ADMINISTRATIVE SANCTIONING SYSTEM IN TURKEY*

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Introduction

Seperation of powers in Turkish legal system such as others in Europe leads to evaluate two kinds of sanctions different from each other: the sanctions applied by courts and the sanctions applied by Administration. Administrative sanctions can be regarded as an old in applying and a new field in theory in the sanctioning system of Turkey. That was a neglected field in Turkish Law. There was only one theoretical administrative law study on this subject by recent times, which was focused on administrative sanctions and particularly on the ones in Italy[1]. Sometimes, that field has been studied in some administrative law textbooks as a matter of competence of independent regulatory agencies[2], and sometimes as a particular dissertation thesis[3].

In this study, first of all, we will try to determine the term of administrative sanction. Later, some sorts of administrative sanctions in Turkey will be introduced. Eventually, general principles applying to administrative sanctions in Turkish Law will be discussed.

Administrative Penal Law as a developing field occurred after a long time struggle of administrative law scholars. However, there were some

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* Editör Notu: Bu çalışma Hollanda'da Utrecht Üniversitesinde yapılan bir sempozyumda sunulmuş ve uluslararası tebliğ olması nedeniyle hakem denetiminden geçirilmemiştir.

** The Law Faculty of Ataturk University, Administrative Law Department. That paper exposed in oral presentation in Expertmeeting in **Centre for Enforcement of European Law (CEEL) Utrecht,** Netherland, 16 July 2004 in Utrecht University.

1 ÖZAY, İl Han, İdari Yaptırımlar, (Administrative Sanctions), IU. Yayın No: 3326, HF Yayın No: 691, Istanbul 1985.

2 GÖZÜBÜYÜK, Şeref; TAN, Turgut, Idare Hukuku I, Genel Esaslar, (Administrative Law I, General Basics) Ankara 1998.

3 OĞURLU, İdari Yaptırımlar Karşısında Yargısal Korunma (Administrative Sanctions and Judicial Protection Against Them), 1st Edition, Seckin Yayınları, Ankara 2000. (2nd Edition 2001)

difficulties to establish this new field. While Turkish administrative law is quite similar to *droit administratif* of France generally, all the principles in Turkish Administrative Penal Law are from Italian Criminal Law in contrast. The inevitable codification in the first decades of Turkish Republic led to a mixed and complex system which many times does not comply with each other because of judicial sanctions from Italian criminal law and administrative sanctions from French administrative law. The confusion is more obvious especially when someone would like to study on a subject which is an intersection area of Criminal Law and Administrative Law such as administrative sanctions.

Turkish Criminal Law and Administrative Law scholars studied and tried on their branches independently from other fields for a long time. Later, it began to mix within the others. Because, Criminal Law scholars regarded and studied that field such a criminal law subject. This caused more and more similitude gradually. This problem does not belong only to Turkey. It is clear that similar problems exist in other European countries. For example, the decisions taken at the 14th Criminal Law Congress in Vienna illustrates that administrative sanctions are regarded as a part of criminal law by many Criminal Law scholars. However, in my opinion, while criminal specialists in Turkey have an opposite opinion, administrative sanctions have been developing and must be improved as an independent field from criminal law.

We know that, socio-politic changes after World War II caused rapid changes in number and sort of these sanctions. Thus, a new field was born: *Ordnungvidrigkeitsrecht* in *Verwaltungstrafrecht* in German Administrative Law, and in *Droit Administratif Pénal* in French Administrative Law. So, it has been distinguished and discussed whether exists an independent field from Criminal Law as *Administrative Sanction Law*. In my opinion, surely there is and must be an independent field as *Administrative Sanction Law* in Turkish Administrative Law, as the scopes, applying areas and procedures of two types of sanctions are quite different from each other. The difference between them causes many crucial results:

Firstly, judicial sanctions are be judged, applied and enforced by the independent courts. But, administrative sanctions are be decided and enforced by the authorized administration without any court decision. Turkish administrative law gives to the administration the power to enforce its decisions by its own means to a very large extent, without court order. Thus, administrative sanctions are one aspect of this power. In addition, their applying procedures are quite different; there is not a court for deciding an administrative sanction. In deciding upon these sanctions, mostly classical administrative

and sometimes, due to the nature of the sanction, quasi-judicial procedures are applied[4].

Secondly, approaches and aspects of them are different from each other. Judicial sanctions are used to prevent grave crimes and to punish big violations. In contrast, administrative sanctions are used to prevent smaller infringements.

Thirdly, the results of administrative sanctions are not as heavy so judicial sanctions many times. However, sometimes some administrative sanctions enforced by Independent Regulatory Agencies can be quite heavy such as a prohibition of broadcasting for a radio station or a television channel during a month by Supreme Council of Radio-Television.

I. General Instructions According to Turkish Administrative Law

1. The Concept of Administrative Sanction

Administrative sanctions, as a sort of administrative acts, are a dimension of the unilateral decision-making power of the Administration. This is the power to decide, to apply and enforce sanctions against individuals who violates laws of public order. They are used in a very wide area: in Environmental Law, Labor Law, Construction Law, Soil Law, Disciplinary Law, etc. However, the first examples of that area were the sanctions applied by municipals in Turkey.

The aim of those sanctions is not only to protect public interest, but to protect small violations in social and public order area, many times not general aims but special goals[5]. At the same time, these are prescribed for preventing perpetrators of with sanction and an amelioration of them and for the others as a warning. Their primary aim is to stop a present infraction or prevent possible infractions.

These sanctions are always with punitive character. Even, withdrawal of a permission or a license can be used as a sanction sometimes. However, when a municipality gives a permission for construction of a building for a

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4 GÜRAN, Sait, Introduction to Turkish Law, (Edit. WALLACE, D.; ANSAY, T.), 1996 Ankara, p.67.

5 For example, according to the Article 1 of Capital Market Law, Law No. 2499, (As amended by Law No. 4487), "The subject of this Law is to regulate and control the secure, transparent and stable functioning of the capital market and to protect the rights and benefits of investors with the purpose of ensuring an efficient and widespread participation by the public in the development of the economy through investing savings in the securities market.": Thus, the special aim of the sanction prescribed in this law is to protect that field against violations. But general aim is to protect public order.

certain time (one month in Turkish law), relevant person must use that permission in this time period.

Administrative sanctions can be applied against legal persons as well as natural persons. Sometimes, these are applied to individuals who do not respect decisions of administration.

Italian administrative law scholar Guidio Zanobini, perhaps the first administrative law scholar who tried to describe it, shows the characteristics of these sanctions as "to be applied by administration authorized with an act of Legislation"[6]. A short description can be done with these words here: administrative sanctions are the acts which enforced by Administration without a judgment for protecting the administrative order, sometimes for establishing it again.

2. The Sorts of Administrative Sanctions in Turkey

The unilateral decision-making power of the Administration comprises- for example- disciplinary penalties, fines, permanent or temporary prohibitions from carrying out a business, professional activities or attending school, and revocation or suspension of licenses. But the Administration can not decide a sanction which results an imprisonment. However, certainly, the courts can decide, even the heavier ones.

Some of these sanctions have similar names with judicial sanctions. For instance, fines, disqualification from holding public office temporarily or for life or disqualification from practicing a profession or trade (Criminal Code Article 11). The same names of crimes are used for some behaviors which violates the administrative public order. For example, State Public Servants Act (657), or By-Law (Yönetmelik) of Disciplinary for Public Personnel of Universities (2547) or the disciplinary sanctions applied by Bars, Associations and schools use the same names for those sanctions as in Criminal Code.

Disciplinaries, revocations, withdrawals, tax punishments are regarded as administrative sanctions in Turkey. Coercive measurements applied by police power are not a sort of administrative sanctions. These type of measurements are preventive, but not punitive ones. However, these sort of restrictions must be complied with principle of proportionality and legality such as administrative sanctions. Besides, demolition of a building is an administrative sanction when it has been used for punishing the violation of the rules of Construction Law. But, where it has been used for preventing the

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6 ZANOBINI, Guiidio, İdari Müeyyideler, (Sanzioni Amministrativi), (Translated to Turksih by GÜNAL, Yılmaz, Ankara 1964).

danger for humans and environment by collapsing it is an administrative sanction. Restraining sanctions are regarded as civil sanctions. Interest on delay is a fiscal sanction, not an administrative one.

3. Legal principles for applying administrative sanctions

Obviously, the involvement and measures by administration as an organ of the state in daily practice on the rights and freedoms of individuals are restricted. Now, let us look at the general limits of administration on using administration sanctions:

a. According to the 13th article of Turkish Constitution, when there is a restriction, concerning limits must also have been determined before. First limit for administration is that the rights and freedoms of individuals must be determined in Constitution. Since enforcement of administrative decisions may interfere with the rights and liberties of individuals, the authority to make such decisions must be based on legislation.

b. So far, administrative courts in many European countries begun to apply the doctrine of proportionality as a principle developed in EC law, under pressure of the increasing importance of EC law. Its implication for internal laws of member states has crucial significance still. Importance of the doctrine of proportionality is increasing day by day as crucial review mean. This principle became a crucial review mean of courts after amendment in Constitution in 2000[7].

c. According to the 2nd article of Act of Administrative Judicial Procedure of Turkey, margin of appreciation and discretion must be used in proper way.

Other essential principles for the sanctions and restrictive measures are prescribed in article 13th and 38th of Turkish Constitution.

aa. No crime and punishment without law. According to the Turkish Law administrative sanctions imposed can be only laid down by law. This is a rule which derives from Constitution: *"The punishments and penal measures shall be established only by law. No one may be punished for an act which is not prescribed by law as crime."* (1982 Constitution article 38). Administrative offences must be defined clearly in the regulation that puts the offence and sanction for it.

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7 OĞURLU, Yücel, İdare Hukukunda Ölçülülük İlkesi, (The Principle of Proportionality in German and English Administrative Law), (Article), Erzincan Hukuk Fakültesi Dergisi, S.5, 1999; OĞURLU, Yücel, The Principle of Proportionality in Comparative Administrative Law (Book), Seckin Yayınları, Ankara 2001.

A natural result of this principle is *prohibition of interpretation by analogy*. The same principles are effective for administrative sanctions. Turkish Constitutional Court (Anayasa Mahkemesi) and Council of State (Danıştay) looks for compliance with this principle when reviews an administrative sanction. At the same time, these must be based upon, and clearly defined by a law, a regulation, or a by-law.

bb. Non Bis in Idem: Double jeopardy is forbidden for all sort of sanctions generally. According to the Turkish Law a court can not judge two punishments for the same crime. In the same way, a person may not be penalized administratively twice for the same act on the basis of the same article of law except a different social interest must be protected. The administration can not decide for two sanctions for the same violations. But, when a court judges a crime and decide a punishment, the Administration can decide a sanction for the same behavior which violates the administrative order[8]. The Administration must obey this principle, too. Turkish Constitutional Court and Council of State decide in this way. Every administrative authority has to take into account the sanction previously imposed for the same act by other authority.

cc. Ban for Retroactivity: According to the article 38 of Constitution "No one shall be punished for any act which did not constitute an offence under the law in force at the time it was commited. No one shall be given a heavier penalty for an offence than the penalty applicable at the time when the offence was committed." This article is effective for the administrative sanctions. Turkish Constitutional Court and Council of State expect from Administration to obey this principle when applies an administrative sanction. Retroactive affect can be applied only for favor of the accused individual.

dd. Proportionality: The administrative sanction will be applied must be sufficient to prevent the violations against public order; necessary for the legitimate aim of the regulations; and the sanction must be proportionate with the act or behavior of relevant person. The principle of proportionality has become a restriction for Administration when he restricts the rights and freedoms of individuals[9]. Since many administrative sanctions cause a re-

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8 OĞURLU, Yücel, "Disiplin Cezalarında Ne Bis in İdem Kuralı", Ankara Hukuk Fakültesi Dergisi, S.2, 2003, Ankara; OĞURLU, Yücel, İdare Hukukunda Kazanılmış Haklara Saygı ve Haklı Beklentiler (Vested Rights and Legitimate Expectations in Administrative Law), Ankara 2003.

9 Amended on 17 October 2001 by Law No. 4709.

striction on the rights and freedoms of individuals, administration must obey this principle strictly, too[10].

dd. Burden of Proof: The burden of proof is on administration many times. The administration must prove the violation of the relevant person who violates the public order.

II. The Gaps in Turkish Administrative Sanctioning System

A. The Obstacles on Lawsuit Against Administrative Sanctions

1. General Obstacles:

There is not an "Act of Administrative Sanction" in Turkey. The relevant rules are spread in many different articles of Constitution and other acts. Nearly 150 different acts consists administrative sanctions. In addition, absence of an Act of Administrative Procedure causes a chaos in proceeding. Thus, there is not a certain and common procedure for administrative sanctions. However, any administration has to find and apply the procedures in relevant acts.

2. Constitutional Obstacles

a. According to the 1982 Constitution (art. 125). It can not be brought a lawsuit against the acts of High Council of Judges and Prosecutors. That means nobody can apply a lawsuit against the administrative sanction decision of that Council.

b. The same obstacle is valid for the sanctions of High Commission of Military (art. 125/2 of 1982 Constitution)

c. Another obstacle is that it can not be brought a lawsuit against the acts of President (art. 125 of 1982 Constitution)

d. The sanctions of censure and warning can not be brought a lawsuit except it has been stipulated by the relevant act (art. 129 of 1982 Constitution)

3. Obstacles Arised from Acts

Individuals affected by such an administrative sanction may seek judicial remedy, including stay orders[11]. However, some acts prohibit to apply lawsuit in Turkey. Here are only some examples of these dozens of obstacles arising from acts.

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10 OĞURLU, Yücel, A Comparative Study on The Principle of Proportionality in Turkish Administrative Law, Kamu Hukuku Arşivi, KHuK, 2003, S.5.

11 GÜRAN, p.7.

a. Acts of General Governor in district of Maritial Law (Statutory Decree No: 285)

b. Some sanctions regulated in The Act-of Highways Traffic can not be brought a lawsuit. (A.H.T., art. 115-116)

c. The fines prescribed in The Act of Villages (Act No:442)

d. Amended 18 th article of The Act of Local Administration (Act No:2972)

e. The fines prescribed 20 th article of "Act of Silkworm and Its Feeding" are certain ones and can not be suited anyway.

In addition, there are some administrative sanctions which can be brought a lawsuit. However there is not an appeal for them. For instance, 14th article of Act of Harbors (No:618) prevents to go judicially objections.

My main proposals for solving this problems and changing negative table by adopting an "Act of Administrative Sanction" and "Act of Administrative Procedure" was in conclusion of my thesis. Those suggestions are valid still for Turkey. These changes must include solutions and suggestions in Recommendation No. R (91) 1 of the Committee of Ministers to Member States on Administrative Sanctions[12]

In contrast to this negative table, Turkey is in struggle to change all démodé articles of Constitution and Acts like Criminal Code. In addition, "Freedom of Information Act" which is important for administrative sanctions has come into force in April 2004.

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12 Adopted by the Committee of Ministers on 13 February 1991 at the 452nd meeting of the Ministers' Deputies will provide harmonization to EU law.