Right to Trial within a Reasonable Time in Turkey and the European Court of Human Rights

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ABSTRACT

Turkey takes the lead in terms of violations of the European Convention on Human Rights (hereafter ECHR). The ECtHR condemns Turkey in most of the cases for the violation of article 6 providing the “Right to a Fair Trial”. After analyzing the European Court of Human Rights (hereafter ECtHR) decisions, it is established that the most problematic element in the context of the right to a fair trial is the “reasonable time”. The concept of “reasonable time” provided by article 6 of the ECHR - and reinforced by the ECtHR decisions - applies to civil, administrative and criminal cases.

In this study, the “reasonable time” violations are examined. Firstly, the paper discusses the reasons for which both civil and criminal cases are prolonged and the reasonable time is exceeded. The criterion we take as reference in this review is mainly the ECtHR jurisprudence. Secondly the paper discusses the reforms conceived in Turkish domestic law in order to overcome this problem, and how successful they have been so far in resolving this issue.

Keywords: Right to a fair trial, trial within a reasonable time, European Convention on Human Rights, European Court of Human Rights, Article 6/1, Turkish Constitution, Turkish Domestic Law, Constitutional Amendments, Legal Reform

I. Introduction

The right to a fair trial provided in article 6 of the ECHR has a different standing among other rights of the Convention. The right to a fair trial differs from other rights with its specificity to make regulations regarding the judiciary power. With the right to a fair trial, the judicial power is subject to limitations, while the protection against the judiciary is not the primary objective in other rights. The right to a fair trial constitutes a right for individuals, on the other
hand it represents a duty for the state. The state is obliged to provide individuals with the right to a fair trial. Accordingly, paragraph 1\footnote{“In the determination of his civil rights and obligations or 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 interests 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 to the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interests of justice.”} of article 6 enumerated some of the principles constituting the right to a fair trial. These are, the trial of the case before an independent and impartial court established by law, in a reasonable time, openly and in a fair manner.

In its decision concerning article 6, which has been composed of a broad interpretation based on the fundamental importance of “fairness”, the ECtHR affirmed that it was crucial for the justice to be manifested fairly in democratic societies. Therefore, it remarked that:

\begin{quote}
In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of article 6 para. 1 (art. 6-1) would not correspond to the aim and the purpose of that provision\footnote{Delcourt v. Belgium, A11, 1970, no. 268/65, §25}. \end{quote}

The ECtHR concluded that the right to a fair trial includes implicit elements other than those explicitly enumerated in the paragraph. Among the implied elements that emerge from the ECtHR’s jurisprudence, the principles of the right to access to the court\footnote{Golder v. The United Kingdom, A18, 1975, no. 4451/70 §23- 40; Airey v. Ireland, A41, 1979, no. 6289/73, § 24}, the equality of arms\footnote{Delcourt v. Belgium, §28,}, the contradictory trial\footnote{Brandstetter v. Austria, A211, 1991, no. 13468/87, §66} and the right to reasoned decision\footnote{Gölcüklü Feyyaz “AlİHS’de Adil Yargılama” (Fair trial in the European Convention on Human Rights) AUSBF D C. 49 Y. 1994 S.1-2, p.200-201} can be counted. In the continuation of paragraph 1, rule stating that the trial ought to be conducted with an open hearing and its exceptions have been noted. Paragraph 2 contains the presumption of innocence, while paragraph 3 regulates the rights and guarantees of the defendant’s rights.

The ECtHR, in order to ensure that individuals are granted the right to a trial within a reasonable time, declared the purpose of the provision in its first decision:
The purpose of this provision (6/1), which applies to both sides of the trial, is to protect them from excessive delays in the trial process; especially in criminal cases, preventing the accused from living for a long time worrying about the outcome of his trial. As a matter of fact, the 2018 ECtHR annual report points out that states were principally condemned for violation of article 6 of the ECHR. When we analyze the statistics of the year cited in this report, the violations of the right to a fair trial constitute 24.10% of all the violations. The Convention provision giving rise to the greatest number of violations is article 6, firstly with regard to the right to a fair trial, then the right to a hearing within a reasonable time. This fact is expressed by two scholars as “justice delayed is justice denied”, and “delayed justice is regarded as injustice”. The ECtHR frequently reminds in its decisions that the fulfillment of the obligation to protect the rights expressed in article 6/1 of the ECHR does not only mean that the contracting states do not deliberately attempt to impede access to the court or that there is no positive obstacle emanating from the states. But, fulfillment of a duty under the Convention on occasion necessitates some positive action on the part of the State. In this context, states have to balance the obligation to deliver justice and the burden of speeding proceedings. The effort to try the cases promptly should not prevent the courts from delivering a lawful and fair decision. States must simultaneously assure a fair trial procedure and a trial within a reasonable time.

11 Airey v. Ireland, §25; see also Ülger v. Turkey, 2007, no. 25321/02, §44
12 İnceoğlu, Adil Yargılanma Hakki, p.386
Paragraph 1 of article 6 imposes the duty on the contracting states to regulate their legal systems in a way to meet all the requirements of the article, regardless of the costs. In terms of the right to trial within a reasonable time, the ECtHR reminds that everyone has this right, and stresses that the contracting states must satisfy this requirement.

Article 6 para. 1 (art. 6-1) of the Convention guarantees to everyone against whom criminal proceedings are brought the right to a final decision within a reasonable time on the charge against him. It is for the Contracting States to organize their legal systems in such a way that their courts can meet this requirement.

II. Right to Trial within a Reasonable Time in Turkey

Turkey signed the ECHR on 4 November 1950, and it was ratified by law number 6366 on 10 March 1954. The state granted the right of individual petition to the ECtHR in 1987 and admitted the compulsory jurisdiction of the ECtHR in 1990.

Prior to 2004, article 90 paragraph 5 of the Constitution stated that “International treaties duly put into effect have the force of law.” The Constitution affirmed that all types of international treaties had the same status in the hierarchy of norms. In its decisions, the Constitutional Court used international treaties not as a norm per se, but as a statutory instrument based on the principles of the state and the rule of law relating to human rights set out in article 2 of the Constitution. In other words, the Constitutional Court has neither annulled a provision of law solely because of violation of the Convention, while controlling the conformity of laws with the Constitution; nor did it refrain from applying the relevant provisions of the law on grounds of violation of the Convention. The general attitude of the Court was not to accept the international treaties above the Constitution; it would use them as a statutory instrument. The Constitutional Court underlines that;

14 Airey v. Ireland, § 24
Accordingly, the rules of the European Convention on Human Rights have also the force of law. However, since the Law on Political Parties no. 2820 has the nature of a special law compared to the Convention, it has priority to be implemented. Moreover, the Convention does not include concrete rules to be applied in political party closure cases. For these reasons, it is not possible to directly apply in the case the relevant rules of the European Convention on Human Rights by neglecting the provisions of the Law on Political Parties.

In 2004, article 90 of the Constitution was amended by removing any ambiguity about the place of the Convention in domestic law. However, the result expected by the constitutional amendment could not be achieved. Although Council of State asserted in sporadic decisions that international treaties are supra-legal and binding in terms of executive and judicial branches, national courts have continued to neglect the provisions of the Convention or have interpreted them as they see fit, regardless of the case law of the ECtHR. It was specified in article 90 paragraph 5 that:

In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.

According to the majority of the doctrine, the interpretation of this provision suggests that international agreements prevail over laws if they relate to human rights and otherwise they are equivalent to laws and the Constitution prevails over all types of international agreement.

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17 Article 90 paragraph 5 of the Constitution: “International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. (Sentence added on 7 May 2004; Act No. 5170) In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail”.
Thus, the ECHR would override laws because it relates to human rights, but it would not prevail over the Constitution no matter its relevance with human rights.

Albeit the concept of the right to a fair trial was not explicitly included in Turkish law until 2001, it was possible to encounter the elements of this right both in the Constitutions made throughout the history of the Republic and in various judicial decisions.

There is no doubt that the principle emphasized as "fair and just..." judgment in the preamble of article 36 will gain meaning and integrity with a "right of defense" "by making use of all legitimate means and instruments...". Thus, the word "all", whose existence is accepted in the theoretical plan or by interpretation, includes the full enjoyment of the right to defense without any limitation20.

This article titled "Freedom to claim rights" and other constitutional procedural safeguards complementary to it have played a central role in the Constitution before and now. These guarantees are one of the fundamental elements of the rule of law according to the Constitutional Court;

One of the fundamental elements of the right to a fair trial, which is guaranteed in article 36 of the Constitution, is the principle of holding public hearings regulated in article 141 of the Constitution. The purpose of the principle of public trial is to ensure the transparency of the judicial activity by opening the functioning of the judicial mechanism to public scrutiny and to prevent arbitrariness in the trial. In this respect, it constitutes one of the most essential realization means of the rule of law21.

When observing Turkish laws concerning the right to a fair trial, three articles of the constitution are substantial: articles 36, 3722 and 3823. Besides, the right to a fair trial still had

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21 Constitutional Court, Recourse of Nevruz Bozkurt, B. No: 2013/664, 17.09.2013, § 32.
22 “No one may be tried by any judicial authority other than the legally designated court.”
23 “No one shall be punished for any act which does not constitute a criminal offence under the law in force at the time committed; no one shall be given a heavier penalty for an offence other than the penalty applicable at the time when the offence was committed.”
a legal basis, in accordance with the disposition in article 2 of the 1982 Constitution\textsuperscript{24}. In 2001 the concept has positively gained a constitutional ground with an addition to article 36 of the Constitution\textsuperscript{25} which regulates the freedom to claim rights. Article 36 does not define the right to a fair trial; the content of the right is to be determined resting on the universal standards set by the ECHR. The regulation in article 90 of the Constitution also provides a basis to this perspective. Article 90 recognizes the priority of the international agreements, duly put into effect, concerning fundamental rights and freedoms - therefore of the ECHR- in case of a conflict with laws. Hence, the Constitution does not regulate all the aspects of the right in question, which necessitate referring to a higher norm. In this case, the higher norm is the Convention, as it is foreseen in article 90 of the Constitution. Thus, article 6 of the ECHR may be taken as a reference when exercising the right to a fair trial in domestic law.

As the ECtHR decisions demonstrate, article 6 of the ECHR is the most recurrently disregarded article by Turkey. The number of violations amount to a substantial number particularly in 2010, but also in the overall analysis\textsuperscript{26}. A closer look indicates that the cases in which Turkey is convicted of violation are primarily due to criminal proceedings. This comes from the fact that the right to a trial within a reasonable time is not respected in these proceedings.. Therefore, we consider that firstly, it is essential to study the sources and the reasons for these violations and secondly, to assess the efforts and the modifications made in order to comply with the standards established by the ECHR.

\textsuperscript{24} “The Republic of Turkey is a democratic, secular and social state governed by rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the preamble.”

\textsuperscript{25} “Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures.”

\textsuperscript{26} Based on the statistics published by the Turkish Ministry of Justice; https://inhak.adalet.gov.tr/Resimler/Dokuman/1012201914015217.pdf. Between the years 1959 and 2018, ECtHR condemned Turkey for the violation of the right to a fair trial 919 times. This makes article 6 of the Convention the most violated right among all.
1. Number of Violations of Articles of the ECHR between 2003 and 2018 in Turkey

<table>
<thead>
<tr>
<th>Country</th>
<th>Number of violations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Turkey</td>
<td>607</td>
</tr>
<tr>
<td>France</td>
<td>284</td>
</tr>
<tr>
<td>Germany</td>
<td>102</td>
</tr>
</tbody>
</table>

2. Number of Cases Regarding the Length of the Proceedings (article 6/1 ECHR)²⁷

²⁷ECHR, Overview 1959-2019, Council of Europe: https://www.echr.coe.int/Documents/Overview_19592019_ENG.pdf, p.6. The statistics show the total number of violations of the article 6/1 between 1959 and 2019. In order to make a comparison, there are also some statistics from other countries.
III. The Sources of Obstructions to the Right to a Trial within a Reasonable Time

Concerning appeals to the ECtHR for violation of the right to a fair trial by Turkey, the majority relates to the reasonable time and often results in violation of this right (see; Table 1 and 2). First of all, there are deficiencies about enacting the right to a fair trial within a reasonable time in the Constitution and in the domestic law; nothing in the Constitution of 1982 presents a guarantee for this right. The only regulation is in article 141, paragraph 4; it is accepted as the duty of the judiciary to conclude the cases as quickly as possible. However, whether the phrase “as quickly as possible” in the article meets the concept of “reasonable duration” is debatable. If the statement “possible” is interpreted as giving legitimacy to the economic, physical and personal insufficiencies to prolong the cases, it would not meet the reasonable time requirements of the ECtHR. Examining the ECtHR judgments, the state is responsible for delays attributable to its own administrative and judicial bodies. The state is obliged to pay the necessary attention and act swiftly in this matter. Judicial bodies are responsible for their conduct, including, for example, delays in the filing of a public case, or delays in the subsequent referral of the case to another court, or in the appointment of a rapporteur.

In terms of reasonable time, the ECtHR examines the criteria of "the complexity of the case", "the attitude of the applicant" and "the attitude of the competent authorities". Therefore, no definite time has been determined in terms of reasonable time and a conclusion has been reached by taking into account the specific features of each case. For example, it was highlighted that greater attention should be paid to speeding up the proceedings in labour

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28 “It is the duty of the judiciary to conclude trials as quickly as possible and at minimum cost.”
30 Eckle v. Germany, A51, 1982, no. 8130/78, § 73
courts, in the trial of detainees or in other similar special situations\textsuperscript{31}. The ECtHR considers that if a case filed lasts longer than anticipated in respect to the above mentioned criteria, there is a violation of article 13\textsuperscript{32} of the ECHR. If the reclaimant is granted the right to appeal to appellate courts and to set a deadline for the settlement of the case or to obtain redress due to the long duration of the case, the Court may consider that there is no violation. Although, when we look at paragraph 4 of article 141 of the Constitution, such a right is not recognized and there is a lack of explicit provision for a trial within a reasonable time\textsuperscript{33}. In all likelihood, for this reason, Turkey has been condemned in several cases by the ECtHR. To give an example of one of the most trumpeted cases in the press, the Nalbant case\textsuperscript{34} lasted forty-three years and Turkey has been found in violation of article 6/1 of the ECHR.

3.(A) Trial within Reasonable Time in the context of Criminal Cases

Article 6 paragraph 1 of the ECHR states that “In the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time…” As it can be understood from the text of article 6/1, the right to be tried within a reasonable time will be valid both in disputes regarding civil rights and obligations and those regarding criminal charges. In practice, it is more instrumental in criminal proceedings. The person being charged or accused must be fairly tried, investigated and prosecuted at every stage of the trial in all criminal proceedings\textsuperscript{35}.

The right to a fair trial within a reasonable time in criminal law is a notable problem for Turkey. Among the forty-seven states of the Council of Europe, Turkey is in the worst position regarding long periods of detention, especially in matters of freedom of expression

\textsuperscript{32} “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”.
\textsuperscript{33} Pazarcı, Hüseyin, Uluslararası Hukuk, 1. Kitap (International Law), Ankara, A.Ü.S.B.F. Yayınları, 1985, p. 29
\textsuperscript{34} Nalbant v. Turkey, 2006, no. 61914/00
and the press. One case worth mentioning is the Cumhuriyet trial. In late 2016, more than a dozen different journalists and executives at Cumhuriyet newspaper were charged with various terrorism offences. The striking point is that the first hearing of the trial of nineteen defendants, twelve of them in detention, began nine months after the arrests, on July 24, 2017.

In the ECtHR jurisprudence and domestic law, violations of the right to a trial within a reasonable time come forward mostly in criminal law. More precisely the pre-trial detention periods, which is a substantial issue in Turkey, lead to these violations. According to the ECtHR, pre-trial detention is not a practice that can be exercised at all times and is an exception. In other words, the principle is not to hold the person in remand prison until trial or sentencing. States should take measures to ensure that the length of proceedings is maintained as short as possible for ensuring the fairness of the judicial process and defence rights permit. However, violating the principle of presumption of innocence, in practice the pre-trial detention has become the norm in Turkey. A clear example is Şahap Doğan, who had been under arrest in Tekirdağ F-Type Prison for fourteen years although there has not been a final decision on his case. Judges decide the detention of the person regularly, with ready-made sentences that they use notwithstanding with the situation. ECtHR does not accept as a justification, the stereotypes such as “taking into account the nature of the crime, the state of the evidence and the content of the case file” recorded by the tribunals in the decisions to extend the arrest.

According to the ECtHR, the restriction of freedom must be justified by other grounds. In such a situation, the ECtHR pays special attention to whether the judicial authorities’ reasons to justify the deprivation of liberty continue and urges the judicial authorities to pay more attention to the procedural rules. Accordingly,

The persistence of plausible reasons for suspecting the arrested person of having committed an offense is a sine qua non for the regularity of continued detention, but after a certain time this is no longer sufficient. The court must then establish whether

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36 Compared with other countries that are next after Turkey, we observe very large differences. In 2010 the number of cases against Turkey on this issue were 6500; however in November 2011 this number increased to 9000.
37 Şahap Doğan v. Turkey, 2010, no. 29361/07
38 Cahit Demirel v. Turkey, 2009, no. 18623/03, § 27
39 Wemhoff v. Germany, A7, 1968, no. 2122/64, § 9
the other grounds adopted by the judicial authorities continue to legitimize the deprivation of liberty. When they turn out to be “relevant” and “sufficient”, it also examines whether the competent national authorities have taken “particular care” to the continuation of the procedure.

Pre-trial detention should only be limited to situations where it is absolutely necessary for the public interest; however, as long as it continues, the detention should be based on sufficient grounds for the definite public interest. In any event, pre-trial detention should not exceed a reasonable time. In Cahit Demirel decision, the ECtHR found that the detainment of applicant for six years and four months before the ruling of the tribunal was contrary to article 5/3 of the ECHR. In Turkey, the 15 July 2016 coup d’état attempt against state institutions was followed by the mass arrests of almost 45,000 people, including military officials, police officers, judges, governors and civil servants. After the coup attempt, the Ankara public prosecutor’s office opened a criminal investigation in which 3,000 judges and prosecutors were taken into police custody and placed in pre-trial detention. Mr. Altan, a former member of the Turkish Constitutional Court, was detained and he applied to the ECtHR challenging his pre-trial detention. This case is one of the exemplary cases regarding the abuse of the pre-trial detention period by the Turkish authorities. The Court held that;

More specifically, concerning the order for the applicant’s pre-trial detention on 20 July 2016, the Court notes that it has found that the evidence before it is insufficient to support the conclusion that there was a reasonable suspicion against the applicant at the time of his initial detention. That being so, the suspicion against him at that time did not reach the required minimum level of reasonableness.

This judgment highlights the importance of procedural safeguards and the respect of the principle of reasonableness in the context of pre-trial detention.

40 Pantano v. Italy, 2003, no. 60851/100, § 66
41 Cahit Demirel v. Turkey, 2009, no. 18623/03
42 “Everyone arrested or detained following the provisions of paragraph 1 (c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”
43 Alparslan Altan v. Turkey, 2019, no. 12778/17, § 148
Another trumpeted case was the Ergenekon, a series of high-profile trials in Turkey. Almost 300 people, including military officers, journalists and opposition lawmakers, all alleged members of Ergenekon, were accused of plotting against the Turkish government. The trials took place between 2008 and 2016. The point which requires attention is the lengthy trial and investigation processes. Even though the investigations started in June 2007, the first indictment was sent to the court in July 2008. Therefore, many people remained in pre-trial detention for nearly a year. The wait for a trial for one year in detention constitutes another example of a reasonable time violation. The Association of Contemporary Journalists declared about the case:

The prolonged detention has now turned into execution, that is, a punishment. The release of our friends who do not have the possibility of escaping and who do not have the situation to darken evidence, and the continuation of their trials without arrest is a requirement of both our national laws and international law. Delayed justice is not justice. 44

The general preamble of the Criminal Procedure Code (CPC) is the primary basis of the necessity of concluding the cases in a reasonable time. In the preamble, it is expressed that the conclusion of cases within a reasonable time is considered among the reasons for the adoption of the Code 45. Although there are many regulations regarding the right to a fair trial, such as holding a trial without defendant in order to prevent the case to be prolonged when the conditions are met, arrangements to ensure that the fugitive defendant is present at the hearing, the establishment of judicial law enforcement agencies, the establishment of a compulsory defence system, various regulations regarding the investigation phase, return of the indictment, regulations on experts, regulations on written notice and other regulations 46 in the CPC, the only manifest principle is in article 190 stating that “the main hearing may be interrupted in a way that permits that the trial may be conducted within a reasonable time.”

Article 102 of the CPC\textsuperscript{47}, on the other hand, introduces maximum periods for the continuation of detention, instead of the condition of reasonableness. The Code does not mention the reasonable time exigency on the most critical matter. It is precisely the lack of reasonableness in the determination of detention periods that leads to condemnations of Turkey by the ECtHR. There is no criterion in the law to assess the length of detention before these time limits expire.

3.(B) Right to Trial within Reasonable Time in Administrative Cases

In terms of administrative jurisdictions, responsible for judging matters opposing private individuals and the administration, there is no express provision regarding the right to trial within a reasonable time in the Code of Administrative Procedure. However, when the Constitutional Court examines the applications for violation of the right to be tried within a reasonable time through an individual application, it uses articles 1/2, 14/3-4, 20/5, 49/3 and 60 of the Code as the relevant domestic legal norms\textsuperscript{48}. The articles shown as a basis for the right to be tried within a reasonable time should be construed in the manner to establish their connection with this right, although they do not refer to it explicitly. Thus, the fact that almost all of the mentioned articles have been amended underlines the importance of this review.

Despite the substantial increase in the number of judges, the establishment of new courts and the doubling of the number of members of the Council of State, no solution has been found to the lengthy trials, which is one of the most critical problems of the administrative jurisdiction system. While an action for nullity or a full remedy action filed in first instance courts is decided within approximately one year, the waiting period at the appeal stage is approximately three years.

IV. The ECtHR’s Position on the Right to Trial within Reasonable Time

\textsuperscript{47} (1)"Where the crime is not within the jurisdiction of the Court of Assizes, the maximum period of detention shall be one year. However, if necessary, this period may be extended, for six more months, by explaining the reasons". (2)\textsuperscript{2}"Where the crime is under the jurisdiction of the Court of assize, the maximum period of detention is two years. This period may be extended by explaining the reasons in necessary cases, but the extension shall not exceed 3 years".  
The ECtHR decides whether the right has been violated based on criteria such as the complexity of the case, the attitude of the applicant during the case and the behaviour of the authorities in the examinations of reasonable time. The workload in the courts is the most considerable obstacle to this right. Nevertheless, the workload of the courts is not a justifiable excuse for the ECtHR. Cases involving child custody violations of bodily integrity and disputes with the employers need to be heard even more promptly.

The ECtHR has made it clear that the efforts of the judicial authorities to speed up the trial as much as possible are important in terms of ensuring that the applicant benefits from the guarantees under article 6. Therefore, a special task of the national court is to ensure that all those involved in the proceedings make maximum efforts to avoid unnecessary delays.\(^49\)

That is to say, the opinion of the ECtHR on this issue is clear. Temporary blockages in the judicial activity do not result in condemnation of the state when necessary measures are taken to eliminate this situation as soon as possible. However, if this congestion becomes a structural feature in the judicial system of the state, it implies that the right to trial within a reasonable time under article 6 cannot be fulfilled. One must admit that the slowness of the Turkish judicial system belongs to this second group, and unfortunately it has become a structural feature. While some of the reasons for the violation of the right to a fair trial and reasonable time are related to the legislation, most of them are associated with the implementation of the law. Although there are improvements in the legislation with the reforms made from time to time, the courts cannot conclude the trials within a reasonable time due to the reasons stemming from old habits and the resistance to reforms and innovation.\(^50\)

Based on the data concerning the First Instance Civil Courts, the Table 3 illustrates to what extent the courts are overloaded and the average duration of proceedings is lengthy. According to data of the ECtHR, in the period between 1959-2019 Turkey was the second country in terms of highest number of violations of the right to a trial within a reasonable

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time. The ECtHR condemned Turkey 607 times between 1959 and 2019 for the violation of the right to a trial within a reasonable time.\footnote{European Court of Human Rights (2015b: 6-7), \textit{Overview 1959-2014, Strasbourg}} In 2014, with a total of eleven decisions, Turkey became the third country with the highest number of violations on this issue.\footnote{European Court of Human Rights (2015a: 10-11), \textit{The ECHR in facts & figures 2014, Strasbourg}}


<table>
<thead>
<tr>
<th>Court type</th>
<th>Incoming case</th>
<th>Average duration of proceedings</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cadastral</td>
<td>27,236</td>
<td>564</td>
</tr>
<tr>
<td>Labor</td>
<td>569,595</td>
<td>555</td>
</tr>
<tr>
<td>Intellectual and industrial rights</td>
<td>10,500</td>
<td>497</td>
</tr>
<tr>
<td>First instance civil</td>
<td>1,128,182</td>
<td>425</td>
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<tr>
<td>Consumer</td>
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<tr>
<td>Family</td>
<td>454,434</td>
<td>187</td>
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<tr>
<td>Enforcement</td>
<td>325,551</td>
<td>159</td>
</tr>
<tr>
<td>Civil courts of peace</td>
<td>915,471</td>
<td>112</td>
</tr>
</tbody>
</table>

Those obstacles to the proper implementation of the reasonable time in the domestic legal order urged the authorities to make efforts to prevent the systematic violations of this right. Hence, several reforms have been envisaged and realized. Now, it is indispensable to examine whether these efforts succeeded or failed, and why.

V. Reforms Effectuated with Intent to Ameliorate the Exercise of the Right to a Trial within a Reasonable Time
There have been several reforms on the right to a fair trial. The constitutional reform of 2001 is the most comprehensive one since the establishment of the 1982 Constitution. The essential reform concerning fair trial was that this right was enshrined in article 36 of the Constitution. Another amendment was the inclusion in the Constitution of the two new principles in the light of article 1 of the Protocol 4 of the ECHR entitled “Prohibition of imprisonment for debt”. The first principle indicating that “evidence obtained unlawfully cannot be accepted as evidence”, was added in paragraph 5 of article 38 and the second one marking “no one may be deprived of his liberty only because it does not fulfil a contractual obligation “, was included in paragraph 6 of article 38 of the Constitution. Another reform introduced in this context was the provision of the Constitution specifying that “the state must specify the remedies and legal authorities to which the persons concerned will turn and the deadlines for these remedies”.

Reforms were also made in order to eliminate the deficiencies in the criminal law. One of the substantial modifications on the subject concerns the length of time in which the detained person is brought before a judge. In addition, it was made compulsory to immediately inform relatives of the detention of the person. Thus, efforts have been made to ensure that these regulations complied with article 6 of the ECHR, nevertheless they are not sufficient. Article 102 of the CPC is in contrast with the regulations of article 19/8 of the Constitution and article 5 of the ECHR, which requires a “reasonable period” in detention. Article 102 of the Criminal Procedure Code provides time limits to the continuation of detention, instead of the condition of reasonableness. There are no criteria in the law for evaluating the length of detention before these periods expire. In this context, the problem is that the maximum detention period of five years in heavy penalty charges exceeds the reasonable period in article 5 of the ECHR. Five years is simply too much of a margin to be given to appreciation of the courts. Thus the court could detain the person prior to the trial, even if this person is not

54 “Where the crime is not within the jurisdiction of the court of assizes, the maximum period of detention shall be one year. However, if necessary, this period may be extended, for six more months, by explaining the reasons. Where the crime is under the jurisdiction of the court of assize, the maximum period of detention is two years. This period may be extended by explaining the reasons in necessary cases, but the extention shall not exceed 3 years, and shall not exceed 5 years for crimes defined in the Fourth, Fifth, Sixth and Seventh Chapters of the Second Book of the Turkish Penal Code No. 5237 and the crimes within the scope of the Anti-Terror Law No. 3713 of 12/4/1991.”

55 “Persons under detention shall have the right to request trial within a reasonable time and to be released during investigation or prosecution.”
charged of the "catalog crimes" mentioned in the CPC. It is particularly risky given that strong grounds for suspicion that the crime is committed are uniquely sought for "catalog crimes."56 As a result, certain jurists such as Kemal Akkurt suggest a stipulation which manifests that the detention cannot exceed a reasonable time be added to article 102 of the CPC.57 This is also an exigence of article 90 of the Constitution given that it recognizes the priority of the international agreements, duly put into effect, concerning fundamental rights and freedoms in case of a conflict with laws. Therefore article 5 of the ECHR must be taken as a reference for the domestic law.

Within the scope of reasonable time discussions, due to the increasing workload of the ECtHR, the issue of the ECHR's effectiveness was raised. One of the main approaches in searching for a solution has been "Contracting States' making the necessary regulations in their domestic law to fulfill the requirements of the ECtHR decisions."58 However, the ECtHR itself has produced a solution to the issue. If a state takes no action despite many condemnation decisions by the ECtHR on a matter, the applications made against the state in question are no longer examined in detail. Considering the decisions of the ECtHR regarding the Turkish administrative justice, we observe that the Court hasn't considered necessary to make a thorough investigation of every case. We see examples in cases such as appointment and dismissal of public officials and full remedy actions regarding the request of compensation from the administration. It was observed in Nusret Erdem v. Turkey that,

However, the Court has on numerous occasions dealt with cases raising questions similar to that in the present case, in which it has found a violation of article 6 § 1 of the Convention (see, among many others, Frydlender v. France [GC], no.30979 / 96, § 43, ECHR 2000-VII). After having examined all the elements submitted to it, the Court considers that the Government have not put forward any fact or argument which could lead to a different conclusion in the present case. Having regard to its case-law

56 Article 100/1 CPC: “If there are facts that tend to show the existence of a strong suspicion of a crime and an existing “ground for arrest”, an arrest warrant against the suspect or accused may be rendered...”
in the matter, the Court considers that in the present case the length of the proceedings in issue is excessive and does not meet the “reasonable time” requirement.

Undoubtedly, it was essential to find a solution to the lack of remedy in domestic law that could respond to the allegations of violation of reasonable time. To this extent, the next step has been the efforts of the Turkish judiciary of “establishing an effective domestic remedy.” The remedy was found in the establishment of the Human Rights Compensation Commission - a reaction to the pilot decision of the ECtHR.

There are two reasons that urged the ECtHR to choose a pilot case in Turkey regarding the right to trial within a reasonable time. Firstly, the ECtHR was consistently condemning Turkey in a great number of decisions and secondly, there were not any mechanisms in domestic law to prevent these condemnations. The ECtHR, in the Ümmühan Kaplan decision, indicated that the violations filed against Turkey endured systematically for many years and that the contracting states were obliged to arrange for the reasonable period obligations to be respected in the judicial order. It postponed processing of applications until an effective remedy was provided. Upon this pilot decision, it was concluded to institute a compensation commission in domestic law; hence the Human Rights Compensation Commission was established as an effective domestic remedy against allegations of violation of reasonable time. The Commission, which has been recognized by the ECtHR as an “effective domestic remedy that must be exhausted” had a limited competence. It would be effective to finalize the pending applications that have been brought to the ECtHR. The competence of the Commission would cover investigations and prosecutions in criminal law, failure to complete

59 Nusret Erdem v. Turkey, 2010, no. 34490/03, § 20-21
60 Nurcan Yılmaz, “Avrupa İnsan Hakları Mahkemesi Kararlarıyla Ortaya Çikan Adil Yargılanma Hakkı Kriterlerinin Türk İdari Yarglama Hukuku Açısından Muhtemel ve Gerçekteşen Etkileri” (Possible and Actual Effects of the Criteria of the Right to a Fair Trial Revealed by the Decisions of the European Court of Human Rights in terms of Turkish Administrative Jurisdiction Law). İstanbul Üniversitesi Sosyal Bilimler Enstitüsü, 2015, p.172
61 For the decisions of the ECtHR stating that the Turkish legal system does not provide an effective domestic remedy to which the trial periods can be challenged, see: Tendik and others v. Turkey, 2005, no.23188/02; Oyal v. Turkey, 2010, no. 4864/05.
62 Ümmühan Kaplan v. Turkey, 2012, no. 24240/07
63 Law no. 6384 “Law on the Settlement of Some Applications Made to the European Court of Human Rights by Compensation”, 9 January 2013
64 Turgut and others v. Turkey, 2013, no. 4860/09; Yıldız and Yanak v. Turkey, 2014, no. 44013/07
the proceedings of administrative law and private law in a reasonable time, incomplete or late execution or non-execution of court decisions.

Besides the Human Rights Compensation Commission, the right of individual application before the Constitutional Court, which became effective in the legal system with Law no. 5982 of 12/09/2010 and the amendments made to articles 148 and 149 of the Constitution, was one of the establishments of an effective domestic remedy. In its reviews, the Court would also take into account the applications related to cases dating back the date of effect of this right. Anyone whose rights guaranteed by the Constitution, the ECHR and additional protocols, to which Turkey is a party, are allegedly violated by public power, can make an individual application before the Constitutional Court. One of the motivations for introducing this mechanism is to reduce the number of appeals that are made to the ECtHR. With the resolution of the Constitutional Court, the extended trial issue is mainly out of the ECtHR’s control. That is why it is crucial to analyze the statistics of requests made and see where there have been more violations. The cases regarding the reasonable time expected to appear before the ECtHR manifested themselves before the Constitutional Court. The proportion of applications concerning the right to a trial within a reasonable time constitutes 52 percent of all the applications between June 2010 and September 2012. This striking number of 5241 applications indicates an inclination of applicants to seek solutions through the Constitutional Court. The arrest is the measure that is the most often appealed against, for violating the right to liberty and security of the person. As seen in the Table 4, in individual appeals, in most of the cases, the decision of violation concerns the right to a fair trial and the resulting lengthiness of proceedings. One of the several exemplary decisions of the Constitutional Court affirming the violation of reasonable time is expressed as follows;

None of the factors such as the number of defendants in the case, the complexity of the case, the nature and nature of the crime charged, the amount of punishment foreseen for the crime in question, which should be taken into account in assessing whether the trial period is reasonable or not, does not allow the trial period in the present case to be evaluated as reasonable. This trial period cannot be considered reasonable in a non-

complex case where a single defendant is tried. For the reasons explained, it should be decided that the "right to trial within a reasonable time" guaranteed by article 36 of the Constitution has been violated.

Even just the violation of the right to a trial within a reasonable time constitutes %57.7 of the totality of violation decisions made in individual applications until 2018. This strikingly-high share of violations substantiates how the reasonable time issue remained unsolved in Turkish law and came up consistently as a problem before the Constitutional Court.

4. Distribution of Violations of the Right to Fair Trial by Guarantees

<table>
<thead>
<tr>
<th>Guarantee</th>
<th>Number of violations</th>
<th>Percentage of violations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Right to trial within a reasonable time</td>
<td>2966</td>
<td>%57.7</td>
</tr>
<tr>
<td>Equality of arms principle / The adversarial</td>
<td>816</td>
<td>%15.9</td>
</tr>
<tr>
<td>jurisdiction principle</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to justified decision</td>
<td>558</td>
<td>%10.9</td>
</tr>
<tr>
<td>Right to a fair trial</td>
<td>531</td>
<td>%10.3</td>
</tr>
<tr>
<td>Right to access to court</td>
<td>228</td>
<td>%4.4</td>
</tr>
<tr>
<td>Right to witness hearing</td>
<td>15</td>
<td>%0.3</td>
</tr>
<tr>
<td>Other</td>
<td>14</td>
<td>%0.3</td>
</tr>
<tr>
<td>Right to counsel assistance</td>
<td>12</td>
<td>%0.2</td>
</tr>
<tr>
<td>Total</td>
<td>5140</td>
<td></td>
</tr>
</tbody>
</table>

* Applications with a decision of violation of only the right to trial within a reasonable time: 2339 (%45.5)

The length of trial periods in Turkish law has become a structural problem. In accordance with the jurisprudence of the ECtHR, the intermediate courts of appeal (istikaf mahkemeleri) were presented as a solution to this fundamental concern. The intermediate courts of appeal handle both the facts and conducts a legal review. The court may collect evidence that has not

67 Constitutional Court, No. 2012/625, 09.01.2014, § 43, 44
68 Based on the statistics prepared by the Constitutional Court on individual applications until 2018: https://www.anayasa.gov.tr/media/5601/bb_istatistik_2018.pdf
been gathered by the local court, listen again to witnesses and decide as a result of the appeal review by conducting a legal inspection together with all the other pieces of evidence present and collected in the civil or criminal case. The appeal review (temyiz) means, on the other hand, that the Supreme Court only reviews the decision made by the court of appeal in legal terms.

The lawmakers tried to prevent this new court from producing similar trial durations as the two-level jurisdiction. This measure was conceived to conclude the files in question more quickly. First, the decisions finalized without appeal would relieve the workload of the Council of State. These courts would not be a "court of appeal". The decisions made by the courts of first instance would be directly appealed in the intermediate courts of appeal. These courts would be qualified as "second instance courts". Secondly, a helpful element would be the decrease in the workload of first instance courts with the absence of remand. With the establishment of the courts in question, it was aimed to increase the number of remedies and legal assurances. It also paved the way for the retrial and the re-evaluation of evidence.

VI. Recommendations

Based on all these, we can make some recommendations to find a solution to the issue of the trial within a reasonable time. First of all, pre-trial detention should only be limited to situations where it is absolutely necessary for the public interest. However, as long as there is a pre-trial detention, the state of detention should be based on sufficient grounds for the public interest. In any event, pre-trial detention should not exceed a reasonable time. In order to achieve this, certain rules that will not leave any room for appreciation should be included in the CPC. Judges and prosecutors should pay special attention to the duration of cases involving detention, prioritize these cases and ensure that the length of the trial is kept as short as the quality of the judicial process and defense rights permit. Secondly, the Ministry of Justice should establish mechanisms for compensation for damage caused by the lengthy proceedings. Thirdly, the Board of Judges and Prosecutors should establish a normative framework by basing it on the complaints about the malfunctions of the judicial system to detect the defects of the courts and to improve their activity. Fourthly, the Ministry of Justice and the Board of Judges and Prosecutors should set criteria in line with the standards of the
European Commission for the Efficiency of Justice to monitor and evaluate the duration of judicial proceedings in order to increase the effectiveness of judicial activities. Finally, depending on these cases’ complexity, the Ministry of Justice should establish reliable benchmarks, such as “average time criteria” to deal with piled-up cases and work effectively on the new ones.

Conclusion

The national judicial system, which protects the basic conditions and freedoms and acts as the guardian of the rule of law, while protecting human rights, is not only responsible to society and country, but also vis-à-vis international mechanisms. In this sense, states make improvements in their domestic laws in order to fulfil their obligations to the international or supranational organizations they are affiliated with. Of course, legislative changes alone are not enough to reach the level of international norms. For this reason, attitudes and perceptions of the judges are also crucial for the principles within the scope of the right to a fair trial to be fully implemented.

The ECtHR ruled that in Turkey, the problem was not simply about loopholes in the legislation. Rather, the rights recognized by the law were not exercised effectively and efficiently by the responsible parties. According to the ECtHR, even if there are efficient remedies in the domestic law, the failure to apply them accurately gives rise to condemnation decisions. In other words, the ECtHR considers that the factors for the breach are primarily due to the errors of the judicial authorities rather than to legal deficiencies and differences. Öneryıldız decision of the ECtHR is a sound example. The Court stated that the administrative law remedy used by the applicant appeared to have been sufficient for him to enforce the substance of his complaint and had been capable of affording him adequate redress for the violation of article 2. However the Court detected that the necessary steps were not taken by the state and the damages awarded to the applicant had never been paid to him, so considered the remedy as ineffective.

Recognizing the jurisdiction of the ECHR and being a party to the Convention is not sufficient in itself. For this reason, Turkey has made essential changes in laws and institutions, and established new institutions. We acknowledge that Turkey has made arrangements in domestic law but it still has problems when it comes to the harmonization of these arrangements with the case law and the practice. Although the references to the ECHR in the decisions of judicial bodies have multiplied, what is more critical than embellishing the decisions with these references is the formation of a tradition of behaviour that will ensure the accordance of the court standards with the spirit of the ECHR, especially in first instance trials. In other words, the requirements of fair trial essentially need to be imported into the case, instead of just being cited. For this reason, the ultimate goal is to change the core of the judicial system to solve the problems that have become a structural issue. In terms of Turkish administrative jurisdiction law, the intermediate courts of appeal can be an example of the structure change we mentioned above, due to their effect on the reasonableness of the trial periods and the ability to eliminate the first instance violations by conducting a legal review in the second instance. However, it is not so easy to achieve the desired proportionality. With existing staff and infrastructure, Turkey has often been condemned by the ECtHR because of the length of proceedings. This clearly indicates that a drastic change both in staff and infrastructure is a sine qua non condition for meaningful change in Turkish judiciary. If fulfilled, improved legal regulations and new institutions might bring about significant developments in the future.