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Mandatory Administrative Remedies and the Right to Access to a Court in Civil Procedure Law: An Analysis in the Light of the Jurisprudence of the ECtHR and the Turkish Constitutional Court



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Abstract

In the rule of law, the main principle is to resolve legal disputes through the state courts. However, within the framework of its discretionary power, the State may introduce various remedies for various disputes. When the law stipulates that a lawsuit may be brought before a civil court only after the exhaustion of a mandatory administrative remedy, it directly concerns the civil aspect of the right to access to a court. The study's primary purpose is to examine whether mandatory administrative remedies, often overlooked in civil procedure law, violate the right to access to court and explore ways of ensuring more robust protection of such fundamental right. Compulsory out-of-court mechanisms limit the right to access to court, an indispensable element of the right to a fair trial. Both in the ECHR system and in Turkish law, the right to access to court may be limited in accordance with the regime of the limitation of fundamental rights. If the authority is not a tribunal and is not considered a tribunal, a judicial appeal must be available against that decision. In Turkish civil procedure law, there are several procedures having mandatory administrative remedies. In particular, an explicit regulation on the mandatory application to the Social Security Institution is needed to secure the right to access to court. The remedies that prevent or postpone the filing of an enforcement proceeding, as well as a lawsuit by a mandatory administrative remedy, should be very carefully regulated.

Keywords

Limitation of fundamental rights · mandatory administrative remedy · out-of-court mechanisms · procedural requirements · right to a fair trial (civil aspect) · right to access to a court



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I. Introduction

Access to justice is not always secured through recourse to state courts; in certain cases, it may be possible, and even necessary, to envisage alternative mechanisms beyond direct application to the judiciary. Within certain limitations, different remedies may be preferred instead of state courts, or both court and non-court remedies may be regulated together. Administrative and political remedies are also seen as requirements for the freedom to seek rights¹. In particular, the introduction of administrative remedies has a function that complements judicial protection². On the other hand, alternative dispute resolution is also a part of access to justice alongside access to the court³. Therefore, in addition to access to court, introducing other mechanisms to a certain extent can be considered within the obligation of the State to provide legal protection⁴. This is a result of the fact that access to justice is a developing and broad concept in today's understanding⁵.

In the rule of law, the main principle is to resolve legal disputes through the state courts. However, within the framework of its discretionary power, the State may introduce various remedies for various claims or disputes. The legitimacy of remedies outside the state courts depends on certain conditions and guarantees. Mandatory out-of-court mechanisms limit the right to access to the courts. Such a limitation can only be compatible with access to justice when it does not violate the right to access the courts.

These procedures may initially suggest administrative procedural law. However, when the law allows a lawsuit to be filed in civil courts after the exhaustion of a mandatory administrative remedy, it directly concerns the civil aspect of the right to access to a court. The study's primary purpose is to examine whether mandatory administrative remedies, often overlooked in civil procedure law, violate the right to access to court and explore ways of ensuring more robust protection of such right. To this end, first, the relation between mandatory administrative remedies and the civil aspect of the right to access to court is set forth. The jurisdiction of the European Court of Human Rights (ECtHR) is used as a main framework for this. Then, specific procedures under Turkish law are discussed. The practices that may cause a violation of the right to access to court are explained in the light of the decisions of the Turkish Constitutional Court (TCC). Finally, the conclusions reached are presented.

II. Scope and Limitations of the Study

In the context of its discretionary power to establish mechanisms for access to justice, the State may determine administrative remedies for resolving specific disputes. In resolving disputes falling within the jurisdiction of the administrative procedural law, application to certain administrative appeal remedies may be mandatory before filing a lawsuit before the administrative court. Mandatory administrative appeals have the function of dispute resolution just like the judiciary. Therefore, this raises the question of the extent to

¹Cengiz Gül and Fatih Birtek, 'Hak Arama Özgürlüğü ve Türk Pozitif Hukukunda Yargı Yolu Kapalı İşlemler' (2007) 2(1-2) ERÜHFD 3, 7; Hüseyin Turan, *İnsan Hakları Avrupa Sözleşmesinde ve Türk Hukukunda Adil Yargılanma Hakkı* (1st edn, Adalet Yayınevi 2016) 126; İsmail Köküsarı, 'Hak Arama Özgürlüğü ve 2010 Anayasa Değişiklikleri' (2011) 15(1) GÜHFD 163, 166; Mesut Aydın, 'Anayasa Mahkemesi Kararlarında Hak Arama Özgürlüğü' (2006) 61(3) AÜSBFD 1, 6

²Dieter Lorenz, 'Der grundrechtliche Anspruch auf effektiven Rechtsschutz' (1980) 105(4) AöR 623, 626

³Franziska Hidding, *Zugang zum Recht für Verbraucher* (1st edn, Duncker & Humblot 2019) 58

⁴Mine Akkan, 'Medeni Usul Hukukunda Etkin Hukuki Koruma' (2007) 3(6) MİHDER 29, 30; Volker Buermeyer, *Rechtsschutzgarantie und Gerichtsverfahrensrecht* (1st edn, Carl Heymanns Verlag 1975) 24

⁵A Uzelac and CH van Rhee, 'Introduction' in A Uzelac and CH van Rhee, *Access to Justice and the Judiciary- Towards New European Standards of Affordability, Quality and Efficiency of Civil Adjudication* (1st edn, Intersentia 2009) 1



which the guarantees of the right to a fair trial are applicable in these remedies⁶. The same question also applies to procedures requiring application to the administration in the first place. Indeed, this issue has also been analysed in the case law of the ECtHR⁷.

However, the subject of this study is not the annulment and full remedy actions within the framework of Article 2 of the Administrative Procedure Code No. 2577. Dispute resolution is a matter that concerns the judicial function of the State⁸. Within the civil jurisdiction, which is the ordinary jurisdiction,⁹ private law disputes are resolved according to the rules of civil procedure law. However, in some cases, to resolve certain disputes, an application to an administrative body is compulsorily required first, and the court can only be accessible against the decision of this body. The legal remedy against the decision of the administrative organ may not always fall into the administrative procedure law. It is very well possible to apply to the civil courts against the decision. The fact that the lawsuit to be filed in this context will be heard in the civil courts indicates that the matter concerns the civil procedure law. Preventing the filing of a lawsuit by imposing an obligation to apply to the administration means limiting the right to access to court. In cases where the right to access to court is limited by mandatory administrative application, such limitation must be made under the regime of the limitation of the fundamental rights. The subject of this study is the relation between the right to access to court and the obligation to apply to the administration in matters concerning civil jurisdiction. To concretise the subject, several procedures were selected. The first procedure is the obligation to apply to the Social Security Institution, because it is the most frequently encountered one in the practice of civil procedure law. In addition, the application procedures to the land registry office and the State of emergency commission are examined afterwards because such procedures are subject to current individual applications of the Turkish Constitutional Court. Finally, the relationship between the administrative remedies and enforcement proceedings is examined. Procedures related to administrative law and other out-of-court remedies in civil procedure law are excluded from the scope.

III. The Relation Between Mandatory Administrative Remedies and the Right to Access to Court in the Framework of the ECtHR Case Law

In accordance with the contemporary understanding of the rule of law, the State is the addressee of the legal protection demands of individuals, and it is under the obligation to ensure justice (*Justizgewährungspflicht*) as a requirement of the rule of law¹⁰. The “freedom to seek rights,” as expressed

⁶Burak Öztürk, *Hak Arama Özgürlüğü Çerçevesinde Zorunlu İdari İtiraz* (1st edn, Yetkin Yayınları 2015) 169

⁷See II-B

⁸Öztürk (n 6) 170

⁹Mine Akkan, *Pekcanitez Usul Medeni Usul Hukuku* (15th edn, On İki Levha Yayınları 2017) 80; Murat Atalı, İbrahim Ermenek and Ersin Erdoğan, *Medeni Usul Hukuku* (7th edn, Yetkin Yayınları 2024) 35; Saim Üstündağ, *Medeni Yargılama Hukuku*, vol I (7th edn, 2000) 23

¹⁰BVerfGE 54, 277; Abdürrahim Karslı, *Medeni Muhakeme Hukuku* (5th edn, Filiz Kitabevi 2020) 14-15; Atalı, Ermenek and Erdoğan (n 9) 2-3; Baki Kuru and Burak Aydın, *Medeni Usul Hukuku Ders Kitabı* (8th edn, Yetkin Yayınları 2023) 104; Buermeyer (n 4) 23, 87-88; Caroline Meller-Hannich, *Zivilprozessrecht* (3rd edn, Kohlhammer 2022) 1; Eberhard Schmidt-Aßmann, *Dürig/Herzog/Scholz Grundgesetz Kommentar* GG Art. 19 Abs. 4 (102nd edn, C. H. Beck 2023) 16; Gregor Vollkommer, ‘Einleitung’, *Zöller Zivilprozessordnung* (34th edn, Otto Schmidt 2022) 30; H Yavuz Alangoya, M Kâmil Yıldırım and Nevhis Deren Yıldırım, *Medeni Usul Hukukunun Esasları* (8th edn, Beta 2011) 201; Hakan Pekcanitez, Oğuz Atalay and Muhammet Özkes, *Medeni Usul Hukuku* (12th edn, On İki Levha Yayınları 2024) 2-3; Hakan Pekcanitez, *Pekcanitez Usul Medeni Usul Hukuku*, vol 1 (15th edn, On İki Levha Yayınları 2017) 12; Hans Joachim Musielak and Wolfgang Voit, *Zivilprozessordnung Kommentar* (19th edn, Vahlen 2022) 6; Hans-Detlef Horn, ‘§132 Verbot von Ausnahmegewichten und Anspruch auf den gesetzlichen Richter’ in Detlef Merten and Hans-Jürgen Papier (eds), *Handbuch der Grundrechte, Band V, Grundrechte in Deutschland: Einzelgrundrechte II*, (38th edn, C. F. Müller 2013) 1273; Hans-Jürgen Papier, ‘§176 Justizgewähranspruch’ in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland, Band VIII Grundrechte: Wirtschaft, Verfahren, Gleichheit*, (3rd edn, C. F. Müller 2010) 492-495; İbrahim Aşık and others, *İcra ve İflas Hukuku* (2nd edn, Seçkin Yayıncılık 2023) 35; Ingo Saenger, ‘Einführung’ in Ingo Saenger (ed), *Saenger Zivilprozessordnung* (9th edn, Nomos 2021) 9; Petra Pohlmann, *Zivilprozessrecht* (5th edn, c. H. Beck 2022) 3; Süha Tanriver, *Medeni Usul Hukuku*, vol 1 (6th edn, Yetkin Yayınları 2024) 85, 90; Wolfgang Brehm, ‘Einleitung’ in Reinhard Bork and Herbert Roth (eds), *Stein/Jonas Kommentar zur Zivilprozessordnung Band 1* (23rd edn, Mohr Siebeck 2014) 114; Wolfgang Lücke, *Zivilprozessrecht I* (11th edn, C. H. Beck 2020) 1. See also Dinah Shelton, *Remedies in International Human Rights Law* (2nd edn, Oxford University Press 2005) 8



in Article 36 of the Turkish Constitution, besides being a fundamental right for individuals, imposes an obligation on the State to make the judicial system accessible to citizens¹¹. To ensure the effective exercise of the freedom to seek rights, the State has to establish the necessary legal remedies, particularly the court organisation¹². Guaranteeing the right to apply to a court is the first step in ensuring the effectiveness of the freedom to seek rights¹³. In this respect, as a requirement of the rule of law, the right to access to a court (*Recht auf Zugang zu einem Gericht*) is a fundamental judicial right;¹⁴ it is an indispensable element of the right to a fair trial and the freedom to seek rights¹⁵.

The ECtHR first recognised the concept of the right to access to a court in its 1975 judgement in *Golder v. the United Kingdom*. According to the ECtHR, the elements of the right to a fair trial guaranteed by Article 6 of the Convention—namely, “the fair, public and expeditious characteristics of judicial proceedings”—are of no value at all if there are no judicial proceedings¹⁶. On the other hand, the principle of the rule of law must be considered in the interpretation of the Convention, and it is not possible to conceive of the rule of law without the possibility of access to courts in civil matters¹⁷. In other words, the Court held that the fair trial guarantees would be useless if it were impossible to start court proceedings in the first place,¹⁸ reflecting the effective rights interpretation technique¹⁹. The ECtHR’s approach that the right to access to a court is a requirement of the rule of law and a right inherent in the right to a fair trial has become established jurisprudence since the *Golder* judgement of 1975. Therefore, it has been accepted that Contracting States have to effectively guarantee the right to access a court.²⁰ In its 1979 judgement in *Airey v. Ireland*,²¹ the ECtHR clearly stated that the protection of rights must not be theoretical or illusory but practical and effective. The State cannot remain passive in terms of the effective protection of the right to access to a court²².

The right secured by Article 36 of the Constitution of the Republic of Türkiye is not expressed as “the right to access to court” but rather as “the freedom to seek rights.” Nevertheless, it is possible to accept

¹¹Yaşar Demircioğlu, *Medeni Usul Hukukunda İnsan Hakları ve Adil Yargılanma Güvenceleri* (1st edn, Yetkin Yayınları 2007) 106

¹²Alexander Bruns, ‘Der Zivilprozess zwischen Rechtsschutzgewährleistung und Effizienz’ (2011) 124(1) ZJP 29, 33; Arnd Uhle, ‘§129 Rechtsstaatliche Prozeßgrundrechte und -grundsätze’ in Detlef Merten and Hans-Jürgen Papier (eds), *Handbuch der Grundrechte, Band V, Grundrechte in Deutschland: Einzelgrundrechte II*, (38th edn, C. F. Müller 2013) 1089-1107; Baki Kuru and Burak Aydın, *Medeni Usul Hukuku El Kitabı*, vol 1 (2nd edn, Yetkin Yayınları 2021) 54-55; Emel Hanağası, *Davada Menfaat* (1st edn, Yetkin Yayınları 2009) 41; Hans Prütting, ‘Einleitung’ in Hans Prütting and Markus Gehrlein (eds), *Zivilprozessordnung Kommentar* (15th edn, Luchterhand 2023) 40; Lorenz (n 2) 626; Lüke (n 10) 36; Meral Sungurtekin Özkan, ‘Anayasanın Sosyal Hukuk Devleti İlkesi ve Medeni Yargılama Hukuku’ (2009) 11 DEÜHFD 553, 561; Muhammet Özkes, *Medeni Usul Hukukunda Hukuki Dinlenilme Hakkı* (1st edn, Yetkin Yayınları 2003) 51, 53; Ramazan Arslan and others, *Medeni Usul Hukuku* (9th edn, Yetkin Yayınları 2023) 51-53; Süha Tanrıver, *Yargı Teşkilatı ve Görevlileri* (1st edn, Yetkin Yayınları 2022) 48; Şanal Görgün, Levent Börü and Mehmet Kodakoğlu, *Medeni Usul Hukuku* (13th edn, Yetkin Yayınları 2024) 1; Tanrıver (n 10) 76; Tolga Akkaya, *Medeni Usul Hukukunda İstinaf* (1st edn, Yetkin Yayınları 2009) 45; Üstündağ (n 10) 16

¹³Akkan (n 4) 37

¹⁴Konuralp and Hanağası defined the concept of a procedural fundamental right, which can also be expressed as a procedural fundamental right, as “a formal right that does not constitute an inviolable habitat in itself but serves to realise substantive fundamental rights and human rights within the judicial activity.” See Haluk Konuralp and Emel Hanağası, ‘Fransız Hukukunda İptal Amaçlı İstinaf Yolu’ (2007) 54 LHD 1795, 1797. According to another opinion, judicial fundamental rights can be defined as “auxiliary fundamental rights that serve the realisation of human rights and substantive fundamental rights in the Constitution in the field of judicial activity.” See Esra Atalay, ‘Yargısal Temel Haklar’ in Prof. Şükrü Postacıoğlu’na Armağan (1st edn, Dokuz Eylül Üniversitesi Hukuk Fakültesi Yayınları 1997) 437, 441

¹⁵Buermeyer (n 4) 59-60; İbrahim Kaboğlu, *Özgürlükler Hukuku* (4th edn, Afa Yayınları 1998) 129; Öztürk (n 6) 75; Tuğçe Bahadır, *Hak Arama Hürriyeti Perspektifinden Arabuluculuk* (1st edn, Seçkin Yayıncılık 2022) 49

¹⁶*Golder v UK* App no 4451/70 (ECtHR, 21 February 1975) para 35

¹⁷*Golder v UK* para 34

¹⁸Clare Ovey and Robin C. A. White, *Jacobs & White-The European Convention on Human Rights* (4th edn, Oxford University Press 2006) 170

¹⁹The technique allows the Court to give the provisions “fullest weight and effect consistent with the language used and with the rest of the text and in such a way that every part of it can be given meaning”. See Ovey and White (n 18) 47

²⁰Ovey and White (n 18) 171. See, for example, *Pudas v Sweden* App no 10426/83 (ECtHR, 27 October 1987) para 37-39; *Osman v UK* App no 10426/83 (ECtHR, 28 October 1998) para 136; *Marini v. Albania* App no 3738/02 (ECtHR, 18 December 2007) para 112-113

²¹*Airey v Ireland* App no 6289/73 (ECtHR, 9 October 1979)

²²*Airey v Ireland* para 24-26; Ovey and White (n 18) 48; Shelton (n 10) 9



that the freedom to seek rights is a concept that coincides substantially with the right to access to court²³. Indeed, according to the Turkish Constitutional Court, “*beyond the fact that it is a fundamental right in itself, the freedom to seek rights is one of the most effective guarantees that ensure the proper enjoyment and protection of other fundamental rights and freedoms, and the granting of the right to sue before the judicial authorities constitutes a prerequisite for a fair trial*”²⁴. In its another judgement, the Constitutional Court characterised the right to access to court as one of the fundamental elements of the freedom to seek rights and stated that it imposes a duty on the State to establish effective judicial remedies.²⁵ The rule of law must make all legal protection mechanisms, especially the courts, accessible. The State must avoid interventions that restrict the freedom to seek rights and to take appropriate measures for its effective use²⁶. In this sense, an interference with the right to access to court will also mean an interference with the freedom to seek rights.

Both in the ECHR system and Turkish law, fundamental rights are not regulated without limitation. In this context, the right to access to court cannot be considered an absolute right. To ensure the proper administration of justice and the effectiveness of legal protection, the right to access to court may be limited in certain procedural aspects. However, procedural requirements cannot be designed in such a way that they create an obstacle to exercising the right to access the court²⁷. Even in *Golder v. the United Kingdom* judgement of 1975, in which the right to access to court was conceptualised in the case law of the ECtHR, it was accepted that the right in question could be subject to certain limitations. Contracting States have a certain degree of discretion in their regulations on the right to access to court. However, the rules and especially the limitations to be made within the framework of the discretionary power must not impair the essence of the right and other rights regulated in the Convention²⁸.

To emphasise, the right to access an independent and impartial court established by law, which is under the protection of Article 6 of the ECHR, cannot be considered an absolute right²⁹. Therefore, what matters is whether any limitations imposed on this right are compatible with the rule of law. The ECtHR assesses the appropriateness of the limitation according to the following criteria conceptualised in the *Ashingdane v. the United Kingdom* judgement: “[...] the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. [...] Furthermore, a limitation will not be compatible with Article 6 para. 1 (art. 6-1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved³⁰.” In the Turkish Constitution, the criteria for the limitation of fundamental rights and

²³Ahmet Ekinci, ‘Anayasa Mahkemesi’nin Bireysel Başvuru Kararlarında Mahkemeye Erişim Hakkı’ (2014) 18(3-4) GÜHFD 821, 824; Ejder Yılmaz, ‘Medeni Yargıda İnsan Hakları’ (1996) 2 TBBD 149, 155

²⁴TCC 41/19, 09.02.2012 (OG 13.02.2013 I 28558)

²⁵TCC 95/176, 13.11.2014 (OG 13.03.2015 I. 29294)

²⁶Bihter Aydın, ‘Türk İdari Yargı Düzeninde Mahkemeye Erişim Hakkı’ (2013) 15 TAAD 271, 275; Cristoph Grabenwarter and Katharina Pabel, *Europäische Menschenrechtskonvention* §24 (7th edn, C. H. Beck 2021) 51; Feyyaz Gölcüklü, ‘Avrupa İnsan Hakları Sözleşmesi’nde Adil Yargılama’ (1994) 49 (1) AÜSBFD 199, 209; Gül and Birtek (n 1) 7; Köküsarı (n 1) 167; Şeref Gözübüyük, Feyyaz Gölcüklü and Abdurrahman Saygılı, *Avrupa İnsan Hakları Sözleşmesi ve Uygulaması* (12th edn, Turhan Kitabevi 2019) 275

²⁷Atalı, Ermenek and Erdoğan (n 9) 110-111; Karl Heinz Schwab and Peter Gottwald, *Verfassung und Zivilprozess*, (1st edn, Verlag Ernst und Werner Gieseking 1984) 39

²⁸See also *Golder v UK* para 38; *Certain Aspects of the Laws on the Use of Languages in Education in Belgium v Belgium* App no 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, (ECtHR, 23 July 1968) para 5

²⁹Grabenwarter and Pabel (n 26) 53; Stefan Harrendorf, Stefan König and Lea Voigt, ‘Art. 6’ in Jens Meyer-Ladewig, Martin Nettesheim and Stefan von Raumer (eds), *Europäische Menschenrechtskonvention Handkommentar*, (5th edn, Nomos 2023) 33

³⁰*Ashingdane v UK* App no 8225/78 (ECtHR, 28 May 1985) para 57. See also David Harris and others, *Avrupa İnsan Hakları Sözleşmesi Hukuku Dördüncü Basım* (Mehveş Bingöllü Kılıcı and Ulaş Karan trs, 2nd edn, On İki Levha Yayınları 2022) 380; Grabenwarter and Pabel (n 26) 53; Gölcüklü (n 23) 209; Gözübüyük, Gölcüklü and Saygılı (n 26) 273-274; Harrendorf, König and Voigt (n 29) 34; Sezin Aktepe Artık, *Avrupa İnsan Hakları Sözleşmesi ve Avrupa İnsan Hakları Mahkemesi Kararları Işığında Medeni Usul Hukukunda Adil Yargılanma Hakkı* (1st edn, Seçkin Yayıncılık 2014) 124-125; Sibel Inceoğlu, *İnsan Hakları Avrupa Mahkemesi Kararlarında Adil Yargılanma Hakkı Kamu ve Özel Hukuk Alanlarında Ortak Yargısal Hak ve*



freedoms are set out in Article 13 as follows: “Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality.” In individual applications regarding the right to access to the court, the Constitutional Court examines, particularly based on the criteria of legality, legitimate aim, and proportionality. Therefore, within the framework of the judgments of the ECtHR and the Turkish Constitutional Court, the rules stipulating a mandatory administrative remedy must be in line with those criteria. It must be regulated by law, be based on a legitimate purpose, and be proportionate (*a fortiori*, not impairing the essence of the right). Otherwise, there is a very likely risk of a violation of the right to access to the court.

In general, accessing remedies other than state courts can be based on the right to an effective remedy rather than the right to access to a court³¹. In the rules regulating the right to an effective remedy, an authority, not a judicial body, is the application authority. Therefore, as a rule, the application authority does not have to be a judicial body³². However, the judicial application is within the intersection area of both rights³³. In addition, the right to access to court (Art. 6 ECHR, Art. 36 TCC) is a special provision (*lex specialis*) compared to the right to effective remedy (Art. 13 ECHR, Art. 40 TCC). For these reasons, it is possible to say that an administrative application obligation under civil procedure law is primarily linked to the right to access to court.

A. The Problem of Whether the Authority to be Applied Has the Nature of a Court

As stated in the introduction, the primary means for dispute resolution is to apply to the state courts; thus, mandatory administrative remedies limit the right to access to court. The limitation of the right to access to court through mandatory administrative remedies does not lead to a violation, provided that certain conditions are fulfilled. First, if an administrative body fulfils certain safeguards, it is considered within the scope of the concept of “tribunal” in the ECtHR jurisprudence in terms of the right to access to court. However, if the authority to be applied is not a tribunal and is not considered a tribunal following the ECtHR’s doctrine of autonomous interpretation, the remedy against the decision of that authority must be appealable in a court.

In the original text of the ECHR, the term used is “tribunal,” not “court.”³⁴ Although the Turkish text uses the term “court” and the German text uses the term “Gericht,” the concept of “tribunal” is expressed in the article in English. It is a broader concept than “court,” so it is seen as more appropriate to express it as a “place of jurisdiction” in Turkish³⁵. Nevertheless, since the right is conceptualised as the “right to a court”

İlkeler (4th edn, Beta Yayınları 2013) 118; İrem Banu Başer Öcal, *Türk İş Hukukunda Adil Yargılanma Hakkının Bir Unsuru Olarak Mahkemeye Erişim Hakkı*, (1st edn, Adalet Yayınevi 2024) 67-68

³¹On the practice of the Constitutional Court in this respect, see Ömer E Egeleş, *İnsan Hakları Avrupa Sözleşmesi ve Anayasa Çerçevesinde Etkili Başvuru Hakkı* (1st edn, On İki Levha Yayınları 2021) 61-64. The right to effective remedies for alleged violations of one’s rights is considered an essential part of access to justice in a broad sense. See European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Law Relating to Access to Justice* (2016) 92, <<http://fra.europa.eu/en/publication/2016/handbook-european-law-relating-access-justice>> accessed 24 October 2024

³²Sibel İnceoğlu, *İnsan Hakları Avrupa Sözleşmesi ve Anayasa, Anayasa Mahkemesine Bireysel Başvuru Kapsamında Bir İnceleme* (1st edn, Avrupa Konseyi Yayınları 2013) 445-446

³³Öztürk (n 6) 141

³⁴The official languages of the Council of Europe are English and French. For versions of the ECHR in different languages, see <<https://www.echr.coe.int/Pages/home.aspx?p=basictexts/convention>> accessed 1 December 2024.

³⁵In the Turkish translation of the Guidelines on Article 6 of the European Convention on Human Rights published by the Ministry of Justice, the term “tribunal” is used as the term “place of jurisdiction (*yargı yeri*)” See <https://www.echr.coe.int/Documents/Guide_Art_6_TUR.pdf> accessed 1 December 2024. For detailed information on the difference between the terms, see Kemal Başlar, *The Concept of Court in Constitutional Jurisdiction* (1st edn, Roma Yayınevi 2005) 7-13; see also Bilgehan Yeşilova, ‘6502 sayılı (Yeni) Tüketicinin Korunması Hakkında Kanun’a Göre Tüketici Uyuşmazlıklarının Çözümü Usulü ve Yargılama Kuralları’ (2014) 9 THD 107, 109; Sema Taşpınar Ayvaz, ‘Tüketici Hakem Heyetlerinin Hukuki Niteliği’



or “right to access to court,” the term “court” is used throughout the study except in this chapter, in which the emphasis of that nature is in question.

The right to demand that civil claims be heard before a court is expressly guaranteed in Article 6 of the ECHR. This right is not only a part of the right to a fair trial but also one of its constituent elements³⁶. Similarly, Article 9 of the Turkish Constitution explicitly states that “the judicial power shall be exercised by independent and impartial courts on behalf of the Turkish nation.”

The ECtHR examines whether an authority is a tribunal primarily as a condition of admissibility regarding the claim of violation of the right to a fair trial. The Court interprets the concept of a tribunal in the ECHR as an autonomous concept and may functionally include some bodies that are not characterised as courts in domestic law within the framework of the ECHR system³⁷. As expressed by the ECtHR, “For the purposes of Article 6 1, a tribunal need not be a court of law integrated within the standard judicial machinery³⁸.” For example, in the renowned *Sramek v. Austria* judgement of 1984, the Court held that for the purposes of Article 6, a body that does not qualify as a court under domestic law is included within the substantive meaning of the term “court” in the article. It recognised the body that was the subject of the application, the Regional Real Estate Transactions Authority (*Landesgrundverkehrsbehörde*), as a tribunal³⁹.

When examining whether a body qualifies as a court, the ECtHR primarily uses the criterion of the judicial function and defines it as “determining matters within its competence based on rules of law and after proceedings conducted in a prescribed manner⁴⁰.” For this purpose, the court must be constituted in accordance with the law; otherwise, neither a court nor a judicial decision can actually exist⁴¹. In addition, the body in question must fulfil the conditions of independence, impartiality, the duration of its members’ terms of office and procedural guarantees⁴². In fact, the ECtHR recognises that the lack of independence or impartiality of a tribunal alone violates the right to a fair trial⁴³. Moreover, according to the ECtHR, a body that is not independent and impartial cannot even be characterised as a tribunal for the purposes of Article 6⁴⁴. To summarise, the ECtHR accepts that a body that also performs administrative functions may be considered a tribunal when it performs judicial functions and examines the judicial function and the guarantees of independence and impartiality in each case separately⁴⁵.

In determining whether a body qualifies as a tribunal, the authority to make binding decisions plays a decisive role. Bodies that only issue advisory decisions rather than binding ones have not been recognised as tribunals⁴⁶. Likewise, if another body decides whether to implement the decisions of a body characterised

in M. Ertan Yardım (ed), *Tüketici Hukukunda Uyuşmazlık Çözümüne İlişkin Güncel Sorunlar ve Çözüm Önerileri Sempozyumu* (Seçkin Yayıncılık 2018) 45-46

³⁶Gözübüyük, Gölcüklü and Saygılı (n 26) 275; Turan (n 1) 153

³⁷Guide on Article 6 of the European Convention on Human Rights, Right to a Fair Trial Civil Limb (updated to 31 August 2022) 34-39 <https://www.echr.coe.int/documents/guide_art_6_eng.pdf> accessed 7 September 2022; Gökhan Çayan, ‘Avrupa İnsan Hakları Mahkemesi ve Anayasa Mahkemesi Kararları Işığında Mahkemeye Erişim Hakkı’ (2016) 28 TAAD 235, 245; İnceoğlu (n 30) 158-159

³⁸*Xhoxhaj v Albania* App no 15227/19 (ECtHR, 9 February 2021) para 284

³⁹*Sramek v Austria* App no 8790/79 (ECtHR, 22 October 1984) para 36

⁴⁰*Cyprus v Turkey* App no 25781/94 (ECtHR, 10 May 2001) para 233; *Sramek v Austria* para 36. See also Gözübüyük, Gölcüklü and Saygılı (n 26) 275; Tanrıver (n 12) 45

⁴¹Demircioğlu (n 11) 65-66; Ramazan Arslan, *Medeni Usul Hukukunda Yargılamanın Yenilenmesi* (1st edn, Turhan Kitabevi 1977) 61, 132

⁴²*Cyprus v Turkey* para 233; *Guðmundur Andri Ástráðsson v Iceland* App no 26374/18 (ECtHR, 1 December 2020) para 219; see also Öztürk (n 6) 185-187

⁴³*Findlay v UK* App no 22107/93 (25 February 1997) para 80

⁴⁴*Guðmundur Andri Ástráðsson v Iceland* para 232

⁴⁵İnceoğlu (n 27) 159

⁴⁶*Bentham v the Netherlands* App no 8848/80 (ECtHR, 23 October 1985) para 40; Gözübüyük, Gölcüklü and Saygılı (n 23) 275



as a tribunal in domestic law, the body in question may not be considered a tribunal under the ECHR⁴⁷. This is because, as emphasised by the ECtHR, it is inherent in the very concept of a tribunal that a judicial authority determines unalterable and binding rulings⁴⁸. In fact, the last paragraph of Article 138 of the Turkish Constitution affirms the case law of the ECtHR and explicitly states that “*the legislative and executive organs and the administration are obliged to obey the decisions of the courts; these organs and the administration cannot change the decisions of the courts in any way and cannot delay their execution.*” In addition, the authority to decide in this way must have the “*jurisdiction to examine all questions of fact and law relevant to the dispute before it*”⁴⁹.

B. Filing a Judicial Appeal after the Application to the Administration

In the second possibility where the mandatory application is related to the right to access to court, there is no discussion about the nature of the administrative body. When the authority is not a court and is not considered a court in terms of the ECtHR jurisprudence, there is no possibility of applying directly to the court. Therefore, in this case, the obligation to apply to the administration limits the right to access to court. In other words, it constitutes a limit to the right since it prevents right seekers from the chance to direct access to the courts⁵⁰. In that case, this limitation of the right to access to court must, undoubtedly, be made following the regime of limitation of fundamental rights. To put it more clearly, a mandatory administrative remedy for resolving a civil dispute does not violate the right to access to court only if this regulation is made by law, is based on a legitimate purpose, and is proportionate.

The ECtHR also applies the *Ashingdane* test when examining whether an application to a body not recognised as a tribunal under domestic law violates the right to access to court. According to the Court, for the right to access to court to be considered violated in this case, it must be either impossible or unduly restricted to appeal the decision of such body to a court established in accordance with Article 6 of the ECHR⁵¹.

A judgement of the ECtHR against Türkiye in 2021⁵² can be examined as an example of the lack of the possibility to appeal to a court against the decision of an administrative body, which leads to a violation of Article 6. Pursuant to the tenth paragraph of Article 159 of the Turkish Constitution, there is no recourse to the court against the decisions of the Council of Judges and Prosecutors, except for the decisions regarding dismissal from the profession. For example, the only remedy available to a judge against whom a disciplinary penalty has been imposed is the appeal mechanism within the Council, and there is no access to the court against the decisions upon the appeal. The ECtHR ruled that there was a violation of Article 6 because the applicant judge’s case *was not heard by a court* established by law. The main ground is that the body imposing the disciplinary penalty (and upholding it in the appeal procedure within the Council) was not a court and could not be considered a court in the broad sense of Article 6. This is because it did not provide any procedural guarantee, nor a remedy to a court against the applicant’s disciplinary penalty⁵³.

⁴⁷Durmuş Tezcan and others, *İnsan Hakları El Kitabı* (9th edn, Seçkin Yayıncılık 2021) 336; Inceoğlu (n 30) 161

⁴⁸*Van de Hurk v the Netherlands* App no 16034/90 (ECtHR, 19 April 1994) para 45; *Findlay v UK* para 77; for further judgments and information, see Inceoğlu (n 30) 162

⁴⁹*Ramos Nunes de Carvalho e Sá v Portugal* App no 55391/13, 57728/13, 74041/13 (ECtHR, 6 November 2018) para 176-177; *Belilos v Switzerland* App no 10328/83 (ECtHR, 28 April 1998) para 70

⁵⁰Bahtiyar Akyılmaz, Murat Sezginer and Cemil Kaya, *Türk İdari Yargılama Hukuku* (10th edn, Seçkin Yayıncılık 2024) 267; Öztürk (n 6) 92-93

⁵¹Schwab and Gottwald (n 27) 34; Inceoğlu (n 30) 160; *Bryan v UK* App no 19178/91 (ECtHR, 22 November 1995) para 56-59

⁵²*Eminağaoğlu v Türkiye* App no 76521/12 (ECtHR, 9 March 2021) para 95-105

⁵³*Eminağaoğlu v Türkiye* para 103-105



The Turkish Constitutional Court has also examined on various occasions, both in its constitutional control and individual applications, whether certain authorities are courts or not. The Turkish Constitutional Court has rendered different judgments concerning different bodies over the years. It makes its assessments in its current judgments in line with the case law of the ECtHR, emphasising the criterion of the exercise of the judicial function⁵⁴.

IV. Examples on Mandatory Administrative Remedies Before Filing a Lawsuit in a Civil Court in Turkish Law

As mentioned above, there are several procedures where the appellate court is a civil court against the mandatory administrative decision. After analysing the conditions under the ECHR system for the limitation of the right to access to a court through mandatory administrative remedies, concrete examples should be given from Turkish civil procedure law. It should be noted that the aim here is not to analyse all procedures within this scope. Rather, the aim is to outline a framework on the subject by selecting common examples in practice and have led to specific problems.

In this respect, first, the application to the Social Security Institution (SSI) as a common mandatory administrative remedy, then the application to the land registry offices, and the remedies to the State of Emergency Commission and the administrations within the framework of the State of Emergency are analysed. In the compulsory application to the SSI, some issues need to be addressed in terms of the right to access to court in civil procedure law. In other remedies, practices already subject to the Turkish Constitutional Court's judgments on violating the right to access to civil court have been observed.

According to Article 68 of Code No. 6502 on the Protection of Consumers in Turkish civil procedure law, applying to district or provincial consumer arbitral tribunals for consumer disputes below a certain amount or value is mandatory. Article 70 of the Code stipulates that the decisions of the consumer arbitral tribunal may be appealed before the consumer court. In that case, for consumer disputes below a certain amount, the direct application to the court is not possible, and the court can only be applied by appealing against the decision of the consumer arbitral tribunal⁵⁵.

To facilitate consumers' access to justice, the EU law encourages various remedies other than the state judiciary⁵⁶. However, the legal nature of the mandatory procedure in Turkish law has been debated in the civil procedure law literature for a long time⁵⁷. It is not relevant to the subject of this study to include all the arguments; however, since it will determine the scope of the study, I should state my opinion on this issue. In my opinion, although it does not resemble classical arbitration and lacks certain guarantees, the application to consumer arbitral tribunals should be considered mandatory arbitration, since access to the state courts is closed and the tribunal conducts judgement-like activities by applying substantive law.

In line with the adopted opinion, I do not consider the application to the consumer arbitral tribunal as a mandatory administrative remedy. Therefore, this procedure is not discussed in this section, where chosen

⁵⁴For further information on this subject, see Çağrı Mardin, 'Medeni Usul Hukukunda Adalete Erişim' PhD thesis, Marmara University 2024, 43-48

⁵⁵With the amendment made to Article 68 with Article 11 of Code No. 7063 dated 06.12.2017 (OG 20.12.2017 I 30276), the filing of an enforcement proceeding is preserved

⁵⁶See, for example, Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/ EC, <<http://data.europa.eu/eli/dir/2013/11/oj>> accessed 24 November 2024

⁵⁷On the relation between the legal nature of consumer arbitral tribunals and access to justice, see Mardin (n 54) 110-113. See also Orhan Emre Konuralp, 'Hakemlerin Hukuki Sorumluluğu' PhD thesis, Ihsan Doğramacı Bilkent University 2024, 42-45



concrete examples are examined because the subject of the study is limited to the relation between the right to access to court and mandatory administrative remedies.

A. Application to the Social Security Institution

In the Turkish civil judicial organisation, social security law is the typical area where an application to an administrative body is required⁵⁸. Under the first paragraph of Article 4 of the Labour Courts Code No. 7036, in disputes arising from the social security legislation, application to the Social Security Institution is mandatory, except for the requests to determine compulsory insurance periods. Under Article 403 of Presidential Decree No. 4,⁵⁹ the SSI, as a related institution of the Ministry of Labour and Social Security, has a public legal personality. It is administratively and financially autonomous and is subject to the provisions of Code No. 5502 dated 16.05.2006 on Certain Regulations Regarding the Social Security Institution⁶⁰. The provisions of private law in cases without provision in the Decree. Therefore, there is no doubt that the procedure obliging application to the SSI is a mandatory administrative remedy in the context of the study.

The first paragraph of Article 4 of Code No. 7036 provides as follows: *“In disputes arising from the Social Security and General Health Insurance Code dated 31/5/2006 and numbered 5510 and other social security legislation, it is mandatory to apply to the Social Security Institution before filing a lawsuit, except for the requests for determination of compulsory insurance periods due to their work subject to a service contract. Without prejudice to the periods stipulated in other codes, the request shall be deemed rejected if the Institution does not respond to the application within sixty days. To file a lawsuit against the Institution, the request must be rejected or deemed rejected. The time to be spent in the application to the Institution shall not be considered in the calculation of the statute of limitations and forfeiture periods.”* The second paragraph of the article stipulates that *“the lawsuits to be filed against the employer for the determination of the compulsory insurance periods shall be notified to the SSI ex officio, the SSI shall participate in the lawsuit as a third-party intervening and may apply for legal remedy even if the party it participates in the lawsuit does not apply and is obliged to implement the decision to be rendered as a result of the proceedings⁶¹.”* It should be noted that the provisions mentioned above are the confirmation of the third and fourth paragraphs added to Article 7 of the repealed Labour Courts Code No. 5521⁶² by Article 64 of the Code No. 6552⁶³ dated 10.09.2014⁶⁴. To file a lawsuit, the application must be rejected by the SSI or deemed rejected for not responding within sixty days.

According to Article 5 of Code No. 7036, in principle, the labour court has material jurisdiction in cases arising from social security legislation. The article also provides exceptions to the material jurisdiction of the labour court: The labour courts shall not hear the disputes within the scope of appeals to administrative fines and the disputes stated in the provisional article 4 of the Code No. 5510 on Social Security and General

⁵⁸OG 25.10.2017 I 30221

⁵⁹For presidential decree No. 4 on the Organisation of Institutions and Organisations Affiliated, Related and Associated to Ministries and Other Institutions and Organisations, see OG 15.07.2018 I 30479

⁶⁰OG 20.05.2006 I 26173

⁶¹For detailed explanations on the social security law claims that may and may not be associated with the service determination case, see Ayşe Köme Akpulat, *İş Mahkemelerinde Yargılamanın Özellikleri* (1st edn, On İki Levha Yayınları 2018) 301-304

⁶²OG 04.02.1950 I 7424

⁶³OG 11.09.2014 Dup I 29116

⁶⁴The provision in the fourth paragraph of Article 7 of the repealed Code No. 5521 reads as follows: *“Upon notification, the Institution, which participates in the lawsuit as an accessory intervener alongside the defendant, may apply for legal remedy even if the party it participates in the lawsuit does not apply.”* This was brought before the Turkish Constitutional Court with the claim that it is unconstitutional. The Court examined the claim in the context of Articles 2 and 142 of the Constitution and decided that the provision was constitutional. See TCC 177/49, 14.05.2015 (OG 11.06.2015 I 29383)



Health Insurance⁶⁵. Similarly, Article 101 of the Social Security and General Health Insurance Code states that the labour courts have jurisdiction in social security disputes unless indicated otherwise. When the aforementioned legal provisions are considered together, the conclusion reached is that applying to the SSI in a social security dispute before the labour court is a procedural requirement that must be fulfilled before filing a lawsuit⁶⁶.

The Labour Courts Code contains various regulations regarding the procedural rules to be applied in labour courts. Under Article 9, in cases where there is no specific provision in the Code, the provisions of the Code of Civil Procedure No. 6100 (CCP) shall apply. In that case, in social security disputes falling within the jurisdiction of the labour courts, the obligation to apply to the SSI and related procedural issues is naturally determined according to the rules of civil procedure law. Therefore, the mandatory application procedure to the SSI, which prevents filing a lawsuit before the labour courts, is in direct relationship with the right to access to court in the context of civil procedure law.

This mandatory application to the SSI constitutes a special procedural requirement in terms of civil procedure law⁶⁷. The mere filing of the application is not sufficient for the fulfilment of the condition, but the claim must also be rejected or deemed rejected⁶⁸. There are several issues to be discussed from a procedural perspective here. First, in case a lawsuit is filed lacking the application to the SSI, it should be dwelled on how the court must decide. According to Yargıtay, the Turkish Court of Cassation, in case the application to the SSI is not evident, a period should be granted to the plaintiff in accordance with the second paragraph of Article 115 of the CCP. Therefore, the case should be heard on the merits *“if the procedural requirement regarding the application to the Institution and the Institution’s transaction or action regarding the rejection of the application are fulfilled”* within this period⁶⁹. According to an arguing opinion in the literature, such practice is not correct, and in this case, since it is not clear whether the SSI will issue a rejection or not, and therefore, whether a dispute will arise or not, the period should not be granted, and the case should be dismissed on procedural grounds⁷⁰.

⁶⁵OG 16.06.2006 I 26200

⁶⁶Regarding the disputes within this scope, it can be accepted that the labour courts have a judicial supervision power over the SSI. On this issue, see Ali Güzel, Ali Rıza Okur and Nurşen Caniklioğlu, *Sosyal Güvenlik Hukuku* (20th edn, Beta Yayınları 2024) 246

⁶⁷Tanrıver (n 10) 205. In the legal doctrine, although it is understood from Article 4 that the obligation to apply to the SSI is a condition of litigation, it is stated that the wording of the article is susceptible to different interpretations and that the use of the expression *“it is ... a condition for filing a lawsuit”* in Article 4 regarding the application to the SSI, although mediation is explicitly regulated as a condition of litigation in Article 3, is not in accordance with the law-making method. According to the authors, although applying the SSI makes sense theoretically, it is not an effective remedy in practice. See Muhammet Özekes and Murat Atalı, ‘7036 Sayılı Yeni İş Mahkemeleri Kanunu Üzerine Eleştiri, Değerlendirme ve Öneriler’ in Ömer Ekmekçi and others (eds), *Yeni İş Mahkemeleri Kanunu Üzerine Toplantısı*, (1st edn, On İki Levha Yayınları 2018) 70-71; Başer Öcal (n 30) 84

⁶⁸*“On the other hand, it should be noted that the fulfilment of the condition of ‘written request / written request’, which is stipulated in the social security laws as mandatory for obtaining some social insurance rights, does not result in the conclusion that the above-mentioned condition of ‘application to the Institution before filing a lawsuit’ is also completed. Although the condition of ‘written request/written request’ is stipulated for obtaining social insurance rights, the condition of ‘application to the Institution before filing a lawsuit’ is a legal regulation introduced to resolve the dispute between the plaintiff and the Social Security Institution Presidency administratively, in other words, to reduce the workload of the labour courts...”* Gaziantep BAM 10 HD, 728/704, 03.05.2019

⁶⁹It is observed that the 10th Civil Chamber of the Court of Cassation uses the same reasoning in its decisions on this issue: *“...the applicant should be given a statutory period of time to apply to the Social Security Institution about the request subject to the lawsuit and to document that the Institution has a transaction or action indicating the will of rejection in accordance with the aforementioned legal regulation, and if the lack of the condition of the lawsuit is not completed within this period, the lawsuit should be rejected procedurally due to the absence of the condition of the lawsuit, and if the condition of the lawsuit regarding the application to the Institution and the transaction or action of the Institution regarding the rejection of the application is completed, the lawsuit should be decided according to the result to be reached by entering the merits of the case.”* Yargıtay 10 HD, 3542/6660, 12.06.2024; Yargıtay 10 HD, 6114/6325, 05.06.2024; Yargıtay 10 HD, 10073/11001, 21.09.2022; Yargıtay 10 HD, 5777/10012, 29.06.2022; Yargıtay 10 HD, 2534/11933, 11.10.2021; Yargıtay 10 HD, 2819/5578, 27.06.2019; Yargıtay 10 HD, 1204/3364, 17.04.2017. In the regional court of appeal practice, decisions in the same direction are made with very similar reasoning. See Sakarya BAM 10 HD, 1268/151, 12.02.2020; Bursa BAM 11 HD, 479/161, 16.01.2020; Kayseri BAM 7 HD, 01.07.2020, 401/586; Gaziantep BAM 10 HD, 728/704, 03.05.2019; İstanbul BAM 34 HD, 2726/661; 21.03.2019; Ankara BAM 11 HD, 1672/234, 12.02.2019. See also Başer Öcal (n 30) 89

⁷⁰Köme Akpulat (n 61) 305-306



The period to be granted to fulfil the lacking procedural requirement stipulated in the second paragraph of Article 115 of the CCP is regulated as two weeks. In cases where the SSI rejects or is deemed to have rejected the application, the maximum period will be sixty days. From this point of view, a situation arises, such as waiting for a more extended period than stipulated in the CCP to fulfil the lacking procedural requirement. On the other hand, it can be evaluated whether granting a period for the application to the SSI constitutes a ground for suspension of the hearing within Article 165 of the CCP. Under this article, the judge may suspend the hearing if the judgement in the case depends on the determination of another administrative authority. This is because the article explicitly lists the application to the administrative authority among the cases that may result in the suspension of the hearing⁷¹. However, the granting of a period for the application in case of filing a lawsuit without applying to the SSI is different from the period of the suspension of the hearing. This argument will be better understood when the second paragraph of the Article is examined closely: The second paragraph of the Article reads as follows: *“If the examination and finalisation of a case depends on the resolution of another case or administrative authority, the court shall grant the party concerned an appropriate period to apply to the competent court or administrative authority. If no application is made to the competent court or administrative authority within this period, the party concerned shall be deemed to have waived its claim in this respect, and the main case shall be decided.”* As seen, in the case of a suspension of the hearing, there is a dependency on the determination of another authority for the court to make a judgement. If the relevant application is not made, the court shall give its ruling according to the existing merits. However, it is not possible to examine and decide on the merits in the absence of a procedural requirement⁷². In the case of the mandatory application to the SSI, the court’s hearing of the case does not depend on the SSI’s determination of the dispute but on the *rejection* of the request. In other words, the lawsuit can only be filed if the request is made to the SSI and rejected or deemed rejected. For these reasons, I believe granting a period for applying to a case a lawsuit is filed without applying to the SSI is not related to the second paragraph of Article 165 of the CCP. In other words, making an application to the SSI and waiting for its result cannot be subject to the suspension of the hearing.

It is evident that the right to access to court in social security disputes is limited by the obligation to apply to the SSI. Therefore, whether the limitation in question complies with the regime of limitation of fundamental rights must be examined. First, since the obligation to apply to the SSI before filing a lawsuit is regulated in Article 4 of the Labour Courts Code, it fulfils the criterion that the limitation must be made by law.

As stated above, the obligation to apply to the SSI was first introduced to the Turkish labour and social security procedural law with the third paragraph added to Article 7 of the revoked Labour Courts Code No. 5521 by Article 64 of Code No. 6552 dated 10.09.2014. In the justification of the amendment, it is stated that it serves the purpose of *“resolving disputes at the administrative stage before resorting to judicial remedies”*⁷³. In this framework, it is obvious that the mandatory application procedure to the SSI serves the purpose of *“better administration of justice”* as stated in the case law of the ECtHR and *“concluding trials as quickly as possible and at minimum cost”* as stated in Article 141 of the Turkish Constitution⁷⁴. This shows that the limitation in question also fulfils the legitimate aim test.

⁷¹İbrahim Aşık, *Medeni Usul Hukukunda Bekletici Sorun* (1st edn, Seçkin Yayınları 2012) 126-127

⁷²*ibid* 85

⁷³Justification of Article 64 of Code No. 6552 dated 10.09.2014 <<https://cdn.tbmm.gov.tr/KKBSPublicFile/D24/Y4/T1/DosyaKomisyonRaporunuVerdi/8f629638-7834-4c54-9344-dbc5dd6e142e.pdf>> accessed 20 November 2024

⁷⁴Although this provision in the last paragraph of Article 141 of the Turkish Constitution essentially corresponds to the principle of procedural economy, the Turkish Constitutional Court also considers objectives such as reducing the judiciary’s workload and facilitating access to justice as a constitutional reason for limiting fundamental rights. For detailed evaluations on this issue, see Öztürk (n 6) 121-123



In my opinion, it cannot be said that the obligation to apply to the SSI constitutes an unreasonable interference with the right to access to the court. Whether the above-mentioned remedy is effective in practice is another dimension of the issue and goes beyond the scope of this study. Article 4 of the Labour Courts Code stipulates that in addition to the obligation to apply to the SSI, the Institution is obliged to respond within sixty days, and if it does not respond, the request will be deemed rejected. To file a lawsuit, it is also sufficient to be deemed rejected. Most importantly, it is accepted that the period from the application to the SSI until the finalisation of the application will not be considered in the calculation of the statute of limitations and forfeiture periods. In that case, a possible delay will be a delay of a maximum of sixty days, during which the statute of limitations and forfeiture periods will not run. For these reasons, I consider that this limit to the right to access to court complies with the principle of proportionality. In addition, in case a lawsuit is filed without applying to the SSI, I believe it is possible to grant a statutory period of time for the application. This is because the purpose of Article 115 of the CCP is to conduct the proceedings in accordance with the procedural economy by fulfilling the procedural requirements possible during the proceedings. In practice, considering the courts' workload, the sixty-day period will probably be shorter than the time between two hearings. During the period until the next hearing, the plaintiff will apply to the SSI and, at the latest, will complete such a procedural requirement sixty days later. This practical result also complies with the third paragraph of Article 115 of the CCP. The paragraph stipulates that the case shall not be dismissed on procedural grounds due to the lack of a procedural requirement that has not been noticed before dealing with the subject matter of the case but has been remedied at the time of the judgement. Therefore, in my opinion, when a lawsuit is filed without applying to the SSI and this does not affect the ordinary course of the proceedings, dismissing the case on procedural grounds would not serve the procedural economy. If the plaintiff does not apply to the SSI within this period, there is no doubt that the case will be dismissed. I believe that if the SSI accepts the application, which is permitted to be made during the proceedings, since the case will lack the subject matter, it should be ruled that there is no need to decide on the merits.

However, it should also be noted that the ECtHR analyses the foreseeability of the remedies and the procedural rules to be applied in the context of the right to access to court in connection with the principle of legal certainty. According to the ECtHR, procedural steps and time limits must be foreseen in a way that ensures the proper administration of justice and the principle of legal certainty⁷⁵. Considering that the judicial practice is consistent in granting a time limit for the fulfilment of the lacking procedural requirement in case of filing a lawsuit without applying to the SSI, it can be accepted that there is legal certainty in this regard. Accordingly, the right to access to court cannot be deemed to have been violated solely based on this practice. Nevertheless, it should not be forgotten that in the rule of law, the rules of judicial procedure must be regulated in a clear and certain manner. The period for completing the application to the SSI does not fully align with the rules in the CCP regarding the fulfilment of the lacking procedural requirement. It is also unclear what kind of ruling the court should give in case the SSI accepts the application which is made within the granted period. Although the law does not have to regulate every possibility on every issue, uncertainty regarding the legal remedies themselves cannot be accepted. Therefore, in my opinion, an explicit regulation on this issue is needed. Such a regulation would more effectively secure the right to access to court and better serve the principle of legal certainty.

In addition to the obligation to apply to the SSI, the social security law also provides for an administrative appeal procedure in the context of the determination of the degree of disability. According to Article 25 of Law No. 5510, for the insured to be considered disabled, it must be determined by the Institutional

⁷⁵See, for example, *Miragall Escolano and others v Spain* App no 38366/97, 38688/97, 40777/98, 40843/98, 41015/98, 41400/98, 41446/98, 41484/98, 41487/98, 41509/98 (ECtHR, 25 January 2000)



Health Board that the insured has lost at least 60% of his/her working capacity⁷⁶. Pursuant to the fourth paragraph of Article 58 and the second paragraph of Article 95 of the Law, the report of the Institutional Health Board may be appealed before the Social Insurance High Health Board within the SSI. There is no provision in the Law stating that the application to the labour court against the decision rendered upon objection is closed. Therefore, the objection procedure in question should not be considered a compulsory administrative objection. As a matter of fact, the Court of Cassation accepted that it was possible to apply to the court with a decision on the unification of conflicting judgments in 1976⁷⁷. Therefore, it is possible for the relevant persons to first apply to the Social Insurance Supreme Health Council against the report issued by the Institution's Health Board and to the labour court against the decision issued upon objection⁷⁸. In fact, the Court of Cassation has accepted that in the event that a lawsuit is filed without an objection, the lawsuit should not be dismissed on procedural grounds; the court should continue the proceedings by obtaining a report from the Social Insurance Higher Health Council and, in case of objection, from the Forensic Medicine Institution⁷⁹. Since there is no explicit statutory regulation regarding the obligation of the objection procedure, the judicial practice is correct in terms of securing the right to access to court.

B. Application to the Land Registry Office

According to the case law of the ECtHR, in principle, mandatory administrative remedies limit but do not violate the right to access court as long as the appeal to the court is possible, as stated above. Another example of the limitation of the right to access court through mandatory administrative remedy in the context of civil procedure law is the requests made to the land registry offices regarding the correction of land registry records. In the fourth paragraph of Article 75 of the Land Registry Bylaw⁸⁰, it is obligatory to apply to the land registry directorates for updating the information in the land registry. Again, under the fourth paragraph of Article 26 of the Bylaw, a contest can be made to the Regional Directorate of the Land Registry against the decision of the land registry directorates. Further, against that decision, the applicant may apply for the General Directorate of Land Registry. Regarding the matters within the scope of the above-mentioned articles, applicants must exhaust the remedy of application to the land registry office before applying to the court. In that case, it is obvious that the mandatory administrative remedy is a limitation on the right to access to court. The issue to be examined is whether this limitation follows the constitutional framework.

Indeed, in one of its judgments, the Turkish Constitutional Court precisely made this analysis. In this case, the applicants first applied to the land registry directorate because of the incorrect spelling of their first and

⁷⁶On this issue, see Güzel, Okur and Caniklioğlu (n 66) 503-512

⁷⁷"However, if the person concerned believes that the matter decided by the last paragraph of Article 109 is not in accordance with the truth, he/she may apply to the court based on the constitutionally guaranteed right under Article 31/1 of the Constitution of the Republic of Türkiye, 'Everyone has the right to claim and defend himself/herself as a plaintiff or defendant before the judicial authorities by making use of all legitimate means and remedies'. In this case, the court may order a new expert examination since it is inconceivable that the independent judicial body will be bound by the decision of the Social Insurance Supreme Health Council mentioned in Article 109 of Law No. 506. To bind the judicial body to this decision would result in the resolution of the dispute by a board other than the judicial body, which is directly contrary to Articles 7 and 132/1 of the Constitution, which stipulate the principle of 'Judicial power is exercised by independent courts on behalf of the Turkish Nation' and 'Judges are independent in their duties; they judge according to the Constitution, the law, the law and their conscientious convictions', respectively. Courts have to interpret the laws in accordance with the Constitution and cannot adopt an interpretation contrary to the Constitution. In that case, in accordance with Article 109 of Law No. 506, the relevant persons may apply to the court against the matter decided by the Social Insurance Supreme Health Council, and it cannot be accepted that this decision is final and binding for the courts." Yargıtay İBBGK, 6/4, 28.06.1976 (OG 26.07.1976 | 15658)

⁷⁸Güzel, Okur and Caniklioğlu (n 66) 513

⁷⁹In one of its judgments, Yargıtay even reversed the decision to grant a period to apply to the Institution on the grounds of procedural economy. It ruled that the court should perform the necessary examination. See Yargıtay 21 HD, 8512/8753, 02.12.1999

⁸⁰With Article 139 of the Presidential Decree No. 700 dated 02.07.2018 and numbered 700 (OG 07.07.2018 2nd Dup I 30471), an amendment was made stating that the matters specified in the Turkish Civil Code to be regulated by statute shall be determined by a regulation issued by the President of the Republic. However, since the provisional Article 1 of the Decree stipulates that the relevant legislation will remain valid unless repealed, the Land Registry Bylaw is still in force. See Lale Sirmen, *Eşya Hukuku* (11th edn, Yetkin Yayınları 2023) 142



last names in the land registry. However, upon the directorate's rejection, they applied to the court without exhausting the remedies of contest stipulated in the Bylaw. The courts of first instance and regional courts of appeal concluded that an application to the court could only be made by exhausting such remedies. The Constitutional Court ruled that the right to access to court was violated because the restriction was made by bylaw, not by law. It did not discuss the issue in terms of the exhaustion of administrative remedies of appeal⁸¹. In my opinion, if the administrative remedy was regulated by law, it should be accepted that the contest remedies, which are the stages of that remedy, should be exhausted. Otherwise, the objection mechanism would have become ineffective and meaningless. If the legislator has accepted an administrative remedy before the application to the court, it cannot be intended that some of the stages of this remedy are applied, and some are not. To emphasise, this argument would only be valid if the administrative remedy was stipulated by law. The Constitutional Court's reasoning that failing to regulate these remedies by law violates the right to access to court is entirely justified. In that case, within the framework of the hierarchy of norms (*lex superior*), the provisions of the Land Registry Bylaw failing to comply with the Turkish Civil Code and even the Constitution cannot be applied. Therefore, arguing whether the administrative appeal procedures stipulated in the Bylaw must be exhausted is unnecessary. In other words, neither the administrative application nor the appeal remedies are applicable. The Court of Cassation issued conflicted judgments before the decision of violation of the Constitutional Court⁸². After that, it ruled that it is not acceptable to limit the right to access to the court with the provisions of the Bylaw, and therefore, the courts cannot dismiss the cases on procedural grounds due to the obligation to apply to the land registry office and the related administrative remedies not being exhausted⁸³.

In conclusion, given the principle that the right to access to court can only be limited by law, the relevant provisions of the Land Registry Bylaw are inapplicable. With its discretionary power, if the legislator is willing to maintain its intention to resolve such disputes through administrative remedies first, it should regulate these remedies by law. Also, in such a law, a procedure restricting the right to access to court to an unconstitutional extent must be avoided.

C. Applications Made During the State of Emergency

1. Application to the State of Emergency Commission

Another remedy that can be examined in relation to the right to access to court, which has also been subject to multiple violation decisions by the Turkish Constitutional Court, is the application to the State of Emergency Commission. Article 4, subparagraphs (f) and (g) of the Statutory Decree No. 667 on the Measures Taken under the State of Emergency stipulated that those public officials ("*including employees*") with links to terrorist organisations would be dismissed from public service⁸⁴. In addition, Article 1 of the Statutory Decree No. 685 established the State of Emergency Procedures Review Commission "*to examine and decide on applications against the procedures directly established by the provisions of the Statutory Decree without*

⁸¹Ahmet Önder and Others App no 2018/23929 (TCC, 10 February 2021) para 49-53

⁸²The lack of uniformity in the practice of the Court of Cassation is also understood from the judgments referred to in the Constitutional Court judgement. See Yargıtay 1 HD, 8720/10190; 09.11.2016; Yargıtay HGK, 3648/1073, 23.11.2016; Yargıtay 1 HD, 1754/2022, 18.04.2017

⁸³"Therefore, limitations preventing the person from applying to the court can only be regulated by law." In the hierarchy of norms, a regulation restricting the right to access to the court cannot be regulated by the bylaw, which comes after the laws. Paragraph 2 of Article 114 of the HMK clearly states that the provisions regarding the conditions of litigation in other laws are reserved. For this reason, it is impossible to decide to dismiss the case on procedural grounds because the obligation to apply to the land registry directorate in Article 75/4 of the Land Registry Regulation and the related administrative objection process has not been completed." Yargıtay HGK, 1224/209, 04.03.2021; Yargıtay HGK, 1230/210, 04.03.2021; Yargıtay HGK, 3165/211, 04.03.2021

⁸⁴OG 23.07.2016 I 29779. The same provision is included in subparagraphs (f) and (g) of Article 4 of Law No. 6749 dated 18.10.2016 (OG 29.10.2016 I 29872), which enacted the provisions of the Decree-Law No. 667



any other administrative action⁸⁵.” In some of the reemployment lawsuits labour courts decided “not to decide on the merits” since the jurisdiction of such cases belonged to the State of Emergency Commission. They send the case files to the Commission under the aforementioned provision of the Statutory Decree No. 667⁸⁶.

The Constitutional Court, on the other hand, ruled that dismissing cases that do not fall into the scope of the State of Emergency Commission’s jurisdiction violated the right to access to court in terms of the principle of legality⁸⁷.

As can be seen, a mandatory administrative remedy is envisaged for the applications arising from the procedures directly established by the statutory decrees. Article 11 of Code No. 7075 (and former Statutory Decree No. 685) stipulates that a lawsuit can be filed against the decisions of the State of Emergency Commission before the administrative court or the Council of State (Danıştay). In fact, these procedures are the subject of administrative jurisdiction as they are related to public officials and not to persons working in institutions related to labour contracts. However, the erroneous interpretation of the courts has led to the violation of the right to access court in terms of civil procedure law. Examining provisions on access to justice in administrative procedure law is beyond the scope of this study, which is limited to civil procedure law.

2. Application to the Administration

Another relevant example is the civil claims of the institutions dissolved and transferred to the General Directorate of Foundations or the Treasury during the state of emergency⁸⁸. Article 5 of the Statutory Decree No. 670, which was enacted as the Code No. 7091⁸⁹ dated 08.02.2018, adopts the principles for the transactions regarding such transfers. The fourth paragraph of the article briefly stipulates that those who claim rights regarding debts and obligations may apply to the relevant administration within sixty days⁹⁰. Article 16 of the Statutory Decree No. 675, which was enacted as Code No. 7082 dated 06.02.2018,⁹¹ stipulates that if a lawsuit or an enforcement proceeding is filed against the administration upon the dissolution of such institutions, they shall be dismissed due to the lack of a procedural requirement.

In a case a debtor filed a negative declaratory action against the Treasury and requested the determination of non-debtor status. The courts of the first instance dismissed the lawsuit due to the lack of a procedural requirement, as the mandatory administrative remedy was not filed within sixty days under the

⁸⁵OG 23.01.2017 I 29957. The same provision is included in Article 1 of Law No. 7075 dated 01.12.2018 (OG 08.03.2018 Dup I 30354), which enacted the Decree Law No. 685 provisions

⁸⁶The third paragraph of the provisional Article 1 of Decree-Law No. 685 has been amended and incorporated into Law No. 7075. The third paragraph of the provisional Article 1 of Law No. 7075 includes the following provision: “For those who have previously applied to any judicial authority or filed a lawsuit on matters falling within the jurisdiction of the Commission, the procedures and deadlines in Article 7 shall apply. In these files, the judicial authorities shall decide definitively on the file that there is no need for a decision to be made and that the costs incurred by the parties shall be left to them, and no attorney’s fee shall be awarded. These files shall be sent to the Commission for examination without requiring a new application.”

⁸⁷“Article 1 of the Decree-Law No. 685 stipulates that the jurisdiction of the SoE Commission is limited to the applications regarding the transactions directly established by the provisions of the decree law without any other administrative action, and the practices of the Court of Cassation clearly state that the termination procedures established by legal action based on the decree-law are subject to judicial review. Accordingly, the fact that the court of first instance, which was assigned the task of resolving disputes arising from labour law between the employee and the employer by Law No. 5521, ended the proceedings without examining the merits of a dispute before it by pointing to the State of Emergency Commission is an obvious error of interpretation and it cannot be said that the decision given as a result of the proceedings carries the element of legality.” Ahmet Özdoğan App no 2017/26326 (TCC, 9 January 2019) para 45-46. In the same direction, see Hamiyet Sürücü App no 2017/32292 (TCC, 14 October 2020); Mehmet Gazi Aydın and others App no 2018/10941 (TCC, 7 October 2021). In one case, the State of Emergency Commission returned the file to the court, stating that there was no action to be taken by them since no action had been taken within the scope of the Decree Law, and the Constitutional Court ruled on the violation of the right to access to the court since the court did not take any action. See Şakir Tekelli App no 2018/5437 (TCC, 7 October 2021)

⁸⁸OG 17.08.2016 I 29804

⁸⁹OG 08.03.2018 Dup I 30354

⁹⁰OG 29.10.2016 I 29872

⁹¹OG 08.03.2018 Dup I 30354



above-mentioned statutory decrees. Upon the individual application, the Turkish Constitutional Court finds a violation of the right to a court. According to the Court, such a procedural requirement only applies to cases in which a claim of a right is made. Undoubtedly, the plaintiff does not claim of a right in negative declaratory cases that are not actions of debt. Therefore, applying that procedural requirement to a negative declaratory case means an unlawful expansion of the norm limiting the right to access to court⁹².

In my opinion, the Constitutional Court has demonstrated a correct approach in terms of the proper use and interpretation of the concepts related to the civil procedure law⁹³ and has acted in accordance with the need to prefer the least restrictive result⁹⁴ in the interpretation of the provisions of the law. The reasoning of the judgement is enlightening for such cases related to the right to access to court in civil procedure law.

V. Examples on Mandatory Administrative Remedies Before Enforcement Proceedings in Turkish Law

As mentioned throughout the study, the state courts are the primary addressee of the request for legal protection. Still, the State may decide to resolve certain disputes out of court to enhance the efficiency of the justice system. In Turkish law, apart from these procedures, money or collateral receivables may be pursued through enforcement offices without a prior judgement or enforceable document. In this framework, the enforcement without judgement is a *sui generis* remedy, a mechanism of access to justice, which may be used for monetary receivables⁹⁵. On the other hand, the enforcement proceeding with judgement can be directly considered part of the right to access to court. This is because if a judgement cannot be enforced, access to the court cannot be effectively secured⁹⁶. This principle is well established in the case law of both the ECtHR and the Turkish Constitutional Court, which recognise the right to enforcement as an integral component of the right to access to court⁹⁷. Therefore, any mandatory administrative remedy that must be exhausted before the enforcement of a court decision should be assessed in terms of its compatibility with this right, just as such remedies are examined before filing a lawsuit.

In Turkish law, multiple laws provide for mandatory administrative remedies before filing a lawsuit, as well as prohibitions on enforcement proceedings for disputes regarding monetary receivables to which the administration is a party. More precisely, some regulations in Turkish law prohibit the creditors from directly pursuing enforcement proceedings against the administration for their receivables and require them to

⁹²"It is clear that the litigation requirement introduced by the third paragraph of Article 16 of Executive Decree 675 must be considered within the scope of the fourth paragraph of Article 5 of Executive Decree 670. In this context, it is understood from the wording of the article that the obligation to apply to the administration is imposed only for those who claim a right. On the other hand, the applicant is a debtor who filed a negative declaration case against the enforcement proceedings initiated against him. Nevertheless, the Court applied the aforementioned litigation requirement to the applicant, who filed a lawsuit to have it determined that he was not a debtor, by expanding the limiting norm introduced in terms of the right to access to the court and decided to dismiss the case on procedural grounds... Considering the above information, in a case that clearly does not qualify as a debt case, the Court's application of the limiting rule in the form of the litigation requirement stipulated by the Decree Law No. 675 to the proceedings without interpreting it as stated in the light of the Decree Law No. 670 has created an interference with the applicant's right to access to the court that has no legal basis." Şennur Atalar App no 201938925 (TCC, 13 December 2023) para 37, 42

⁹³On this issue, see Ali Cem Budak, 'Belirsiz Alacak Davası ve Anayasa Mahkemesi'nin İsmail Avcı Kararı' in *MİHBİR XVIII. Toplantı* (1st edn, 2023) 99-101

⁹⁴Ali Cem Budak and Varol Karaaslan, *Medeni Usul Hukuku* (8th edn, Filiz Kitabevi 2024) 17-18

⁹⁵For evaluating enforcement proceedings without a writ of execution as a remedy in terms of effective legal protection, see Akkan (n 4) 63-65

⁹⁶Budak and Karaaslan (n 94) 75; Emel Hanağası and Hakan Hasırcı, 'Avrupa İnsan Hakları Mahkemesi ve Anayasa Mahkemesi Kararlarının Medeni Usul ve İflas Hukukuna Etkileri' in Hakan Pekcanitez and Muhammet Özkes (eds), *Cumhuriyetin 100. Yılında Medeni Usul ve İcra İflas Hukukumuzun Gelişim ve Değişim Süreci* (1st edn, On İki Levha Yayınları 2023) 363-364; Harrendorf, König and Voigt (n 29) 46; see also Mardin (n 54) 32-37

⁹⁷*Hornsby v Greece* App no 18357/91 (ECtHR, 19 March 1997) para 40; *Kutić v Croatia* App no 48778/99 (ECtHR, 1 March 2002) para 24; *Ahmet Yıldırım* App no 2012/144 (TCC, 2 October 2013) para 28; *Mustafa Ekşi* App no 2014/7711 (TCC, 24 January 2018) para 27. For more examples of Turkish Constitutional Court decisions on this issue, see Murat Atalı, Ersin Erdoğan and Süleyman Burak Gündoğdu, *Anayasa Mahkemesi'nin Medeni Usul Hukuku Hakkında Bireysel Başvuru Kararları* (1st edn, Yetkin Yayınları 2021) 357-361



apply to the administration first. It should be noted that the subject to be discussed here is not the provision added to the third paragraph of Article 42 of the Enforcement and Bankruptcy Code stating that *“In matters that fall within the jurisdiction of the administrative procedure law, proceedings without judgement cannot be applied⁹⁸.”* Because within the scope of this provision, the competent jurisdiction is the administrative jurisdiction. The issue to be emphasised here is the civil jurisdiction and procedural law regulations. In civil procedure, the monetary creditor has the choice to file a lawsuit or an enforcement proceeding without judgement if the conditions are met. Thus, preventing the right to file an enforcement proceeding directly means limiting the freedom to seek rights. Although there is no doubt that the enforcement office is not a court, enforcement proceedings without judgement are also secured by Article 36 of the Turkish Constitution as a means of seeking rights. On the other hand, the creditor’s right to demand to enforce the court’s decision, in other words, the right to enforce such decisions, is an integral component of the right to access to a court. Therefore, these regulations must be closely analysed and evaluated within the framework of limiting fundamental rights. Examples of the relevant rules will be given first, and then a common evaluation will be made.

A. Article 28 of the Administrative Procedure Code

The regulation that should be mentioned first in this regard is included in the second paragraph of Article 28 of the Administrative Procedure Code, which is a general provision amended by the Code No. 6352 dated 02.07.2012⁹⁹: *“The amount awarded in cases requiring the payment of a certain amount of money and the attorney fee and judicial expenses awarded in all kinds of cases shall be deposited to the bank account number to be notified in writing by the plaintiff or their attorney to the defendant administration, as of the date of this notification, within the framework of the procedures and principles specified in the first paragraph. If the payment is not made within the periods specified in the first paragraph, it shall be executed and enforced in accordance with the general provisions.”* In the first paragraph, it is stated that the administration must act in accordance with the administrative judgement and without delay, and this period cannot exceed 30 days from the date of the request to the administration.

According to the regulations above, the person who is a creditor of the administration must apply to the relevant administration for the payment of the receivable before filing enforcement proceedings. The creditor may file an enforcement proceeding only if the administration fails to make payment within 30 days. In case the enforcement proceeding is filed without exhausting the mandatory administrative remedy, it is necessary to answer the question of how to proceed. The Court of Cassation considers the administrative remedy as a procedural requirement and rules that the enforcement proceedings must be annulled upon an application being made to the enforcement court through a complaint without a time limit¹⁰⁰.

It should be noted that the Turkish Constitutional Court has examined whether the mentioned provision is unconstitutional. The Court concluded that requiring the creditor to notify the administration of the

⁹⁸The paragraph above was added by Decree Law No. 694 dated 15.08.2017 (OG 25.08.2017 I 30165), which was later enacted as Law No. 7078 dated 01.02.2018 (OG 08.03.2018 Dup I 30354). For the opinion finding this regulation accurate, see Bülent Desteci, *İcra Hukukunda Takip Şartları* (1st edn, Adalet Yayınevi 2024) 227. For a detailed examination of the problems that occurred before the introduction of this regulation, see Emel Hanağası and Burak Öztürk, ‘İdari İşlem ve Eylemlerden Doğan Zararların Giderilmesinde İlâmsız İcra Yolu’ (2013) 29(1) BATİDER 79

⁹⁹OG 05.07.2012 I 28344

¹⁰⁰See, for example, *“The purpose of the amendment brought to Article 28/2 of the Administrative Procedure Law by Article 58 of the Law No. 6352 is to enable citizens to collect their receivables without having to apply for execution, thereby reducing the workload of the enforcement offices and preventing the administrations from paying execution expenses, ... initiating enforcement proceedings subject to the complaint ... without a proper application to the debtor administration ... is contrary to the purpose of Article 28/2 of the Administrative Procedure Law.”* Yargıtay 12 HD, 12974/489, 12.09.2023. For decisions containing similar assessments, see Yargıtay 8 HD, 5405/6032, 24.04.2017, Yargıtay 8 HD, 23024/1966, 08.02.2016; Yargıtay 8 HD, 14751/21229, 26.11.2015. See also Desteci (n 98) 228



account number constitutes a reasonable and proportionate burden. It does not prevent the freedom to seek rights; therefore, the provision is not unconstitutional¹⁰¹.

B. Additional Article 4 of the Expropriation Code

Another example of mandatory administrative remedies before the creditor files enforcement proceedings is found in the Expropriation Code No. 2942 dated 04.11.1983¹⁰². First, it should be noted that according to the provision added to the first additional article of the Expropriation Code by the Code No. 7421 dated 16.11.2022, in the event that the procedures specified in the article are not carried out within the specified period, the lawsuits regarding ownership shall be heard in the civil jurisdiction. Therefore, the proceedings under this article are subject to the rules of civil procedural law. The first paragraph of the additional fourth article added to the same Code by Code No. 7421 is as follows: *“The compensation, indemnity, attorney’s fee, and trial expenses awarded by the courts under this Law shall be deposited to the bank account number to be notified in writing by the plaintiff or their attorney to the defendant administration within thirty days from the date of such notification. Failure to make payment within this period shall be enforced in accordance with the general provisions.”*

As can be seen, this provision added in 2022 parallels the second paragraph of Article 28 of the Administrative Procedure Code. Accordingly, a creditor entitled to the expropriation price cannot initiate enforcement proceedings without first exhausting the mandatory administrative remedy.

C. Article 36 of the Social Security Institution Code

The obligation to apply to the SSI before filing a lawsuit in social security disputes was analysed above¹⁰³. This mandatory administrative remedy similarly applies before initiating enforcement proceedings for receivables awarded against the SSI. In the second paragraph of Article 36 of the Social Security Institution Code amended by Code No. 6552 dated 10.09.2014, it is stated that in all kinds of lawsuits to which the Institution is a party, it is obligatory to apply to the Institution by notifying the bank account number for the payment of the actual receivable, attorney’s fee and judicial expenses. The Institution must make payment within 30 days, and an enforcement action cannot be taken before this period expires. Therefore, the creditor shall first apply to the SSI, and if the SSI fails to make payment within 30 days, the creditor may apply for enforcement proceedings¹⁰⁴. It should be noted that the judgement does not have to be final before the payment can be made. As a matter of fact, the last sentence of the aforementioned paragraph states that *“if the amounts in the court decisions are paid before the finalisation of the decision, the amounts paid following the reversal of the decisions by the relevant authorities will be collected from those concerned together with the legal interest to be accrued from the date of payment.”*

¹⁰¹ *“The requirement for the plaintiff to notify the administration of the account number is a reasonable and measured burden in the face of the fact that the administration cannot know the plaintiff’s account where the money will be deposited and, therefore, will not be held responsible for the delay in the collection of the receivable... For these reasons, it is not possible for the rules subject to the lawsuit to actually extend the period of execution of the court decision, which is set as thirty days in the Law, despite the plaintiff’s timely fulfilment of the notification obligation in this regard, and to grant additional time to the administration regarding the implementation of the stay of execution decisions under appeal. Therefore, it cannot be said that the rules limit the freedom to seek rights or delay the implementation of stay of execution decisions. On the other hand, the period specified in paragraph (1) of Article 28 of Code No. 2577 for the execution of court decisions is valid for all administrative and judicial decisions without any distinction, and there is no provision in the Law stipulating that the said period of time will not be applied in the judgments regarding the payment of a certain amount of money. For the reasons explained, the rules subject to the lawsuit do not contradict Articles 2, 36, and 125 of the Constitution. The cancellation request must be rejected.”* TCC 100/84, 04.07.2013

¹⁰² OG 08.11.1983 I 18215

¹⁰³ See above III-A

¹⁰⁴ *“...In the aforementioned regulation, regardless of whether the judgement is issued by the courts of judicial jurisdiction or not, in the proceedings with judgement to be initiated against the Social Security Institution, it is obligatory to first apply to the Institution. In the concrete case, the proceedings were initiated on 31.10.2014, after the effective date of the aforementioned Law, and no application was made to the claimant institution. For the reasons explained, while the court should evaluate the complaint in accordance with the aforementioned legal regulation, it was not correct to decide to reject the complaint with the written justification.”* Yargıtay 8 HD, 5405/6032, 24.04.2017



In one case, the applicant applied to the SSI for the payment of the receivable indicated in the judgement, and the SSI informed the applicant within thirty days that the judgement had been appealed and that action would be taken if it was upheld. Thereupon, the applicant filed an individual constitutional application due to the administration's failure to comply with the judgement. While the individual application was pending, the SSI made a payment after the judgement was upheld. Although the Turkish Constitutional Court examined the application in terms of the right to access to court, it accepted that the SSI made the payment within a reasonable period of time following the finalisation of the judgement and decided to dismiss the application as there was no justification for continuing the examination of the subject matter of the application¹⁰⁵. Therefore, no assessment was made on the merits of the application in terms of the right to access to court.

Making a common assessment regarding these three regulations is possible. Preventing the creditor from filing proceedings through a mandatory administrative remedy is a limitation of the right of enforcement of the judgement as a part of the right to access to court. This restriction has a statutory basis through additions to the relevant codes. The obligation of the administration to fulfil judgments is expressly grounded in the fourth paragraph of Article 138 of the Turkish Constitution, and this obligation is confirmed in the aforementioned statutory provisions. From this point of view, it is aimed at the creditor to quickly obtain their receivables without resorting to enforcement, and this purpose complies with the legitimate purpose criterion. In addition, it cannot be accepted that filing the enforcement procedure in case the administration fails to make payment within 30 days constitutes an unreasonable intervention. In any case, the creditor will have the right to initiate enforcement proceedings within 30 days at the latest from the date of the request. Moreover, as stated by the Turkish Constitutional Court in its review of the second paragraph of Article 28 of the Administrative Procedure Code, the creditor's notification of the bank account number to the administration should be considered a reasonable and proportionate burden. In summary, in my opinion, there is no violation of the right to access to court in the postponement of enforcement proceedings through mandatory administrative remedy in the cases considered as examples. However, it should not be forgotten that the ways that prevent or postpone the filing of an enforcement proceeding, as well as a lawsuit by a mandatory administrative remedy, should be very carefully regulated.

Conclusion

In the rule of law, the main principle is to resolve legal disputes through the state courts. However, within the framework of its discretionary power, the State may provide different remedies for different claims or disputes. The legitimacy of remedies outside the state courts depends on certain conditions and guarantees. In particular, mandatory out-of-court mechanisms limit the right to access to a court. These procedures are essentially reminiscent of the administrative jurisdiction. However, the regulations regarding filing a lawsuit in the civil jurisdiction after the mandatory administrative remedy are directly related to the right to access to court in the civil aspect. The subject of this study is the relationship between the mandatory administrative remedy in matters concerning civil jurisdiction and the right to access to court.

To ensure the effective exercise of the freedom to seek rights, the State must establish the necessary remedies, particularly the organisation of courts. Guaranteeing the right to apply to the court is the first step in ensuring the freedom to seek rights effectively. In this respect, as a requirement of the rule of law, the right to access to a court is a fundamental judicial right and is an indispensable element of the right to a fair trial and the freedom to seek justice. The ECtHR first used the concept of the right to access to court in

¹⁰⁵ Necmi Karakuş App no 2014/3240 (TCC, 26 October 2016)



its 1975 judgement in *Golder v. the United Kingdom*. According to the ECtHR, the fair, expeditious, and public nature of the proceedings, which are among the elements of the right to a fair trial guaranteed by Article 6 of the Convention, have no value and meaning without a trial. On the other hand, the principle of the rule of law must be considered in the interpretation of the Convention, and it is not possible to conceive of the rule of law without the possibility of access to courts in civil matters. The Turkish Constitution does not use the term right to access to court, but Article 36 guarantees the freedom to seek justice.

Both in the ECHR system and in Turkish law, the exercise of fundamental rights is not regulated in an unlimited manner. In this context, the right to access to court cannot be considered an absolute right. States have a certain degree of discretion in their regulations on the right to access to court. However, the rules and especially the limitations to be made within the framework of the discretionary power must not impair the essence of the right and other rights regulated in the Convention. In accordance with the judgments of the ECtHR and the Turkish Constitutional Court, it is obligatory that the rules stipulating an administrative remedy by preventing the right to apply to the court must be regulated by law, be based on a legitimate aim and be proportionate (inevitably not impairing the essence of the right); otherwise, there is a risk of violation of the right to access to court.

The limitation of the right to access to court through a mandatory administrative remedy does not lead to a violation if certain conditions are fulfilled. First, it should be noted that if an administrative body fulfils certain safeguards, it is considered within the scope of the concept of a tribunal in the case law of the ECtHR regarding the right to access to court. However, if the authority is not a tribunal and is not considered a tribunal within the framework of the ECtHR's autonomous interpretation, a judicial appeal must be available against the decision of that authority.

Social security law is the typical area in the Turkish civil judicial organisation where the mandatory administrative remedy is foreseen. In disputes arising from social security law, except for the requests for the determination of compulsory insurance periods, application to the Social Security Institution is mandatory. Direct litigation against the SSI is not accepted. In social security disputes falling within the jurisdiction of labour courts, the obligation to apply to the SSI and related procedural issues is naturally determined according to the rules of civil procedure law. Therefore, the mandatory administrative request to the SSI, which prevents filing a lawsuit before the labour courts, directly relates to the right to access to court in the context of civil procedure law. If a lawsuit is filed without applying to the SSI, the Court of Cassation recognises that the claimant should be given time to apply to the SSI. The second paragraph of Article 115 of the CCP stipulates a period of two weeks for completing the missing procedural requirement. In cases where the SSI rejects or is deemed to have rejected the application, the period will be a maximum of sixty days. From this point of view, a situation arises, such as waiting longer than stipulated in the CCP to complete the missing litigation requirement. Waiting for the SSI application may suggest suspension of the hearing. However, in my opinion, the application in question cannot be subject to such suspension within the framework of Article 165 of the CCP. It is evident that the right to access to the court for disputes arising from the social security law legislation is limited due to the obligation to apply to the SSI. I believe that this limitation complies with the legality, legitimate aim, and proportionality criteria. On the other hand, since the legal nature of the period for the completion of the requirement to apply to the SSI is uncertain, in my opinion, an explicit regulation on this issue would secure the right to access to court more effectively.

Another example of the limitation of the right to access to court through mandatory administrative remedy in civil procedure law is the requests made to the land registry offices to correct land registry records. Under Articles 26 and 75 of the Land Registry Bylaw, it is mandatory to apply to the land registry offices to update the information in the land registry. In that case, it can be easily said that the mandatory adminis-

trative application procedure is a limitation on the right to access to court. The Turkish Constitutional Court ruled that the right to access to court was violated because the restriction was made by a bylaw and not by a law. Given the principle that the right to access to court can only be limited by law, the provisions of the Land Registry Bylaw regarding the obligation to apply to the land registry directorate are therefore inapplicable. With its discretionary power, if the legislator is to maintain its intention to resolve such disputes through administrative remedies first, it should regulate these remedies by law. Also, in such a law, a procedure restricting the right to access to court to an unconstitutional extent must be avoided.

The mandatory application to the State of Emergency Commission has been subject to multiple violation decisions of the Turkish Constitutional Court. In some of the reemployment lawsuits labour courts decided “*not to decide on the substantive grounds*” because the jurisdiction of such cases belonged to the State of Emergency Commission and to send the case files to the Commission. The Turkish Constitutional Court ruled that the decisions of the instant courts violate the right to access to court. It stated that it was outside the scope of the State of Emergency Commission’s jurisdiction by the statutory decrees. Similarly, the Court considered the extension of the scope of the rules stipulating the obligation to apply to the administration during the state of emergency and not hearing the cases as a violation of the right to access to court on the ground that lacking a legal basis. The Court’s interpretation is justified in terms of the protection of fundamental rights, and the reasoning of the judgement is enlightening for such cases related to the right to access to court in civil procedure law.

In the established case law of both the ECtHR and the Turkish Constitutional Court, the right to enforce the judgement is also considered within the scope of the right to access the court. Therefore, a mandatory administrative remedy before the enforcement of the court decision should be examined in terms of the right to access to court as well as before filing a lawsuit. Preventing the creditors from filing an enforcement proceeding by obliging them to apply to the administration is a limitation to the right of enforcement of the judgement as a part of the right to access the court. There is no violation of the right to access to court in the postponement of enforcement proceedings through mandatory administrative remedy in the cases considered as examples. However, it should not be forgotten that the ways that prevent or postpone the filing of an enforcement proceeding, as well as a lawsuit by a mandatory administrative remedy, should be very carefully regulated.



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