

Turkish Constitutional Court: Limiting Criteria for Judges to be Assigned as Experts do not Breach the Constitution

8 May 2020

Turkish Constitutional Court ("**TCC**") recently evaluated and dismissed Izmir 1st Criminal Court of Intellectual and Industrial Rights' ("**Applicant**") application for the abolishment of some articles of the Law on Experts, Law of Judges and Prosecutors, and Code of Criminal Procedure.

In the case at hand, the regional expert committee did not approve the expert commissioned by the Applicant based on the fact that he was not included in the list, and there are experts who are registered under related specialty branch. In response, the Applicant applied to the TCC and requested the abolishment of the relevant articles by claiming that they are unconstitutional.

The Applicant requested the abolishment of relevant articles of Law on Experts ("**Law**"), Law of Judges and Prosecutors, and Code of Criminal Procedure regarding

- experts can only make evaluations limited to their technical expertise and cannot make a legal evaluation,
- legal experts cannot be assigned if they do not have another technical expertise,
- in principle experts should be appointed from regional lists,
- breach of such provisions requires a discipline penalty for judges,

due to being in breach of articles 2, 36, 138, 139, and 140 of the Constitution.

TCC rejected the 4th clause of article 10 and 6th clause of article 12 of the Law on procedural grounds since it has not been 10 years since the decision resolving the application made to the TCC on the same issue was published in the Official Gazette.

Remaining articles have been substantially examined and as the result of this examination:

- The rule preventing experts from making explanations and legal evaluations outside of his/her technical expertise have been claimed to breach the constitution. The claim was based on such rule being against the job's nature as experts cannot make classifications with respect to criminal law; however, most of the time they have to give an opinion based on the legislation and by evaluating the legislation. TCC has stated that under the principle of independence of the courts, determining the legal qualification and applying the law to the present case is the primary public power and duty of the courts. Accordingly, TCC did not find this limitation unconstitutional and rejected the claim.
- The rule that set forth that judges should clearly indicate the limits of the examination to the commissioned expert for evaluation of subjects that require expertise or technical information, has been claimed to be unconstitutional. The Applicant claimed that judges' strict determinations might heavily influence the expert and cause bias. TCC stated that the purpose of the regulation in question is the judge to determine the scope of the examination to be conducted by the expert and ensure the adjudication to be conducted fairly, in a reasonable time and with minimal expenses. Accordingly, TCC rejected the application on the ground that in the event of the abolishment of such regulation, those principles cannot be maintained.
- The rule regulating the selection of the experts based on the regional lists has been claimed to be unconstitutional. The Applicant argued that such regulations make the courts be under the strict supervision of regional committees, result in a monopoly of experts on the lists and make it actually impossible to assign experts that are not on the list. The Applicant also argued that assigning expert from another region's list may have high costs. TCC stated that such rules aim the supervision of the competency of the experts and their lawful election, and their only purpose is to increase the effectiveness of experts. Accordingly, TCC

rejected the application stating that rules do not violate the right to a fair trial and independence of the courts.

- The rule that sets forth a warning penalty will be applied to judges and public prosecutors that do not abide the rules while selecting and assigning experts have been claimed to violate the constitution due to imposing administrative fines to the judge for not abiding the rules regarding choosing expert results in arbitrary interference of the administration to adjudicative activities and this situation creates a pressure on the judge. This application has been rejected as this rule is stipulated for adjudicative services to function properly and considering the public interest and that administrative fines can be brought under the discretion of the lawmaker and in this scope, there is no aspect violating the independence of the courts and the right to a fair trial.
- The rule stipulating that those who have studied law cannot be appointed as experts unless they certify that they have a different specialty outside of the legal field has been requested to be abolished. The Applicant based this request on the claims that intellectual and industrial rights require legal expertise, and the evaluation should be made by the expert since the judge has a very limited time. TCC rejected this objection by stating that the judicial power has been given to independent and objective courts and this power cannot be transferred to others -even if through an expert- and finding, interpreting and applying the rules of the law are already the primary duty of the judge.

In summary, some of the objections subject to the application were rejected on procedural grounds, and the rest were rejected on substantial grounds since no violation of the constitution was found.

Please see this [link](#) for the full text of the decision of the Turkish Constitutional Court's decision dated 19 February 2020 and numbered 2018/152 E., 2020/11 K. published in the Official Gazette dated 15 April 2020 and numbered 30960 (Only available in Turkish).

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