

THE CONTRIBUTION OF AN IMPORTANT VERDICT OF TURKISH COUNCIL OF STATE TO THE SYSTEM OF LAW IN EVALUATING CIVIL SERVANTS

*R. Cengiz DERDİMAN**

ABSTRACT

According to the resolution established unanimously on 31 January, 2005 by basis no:2004/6213 and resolution no:2005/329, II. Seccion of Turkish Council of State, has applied a procedure ensuring civil servant's security, equality and impartiality beyond defined establishments about the evaluation of civil servants in the exercise of their duties.

In this short study, the chronic of this resolution will be emphasized. It is about arranging the registry report, the document regarding the evaluation of the function of civil servants.

I want to analyse and present this resolution below with reference to different aspects which I notice important and original in terms of comperative law and public administration.

Key Words: *Council of State, comperative law, public administration, Registry Report, capability of perception.*

ÖZET

Kamu Görevlilerinin Değerlendirilmesinde Türk Danıştayının Verdiği Bir Kararın Türk Hukuk Sistemine Katkıları

Türk Danıştayı 2. Dairesinin, 31.1.2005 tarihinde oy birliği ile verdiği Esas No: 2004/6213 Karar No: 2005/329 sayılı kararda, kamu

* *Associate Prof.; Deputy Chief of the Security Directorate of Bursa, Guest scholar in Uludag University Economic and Administrative Sciences Faculty.*

görevlilerinin değerlendirilmesinde bilinen kararlarından daha ötede memur güvenliğini, eşitliği ve tarafsızlığı destekleyici bir hüküm vermiştir.

Bu kısa çalışmada, bu kararın kroniği üzerinde durulacaktır. Bu karar da kamu görevlilerinin görevlerinde değerlendirilmesinin belgesi olan sicil raporlarının düzenlenmesi ile ilgilidir.

Karşılaştırmalı hukuk ve kamu yönetimi açısından önemli ve orijinal olduğunu gördüğüm bu kararı çeşitli yönleri ile aşağıda analiz edip okuyucuya sunmak isterim.

***Anahtar Kelimeler:** Danıştay, karşılaştırmalı hukuk, kamu yönetimi, sicil raporları, kavrama yeteneği.*

1. GENERAL TERMS OF RESOLUTION OF COUNCIL OF STATE AND FORMER PROCESS

As it is stated in the resolution, whose details are explained below, of 2nd Section of Turkish Council of State¹, Malatya Administrative Court² hears a case sued by a plaintiff; a teacher as a civil servant in Malatya, in demand for the annulment of moderate registry report of 1998. At the end of the case, Court of first instance dismisses the demand of annulment action by a resolution, basis no:2001/1271 and resolution no:2002/656, dated 9 May, 2002, and in consequence, the Court finds administrative act legal.

Malatya Administrative Court proposes some legal grounds for the resolution:

¹ “Council of State is the last instance for reviewing decisions and judgments given by administrative courts and which are not referred by law to other administrative courts. It shall also be the first and the last instance for dealing with specific cases prescribed by law.” (Turkish Constitution- article 155). In terms of carrying out administrative law and administrative judgment, there is a principle of separation of powers and in this respect, it is separated from Anglo Saxon’s system of unity of powers and overlaps with the system of Continental Europe. According to the regulation came into force, regulation no:5183, it has 13 session of administrative office. Except for the first one, the others are named as session of Administrative Law Divisions. First Division of Administrative Office which sees administrative affairs that are not defined as a case and administration needs to consult is named as administrative session.

² Administrative Courts are the real charged and authorized courts that give the decisions appealed in Council of State. Although this kind of courts exists in only one city in Turkey, its management control determined by law covers a few cities and one of these 25 courts is Malatya Administrative Court. Malatya is a city in the east part of Turkey.

1-) The registry report in litigation is arranged as moderate level and positive with 66 points in average. In that registry report, I .Chief civil servant's mark³ is 61, and II .Chief civil servant's is 70.

2-) According to these marks, the plaintiff's registry of 1998 is not arranged negatively as claimed in petition for lawsuit.

3-) It is based on observation and conviction in terms of quality of matters that affect evaluation. Observation and conviction have features that can vary as the time goes. For this reason, it is certain that the success level shows differences as the years pass.

4-) While the registry and success marks which are in positive level but low in mark are controlled, it is to be proved that Chief civil servants give marks to the civil servants for personal benefits.

5-) Legal evidence is not found for the plaintiff as to be assessed low mark on purpose to his registry of 1998.

The plaintiff appeals against a judgment of local court in order to apply to Council of State. Therefore, as an appeal of this resolution of the local court, II. Section of Turkish Council of State reviewing the legality of acts quashes a judgment on appeal. When Council of State quashes a judgment, it is emphasized that the points that affect Chief civil servants' forming conviction in the "Principles of Inquiry upon Judicial Initiative "are to be based on concrete information and record. Furthermore, it emphasizes that the method of concrete information and record is beyond debate.

2. THE IMPORTANCE OF REGISTRY REPORT IN TURKEY ACCORDING TO COUNCIL OF STATE

Registry report is a documentation of evaluating acts, and evaluating is an act of reaching a conclusion about the level of success in person's job, general situation and attitude in manner (Derdiman, 2004: 111).

In the resolutions that have been adopted by Council of State, it is seen to tell the important features of registry report in Turkey. According to Council of State, evaluating as a system, forms basis of applications about personnels and deals out aims such as promoting personnel, potential

³ Chief civil servant is an authority who fills relevant civil servants' registry reports with certain regulations. There are II. Chief civil servants who fill the reports. I. Chief civil servant is a hierarchical authority closer to the one arranging registry report. Each civil servant's average registry marks are calculated by dividing the total number or registry report by given mark. Division by two of the two Chief civil servants' marks gives the "registry mark".

growth, determining the training needs, coming into existence of the success level and remunerating, raising the wage, changing the permanent situation of job and retiring.

Registry Report is qualified as a legal document bringing up relevant personnel's vocational knowledge, experience, manner and attitude in that year and existing after the evaluation of all of these points. For this reasons, the weight of legal effects caused by registry report is indisputable.

For these features, from the point of view of the important results, registry reports are arranged in Civil Servants' Act, resolution no: 657 of article 111., 113., 115., 119.

According to the resolution, registry reports:

1-) Take basis on essential characters and registry documents in civil servants' determining capacity, process in degree, rise in rank, placing on the retired list or renouncing the duty (article no: 111).

2-) Determine competence level by converting it to a mark in registry reports which Chief civil servants hold in certain times (article no: 113).

3-) State negative and positive qualities, deficiencies and faults in civil servant's manner and attitude with Chief civil servant's registry reports of civil servants lower in rank (article no: 115)

4-) State that civil servants whose marks are upon 60 of 100 have high registry marks and those down 60 of 100 have low registry marks. (article no: 119) In Registry Regulation of Civil Servants⁴, registries are given according to the law in force as long as it is marked on 100 basis, in Turkey. It is understood that 0–59 marks are poor, 65–74 marks are moderate, 75–89 marks are good and 90–100 marks are well.

Civil servants who are given negative registry marks and evaluated deficient are warned by a confidential writing from an authorized chief in a month from the date of transition of reports to the maintenance place of registry reports in order to dispel their deficiencies and faults that caused this situation. This warning is not meant admonition warning, deficiency letter in disciplinary regulations. (Derdiman, 2004: 115).

Convincions and written observation statements of Chief civil servants about civil servants' general manner and attitude are considered in registry marks.

⁴ This regulation came into force by Official Gazette, published on 18 October, 1986, publish no: 19255.

5-) As it is stated above, Chief civil servants should state written observation and conviction about civil servants on their capability for duty, whether they have a life affecting duty in a negative way⁵.

3. THE IMPORTANCE AND EFFECT OF THE RESOLUTION OF COUNCIL OF STATE

Firstly, in evaluation system of civil servants, it is to be emphasised that the resolution of Council of State is a first resolution that blazes a trail and that sort of resolutions are not encountered before. Furthermore, it can be told that it is hard to encounter much that sort of resolutions in Archive of Unification Judicial Practices. As we told it is not encountered that sort of resolutions in Turkey, it also does not attract attention in comparative law practices as far as we analyse.

If registry reports, which are the evaluation documents of civil servants both in Turkey and in other countries, are seen as a sign of negative and inadequacy, there are numerous resolutions that redress unjust treatment given by injured parties. There are numerous resolutions in our country that is the same quality.

For instance, in Council of State IDD GK⁶ resolutions, resolution no:1988/133 and 1989/16, dated 17 February, 1989, that the reasons of the negative registry marks are to be based on concrete justifications is discussed⁷ (Günday, 2004: 534, dp. 5).

⁵ According to the Registry Regulation of Chief Civil Servants, civil servants are evaluated in the light of the following criteria a) Appearance (outward appearance, dressing), b) intelligence level and capability of perception, c) determination and commitment, honesty and reliability in keeping a secret, and success in social relations, d) whether or not they have any habits not befitting their works and positions, such as drinking alcohol or gambling, e) bad behaviors such as lack of confidence, pursuing only his/her own benefits, lying, gossiping, jealousy, grudging. According to the evaluation results made by using knowledge and observations obtained in registry session, the ideas about deficiency and fault, negative and positive sides of civil servants are written to a part about evaluation of personality in registry report separately, clearly and in accordance with detailed or briefly (Derdiman, 2004: 113).

⁶ IDD GK is a superior committee among the divisions of administrative office. Therefore, the decision of this committee is especially noted.

⁷ In France, until recently, it has not been applied to administrative judgment for registry. Registry preparation transactions have been accepted. However, an action for damages can be brought against administration because of the responsibility of it claiming its deficiencies because of low registry marks.

However, in Turkish public administration, until the date that resolution we analysed is carried and declared, there was a belief that it accepted no responsibility for public servants to have the mark not negative but “low”. Because, there is not a resolution given by administrative judgment authorities about arranging registry report not negative but low. In this event, the resolution of Council of State determines people can be unjustly treated because of low registry. As it is stated above, Council of State explains its decision as registry is important in premium and promotion.

This resolution of Council of State is important for another aspect. Council of State gives this resolution by quashing the judgment of court of the first instance as it is referred above. It emphasizes indirectly that the decisions of Chief Officers who make evaluation can change and it is in contradiction with the rule of law. This aspect of Council of State is thought to be sensitive resolution for the assurance of public servants and it can be said that public servants’ regulation and allied subjects are still another topic of discussion and they are evaluated below.

4. THE RESULTS OF COUNCIL OF STATE’S RESOLUTION

As stated below, this resolution of Council of State works out objective, therefore, it charges administration with appliance in the same situations. For this reason, public servants who have authority of registry evaluations are to be announced. Because, administration should do something in order to want not only plaintiff who claims dispute but also public sector to abide by a decision.

In Turkish public administration, these resolutions have not a clear binding as it is in the Unification of the Judicial Practices. These resolution concerns only parties in dispute. However, the feature of the annulment a judgment’s objectivity which means when same situations it is to be applied in every case, requires at least to be taken into consideration.

At that point, the duty of administrative judgment authorities is not to change conviction in new and typical resolutions that fit the resolution they take. Therefore, courts should avoid constant changes in their decision they give by conscience. This is important for reliability and stability of court decision.

On the other hand, Council of State determines to assign a reason for low marks, but does not state according to which mark registry mark is accepted low. This means, it does not state the highest mark and, furthermore,

Recently, registry has begun to be dispute at annulment action. (Tortop, 2005: 107).

it does not state which mark is defined low. That is to accept that everyone who has low mark less than 100, which is the highest registry mark, can sue. Without doubt, everyone has a right to sue for administrative act. Council of State should not disregard to find the acceptable balance with principles of state of law while providing to enjoy democratic personnel rights with public order requirements. This balance was found contradictory to law as it is violated focusing on public order in resolution of local court and for this reason it was quashed by Council of State.

In fact, such a balance is possible to be put and developed by public organizations. The important point is that administration can prove justness in act. Because, according to the principles of administrative judgment, proving the justness in acts through the trial process is a duty of administration. In such a case, administration has an authority of arranging low registry mark and it is enough to set forth a fair cause⁸.

At that point, it should be stressed that registry marks are confidential in Turkey. Registry, which is filled by public servant, cannot be dispute at law without knowing whether it has features giving any harm to person. Consequently, resolution in analysis leads to an idea that registry reports are informed to those whose registry reports are arranged.

We say, "Lead", because there is no such a possibility except for the low registry marks in Turkey. Registry mark is confidential in Turkey. No one can see the registry report in institution except for Chief civil servant and people whom administrator allow to see for proceedings and correspondence such as delivering to related places, preparing and sending to II. Chief civil servants. Chief civil servant cannot see the registry report again after sending it to the superior Chief civil servant. (Derdiman, 2004: 115).

That the registry reports and marks are confidential hinders freedom to seek remedy. 1982 Turkish Constitution, article no: 36 states that: "*Everyone has a right of litigation either as a plaintiff or defendant and the right to a fair trial before the courts through lawful means and procedures*". The same constitution's article no: 40/2 states: "*The State is obliged to*

⁸ To give negative registry marks, it is a well-known method to determine via disciplinary investigations the inadequacies and behaviors in contradiction to the requirements of the services, which could be shown as the reasons for negative marks. All the same, justification and tendering evidence of such negativity in another lawful way is a hierarchical authority and duty of Chief civil servant's. However, on one hand, why a person who has not received a disciplinary punishment and a warning cannot get the highest registry mark is a topic of discussion; on the other hand, that most of the civil servants' registry reports in public office are filled without referring to these regulations is to be asserted.

indicate in its transactions, the legal remedies and authorities the persons concerned should apply and their time limits”.

It is seen that the confidentiality of registry report hinders both the freedom of seeking remedy and carrying out the functions by Turkish State stated in act no:40/2.

Another objection about confidentiality of registry report is emphasized:

1-) The confidentiality of registry report hinders the function of self-correction by informing people to be evaluated in advance. Confidentiality is more suitable to give seniors wide and arbitrary rights. (Derdiman, 2004: 113; Derdiman-Akdeniz, 2003: <http://...htm>; Tortop, 2005: 108).

2-) That the registry reports are confidential hinders the evaluation of people's contribution to the total quality in organizations or their performances. It is beneficial to evaluate the personnels' personalities and their situations in organizations in their evaluation. By this way, more objective performance criteria can be determined by depending on these definitions. In conclusion, the criterias determining civil servant's efficiency and capability should be chosen (KAYA, 1991: 2005).

3-) Moreover, everyone has a right to know what is carried out about them. Because, application is done according to this registry. There is not any objection on informing the people about the results of their registry reports as long as it is done by objective procedure, because the people being evaluated in an objective way accept their evaluation.

For such reasons, different applications can be seen in different countries. In USA, registry is informed to concerned people. In some European countries (such as Britain) they are informed if registry is negative (Tortop, 2005: 108).

In Turkey, new regulation coming into force in 2004 under the name of “Act to Access Information”, regulation no: 4982, contains that people can use their rights of obtaining knowledge from administration authorities with a petition and in practice, when people apply to obtain knowledge, they are only told about the partition of their registry report, which means it is poor or well and still they are not informed⁹. So, the resolution of Council of State constrains giving clear information about registry.

⁹ About the applications made to learn the registry grades according to the law numbered 4892, The Board of Obtaining and Evaluating Information has most of the time decided that the applicants themselves could be informed of their grades. The examples that could be given here are the Board's judgment dated 05.07.2004 and numbered 2004/12 (BEDKK, 2004a) and the one dated 25.10.2004 and numbered 2004/19 (BEDKK, 2004b). In those judgments, the

Upon this information, it should be made related administrative regulary act and judgment cancel by applying for the competent judgment authority within procedure.

5. CONCLUSION

Council of State while hearing and disposing of the cases sued by people having negative registry marks, first of all, with its pattern resolution which is the subject of this work, despite negative, sustains a suit, and decides that administration should base low registry mark on fair cause.

In this way, it is proceeded by first and important stages in comperative law. However, the application of confidentiality of registry marks is to be abolished and passed to open registry system for the application of the resolution of Council of State. So the attitude of public organization according to performance criteria is concretized. Moreover, as a result of freedom to seek remedy, people shall have the right to know for which reasons they get low marks and seek remedy in concerned authority and office as long as they have applied to judgment institution.

In conclusion, this resolution gives rise to the concept of public administration and public servant's evaluation about giving registry marks and is guaranteed to be lawful in all aspects. The meaning of this guarantee depends on increasing reliability as long as Council of State gives the same cases. The most pleasant social way of living in a country is to accept the supremacy of the law.

BİBLİOGRAPHY

CANMAN, Doğan; 1995: *Çağdaş Personel Yönetimi*, Türkiye ve Ortadoğu Amme İdaresi Enstitüsü Yayınları, No: 260, Ankara.

Board declared within the framework of the Law numbered 4982 that the registry reports are to be accessible not to the third people but only to the civil servant concerned. While giving that decision, the Board referred to the rationale that the law numbered 4982 indirectly overrules the provision in the Civil Servants Law numbered 657 that registry reports are confidential. At that point, the Board considered mainly the provision in the law numbered 4982 concluding "Beginning from the date on which this law is promulgated, the provisions in the other laws contradicting this law cannot be applied." In the last analysis, these judgments are those of a Board and the Board might judge every single event from different points of view. However, the Board has been one of the parties emphasizing the necessity of the confidentiality of the registry reports to the third people only, and that and all the other data remind one more and more of the need to invalidate the provision on the confidentiality of registry reports.

(BEDKK) Bilgi Edinme Değerlendirme Kurulu Kararı
(The Judgment of Board of Obtaining and Evaluating Information)

2004a:

<http://www.turkiye.gov.tr/docs/basbakanlik/birimler/bilgiedinme/%C4%B0%C3%A7i%C5%9Fleri%20Emniyet.doc>, Access date: 16.06.2006.

(BEDKK) Bilgi Edinme Değerlendirme Kurulu Kararı.

(The Judgment of Board of Obtaining and Evaluating Information); 2004b:

<http://www.turkiye.gov.tr/docs/basbakanlik/birimler/bilgiedinme/AA2.doc>,
Access date: 10.06.2006.

The resolution of Second Council of State; 2005: About making based on lawful reasons of the registry reports arranged positive but low in marks. Basis No: 2004/6213 Resolution No: 2005/329, www.memurlar.net Access date: 22.02.2006.

DERDİMAN, R. Cengiz; 2004: *Türkiye İdaresinin Hukuksal Yönü ve Yapısı (Kamu Malları ve Görevlileri)*, c. II, Alfa Aktüel Yayınları, İstanbul.

DERDİMAN, R. Cengiz – AKDENİZ, Derin; 2003: Kamu Yönetiminde Performans Göstergesi Olarak Sicil Değerlendirmesi, *Polis Dergisi*, year: 9, number: 34, January-February-March 2003, http://www.egm.gov.tr/StratejiGelistirmeDB/dergi/34/yeni/web/R_Cengiz_DERDIMAN_Derin_AKDEN.htm, Access date: 05.03.2006.

GÜNDAY, Metin; 2002: *İdare Hukuku*, İmaj Yayıncılık, 9. Edition, Ankara.

TORTOP, Nuri; 2005: *Kamu Personel Yönetimi*, 7. Edition, Yargı Yayınları, Ankara.

Kamu Yönetimi Araştırma Raporu Genel Rapor.

(KAYA) 1991: *Türkiye ve Ortadoğu Amme İdaresi Enstitüsü Yayınları*, Ankara.