

ADMINISTRATIVE TUTELAGE IN TURKISH LAW

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1. GENERALLY

As it is known, the government is responsible for all kinds of public services. However, that the government is responsible for all kinds of public services does not mean that the government has to carry out all these services by itself. The government consigns these public services to the administration which can fulfill these services in the most economic, most efficient and most successful way. In other words, public services are shared among local units and the government organization in terms of public interest.

In this context, local administration artificial persons are authorized to take decisions and carry out these decisions by themselves. However, local administration institutions may misuse their authorities both personally and politically.

Thus, the abovementioned autonomy is not absolute and unlimited. The central administration always controls the local administrations via "administrative tutelage". This control forms a relationship between the government and the artificial persons and avoids contradictions by ensuring the conformity of the cooperation between local administration artificial persons and the center to certain rules and principles. By this way, it procures the continuity of the public services¹.

Administrative tutelage control was clearly expressed in 1982 Constitution. The 5th paragraph of the 127th article states the reason of existence of this institution as follows: "The central administration has the power of administrative tutelage over the local governments in the framework of principles and procedures set forth by law with the objective of ensuring the functioning of local services in conformity with the principle of the integral unity of the administration, securing uniform public service, safeguarding the public interest and meeting local needs, in an appropriate manner."

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1) Keleş Ruşen-Yavuz Fehmi, yerel yönetimler, Ankara, 1989, p.64

1. DEFINITION & LEGAL QUALITY

Administrative tutelage means “the control of the center on financial resources, and acts of the public service artificial persons and local administration artificial persons to procure public order and national integrity, depending on the authorities assigned by the laws.”²

Constitutional court defines administrative tutelage as follows: “It is a kind of administration authority which should be regulated by laws and which the local administration can carry out on local administrations.”³ In one of its other decisions it defines administrative tutelage as “the authority of the central administration to approve, refuse, and change and approve the executive decisions of the local administrations.”⁴

As a result, there are two different artificial persons for administrative tutelage. The one who controls and the one who is controlled are the same for the relationship between local administration artificial persons and the center representing the government or the body acting on behalf of him/her.

Since the administrative tutelage authority which is a means of administrative control is not a rule but an exception, it must be designated by laws. The facts that who will use these authorities, which decisions of local bodies will be subject to beforehand approval and all the other acts related to administrative tutelage are determined by laws⁵. In other words, the center can use this authority as long as the laws permit⁶.

III. THE WAY ADMINISTRATIVE AUTHORITY IS USED

A. Tutelage Control Over The Acts Of Public Corporate Bodies

Control over acts means all the measures taken compatible to acts of tutelage bodies against decision taken or to be taken by the authorized bodies of local administration artificial persons⁷.

Tutelage control over the acts is expressed as “legality”, “appropriateness” and “conformity to needs” control⁸.

2) Coşkun Sabri, İdari Vesayet, Ankara, 1976.

3) Anayasa Mahkemesi, 22.6.1988 T., E. 1987/18, K. 1988/23 ; AMKD, S.24, pp.334-335

4) Anayasa Mahkemesi, 26.9.1991 T., E. 1990/98, K. 1991/32 ; AMKD, S.27/2, p.551

5) Nadaroğlu Halil, Mahalli İdareler, İstanbul, 1998, p.26.

6) Aslan Zehreddin, İdari Denetim Biçimleri, Basılmamış Yüksek Lisans tezi, İstanbul, 1989, p.81.

7) Güreli İsmail Hakkı, İdari Vesayet-Amme Hükmi Şahıslarının İdarece Murakebesi, Ankara, 1944, p.9.

8) Arslan Süleyman, İdari Vesayet Denetimi ve Türkiye Uygulamasında Ortaya Çıkan Sorunlar, 1. Ulusal İdare Hukuku Kongresi, İkinci Kitap, Ankara, 1990, p.512.

1. Authority To Give Permission Beforehand

In such circumstances, in order for that act to be legally valid, it is a must that permission be taken by the tutelage body. For instance, according to the 47th article of the Village Law, the kaimakam of the village and village council come together in order to discuss the shared jobs of two or more villages, afterwards they get permission from the government and afterwards they start out to work.

As it is explained in the article, they will inform the tutelage administration authority about the decisions of the village council, and they can only start to work if they can get the permission. The government term in the article refers to the administrators of the cities or districts where tutelage administration authorities are found, and authorized tutelage senior officials are the governor and the kaimakams.

2. Approval Authority

The most important aspect of the administrative tutelage on acts is the approval of the local administration artificial persons decisions.

Approval is the decision that is appropriate when it is not illegal on acts where the decrees of the local administration artificial persons pertaining to acts that the administrative tutelage bodies are authorized to examine.

These decisions cannot be applied for local administration institutions as long as they are not approved by central administration or by its agent⁹. Thus, it should be noted that the approval must be carried out by the central administration in order for the decision taken to come into force¹⁰.

Another act that should be taken into account is the fact that all the acts of local administration artificial persons are subject to approval. As a result, the decisions of local administration institutions should be divided into two as acts subject to approval and as acts not subject to approval¹¹.

a) Acts Subject To Approval

The legislator makes it compulsory to be approved by the tutelage administration the acts of local administration artificial persons to gain the quality of certainty and applicability. This act gains the right to be a complete act after approval¹².

9) L. Ridley-J. Blondel, Public Administration in France, London, 1969, p.104.

10) Erdoğan Sedat, Belediyeler Üzerindeki İdari Vesayet Yetkileri, Belediyemize Yararlı Bilgiler, TBD Yayını, Ankara, 1972, p.203

11) Arslan Süleyman, Türkiye'de ve İngiltere'de Merkezi İdarenin Mahalli İdareler Üzerindeki Denetimi, Ankara, 1978, p.63.

12) Coşkun Sabri, ibid., p.30.

All the decisions of some of the institutions are subject to approval. All the decisions taken by city councils are subject to the approval of the governor. On the contrary, some decisions of some institutions are subject to approval and some may come into force without approval. Concerning Turkish laws, the decisions of the town council taken on behalf of municipality artificial person are that kind. For instance, according to the 15th article, the municipality may assign the wholesale or retail or maximum prices and profit shares of meat, bread, fruits, vegetables, firewood and coal. It can also assign what the other food and necessary materials are, but if it should also assign the maximum sales prices and profit shares of such materials, this decision should be approved by the city or district councils. For this reason, the tutelage control on municipalities is narrower than that of the city administrations'.

The approval authority changes according to the importance and features of the decisions. While some of the acts are approved by superior officers of this place such as the governor or the kaimakam, some of the acts can only be approved by ministries or the Council of Ministers. For instance, while the budget of the Municipality is approved by the governor of the district or the Mayor, the budget of city private administration is approved by the Ministry of Internal Affairs. The abovementioned two powers are completely independent from each other and there are two different acts concerning subject and judicial decisions. Thus there is the actual legal act carried out by the related administration and there is the approval of it¹³.

Although the act carried out by the related administration is "certain", for it to come into force there should be another "certain" act to be carried out by another authority of the administration defined by laws. Since results come about by the combination of these two acts, when we consider the outcoming result as a whole, it is better to name this "combination act"¹⁴.

Furhermore, the fact that the tutelage administration may use its approval and control authority on some acts is constricted by laws for certain periods of times. If control and approval are not fulfilled in this period, the act of the local administration person may gain certainty and can be brought into application. For this decision to come into force it is essential that the abovementioned obligatory approval period is over. This is called "Implied Approval"¹⁵.

According to the Turkish law, the 13th article of the Municipality Law

13) Onar Sıddık Sami, *İdare Hukukunun Umumi Esasları*, C.II, İstanbul, 1966, p.629.

14) Özay İlhan, *Günışığında Yönetim*, İstanbul, 1996, pp.164-165.

15) Arslan Süleyman, *Türkiye'de ve İngiltere'de*, p.64.

about the budget of the municipality has a judgment stating that if the budget is not approved by the related authority in seven days, the budget will come into force by itself. Here, the legislator aims to prevent the tutelage authority from neglecting its duties and neglecting public services, in favor of public interest.

b) Acts not subject to approval

These are the decisions that are not subject to approval of administrative tutelage post and that come into force as soon as it is given by the local administration body¹⁶.

3. Nullity Authority

It is the termination of the decision taken by the tutelage body with all its legal results when the decision taken by the local administration is considered as against the general or local interests or regulations. Nullity has an effect for going back¹⁷.

As it is widely accepted, nullity authority can be applied on acts whose application does not depend on approval from tutelage administrator. Since the decisions which came into force by approval are not obligatory decisions to be applied for a restricted period of time or for no any time before the approval, there is no need to enforce nullity authority¹⁸.

This method is carried out by examination of the objection by the tutelage administration or by direct examination of the tutelage control for any reason when the related third person applies against the decision of the local administration artificial person subject to tutelage control.

4. Authority to Stop Execution

It is keeping back the decisions taken by the local administration authorities by the authorized administrative tutelage bodies¹⁹.

As it is stated in the 73rd article of the Municipality Law, the authority to stop execution may be assigned to the tutelage bodies in order to prevent inconveniences that may result from the application of the decision in the period since the decision is taken after the objection is examined when there is an objection against the decisions of the local bodies and if this objection is examined by the tutelage bodies.

16) Arslan Süleyman, İdari Vesayet Denetimi, p.516.

17) Erdoğan Sedat, ibid., p.204.

18) Coşkun Sabri, ibid., p.28.

19) Aslan Zehreddin, ibid., p.96.

5. Substitution

When the tutelage body can take decisions on behalf of local administration artificial persons and when it can change these decisions, then there is substitution.

Administrative tutelage body is not authorized to act on behalf of local administration artificial persons, it can only control if they are legal for itself according to the articles stated in laws²⁰.

As a matter of fact, the 40th article of Village Law states that the governor of the district may terminate the decisions of the village headman which are not to the benefit of the villagers. However, the governor of the district cannot take decisions on behalf of him/her. That the decision is taken by the villagers means the general rule.

On the contrary, there are exceptions to this case. For instance, according to the Construction Law, according to the 9th article named "the authority of the Ministry on Construction plans", the Ministry is authorized "to do", "to have it done" and "to change" the construction plans. This constitutes an example for "acts on behalf of others".

Since the definition as "places having railways or motorways nearby" is accepted as the necessary conditions, the Ministry of Constitution may find it necessary to carry out its plan of nearly all of the habitances and it may take decisions that will replace that of the municipality²¹.

Actually, acting as replacing for tutelage cannot be reconciled with the principles of autonomy and democracy.

B. ADMINISTRATIVE TUTELAGE ON ORGANS OF PUBLIC CORPORATE BODY

1. Authority To Assign To A Position

Tutelage administration carries out the tutelage control on the local administration artificial persons subject to tutelage control by its authority to assign some of the administrators and officers²².

By this way, it finds the opportunity to follow directly and to manage for the public benefit the policies of the **local** administration artificial persons. For instance, in Turkey the general manager and members of the executive board of State Economic Enterprises are assigned with a common decree.

20) Duran Lütfi, İdare Hukuku Ders Notları, İstanbul, 1982, p.52.

21) Özay İl Han, ibid., p.163.

22) Coşkun Sabri, ibid., p.24.

Apart from this, the manager of the city private administration who is one of the most important people of the local administration artificial persons is the governor who is the representative of the government and the most authorized executive of the central administration in town. The governor is nominated by assigning on contrary of the other bodies.

2. Authority To Extend The Duration Of Committee Meeting And To Invite To Extraordinary Meeting

Tutelage administration has the authority to invite the councils which are the decision bodies of the local administration artificial persons to extraordinary meeting and to extend the duration of them. Tutelage administration should use this authority in favor of public interest and public order. The laws state who and in which way will use the mentioned control authority.

The 54th article of the Municipality Law states that the town council will meet three times a year on the first days of October, February and June. The duration of the meeting is stated as 30 days for the budget meeting and the duration of the other meetings is defined as 15 days. The governor has the authority to extend the duration of the meetings if the necessary acts are not completed in the given time. However, this duration may not exceed 15 days. The governor may inform the Ministry of Internal Affairs about the reasons for using this authority.

Apart from this, the same article states that the council will meet extraordinarily if the mayor sends a written invitation or 1/3 of the members prepare a justified proposal or if the governor makes a direct invitation.

To sum up, tutelage council has the authority to extend the ordinary meeting duration of the council and to call the council directly for extraordinary meeting.

3. Authority To Temporarily Remove From Office

Tutelage administration has the authority to temporarily remove from office the organs of local administration artificial persons subject to tutelage control in accordance with laws. This method is applied in favor of public interest and its field of application is restricted by laws²³.

Removing from office should have a reason. In other words, the administration does not have an unlimited authority about removing from office and also it is impossible. Removing from office is a precaution. In order for this application to be fulfilled, there should be an occasion that requires a

23) Aslan Zehreddin, *ibid.*, p.103

discipline investigation about the officer or an occasion that requires an investigation according to the articles of Turkish Penalty Court or Criminal Jurisdiction Procedure Law. However, the authorities stated in the 138th article of the State Officers Law about the occasions that require public services, will have the right to give judgements and they will be able to use this temporary measure. However, while they use this judgement authority, the proofs of the one who carries out the investigation should be evaluated, the truth of the complaint should be confirmed, the importance and effect of this act in terms of public services and only then should the decision to removal from office be taken.

According to the decision of the jurisdiction, if an officer is removed from office before the occasion is thoroughly investigated, this is a serious mistake²⁴.

As a result, the decision to remove from office can be taken in terms of discipline investigation and penalty prosecution. Removing from office may be applied for each stage of the investigation about the officer. Removing from office has two reasons. One of them is to procure the correct fulfillment of the investigation and the other is to prevent the investigation from going wrong²⁵.

According to the Turkish Law, the mayor may be temporarily removed from office in this procedure. Temporarily removing from office of the mayor is carried out through an administrative decision. According to this, the mayor may be temporarily removed from office by the Minister of Internal Affairs if there is an investigation, prosecution or trial against him/her²⁶.

Apart from this, the authority to dismiss bodies is assigned to judiciary bodies. The Constitution states "The control on the solutions on the objections related to gaining the right to be an authorized body for the local administrations can only be executed by judicial means. The authority to annul of the municipalities and town councils is given to the jurisdiction after having been taken from the government.

C- TUTELAGE CONTROL ABOUT FINANCIAL SUBJECTS

Today, the ability to own all the means for the efficiency of public services depends on the power of the tools. Today, to be able to have all these tools depends on the financial power of the administration. It depends on the financial resources of the local administration artificial persons. Thus, control

24) Gözübüyük Şeref, Yönetim Hukuku, Sevinç Matbaası, Ankara, 1982, p.161.

25) Giritli İsmet-Pertev Bilgen-Akgüner Tayfun, İdare Hukuku, İstanbul, 2001, pp.605-606

26) Constitution, Article 127/5.

of the financial resources constitutes one of the most efficient ways of tutelage control²⁷.

For instance, Tutelage Administration carries out this control by examining and approving the budget, by examining the appropriateness of the investments and plans in terms of public interest and the general plan and by giving permissions in subjects for which the laws permit.

For instance, the 1580 numbered Municipality Law's 123th article gives the tutelage body to change the budget only for five subjects. These subjects include:

- Correcting the articles and words which are incompatible with the laws and regulations and which are stated in the budget text.
- Erasing the incomes in the budget which the municipalities are not authorized to collect or decreasing the funds or incomes which are applied by exceeding the tariffs and the authorities.
- Excluding from the budget the services which are not the responsibility of the Municipality and the expenditures related to them.
- Addition of the fund related to obligatory expenditures which are not included in the budget.
- If the incomes in the budget are not enough to meet the obligatory expenditures, they will be increased to the maximum position defined by the laws; if this is not enough giving funds to the obligatory expenditures from the expenditures which are not obligatory.

Municipality Council resolution related to borrowing and lending stated in the same Constitution's 5th paragraph of the 70th article and 8th article states that apart from the municipality taxes and pictures, the prices for the services of the municipalities will be come into force by the approval of the civil service officer of the highest rank of that place.

Moreover, financial aid and giving credits, the financial aid of the tutelage administration besides income resources is an essential resource for the obligatory public interests to be fulfilled. When this aspect is also taken into account, it can be easily understood that the financial aid is a powerful control way for the tutelage administration. Besides, some amount of money needed by local administration artificial persons is taken from the tutelage administration to be paid back after a certain period of time. Although the money borrowed is to be paid afterwards, it is an effective means of control as the subventions for the tutelage administration.

27) Coşkun Sabri, *ibid.*, p.33.

3. CONCLUSION

Since the government is responsible for the fulfillment of the services, it is very normal that the services of the government are checked if they are carried out well or not. For these reasons, the government will control the activities of local administrative artificial persons in various ways on condition that it adheres to democratic principles. By this way, the possibility that these artificial persons may conflict with the comprehensive activities and targets of the government.

The central administration carries out this tutelage control relation between two different artificial persons by being active on the agents, organizations, acts and financial belongings of the local administration artificial persons in regard of both for service and location.

While this control is executed by the central administration, it is a must that the public interest be protected. "Autonomy" limits expressing democracy which is a principle for managing themselves and which is one of the milestones of artificial persons, and a way of administration which demolishes autonomy should not be accepted.

That the tutelage control of the central administration does not harm the autonomy of the local administration artificial persons and that it should not constrict the local enterprenourship and development capacity of them should be the main and the most important principle. That the local administration artificial persons' controls are informative, that they are open to serving, that the results are traced and evaluated should be procured.

In Turkey, we may see that the central administration carries out administrative tutelage control on these three local administration units.