

Realizing Social And Economic Rights: The Example of Judicial Attitudes Towards The Rationing of Healthcare in Turkey

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ÖZET

Sosyal ve Ekonomik Hakları Gerçekleřtirmek: Türkiye Örneğinde Sağlık Hizmetlerinden Yararlanmanın Kısıtlanmasına İliřkin Yargısal Yaklaşımlar

Ülkelerin anayasalarında yer alan sosyal ve ekonomik haklar, gerçekleştirilmeleri konusunda yeterli düzeyde zorlayıcı hukuksal araçların bulunmaması noktasında her zaman tartışmalı bir konu olmuştur. Sosyal ve ekonomik hakların ileri sürülmesindeki sorunlara rağmen Türk Anayasası, sağlık hizmetlerinden yararlanma hakkı dâhil son derece geniş bir sosyal ve ekonomik haklar kataloğunu benimsemiş bulunmaktadır. Yargısal yollara başvuru konusunda herhangi bir özel sınırlamanın öngörülmediği bir bağlamda, yasa koyucuya bu hakları gerçekleřtirmek noktasında tanınan takdir yetkiyle birlikte, Türkiye’de sosyal ve ekonomik hakların yargısal yollardan ileri sürülebilmesi ilgi çekici hukuksal bir sorundur. Bir sosyal ve ekonomik hak olarak sağlık hizmetlerinden yararlanma hakkının kısıtlanmasına dair hukuksal sorunlar Türkiye’nin kamu hukuku ajandasında önemli bir yer tutmaktadır. Bu çerçevede Türkiye’de sağlık hizmetlerinden yararlanmanın kısıtlanmasına dair sorunlarda kayda değer bir yargısal müdahalenin varlığı gözlenebilir.

Anahtar Kelimeler

Sosyal ve ekonomik haklar, sağlık hizmetlerinin kısıtlanması, sağlık sigortası, takdir yetkisinin yargısal denetimi

ABSTRACT

The existence of social and economic rights in nations’ constitutions has always been a controversial issue due to the inherent limitation of their enforceability. Notwithstanding this limitation, the Turkish Constitution recognizes and establishes a large catalogue of social and economic rights, including the right to healthcare. Enforceability of these rights through judicial means is an interesting legal issue in Turkey, since the Turkish Constitution dilutes the duties of the State by giving the legislature discretionary powers in realizing these social and economic rights without specifying any clear provision concerning their judicial enforceability. Rationing healthcare services is one of the most controversial legal issues in Turkey’s public law itinerary. As such, there is a noticeable judicial involvement in rationing healthcare services in Turkey.

Keywords

Social and economic rights, rationing healthcare, healthcare insurance, judicial review of discretionary powers

Introduction

The founding principles as outlined in the first part of the Turkish Constitution of 1982 (*hereafter referred to as the "Constitution"*) sets out the structural form of the state and describes the Turkish Republic as a democratic, secular and welfare state, which respects human rights and is governed by the rule of law.¹ These descriptive and rigid features of the Turkish Republic can never be amended.² The most contentious features of the Turkish Republic remain its secularist and welfare statist nature, principles that remain to be intensely debated within the political and legal quarters.

In addition to the individual rights of person, the social and economic rights are similarly enshrined in the Constitution. The succeeding part of the Constitution enumerates the civil and political rights of individuals which government must refrain from interfering. Many of the social and economic rights inherent in this part of the Constitution necessitate the affirmative actions of the state. There is the common assumption that within the Turkish constitutional development the genuine enjoyment of conventional individual rights and freedoms is only feasible with the realization of social and economic rights.³ However, realization of these social and economic rights is dependent on the economic sources of nations and diligent State action. Thus their enforceability has always been contentious, which raises the question of whether these are real rights. While the enforceability of these rights are being persistently debated by the human rights theorists within the framework of modern constitutional systems,⁴ large catalogue of exorbitant social and economic rights continue to find sustenance in the Constitution.⁵ Even if the enforceability of the right to healthcare and social security remain to be the most controversial and debated subject, I continue to maintain that these rights⁶ should continue to remain as part of the constitutional rights.

1 Art. 2. I will use the English translation text made by Grand National Assembly of Turkey < https://global.tbmm.gov.tr/docs/constitution_en.pdf > visited on 14 Jan. 2016.

2 Art. 4.

3 KİLİ, S. "Turkish Constitutional Developments: An Appraisal", **Capital University Law Review**, Vol. 21, 1992, p. 1066.

4 KINNEY, E.D./CLARK B.A. "Provisions for Health and Health Care in the Constitutions of the Countries of the World", **Cornell International Law Journal** Vol. 37, 2004, p. 299; SUNSTEIN, C., "Against Positive Rights", **East European Constitutional Review**, Vol. 2, 1993, p. 37. ODER, B. E. (2008): "Devletin Olumlu Edimini Gerektiren Sosyal Hakların Anayasal Düzeyde Korunması ve Yargısal Tutumlar" [At constitutional level, protection of social rights which require state's affirmative action and judicial attitudes], **G.Ü.H.F.D.**, C. 2008/1, pp. 202-205; ERDOĞAN, M., **İnsan Hakları Teorisi ve Hukuku** [Theory and Law of Human Rights], Orion Yayınevi, Ankara, 2007, p. 63; HENDRIKS, A., (1998): "The Right to Health in National and International Jurisprudence", **European Journal of Health Law**, Vol. 5, 1998, p. 392; LENAGHAN, J., **Rationing and Rights in Health Care**, Institute for Public Policy Research, 1996, p. 27.

5 For example, Right and Duty to Work (Art. 49), Right to Housing (Art. 57), Development of Sports (Art. 59), Protection of Arts and Artists (Art. 64) are relatively and unnecessarily listed as rights of individuals and the duties of the State.

6 According to the Cass Sunstein who highly criticizes the social and rights suggests that constitutional provisions that call for social and economic rights should be eliminated, and restricted "such rights to those that fare best, (perhaps right to social security)." SUNSTEIN, 1993, p. 38.

The establishing and operating national social security system is denoted by the Constitution as one of State's duties.⁷ The administration of the Turkish social security system includes the service of healthcare insurance with the view to enhancing the right to healthcare as enshrined by the Constitution.⁸ Additionally, the Constitution contains provisions for the protection of children, the incapacitated⁹ and the social wellbeing of children.¹⁰ These Constitutional provisions articulate the multi-dimensional aspects of the right to healthcare and social security.

However, the Constitution has left the realization of these social and economic rights to the discretion of the legislature. As the legislature's discretionary power founds sustenance for rationing the healthcare service from a constitutional ground, it is this aspect of "discretionary" authority that remains the source of the predicaments in the Turkish healthcare system for over twenty years. Endeavors in balancing the healthcare rationing with the 'discretionary' paradigm and satisfying the prerequisite of human rights is becoming harder than ever, as effective or life-saving procedures in medical care is accompanied by ever growing costs.

This article will generally analyze and try to illuminate judicial attitudes concerning healthcare rationing in the context of the Constitution, which remains to be the most controversial issue. International human rights treaties have an important role in the Turkish legal system.¹¹ But this article will not elaborate on this dimension. The premise of this article will be limited with the delineation and the examination of the Constitutional provisions concerning the rights to healthcare and social security.

This article will initially attempt to elucidate the public service characteristics of the healthcare system, as all issues regarding healthcare can inevitably be embodied in the conceptual framework of public services. It will follow with the examination of the judicial decisions concerning the interpretation of the constitutional provisions in settling disputes arising from rationing healthcare services.

7 Art. 60.

8 Art.'s. 60 and 56(5).

9 Art. 61.

10 Art. 58.

11 International treaties which are signed and approved by the Government and Parliament directly incorporate into Turkish legal system. The Turkish Constitution requires the national laws to be compliant with provisions of international treaties pertaining to the human rights. In other word, national laws must subserve international human rights treaties. If there is contradiction between the law and international human rights agreement courts and public bodies have to choose the provisions of international human rights agreement as prevailing norms (Art. 90 of Turkish Constitution). For general information and unique constitutional problems regarding to international treaties in Turkish legal system *see* GONENC L./ESEN, S., "Problem of the Application of Less Protective International Agreements in Domestic Legal Systems: Article 90 of the Turkish Constitution", **European Journal of Law Reform**, Vol. 8(4), 2006, pp.485-500 .

I. Public Service Activity in Healthcare Sector

Article 56 of the Constitution states that everyone has a right to lead their lives in conditions of physical and mental health, by conferring a duty on the State to ensure the realization of this right. The same article also declares that the State has authority over central planning by regulating the public and private healthcare services and institutions. It is clear from the wording of the Constitutional provisions that it does not accept real free market conditions in the healthcare sector. In other words, the State has been entrusted with the central planning and regulation in realizing the constitutional right to healthcare. Consequentially, healthcare services cannot be viewed as fields for regular commercial activities, although there are no limitations or restrictions on private corporate activities within the healthcare sector. Moreover the government has even encouraged their activities in this field. Constrained with extensive regulatory measures and remaining within shadows of uncompetitive State-owned enterprises, private corporations have a relatively limited role in the healthcare sector, yet during the last decade there has been a remarkable tendency towards privatization.

In line with these constitutional provisions, the Turkish Constitutional Court (*hereafter referred to as the Constitutional Court*) upheld the controversial legislation that empowered the central government to set prices for public services and also, if required, for private healthcare institutions. According to the Constitutional Court, such legislative amendments were necessary for the State to accomplish its constitutional duty to enhance the quality and efficiency of the healthcare services.¹² Furthermore, in line with this judicial assessment, we have witnessed similar legislation bearing the same persistent objectives being implemented by the government. This includes the authorization of the Ministry of Health to determine the norms and standards of medical and pharmaceutical products and the right to set prices accordingly.¹³

Moreover, a further component or support for realizing the right to healthcare in Turkey is the publicly funded healthcare insurance system. As part of the social security system, the Social Security Public Corporation (SSPC) (*Sosyal Güvenlik Kurumu*) governs the healthcare insurance system.¹⁴ It is financed primarily with the social security payroll tax and partly by the State.¹⁵ Article 56/5 of the Constitution directs the State to establish a “*universal healthcare insurance*” with the view to providing a widespread

12 Anayasa Mahkemesi, E.: 1987/16, K.: 1988/8, K.T.: 19/04/1988 [Constitutional Court, 16 Apr. 1988, Decision number: 1988/8]. All the decisions of Turkish Constitutional Court are accessible with the decision number at < <http://www.anayasa.gov.tr/icsayfalar/kararlar/kbb.html> > visited on 14 Jan. 2016.

13 The other price-setting actor is Social Security Public Corporation (SSPC) which is the largest single purchaser of healthcare services in the market. As a largest single purchaser, SSPC has an indirect, but strong power in setting the prices of services provided by private enterprises. On this subject, see HERVEY, T.K./McHALE, J.V., **Health Law and the European Union**, CUP, 2004, p. 287.

14 Before the reform of 2006 the social security system had been fragmented into different public social security corporations. The reform of 2006 unified these corporations as a new corporation named Social Security Public Corporation. The cases cited in this article were adjudicated before this reform. However, regarding the topic of this article, to use Social Security Public Corporation as a generic term makes no difference.

15 Art. 81 of Law no: 5510 on 31 May 2006.

healthcare system for the benefit of the public.¹⁶ In accordance with this directive, the legislature enacted the Law of Social Security and General Health Insurance¹⁷ in 2006. This legislation entitles everyone, including refugees and stateless person, to healthcare insurance. While the healthcare system has other vital inadequacies, such as the availability and quality of healthcare services, judicial disputes regarding the right to healthcare often appear as an inseparable part of the problems of the healthcare insurance system.

Due to the constitutional provisions, it is necessary to initially set out the public service characteristic of the Turkish healthcare system. The concept of public service is a sophisticated notion of the Turkish administrative law. Public services are defined as service provided by the state, local governments or other public bodies and to an extent by private sectors on behalf of and under intrinsic regulation of those public bodies¹⁸. Healthcare and social security, alongside education and national defense etc., are the grand public services provided by the state or other public bodies. These public bodies must abide by the principles of equality, neutrality, continuity and adaptability¹⁹ in the course of delivering these services. These are the general principles of the Turkish administrative law. An administrative body will be liable to stiff penalties if found to be breaching the essence of these principles. Similarly, these principles, in addition to the ethical rules regulating the health care profession, play an effective role in shaping the administrative and management activities of the healthcare services.²⁰

Public services, being an area consisting of government's main activities, explicitly invade the markets by inevitably restricting competition, the freedom of contract and enterprise²¹. However its restrictive nature sometimes has progressive effects on human rights. In most respects it is clear that the scope and the success of many public services depend predominantly on the strength of the welfare state striving for the realization of social and economic rights. Historically the notion of welfare state led to the expansion of public services. In other words, public service is an effective tool of a welfare state for the realization of social and economic rights. And one can notice that within the concept of a welfare state, social and economic rights and public services are entwined to such degree that the deterioration of one directly and adversely affects the other.

16 Art. 56(5): "In order to establish widespread health services general health insurance may be introduced by law."

17 See *supra* note 15.

18 GÜNDAY, M., **İdare Hukuku** [Administrative Law], İmaj Yayınevi, Ankara, 2011, pp. 330-333.

19 Adaptation to new technologies and social needs.

20 Courts also take into consideration ethical rules while reaching decisions regarding healthcare services. For example, in the process of treatment deficiency of informing the patient about possible side effects of the medicine has been assessed, by the Court, as a gross fault effecting the permission of the patient for the treatment and required compensation for the side effect damage. Danıştay, İ.D.D.K., E.:2002/716, K: 2003/91, K.T.: 03/07/2004 [Council of State, Plenary Session of the Administrative Law Divisions, 03 July 2004, Decision number: 2003/91].

21 GÜNDAY, 2011, p. 333.

Another important dimension of public service that may be considered of importance is the nature of the legal relationship between the beneficiaries and the public service providers. This relationship may transpire in a statutory (non-contractual), contractual or even in a quasi-contractual format. In Turkey the relationship between the healthcare beneficiaries and the SSPC is statutory. This means that the legislator and SSPC have unilateral authority to alter the terms and conditions of healthcare insurance by enacting new rules, and in doing so they rely on their discretionary power. This statutory relationship depends on the individuals' constitutional rights and therefore provides the beneficiaries larger legal protection than any other contractual relationship²².

II. Legislative Discretion on the Extent of Public Healthcare Insurance Coverage

The affirmative action of the state in realizing social and economic rights is more significant than recognition of these as constitutional rights. Although the right to healthcare and social security are recognized constitutional rights, curbing public healthcare expenditure has unfortunately, and perhaps inevitably, been the main concern for governments in the last twenty years in Turkey.²³ This tendency led to restrictive legislations and administrative regulations to be enacted in various stages. Likewise, the government ratified within the revised public healthcare insurance system the requirement for payment of surcharges, or obligatory fees for the recipients of the healthcare services. As we will see below, the courts annulled the majority of these legislative and regulatory sanctions on grounds that they interfere with the *right to social security* and even the *right to life*.

While the judicial review of legislative statute, by-laws or administrative decisions has an effective role on the realization of the right to healthcare and social security, enforceability of these rights is a general problem in the Turkish legal system. Primarily, the wording of these constitutional rights generates an apparent weakness of enforceability. As such, Article 65 of the Constitution accentuates that the realization of social and economic rights is within the discretion of the State to fulfill, thus requiring the State to accomplish these responsibilities within the limits of its financial adequacy.²⁴ Therefore, if we were to highlight the importance of social and economic rights in comparison with other contemporary constitutional rights, its significance is greatly

22 YILMAZ, H., **Sağlık Hizmetlerinden Yararlanmanın Kısıtlanması ve Kısıtlamanın Yargısal Denetimi** [*Rationing healthcare and judicial review*], Seçkin Kitabevi, Ankara, 2011, p. 76.

23 This tendency can be observed across the globe. See KEITH, S., Law, **Legitimacy and the Rationing of Health Care**, CUP, 2007; FLOOD, C.M./ STABILE, C.M./ TUOHY, C. H., "The Borders of Solidarity: How Countries Determine the Public/Private Mix in Spending and the Impact on Health Care", **Health Matrix: The Journal of Law-Medicine**, Vol. 12(2), pp. 297-356.

24 Art. 65: "The State shall fulfill its duties as laid down in the Constitution in the social and economic fields within the capacity of its financial resources, taking into consideration the priorities appropriate with the aims of these duties."

enervated as these are “rights recognized but subject to legislative implementation”²⁵ providing the legislature the authority to devise the boundaries of such rights.

Therefore, and by reason of the financial inadequacy, the legislation has a general discretion to initiate, reshape or even ration the supply of public services that implement such social and economic rights. However, this does not mean that such discretionary power is not within the ambit of constitutional supervision and that any restrictive legislative statute concerning social and economic rights will escape the clutches of the Constitutional Court. All legislative acts of the executive are subject to, without any exceptions, the Constitutional Court’s jurisdiction.²⁶ There is a lack of an inherent rule for the exclusion of any legislative acts of the executives concerning the social and economic rights from constitutional review. However, the usual judicial function of the courts exhibits an apparent enervation of will in reviewing such discretionary power.²⁷ As a result, Article 65 of the Constitution has come under severe criticisms on grounds that it creates the basis on which the State can elude from its duties in realizing the social and economic rights.²⁸ Such criticisms are partly correct due to there being a lack of an apparent judicial instrument in place to force the State to device public services that would stimulate the realization of social and economic rights.²⁹

In my view, once the legislature initiates a social public service by legislation, the abolishing or rationing of this service may not be feasible on the basis of the discretionary power of the legislature and the executive,³⁰ unless acceptable social and economic requirements or necessities require its abolishment. Although there remain major issues concerning the Constitutional Court’s jurisdictional entitlement in determining what the acceptable social requirements or necessities are, all legislative statutes, as noted above, by the legislature are, without any exceptions, subject to the Constitutional Court’s jurisdiction for review. At this point, instead of reviewing social and economic requirement or necessities, I would expect the Constitutional Court to consider the different dimensions or extent of the linkage of social and economic rights with the other contemporary constitutional rights. This view is particularly tangible, at least, as the realization of the rights to social security and healthcare is in close

25 DAINITH, T., “The Constitutional Protection of Economic Rights”, **International Journal of Constitutional Law**, Vol.2, 2004, p. 71.

26 Art.146 of the Constitution.

27 KINNEY/CLARK, **2004**, p. 300.

28 GÖNENÇ, L., “The 2001 Amendments to the 1982 Constitution of Turkey”, **Ankara Law Review**, Vol. 1(1), 2004, pp. 105-106; UYGUN, O., “Küreselleşme ve Değişen Egemenlik Anlayışının Sosyal Haklara Etkisi” [*Impact of the Globalization and Changing Sovereignty on Social Rights*], **Anayasa Yargısı** [Constitutional Justice] Vol. 20, 2003, p. 281.

29 See also DAINITH, **2004**, p. 72.

30 See also GÖZLER K., **Anayasa Hukuku** [Constitutional Law], Ekin Kitabevi, Bursa, 2000, pp. 60-163; ÖZBUDUN, E., **Anayasa Hukuku** [Constitutional Law], Yetkin Kitabevi, Ankara, 1998, pp. 99-112; GÖREN, Z., “Sosyal Devlet İlkesi ve Anayasa Hukuku Açısından Yaşam Kalitesi” [*Principle of Welfare State and Quality of Life According to the Constitutional Law*], **Anayasa Yargısı** [Constitutional Justice] Vol. 14, 1997, p. 116.

proximity and endures a strong linkage with other contemporary individual rights³¹ as will be demonstrated below. Thus, the State's constitutional duty should be examined in a larger context. Instead of having made social and economic rights injudicial by referring to Article 65 of the Constitution, the Constitutional Court has hitherto tried to restrict the discretionary power of the legislature.

For instance, the Constitutional Court upheld the legislation that required the beneficiaries of prosthesis limbs to pay no more than 20% of their monthly minimum wage for the incurred costs, which otherwise would have been paid for by the SSPC. The Court, in this instance, underlined the discretionary power of the legislature as articulated in Article 65 of the Constitution. More importantly, however, was that the Court clearly emphasized that legislation cannot result in the constitutional guarantee of the social and economic rights being in vain. On the other hand, the Court took into consideration that the legislation had assigned the maximum rate of surcharge, purporting that the legislation would otherwise be unconstitutional.³² In an earlier decision the Constitutional Court held that individuals unable to afford surcharges to be exempt from this legal obligation.³³ This clearly demonstrates that the Court has intentionally shown reluctance in interpreting constitutional provisions that would otherwise nullify the legislature's discretion concerning social and economic rights. In an equal footing, the Court has nonetheless provided conditions, such as necessity of assigning maximum rate of surcharge, with the view to restricting the legislature's discretionary power.

The Constitutional Court can be seen to have restricted the discretionary power of the legislature in another landmark case. In doing so, it clearly chose to shift the focus of the case away from the subject of social and economic rights to the issue of contemporary individual rights. Interpreting "*the right to life*" the Constitutional Court annulled the amendments of the social security legislation that directed the SSPC to provide inpatients with "*six-month limited coverage*". The Court held that even if Article 65 of the Constitution confers a general discretion on the legislature to fulfill its duty of ensuring the social and economic rights of individuals, the right to social security, in this case, was not simply an isolated item of social and economic rights but also a matter of "*the right to life*". Accordingly, it held that the legislation limiting the healthcare coverage directly jeopardizes the life of individuals.³⁴ The Court, in this case, refrained from making references to the constitutionally guaranteed social and economic rights,

31 WICKS, E., **Human Rights and Healthcare**, Hart Publishing, 2007, pp. 12-15; MANN, J. M., et al., "Health and Human Rights", in MANN, J. M., et al. (eds.), **Health and Human Rights**, Routledge, 1999, pp. 7-18; HENDRIKS, 1998, p. 389.

32 Anayasa Mahkemesi, E.: 1992/99, K.: 2001/41, K.T.: 23/02/2001, [Constitutional Court, 16 Feb. 2001, Decision number: 2001/41].

33 *Supra* note 12.

34 Anayasa Mahkemesi, E.: 1996/23, K.: 1996/38, K.T.: 16/10/1996 [Constitutional Court, 16 Oct. 1996, Decision number: 1996/38]. In the previous case, the Constitutional Court annulled eighteen month-limited-coverage with the same justification. Anayasa Mahkemesi, E.: 1990/27, K.: 1991/2, K.T.: 17/01/1991 [Constitutional Court, 17 Jan. 1991, Decision number: 1991/2].

in particular the right to healthcare. This reluctance was perhaps due to their innate vagueness and relative weakness. Instead, it chose to refer to "*the right to life*" and identified public funding of long-term healthcare service as the cornerstone of that right. No doubt that cutting off public insurance payments in similar scenario would have meant leaving the inpatients, in need of healthcare service in excess of six months, to endure extreme hardship, perhaps even to die. The Court's reasoning had indeed extended the boundaries of the right to healthcare and social security by generating along the way an impervious right by correlation with that of "*the right to life*".

In line with its outlook on the right to healthcare and social security service, the Court have used excerpts from its precedents on "*the right to life*" while also assessing exemptions of public health insurance payment for more qualified services and supplementary needs of patients. As far as measures on the protection of individual lives and delivering minimum SSPC funded healthcare services is concerned, the Court has held that the legislature has the discretion to burden patients with surcharges for supplementary needs and treatments. While endorsing the legislation, the Court emphasized the need to establish a criterion in determining the maximum level of surcharges that the patient could be burdened with. It further stressed that the extent of such criteria should not prevent or restrict the basic medical needs.³⁵

Clearly, the scarcity of resources might not be the real reason for curbing the coverage of healthcare insurance in every case. The choices of the majority of the Parliament may be stimulated with ideological motives.³⁶ Whatever the reasons or motives may be, the constitutional provisions and its interpretations by the Constitutional Court confine the legislatures pecuniary choices based on an ideological point of view. From such perspective, the Constitution can be considered as ideologically biased, notably in regards to social and economic rights. Theoretically, even a sizable Parliamentary majority may not be able to abolish or amend constitutional provisions regarding social and economic rights due to its firm linkage with the notion of the "*welfare state*", which remains amongst the unamendable characteristic of the Turkish state in the Constitution. In fact this is more than a simple theoretical notion. This was strongly emphasized by the Constitutional Court in one of its landmark decisions. The Constitutional Court annulled specific amendments of the Constitution that provided a legal framework for the abolishment of a ban that prevented women from wearing headscarves at universities. The Constitutional Court stressed that such amendment indirectly aimed at altering a specific unamendable provision within the Constitution that secures the secular characteristic of the state.³⁷ This decision clearly implies that any proposed amendment of the Constitution by the legislature will be subjected to judicial review for conformity with

35 Anayasa Mahkemesi, E.: 2006/111, K.: 2006/112, K.T.: 15/12/2006 [Constitutional Court, 15 Dec. 2006, Decision number: 2006/112].

36 See generally MULLEN, P. M., "Is It Necessary to Ration Health Care?", **Public Money and Management**, Vol. 18(1), pp. 52-58.

37 Anayasa Mahkemesi, E.:2008/16, K.: 2008/116, K.T.: 05/06/2008 [Constitutional Court, 5 June 2008, Decision number: 2008/116].

the unamendable provisions of the Constitution and, if found to contradict wish such provisions, can be annulled by the Constitutional Court. From this perspective one can assume that any Parliamentary majority could not simply just amend the Constitution so as to alter, nullify or cause an unjudicable condition for the realization of, for example, the social and economic rights. Such amendments would be seen as in contradiction of the characteristic notion of the welfare state, which is governed by the rule of law and respect for human rights.

Equally, one of the peculiarities of the Turkish Constitution is that while on the one hand it prohibits the legislature to amend the constitutional provisions with close linkage with the unamendable Article that characterize the Turkish State as a welfare state, on the other it permits it by allowing it to exercise its discretionary power in the realization of the social and economic rights. Unfortunately, the Constitutional Court has tried to cope with this peculiarity by compromising between the notion of welfare state and the legislature's discretionary power in the realization of its duties. If judicial protection cannot be afforded to these social and economic rights, at least at a minimum level, one of the unamendable constitutional characteristics of the Turkish Republic face becoming a constitutional absurdity. As is well known, as the evolution of both the welfare state and social and economic rights are historically entwined and overlap, constitutional controversies on the realization of social and economic rights would always bring the notion of the welfare state into the limelight.³⁸

III. Regulatory Power of Administration on the Extent of Public Healthcare Insurance System

At the outset, an explanation of the administrative regulatory power of the legislature in the Turkish legal system will prove helpful. The Constitution has reserved the primary law-making authority for the legislature.³⁹ Except for the provisions under martial law, the government or the executive has no autonomous law-making authority. Administrative law-making authority must always depend on and be within the scope of rights of the legislature. Therefore, the administrative regulations cannot be inconsistent with legislative law. The boundaries of law-making authority, delegated by legislation to administrative agencies, are arcane and critical issues that are encountered in the study of the Turkish administrative and constitutional law. Mapping the boundaries of the administrative regulatory power to discern some general and decisive criterions that are acceptable for all regulatory subjects is almost impossible in the Turkish legal system. However, the decisions of the administrative courts indicate a judicial tendency in each regulatory subject.

The majority of the litigation procedures commenced by the healthcare beneficiaries are against the SSPC. These are mainly due to its decision to ensue the regulations that curb the healthcare costs under the social security system. In light of the

38 YILMAZ, 2011, pp.79-87.

39 Art.'s 7, 115, 124 of the Constitution.

constitutional provisions, the Council of State (*Conseil d'Etat*), the highest administrative court in Turkey, almost always interpret the legislation and the administrative regulations in favor of the healthcare beneficiaries. In doing so, it does not always explicitly rely on the aspect of an individual's constitutional right to healthcare and social security.

Such propensity by the Council of State is exemplified in some of its landmark cases concerning the regulations that rationed disabled individuals' needs of rehabilitation. In one of its leading cases, the Council of State reviewed the administrative regulation that stipulated an age limit (up to twenty-one) for disabled individuals' rehabilitation by the public service rehabilitation institutions.⁴⁰ And another involved the assessment of the administrative regulation that imposed surcharges on parents who had financial capacity to recompense for the rehabilitation of their mentally disabled child.⁴¹ Even though Article 65 of the Constitution and the scarcity of resources, in both cases, formed the foundations of the arguments, and also formed an important part of the defense teams' submissions in favor of the administrative regulations, the Council of State held each of the disputed regulations as unlawful. Deliberating on these cases, the Council of State had initially considered the effects of Article 61 of the Constitution, which defines the State's duty to undertake measures. Such measures, it considered, should extend to form a positive obligation on the State for the protection of the incapacitated and elderly citizens. The Council of State further noted that the power of restriction rests on the legislature and that such authority can only be exercised with an Act of Parliament. Therefore, the Council of State annulled the relevant administrative regulation on the basis that it reached beyond the limits of the powers conferred upon it.

These judicial decisions reveal the necessity for such restrictions, particularly concerning right to health and social security, to be embodied and adopted by a more serious and transparent legislative public policy-making process. The authority to emplace restrictions on basic individual rights rests on the legislature in modern democratic societies. These judicial decisions further substantiate the notion that the primal authority with the power to exercise restrictions on basic constitutional rights, like the right to health and social security, rests upon the legislature within the Turkish constitutional system. Unless the legislature sets the main and general provisions of the restrictions with an act of Parliament, neither the government nor an administrative body are authorized to implement regulations with the intention to restrict the enjoyment of those rights.⁴²

40 Danıştay, 8. Daire, E.:2003/614, K.: 2004/1921, K.T.: 22/04/2004 [Counsel of State, 8th Division, 22 Apr. 2004, Decision number: 2004/1921]. All the decisions of Counsel of State cited in this article are accessible with division and decision number at < <http://emsal.danistay.uyap.gov.tr/VeriBankasiIstemciWeb/> > visited on 16 Jan. 2016.

41 Danıştay, İ.D.D.K., E.: 2000/401, K.: 2000/938, K.T.: 03/07/2000 [Counsel of State, Plenary Session of the Administrative Law Divisions, 03 July 2000, Decision number: 2000/938].

42 See also Danıştay, 11. Daire, E.: 2002/75, K.: 2005/2348, K.T.: 06/05/2005 [Counsel of State, 11th Division, 6 May 2004, Decision number: 2005/2348].

The argument of scarcity of resources did form the basis of the argument in a similar case, in which the claimants sought compensation for the death triggered by the rabies vaccine. The claimants argued that the health administration had breached its duty by delivering low quality vaccine that jeopardized the health of the general public. The Council of State acknowledged that the vaccine had been low quality and carried certain health risks. It held that health administration were under a constructive obligation to provide for use less perilous vaccine, dismissing the arguments of scarcity or resources by the defence as futile in situations where one's life is at stake.⁴³

In a similar case involving the SSPC, where it rejected payment for a more qualified and costly heart stent for treatment, the Council of State broadened the parameters of these rights even further. The health care specialists involved in the treatment of the patient in this case confirmed the need for use of this particular apparatus as a medical necessity due its special circumstances. The Council of State invalidated the SSPC's decision to refuse to meet the expenses reflecting on the expert medical report justifying the need to use a more qualified type of hearth stent for a medically successful treatment.⁴⁴ This case clearly established a judicial precedent, where the right to health care now extends and cover the right to a more qualified treatment whenever medically necessary, and that the request for payment of such expenses cannot be declined or limited even if such treatment were delisted from the healthcare coverage by the SSPC.⁴⁵

All the above cases expose one particular fact; that the general notion of the right to healthcare has not always establish itself as a prime element and the natural extension of an unamendable constitutional right in Turkey⁴⁶. Even if the right is enshrined in the Turkish Constitution, the disputes have overwhelmingly been settled on the basis of a wider concept of public services and the necessities of a welfare state.

Conclusions

The Constitutional provisions have established the general framework of the Turkish healthcare and social security system. Such provisions clearly reject, in the context

43 Danıştay, 10. Daire, E.: 1995/7086, K.:1996/7534, K.T.: 14/11/1996 [Counsel of State, 10th Division, 14 Nov. 1996, Decision number: 1996/7534]. For other similar decisions *see* Danıştay, 15. Daire, E.: 2013/2602, K.: 2015/5720, K.T.: 07/10/2015 [Counsel of State, 15th Division, E.: 2013/2602, 07 Oct. 2015, Decision number: 2015/5720]; Danıştay, İ.D.D.K., E.:1998/816, K: 1997/1, K.T: 17/01/1997 [Council of State, Plenary Session of the Administrative Law Divisions, 17 Jan. 1997, Decision number: 1997/1]; Danıştay, 10. Daire, E.: 1995/665, K.: 1997/801, K.T.: 11/03/1997, [Counsel of State, 10th Division, 11 Mar. 1997, Decision number: 1997/801].

44 Danıştay, 2. Daire, E.: 2004/2524, K.: 2006/970, K.T.: 27/03/2006 [Counsel of State, 2nd Division, 27 Mar. 2006, Decision number: 2006/970]. See also, Danıştay, 2. Daire, E.: 2010/3155, K.:2010/3904, K.T.: 20/10/2010 [Counsel of State, 2nd Division, 20 Oct. 2010, Decision number: 2010/3904].

45 SSPC must not pay the costs of medicines and medical devices which are not licensed by Ministry of Health. See Danıştay, 11. Daire, E.: 2003/4371, K.: 2006/781, K.T.: 22/02/2006 [Counsel of State, 11th Division, 22 Feb. 2006, Decision number: 2006/781].

46 In some cases, Counsel of State heavily relies on the individual's constitutional right to healthcare and social security. See, Danıştay, 15. Daire, E.: 2013/2602, K.: 2015/5720, K.T.: 07/10/2015 [Counsel of State, 15th Division, 07 Oct. 2015, Decision number: 2015/5720].

of healthcare services, the free market-based ideas. These services have always been considered in the framework of social and economic rights.

The Turkish constitutional system has no decisive provision precluding the Constitutional Court from reviewing the legislative laws pertaining to rationing or abolishing public services, considering its purpose is to realize these social and economic rights. There remain doubts as to whether the legislature explicitly exercises its discretionary powers to confine and limit judicial intervention on legislative acts on rationing the healthcare services. This may relatively be true in practice. However, even if such discretionary authority stem from the powers conferred by the Constitution, the Constitutional Court has played an intriguing role in restricting such discretionary power. While the Court has exercised the notion of checks-and-balances to emulate a judicial perception of what the right to healthcare services should entail, on the contrary, its failure to create real economic values exposes it to severe criticisms. This may be seen that judicial decisions aiming at realization of social and economic rights are exercised in vain. This is rationalized to the extent that lack of resources would generally mean financial limitations to recourses, as it requires a substantial increase in the social service expenditures. Therefore a contrary perceptive argument is; better services require either increase in taxes or an imbalance in government budget effectively leading to the mismanagement of the State's economy. In deducing the current paradigm one can only conclude that by embroiling the courts in the realization of social and economic rights has inevitably allowed the judiciary with immense flexibility and opportunity to shape the legislature's will. Such predisposition can certainly be unacceptable when considering the nature of the judicial function.

However, the Turkish constitutional framework of the notion of welfare state is considered as a coercive inspiration for the Constitutional Court to oversee the decisions of the legislature. The legislature's decisions are politically motivated, particularly in respect to the distribution of scarce resources earmarked for the healthcare services. In other words, the constitutional framework containing an unamendable and rigid characteristic of a welfare state in contrast with the flexible social and economic rights creates an impasse and thereby impels the Constitutional Court to embroil in policy choices and management of scarce resources allocated to the healthcare services. In this abnormal constitutional design the Constitutional Court always had the risk of moving beyond its judicial function when ruling on matters concerning social and economic rights. In doing so keeps these rights as tangible constitutional value and venerable part of the Constitution which otherwise face the risk of gradual deterioration.

The Constitutional Court judgments have, after all, the aptitude to directly and indirectly affect the legislative policy-making progress. For instance, some of the provisions of the latest social security reform act by the legislature concerning the rationing of the healthcare services were endorsed and found to be compatible by the Constitutional Court with the criteria it set in its formative case law. This illustrates the effectiveness of the Constitutional Courts role in delivering justice by simply interpreting the

Constitution. The *obiter dicta* of the Constitutional Court decisions have helped in shaping the meaning of the term welfare state. Such thorough description has had a major affect on other courts as well. Inevitably, the Judiciary has played a key role in defining the dimensions and the connections between the State's duties with the general rights concerning the healthcare system.

There is a resilient right-based approach to healthcare disputes. More interestingly, in healthcare disputes, the administrative courts have shown a tendency to use the logic of "*public service*", as the principles of such concept provide the more convenient means of settling the dispute arising from the healthcare services. The established connections between the rights and the state' duties indicate the presence of social solidarity between the general society when the subject matter relates to healthcare and social security. The majority of the Turkish society has always considered that preserving or expanding on these rights ought to be the natural and primary objective of politics. Unfortunately, Turkish political parties would never publicize the details of their plans for rationing healthcare services until they gain a parliamentary majority. Hence, judicial involvement in rationing healthcare services can be seen as the counteracting factor in shaping the premise of political decisions, which in the public's opinion is a benign behavior.

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