THE PROBLEM OF JURISDICTION ACCORDING TO THE DECISIONS OF THE COURT OF CONFLICTS RENDERED IN 1965 - 69 IN CASES RELATED TO RECOVER DAMAGES CAUSED BY THE VEHICLES OF THE MINISTRY OF NATIONAL DEFENCE

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The Constitution of 1961, in Article 7, declares that the judicial power must be exercised by independent courts in the name of the Turkish Nation. The Constitution also provides for three separate court systems (Article: 139-142) having different jurisdictions: civil, administrative and military. Thus, the judicial power is exercised by independent courts which use the same (and the single) judicial power, but belong to one of those separate court systems having different jurisdictions. The existance of three separate court systems (three competent branches) creates conflict of jurisdiction in various fields — particularly twilight zones — between the courts of different branches. One of these controversial fields is the cases to recover damages caused by the vehicles of the Ministry of National Defence (MND); Which branch (court) has jurisdiction upon this cathegory cases? The Court of Conflicts (*) answered this question by a very sound decision that completely complies with the principles of Administrative Law, in 1949. But as a result of its later approaches and understanding on this matter the Court has created a conflict with the Administration in the last one and a half decade.

As far as this cathegory cases are concerned, the Court of Conflicts considers the Administration, ie. MND, an ordinary motor vehicle owner and a master-employer who is liable under the provisions of Private Law for tort damages caused by its agents and employees in the course of performing their duties. There is simply a tort

act that must be judged under the provisions of the Law of Obligations. There is not a legal problem that nees to be solved according to the principles of liability of Administrative Law. Therefore, in the opinion of the Court of Conflicts actions started to recover tort damages that caused by the motor vehicles (and agents) of the MND, do not fall within the jurisdiction of Administrative Courts, ie. Council of State (Danıştay), but of Civil Courts.

On the other hand, the Administration, MND, has insistently claimed and objected that this cathegory cases must be reviewed by administrative courts only. The MND, correctly states that the activity that these vehicles are used is a public service; and the damage is given by the vehicles in the course or for the sake of the fulfilment of a public service. The MND, is not an ordinary master - employer, and the vehicle is not an ordinary vehicle like a taxicab, a truck, for example carrying vegetables, a seightseeing bus or a tractor; the MND itself and its vehicles are something else both functionally and in nature. What the Court of Conflicts considers tort liability is in fact service fault liability, and even in some circumstances liability for risk. For this reason cases of this cathegory must definately fall within the jurisdiction of administrative courts, in other words the Council of State, Danıştay.

This controversy between the MND and the Court of Conflicts has continued in 1965 - 69 era too. The Court has kept tracing the same line (*); however, in several exceptions and in its last decisions has changed its opinion for the competence of administrative courts. I hope that this revival would last forever and the principles of liability of Administrative Law do govern this cathegory cases.

By the way, I would like to state — by focusing on — that: a motor vehicle of MND could not be considered and compared with and ordinary motor vehicle. Its nature is completely and uncomparably different. It (and its driver) is an incorporated element of the public service of national defence. The vehicle is as much important, vital and indispensable part of this public service as the personnel employed or charged in national defence is. And in Turkey, where Administrative Law has been adopted and applied, it is impossible to deem and equalize MND with o private employer-master.

The Court of Conflicts has omitted the aforewritten points and,

consequently, has applied the following two criteria in the problem of jurisdiction on the said cathegory cases. These criteria which I have deduced from the cases rendered in 1965 - 69 are:

1. The court which will have jurisdiction in these cases must be determined by totally respecting, the cause of action, the claims, the understanding, exposition and the demands of the plaintiff only, without looking over and taking into consideration the counter claims set forth in the file. If the plaintiff is of the opinion that there is an ordinary tort liability of the MND and therefore civil civil courts must review the case the Court of Conflicts shou'd hold that the case falls within the jrisdiction of civil courts. But, if the plaintiff claims that his case must go to the administrative courts the Court of Conflicts should order that administrative courts put their hands on the case which is completely in the same nature with the former one. In the article there are examples, even shocking examples, selected among the decisions of the Court of Conflicts in the said era.

2. The second criterion is: Cases which necessitate the determination of the issue that whether a service fault of the MND exists must go to administrative courts. The important difference of this criterion is the approach of the Court. This time the Court does not absolutely commit itself to the complaint written by the plaintiff; it does look over the whole file and determines what the legal issue is. If it reaches the opinion that the legal issui is the determination of whether a service fault of the MND exists then the Court of Conflicts refers the case to administrative courts, Council of State, Danıştay. The Court has also developed and laid down — through its decisions ofcourse — two cues which help it to apply this criterion relatively more accurately.

I must say that these two criteria has never been able to bring a sound and satisfactory solution to question of jurisdiction in these cathegory cases. The Court has to find out and exercise a criterion which really complies with the principles of Administrative Law.

As far as aircrafts — and ships of the Navy — are concerned The Court of Conflicts has clearly concerned and treated MND as an ordinary vehicle owner, master-employer, subject to tort liability of Private Law. I must point out that in Administrative Law, today, for some crafts and planes it is accepted that the Administration,

in our case the MND, carries liability for risk, a principle of liability which does not even require the existence of a fault or negligence in the service. But the Court of Conflicts unfortunately is so much beyond this point (liability for risk) that it has still commited to principles of Private Law (*) and not even reached to service fault liability which requires a negligent act, a fault in the fulfilment of the public service in the terms of Administrative Law. As a result of this understanding a jet plane, an atomic submarine, a destroyer, an aircraft carrier, a propellered plan loaded ammunition fall in the same cathegory with an ordinary truck loaded vegetables, a school bus, a taxicab, a train or even with a horse - drawn cart.

In the course of by research on the decisions of the Court I noticed that the status of the victim, the defendant or the deceased, seems to have an effect on the solution of the problem of jurisdiction. Let me put it this way: Does it make a difference on the determination of the competent court (administrative or civil) that the victim be third person or the agent of the Administration? An on its face study of the cases shows that there is such a criterion; but a deeper scruntinization proves that a third person-agent distinction is just a coincidence; nothing more. The Court of Conflicts has never meant, established and exercised such a criterion. The fact that cases in which the victim is a third person are reviewed by civil courts and, in which he is an agent of the Administration fall within the jurisdiction of administrative courts is a mere coincidence, nothing else at all.

In the conclusion of the article I summarized my opinions as follows:

Firstly: I definately and absolutely reject the criterion that the competent court must be determined by totally respecting the cause of action, the claims, view and demands of the plaintiff solely.

Secondly: I do not join the second criterion as well.

Thirdly: The fact that the victim is either third person or an agent of the MND makes no difference from the point of jurisdiction.

Fourthly: Even for the motor vehicles, the inclination is liability for risk, I absolutely reject the application of principle of the master-employer's liability which is an institution of Private Law.

Fifthly: I am of the opinion that the most sound criterion for jurisdiction is the one which is based upon the relation of vehicle, a means of the public service, administrative power, procedure and function.

Sixthly: The liability of the MND must be governed by principles of «service fault» and «liability for risk». And the problem of which of these two is applicable in a given case must be determined according to the kind, qualifications of the vehicle and to the nature of the service that it is used for.