoc-en)

25. **Canseven v. Turkey, App. No: 70317/01, Strasbourg 15 February 2007.** (Çelik, Adem; Adil Yargılanma Hakkı, (Avrupa İnsan Hakları Sözleşmesi ve Türk hukuku), Adalet Yayınları, Ankara 2007)

26. **Ciricosta and Viola v. Italy,19753/92, 4.12.1995, Series A, No. 337.** (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Ciricosta%20%7C%20Viola%20%7C%20v.%20%7C%20Italy&sessionid=50833577&skin=hudoc-en)

27. **Corigliano v. Italy,8304/78, 10.12.1982,** (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Corigliano%20%7C%20v.%20%7C%20Italy&sessionid=50833577&skin=hudoc-en)

28. **Coşkun v. Turkey Application No: 620/03, Strazburg 21 April 2009** (http://www.inhak-bb.adalet.gov.tr/aihm/aihmtkliste.asp?psearch=co%FEkun&psearchtype=AND)

29. **Cyprus v. Turkey,25781/94, 10.05.2001,** (http://cmiskp.echr.coe.int/tkp197/view.asp?item=5&portal=hbkm&action=html&highlight=cyprus%20%7C%20v.%20%7C%20turkey&sessionid=50944899&skin=hudoc-en)

30. **Çelik and Others v. Turkey, App. No: 56835/00, Strasbourg, 20 April 2006.** (http://www.inhak-bb.adalet.gov.tr/aihm/aihmtkliste.asp?psearch=%E7el&psearchtype=AND)

31. **De Cubber v Belgium, 26.10.1984, 9186/80** (http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=De%20%7C%20Cubber%20%7C%20v%20%7C%20Belgium&sessionid=50833577&skin=hudoc-en)

32. **De Haan v. Netherlands,22839/93,** 26.08.1997.(Mole Nuala, and Harby Catharina, Adil Yargılanma Hakkı, Directorate General of Human Rights Council of Europe F-67075, Strasbourg, Cedex, 2001, 1st ed., October, 2001, p. 31 (İnsan Hakları Avrupa Sözleşmesinin 6. Maddesinin Uygulanmasına İlişkin Kılavuz)

33. **Delcourt v. Belgium,2689/65, 17.01.1970,** (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Delcourt%20%7C%20v.%20%7C%20Belgium%2C&sessionid=51006165&skin=hudoc-en)

34. **Demirel v. Turkey, 28.01.2003, Appl. Number: 39324/98.** (Adalet Bakanlığı Yargı Mevzuatı Bülteni, Issue: 159, p. 43).

35. **Eckle v. Germany,8130/78, 15.07.1982,** (http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Eckle%20%7C%20v.%20%7C%20Germany&sessionid=50833577&skin=hudoc-en)

36. **Engel and Others v. Netherlands, 5100/71; 5101/71 ; 5102/71,8.6.1976,** (Cited by Doğru, Osman, İnsan Hakları Avrupa Mahkemesi İçtihatları, V I, Beta, 2002, p.531).

37. **Erdoğan v. Turkey, 09.07.1992, 72 D.R., 81.** (Adalet Bakanlığı Yargı Mevzuatı Bülteni, Issue: 167, p. 45).

38. **Ferrantelli and Santangelo v. Italy,19874/92, 07.08.1986** ;(Mole Nuala, and Harby Catharina, Adil Yargılanma Hakkı, Directorate General of Human Rights Council of Europe F-67075, Strasbourg, Cedex, 2001, 1st ed., October, 2001, p. 31 (İnsan Hakları Avrupa Sözleşmesinin 6. Maddesinin Uygulanmasına İlişkin Kılavuz).

39. **Fey v Austria, 24.02.1993,14396/88;** (Mole Nuala, and Harby Catharina, Adil Yargılanma Hakkı, Directorate General of Human Rights Council of Europe F-67075, Strasbourg, Cedex, 2001, 1st ed., October, 2001, p. 31 (İnsan Hakları Avrupa Sözleşmesinin 6. Maddesinin Uygulanmasına İlişkin Kılavuz).

40. **Fey v. Austria,14396/88, 24/02/1993,** (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Fey%20%7C%20v.%20%7C%20Austria&sessionid=50833577&skin=hudoc-en)

41. **Findlay v. United Kingdom, 25.02.1997, 22107/93;** (Mole Nuala, and Harby Catharina, Adil Yargılanma Hakkı, Directorate General of Human Rights Council of Europe F-67075, Strasbourg, Cedex, 2001, 1st ed., October, 2001, p.

31 (İnsan Hakları Avrupa Sözleşmesinin 6. Maddesinin Uygulanmasına İlişkin Kılavuz)

42. **For summary news about the case of Sacit Kayasu v. Turkey** see. http://www.tumgazeteler.com/?a=4341115

43. **Foti and others v. Italy,7604/76,7719/76,7781/77, 10.12.1982, par. 61** (Doğru Osman, ibid).

44. **Genç v. Turkey,31891/96, 30.10.2001,** (http://www.inhak-bb.adalet.gov.tr/aihm/aihmtkliste.asp?psearch=gen%E7&psearchtype=AND)

45. **Golder v. United Kingdom,4451/70, 21.02.1975, par. 32.** (http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=50833577&skin=hudoc-en&action=request)

46. **Gregory v. United Kingdom**, **25.02.1997, 22299/93** .(Mole Nuala, and Harby Catharina, Adil Yargılanma Hakkı, Directorate General of Human Rights Council of Europe F-67075, Strasbourg, Cedex, 2001, 1st ed., October, 2001, p. 31 (İnsan Hakları Avrupa Sözleşmesinin 6. Maddesinin Uygulanmasına İlişkin Kılavuz).

47. **Guzzardi v. Italy, 7367/76, 0041, 06.11.1980,** (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Guzzardi%20%7C%20v.%20%7C%20Italy&sessionid=50833577&skin=hudoc-en)

48. **Gülşen and Halil Yasin Ketencioğlu v. Turkey, 25.9.2001.** (Adalet Bakanlığı Yargı Mevzuatı Bülteni, Issue: 177).

49. **H. v. United Kingdom, 08.07.1987, A 120, par. 81** (Gözübüyük Şeref and Gölcüklü Feyyaz, ibid, p. 286).

50. **Hauschildt.v Denmark, 10486/83, 24.05.1989,** (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html

&highlight=Hauschildt%20%7C%20v.%20%7C%20Denmark&sessionid=5083
3577&skin=hudoc-en)

51. **Holm v. Sweden, pars. 32-33** (İnceoğlu Sibel, ibid, p. 198); Gözübüyük and Gölcüklü, ibid,

52. **İnan v. Turkey,39428/98, 30 October 2001,;** (http://www.inhak-bb.adalet.gov.tr/aihm/aihmtkliste.asp?psearch=inan&psearchtype=AND)

53. **İncal, Mehdi Zana, Çıraklar,and Gerger v. Turkey** (Adalet Bakanlığı Eğitim Dairesi Başkanlığı, Yargı Mevzuatı Bülteni, Issue no: 173, 178, 188, 170.)

54. **Karakoç v. Turkey,27692/95,28138/95,28498/95, 15.10.2002.** (Adalet Bakanlığı Yargı Mevzuatı Bülteni, Issue: 161,)

55. **Kostka v. Poland, 16.02.2010**, App. No. 29334/06,

56. **König v. Germany,6232/73, 28.6.1978, par. 99.**
(http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html
&highlight=K%F6nig%20%7C%20v.%20%7C%20Germany%2C&sessionid=5
0833577&skin=hudoc-en)

57. **Langborger v. Sweeden,11179/84, 22.06.1989.** (Mole Nuala, and Harby Catharina, Adil Yargılanma Hakkı, Directorate General of Human Rights Council of Europe F-67075, Strasbourg, Cedex, 2001, 1st ed., October, 2001, p. 31 (İnsan Hakları Avrupa Sözleşmesinin 6. Maddesinin Uygulanmasına İlişkin Kılavuz).

58. **Lechner and Hess v. Austria,9316/81, 23.04.1987,** (Gözübüyük Şeref and Gölcüklü Feyyaz, ibid, pp. 286-287)

59. **Mehmet Ali v. Turkey,29286/95, 25.09.2001**;
(http://www.mazlumder.org/haber_detay.asp?haberID=293)

60. **Micallef v. Malta, App no. 17056/0, Judgment Strasbourg, 15 January 2008,** (http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Micallef%20%7C%20v.%20%7C%20Malta%2C&sessionid=50833577&skin=hudoc-en)

61. **Mitap and Müftüoğlu v. Turkey,15530/89,15531/89, 25.3.1996.** (see Cyprus v. Turkey judgement).

62. **Neumeister v. Austria,1936/63, 27.06.1968,** (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Neumeister%20%7C%20v.%20%7C%20Austria&sessionid=50833577&skin=hudoc-en)

63. **Pekdaş v. Turkey, 30.10.2001**; (http://www.inhak-bb.adalet.gov.tr/aihm/aihmtkliste.asp?psearch=pekda%FE&psearchtype=AND)

64. **Piersack v. Belgium, 01.10.1982,8692/79;** (Mole Nuala, and Harby Catharina, Adil Yargılanma Hakkı, Directorate General of Human Rights Council of Europe F-67075, Strasbourg, Cedex, 2001, 1st ed., October, 2001, p. 31 (İnsan Hakları Avrupa Sözleşmesinin 6. Maddesinin Uygulanmasına İlişkin Kılavuz).

65. **Preto and Others v. Italy, 8.12.1983, A 71; Monet v. France, 27.10.1993, A 273,** (Gözübüyük Şeref and Gölcüklü Feyyaz, ibid, p. 287)

66. **Pretto and Others v. Italy,7984/77, 08.12.1983, par. 35/a.** (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Pretto%20%7C%20Others%20%7C%20v.%20%7C%20Italy&sessionid=50833577&skin=hudoc-en)

67. **Proszak v. Poland,25086/94, 16.12.1997.** (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Proszak%20%7C%20v.%20%7C%20Poland&sessionid=50833577&skin=hudoc-en)

68. **Pullar v. United Kingdom,22399/93, 10.06.1996,** (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Pullar%20%7C%20v.%20%7C%20United%20%7C%20Kingdom&sessionid=50833577&skin=hudoc-en)

69. **Ramazanoğlu v. Turkey,39810/98, 10.06.2003, par. 24** (Adalet Bakanlığı Yargı Mevzuatı Bülteni, 28 October 2003, number 228, p. 90);

70. **Reilly v. Ireland, 29.07.2004,** (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Reilly%20%7C%20v.%20%7C%20Ireland&sessionid=50833577&skin=hudoc-en).

71. **Remli v. France,16839/90, 23.4.1996;** (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Remli%20%7C%20v.%20%7C%20France&sessionid=50833577&skin=hudoc-en)

72. **Selçuk Yıldırım v. Turkey, 30451/96, 25 September 2001,** (Adalet Bakanlığı Yargı Mevzuatı Bülteni, Issue: 188 p. 54);

73. **Sramek v. Austria, 22.10.1984,8790/79,** (Gölcüklü, Feyyaz, İnsan Hakları Avrupa Sözleşmesi ve Uygulaması, 3rd ed., p. 211) and (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Sramek%20%7C%20v.%20%7C%20Austria&sessionid=50833577&skin=hudoc-en)

74. **Stögmüller v. Austria,1602/62, 10.11.1969, A 9 - 5;**(http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=St%F6gm%FCller%20%7C%20v.%20%7C%20Austria&sessionid=50833577&skin=hudoc-en)

75. **Sutter v. Switzerland, 01.03.1979, 16 DR 166,** (İnceoğlu Sibel, ibid,.)

76. **Şahiner v. Turkey, 25.09.2001** (Adalet Bakanlığı Yargı Mevzuatı Bülteni, Issue: 178, p. 31).

77. **Tamkoç v. Turkey,31881/96, 25 September 2001,** (Adalet Bakanlığı Yargı Mevzuatı Bülteni, 12.03.2002, number 172)

78. **Thomann v Switzerland, 10.06.1996.17606/91,17602/91 ,**(http://cmiskp.echr.coe.int/tkp197/search.asp?sessionid=51026772&skin=hudoc-en)

79. **Thommann v. Switzerland, 10.6.1999,** (Mole Nuala, and Harby Catharina, Adil Yargılanma Hakkı, Directorate General of Human Rights Council of Europe F-67075, Strasbourg, Cedex, 2001, 1st ed., October, 2001, p. 31 (İnsan Hakları Avrupa Sözleşmesinin 6. Maddesinin Uygulanmasına İlişkin Kılavuz).

80. **Tutsa v. Italy, 27.2.1997, A 231& 57; Bunkate v. Netherlands, 26.5.1993 & 20-23** (Gözübüyük Feyyaz and Gölcüklü Şeref, Avrupa İnsan Hakları Sözleşmesi ve Uyulaması, 4th press);

81. **Van De Hurk v. Netherlands,16034/90, 19.04.1994, par. 45.** (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Van%20%7C%20De%20%7C%20Hurk%20%7C%20v.%20%7C%20Netherlands&sessionid=50833577&skin=hudoc-en)

82. **Van Laak v. Netherlands, 31.03.1993,74 DR 156;** (İnceoğlu Sibel, ibid).

83. **Vehbi Ünal v. Turkey, App. No: 48264/99, Strasbourg, 9th November, 2006.** (http://www.inhak-bb.adalet.gov.tr/aihm/aihmtkliste.asp?psearch=Vehbi+%DCnal+&psearchtype=AND)

84. **Wemhoff v. Germany,2122/64, 27.06.1968.** (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html

&highlight=Wemhoff%20%7C%20v.%20%7C%20Germany&sessionid=50833577&skin=hudoc-en)

85. **Wettstein v. Switzerland, 21.12.2000.** (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Wettstein%20%7C%20v.%20%7C%20Switzerland&sessionid=50833577&skin=hudoc-en)

86. **Wiesinger v. Austria,11796/85, 30 October 1991.** (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Wiesinger%20%7C%20v.%20%7C%20Austria%2C&sessionid=50833577&skin=hudoc-en)

87. **Yalgın v. Turkey,33370/96, 25.09.2001,** (http://www.inhak-bb.adalet.gov.tr/aihm/aihmtkliste.asp?start=76)

88. **Zand v Austria, .** (Mole Nuala, and Harby Catharina, Adil Yargılanma Hakkı, Directorate General of Human Rights Council of Europe F-67075, Strasbourg, Cedex, 2001, 1st ed., October, 2001, p. 31 (İnsan Hakları Avrupa Sözleşmesinin 6. Maddesinin Uygulanmasına İlişkin Kılavuz)

89. **Zimmerman and Stainer v. Switzerland, 13.7.1983,** (Doğru Osman, ibid,)

90. **Zumbotel v. Austria, 29.09.1993,** (Gözübüyük Şeref and Gölcüklü Feyyaz, ibid,);