

Legal (Evidentiary) Value of the Unjust Treatment Argument

■ by *Mehmet Akif Tutumlu**

I. INTRODUCTION

The situations are similar:

A woman or a man, holding a court petition, enters the judge's office with a sad face, directs his/her sad look to the judge on the bench with a plea for help: the defendant municipal authority has refused their application to connect utility services (water, electricity, gas) to their new apartment, recently bought from the builder, due to the absence of a housing license (*iskan*) and all the family members – perhaps including some pregnant, paralyzed, or some other disadvantage – suffer from this situation.

Honorable Judge, please protect me from this unjust treatment!

Certainly, the unjust treatment cases are not limited to the ones described above; there are hundreds of them and the judges must render a decision for each and every one of them. As lawyers and addressees of such cases from daily life, I believe that it is important to open a discussion about the concept of unjust treatment – its position in law and particularly the proof value of it; that is the aim of this article.

II. THE CONCEPT

The adjective form of “*mağduriyet*” (unjust treatment) is “*mağdur*” (victim) and it stems from “*gadr*” in Arabic. *Mağdur* (victim) is someone who has been subjected to unjust treatment (*gadre*).¹

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¹ DEVELLİOĞLU, Ferit, Ottoman-Turkish Encyclopedic Dictionary, 10th Edition, Ankara 1992, p. 670; OZÖN, Mustafa Nihat, The Great Ottoman-Turkish Dictionary, 8th Edition, Istanbul, 1997, p. 471.

In legal terminology, “*mağdur*” (victim)² describes a person who suffers an injury as the result of a criminal or unjust act. The “-et” tail converts the word from an adjective to an adverb.

We encounter discussion of the victim very often in the Criminal Procedural Law. The rights of the victim, as the person who has directly been injured by the crime, are addressed in the Criminal Procedural Code (Law No. 5271, in the 4th book, 1st part (Art. 233, 236)).³ Nonetheless, the concept of unjust treatment cannot be seen in the Code although the word “victim” is present.

If we go through the norms that regulate our Civil Procedural Law, in both our Civil Procedural Code and in other special Codes that regulate the civil procedure, I could not find any provision in which the concept of unjust treatment/victim is addressed. Indeed, the normative language prefers to use the concept of fair/unfair pairs.

III. LEGAL (EVIDENTIARY) VALUE OF UNJUST TREATMENT ARGUMENT

As Derrida once said, all the sayings and speeches are relevant mostly as rhetoric and to language games,⁴ primarily in cases whereas the vertical dimension of the language has been used.

In this aspect, the concept of unjust treatment is put on the track of language with a rhetoric motif.

This has happened over time as the meaning of the concept of the unjust treatment has expanded. The hard times that a person has to carry and which are difficult to endure influence the present meaning of the concept.

It can be widely seen, especially in the injunction and case petitions, that the concept of unjust treatment is used as a strong argument and there is no legal rule that bans it.⁵

In this case, the opposing party evaluates this argument as an anti-thesis and the judge evaluates it in the aspect of proof and logical norms.

In the aspect of logic/good judgement, to bring forward the argument of the concept of unjust treatment in a court case – that is to say that the petitioner is in a difficult situation – is accepted as a logical error⁶ that is called an appeal to pity (*argumentum ad misericordiam*).

Professor İbrahim Emiroğlu explains “*argumentum ad misericordiam*,” which can be understood as to emphasize the need for pity instead of the condition and evidence which the law requires, as:

“(…) it is absolutely wrong for the ones who need mercy to bring

2 YILMAZ, Ejder, Legal Dictionary, 7th Edition, Ankara, 2002, p.759.

3 It is considered that the concept of unjust treatment is recognized and therefore the descriptions do not take place in the general regulation (Article 2).

4 SIM, Stuart, Derrida and the End of the History, (Trans. by Kaan H. Ökten), İstanbul, 2000, p. 35.

5 See Turkish Civil Procedure Code (HUMK), Art. 179/3.

6 EMİROĞLU, İbrahim, Logical Errors (PhD Thesis), Ankara, 2004, p. 194.

*forward their case on the grounds that the consequences would have been worse for them if it did not happen instead of the other way around.”*⁷

The same logical error is explained by Associate Professor İrfan Erdoğan as the call for the feeling of sorrow.⁸ Briefly, it is “if/when my demand is not fulfilled, I shall be in a worse situation.”

If we apply this logical norm to the example contained in the preamble, there is no causal connection between the person who could not get his/her apartment connected to the utility services (gas, water, electricity) and the act of denial by the municipal authority.⁹ That means that the person could not get his/her apartment connected to the utility services, not due to the unlawful denial of the authority to them, but because he/she moved in his/her apartment before the builder had obtained the compulsory housing license.

Another example is from the High Crime Court (where I completed my judicial traineeship). The defendant’s lawyer demanded that his client (the prisoner) be released from the prison; his argument was that “*the conditions of the prison are not appropriate!*”

There is no need to say that there is no causal connection between the conditions of the prison the defendant’s right to release for the crime!

Legal Evaluation

This means that the evaluation of cases and facts which are the subject of a dispute are subject to the legal value being measured by the judge. It is important to stress that the fact hypotheses which are described as unjust treatment should not be considered to be unrealistic all the time. If we go back to our first example, the failure to allow the subscription of water, electricity and gas due to the failure to obtain the housing permit is an unjust treatment that would harm the consumer. Apparently, there is a causal connection between the act and the fact; thus, conditions for the protection of the consumer have been attained.

IV. TENSION OF THE PRELIMINARY INJUNCTION

It is essential to look at the situation closer from the aspect of requests for preliminary injunctions for high-value conflicts. Such requests are usually brought to the court with “high-octave” speeches of unjust treatment and are moreover submitted to the court with panic and anxiety.

At first sight it might be considered that such effects/illusions are in the nature of a preliminary injunction. However, it is vital to separate two issues carefully here. Although the conditions for the preliminary injunction, such as urgency of the matter, the potential damage to the court case or the potential danger to the court case are the compulsory conditions in order to render such a decision, they are not enough by themselves alone. The party requesting the preliminary injunction must

⁷ Id.

⁸ ERDOĞAN, İrfan, *Positivist Methodology*, Ankara, 2003, p. 57.

⁹ See Development Code (İmar Kanunu), Art. 31.

prove them as well.

The proof mentioned here is the approximate proof.¹⁰ Accordingly, the party that requests the preliminary injunction must submit all the required evidence with the court petition that proves that he is justified in the related main conflict and the other party is not at all.

That means that without any valid and strong grounds, it is not possible to issue a preliminary injunction by just relying on the exaggerated unjust treatment arguments. While stating that, I do not mean that I do not take into account the argument of the high tension of the possible potential damage and danger of the court case. Nonetheless, the judge's rulings, which are not, at least, supported by the approximate proofs, would reveal the fact and suspicion that some other measurements than the legal ones take place while making such a ruling.¹¹

CONCLUSION

Courts are the institutions which separate the just from the unjust and protect the just within the legal framework. In this respect, there should be no doubt that – in the technical meaning – the victims are going to be protected. However, the legal system does not grant the right to a person to get out of a situation into which he put himself by his own inaccurate and illegal acts.

Stated another way, it is one of general principles of law that a person cannot get any legal benefit from his own inaccurate and illegal acts.

On the other hand, it is absolute that the courts are entitled to render decisions upon concrete and strong evidence, rather than upon exaggerated rhetoric that aims to convince and persuade without any proof.¹²

As human beings, sometimes it is obvious that we tend to help people without taking into account the fact that they have themselves created the situation. Especially in the resolution of disputes between people, we must take into account the rational norms and logical ways within the framework of law rather than emotional norms¹³ such as pity.

10 See PEKCANITEZ/ATALAY/ÖZEKES, Turkish Civil Procedural Law, 5th Edition, Ankara 2006, p. 408, Art. 617 et seq.

11 In some regulatory preliminary injunction cases, (for example, in divorce cases, living allowance, relations with the children, leaving the house in favor of the other party etc.) there is no extra need for evidence. The same rule applies for situations specifically addressed in the laws and for precautions that the judge can take on his/her own initiative.

12 ÖZLEM, Doğan, Science, History and Interpretation, Istanbul, 1998, p. 124.

13 We shall end this article with a memory: In a water subscription case, a woman entered my office with a 2 year-old baby in her arms. When she started to tell me her situation with a sad face and gestures, I had her file brought to my office. The woman did not have role (defendant or plaintiff) in the case. I asked her about that and she said that the actual plaintiff was her husband and he was waiting outside of the office. I called her husband inside and I told both of them that their acts were not appropriate at all. I certainly refused the request for a preliminary injunction, for which the legal conditions were not present. Meanwhile, the baby in her mother' arms was looking at me, looking at the books and sometimes sucking his finger silently. I gave him a bar of chocolate because as they were leaving I felt sorry for him the most.