

THE LEGAL AID IN TURKISH ADMINISTRATIVE PROCEDURE LAW IN THE LIGHT OF THE ECHR CASE-LAW

İham İctihatları Işığında Türk İdari Yargılama Hukukunda Adli Yardım

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Research Article

Abstract

The ability of individuals to apply to the judicial way is important in terms of guaranteeing their fundamental rights and freedoms. In particular, the existence of this legal guarantee becomes more meaningful in terms of legal relations between the individuals and administration who have the privilege of using public power while performing their duties assigned by positive legal rules. At this point, besides the independence and impartiality of the judiciary, accessing the judicial path also appears as a requirement of the right to a fair trial. So that the right to a fair trial can find application in the legal relations between individuals as well as in public law relations between the administration and individuals. In this sense, it should be stated that the legal aid institution in Turkish administrative procedure law has an important value in terms of the right of access to court within the framework of the right to a fair trial. Nevertheless, the decisions of the European Court of Human Rights (ECHR) should be examined to better understand the legal aid institution and ensure the conceptual integrity within the framework of the right to a fair trial. In this direction, the study will examine how the legal aid institution's theoretical foundation is determined, and in the light of judicial decisions, how it relates to the fundamental rights and freedoms of individuals.

Keywords Right to a Fair Trial, Right to Access to Court, Legal Aid, Administrative Regime, Administrative Case

Özet

Bireylerin yargısal yola başvurabilmesi, temel hak ve hürriyetlerinin güvence altına alınması noktasında önem arz etmektedir. Özellikle, bu yasal güvencenin varlığı, pozitif hukuk kurallarıyla kendisine verilen görevleri yerine getirirken kamu gücünü kullanma ayrıcalığına sahip olan idare ve bireyler arasındaki hukuki ilişkiler açısından daha anlamlı hale gelmektedir. Bu noktada yargının bağımsızlığı ve tarafsızlığı yanında yargısal yola erişebilmek de adil yargılanma hakkının bir gereği olarak karşımıza çıkmaktadır. Öyle ki adil yargılanma hakkı, bireyler arasındaki hukuki ilişkilerin yanında idare ile bireyler arasındaki kamu hukuku ilişkilerinde de uygulama alanı bulabilmektedir. Bu anlamda Türk idari yargılama hukukunda adli yardım müessesinin adil yargılanma hakkı çerçevesinde mahkemeye erişim hakkı bakımından önemli bir değer taşıdığı ifade edilmelidir. Bununla birlikte adil yargılanma hakkı çerçevesinde adli yardım müessesinin daha iyi kavranabilmesi ve kavramsal bütünlüğün sağlanabilmesi adına, İnsan Hakları Avrupa Mahkemesinin vermiş olduğu kararların da irdelenmesi gerekmektedir. Bu doğrultuda çalışmada, adli yardım müessesinin teorik temelinin ne olduğu belirtilerek, yargı kararları ışığında, bireylerin temel hak ve hürriyetleriyle bağıntısının ne şekilde kurulduğu irdelenecektir.

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INTRODUCTION

The modern human rights doctrine does not only deal with human rights at an abstract level with unreasonable demands¹. Besides, human rights do not only correspond to an “*abstract value*” but also “*particular social practices to realize those values*”². In this sense, in a system where the rule of law exists, the concept of “*right*” will have gained a real meaning³. The rule of law, as a modern concept, represents an ideal order in which “*the fundamental rights and freedoms of individuals*” are protected⁴. The right to a fair trial within this order, represents an “*important element*” in terms of the exercise of other fundamental rights and liberties of individuals⁵. Especially, as a result of the increasing duties imposed on the modern state, the fundamental freedoms of individuals “*can be affected*” by the administrative activities carried out. However, the fundamental nature of human rights also requires that any illegal administrative action be taken against them⁶. In this sense, some legal mechanisms have been envisaged to provide the right of access to the court to eliminate the damages arising from these activities, one of which is legal aid.

In some international human rights treaties, it is seen that the legal aid institution has found application especially in the field of criminal law⁷. For example, International Covenant on Civil and Political Rights (ICCPR⁸) Article 14, paragraph (3) (Art.14/3) “*In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (...) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not*

¹ Beitz, Charles R., *The Idea of Human Rights*, Oxford University Press, New York, 2009, p.30.

² Donnelly, Jack, *Universal Human Rights in Theory and Practice*, 3. Edition, Cornell University Press, Ithaca and London, 2013, p.11.

³ According to, The Universal Declaration of Human Rights (UDHR) Preamble, paragraph (3) “*Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law*”. See for full text: (https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf), Date of access:03.03.2020. See also; Sellers, Mortimer, “*An Introduction to the Rule of Law in Comparative Perspective*”, (Ed. Sellers, Mortimer/ Tomaszewski, Tadeusz), Springer, Dordrecht, 2010, p.1.

⁴ Özenç, Berke, *Hukuk Devleti Kökenleri ve Küreselleşme Çağındaki İşlevi*, İletişim Yayınları, İstanbul, 2014, p.231.

⁵ İnceoğlu, Sibel, *İnsan Hakları Avrupa Mahkemesi Kararlarında Adil Yargılanma Hakkı*, 4. Edition, Beta Yayıncılık, İstanbul, 2013, p.1.

⁶ Erdoğan, Mustafa, *İnsan Hakları Teorisi ve Hukuku*, 3. Edition, Hukuk Yayınları, Ankara, 2019, p.116.

⁷ Capelletti, Mauro, “*Legal Aid in Europe: A Turmoil*”, *American Bar Association Journal*, Vol.60, No.2, 1974, p.207.

⁸ See for full text: (<https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>), Date of access:03.03.2020.

have legal assistance, of this right; and to have legal assistance assigned to him, in any cases where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it". Again, it is seen that the UDHR Art.11/1, "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence". However, it is possible to come across international treaties that evaluate the concept of legal aid within a broader framework: for example, 1951 Convention Relating to the Status of Refugees⁹ Art.16/2, "A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautio judicatum solvi*". In this respect, it can be stated that the scope of the "right to a fair trial and the field of application" are handled in different ways in international human rights treaties.

However, in regional human rights treaties; in particular, when the provisions of the ECHR Art.6/1 and Art.6/3 are evaluated together, "Everyone charged with a criminal offence has the minimum rights: (...) (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require". This provision parallels the International Covenant on Civil and Political Rights Art.14 provision in this sense¹⁰.

In the same direction, when looking at the 47th article of the European Charter of Fundamental Rights; "Everyone is entitled to a fair and public hearing within a reasonable time limit by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice"¹¹. In this sense, as stated in the European Agreement on the Transmission of Applications for Legal Aid¹² Art.1, individuals may also benefit from legal aid in terms of administrative issues. Likewise, when African Charter on Human and Peoples' Right Art.6 and Art.7/1¹³ and the American

⁹ See for full text: (<https://www.unhcr.org/3b66c2aa10>), Date of access:03.03.2020.

¹⁰ Endicott, Timothy, Administrative Law, 4. Edition, Oxford University Press, Oxford, 2018, p.181.

¹¹ In parallel with this provision, it is seen that the decisions made by the Court of Justice of the European Union (ECJ) are emphasized that the legal aid institution is an essential element in terms of providing access to the court. Varadi, Agnes, "The Concept of Legal Aid in the Most Recent Case Law of ECJ", Hungarian Yearbook of International Law and European Law, 2015, p.462.

¹² See for full text: (<https://rm.coe.int/1680077322>), Date of access:11.03.2020.

¹³ African Charter on Human and Peoples Rights Art.6 "Every individual shall have the

Convention on Human Rights Art.8/1¹⁴; it can be mentioned that the right to a fair trial has the opportunity to apply on a larger scale and that the legal aid institution can be applied within this scope. In this context, it can be stated that the positive obligation of the state is at the forefront in the Inter-American and African regional human rights treaties in terms of the right to a fair trial and to benefit judicial protection¹⁵. Therefore, when evaluated from “*the right to a fair trial*”, it can be mentioned that “*the legal aid*” institution can find application in terms of “*administrative procedure law*” and this has a legal basis in human rights treaties.

In this sense, it can be said that the right to a fair trial has a close relationship with individuals’ other fundamental rights and freedoms. Indeed, in a legal system where there is no right to a fair trial, the concept of the state of law constitutes an “*illusion*”¹⁶. So, in this context, “*European Convention on Human Rights (“Convention”) is one of the best contexts in which to analyse the rule of law as an international law concept*”¹⁷. However, Art.6 of the Convention assurance can be applied “*in the presence of a dispute regarding civil rights and obligations or a criminal charge*”. Therefore, the content of the expression “*being related to civil rights and obligations*” should be determined. It should be stated whether the Art.6 of the Convention can find application in terms

right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained”. African Charter on Human and Peoples Rights Art.7/1 “Every individual shall have the right to have his cause heard. This comprises: a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; b) the right to be presumed innocent until proved guilty by a competent court or tribunal; c) the right to defence, including the right to be defended by counsel of his choice; d) the right to be tried within a reasonable time by an impartial court or tribunal”.

¹⁴ The American Convention on Human Rights Art.8/1 “*Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature*”.

¹⁵ Burbano-Herrera, Clara/Viljoen, Frans, “Interim Measures Before the Inter-American and African Human Rights Commissions: Strengths and Weaknesses”, Human Rights and Civil Liberties in the 21st Century (Ed. Haack, Yves/Brems, Eva), Springer, Dordrecht, 2014, p.166.

¹⁶ See. Madsen, Mikael R., “The Protracted Institutionalization of the Strasbourg Court: Legal Diplomacy to Integrationist Jurisprudence”, The European Court of Human Rights between Law and Politics (Ed. Christoffersen, Jonas/Madsen, Mikael R.), Oxford University Press, USA, 2011, p.54.

¹⁷ Lautenbach, Geranne, The Concept of the Rule of Law and The European Court of Human Rights, Oxford University Press, Oxford, 2013, p.3.

of disputes between the administration and the individual¹⁸. In this direction, before examining the legal aid concept in administrative procedure law within the framework of the rule of law principle, it is necessary to explain the connection of this concept with its right to a fair trial.

1. Theoretical Basis of the Right of a Fair Trial-Legal Aid Relation: Under the Art.6 of the Convention

In fact, in terms of legal disputes arising from the decisions made by the administrative authorities, it can be mentioned that the provision of Art.6 of the Convention does not apply in general¹⁹. However, the meaning given by the national legal systems to the concept of civil rights and obligation in domestic law is not binding in terms of the European Court of Human Rights (“ECHR”), and in this sense it emerges as an autonomous concept²⁰. Indeed, although the content of the right to a fair trial in terms of various international treaties may be uncertain²¹; it can be stated that the right should not be handled in the narrow sense of the ECHR in terms of dynamic interpretation. In this regard, “*state of being related to civil rights and obligations*” could be the subject in terms of legal relations between the administration and private persons²². In this context, it can be mentioned that there is a legal relationship regarding civil rights and obligations, for example, concerning granting of building permits or operating license²³ or regarding professional activities²⁴. Especially considering the concept of “*right to good administration*” within the framework of ECHR-EU case law relationship²⁵; it is possible for individuals to make a request

¹⁸ Endicott, p.181. Also see; Sever, Tina, “Procedural Safeguards Under The European Convention on Human Rights in Public (Administrative) Law Matters”, Danube: Law, Economics and Social Issues Review, Vol.9, No.2, 2018, p.99.

¹⁹ Wade, H. W. R./Forsyth, Christopher F., Administrative Law, 11. Edition, Oxford University Press, Oxford, 2014, p.379.

²⁰ Wright, Jane, Tort Law and Human Rights, Hart Publishing, Oxford, 2001, p.150; İnceoğlu, İnsan Hakları Avrupa Mahkemesi Kararlarında Adil Yargılanma Hakkı, p.21.

²¹ Keller, Helen/Ulfstein, Geir, “Introduction”, UN Human Rights Treaty Bodies Law and Legitimacy (Ed. Keller, Helen/Ulfstein, Geir), Cambridge University Press, Cambridge, 2012, p.8.

²² Seerden, René/Stroink, Frits, “Administrative Law in the Netherlands”, Administrative Law of the European Union, its Member States and the United States: A Comparative Analysis (Ed. Seerden, René/Stroink, Frits), Intersentia, Antwerpen, 2002, p.175.

²³ ECHR. Sine Tsagarakis A.E.E. v. Greece, App. No.17257/13, 23.05.2019, para.37 et seq. (<https://hudoc.echr.coe.int/eng#%7B%22documentcollectionid%22:%5B%22GRANDCHAMBER%22,%22CHAMBER%22%5D,%22hereafter%22:%5B%22HUDOC%22%5D,%22dateofaccess%22:%5B%2203.03.2020%22%5D%7D>), Hereafter: HUDOC Database), Date of access:03.03.2020.

²⁴ İnceoğlu, Sibel, “Adil Yargılanma Hakkı”, İnsan Hakları Avrupa Sözleşmesi ve Anayasa (Ed. İnceoğlu, Sibel), 3. Edition, Beta Yayıncılık, İstanbul, 2013, p.210.

²⁵ Schwarze, Jürgen, “Judicial Review of European Administrative Procedure”, Law and Contemporary Problems, Vol.68, No.1, 2004, p.88.

for the good functioning of the administration, as well as to benefit from an effective judicial remedy in cases where this functioning is not provided. In this context, it can be stated that the right to a fair trial can be applied in terms of administrative procedure law²⁶.

The right to a fair trial, which has an important place in terms of the use of other civil and political rights, includes, above all, the “*right to appeal to an independent and impartial tribunal*” to the extent that it has a legal interest by individuals and requires a positive action by the state to ensure this²⁷. Therefore, it is observed that those who cannot pay the costs of lawsuits are provided with the opportunity to benefit from the legal aid institution in order to make it easier for people to file a lawsuit within the scope of the right to legal remedies²⁸. In other words, “*Legal aid is often an essential element for the effective protection of rights. This is particularly true in instances in which the person needs of financial support finds him- or herself already in a structurally weaker position than the other party, for example in cases in which a citizen faces the government*”²⁹. In this sense, there is a tight connection between the right to access to court and the legal aid institution in the context of the right to a fair trial³⁰. Because the right to a fair trial in a legal order that does not have the right to access to the court will not express any value in terms of individuals³¹. According to the Constitutional Court of the Republic of Turkey (abbreviated as “*TCC*”), it is seen that the applications of those who claim that the heavy conditions of the lawsuit; have been evaluated within the scope of the right to access the court as an element of the right to a fair trial³². Therefore,

²⁶ Lavrysen, Laurens, “Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequate Protect ECHR Rights”, Human Rights and Civil Liberties in the 21st Century (Ed. Haec, Yves/Brems, Eva), Springer, Dordrecht, 2014, p.113.

²⁷ Palmer, Ellie, Judicial Review, Socio-Economic Rights and the Human Right Act, Hart Publishing, Oxford, 2007, p.20.

²⁸ Turkish Council of State 10th Chamber (“*Danıştay 10. Daire*”, Hereafter: “*D10D.*”), Docket No. (E.) 2008/1136, Judgment No. (K.) 2011/4131, Decision Date (T.) 10.10.2011, Journal of Turkish Council of State (Danıştay Dergisi), Issue:130, p.372. These abbreviations will be taken as basis in terms of the references made in the continuation of the study.

²⁹ Gruodyté, Edita/Kirchner, Stefan, “Legal aid for intervenors in proceedings before the European Court of Human Rights”, International Comparative Jurisprudence, Vol.2, No.1, 2016, p.36.

³⁰ ECHR. Golder v. United Kingdom, App. No:4451/70, 21.02.1975, Series A, No.18, para.25-26, HUDOC Database, Date of access:03.03.2020; ECHR. Airey v. Ireland, App. No:6289/73, 09.10.1979, Series A, No.32, para.26, HUDOC Database, Date of access:03.03.2020. See also. Lavrysen, p.119.

³¹ Dembour, Marie-Bénédicte, Who Believes in Human Rights? Reflections on the European Convention, Cambridge University Press, Cambridge, 2006, p.21.

³² The Constitutional Court of the Republic of Turkey (“*TCC.*”) Application of (App. of) Sadegül Baykuş and Devrimci Sağlık İşçileri Sendikası, App No:2014/2197, 21.09.2017, para.35, (<https://kararlarbilgibankasi.anayasa.gov.tr>, Hereafter: TCC Decisions Database),

it can be mentioned that the legal aid institution should be in legal order to say that the right to a fair trial is provided in real terms and that the state has a positive obligation in this regard³³. In particular, it is understood the necessity of such practice in the face of high judicial expenses and some defenses require effective legal aid³⁴.

2. The Concept of Legal Aid in the Light of Right to a Fair Trial in Positive Law

It is observed that human rights are not only comprehensively coded in international law anymore, but they also appear in the country's legal system³⁵. Accordingly, it is seen that the concept of legal aid in the context of the right to a fair trial is regulated in various national constitutions³⁶. Therefore, it can be said that, there is a positive basis in some national legal systems in parallel with the international documents of the legal aid institution within the scope of the right to a fair trial³⁷. Accordingly, when considered in terms of Constitution of the Republic of Turkey ("*Constitution of 1982*")³⁸, the right to access to the court, which is one of the elements of the right to a fair trial, regulated in Art.36

Date of access:03.03.2020.

³³ Van As, Hennie, "Legal Aid in South Africa: Making Justice Reality", Journal of African Law, Vol.49, No.1, 2005, p.54.

³⁴ Stavros, Stephanos, "Fair Trial in Emergency Situations", The International and Comparative Law Quarterly, Vol.41, No.2, 1992, p.355. See also; ECHR. Mikhaylova v. Russia, App. No:46998/08, 19.11.2015, para.78, HUDOC Database, Date of access:03.03.2020.

³⁵ Tambakaki, Paulina, Human Rights, or Citizenship?, Birkbeck Law Press, USA, 2010, p.3.

³⁶ For example, according to Art.49 of the Venezuelan Constitution of 1999, "*All judicial and administrative actions shall be subject to due process, therefore: Legal assistance and defense are inviolable rights at all stages and levels during the investigation and proceedings*". See for full text: (https://www.constituteproject.org/constitution/Venezuela_2009.pdf?lang=en), Date of access:03.03.2020. According to Art.48 of the Constitution of the Russian Federation in 1993, "*Everyone shall be guaranteed the right to qualified legal assistance. In the cases envisaged by law, legal assistance shall be provided free of charge*". See for full text: (https://www.constituteproject.org/constitution/Russia_2014.pdf?lang=en), Date of access:03.03.2020. In accordance with Art.27 of the Croatian Constitution of 1991, "*The Bar, as an autonomous and independent service, shall provide everyone with legal aid, in conformity with law*". See for full text: (https://www.constituteproject.org/constitution/Croatia_2013.pdf?lang=en), Date of access:03.03.2020. See also; ECHR. Granos Organicos Nacionales S.A. v. Germany, App. No:19508/07, 24.09.2012, para.17-18, HUDOC Database, Date of access:03.03.2020. Also see. Rønning, Olaf H., "Legal Aid in Norway", Outsourcing Legal Aid in the Nordic Welfare States (Ed. Rønning, Olaf H./Hammerslev, Ole), Palgrave Macmillan, Switzerland, 2018, p.22.

³⁷ See also; Bedos, Jean Luc, "Acil Haklar: Fransa'da Yurttaşların Hukuki Bilgilere Erişimi" (transl. by Kaya, Cemil), Union of Turkish Bar Associations Review (TBBD), No.83, 2009, p.397.

³⁸ See for full text: (https://global.tbmm.gov.tr/docs/constitution_en.pdf), Date of access:03.03.2020.

of the Constitution of 1982³⁹; to be fully realized, it is stated that financial convenience should be provided to the persons who are unable to pay the necessary trial expenses without any financial difficulties or in accordance with the principle of the social state⁴⁰. In this context, the realization of the social state principle will be made possible by the legal aid institution⁴¹. For example, individuals may benefit from legal aid in certain cases in terms of lawsuits arising from disputes arising from the cadastral procedures established by the administration in accordance with Art.25 of Cadaster Law No.3402⁴² or the procedures established regarding the legal status of foreigners in accordance with Art.81 of Foreigners and International Protection Law No.6458⁴³.

As for the Turkish administrative procedure law, the concept of legal aid is included in Art.334 of the Law No. 6100 on the Civil Procedures Law (“Law No. 6100⁴⁴”), depending on the reference made by Art.31 of the Law No. 2577 on the Administrative Procedure Law (“Law No. 2577⁴⁵”). In accordance with this article, it was stated that “*those who lack the ability to pay the necessary trial or follow-up expenses partially or completely without making the livelihood of himself and his family considerably difficult*”, “*beneficial associations and foundations*” and “*foreigners depending on the condition of reciprocity*” can benefit from legal aid⁴⁶. In this context, a decision must be made by the administrative court in order for a natural person to be included in the category of “*those who lack the ability to pay the necessary trial or follow-up expenses partially or wholly without making the livelihood of himself and his family considerably difficult*”⁴⁷. In this sense, to benefit from “*legal aid*”, which is also called “*the right of poor persons*”⁴⁸ in comparative law and to

³⁹ Constitution of 1982 Art.36 “*Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures. No court shall refuse to hear a case within its jurisdiction*”.

⁴⁰ TCC. App. of Rıdvan Uzuntok, App. No:2014/17300, 21.11.2017, para.43, TCC Decisions Database, Date of access:03.03.2020.

⁴¹ TCC. App. of Rıdvan Uzuntok, para.42.

⁴² RG.09.07.1987-19512.

⁴³ RG.11.04.2013-28615.

⁴⁴ RG.04.02.2011-27836.

⁴⁵ RG.20.02.1982-17580.

⁴⁶ For the distinctions made in this issue, see; Atalay, O., Pekcanitez Usûl Medenî Usûl Hukuku, 15. Edition, Istanbul, 2017, p.2415.

⁴⁷ See also; Turkish Council of State Plenary Session of the Administrative Law Chambers (“*Danıştay İdari Dava Daireleri Kurulu*”, Hereafter: “*DİDDK*.”) E.2018/722, K.2018/1125, 21.03.2018, (<https://www.lexpera.com.tr>), Date of access:03.03.2020; D10D. E.2009/16671, K.2013/2098, 11.03.2013, (<https://www.lexpera.com.tr>), Date of access:03.03.2020; D10D. E.2009/3442, K.2013/1174, 15.02.2013, (<https://www.lexpera.com.tr>), Date of access:03.03.2020; D10D. E.2010/3571, K.2013/901, 12.02.2013, (<https://www.lexpera.com.tr>), Date of access:03.03.2020.

⁴⁸ Petrescu, Oana-Măriuca, “Ensuring Equal Legal Aid to the Citizens in the European

fall into the category in question, individuals must make clear requests to the court in this direction and present documents indicating that they are not in a position to cover their costs⁴⁹.

Considering the decisions made by the TCC, it is seen that, in the request of the individuals who are understood to lack the power to pay the judicial expenses without making their livelihood substantially difficult, it is necessary to decide on the acceptance of the legal aid request that does not clearly lack support⁵⁰. Therefore, in order for the legal aid request to be accepted; “(i). *the applicant cannot pay the necessary trial costs partially or completely, without significantly undermining his or her family's livelihood, (ii). their demands should not be groundless*”⁵¹. In other words, Art.31 of Law No. 2577 states that the provisions of the Civil Procedure Law will be applied in cases where there is no provision in this law, in the cases of experts, discovery, evidence, judgment expenses and legal aid, but the nature of administrative disputes referred by the administrative judge and it is clear that it should be applied to the extent that it complies with the administrative procedure⁵². Based on the case file, the Turkish Council of State (“*Council of State*”) has decisions that reveal that the person's poverty can be understood⁵³. In this context, it can be stated that the Council of State accepts requests for legal aid in cases where its conditions “*coexist*”: (i). has no clear violation of its claims and defenses, (ii). documentation of the condition of poverty⁵⁴.

3. Explaining the Purview of the Legal Aid

Legal aid can be expressed as a legal opportunity for the persons, if required by the economic and social situation⁵⁵. However, it can be stated in the ECHR

Procedural Law”, Acta Juridica Hungarica, Vol.55, No.1, 2014, p.57.

⁴⁹ Atalay, Pekcanitez Usûl, p.2423-2424.

⁵⁰ TCC. App. of Tuncay Gürsen, App. No:2016/35379, 15.01.2020, para.16, TCC Decisions Database, Date of access:03.03.2020.

⁵¹ TCC. App. of Sabri Çetin, App. No:2103/3007, 06.02.2014, para.31, TCC Decisions Database, Date of access:03.03.2020.

⁵² D2D. E.2018/4013, K.2019/1520, 28.03.2019, (<http://www.kazanci.com/kho2/ibb>), Date of access:20.02.2020.

⁵³ D15D. E.2012/335, K.2013/1490, 21.02.2013, (<https://www.lexpera.com.tr>), Date of access:03.03.2020; D15D. E.2013/311, K.2013/1491, 21.02.2013, (<https://www.lexpera.com.tr>), Date of access:03.03.2020.

⁵⁴ D15D. E.2013/100, K.2013/1943, 14.03.2013, (<https://www.lexpera.com.tr>), Date of access:03.03.2020.

⁵⁵ In this sense, depending on the socio-economic situation of individuals, the field of application of legal aid may arise in the form of benefiting from the assistance of a lawyer or meeting the costs of the trial. See; Karan, Ulaş, Uluslararası İnsan Hakları Hukuku ve Anayasa Hukuku Işığında Eşitlik İlkesi ve Ayrımcılık Yasağı, On İki Levha Yayıncılık, İstanbul, 2017, p.416-417.

judgments that the expression “*findings and the particular circumstances of the present case*”⁵⁶ is at the forefront. In other words, the legal opportunity in question will not be evaluated in a way that will be applied to every person and in any case, and will be handled by considering the economic and social situation of the person⁵⁷. Especially, if the person is under a burden that would not be expected to be legally folded, then this person's failure to benefit from legal aid will violate the provisions of Art.6/1 of the Convention⁵⁸. Undoubtedly, if there is an illegitimate request, the absence of legal aid in this case will not violate the provision of Art.6 of the Convention⁵⁹.

It should be noted that in countries that adopt the administrative regime, the administration’s ability to establish certain procedures using public force requires that individuals whose rights or interests are affected have access to the court⁶⁰. Essentially, within the framework of the rule of law, individuals need to have access to the judicial remedy against the administration’s actions. In addition, in some cases, individuals may be able to benefit from legal aid under Art.6 of the Convention in order to effectively defend their claims by actively participating in the administrative proceedings⁶¹. Indeed, the *Siałkowska v. Poland* decision by ECHR emphasized this issue; “*an effective exercise of the right of access to a court required that the legal aid system should be organized in such a way as to make access to legal aid both transparent and effective*”⁶². Accordingly, although some conditions are envisaged, such as the possibility of winning the case in terms of benefiting from legal aid⁶³, an evaluation should be made by the judicial body, primarily considering the economic situation of individuals. In this respect, the decision of *İlbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey*, which was given by the ECHR on this issue, was the subject of the applicants’ death when her seven-year-old son died after trying to return home alone due to bad weather conditions. Requests for assistance were rejected by the administrative court “*without any particular reason, only*

⁵⁶ ECHR. *Hood v. The United Kingdom*, App. No:27267/95, 18.02.1999, para.78, HUDOC Database, Date of access:03.03.2020.

⁵⁷ ECHR. *McVicar v. The United Kingdom*, App. No:46311/99, 07.08.2002, para.33, HUDOC Database, Date of access:03.03.2020.

⁵⁸ ECHR. *McVicar v. The United Kingdom*, para.32-33.

⁵⁹ ECHR. *Gnahore v. France*, App. No:40031/98, 19.09.2000, para.41, HUDOC Database, Date of access: 03.03.2020.

⁶⁰ ROUSSET, Michel, *L’idée de puissance publique en droit administratif*, Paris, Librairie Dalloz, 1960, p.173.

⁶¹ ECHR. *P., C. and S. v. The United Kingdom*, App. No:56547/00, 16.10.2002, para.90-91, HUDOC Database, Date of access:03.03.2020.

⁶² ECHR. *Siałkowska v. Poland*, App. No:8932/05, 22.03.2007, para.78, HUDOC Database, Date of access:03.03.2020.

⁶³ See; Akıncı, Müslüm, *İdari Yargıda Adil Yargılanma Hakkı*, Turhan Kitabevi, Ankara, 2008, p.206.

by referring to the relevant legislation⁶⁴. As regards this case, ECHR found that the decision in question was inconsistent with Art.6/1 of the Convention and disproportionately limited its right to access the court⁶⁵. In the decision of *Mehmet and Suna Yiğit v Turkey* issued by ECHR, it was decided that the rejection of the request for legal aid was disproportionate and therefore illegal because the applicants did not have any assets in terms of the dispute arising from the imperfect action of the administration⁶⁶. Therefore, all conditions must be examined to determine whether the restrictions imposed on the right to access courts weaken the core of this right, whether these restrictions pursue a legitimate purpose and whether there is a reasonable relationship⁶⁷.

In Turkish law, it is accepted that the judicial aid institution can also find application in terms of administrative cases when considering the decisions of TCC, (i). the necessity to decide by evaluating the legal aid request, (ii). it is seen that a judgment is reached by considering whether the person is exposed to any judicial expenses which cannot be tolerated⁶⁸. With the reference to the Art.312 and Art.339 of the Law No. 6100, it is possible for the person who benefited from legal aid from the evaluation of the provisions of the legislation; to collect the judicial expenses, to openly or partially exempt from the trial expenses⁶⁹. In this sense, in the lawsuit filed by the Council of State with the request for the cancellation of the medical board report stating that the disability situation is not severely disabled, it was decided that “*whether the collection of the costs of the trial would result in the victimization of the beneficiary of legal aid*” should be examined⁷⁰. In another decision of the Council of State -Law No.3816 on State Coverage of Treatment Costs of Citizens Who Lack the Ability to Pay by Granting Them Green Card issued⁷¹- it is understood that there are no immovable and movable property registered on applicants. In this case, since it was understood that the condition of poverty required for the acceptance of the request for legal aid was fulfilled, it decided that the

⁶⁴ ECHR. *İlbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey*, App. No:19986/06, 10.07.2012, para.40, HUDOC Database, Date of access:03.03.2020.

⁶⁵ ECHR. *İlbeyi Kemaloğlu and Meriye Kemaloğlu v. Turkey*, para.52-53.

⁶⁶ ECHR. *Mehmet and Suna Yiğit v. Turkey*, App. No:52658/99, 17.07.2007, para.36-37; see; Doğru, Osman/Nalbant, Atilla, *İnsan Hakları Avrupa Sözleşmesi Açıklama ve Önemli Kararlar Cilt-I*, 2. Edition, Legal Yayıncılık, İstanbul, 2013, p.630;

⁶⁷ De Moor-van Vugt, Adrienne, “Administrative Sanctions in EU Law”, *Review of European Administrative Law*, Vol.5, No.1, 2012, p.31.

⁶⁸ TCC. App. of Elif Dandan and İpek Melis Dandan, App. No:2014/9973, 05.04.2018, para.69, TCC Decisions Database, Date of access:03.03.2020.

⁶⁹ D15D. E.2015/5251, K.2015/6403, 22.10.2015, (<https://www.lexpera.com.tr>), Date of access:03.03.2020.

⁷⁰ D15D. E.2016/2380, K.2016/2544, 12.04.2016, *Journal of Turkish Council of State*, Issue:142, p.263.

⁷¹ RG.13.08.1992-21314.

plaintiffs should be decided to accept the request for legal aid, while there was no lawfulness⁷² in the rejection of the request for legal aid. Also, regarding the application for legal aid in an administrative case, the court's unjustified delay may lead to a violation of the right to a fair trial in terms of the person who cannot benefit from legal aid⁷³.

As stated above, the concept of legal aid, which has an important place in terms of the right to a fair trial, has also been extensively addressed in the ECHR decisions⁷⁴. Although the concept of legal aid in terms of comparative law is generally addressed within the framework of criminal law⁷⁵, it also has legal value in terms of administrative procedure law. In this sense, since it is possible to examine some administrative disputes within the civil rights and obligations, it can be stated that the concept of legal aid can be examined within the scope of Art.6/3 of the Convention. Considering that the ECHR constitutes one of the most important regional legal mechanisms in terms of human rights⁷⁶, it is necessary to evaluate the judgments of the court comparatively while examining the concept of legal aid. Therefore, in the continuation of the study, how the institution in question was handled in the decisions of the ECHR and the Council of State will be examined.

4. The Importance of Legal Aid in Administrative Cases

The concept of administrative law in terms of human rights “*is characterized by a very strong insistence that all acts of public officials be clearly intra vires, fully authorized by a legitimate rule or statute*”⁷⁷. However, the use of public power in administrative acts and the fact that the administration is in a more privileged position than individuals in this sense reveals the importance of the institution in question. Indeed, given the purpose of the administrative judiciary to ensure that the administration is acting in accordance with the law in general, it is an important place for individuals to have access to the court⁷⁸.

⁷² D10D. E.2008/2007, K.2010/1843, 09.03.2010, Journal of Turkish Council of State, Issue:125, p.346.

⁷³ ECHR. Sürmeli v. Germany, App. No:75529/01, 08.06.2006, para.71, HUDOC Database, Date of access:03.03.2020.

⁷⁴ See; Karan, p.417.

⁷⁵ Chhabra, Kirpal Singh, “Legal Aid in Criminal Proceedings”, Journal of the Indian Law Institute, Vol.22, No.3, 1980, p.372. Huang-Thio, S. M., “Legal Aid: A Facet of Equality before the Law”, The International and Comparative Law Quarterly, Vol.12, No.4, 1963, s.1136.

⁷⁶ Duxbury, Alison, The Participation of States in International Organisations The Role of Human Rights and Democracy, Cambridge University Press, Cambridge, 2011, p.127.

⁷⁷ Robertson, David, A Dictionary of Human Rights, 2. Edition, Europa Publications, London, 2004, p.4.

⁷⁸ Köksal, Mustafa, Adli Yardım (Müzaheretli Adliye) Kurumunun İdari Yargıdaki Uygulaması, Terazi Law Journal (Terazi Hukuk Dergisi), Vol.4, No.40, 2009, p.98.

Especially in the present day when the concept of global administrative law has been proposed, some effective judicial guarantees and safeguards must be created in terms of the decision making and implementation processes of the administration⁷⁹. Therefore, it can be mentioned that the legal aid institution plays a role in the realization of the rule of law principle in administrative procedure law.

In terms of administrative cases, reference is made to the general rules of law in terms of legal rules to be applied for legal aid⁸⁰. However, since the administrative procedure has some specific features; the legal institution in question must be interpreted within the administrative judgment process⁸¹. Therefore, in terms of administrative procedure law, it can be stated that the decisions given by courts about legal aid are interim decisions and can only be appealed with the final decision⁸². In this context, there is no hesitation in examining whether the decision regarding the rejection or acceptance of the request for legal aid, which changes the course of the proceedings, is considered in accordance with the relevant provisions of the law, during the examination of a decision that may be subject to an appeal regarding the dispute by the appellate authority⁸³. Undoubtedly, as the Council of State has stated, there is no legal obstacle in the examination of the decision regarding the rejection or acceptance of the request for legal aid, which changed the course of the proceedings at the stage of the examination by a judge, which may be the subject of an appeal regarding the dispute⁸⁴. In this sense, it is of great importance to present the socio-economic situation of the individual in an objective manner and with justifications in terms of the national legal system⁸⁵. As a matter of fact, according to the *Kaba v. Turkey* decision given by ECHR, “*Even though the person who served as an officer in the navy died from cancer, the case of the deceased person’s spouse and children were not evaluated sufficiently by*

⁷⁹ Kingsbury, Benedict/Krisch, Nico et al., “The Emergence of Global Administrative Law”, *The Emergence of Global Administrative Law*, Vol.68, No.3-4, 2005, p.17.

⁸⁰ D8D. E.2009/3631, K.2009/3579, 01.06.2009, *Journal of Turkish Council of State*, Issue:122, p.375.

⁸¹ See. Latournerie, Roger, *Conseil d’Etat’nın Yargılama Yöntemleri Üzerine Bir Deneme* (transl. by Yayla, Yıldızhan), İÜSBF Yayınları, İstanbul, 1982, p.109.

⁸² D10D. E.2008/2007, K.2010/1843, 09.03.2010, *Journal of Turkish Council of State*, Issue:125, p.346.

⁸³ D10D. E.2008/1136, K.2011/4131, 10.10.2011, *Journal of Turkish Council of State*, Issue:130, p.373-374.

⁸⁴ D15D. E.2011/11728, K.2013/867, 06.02.2013, (<https://www.lexpera.com.tr>), Date of access:03.03.2020.

⁸⁵ Settem, Ola Johan, *Applications of the 'Fair Hearing' Norm in ECHR Article 6(1) to Civil Proceedings: With Special Emphasis on the Balance Between Procedural Safeguards and Efficiency*, Springer, Switzerland, 2016, p.424.

the national court” is against of Art.6 of the Convention⁸⁶. Similarly, in the *Serin v. Turkey* decision, it was found contrary to Art.6 of the Convention that the person’s poverty certificate was not considered enough, and the assessment of the concrete situation was not made by the administrative court⁸⁷. In other words, according to ECHR, “*considering the conditions of the case*”, it may be possible to benefit from legal aid based on the poverty document within the framework of the right to access the court⁸⁸.

Besides, the person’s request for the court to benefit from legal aid does not result in an absolute right⁸⁹. So, if the plaintiff requests, the court is obliged to decide on legal aid, as the court in charge must decide on the matter and ensure the file’s status⁹⁰. Likewise, the administrative court should consider whether this is possible within the framework of “*legal aid*” in order to complete the relative fee by the plaintiff⁹¹. So that the negative situations that occur later in terms of the economic situation of the person may also cause the re-evaluation of the legal aid request⁹². At this stage, whether the request for legal aid is groundless or not should be examined independently before the admissibility examination⁹³. Accordingly, the court of the first instance will have to decide on the request for legal aid at the appeal stage⁹⁴. The legal aid request accepted by the interim decision will continue to effect until it becomes the final judgment, according to paragraph 3 of Art.335 of Law No.6100⁹⁵. However, as stated in the TCC decisions, the fact that the application subject for legal aid is groundless; is not determinant in the admissibility of the

⁸⁶ ECHR. *Kaba v. Turkey*, App. No:1236/05, 01.03.2011, para.22-25, see; Doğru/Nalbant, p.630.

⁸⁷ ECHR. *Serin v. Turkey*, App. No:18404/04, 18.11.2008, in; Demirkol, Selami, *Avrupa İnsan Hakları Mahkemesinin İdari Davalarla İlgili Yargılama Ayrıntıları*, Beta Yayıncılık, İstanbul, 2020, p.128.

⁸⁸ Demirkol, p.129.

⁸⁹ Akyılmaz, Bahtiyar/Sezginer, Murat, et al., *Türk İdari Yargılama Hukuku*, Savaş Yayınevi, Ankara, 2018, p.790.

⁹⁰ D6D. E.1987/331, K.1987/377, 16.04.1987, *Journal of Turkish Council of State*, Issue:68-69, p.447; D15D. E.2011/10415, K.2012/10747, 15.11.2012, *Journal of Turkish Council of State*, Issue:133, p.428.

⁹¹ D6D. E.2014/2387, K.2014/4122, 27.05.2014, *Journal of Turkish Council of State*, Issue:137, p.184.

⁹² Kaplan, Gürsel, *İdari Yargılama Hukukuna Giriş*, Ekin Yayınevi, Bursa, 2018, p.310.

⁹³ TCC. App. of Mehmet Şerif Ay, App. No:2012/1181, 17.09.2013, para.26, TCC Decisions Database, Date of access:03.03.2020.

⁹⁴ D4D. E.2010/8142, K.2010/5098, 20.10.2010, *Journal of Turkish Council of State*, Issue:126, p.188-189; D15D. E.2016/2708, K.2019/312, 05.02.2019, (<http://www.kazanci.com/kho2/ibb>), Date of access:20.02.2020.

⁹⁵ D3D. E.2018/4122, K.2019/1668, 08.03.2019, (<http://www.kazanci.com/kho2/ibb>), Date of access: 20.02.2020.

individual application⁹⁶. In this context, it is not possible to establish a direct relationship between the court decision of the court regarding interim legal aid and the final decision. However, in the decisions made by the court of the first instance, it will be necessary to state that this situation will constitute a reason for disruption in the appeal stage if the relevant person is denied the legal aid request unlawfully despite the necessary conditions⁹⁷. Therefore, “*proper evaluation*” by the competent court that will decide on the legal aid of individuals and decisions in this direction will prevent a possible violation in terms of the person’s right to access the court⁹⁸. Accordingly, within the context of the principle of the rule of law, benefiting from the legal aid institution of people who are unable to meet the costs of the trial has an important value in terms of ensuring the compliance of the administration with the law⁹⁹.

CONCLUSION

Within the framework of the right to a fair trial, the legal aid institution has an important value in the context of the rule of law. It is seen that the concept in question is included in various supranational and national legal texts within the framework of the right to a fair trial. In particular, it is important for people who are in an economic situation who cannot pay the trial expenses to benefit from legal aid and to provide full access to the court. As a result, individuals’ civil rights and obligations may be affected as a result of making and implementing administrative actions. In this context, it is a requirement that individuals can benefit from legal aid against the administration, which has the privilege of using public power. The state’s positive obligation on this issue is concentrated above all in terms of making necessary arrangements in legal aid and applying them lawfully. On the other hand, when the ECHR judgments are examined within the framework of Art.6 of the Convention, it is seen that the legal aid institution has a broad meaning. Again, it is seen that the provision of Art.31 of the Law No.2577 was arranged in parallel with this. In general, it was stated in the Council of State decisions that the legal aid institution could find application in administrative procedure law, and in most cases the state of use was associated with the right to a fair trial. On the other hand, the narrow interpretation of the economic situation of individuals in some decisions made by the Council of State may cause individuals not to benefit from their right to access the court properly. In this context, it will be

⁹⁶ TCC. App. of Mahmut Can, App. No:2013/3008, 06.02.2014, para.31, TCC Decisions Database, Date of access:03.03.2020.

⁹⁷ D15D. E.2011/12209, K.2013/870, 06.02.2013, (<https://www.lexpera.com.tr>), Date of access:03.03.2020.

⁹⁸ Gözübüyük, A. Şeref/Tan, Turgut, İdare Hukuku-II: İdari Yargılama Hukuku, 7. Edition, Turhan Kitabevi, Ankara, 2014, p.964.

⁹⁹ Gözübüyük/Tan, p.964.

more compatible with the concept of rule of law and specifically the right to a fair trial in determining the economic status of individuals, taking into account the legal position of the individuals against the administration.

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