

THE RIGHT TO A FAIR TRIAL IN THE DISCREPANCIES ORIGINATING FROM PUBLIC OFFICIALS' STATUS

*Kamu Görevlilerinin Statüsünden Doğan Uyuşmazlıklarda
Adil Yargılanma Hakkı*

Gökhan ÇAYAN¹

ABSTRACT

It is possible that between the public officials and the government, some discrepancies may occur because of several reasons such as accepting the duty, continuation of the duty, termination of the duty. After long debates, whether or not these discrepancies may benefit from the assurances that are enlisted in the 6th article of the European Convention of Human Rights; inasmuch as that they are related to either civil rights and obligations or criminal charge. For a long time, the loyalty and trust between the public officials and the government caused that the discrepancies originating from public officials are seen as out of coverage. After several decisions are taken, The European Court of Human Rights accepted that until proven otherwise, the discrepancies originating from possible disputes related to work are in the coverage of the 6th article. In the first part of this research, the right to a fair trial and the assurances granted by these rights; in the second part, the coverage field of the right to a fair trial; in the third part, the applicability of the right to a fair trial in the cases of discrepancies originating from public officials will be laid emphasis on.

Keywords: Public Officials, the Right to a Fair Trial, Civil Rights and Obligations, Criminal Charge, Assignment, Transfer, Discipline, Suspension of Duty, Monetary Rights, Personal Rights.

ÖZET

Kamu görevlileri ile Devlet arasından göreve kabul, görevin devamı ve görevin sona ermesi sebebiyle çeşitli uyuşmazlıklar çıkabilir. Bu uyuşmazlıkların Avrupa İnsan Hakları Sözleşmesi'nin 6. maddesinde tanınan güvencelerden yararlanıp yararlanmayacağı uzun süren değerlendirmeler neticesinde belirlenmiştir. Zira bir uyuşmazlığa Sözleşme'nin 6. maddesinin uygulanabilmesi için söz konusu uyuşmazlığın ya medeni hak ve yükümlülüğe ya da suç isnadına ilişkin olması gerekir. Kamu görevlisi ile Devlet arasında mevcut olan sadakat bağı ve güven duygusu, uzun zaman boyunca kamu görevlilerinden doğan uyuşmazlıkların kapsam dışında görülmesine neden olmuştur. Çeşitli kararlardan sonra Avrupa İnsan Hakları Mahkemesi, olağan iş ilişkileri sebebiyle

¹ Stagyer Judge: Ministry of Justice of Turkey; LL. M: Kirikkale University, LL. B: Kirikkale University, D. eP: Pazmany Peter University, For Communication: gcayan@yandex.com , www.gcayan.com .

ortaya çıkan uyuşmazlıkların 6. madde kapsamında olduğunu karine olarak kabul etmiştir. Bu çalışmamızın ilk bölümünde genel olarak adil yargılanma hakkı ve hakkın sağladığı güvenceler; ikinci bölümünde adil yargılanma hakkının uygulama kapsamı; üçüncü bölümünde de kamu görevlilerinden doğan uyuşmazlıklarda adil yargılama hakkının uygulanabilirliği üzerinde durulacaktır.

Anahtar Kelimeler: Kamu Görevlileri, Adil Yargılanma Hakkı, Medeni Hak ve Yükümlülükler, Suç Isnadı, Atama, Nakil, Disiplin, Görevden Uzaklaştırma, Parasal Haklar, Özlük Haklar.

◆◆◆

INTRODUCTION

It is not possible to give a concerted description about the issue of the right to a fair trial. Furthermore, the right to a fair trial comprises of many parameters related to the process of judging. In the same way, this particular right is described with several different terminologies in the different domestic laws of different countries². In its broadest sense, the right to a fair trial is the whole form of the rules that needs to be followed in order for the judging process to be in line with the values of fairness and equity.

There are several regulations in the conventions that are related to the right to a fair trial. The most important one of these regulations is the 6th article of the European Convention of Human Rights. According to this particular article;

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in

² VITKAUSKAS Dovydas/ LEWIS- ANTHONY Sian, Right to A Fair Trial Under the European Convention On Human Rights (Article 6), Interights Published 2009, p. 2.

detail, of the nature and cause of the accusation against him;

(b) to have adequate time and the facilities for the preparation of his defense;

(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;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

I. THE RIGHT TO A FAIR TRIAL AND THE GUARANTEE THAT THESE RIGHT

As the article clearly shows, in order to have a fair hearing, a lot of elements needs to come together. These elements also address the necessary assurances that are needed for the person to be judged fairly.

The Right to Have a Hearing in an Independent and Impartial Tribunal Established by the Law: In order to be able to speak about a fair hearing, the case should be handled by an independent, impartial tribunal established by law. In order for an office to be accepted as a tribunal, it needs to continually solve discrepancies and that their decisions are binding; and the related decisions should not be altered by offices that are not judicatory³. The European Court of Human Rights ECHR interprets the concept of courts, which is in the covenant, as needed in the autonomous interpretation principle. While some of the offices that are not defined as courts and not organized as courts according to the regulations of the nation may be accepted as eligible courts by ECHR according the criteria listed above⁴; some of the courts that are accepted as eligible courts by the law may not be accepted as eligible court by ECHR. There is no clear definition of the understanding regarding the statement that the court should be established by law. In *Posolov V. Russia* application, ECHR stated that two conditions needs to be met in order for a court to be accepted as a court that is established by law. These conditions are: that the national legislation that founded the related court needs to be originating from the decision of a parliament, and that the court is founded according to the procedures that are envisioned in the law. In order for a

³ OSCE- DIGEST, Legal Digest Of International Fair Trial Rights, OHDIR Publishing, Varşova 2012, p. 53; *Van De Hurk V. Holland*; *Vitkauskas and Lewis Antony*, 2009: 66.

⁴ *Argyrou and Others V. Greece*, § 27; *Rolf Gustafson V. Sweden*, § 45; *Sramek V. Austria*, § 36.

hearing to be fair, the fact that the tribunal is established by law is not enough. In addition, the tribunal needs to be both independent and impartial. It is not possible to say that the judging is fair unless the tribunal is independent and impartial. It is impossible to set the concepts of independence, which is an assurance related to status, and impartiality⁵, which is a circumstance related to activity, apart sharply and make them free of each other.

With the notion⁶ of independence, the freedom of the courts is referred to⁷ in terms of not experiencing any pressure or influence from extrinsic and intrinsic sources and not receiving any orders and instructions from the executive and legislative powers.

The notion of impartiality refers to the fact that judges are not prejudiced⁸ and they do not have any relation to the outcome of the case in terms of material and moral values in a direct or indirect way, and the legislative powers are not prejudiced against the parties of the case and the third parties such as media and so on⁹.

Right to Have a Trial Within a Reasonable Time: The other element of the right to a fair trial is to have the trial finished in a reasonable time¹⁰ and have

⁵ The emotions and opinions of the people carrying out the judgmental processes are important regarding the impartiality. For this reason, it is an important necessity that people taking part in the judicial processes are objective towards the parties, that they do not take one of the party's part and leave personal thoughts aside. Impartiality expresses an important moral state regarding the attitude of the judge in the judicial process. Impartiality and being impartial is in fact the necessary component to protect the respect for the judicial system. The determining factor in the court's impartiality is the fact that whether the doubts of the complainant are objectively acceptable or not. When evaluating if the impartiality principle is violated or not in ECHR confine themselves to the only the content of the regulation related to the subject but also takes the judicial system and legal understanding of the country and evaluates how the subject regulation seem when put in those criteria. (Full Citation: Görür Hamit, Adil Yargılanma ve İdari Yargıda Görünümü, Master's Thesis, İzmir 2010).

⁶ Clarke V. United Kingdom: The "independence" notion of the judicial office requires the existence of the procedural assurances regarding the separation of the judgment from other powers and especially from executive powers.

⁷ Le Compte, Leuva ve De Meyere V. Belgium, § 57- 58; Ringesien V. Austria, § 95- 97.

⁸ Buscemi V. Italia, § 67- 68; Castedo V. Spain, § 50; Henryk Urban V. Ryszard Urban V. Poland, § 28.

⁹ Vitkauskas Dovydas and Dikov Grigoriy, Avrupa İnsan Hakları Sözleşmesi Kapsamında Adil Yargılanma Hakkının Korunması, Council of Europe, Strazburg 2012, p. 45; Osce- Diegest, 2012: 61; Vitkauskas and Lewis Antony, 2009 27.

¹⁰ The authority and power to command of the judicial offices are ensured with the resolving of the cases in a reasonable time. If the judicial processes are always late in a society, it causes the diminishing of the authority of the judicial offices on the society. This situation creates a powerful discomfort in the society. People who believe that they will not get their rights from the courts in time try to gain their rights themselves. Thus, the authority of the government and jurisdiction get damaged. It is impossible to talk about a

the discrepancies solved¹¹. This is because in order to be able to talk about a fair hearing, the problem needs to be solved in a reasonable time and the rightful party should be established in this period. The trustfulness of the judicial bodies in the society is ensured¹² with the completion of the judicial processes. The reasonable time period does not refer to a period that is determined beforehand for every case. In other words, there is no set reasonable time period that is applicable for every case. ECHR determines this reasonable time period according to each tangible event and the properties of the controversy present in these events. The decision about this particular problem is made¹³ by referring to the complexity of the case and the attitude and behaviors of third parties and competent authorities. The fact that the case is not completed within the reasonable time limits causes the violation of the right to a fair trial.

Right to be Judged With Equity: The right to be judged with equity - which has the exact same meaning with the term “substantial justice” – controls¹⁴ the justice based on law. In today’s world, the justice mechanism is regulated by the written law in many states of law. In other words, the governments arrange the particular rules that they want them to be implemented, and the action takers solve their problems according to these rules. In a democratic state of law, if there is a concern about establishing written law, the right to be judged with equity steps in and makes sure those possible occurrences of injustice in the case of the practicing of the written law are eliminated. As a result of this, it is not enough to overtly judge people in independent and impartial tribunals in a reasonable time period to establish the right to be judged with fairly, but also the judging process needs to be¹⁵ in accordance with the notion of equity.

Right to be Judged Publicly: Another element of the right to have a fair

democratic law state in the situations where government and jurisdiction received heavy damages. For in the social contract, there is an agreement stating that the rights between the government and people cannot be sought out by people themselves, and these rights can also be granted by the judicial offices of the government. Giving the rights of the person who deserves those particular rights is the most precious and biggest service that the governments can do. For this reason, it is beyond doubt that the lateness of the judicial processes shakes the very foundations of the governments.

¹¹ Bock V. Germany, § 35- 36; Capuano V. Italia, § 30- 31; Deumeland V. Germany, § 75- 79; Erkner V. Austria, § 67- 70; Zimmermann ve Steiner V. Sweden, § 29.

¹² Kaşıkara Serhat, Avrupa İnsan Hakları Sözleşmesi’nin 6. Maddesi Çerçevesinde Makul Süre İçerisinde Yargılanma Hakkı, TBB Review, Iss. 84, Ankara 2009, p. 243.

¹³ Deisl V. Austria, § 30- 35; Katte Klitschede La Grange V. Italia, § 61.

¹⁴ Bayrakçı Esra Tuğba, Adil Yargılanma Hakkının Bir Unsuru Olarak Savunma Hakkı, Master’s Thesis, Kırıkkale 2011, p. 58.

¹⁵ The contents of the right to a fair trial with equity was not arranged in the ECHR clearly. However, ECHR stated that the right to a fair trial equity involves the principle of adversarial proceedings, equality regarding weapons, the right to be ready at the trial, the authority to bring proofs and the right of true decision.

hearing stated in the ECHR's 6th article is the right to have a public hearing¹⁶. To have a public hearing is a right designed to have a open and transparent judicial system. The purpose of this right is to protect the parties in a civil justice, suspects in a criminal justice from the possible arbitrariness that might originate from a secret process of judging and preserving the trust of the society to make justice more visible to everyone¹⁷. The right to be judged publicly guarantees that the hearing and the decree is open to public. While the transparent state of the hearing is a limited right; the openness of the decree is an absolute right. Failure to have a non-public hearing regarding the concrete case may mean the violation of the right to a fair trial.

Given to the Defendant at Minimum: Some assurances needs to be present to be able to talk about a fair judgment process for the defendant¹⁸. From the notion that some assurances at minimum needs to be provided for the defendant, who is defending against the attorney general who uses the power given by the government, to be judged fairly; the 3rd paragraph of the 6th article lists the minimum conditions that needs to be provided to the defendant. According to this, every defendant;

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and the facilities for the preparation of his defence;

¹⁶ Regarding the regulations about the right to be judged publicly can be seen in Universal Declaration of Human Rights. In the 10th article of the Declaration, it is stated that Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

The first paragraph of International Covenant on Civil and Political Rights by stating; "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (order public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children." secured the right to be judged publicly. However, in this article, the right to be judged was arranged as a limited right and not an absolute right; and exceptions were included by emphasizing that the right to be judged publicly is a rule.

¹⁷ Vitkauskas and Dikov, 2010: 63.

¹⁸ Toydemir Seçkin, Adil Yargılanma Hakkı Çerçevesinde Türk İdari Yargı Sistemi, Master's Thesis, İstanbul 2013, p. 65.

(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;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

ECHR regulated the rights in minimum given to the defendant in 5 articles by saying "at least". In the English version of the convention, this is signaled by *minimum rights*, in the French text *notamment* (especially) and they are not in conclusive quality but in the way of sampling. As a result of this, the enlargement of these rights mentioned in the article is possible¹⁹.

II. THE GENERAL PRINCIPLES OF THE RIGHT TO A FAIR TRIAL

In order for the principles that are guaranteed with the ECHR to be applied, the discrepancies need to be originating from the civil rights and obligations or criminal charge. If this discrepancies is not originating from civil rights and obligations or criminal charge; it is not possible to apply the 6th article of ECHR.

In the 6th article of ECHR, which regulates the right to a fair trial, the principles and elements that will be implemented in the cases of discrepancies related with criminal charge and civil rights and obligations are arranged separately. In fact, this arrangement is the reflection of the natural difference between the discrepancies originating from civil rights and obligations and criminal charge.

Before, while determining if a discrepancy is in the coverage of civil rights and obligations, ECHR came to conclusion by researching the tribunal that the discrepancy is bound to and the national legislation. The discrepancies that are enlisted as civil rights and obligations in the national legislation and the ones that law courts are appointed for resolving the issue were accepted under the coverage of civil rights and obligations²⁰. While a discrepancy is covered under the civil rights and obligations in the national legislation of a conventional government and courts of law are appointed for its resolution; in some other conventional government, the same discrepancy may not be covered under

¹⁹ Sanivar Ramadan, Avrupa İnsan Hakları Sözleşmesinin 6. Maddesi Çerçevesinde Adil Yargılanma Hakkı ve Sanığa Tanınan Temel Güvenceler, Master's Thesis, Gazimagusa 2012, p. 85.

²⁰ İnceoğlu Sibel, Adil Yargılanma Hakkı ve Yargı Etiği, Council of Europe, Ankara 2007, p. 20.

the civil rights and obligations in the national legislation or courts of law may not be appointed for the resolution. This situation prevented the unity of supervising the document. A discrepancy could be disciplined thanks to the regulation that puts it under the coverage of civil rights and obligations and that courts of law were appointed for its resolution; in another conventional government, the same discrepancy could not be disciplines just because it was not put under the coverage of civil rights and obligations and courts of law were not appointed for its resolution.

In the *Reingeisen V. Austria* application, to remove the inconveniencies and ensure the unity in supervising the document, ECHR renounced this aforesaid vision and claimed that while determining if a right or responsibility is civil, the regulations in the national legislations is not binding anymore. From this point on, ECHR uses the autonomous interpretation principle while determining if a right or responsibility is civil. According to this principle, the matter in dispute is evaluated free from the national qualifications in a separate manner for each concrete event²¹. In the real sense, in the *Baroan V. Portugal* application, ECHR claimed that the notion of civil rights and obligations are independent from the description present in the national law and the delineation of the related legislation that will be applied to the dispute; and what really matters is the evaluation of whether or not the quality of the right and the outcome of the judgment will have a direct impact on the civil rights and obligations²². From this point on, the qualification²³ of the agency that is given permission to solve the discrepancy and the legislation that will be applied to the discrepancy do not have any importance²⁴ in deciding the discrepancies regarding civil rights and obligations. For this reason, if the discrepancy for which administrative justice or constitutional jurisdiction is appointed for the resolution carries the necessary qualifications, can be accepted as a discrepancy that belongs to the civil rights and obligations²⁵.

²¹ Inceoğlu, 2007: 15.

²² Vitkauskas and Dikov, 2012: 14.

²³ In fact, this view is the consequence of the autonomous interpretation principle. For ECoHR, because they will evaluate the notion of civil rights and obligations free from the characterization of it existent in the national legislation, the subject right and responsibility of the discrepancy, will be evaluated according to the fact that whether or not it is arranged in the private law in the national legislation or whether or not that the discrepancy related to the subject right and responsibility can be solved in law courts.

²⁴ In the application, ECHR stated that they will not take the regulations in the national legislation while determining the concept of civil rights and obligations. Even if a discrepancy is not categorized as a civil right and responsibility in the national legislation, ECHR can evaluate the subject discrepancy as belonging to the civil rights and obligation.

²⁵ Inceoğlu, 2007: 22.

The 6th article of the European Convention of Human Rights finds its application field first in the discrepancies regarding civil rights and obligations thanks to its nature. In judging if a right is civil or not in its nature, the economical nature of the right is an important factor. In the broadest sense, the rights and obligations originating from civil law, obligations law, law of things, commercial law, and insurance law are considered as civil rights and obligations²⁶. However, it is not possible to say that a right or responsibility is naturally civil just by judging it from its economical perspective²⁷. For this reason, while making specifications, the parties of the relationship need to be taken into account. For instance, ECHR presumably accepts that the discrepancies originating from economical activities between private people are in the coverage of civil rights and obligations.

While deciding if a right or responsibility is civil or not, the parties of the discrepancy need to be evaluated. However, in order for the discrepancy to be under the coverage of civil rights and obligations, it is not necessary for the discrepancy to originate between private people. In this sense, discrepancies originating between people and the government, finds use of the 6th article of the convention if the discrepancy is related to the civil rights and obligations.

A periodical growth is observed in the intrinsic lines of ECHR concerning the point that if the discrepancies originating from the administration will be considered under the coverage of civil rights and obligations. In the earlier times, in the cases where the applicant is applying against the decisions of the courts of conventional governments, ECHR assumed that the competitive right was not under the coverage of civil rights and obligations. After that ECHR revoked this assumption and put forward a criteria evaluating that if the acts and operations erected by the administration violates the rights in the European Convention of Human Rights. According to this; the discrepancies regarding the rights granted in the convention was started to be heard in ECHR. At the very last, ECHR renounced this evaluation and chose the way where they decide whether or not to accept the application depending on the evaluation of the outcome of the relevant discrepancy regarding its violation of the civil rights and obligations²⁸. In this ruling case, if the discrepancy is violating the civil rights and obligations, it is claimed that the 6th article of the convention can be applied in the cases where the

²⁶ On the contrary, the fact that there is an economical request amongst the complainant's unjust treatments does not necessarily require the conflict to be evaluated as Civil.

²⁷ Vitkauskas ve Dikov, 2010: 14; Vitkauskas and Lewis Antony, 2009: 7.

²⁸ Osce- Diegest, 2012: 40- 44.

person is against the government²⁹. In a shorter version, according to ECHR; all cases are in the coverage of the 6th article of the convention as long as their outcomes affect the civil rights and obligations.

There is not a clear definition as to what should be understood when talking about the outcomes belonging to the civil rights and obligations. In order for a discrepancy to belong to the civil rights and obligations as a result of its outcome, the quality of private law needs to be dominant. If public law is dominant in the relationship between the person and the government, the 6th article of European Convention of Human Rights (ECHR) cannot be applied to the case³⁰. Hence, in the *Deumelan V. Germany* application, ECHR assumed that in order for a case to be accepted as within the borders of civil nature; the private law elements needs to be dominant over the public law elements³¹.

Another field that ECHR can be applied besides the discrepancies originating from civil rights and obligations is the cases where an accusation is made against a person; in other words, an investigation is opened against him or a prosecution is in place. According to the 6th article of ECHR, all people being accused of a crime will benefit from the right to a fair trial from the point the accusation is made against them³².

Like the notion of civil rights and obligations, ECHR explains incrimination in its autonomous interpretation principle. According to the autonomous interpretation principle, the matter in dispute is evaluated free from the national qualifications in a separate manner for each concrete event. The court explains the notion of incrimination essentially and establishes the notion of incrimination by going beyond what is visible³³.

²⁹ Vitkauskas and Dikov, 2010: 14.

³⁰ The court who at first adopted the limiting interpretation method now uses the extensive interpretation method and broadens the coverage of the article by taking the qualifications of the each concrete case in consideration. For example, the social security right which was thought to be out of coverage of the 6th article now is in the coverage of the 6th article. Without doubt, doing the exact opposite of this will damage the trust to the control mechanism brought by the Convention. For the applications originating from administrative law is the things that people are subjected to most violations. The right to a fair trial, like it is exactly the same in other judicial offices, is a basic principle in administrative jurisdiction. For this reason, the fact that the administrative field was not touched upon in the 6th article of the ECHR does not mean that the Convention cannot be applied in this field. (Full Citation: Yüksel Hatice, *Uluslararası Sözleşmelerde ve Türk Hukukunda Adil Yargılanma Hakkı*, Başbakanlık Uzmanlık Tezi, Ankara 2010, p. 40).

³¹ Vitkauskas and Dikov, 2010: 14.

³² İnceoğlu, 2007: 15.

³³ *Deweere V. Belgium*, § 49.

In order for an action to be considered as a criminal charge and the 6th article to be applied to the case, one of the three criteria needs to take place. Unlike the criteria used in discrepancies related to the civil rights and obligations in determining the notion of civil, these criteria do not have to take place in a cumulative way. Existence of a single criterion is enough for ECHR to accept the activity as a criminal charge. According to this;

1 Classification of the offense in the law of the respondent state: In this particular case, if the offense is classified as a crime in the law of the respondent state, it is sufficient to consider the act as a crime. There is no need for a further condition to take place. If an act is really classified as an offense by the law of the national law system, the principles of criminal court will step in with the claim that that particular offense took place and the investigation period about the person will begin. In a system where a the right to a fair trial is granted to people from the point of the starting of the criminal investigation, the classification of the act as a crime in the national legislation is enough to apply the 6th article to the case. Likewise, the classification of the act that the person is claimed to committed as a crime in the national legislation generally causes the person to be exposed to criminal investigation and prosecution. If an act is not classified as a crime in the national legislation; then the attribution of the act needs to be determined by evaluating the act with regard to secondary and tertiary criteria³⁴. There are such cases that there may be doubt about if the act are classified as a crime in the national legislation or not³⁵. In such a case, an evaluation with regards to secondary or tertiary criteria will be inevitable.

2. The Nature of the Offense: By taking into account the essentials such as the resemblance of the act to the acts that are classified as crime in the national law, how this act is tackled with in other conventional governments, what should be the response to such an act in a democratic nation, whether or not the act is a qualification that affects everyone in the society; the criteria used in determining the qualifications of the act is called nature of the act criteria³⁶. In this scale, whether or not by taking the nature of the act into account the act should be considered a crime is emphasized. If the act resembles the acts that are considered crimes in the national legislation or if there is a resemblance between the procedure that will be applied to the relevant act and the procedures that will be applied in case of punishments; the act is considered as a crime by its nature. If there is no resemblance between the relevant act and the acts that are considered crimes in the

³⁴ Vitkauskas and Dikov, 2010: 18.

³⁵ Ravnsbors V İsveç, § 35- 40.

³⁶ İnceoğlu, 2007: 20.

national legislation, whether or not the act is considered in conventional governments or what should be the procedure for this kind of act in a democratic state of law should be considered and be determined if the act is a crime or not. Another essential that must be tackled here is that; moving from the fact that if the act has a qualification that will affect everyone, what should be understood from the notion of determining the qualification of the act. If the punishment given to this particular act can only be applied to a certain part of a society the discipline aspect of the act is considered dominant; and if the punishment given to this particular act can be applied to all people in the society, the crime aspect of the becomes dominant³⁷. However, particular crimes that the legislation assumes that they can only be committed by a certain type of people should not be considered in this scope. In the cases where these particular crimes are present, according to the dependence rule, other people can be punished too; because of this, all the society potentially becomes the object of this crime. For instance, because the punishment precluding lawyers from doing their duty only interest the lawyers, it is possible to say that this act's discipline aspect is dominant as it is not possible to punish people with this punishment who are not lawyers. On the other hand, the act of embezzlement is a deliberate crime. The perpetrator of this crime is the public official by law. However, if another person who is not a public official participates in the crime, he or she will too suffer the consequences that are pre-determined for this kind of an act according to the dependence rule.

3. The type and the severity level of the possible punishment: The determination of the qualifications of the act by emphasizing the issues of the purpose of the punishment and whether or not the punishment limits the freedom of the person is called the type and severity scale of the punishment³⁸. In this scale, the offense being charged is determined by taking the type and the severity of the punishment that will be given to the alleged crimes. ECHR almost accepts all the acts that require punishments limiting the freedom of the person as criminal charges³⁹. However, it is not possible to say in advance that all the punishments limiting freedom originate from criminal charges; and for this reason, the 6th article of ECHR can be applied. For ECHR determines the accusation's qualification by taking the severity and the longevity of the freedom limiting punishment. For instance in an application, two days of freedom limiting punishment was not seen enough

³⁷ Aydın Bihter, *Türk İdari Yargı Düzeninde Adil Yargılanma Hakkı*, Master's Thesis, Ankara 2012, p. 45.

³⁸ İnceoğlu, 2007: 95.

³⁹ Vitkauskas and Dikov, 2010: 18.

to incriminate the person; while in another application, 3 months long of a punishment was seen enough to be considered a crime. While the time period of the freedom limiting punishment is determined in terms of criminal charges, not the duration of the final punishment that is given should be taken into consideration, but the minimum punishment duration that can be given to the act in question according to the national legislation should be considered. For instance if a person is given two days of imprisonment as a punishment as consequence of an act, does not allow the acceptance of the act in question to be considered as a criminal charge just because of the severity of the punishment. Only if three months of imprisonment can be given as the punishment for that person as the consequence of his act then should the act needs to be evaluated as a criminal charge⁴⁰. In other respects, the basic qualification of the punishment is not enough to push the alleged offence out of the coverage of the 6th article. Likewise, the dire situation of the punishment that will be given as a consequence of an act is not mandatory for the 6th article to be applied to the case⁴¹.

In short, in order for the 6th article of the ECHR to be implemented, the discrepancy needs to be related to the civil rights and obligations or criminal charges. It is not possible to apply ECHR to the cases where there is no relation to civil rights and obligations and trials that are out of the coverage of criminal charges. Political rights, investigations related to handing over a commercial firm started by government inspectors, permission to do public duty, returning of the criminals and the decisions to banish criminals, procedures regarding an asylum request, decisions regarding the preparation procedures of the administration and domestic affairs, discrepancies originating from the application of security legislations, procedures regarding being unable to receive passport are out of the coverage of the 6th article and applications regarding these issues are automatically turned down⁴². This contention like these are seen neither in the coverage of the criminality nor civil rights and obligations.

III. THE RIGHT TO A FAIR TRIAL IN THE DISCREPANCIES ORIGINATING FROM PUBLIC OFFICIALS

A. IN GENERAL

The question of whether or not it is possible for the discrepancies

⁴⁰ Aydın, 2012: 47.

⁴¹ Vitkauskas and Dikov, 2010: 18.

⁴² Cherepkov V. Rusya, § 32; Dalea V. Fransa, § 32; Fayed V. United Kingdom, § 65; Sukut V. Turkey, § ad; Vitkauskas ve Dikov, 2010: 16- 17.

originating from the public officials to benefit from the right to a fair trial is essentially the problem of acceptableness of the discrepancy between the public official and the government as related to civil rights or obligations or criminal charge. In other words, if the discrepancy between the public official and the government is related to the civil rights and obligations or criminal charge; the 6th article of ECHR will be applicable. On the other hand, if the discrepancy between the public official and the government is not related to the civil rights and obligations or criminal charge; the 6th article of ECHR will not be applicable.

If the discrepancies originating from public officials are accepted as related to civil rights and obligations or criminal charge; the subject discrepancy needs to be resolved in an independent and impartial tribunal established by law in a reasonable time with the notion of equity and publicly. Otherwise, ECHR and the Turkish Constitution are violated.

There is no clear explanation in the doctrine as to whether or not the discrepancies occurring between the public official and the administration are civil rights and obligations. In the countries where administrative procedures are adopted, the discrepancies occurring between the public officials and the administration are often subject to the public law. The approach of ECHR towards this issue changed overtime.

1. First Stage

At first, ECHR separated the discrepancies that originate from public officials and investigated them in two separate ways. If the discrepancy is resulting from a case such as civil service examination, acceptance to civil service, dismissal of the duty, suspension, retirement; because the civil qualifications of the processes are dominant, it was assumed that the 6th article of the convention was applicable⁴³. On the other hand, if the discrepancy is resulting from cases such as social security system or monthly salary waiting to be paid because of the termination of duty, grant, bonuses; because the economical qualifications of the processes are dominant, it was assumed that the 6th article of the convention was applicable. As it can be seen, in the first stage, ECHR assumed the cases of monthly salary waiting to be paid because of the

⁴³ In other words, ECoHR earlier stated that the discrepancies related to the public officer examination, acceptance to public official status, work conditions, ranks and stages, transfers and appointments, adjustments and permits, suspension from duty, termination of duty, retiring as not under the civil rights and responsibilities and that 6th article of the Convention cannot be applied; on the other hand, stated that the discrepancies related to money waiting to be paid as a result of termination of duty, grant and bonuses and the discrepancies originating from social security systems are under the coverage of the 6th article because of their economical qualifications.

termination of duty, discrepancies originating from grants and bonuses and discrepancies originating from social security system under the coverage of the 6th article of the convention.

2. Pellegrini Criteria

In the application *Pellegrin V. France*, a three year contract was signed to work in the transoceanic corporation between the defendants Government and applicant who work as a advisor to the minister in the Ministry of Economy and Trade of Equatorial Guinea. After one year the contract was signed, Equatorial Guinea terminated the complainants' duty. After the termination, the defendant government cancelled the contract of the complainant. After that, a new contract was signed with the applicant and the complainant was employed in Gabon. The validity of this contract was attributed to the fact that the complainant was healthy regarding the issue of working transoceanic⁴⁴. However, in the health screenings of the complainant, it turned out that it was impossible for the complainant to work overseas work. For this reason, the name of the complainant was removed from the roster. The complainant whose name was removed from the roster sued the Government in their administrative tribunal and requested the wage that he did not earn unlawful while he was not on the duty and pecuniary and non-pecuniary damages to be paid as compensation to him⁴⁵. The administrative tribunal consulted the experts and the expert claimed in the report that the health condition of the person is exaggerated and the complainant could work overseas just fine⁴⁶.

Despite of experts' report the local tribunal rejection on the merits. While the case is in appeal, the applied to ECHR claiming that his right to be judged in a reasonable time was violated without waiting for the result of the appeal. In the application, the applicant put forward the fact that he was working under a contract and his application should not be declined because his status needs to be recognized as an official worker⁴⁷. On the other hand, the defendant conventional Government requested the decline of the case according to the established ruling cases by claiming that the complainant is in officer status⁴⁸. In the investigation, ECHR claimed that a distinction needs to be made regarding whether the public officials use the right of independence of the government or whether or not the complainant represents the public authority; that the complainant didn't use the right of independence originating from the government nor he represents the

⁴⁴ *Pellegrin V. France*, § 8- 12.

⁴⁵ *Pellegrin V. France*, § 13- 16.

⁴⁶ *Pellegrin V. France*, § 20- 21.

⁴⁷ *Pellegrin V. France*, § 48- 51.

⁴⁸ *Pellegrin V. France*, § 52- 53.

authority of public; thus, the application is acceptable. As it can be seen clearly, in the case of *Pellegrin V. France*, ECHR which gave up existing opinion in the first stage⁴⁹, aimed to resolve the issue by making a distinction about whether or not the public official used the a portion of the State's sovereign power⁵⁰. According to ECHR discrepancies related to the public officials who are responsible for protecting the interests of the public or use the a portion of the State's sovereign power granted by the government directly or indirectly for themselves such as undersecretary, undersecretary assistant, judge, attorney general, soldier and police; cannot be considered under the coverage of the 6th article and thus it cannot be applied to such cases. However, the discrepancies of employment, continuation of duty and the termination of duty related to the public officials who are not responsible for protecting the interests of the public or use the right of freedom granted by the government directly or indirectly for themselves was accepted as under the coverage of the 6th article. Here only a distinction about whether or not the public official uses the right of freedom granted by the government or not is made. On the other hand, in deciding whether or not the discrepancy is related to the civil rights and obligations, it does not have an importance if the public official is on the staff or under contract⁵¹. Additionally, the fact that the right of freedom granted by the government is used or not. In the *Pellegrin* decision, ECHR did not make the distinction in the cases of retirement of public officials, and no matter how they utilize the right of freedom granted by the government (or not), in the discrepancies originating from the monthly payment, grant or bonus thanks to the retirement; ECHR accepted that the 6th article can be applied.

3. Vilho Eskelinen Criteria

After the first two stages, ECHR made its decision about the applicability of the 6th article of the convention to the discrepancies originating from public officials in the *Vilho Eskelinen and Others V. Finland* application. In this application, Vilho Eskelinen and Others are working as a police and officers. In the collective agreement of which the complainants are also a part, in case the police and office officers work in a suburban region of the country (far away from the center), it was stated that they will receive extra bonus to their wages. The amount of this bonus is decided according to the distance to the center of the region that they are working in. Later, this advantage was removed with a new collective agreement. With this agreement, a new contract was introduced to the complainants to prevent the subject loss. It

⁴⁹ *Pellegrin V. France*, § 59.

⁵⁰ *Pellegrin V. France*, § 65.

⁵¹ *Pellegrin V. France*, § 66- 68.

was stated in this contract that from the date that the contract was signed, complainants would receive extra bonus wage every month. After that, the place of duty of the complainants was moved to a place much closer to the center by the decision of The Ministry of Interior.

As a result of this decision, the complainants could not benefit from the extra bonus wage and the distance between their place of residence and their work place increased approximately 50 kilometers. Police Department of the Ministry of Interior applied to the Ministry of Finance to make sure that the police officers (including the complainants) benefit from the extra bonus wage. The Ministry of Finance declined the application. After this decline, the complainants sued in the national courts. This case was also rejected by the national courts. The appeal request of the complainants was also declined afterwards; and the judgment was final. The complainants claimed that The applicants contested the Government's contention that Article 6 did not apply to some of them in their capacity as police officers. They emphasised that their service and their salaries were not related to the exercise of powers conferred by public law. What was at stake was their right to their salaries. That right was of a private-law character. The amount of their salaries was a contractual matter regulated by the collective agreement between the employee and the employer. The applicants emphasised that they had not complained about the decision to move their offices from one location to another. Neither did the case concern the use of public authority, hiring, career or termination of employment. The dispute also had relevance to the amount of their pensions⁵².

The defendant claimed that the complainants directly participated in the protection of the public duty and the common interests of the government; the 6th article cannot be applied under the provisions of the Pellegrin criteria which the official opinion of the ECHR, and the application cannot be accepted because of these reasons. In the investigation of the issue, ECHR claimed; "The fact that the contract or the additional protocols do not cover the right to access the public duty does not justify the exclusion of the officers from the coverage of the Contract. Two conditions need to happen in conjunction in order for one to claim that the 6th article cannot be applied because of the officer status of the complainants. Firstly, the right to access to courts needs to be limited by the national legislation for the relevant category of duties or workers; secondly, it needs to be related to the government's interest (the proof that the limiting the access to courts is justifiable). The fact that the subject serves a duty related to using a public power or works in a such industry is not decisive. In addition to this, the government needs

⁵² Vilho Eskelinen and Others V. Finland, § 32.

to prove that the case is related to the usage of public power or that the subject private relation is made the subject of the discrepancy. Thus, because the relation between the government and the related officer is private, it is impossible to exclude the discrepancies related to wages, compensations or the ones resembling these from the coverage of the 6th article. At the end, there is a presumption that the 6th article will be applied” and decided that the application is acceptable⁵³.

ECHR accepted that the discrepancies belonging to the civil rights and obligations originating from the disputes between the public officials and the government related to the everyday work relations are under the coverage of the 6th article of the Convention until otherwise is proven. If this proof is granted by the conventional government, ECHR will not apply. The government can cancel out this decision by proving two conditions based on the subject’s official status. The first condition is that there is no access to courts for the subject duty or worker category in the national legislation; and the second condition is that the discrepancy is for the benefit of the Government. In other words, it needs to be proven that the discrepancy originates from the usage of public power. If the conventional government proves these conditions; the 6th article of the Convention can be applied no longer. If the exact opposite of these conditions are in place; in other words, if the discrepancy does not originate from the usage of public power; the claim regarding the officer status will not be sufficient and the 6th article of ECHR will be applied⁵⁴.

The discrepancies between the public officials and the administration;

⁵³ Vilho Eskelinen and Others V. Finland, § 35.

⁵⁴ When the Vilho Eskelinen decision of ECHR is examined, it can be seen that in fact, ECHR tried to explain the topic of the discrepancy regarding whether or not it is caused by the usage of public power or not. According to this, when determining if the discrepancies originating between the public officials and administration belong to the civil rights and obligations, the qualities of the discrepancy needs to be taken into consideration. If the discrepancy originates from the usage of public power, it cannot be considered as belonging to the civil rights and obligations. In other words, the 6th article of the Convention cannot be applied if the discrepancy is caused only by the usage of public power. On the other, if the exact otherwise is the case, the discrepancy will be considered as belonging to civil rights and obligations without checking if the government used its rights of freedom or not, and the 6th article can be applied. Furthermore, it needs to be proven by the Conventional Government that the discrepancy is caused by a use of public power with reasonable and serious proofs. Otherwise, it cannot be accepted that the discrepancy is caused by the use of public power. As it can be seen, ECHR interprets the notion of discrepancies originating in the field of civil rights and obligations broadly. This fact was also shown in the discrepancies originating between the public official and the administration.

Ruling: The 6h article of the Convention can be applied if the discrepancy is related to a ordinary dispute.

Exception: If it is objectively⁵⁵ proven that the subject duty or worker category has no right to access courts in the national legislation and that the discrepancy is related to the interests of the government (the fact that the limitation to access to courts is based on legitimate reasons), the 6th article of ECHR cannot be applied to the situation

Whether or not the 6th article of ECHR will be applied to the discrepancies originating from public officials is determined according to the Vilho Eskelinen criterion which is still in valid.

B. THE RIGHT TO A FAIR TRIAL IN TERMS OF TYPES OF DISCREPANCIES

In this chapter, whether or not the right to a fair trial can be applied to the discrepancies originating from the public officials in the light of the decisions of ECHR and Constitutional Court. The types of the discrepancies will be evaluated according to the states of acceptance to the public duty, continuation of duty and termination of duty.

1. Discrepancies Originating from the Acceptance to the Public Duty

The acceptance to the public duty is carried out by an appointment. In order for the subject operation to take place, a vacant and available position needs to be existent. Conventional governments can arrange the conditions of the acceptance to the public duty freely. In Turkish law, the acceptance to public duty is tied to the conditions such as citizenship, age, education status, health; and the fact that the assignment of the public duty will be made by authorized chiefs is specified.

The acceptance to public duty may create various discrepancies between the people and the administration. Some of the examples for these kinds of discrepancies are: the failure to be appointed to the subject public duty although the necessary conditions are in place, the cancellation of an appointment that already took place on the basis that the conditions are not in place, the fact that different applications are accepted by the parties regarding the appointment.

In the first stage, ECHR claimed that the discrepancies originating from the acceptance to the public duty were not under the coverage of the right to a fair trial. With the Pellegrin criteria, ECHR softened this opinion and later accepted that these kinds of discrepancies are under the coverage of the right to a fair

⁵⁵ Baka V. Hungary, § ad.

trial with the Vilho Eskelinen and Others V. Finland application until the time that it is proven otherwise. The Constitutional Court also accepts that the right to a fair trial applies to the discrepancies originating from the acceptance to the public duty. ECHR, who evaluates the case according to the qualities of the concrete case, determines whether or not the discrepancies is under the coverage of the right to a fair trial by sometimes using the Vilho Eskelinen criteria and sometimes evaluating if the outcome of discrepancy affects the civil rights and obligations or not. The Constitutional Court determines whether or not the 6th article can be applied to the discrepancies originating from the acceptance to the public duty according to the Vilho Eskelinen criteria. In the Yusuf Gezer application the complainant was appointed to the vacant position at the Finance Office of the Bitlis Governorship by being successful at the examination given to the people who will be appointed to the public duty for the first time. After the examination of the documents, presented to start the duty, by Bitlis Governorship, it was decided that, according to the national legislation⁵⁶, that the complainant should not be appointed because he had 3 years of deprivation of rights and 3 years and 9 months of serving in the prison hard time. The criminal court made the decision that the restitution of divested rights of the complainant should take place after the decision to not appoint the subject. The subject opened a case in the administrative court and requested the cancellation of this decision. At the end of the case the court declined the case by claiming that the complainant does not have the conditions to be appointed. The appeal request regarding the decision was also turned down and the provision was made final. The complainant claimed that the decision violated his the right to a fair trial and right to have an effective remedy. The constitutional court claimed that before going down into the essentials of the individual application, the decision of whether or not the discrepancy is under the coverage of the right to a fair trial should be made; and in doing so, while deciding whether or not a violation is under the coverage of the Constitutional Court, the common protection ground of the Constitution and the European Convention of Human Rights should be taken into account.

The Constitutional Court stated that because there is not a clear regulation in the 36th article of the Constitution, the coverage of the right to be judged can be determined according to the 6th article of the Convention; that according to the Convention a discrepancy needs to be related to the civil rights and obligations or criminal charge in order to be under the coverage of the Convention; that whether or not the discrepancy originating from the acceptance to the public duty is under the coverage of civil rights and

⁵⁶ The appointment was not made on the grounds that the subject does not have the conditions in place stated in the 48/ A article of the law numbered 657.

obligations, thus under the coverage of the right to a fair trial, needs to be determined according to the criteria determined by ECHR. Following this decision, it was accepted that in order for the discrepancy originating from the acceptance to public duty to be excluded from the coverage of the right to be judged, it is needed that the access to courts is limited in the national legislation and the necessity of justifying this limitation with a proof that the interest of the government is involved is present; regarding the subject matter, that the complainant has the right to apply to a court regarding his not being appointed to the public duty and for this reason that this discrepancy needs to benefit from the assurances granted by the right to a fair trial; and was accepted that this application is under the authorization of the Constitutional Court and the case started to be heard⁵⁷. As it can be seen clearly, the Constitutional Court evaluated whether or not the discrepancy originating from the acceptance to the public duty is under the coverage of the right to a fair trial according to the Vilho Eskelinen criterion and decided that the application is acceptable by determining that the right to access courts are not limited in the national legislation.

2. Discrepancies Originated In the Serving Time of the Duty

Various discrepancies may manifest themselves in the serving time of the duty between the administration and the personnel. Some examples for these kinds of discrepancies are: transfers between provinces and counties, secondment, transfer, salary, grants and other economical rights, discrepancies originating from law of discipline and other personal rights.

a. Discrepancies Originating from Transfer and Appointment Procedures

It is possible that a public officer's place of duty is changed with a new appointment and transfer. Discrepancies may occur between the administration and the public official because of this change of place. In some cases, not changing the location of the duty despite the request of the public official may result in discrepancies between the personnel and the administration.

ECHR determines whether or not the discrepancies originating from the appointment and transfer activities are under the coverage of the right to a fair trial according to the Vilho Eskelinen criterion. Constitutional Court also determines this issue according to this criterion. In some applications, the Constitutional Court determines the coverage of the right to a fair trial by determining whether or not the discrepancy is related to the civil rights and obligations by its nature or outcome.

⁵⁷ Yusuf Gezer Application, § 15- 18.

Whether or not the 6th article of the Convention is applicable to the discrepancies originating from the transfer appointments between the provinces and counties is determined according to the Vilho Eskelinen criterion. In the Demir Dinipak application, the complainant claimed that his the right to a fair trial was violated as a result of the decline of his cancellation request regarding his transfer from a county to another county. In the investigation of acceptability, the Constitutional Court claimed that in order for the discrepancies between the public official and the administration excluded from the right to a fair trial, regarding the subject discrepancy, the right to access to courts needs to be not legitimized and this deprivation of right needs to be justified with objective proof that it is related to the interests of the government; that the right to apply to courts is given to the subject in the national legislation for the subject discrepancy (that the first condition of Vilho Eskelinen is not in place), and that the application needs to be accepted because of the above explained reasons, and started the case⁵⁸.

The Constitutional court accepted that the right to a fair trial is applicable by stating that the discrepancies originating from Transfer and Appointment procedures are related to civil rights and obligations in respect of their outcomes. In the Yıldırım Gidirioğlu application, the complainant was a security attaché in the Turkey Consulate General of Nuremberg. As a result of the investigation about the dispute between vice consul and himself, he was punished with a reprimand because of his actions against the regulations and instructions; and as a part of the investigation done by Mission Chef regarding the actions that are the subject of the reprimand, was suspended and appointed to the center on the account that he failed the carry out the conditions that his occupation required.

The complainant opened a case in the administrative court requesting the cancellation of the subject appointment procedure. The administrative court declined the case on the account that there is no violation of law in the subject matter. Despite the appeal request of the complainant, the provision was made clear against the complainant⁵⁹. The complainant claims that the case was not seen in a reasonable time and his the right to a fair trial was violated. The Constitutional Court claimed that, according to the 36th article of the Constitution and the 6th article of the Convention, the discrepancies

⁵⁸ Demir Dinipak Application, § 42- 44.

⁵⁹ This decision was sent for appeal by the complainant, and, to be able to act accordingly the fact whether or not the appeal request was done in its time periods and its outcome, it was decided that the original application was closed and the case was sent to the court of trial. The trial court declined the appeal request on the grounds that it exceeded the time limit. This decision was also requested for an appeal by the complainant and it was approved by the state council. (Yıldırım Gidirioğlu Application, §9- 11).

related to the civil rights and obligations needs to resolved in a reasonable time period; although they belong to “public law” according to the legislation provisions existent in the judicial system, the discrepancies whose outcomes are determinant on the rights and obligations of private qualification, are under the coverage of the 36th article of the Constitution and the 6th article of ECHR⁶⁰; for this reason, the assurances provided by the right to a fair trial can also be applied in the cases where there is a cancellation request of an administrative procedure that is alleged to violate the rights of the applier; and started the case.

he cancellation cases filed as a result of not giving consent to a transfer between inter-institutional benefits from the assurances that the right to a fair trial provides. In the İhsan Asutay application, the complainant claimed that on the grounds that he did not give consent to the inter-institutional transfer request of the administration that he was working as a civil officer and the decline of the cases related to this issue violated the right to have education and principles of equality; and further claimed that Military High Administrative Court is not a independent and impartial court, and because that there was a provision according to the delegated legislation which came into effect after the case was filed, declaring that the complainant needs to pay a fixed compensation to the administration, his the right to a fair trial was violated. The Constitutional Court accepted that the discrepancies of administrative qualification between the public officers who work in the military units but not one of the soldiers themselves and the military administration are considered under the coverage of the notion “civil rights and obligations” stated in the 6th article of the Convention, and stated that the discrepancy should be investigated in order to establish the right to a fair trial⁶¹.

⁶⁰ It is not possible to decide on the acceptability of a discrepancy involving a violation of right which is out of the coverage of ECHR, and the sub principles and rights that are the concrete views of the right to a fair trial which come from the ECHR text and the ECHR's decisions are essentially the elements of the right to a fair trial which was stated in the 36th article of the Constitution. In many case reviews where the Court evaluated the case according to the 36th article of the Constitution, by means of interpreting the provision according to the 6th article of ECHR and judicial opinion of ECHR, the rights and principles that are literally existent in the content of ECHR and with the inclusion of them in the right to a fair trial thanks to judicial opinion of ECHR, are under the coverage of the 36th article of the Constitution. The right to be judged in a reasonable time which constitutes the base of the concrete case is also under the coverage of the the right to a fair trial according to the principles stated above; and the 141. article of the Constitution which states that the cases should be resolved by using the least expenditures possible and in a reasonable time and these are the objectives of the jurisdiction, should be considered in evaluating the right to a fair trial in a reasonable time. (Yıldırım Gidirişoğlu Application, § 45).

⁶¹ İhsan Asutay Application, § ad.

b. Discrepancies Originating From Economical Rights

All the discrepancies originating from the deserved rights thanks to the status or activity of the official are under the coverage of the right to a fair trial. In fact, the views and criteria that will cause ECHR to include the discrepancies originating from public officials in the coverage of the right to a fair trial are the result of the evaluations of economical rights. For instance, in the *Vilhi Eskelinen et. al V. Finland* application, ECHR emphasized the economical rights while arguing whether or not to renounce the Pellegring decision, found the fact that the official cannot benefit from the rights granted by the right to a fair trial regarding the discrepancies originating from his economical rights, as a result of the public officers use of power of the government or the representation of the public power authority, against the notion of equity. Discrepancies related to wage, compensation and the ones related to these kinds of rights are seen as possible work disputes by the ECHR and was accepted that the 6th article of the Convention can be applied to them unless it is proven otherwise. The Constitutional Court also accepted the discrepancies originating from economical rights as related to the civil rights and obligations as a consequence of their outcomes, and stated that the 6th article of the Convention should be applied to them. In the *Kadir Can* application, the complainant, who works as a official in a university, requested that the contribution margin percentage of circulating capital is fixed by taking the equals into account and that his rights originated in the past are paid to him with their legal interest and applied to the administration. After the administration turned down the request, the complainant sued the administration in the administrative court. The case was declined by the administrative court and the decision was made clear after the appeal process. The complainant claimed that his right to be judged in a reasonable time was violated because the duration of the case exceeded the reasonable time period. The Constitutional Court decided that the subject case is related to the money owed to the complainant originating from the additional payment of the circulating capital; although the concrete judgment actions are discrepancies originating between the administration and the public official, that there is no doubt that the judgment is about civil rights and obligations⁶².

In the *M.H.U* application, the complainant claimed that he was appointed⁶³ as an official while he was working under the status of out of coverage as a result of the privatization of the institution he was working for, that his

⁶² Kadir Can Application, § ad.

⁶³ The appointment procedure was carried out according to the Law Regarding The Privatization Applications numbered 4046.

request regarding the severance pay and annual leave wage was declined by the administration, that the case he opened with the request that the money owned is paid to him was heard in the Administrative Court, and that the ongoing investigation was not resolved in a reasonable time and claimed that his the right to a fair trial was violated, and demanded compensation.

The Constitutional court decided that the application is related to the civil rights and obligations thanks to their outcomes and started the case by accepting the application.

As it can be understood from the descriptions above and the judgments made, the discrepancies originating from the economical rights of the public officials are accepted as under the coverage of the right to a fair trial and it was stated that the subject discrepancies need to be resolved in a court that is independent, impartial and established by law in a reasonable time according to the notions of equity and publicly⁶⁴.

c. Discrepancies Originating from Disciplinary Law

Disciplinary punishments are the rules aiming to punish the actions of public officials that are not in line with the occupation and they completely deal with occupational mistakes. With these disciplinary punishments, the integrity of the public organization and institutions. As a result, disciplinary punishments are different from the classical punishment obligations. While in the criminal code it is stated that everyone can commit crimes and everyone who commits crimes can be punished with judicial fines, deprivation of rights or deprivation of freedom; the disciplinary punishments can only be given to the related organizational personnel or member of a profession. The harshest of the disciplinary punishments is the termination of duty. There has been a great controversy in the doctrine regarding the determination of the legal qualifications of the disciplinary punishments since the oldest times. A view in the doctrine bases the authority to give disciplinary punishment on contract. There is a controversy between people who defend this view, which is called contract view, about the legal qualifications of the contract. Some of them claim that the contract is a private legal contract while the some of them accept that the contract is an administrative contract. People who defend this view claim that disciplinary punishment is a discrepancy related to the civil rights and obligations; and for this reason, accepts the idea that it should be supervised by ECHR. Another view in the doctrine accepts that disciplinary punishments surfaced in order to protect the order of legal entities of private law and the public law, and the right to punish originates from corporateness.

⁶⁴ Osce- Diegest, 2012: 8

According to people who defend this view which is called corporateness theory, the 6th article of the Convention cannot be applied because the disciplinary punishments cannot be evaluated under both civil rights and obligations and criminal charge. The last view in the doctrine claims that the right to punish originates from the society itself and not from the institutions or the contract; and states that the same assurances need to be granted in the punishments originating from both criminal law and disciplinary law. According to this view, also called as The Unity in Punishment theory, the disciplinary punishments must be considered as criminal charge and should benefit from the assurances 6th article provides. Whether or not the disciplinary punishments can benefit from the assurances stated in the 6th article is essentially tied to which view is accepted as the valid one regarding the judicial qualities of the disciplinary punishments by ECHR. The first application about this particular issue is the *Engel et. al V. Holland* application. The complainants, who work as soldiers in the military, received disciplinary penalty as a result of their actions which were against the military discipline regulations. The punishments given to the complainants were changed to two, three, twelve days, and three and four months' disciplinary jail time. The complainants applied to ECHR claimed that their rights stated in the 6th article of the Convention were violated. ECHR investigated the application regarding its acceptability and tried to determine how the related people are affected as a result of the punishments. In other words, they tried to come to conclusion by using the severity scale of the punishment. ECHR decided that the disciplinary jail time converted from three months to twelve days and the three and four months of jail time are equal to depriving the complainants of their freedom; on the other hand, the two and three days of punishments were not freedom depriving; and evaluated the applications of the first three complainants under the coverage of the 6th article. In the *X V. United Kingdom* application, the application was declined on the grounds that the complainant were forced to resign as a result of the disciplinary investigation opened against him by his superiors, that the subject enforcement is not liberty binding, that the enforcement is a regular punishment. Before, ECHR accepted that the relations between the public personnel and the administration were not under the coverage of the 6th article on the grounds that the public personnel is a part of status law. Later, the court revoked their view in the *Pellegrin V. France* application and chose to determine the judicial qualifications of the public personnel; and evaluated the employment of the personnel who do not use the power of freedom granted by the government either directly or indirectly or represent the public authority, relations in the duration of their duty, and the termination of their duty under the provisions of the 6th article. The fact that ECHR accepted that the relations originating in the serving time of the duty regarding the public personnel who does not use

the power of freedom granted by the government either directly or indirectly or represent the public authority, revived the controversy about whether or not the disciplinary punishments which are basically relations originating in the serving time of the duty will be considered under the coverage of the 6th article. In the reasoned decision of the application, as a result of the dominance of referrals of the discrepancies regarding civil rights and obligations; it is possible to say that this evaluation will not include the disciplinary punishments. In the Vilho Eskelinen and Others V. Finland application, ECHR presented their last principle regarding the discrepancies originating from public officials and the administration. According to this, whether or not the discrepancies originating between the public official and the administration belong to the civil rights and obligations is determined according to the qualifications of the discrepancy. The discrepancies originating because of the fact that public power is used are not considered as civil rights or obligations. On the other hand, if the discrepancy is not caused by a usage of a public power, it will be considered as belonging to civil rights and obligations and the 6th article of the Convention will be applied⁶⁵. As it happened in the Pellegrin decision, if the discrepancy belongs to civil rights and obligations was disputed; however, it was not declared how to act in the case of a criminal charge. Afterwards, ECHR solved the application Olujić V. H Croatia which was related to a disciplinary investigation according to the criteria set during the Vilho Eskelinen et. al V. Finland application. As the result of the disciplinary investigation opened by claiming that the complainant who was the chief of the high court protected illegal economical relations and crimes by using his status, his duty was terminated. The complainant claimed that with the disciplinary investigation, his the right to a fair trial was violated and applied to ECHR. In the investigation of acceptability, the criteria set during the Vilho Eskelinen application was accepted as valid and the decision was given according to this criteria. According to this, if the discrepancy related to the disciplinary punishment does not originate from the usage of public power; the accusation should be accepted as criminal charge. ECHR accepts that some of the disciplinary punishments that are not related to criminal charge belong to civil rights and obligations. In the application Le Compte, Van Leuven and De Meyere V. Belgium where the chamber of doctors opened a disciplinary investigation and caused the doctor to be removed from his duty and the complainants claimed that the right to be judged was violated; ECHR decided that the punishment does not carry the qualifications of a criminal charge and the decision was made regarding the occupational actions of the complainants; and thus, the discrepancy belongs to the civil rights and obligations, and started the case under the coverage of the 6th article.

⁶⁵ İnceoğlu, 2007: 45- 50

However, it should be noted that in this case; the disciplinary punishment was not accepted as a criminal charge but was accepted as belonging to civil rights and obligations. As it can be understood from all these statements, ECHR evaluates whether or not the disciplinary punishments are under the coverage of the 6th article according to every concrete case separately. Some of the disciplinary punishments were accepted as criminal charge on the grounds that the punishment was severe, in some cases the punishments were accepted as discrepancies related to civil rights and obligations; and some of them were considered as regular disciplinary punishments⁶⁶.

d. Discrepancies Originating from Other Personal Rights

Discrepancies originating from ranking up, getting promoted, permit, public housing and other personal rights can also be in the coverage of the right to a fair trial. In order for this happen, the Vilhi Eskelinen criterion needs to be in place or the discrepancy needs to be related to the civil rights and obligations as a result of their outcome. If there is a discipline punishment in the base of discrepancies originating from ranking up, getting promoted, permit, public housing and other personal rights, the disciplinary law needs to be taken into consideration when evaluating the case. In the Mustafa Kivrak application, the complainant claimed that the innocency statement existent in the 38th article and the right to be judged stated in the 36th article of the Constitution were violated⁶⁷ as a result of his not being promoted to second class police headquarters from third class headquarters and the fact that case

⁶⁶ Complicated crime commitment would be the case in the cases where an action belongs both to crime and administrative investigation in the national legislation. Here there is no doubt that the crime investigation will benefit from the 6th article of the Convention. However, it needs to be determined that if the administrative enforcement employed alongside with the crime investigation should be covered under the 6th article. In such cases, it is not possible to say that the crime investigation alone will include the disciplinary punishment given to that same exact act under the coverage of the 6th article. Thus, in order for the investigation regarding if the disciplinary punishment was given according to the right to a fair trial, an evaluation according to the three criteria stated above needs to be done. (Vitkauskas and Dikov, 2010: 19).

⁶⁷ The complainant who was working as the chief of security and was sued on the grounds that he "assaulted an officer on duty", was given 2 months and 20 days of freedom binding punishment. After the appeal request of the complainant, the decision was revoked and the local court concluded that the explanation of the provision was receded. According to the Law Enforcement Agency's 2010 promotion results which was broadcasted online by the Security General Directorate the complainant was not promoted to 3rd grade police headquarters to 2nd grade police headquarters. The case that the complainant opened regarding his failure to be promoted was seen by the administrative court and they decided that the decision has nothing against the law; and it was declined. The decision which was appealed by the complainant was approved. The request of revision of the decision was also declined. (Mustafa Kivrak Application, § 5- 9).

was not resolved in a reasonable time. In the investigation of acceptability, it was accepted that the discrepancy related to the failure to promote the complainant was under the coverage of civil rights and obligations. There is not clear telling that if the Constitutional Court evaluated the discrepancy under the civil rights and obligations as a result of its nature or outcome. However, it is clear that Vilho Eskelinen criterion was not applied here. In this regard, judging from the approach of the Constitutional Court, even if the right to access the courts was limited regarding the discrepancies originating from failure to promote and this limitation is justified with solid proofs objectively, the subject procedure would be accepted. In our view, it is more proper that these kinds of discrepancies are evaluated according to the Vilhi Eskelinen criterion.

3. Discrepancies Originating from the Termination of Public Duty

a. In General

Public duty may end because of various reasons such as withdrawal, assumption of withdrawal, extraction, death or retirement. In some cases discrepancies may occur between the administration and the public official as a result of the termination of duty. Discrepancies originating from the termination of public duty are accepted under the right to a fair trial according to the Vilhi Eskelinen criterion. However, the Constitutional Court also accepted that in some applications the subject discrepancy belongs to civil rights and obligations as a result of their outcome. In the *Joksa V. Lithuania* application the complainant attended the military in the year of 1990. In the year of 2002, the complainant was promoted to sergeant commander position. Afterwards, a 5 year professional service contract was signed between the complainant and the Lithuania Armed Forces. The complainant graduated from a law faculty in 2003 and obtained a practicing certificate. After the graduation, the job description of the complainant was changed and he was appointed as the human resources expert. In 2005, the complainant was promoted to assistant battalion commander who was responsible for judicial subjects. While serving his duty, the complainant stated that in his article "War Without Constitutional Rights" that the new military discipline status limits the protection and judicial representation rights. In the continuation of the article, the complainant suggested that the subject change needs to be reviewed by the president and the change should not be implemented. The article grew big in the scale of the nation and the Prime Minister stated that they started disciplinary investigation about the complainant in an interview. An investigator was assigned to carry out the investigation. The investigator claimed that there were no secret information in the article and it only contains personal opinion of the complainant; and for this reason, there is no need to give a punishment

to the complainant according to the national legislation provisions. The disciplinary chief declined the suggestion of the investigator and penalized the complainant with a reprimand. The objection of the complainant was accepted and the reprimand was taken back. Afterwards, the military officials cancelled the professional service contract of the complainant one year prior to its termination date claiming that the complainant reached his age of retirement. The complainant opened a cancellation case against this decision and claimed that the termination of his contract happened because of the reasons he explained and this procedure is against the law. Furthermore, the complainant claimed that four of his colleagues who are at the same age as him still continue their work and there were no retirement age regulations in the legislation, which the retirement procedures are carried out in practice and the contract of the military personnel cannot be terminated according to this practice lines.

As a result of the judicial processes, the administrative court found the claims unsupported and declined the case. Although the appeal procedures were implemented the high court declined the appeal request who did not consider the decision of the court of trial against the law. The complainant claimed that his defense regarding his four colleagues who are at the same age as him and still continue their duty was not taken into consideration and claimed that his right to defense and the right to be judged was violated. The defendant Government stated that there is an intense trust and loyalty relationship between the military service and the government that the complainant works as an officer according to domestic law, that the government has extensive rights over the personnel and claimed that the 6th article of ECHR cannot be applied in the concrete case. In the investigation of acceptability, ECHR referred to the Vilhi Eskelinen criterion and stated that the channels of judicial remedy was not prohibited in the national legislation and the discrepancy originated from the service contract; although the service contract carries a public qualification, because of the nature of the right provided in the contract stating that the official can work till the termination date of contract, that the discrepancy is related to the civil rights and obligations and accepted the application⁶⁸. Similar evaluations were made in *Baka V. Hungary* application. In the *Baka V. Hungary* application, the complainant was appointed to the chief of High Court for a single semester by the Parliament in 2009. In 2011, the complainant criticized some law amendments amongst which a law motion lowering the retirement age from 70 to 62. After this critique, new constitutional transition decrees were accepted within the scope of constitutional reform program. According to

⁶⁸ Please refer to (for a similar decision): *Nikolova and Vandova V. Bulgaria*.

the transition decrees, the serving period of the complainant was terminated three and a half years before the normal date and the complainant was taken off the duty. After this, the complainant claimed that his serving time was terminated earlier as a result of a decree put in a law, that he could not object to this decision as a result of his being unable to act against the procedure, and that his right to access courts was violated as a result of these reasons. The defendant government claimed that the application cannot be accepted. In the investigation of acceptability, ECHR stated that in order for an official to be excluded from the 6th articles coverage, two conditions need to take place, that in the concrete case the Hungarian Judicial system did not limit the right to access courts for the High Court Chief and judges, thus; the first condition of the Eskelinen criteria is not met; even if it is assumed that the first condition is met, the process of terminating the duty of an officer before his serving time actually ended and limiting the right to access as a result of this process is not justified by any proof objectively; and accepted the application.

In the Mehmet Savni Kafadaroglu application, in the case he opened requesting the cancellation of the procedure regarding his termination of government official duty, the complainant claimed that the judicial process was not resolved in a reasonable time, that he did not have the right to object to the decision made in the revision of the decision, and as a result that his personal rights were taken off of him as a result of this decision; and claimed that his the right to a fair trial which was ensured in the 36th article of the Constitution was violated, and requested the compensation of his losses alongside the detection of the violation. In the investigation of acceptability, the Constitutional Court claimed that the concrete case is related to the termination of government duty; and for this reason that the right to a fair trial should be applied to the case⁶⁹. Like it happens in many decisions, the Constitutional Court did not state which criteria they used in determining the acceptability of the request in this application, too. It needs to be accepted that the Constitutional Court interprets the Convention's application field much more broadly. For ECHR uses Vilho Eskelinen criterion while determining whether or not the subject discrepancies belong to the civil rights and obligations; and in the case that two conditions are proven; accepts that the provisions related to the right to be judged will be applied. However, the Constitutional Court claims that without doubt, the subject discrepancy belongs to the civil rights and obligations by ignoring the possibilities existent in the Vilho Eskelinen criterion.

The Constitutional Court evaluated the discrepancies originating from the failure of extending the public officer's time period of duty under the coverage

⁶⁹ Mehmet Savni Kafadaroglu Application, § ad.

of the right to a fair trial. In the Ahmet Teyit Keşli Application, the complainant started working as a research assistant in Uludağ University in Faculty of Economic and Administrative Sciences in 1999 in the branch of Commercial Law, and requested for permit from work to make a doctorate research in Marmara University. The Board of Directors of Uludağ University accepted the request and forwarded the request to Head of Board of Directors; however the administration of the university re-evaluated the request and by claiming that they need the assistance of the complainant decided the inscription sent to the Head of Board of Directors should be revoked. In the case where the complainant requested the cancellation of this act, the administrative court decided that the execution is terminated on the grounds that there are no changes in the conditions of the period in which the application was accepted. The Marmara University rectorship removed the doctorate record of the complainant on the grounds that he did not do the roster transfer and filled out the application form with deficiency despite the decision made in the court. In the case requesting the cancellation of this act, the administrative court decided that the procedure needs to be cancelled because the fact that the complainant is in the roster of the research assistants is not a reason enough to implement such procedure. Besides that, the complainant was appointed as research assistant again for a year in accordance with the Law of Higher Education numbered 2547 and with date of 4/11/1981. After that, the chief of the related branch opened a case against this event, and the case was declined in terms of its essentials. Meanwhile, the university administration established an operation referring to the decision of stay of execution given by the court regarding the termination of duty of the complainant. The complainant opened a case regarding this issue in the administrative court and decided that the action regarding his termination needs to be revoked on the grounds that the procedure is baseless because the court declined the request earlier. A disciplinary investigation was opened regarding the complainant's time in which he continued his doctorate research in Marmara University, and claiming that he did not come to his duty for 20 days, the complainant was punished with termination of his duty according to the High Disciplinary Council of Higher Education Council. For this reason, the provisions of the court was not put in place, however; after the case the complainant opened against this event in the administrative case; then he was appointed as research assistant again for a year. After 2 months and 13 days of duty, the serving time of the complainant came to an end, and on the grounds that the complainant could not finish his doctorate research, that there was no instructors that he could work together, that he could not establish his order and discipline, that his works was not satisfying the needs; his serving time was not extended and the relation between the complainant and the university was cut off again. The complainant opened a case regarding

this event in the administrative court and the court declined the request. The appeal request of the complainant was also declined by the high court and the decision was made final against the complainant. The complainant claimed that the decision taken in the subject case was not fair and it was not resolved in a reasonable time; and thus his the right to a fair trial was violated. The Constitutional court stated that the application is related to extending the duration of duty, and thus; the discrepancy is related to the civil rights and responsibilities and should be accepted. The court started the case and came to the conclusion that the right a fair trial in a reasonable time of the complainant was violated.

b. Discrepancies Originating from The Money Waiting to be Paid, Grant and Other Rights as a Result of the Termination of Duty

Before the Pellegrin criterion unlike the other discrepancies, it was accepted that discrepancies originating from the money waiting to be paid, grant, monthly wage and bonuses happening as a result of termination of duty between the public official and the administration are under the coverage of the 6th article of the Convention. Also in the Pellegrin and Vilho Eskelinen and Others applications, it was accepted that discrepancies originating from the money waiting to be paid, grant, monthly wage and bonuses happening as a result of termination of duty between the public official and the administration are under the coverage of the right to a fair trial.

C. OTHER SPECIAL CASES

1. Discrepancies Originating From the Termination of Duty

The termination of the duty is the process of suspending the duty of the officer whose stay at that particular duty is undesirable for a set period of time. The suspension of an officer is a measure taken in the field of status of an officer. ECHR approached the discrepancies originating from the termination of duty of the public officers because it is a precaution related to the public official whose stay at the duty is undesirable as a result of a discipline or criminal investigation. Even after the Vilhi Eskelinen criterion, ECHR did not accept the process of the termination. However, they later accepted that as a result of the outcome of the process of termination of duty, the discrepancy belongs to the civil rights and obligations. In the Buterleviute V. Lithuania application, ECHR also investigated the discrepancy based on the right to a fair trial. In this particular application, the complainant works as an assistant manager in a pre-school. Investigation was started on the grounds that took bribery and fake management against the complainant who has an official status according to the national legislation. After that, additional accusations

were made against the complainant about his misuse of the power of duty and embezzlement. After the first accusation, the attorney generalship requested the suspension of the officer; and this request was accepted by the court and the officer was suspended for three months⁷⁰. The complainant claimed that his the right to a fair trial was violated because his right to be judged publicly was not given to him in the process of the decision about the suspension. The defendant conventional Government claimed that the complainant is in public officer status and thus; the 6th article of the Convention cannot be applied. ECHR, who evaluated the application in terms of its acceptability, claimed that it is impossible to accept the suspension procedure as a criminal charge, thus; it needs to be determined that if the subject discrepancy is related to the civil rights and obligations; that while determining this aspect they will not be bound by the regulations existent in the national legislation, that the discrepancy caused the temporary suspension of the complainants occupational duty in the concrete case, and as a result of this, the discrepancy needs to be accepted as related to the civil rights and obligations; and accepted the discrepancies originating from the suspension procedures as under the coverage of the right to a fair trial.

2. Discrepancies Originating from Social Security Systems

ECHR accepts that the discrepancies originating from social security system are related to the civil rights and obligations as a result of their outcome and the assurances in the 6th article can be applied to them. In fact, the economical qualities of the discrepancies originating from social security systems are more dominant than the public law principles. The Constitutional Court also accepts that whether they are between private people or between administration and public officials, the right to a fair trial will be applied to the discrepancies originating from social security systems.

3. Discrepancies Originating from the Regular Military Service

The discrepancies originating from compulsory regular military service are accepted as related to the civil rights and obligations in respect of their outcome by ECHR. For this reason, ECHR investigates discrepancies originating from compulsory regular military service under the coverage

⁷⁰ At the end of the investigation, a public case was opened against the subject. The trial criminal court punished the subject with judicial fine and 2 years and 6 months of deprivation from public duty on the grounds that he was found guilty as a result of some accusations. The punishment time of the complainant was reduced to 1 year and 9 of deprivation of rights after his appeal request. The complainant used his right to file a appeal request again and his punishment time was reduced to 1 year and 3 months; and the decision was made final.

of civil rights and obligations. In the *Palaci V. Italia* and *Sarıdaş V. Turkey* applications ECHR evaluated the discrepancies originating from compulsory regular military service under the coverage of civil rights and obligations. In the *Sarıdaş V. Turkey* application, the complainant requested a roll call as required by the national legislation provisions. In the inspection process, the complainant went to the inspection for military and gave the report showing that he has a organic mental disorder and requested his exemption from military service because of the indication he specified. As a result of their investigation, the health committee gave a report that specifies that the complainant cannot be a commando but can be a soldier. This report was not issued to the complainant. As a result of this, the complainant did not do his preparations in the date of conscription and obviously did not turn himself in to the military; and his status was changed to a military deserter. The complainant learned the issue afterwards and requested from The Ministry of Defense his exemption from the military service claiming that he has an organic mental disorder. After the Ministry of Defense declined the request, a case was opened in the Military High Administrative Court (MHAC) where the cases are seen as first and last degree cases. MHAC decided to apply for an expert opinion and appointed the 12 military officer doctors who did the inspection and gave the report claiming that the complainant is healthy to do his military service as the experts for the case. The experts gave a pre-report claiming that the complainant is fit for serving in the military. After this report, the experts also decided that the complainant is fit for serving in the military in the final report. The final report was not issued to the complainant. The MHAC declined the case after the expert report is presented. Despite other efforts of the complainant, the decision was made final. The complainant claimed that the experts were working under the power of the defendant Ministry of Defense and getting their wages from them, as a result that the experts are tied to the Ministry and they were not impartial; that the expert report was not issued to him and as a result he could not utilize his right to object to the decision; and as a result of these reasons that his the right to a fair trial was violated. The defendant government requested the denial of the application by claiming that the subject case originates from the regular military service procedures and the 6th article of the Convention cannot find use in the case. In the acceptability investigation, ECHR claimed that the fact that the discrepancy originates from the regular military service procedures is not enough alone to prevent the right to a fair trial to be implemented in the case, that the discrepancy is related to the civil rights and obligations as a result of its outcome; and accepted the application and started the case.

CONCLUSION

The inclusion in the public law of the discrepancies originating from the public officials of conventional governments and the necessary loyalty and trust between the public official and government made them questionable about the fact whether or not they can be under the coverage of the right to a fair trial. In fact, in order for a discrepancy to be under the coverage of the right to a fair trial, it needs to be related to civil rights and obligations or criminal charge. In the beginning, the fact that the discrepancies originating from the loyalty and trust connection between the public official and the Government and the public officials themselves show public qualifications caused these subject discrepancies to be excluded from the coverage of the right to a fair trial. Even in this situation, the monthly wage waiting to be paid as a result of the termination of duty, grants, and other economical rights was judged under the coverage of the right to a fair trial - in other words under the coverage of the 6th article of the Convention. Especially in France, the view of ECHR regarding this particular issue was criticized harshly; and the German Federal High Court evaluated some applications regarding the discrepancies originating from public officials under the coverage of the right to a fair trial. After that ECHR claimed that they are not bound by internal regulations and would apply the autonomous interpretation principle in their views regarding the discrepancies. After this claim, ECHR accepted many of the discrepancies that are subject to public law in conventional governments as under the coverage of the 6th article of the Convention. In the *Pellegrin V. French* application, ECHR accepted that the 6th article of the Convention can be applied to discrepancies originating from public officials for the first time. In this application, ECHR reviewed their older decision and claimed that it is against the equality rules to exclude the discrepancy just because the complainant has the officer status. In this application, ECHR determined a criteria and claimed that in an application, the qualifications of the public official need to be evaluated when deciding whether or not the 6th article of the Convention will be applied. According to this criterion, if the public official uses the freedom rights granted by the government or represent the public authority, the 6th article cannot be applied; otherwise it can be applied to the situation. After the *Pellegrin* criterion, ECHR reconsidered the issue in the *Vilho Eskelinen and Others V. Finland* application. After stating that not applying the 6th article of the Convention in the discrepancies, originating from economical rights as a result of the fact that the public official does not use the freedom rights granted by the government or represent the public authority, would cause outcomes that are not in line with the notion of equity; concluded that the problems would be solved by taking the qualifications of the public official into consideration essentially. In the investigation about acceptability of the

application ECHR put forward the Vilho Eskelinen criterion. According to this, unless proven otherwise, the 6th article of the Convention can be applied to the discrepancies belonging to the civil rights and obligations and originating because of the regular work relations between the public official and the government. If this presumption is proven otherwise by the Conventional Government, ECHR will not be applied to the subject discrepancy. The Conventional Government can prove the presumption wrong by proving two conditions by basing them on the status of the officer. These conditions are; the limitation of the right to access to courts for the subject duty or worker category in the national legislation and the fact that the discrepancy is related to the interests of the government. In other words, it needs to be proven that the discrepancy originates from the usage of public power. If the conventional government proves both of the conditions are true; the 6th article of the Convention can no longer be applied. If the situation is the exact opposite for one of the conditions (ex: the right to access courts is not limited); in other words if the discrepancy is not caused by the usage of public power, the claim regarding the officer status will not be enough and the 6th article of the ECHR will be applied.

The Vilho Eskelinen criterion is still valid in determining whether or not the 6th article will be applied to the discrepancy originating from public officials. After the settlement about this issue, ECHR expanded their view about this decision and accepted that some of the discrepancies originating from public officials are related to civil rights and obligations as a result of their outcomes. It is possible to say that the Constitutional Court views the issue of the coverage of the discrepancies originating from the public officials by the right to a fair trial much more broadly. For the Constitutional Court stated that the application of the 6th article in some discrepancies is beyond any doubt.

Shortly, the discrepancies originating from the public officials will benefit from the 6th article of the convention according to the Vilho Eskelinen criterion. On the other hand, if the nature and quality of the discrepancy requires it, the principles regarding the right to a fair trial will also be applied.

◆◆◆◆

BIBLIOGRAPHY

- Aydin Bihter, *Türk İdari Yargı Düzeninde Adil Yargılanma Hakkı*, Master's Thesis, Ankara 2012.
- Banaszak Roland A., *Fair Trial Rights of the Accused: A Documentry History*, Greenwood Pubished, First Edition, 2002.
- Bayrakci Esra Tugba, *Adil Yargılanma Hakkının Bir Unsuru Olarak Savunma Hakkı*, Master's Thesis, Kırıkkale 2011.
- Çayan Gökhan, *Adil Yargılanma Hakkı*, Legal Publising, İstanbul 2016.
- Celik Adem, *Avrupa İnsan Hakları Sözleşmesi ve Türk Hukuku*, Adalet Publishing, Ankara 2007.
- Dutertre Gilles, *Avrupa İnsan Hakları Mahkemesi Kararlarından Örnekler*, Extraits Cles De Jurisprudence- Cour Europeenne Des Droits De l' Homme, Council of Europe, Germay 2003.
- Görür Hamit, *Adil Yargılanma ve İdari Yargıda Görünümü*, Master's Thesis, İzmir 2010.
- İnceoğlu Sibel, *Adil Yargılanma Hakkı ve Yargı Etiği*, Council of Europe, Ankara 2007.
- Kaşıkara Serhat, *Avrupa İnsan Hakları Sözleşmesi'nin 6. Maddesi Çerçevesinde Makul Süre İçerisinde Yargılanma Hakkı*, TBB Review, Iss. 84, Ankara 2009.
- Mole Nuala End Harby Catharina, *Adil Yargılanma Hakkı Avrupa İnsan Hakları Sözleşmesi'nin Uygulanmasına İlişkin Klavuz*, Council of Europe, Germany 2001.
- Osce- Digest, *Legal Digest Of International Fair Trial Rights*, OHDİR Publishing, Warsaw 2012.
- Robinson Patric, *The Right to Fair Trail in International Law, with Specific Reference to the Work of The ICTY*, Berkelet J.L Int'l L. Publicist, Vol. 3.
- Rozakis Christos, *The Right To A Fair Trial in Civil Cases*, Judicial Studies Institute Review, Vol: Iss. 4: 2, 2004.
- Rozakis Christos, *The Right To A Fair Trial: The Light Of European Court Of Human Rights' Decision*, Oxford University Press, London 2013.
- Sanivar Ramadan, *Avrupa İnsan Hakları Sözleşmesinin 6. Maddesi Çerçevesinde Adil Yargılanma Hakkı ve Saniğa Tanınan Temel Güvenceler*, Master's Thesis, Gazimagusa 2012.
- Toydemir Seçkin, *Adil Yargılanma Hakkı Çerçevesinde Türk İdari Yargı Sistemi*, Master's Thesis, Istanbul 2013.

Vitkauskas Dovydas and Dikov Grigoriy, *Avrupa İnsan Hakları Sözleşmesi Kapsamında Adil Yargılanma Hakkının Korunması*, Council of Europe, Strasbourg 2012.

Vitkauskas Dovydas and Lewis- Anthony Sian, *Right to A Fair Trial Under the European Convention On Human Rights (Article 6)*, Interights Published 2009.

Yüksel Hatice, *Uluslararası Sözleşmelerde ve Türk Hukukunda Adil Yargılanma Hakkı*, Ankara 2010.

CASES

BAKA V. HUNGARY: 20261/12; 27/05/2014 <http://hudoc.echr.coe.int/tur?i=001-144139>

BENTHEM V. THE NETHERLANDS: 8848/80; 23/10/1985 <http://hudoc.echr.coe.int/tur?i=001-57436>

BOCK V. GERMANY: 11118/84; 19/09/1989; <http://hudoc.echr.coe.int/tur?i=001-55475>

BUSCEMI V. ITALY: 29569/95 16/09/1999; <http://hudoc.echr.coe.int/tur?i=001-58304>

CAPUANO V. ITALY: 9381/81; 25/06/1987; <http://hudoc.echr.coe.int/tur?i=001-57458>

DEWEER V. BELGIUM: 6903/75; 27/05/1980 <http://hudoc.echr.coe.int/tur?i=001-57469>

ENGEL and OTHERS V. THE NETHERLANDS: 5100/71, 5101/71, 5102/71, 5354/72, 5370/72; 23/11/1976; <http://hudoc.echr.coe.int/tur?i=001-57478>

FAYEDV.UNITED KINGDOM: 17101/90; 21/09/1994; <http://hudoc.echr.coe.int/tur?i=001-57890>

GUINCHO V. PORTUGAL: 8990/80; 10/07/1984; <http://hudoc.echr.coe.int/tur?i=001-57497>

HENRYK URBAN and RYSZARD URBAN V. POLAND: 23614/08; 30/11/2010 <http://hudoc.echr.coe.int/tur?i=001-101962>

KYPRIANOU V. SOUTH CYPRUS: 73797/01; 15/12/2005; <http://hudoc.echr.coe.int/tur?i=001-71671>

LECHNER V. AUSTRIA: 9316/81; 23/04/1987; <http://hudoc.echr.coe.int/tur?i=001-57520>

LE COMPTE, VAN LEUVEN VE DE MEYERE V. BELGIUM: 6878/75, 7238/75; 18/10/1982; <http://hudoc.echr.coe.int/tur?i=001-57521>

JOKSAS V. LITHUANIAN: 25330/07; 12/11/2013; <http://hudoc.echr.coe.int/tur?i=001-138443>

OLUJIC V. CROATIA: 22330/05; 05/02/2009; <http://hudoc.echr.coe.int/tur?i=001-91144>

PELLEGRIN V. FRANCE: 28541/95; 08/12/1999; <http://hudoc.echr.coe.int/tur?i=001-58402>

PIERSACK V. BELGIUM: 8692/79; 26/10/1984; <http://hudoc.echr.coe.int/tur?i=001-57556>

POISS V. AUSTRIA: 9816/82; 29/09/1987; <http://hudoc.echr.coe.int/tur?i=001-57559>

PROCOLA V. LUXEMBOURG: 14570/89; 28/09/1995; <http://hudoc.echr.coe.int/tur?i=001-57944>

RAMBUS V. GERMANY: 40382/04; 16/06/2009; <http://hudoc.echr.coe.int/tur?i=001-93430>

RAVON V. FRANCE: 18497/03; 21/02/2008; <http://hudoc.echr.coe.int/tur?i=001-85185>

ROLF GUSTAFSON V. SWEDEN: 23196/94; 01/07/1997; <http://hudoc.echr.coe.int/tur?i=001-58051>

SARIDAS V. TURKEY: 6341/10; 07/07/2015; <http://hudoc.echr.coe.int/tur?i=001-156205>

SRAMEK V. AUSTRIA: 8790/79; 22/10/1984; <http://hudoc.echr.coe.int/tur?i=001-57581>

SUKUT V. TURKEY: 59773/00; 11/09/2007; <http://hudoc.echr.coe.int/tur?i=001-91560>

VILHO ESKELINEN and OTHERS V. FINLAND: 63235/00; 19/04/2007; <http://hudoc.echr.coe.int/tur?i=001-80249>

VAN DE HURK V. THE NETHERLANDS: 16034/90; 19/04/1994; <http://hudoc.echr.coe.int/tur?i=001-57878>

WEBER V. SWISS: 11034/84; 22/05/1990; <http://hudoc.echr.coe.int/tur?i=001-57629>

ZDANOKA V. LATVIA: 58278/00; 16/03/2006; <http://hudoc.echr.coe.int/tur?i=001-72794>

ZIMMERMANN and STEINER V. SWISS; 8737/79; 13/07/1983; <http://hudoc.echr.coe.int/tur?i=001-57609>