Assessment of Proportional Litigation and Retainer Charges in Full Remedy Actions

■ by *Ali Volkan ÖZGÜVEN**

I – INTRODUCTION

A type of administrative cases, Full Remedy actions are instituted on the grounds of the principle of administrative responsibility by those whose rights have been violated on account of the actions, operations or contracts issued by the administration, with the purpose to restore the violated rights and paying restitution for the resultant loss.[1] Under the Law of Administrative Procedure No. 2577, Full Remedy actions are defined as actions instituted by those whose personal rights have been prejudiced due to administrative actions or operations.

The financial responsibility of the administration is included in the last subclause of Article 125 of the Constitution: *"[t]he administration shall be liable to compensate for damages resulting from its laws or actions."* This constitutional provision and *"The Rule of Law"* (Article 2 of the Constitution) constitute the constitutional basis for Full Remedy actions. Acting on this sentence, the administration is obliged to compensate losses caused by it through any type of actions or operations. However, it is common knowledge that an application to the proper administrative jurisdiction body is required in order to provide for the reinstitution of losses resulting from administrative actions. Although the losses incurred are assumed (under Article 13 of the Law of Administrative Procedure) to be entitled to reinstitution without the actual filing of a formal claim, provided that the losses incurred are requested from the administrative body creating the losses and that the said administrative body grants this request within the one- and five-year-foreclosing periods, the possibility that the administration will reject, in part or in whole, these requests is not an unlikely one, considering that the administration in our country is frequently observed, in practice, to slow down and even fail to fulfill the enforcement of

*** Attorney at Law, Member of Adana Bar.**

[1] For Full Remedy Actions see: Sıddık, Sami Onar İdare Hukukunun Umumi Esasları, Hak Publishing, Istanbul, 1966 Volume III, p.1797; Ragıp SARICA, "İdare Kararlardan Dolayı İdare Aleyhine Açılan Tam – Kaza Davaları" , İstanbul Hukuk Fakültesi Mecmuası, Vol. X, I.3-4, p.186; Şeref GÖZÜBÜYÜK, Yönetsel Yargı, Turhan Publishing, 13. Edition, Ankara, November 1999, p.263; Hamza EROĞLU, İdare Hukuku Dersleri, Sevinç Matbaası, Ankara 1972, p. 394; Celal KARAVELİOĞLU, Değişiklik – Açıklama ve En Son İçtihatlarla İdari Yargılama Usulü Kanunu, 5. Edition, Ankara 2001 Vol. I, p.205.

court decisions. In fact, the statement in the same Law that *"... in case of partial or total rejection of such requests, [the claimants] are entitled to institute a full remedy action as of the day following the notification of the proceedings or, if the request does not receive a response in sixty days, as of the date terminating this prescribed period"* obviously reveals the main purpose of this inclusion to be the determination of the filing period pertaining to a full remedy action.

As can be concluded, within the framework of the principle of financial responsibility, the losses incurred by persons due to the actions or operations of the administration are entitled to reinstitution provided that the relevant administrative bodies are applied to. In other words, those persons whose rights have been violated should file a claim for the restoration of their rights and reinstitution of the losses incurred. The claimant bears the obligation to pay the litigation costs of the filed claim in advance. Like cases in the civil courts, the claimant may have to assume the litigation costs in administrative actions. These costs – litigation costs – include the court charges, as well as the retainer charges awarded by the court to be disbursed to the attorney for the other party. Nevertheless, the litigation costs should be reimbursed by the opposing party if the claimant succeeds in the action.

The charges incurred during the course of litigation and the retainer charges awarded at the conclusion of litigation process are, depending on the individual case, determined proportionally or on a fixed rate basis. In Full Remedy actions, however, the case before the court is associated with a certain value and the litigation charges and retainer charges are thus received in proportional sums. Parallel to the increase in the sum of incurred losses on account of the administration, this situation leads to an increase in litigation and retainer charges. Hence, the prospective litigation costs can show an increase from the sum prescribed in the actual filing of the claim, if the claimant fails in their action. On the other hand, especially taking into consideration the fact that administrative jurisdiction does not provide for partial action via case law – and we believe that partial action should be provided for in Full Remedy actions[2] – it is obvious that these costs become more pronounced from the claimant's point of view in cases where the claimant is in a financially inferior status than the defendant administrative body.

Although limited mostly to the theoretical sphere, the question as to whether the collection of charges from the claimant restrains the right to legal remedy has always been a question in the minds of law practitioners. However, the collection of litigation and retainer charges as proportional sums has released this discussion from the limits of the theoretical sphere. Acting on this context, the topic of our article will be the question as to whether the proportional litigation and retainer charges collected during Full Remedy actions restrain the right to legal remedy; i.e. whether this procedure constitutes a contradiction to the Articles 2, 36 and 125 of the Constitution and Articles 6 and 13 of European Convention of Human Rights.

[2] Partial action within the context of full remedy action will be discussed below.

II – LEGAL JUSTIFICATIONS OF PROPORTIONAL LITIGATION AND RETAINER CHARGES IN FULL REMEDY ACTIONS

A – LITIGATION CHARGES IN FULL REMEDY ACTION

Charge, in its well-known definition, is "the financial obligation imposed compulsorily on persons benefiting from certain public services in order for them to contribute to the cost of these services or imposed during the application of certain procedures by persons."[3] Similarly, in Full Remedy Actions, the persons whose rights have been violated are assuredly subject to charges since they are specifically benefiting from a public service, namely jurisdictional procedures, for the reinstitution of their incurred losses. Does the collection of proportional charges in said actions have relevant justification?

In order to properly respond to this question, the first element of consideration must be the Law of Administrative Procedure, which regulates administrative jurisdiction. Although the Law does not include a provision pertaining to litigation charges, Article 31, entitled the "Applicable Circumstances for Code of Civil Procedure and Tax Procedure Law" clearly refers in various locations to the Code of Civil Procedure for answers to the questions regarding "litigation charges." Acting on these references, a look into the Code of Civil Procedure provides us with the corresponding Article 413. This article states that "[t]he claimant is obliged to disburse the litigation charges to the amount required by the tariffs". As can be deduced, the Code of Civil Procedure refers, for the questions regarding litigation charges, to the Charges Law, Article 15 of which states that the litigation charges shall be received based on procedures stated in Schedule (1) on a proportional basis for cases of an established value and on a fixed basis for the type and nature of the procedure. In accordance with this Article, in practice Full Remedy actions are subject to a proportional basis for charges since the case has a measurable value.

B – RETAINER CHARGES IN FULL REMEDY ACTION

As is well known, under Article 168 of the Legal Profession Act No.1136, cases litigated by assignees are subject to a retainer charge determined at the end of proceedings and to be borne by the unsuccessful party in litigation or execution proceedings according to the minimum tariff issued yearly by Turkish Bar Association and enforced by the Ministry of Justice.

In Full Remedy actions, however, administrative bodies determine a proportional retainer charge under Section 3 of the Legal Profession Minimum Tariff -- "Charges Payable for Legal Assistance Provided in Jurisdiction Bodies and Bureaus of Execution and Bankruptcy and Pertaining to Monetary Issues or Appraisable in Value."

[3] Mualla ÖNCEL, Ahmet KUMRULU, Nami ÇAĞAN, **Vergi Hukuku**, Turhan Publishing, revised and renewed 7. Edition, Ankara, 1999, p. 441.

III – DISCUSSION REGARDING PROPORTIONAL LITIGATION AND RETAINER CHARFES IN FULL REMEDY ACTIONS

A – DISCUSSION REGARDING THE CONTRADICTION OF PROPORTIONAL LITIGATION AND RETAINER CHARGES TO CONSTITUTIONAL PROVISIONS AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

As previously stated, the question as to whether the collection of charges in litigation restrains the right to legal remedy is, and has always been, an issue open to debate. There are two opinions on this issue, the first of which postulates that the collection of charges in proceedings is likely to restrain the right to legal remedy. This opinion thus advocates the need for the removal of litigation charges in order to preserve the right to legal remedy, which is one of the essential principles of law. Those arguing for the relevance of the collection of charges from the claimant postulate that there is a specifically-exploited public service and thus a nominal charge should be collected in return and that administrative offices might be subject to ungrounded preoccupations if the litigation procedures are deemed free of charge.

Even though the latter opinion is agreeable in terms of fixed charges, the cases where proportional charges are applicable and feature the administration as the opposing party eliminate the ability to rationally hold this opinion. In particular, those persons whose rights have been violated by the administration hesitate to pursue their right to legal remedy just because they will have to pay a litigation charge proportional to their incurred losses and because there is no guarantee that they will be successful in their action – even though the proportional charge is partially reimbursed if the case is rejected in Full Remedy actions, the claimant is obliged to pay the full sum of the proportional retainer charge.

As is also well known, the right of recourse is one of the general principles of law and a precondition required for ensuring the continuity of the Rule of Law. This right is included in our Constitution, similar to the constitutions of all governments operating under the Rule of Law. Article 36 of the Constitution establishes this right as an integral part of constitution with the expression that "[e]veryone has the right of litigation, either as plaintiff or defendant, and the right to a fair trial before the courts through lawful means and procedures."

In my opinion, in light of this constitutional provision, it is hardly righteous to argue that the collection of proportional litigation and retainer charges in Full Remedy actions is a procedure fully compliant to the Constitution. In fact, proportionally-collected litigation and retainer charges can and do lead to the violation and restriction of the right of litigation, either as plaintiff or defendant, and the right to a fair trial before the courts through lawful means and procedures.

On the other hand, the collection of proportional litigation and retainer charges also constitutes a contradiction to the European Con-

vention on Human Rights,[4] specifically to Article 6 that regulates the "Right to a Fair Trial" and Article 13 that regulates the "Right to an Effective Remedy." The reason behind such a postulation lies in the necessity to consider the litigation costs payable by individuals during litigation within the framework of the right to recourse. As a matter of fact, according to the European Union Committee of Ministers, individuals should face no economic obligations that bear the potential to prevent the pursuit of rights or filing of a claim before courts that resolve civil, administrative, social and financial matters.[5] Therefore, the European Court of Human Rights can also take into consideration the obligation to be represented by a lawyer and to bear litigation charges and the question as to whether these obligations damage the "Principle of Fair Litigation."[6]

Moreover, considering the fact that Full Remedy actions, much like actions for nullity, are a type of case that ensures jurisdictional control over the administration, proportionally-collected litigation and retainer charges can also be assumed to have a restricting effect on the judicial control over certain actions and procedures of the administration. The restriction of judicial control over the administration cannot be accommodated in "the Rule of Law." As a matter of fact, Article 125 of the Constitution resolves the issue of judicial control over the administration as a *sine qua non* of "the Rule of Law" with the inclusion of the expression that "[a]ll actions and procedures of the administration can be subject to litigation…" and the last subclause of this article regulates the financial responsibility of the administration with the expression that "…[t]he administration shall be liable to compensate for damages resulting from its actions and acts." Consequently, proportional litigation and retainer charges, that are of an extent to be considered a restriction of the right to legal remedy due to economic reasons, allow the exclusion of certain actions and procedures of the administration from the context of judicial control and therefore cannot be deemed legally appropriate.

B – A SUGGESTION FOR FULL REMEDY ACTIONS: PARTIAL ACTION

The actual contradiction between the proportional litigation and retainer charges collected in Full Remedy Actions and the Constitution, the European Convention on Human Rights and generally, to law has been deliberated as stated above. In order to overcome this contradiction to law, enforcement of relevant legal regulations might be considered to be a solution. However, in my view, such contradictions to law, at least on the level of legal regulations, can be corrected by allowing the institution of partial actions through case law issued by the Council of State (also the High Administrative Court – the Danıştay), even if any legal regulation is not devised and enforced.

As is well known, partial action is defined as "a case where the filed claim is associated to a part, but not to the whole, of the claims and a partial action is instituted (and the right to recourse for the remainder of claims is reserved)."[7]

[4] Signed in Rome on 04 November 1950. The Convention was finalized with the addition of the Protocol No.11 enforced on 01 November 1998. Turkey signed the convention on 04 November 1950 and published the convention in Official Journal (RG. 19.3.1954, 8662) upon approval of No.6366 of 10 March 1954.

[5] Ashingdane v. U.K. (1985) (Billur YALTI, "İnsan Hakları Açısından Vergi Yükümlüsünün Adil Yargılanma Hakkı – III", Vergi Sorunları Dergisi, Maliye Gelir Kontrolörleri Derneği Pub. , August 2000, I: 145, p.120.)

[6] YALTI, a.g.m., p.120.

[7] Ejder YILMAZ, Hukuk Sözlüğü, Enlarged Fifth Edition, Yetkin Publishing, Ankara, 1996, p. 466.

However, in practice, partial actions are not allowed against administrative bodies and thus the phrase "provided that our rights to the excess amount are reserved" is ignored in the statement of claim for Full Remedy actions.

In many decisions of the High Court, arguments that partial action is not legitimate in Full Remedy actions and thus the actions instituted after the term of proceedings on the basis of the phrase "provided that our rights to the excess amount are reserved" should be rejected.[8] Although this exemplifies the opinion adopted by the Council of State and High Military Administrative Court, there have been certain cases where positive decisions were forthcoming. For instance, a decision of the High Military Administrative Court stated that "… in cases where a financial reinstitution formerly defined as a yearly annuity becomes subject to an attrition due to the inflation rate observed over time, the institution of a new action years later by considering this attrition as a new loss is not contradictory to the principle of definitive judgment and the loss can be revised according to the altered situation in question."[9]

The case laws of the High Court regarding the possibility that a partial action be instituted in Full Remedy actions are justified on the grounds listed below:

The Law of Administrative Procedure does not include a provision that regulates partial actions.

Article 31 of the Code of Administrative Procedure does not make any reference to the Code of Civil Procedure in this respect.

However, although the Civil Code and other material laws do include provisions that bear the potential to allow for partial action,[10] subsequent actions instituted on the basis of the phrase "provided that our rights to the excess amount are reserved" are thought to be rejected, since similar provisions do not exist in administrative law.

I do not agree with these justifications.

First of all, I would like to discuss the justification pertaining to the lack of a provision regulating partial actions in the Law of Administrative Procedure and in the references in Article 31 of the Law of Administrative Procedure to the Code of Civil Procedure.

The claims that there are no provisions related to partial action in the Law of Administrative Procedure and that Article 31 of the Law of Administrative Procedure does not make any references regarding partial action are both true. However, the justifications listed are not sufficient, since partial action is not regulated in the Code of Civil Procedure. Partial action has been adopted via the case law of the Court of Appeals.[11] Even though Article 4 of the Code of Civil Procedure presents itself as a convenient basis, this article does not regulate partial action, but specifies the court that will be in charge of partial actions, if any. In other words, this article merely clarified a problem – the issue of appointment – which is associated to an already existing – endorsed – legal situation. Therefore, the fact that the Law of Administrative Procedure and its Article 31 do not include a provision regulating partial action does not mean that partial action cannot be adopted into administrative procedure via case law.

[8] E.g. State Council 6. Bureau, Decision No.1999/2712 E..2000/2819 K. of 11 May 2000: "The Administrative Jurisdiction procedure does not provide for the right to institute full remedy action via reserving the right to excess sum of those concerned". State Council 8. Bureau, Decision No.2003/590 E. 2003/3845 K. of 07 October 2003: "The request for the losses incurred on account of administrative actions and procedures should be taken to court within the period of time prescribed under Article 13 of the Code No.2577, the excessive sum associated with the losses revealed in the expert report in the legal process cannot be taken to court after the expiration of said period; and under the said provision, a full remedy action regarding the excess sum cannot be instituted on the basis of the reservation of the related right, since the disbursement of the losses incurred on account of administrative actions can only be enforced via actions instituted within the prescribed period of time". (http://www.kazanci.com.tr)

[9] High Military Administrative Court, 2. Bureau, 29 December 1992 74/913 (Ethem ATAY, Hasan ODABAŞI, Hasan Tahsin GÖKCAN, Teori ve Yargı Kararları Işığında İdarenin Sorumluluğu ve Tazminat Davaları, Seçkin Publishing, First Edition, Ankara, April 2003, p.703.)

[1] For instance, an action for alimony increase or decrease (MK 176/4).

[11] "The claimant does not have to institute a claim for the whole of their claims; they can request the remainder of their claims in subsequent partial actions provided that they reserve their right to the remainder of the sum, they do not misuse the rights granted to them and the first disbursement and the remainder retains its benefit value appraisable as sufficient for the institution of a partial action." Supreme Supreme Court of Appeals General Assembly of Civil Chambers 05.03.1981 -9-5191/201 (Nazif KAÇAK, Emsal İçtihatlarla Hukuk Usulü Muhakemeleri Kanunu, First Edition, Ankara, August 2002 p. 130).

Moreover, there are no provisions in the Law of Administrative Procedure that can potentially prevent the institution of a partial action. Thus, the interpretation that partial action is not legitimate in Full Remedy actions leads to the imposition, via interpretation, of a restraint on basic rights and freedoms, which is not included in the applicable law. This situation, in turn, constitutes a contradiction to Article 13 of the Constitution, resolving that basic rights and freedoms can only be restrained via laws, for this interpretation leaves no ground for the adoption of partial action even though there is no provision in our code of procedure that prevents the adoption thereof. Hence, "the Right to Legal Remedy" regulated in Article 36 of the Constitution is unlawfully restricted.

It is a point well worth emphasizing that the right to recourse, like all rights, has the potential to be made subject to exploitation; nevertheless, the claimant should be entitled to the right of instituting more than two actions via reserving their right to the excess sum, so long as the sum in question retains sufficient value to be preserved.[12]

Another justification for the rejection of partial action is the fact that administrative law does not feature provisions providing for partial action, unlike the Civil Code and other pertinent laws. However, the Supreme Court of Appeals does not require the existence of a specific regulation for the institution of a partial action and advocates the possibility that partial action could be a proper recourse in all cases where a legal benefit is concerned. In my opinion, partial action should be available to persons in Full Remedy actions if there is a legal benefit on the side of the given person whose rights have been violated.

IV – CONCLUSION AND OVERVIEW

Litigation charges and legal costs in general should never reach an extent to where the freedom of pursuing legal remedy is compromised, because the right to legal remedy is not only one of the basic rights and freedoms, but also a *sine qua non* of the Rule of Law. Therefore, legal regulations should be directed towards the correction of litigation and retainer charges currently collected proportionally and thus the existing contradiction to the Constitution and European Convention of Human Rights should be removed. In addition, as a proposal for solution, the institution of partial action can be considered for adoption by the High Courts as an integral option in Full Remedy action. If the current situation continues to govern legal practices, with such frequently encountered decisions in State Council and High Military Administrative Court as "… financial restitution claims of the claimant is determined in expert report to be 3.397.302.000-TL, … and since this sum exceeds the actual request of 1.900.000.000-TL… the proceedings were continued under the scientifically-approved expert report, but the awarded sum was the one declared in the claimant's request,"[13] the judicial system will continue to violate human rights, to fail to compensate in part or in whole the losses of claimants and thus to hinder the due fulfillment of duties of the judiciary, which in turn will damage the public trust therein.

[12] KAÇAK, a.g.e., p.130.
[13] HMAC 2. D. 02.04.1997 – 412/363 (ATAY, ODABAŞI, GÖKCAN, a.g.e., p 700-701).