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The Direct Applicability Of The Constitution As Regards To The Freedom Of Seeking Judicial Remedy And The Protection Of Fundamental Rights And Freedoms

Under Turkish Law direct applicability of the constitutional provisions has been debated by the highest judicial authorities and Turkish doctrine. This debate mainly covers the provisions of the Constitution in relation to the freedom of seeking judicial remedy and fundamental rights and freedoms.

The direct applicability of the constitutional provisions should be treated by considering the competence of the administrative courts as should be the main defender of the rights and freedoms and the transactions and operations of the administration which are from time to time may be criticized as being in breach of the fundamental rights and freedoms.

Article 11 of the Constitution has a binding effect which follows as: "*The provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, and administrative authorities and other institutions and individuals. Laws shall not be in conflict with the Constitution*". This article states that constitutional provisions have a binding effect not only on public bodies but also on the other organizations and individuals. In the legal grounds of this provision, it is emphasized that the Constitution is a brocard - basic legal rules which binds, together with the government or the other power centers of the state, also the individuals. Equally, it is cited that legislative, executive and judicial powers of the state have to comply with the provisions of the Constitution and when it is necessary, Constitution should be applied directly such as other legislations and regulations. This wording of the legal grounds of the aforementioned provision of the Constitution aims to provide that in circumstances where there is a conflict between a provision of the Constitution and a provision of a legal document regulating the same issue, the provision of the Constitution should be prevailed.

The direct applicability of the constitutional provisions has been discussed by the Turkish doctrine and the Constitutional Court with different evaluations as to whether it is possible, and if it is possible, whether the direct application of these provisions may be performed by the legislative, executive or judicial authorities, also whether the provisions of the Constitution may prevent the application of the provisions of a previous legislation by implied abrogation. In this respect, the legal authorities have presented different opinions as the direct applicability of a constitutional provision may be possible if the administration considers that the relevant legal rule is against the general legal principles, thus instead of such legal rule, the relevant provision of the Constitution may be applied. Another opinion, however, asserts that the direct applicability of a constitutional rule may only be possible if there is not any legislative document regulating the same issue.

In the light of the above, it would be helpful to analyze the decision of Turkish Council of State dated 13 November 2006 in order to better understand the approach of the judicial authorities to the matter. This remarkable decision is critically important and debates the direct applicability of the constitutional provisions. In the aforesaid decision, the legal problem was related to a payment order which was issued by the administration on the grounds of the breach of tax liabilities. In this matter, the plaintiff did not oppose to the payment order within 7-day period prescribed under the related legislation; therefore its opposition was rejected by the court of first instance. In fact, the length of the opposition period was not inserted in the payment order. The Council of State, in its decision, overruled the decision of the court of first instance on the grounds that there was a lacuna in the relevant legislation and evaluated the matter by considering the direct applicability of the constitutional provisions from the perspective of the freedom of seeking judicial remedy.

The State Council in its above decision has relied on the article 36 and 40 of the Constitution in order to ensure that the individuals are free to seek remedy either before administrative or judicial authorities. In this respect, the State Council emphasizes that, in order to remove some practical difficulties faced by individuals due to the extremely complicated legislations, even if there is not any provision under the relevant legislations providing that the individuals, who face any administrative transaction, should have been informed of the opposition period for such transaction, the administration, should inform the individual of the relevant judicial and administrative authorities to be applied and also the deadline of such application.

The State Council while overruling the domestic court's decision relied directly on article 40 of the Constitution regulating the freedom to seek remedy and freedom of fundamental rights and found the decision of the court of first instance as in breach of the Constitution. Hence, it may be concluded that as being the highest norm in the legislation system, the Constitution may be applied directly in concrete cases.

It is needed to be stated that as a general rule, the provisions of Constitution can not be applied directly. In order to enforce the provisions of the Constitution, practical legislations which considers the Constitution as the main basis, are required. However it is not obligatory to enact any legislation in subjects which are prescribed by the Constitution in detail. Even the provisions of the Constitution may be applied directly without amending the contrary laws. Moreover there are decisions of the Constitutional Court supporting above.

In every case, particularly concerning the freedom to seek remedy and fundamental rights, compatibility of the administrative transactions to the provisions of the Constitution is to be provided by every single government agency. Otherwise individuals shall not be able to use their rights which are prescribed by the Constitution, due to the complicated legislation and the State shall get behind the "rule of law" notion