ANALYSIS OF THE 10% FINE PROVIDED IN THE ARTICLE 134 OF THE CODE OF ENFORCEMENT AND BANKRUPTCY IN RESPECT TO RIGHT OF ACCESS TO COURT

İlk m. 134’da Yer Alan %10 Para Cezası Hükmünün Mahkemeye Erişim Hakkı Bağlamında Değerlendirilmesi

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ABSTRACT

Right of access to courts is guaranteed by the Article 6 (1) of the EConHR. However, right of access to court is not absolute, which means it may be subject to some limitations. In this respect, States have discretion. However, in any cases, these limitations should not impair the essence of the right, have to follow legitimate aim and be proportionate. According to decision of European Court of Human Rights, provision of a fine after the dismissal of the proceedings is also within the content of access to court. In this respect, providing a fine without both maximum limits and discretion of judges about amount of fine and also without requirement of bad faith for fine, it would be unproportionate limitation, even if it has legitimate aim.

Keywords: Access to Court, Fair Trial, Echr, Misuse of Rights, Courts Fees, %10 Fine

I. Introduction

In the Code of Enforcement and Bankruptcy (Code 2004) there are several articles, which provide payment order in case of claimant demands are

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refused\(^1\). Article 134 of the Code 2004 regulates annulment of the auction, which is made by enforcement authorities during enforcement proceedings. According to Article 134, creditor who demands sale, debtor, person who can be seen on land registry document, and bidder that involve in auction can demand annulment of auction because of the reasons, which are illegality of the actions made by enforcement agency, non-service of announcement document, making of essential fault and fraud in auction. Article 134 also requires that if demand for annulment rejected on merits, then, the claimant has to be ordered to pay a fine amounting to 10% of the object of the dispute. The rationale behind this article is to avoid unnecessary claims intended to delay payment.

In this paper, we are going to analyze European Court of Human Rights’ *Sace Elektrik Ticaret A.Ş. v. Turkey* decision, on the grounds of the ECHR judgments about the access to courts which is provided by Article 6 (1) of the European Convention on Human Rights. First of all, we will summarize the concrete case, then analyze the ECHR’s decision about the access to court, and according to consequences of these decision, we will evaluate our concrete cases. Finally, in order to comply with the ECHR and EConHR, which the Turkey is bound, we are going to propose an amendment in the Code 2004.

**II. Facts**

*Sace Elektrik Ticaret A.Ş.* signed a loan agreement with Yurtbank and registered in 1999, following the applicant company’s delay in its monthly payments, the bank initiated enforcement proceedings\(^2\). At the end of the enforcement proceedings, the Enforcement Court decided that the land in question would be sold at public auction\(^3\). The Enforcement Office announced two dates of public auction, namely 27 February and 9 March 2001, for the sale of the land. Since a bid amounting to at least 60% of the market value of the land, as determined by the experts, could not be obtained during the first auction, the land was sold at the second auction to the sole bidder, namely Sümerbank, which offered TRL 2,623,070,000,000, corresponding to slightly more than 40% of the market value\(^4\). *Sace Elektrik Ticaret A.Ş.* applied to Enforcement Court to annul auction.

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\(^1\) For example, Article 68, 68/a, 169/a and 170.

\(^2\) 22.10.2013, 20577/05, *Sace Elektrik Ticaret A.Ş. v. Turkey*, para. 4. http://hudoc.echr.coe.int/ (Unless otherwise declared, all of the ECHR decision have been taken from this website).

\(^3\) *Sace Elektrik Ticaret A.Ş. v. Turkey*, para. 5.

\(^4\) para. 7.
III. Decision of the Court of First Instance in Turkey

On 15 March 2001 the Sace Elektrik Ticaret A.Ş. applied to the Kartal Enforcement Court to obtain the annulment of the public auction, alleging that there had been several procedural shortcomings in its organization, that is, there had been an error in the notice of the public auction since the correct plot number was 111/4, in the notice the number had been written as 11/4, and according to the Sace Elektrik Ticaret A.Ş., the holding of the second auction on a legal holiday had had a negative impact on attendance.\(^5\)

On 22 October 2002 the court found for the Sace Elektrik Ticaret A.Ş. right and annulled the public auction held on 9 March 2001.

IV. Decision of the Court of Cassation in Turkey

The Court of Cassation held that contrary to public holidays, government agencies continued to work on legal holidays, thus, in the instant case, 9 March 2001 had been declared a legal holiday by the Council of Ministers, but this fact did not necessitate the postponement of the auction.\(^6\) Also, there is a typing error on notice which has to be regarded minor, thus does not either necessitate annulling auction. Nevertheless, the Court of Cassation calculated that the expenses amounted to TRL 875,875,000, and as a result, it stated that a valid bid should have amounted to at least TRL 2,623,253,875,000, thus, it accordingly amended the reasoning for the annulment, but upheld the judgment of the first-instance court.\(^7\) Defendant apply for rectification of decision by claiming that they waive any claim in respect of the costs and expenses incurred for the sale, then the Court of Cassation upheld the defendant’s argument and decided to quash the decision.\(^8\)

After quash of decision, Court of First Instance, according to Article 134 of 2004, dismissed the case and ordered the payment of a fine amounting to 10% of the object of the dispute, namely TRL 262,307,000,000 (approximately 140,000 Euros (EUR)), and then decision was finalized.

V. The Arguments of Plaintiff and Defendant in ECHR

Sace Elektrik Ticaret A.Ş, the plaintiff, argued that the heavy fine imposed pursuant to Article 134 (2) of 2004, had constituted a breach of its right to access to a court that is provided in Article 6 of EConHR.\(^9\)

\(^5\) para. 8.
\(^6\) para. 9-10.
\(^7\) para. 11.
\(^8\) para. 12-13.
\(^9\) para. 24.
The Turkish government argued that the plaintiff may bring its submission before the domestic courts, and also aim of the fine in question was to avoid unjust objections intended to delay the payment of debts\textsuperscript{10}.

VI. The Decision of the ECHR

The ECHR reiterates at the outset that Article 6 (1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal, however, this right is not absolute and may be subject to limitation. That is, Article 6 (1) leaves the government a free choice of the means to be used to provide access to court\textsuperscript{11}. The ECHR states that a restriction affecting the right to a court will not be compatible with Article 6 (1) of the Convention unless it pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved\textsuperscript{12}. For the concrete case, the ECHR stated that the public auction that the applicant company sought to challenge was initially annulled by the Court of Cassation by pointing out that a valid offer should have covered both 40\% of the market value of the property and the costs and expenses incurred in respect of the sale, found it established that the bid in the present case was not sufficient, that means plaintiff cannot be criticized for having initiated process; and the domestic law which does not include upper limit for fine and discretion for judges lead to high amount of fine, which cannot be regarded as proportionate to legitimate aim\textsuperscript{13}.

VII. Analysis

A. Introduction

The decision of the ECHR has to be analyzed in the light of the Article 6 (1) of the EConHR, which regulates right to have fair trial. According to Article 6 (1); \textit{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}. For the sake of this analysis, the bold words –accepted as a right to access to courts by ECHR- will be dealt in the light of ECHR’s judgments.

B. Access to Courts

“Right to have a court” or “access to a court” is not included in Article 6

\textsuperscript{10}para. 25.
\textsuperscript{11}para. 26.
\textsuperscript{12}para. 29.
\textsuperscript{13}para. 31-33.
(1) of the EConHR explicitly\textsuperscript{14}. In Article 6 (1), fair and public hearing within a reasonable time is regulated, however, it is not clear that States have to provide right to access to court. If only the wording of Article 6 taken into account, it can be easily claimed that Article 6 (1) of the EConHR regulates after proceeding stages. For the first time the ECHR discussed the issue -whether Art. 6 (1) provides right to access a court or only provides fair trial after establishing legal proceedings, and if Art. 6 (1) provides right to access courts, whether it is possible to limit it and on which grounds- in \textit{Case of Golder v. United Kingdom}\textsuperscript{15}. In that case, UK agencies did not allow Golder to contact with his solicitor, since he was imprisoned. Thus, Mr. Golder could not apply to a court.

The UK Government has submitted that the expressions “fair and public hearing” and “within a reasonable time”, the second sentence in Article 6 (1) (“judgment”, “trial”), and Article 6 (3) clearly presuppose proceedings pending before a court. Also, they claimed that Article 5 (4) and 13 expressly provide right of access to courts, and if Article 6 (1) were interpreted as providing such a right of access, Article 5 (4) and 13 would become unnecessary.

The ECHR argued that Article 6 (1) does not state right of access to the courts or tribunals in express terms. However, the ECHR emphasizes the word “civil claims”, and state that claim generally exists prior to legal proceedings. Also the Court declared that the word “in the determination of his civil rights and obligations”, on which the Government have relied in support of their contention, does not necessarily refer only to judicial proceedings already pending; it may be taken as synonymous with “wherever his civil rights and obligations are being determined”. The expression “fair and public hearing”, “within a reasonable time” clearly presuppose proceedings pending before a court. It does not mean that EConHR provides fair and public training but excludes right to institutions of proceedings. Also by taking into considerations Articles 5 (4) and 13, the Court stated that these articles are designated to provide procedural guarantees, and Article 6 in itself protect right to a good administration of justice. The Court finds in particular that the interpretation does not lead to confounding Article 6 (1) with Articles 5 (4) and 13 nor making


\textsuperscript{15} 21.02.1975, 4451/70, \textit{Golder v. UK}. This accepted as landmark decision of the ECHR. Kloth, 5.
these latter provisions superfluous. Thus, the Courts stated that right of access constitutes an element which is inherent in the right stated by Article 6 (1). However, the Court also stated that right to access to court is not absolute, and there is a room for limitations permitted by implication. For instance, regulations relating to minors and persons of unsound mind would not be against Article 6 (1), but limitation for prisoners to contact with his solicitor would be against Article 6 (1)\textsuperscript{16}. After Golder case, ECHR in many cases accept the right of access to court\textsuperscript{17}.

To sum up, according to Article 6 (1), there is the positive duty of the state to establish an effective judicial system and to entertain in a way that the courts can meet the guarantees given in the specification including the decision within a reasonable period\textsuperscript{18}. The State is however free to decide how he wants to fulfill this duty\textsuperscript{19}. It can for example ensure the effectiveness of the system by increasing the number of judges. It can also control the effectiveness of periods increase. However, since the ECHR accepts that there is a right of access to court but this is not absolute, the problem emerges when it is required to decide whether government regulation is compatible with Article 6 (1) or not.

The domestic law can limit the access to court; for example, rules for limitation, the deadlines and forms can be determined, can prescribe a justification compulsion, can impose a mandatory representation, can specify the process capacity or impose a pre-litigation for administrative disputes, and can specify fee or mandatory advance payment\textsuperscript{20}. However, a pre-litigation can limit access to the court contrary to the Convention if it is not completed within a reasonable period\textsuperscript{21}. The ECHR also accepted that it is possible to provided public service of document of invitation, if the address is not known and be protected right of the person concerned sufficiently\textsuperscript{22}. However, if the

\textsuperscript{16} Three of the judges of the Court disagree with the decision and claim that even though it is a serious deficiency, the lacking of right to access a court, should be put by the Contracting States, not by the Court itself. Kloth, 5.

\textsuperscript{17} F. Gölcüklü, “Avrupa İnsan Hakları Sözleşmesinde Adil Yargılanma”, (49 (1-2) AÜSBFD 1994) 207-208. We will deal with them below.


\textsuperscript{19} Gözübüyük/ Gölcüklü, 278.

\textsuperscript{20} 10.5.2001, 29392/95 Z and Others v. UK

\textsuperscript{21} 3 years pre-litigation is found as violation, by 23.7.2002, 34619/97, Janosevic v. Sweden.

\textsuperscript{22} 10.4.2003, 69829/01, Nunes Dias v. Portugal; 2.10.2007, 30203/03, Weber v. Germany.
State does not send the documents, which will affect the court decision, this would be violation of the Article 6 (1). Thus, in each individual case, the limits of the limitations have to be decided.

C. Limits of the limitation of access to courts through judgments of ECHR

The access that is given in Article 6 guarantee should not be restricted in a way to touch their essence. To achieve this, the limitation has to be required for the administration of justice, has to pursue a legitimate aim and be proportionate. The ECHR mainly deals with compatibility of “procedural requirements”, “time limitations”, “configuration of legal aid”, “execution of the final decisions”, “immunities” and “court fees” with Article 6 (1). In this paper, first of all, we will analyze of the ECHR judgments on each of these situations, and then will focus on the situation of the payment of fine in this respect.

1. Procedural Requirements

The excessive procedural things for application to court can affect the fairness of the proceeding, likewise, the excessive softness would lead to result the abolition of the procedural rules and has to be avoided.

The procedure should be designed as far as possible so that it enables effective access to court. In the case of Reklos and Davourlis v. Greece, the Greece Court of Cassation rejects the appeal on the basis that applicant has to indicate factual circumstances on which the Court of Appeal based its decision, however they do not show. The ECHR stated that only one element

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24 İnceoğlu, 107-108.
26 We have been inspired from the Guide of the Article 6 of the Council of Europe when deciding these headlines. There are of course some other decisions that we cannot categorize under these headings. For example; Lack of remedies in prisons, which are regarded as civil law, the right of access is violated 6.4.2010, 46194 /06, Stegarescu and Bahrin v. Portugal; When States’ rules require the suspension of all proceedings in respect of certain claims pending the adoption of new legislation and that takes years to, this will be regarded as violation as well, 1.3.2002, 42527/98, Prince Hans Adam II von Liechtenstein v. Germany; In a case where the person has been induced by false promises of the Advocate General to withdraw his appeal, the ECHR accepts violation of Article 6, 9.11.2004, 43600/99 Marpa Zeeland B.V. and Others v. Holland, para 49-51.
has a real importance and Court of Cassation’s examination is not complex, the ECHR emphasizes that the Court of Cassation knows the basis of denial of the Court of Appeal. Thus,

“To declare the single ground of appeal inadmissible because the applicants “[had] not indicate[d] in their appeal the factual circumstances on which the Court of Appeal had based its decision dismissing their appeal” amounted to excessive formalism and prevented the applicants from having the merits of their allegations examined by the Court of Cassation”\textsuperscript{28}.

In the Case of \textit{Kadlec v. Czech Republic}, the ECHR also states that;

“the decision of the Constitutional Court suffers from \textit{excessive formalism}. It notes that the Constitutional Court, which noted that the appeal was marred by a \textit{clerical error}, granted the applicants a deadline for remedy ( inviting them to submit a copy of the decision mentioned on the title page ) , and their lawyer has corrected the error before the end of this period. One cannot therefore say that this inaccuracy could be adjusted later...the interpretation of a procedural requirement prevented the merits of the applicants’ case would be in violation of the right to effective protection by the courts”\textsuperscript{29}.

However, in case of \textit{Edificaciones March Gallego S. A. v. Spain}, the applicant claimed that a mere clerical mistake had been made in the submission of the application to set aside the proceedings brought against the applicant company in that the application had been formally made in the name of Mr. March Olmos who is also the sole director of the applicant company, and not in the name of Edificaciones March Gallego S.A. The ECHR notes that the inadmissibility of Mr. March’s application to set aside was the result of an inaccurate reference to the party bringing the application, a mistake which could not subsequently be remedied. The inadmissibility of the application complained of by the applicant company was the result of an avoidable mistake at the time it was submitted. Thus, there is no violation of the Article 6 (1)\textsuperscript{30}. In the case of \textit{Saez v. Maseo v. Spain}, the appeal before the Supreme Court was first declared admissible and subsequently (7 years later), due to a defect in procedure at the stage of presentation of the appeal dismissed without the applicant has been invited to in a certain time observations. The ECHR finds the interpretation of the Supreme Court in this case too strict and the particularly strict interpretation lead to Supreme Court to declare the case as inadmissible. Thus, the ECHR states that Article 6 (1) is violated\textsuperscript{31}. In

\begin{itemize}
\item \textsuperscript{28} 15.1.2009, 1234/05, \textit{Reklos and Davourlis v. Greece}, para. 28.
\item \textsuperscript{29} 25.4.2004, 49478/99, \textit{Kadlec v. Czech Republic}, para. 27, 29.
\item \textsuperscript{31} 9.11.2004, 77837/01, \textit{Saez Maeso v. Spain}.
\end{itemize}
case of Selin Aslı Öztürk v. Turkey, the ECHR pointed out that only allowing parties to the proceedings to apply for a recognition of the foreign judgment and barring possibility of other interested parties imposes a disproportionate burden on the applicant, who was denied any real opportunity to obtain the recognition of her deceased father’s divorce, and thereby violated her right of access to a court. In case of Bruallo Gomez de la Torre v. Spain, the applicant applies to the Supreme Court on 4.3.1993; however, his appeal is refused pursuant to Law no. 10/92 of 30.4.1992. Under the previous provision, an appeal lay to the Supreme Court in litigation concerning commercial leases in which the amount in issue exceeded five hundred thousand pesetas, but the minimum amount required for an appeal to lie was increased to one million pesetas. The Supreme Courts stated that procedural rules apply immediately to proceedings that are under way. The ECHR pointed out that, it accepts that the procedure followed in the Supreme Court may be more formal. However, the Court notes that the appeal to the Supreme Court was made in the instant case after the applicant’s claims had been heard by both the Madrid Court of First Instance and the Audiencia provincial sitting as an appellate court, each of which had full jurisdiction. Thus, the ECHR stated that the applicant was not unduly hindered in her right of access to a tribunal and, accordingly, the essence of her right guaranteed by Article 6 (1) was not impaired.

Consideration of fairness in this context plays a crucial role. In case of Sergey Smirnov v. Russia, the Court accepted violation, because, the court held the action as inadmissible due to the lack of specification of an address of the applicant even though the plaintiff had given a correspondence address. The ECHR stated that

“a requirement to indicate a place of residence served a legitimate aim, namely the proper administration of justice. However, it considers that the strict application of that requirement in the applicant’s case constituted a disproportionate restriction on his right of access to court. The applicant at the time had no permanent place of residence, and for that reason was obliged to indicate stable addresses where he could be contacted.”

To sum up, it is accepted by the ECHR that if particularly strict interpretation of the procedural rules leads to case as inadmissible, this is the violation of the Article 6 (1) that guarantees access to a court.

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34 20.10.2009, 25924/06, Nowinski v. Poland, para. 34. See also; 22.12.2009, 14085/04, Sergey Smirnov v. Russia, para. 29-32.
2. Time Limitations

In principle, time limitations are accepted to apply to a court, because of the proper administration of the justice and legal certainty by the ECHR. However, the ECHR emphasizes that these rules and their application, should not cut back unreasonable way to access to court or appellate court. For example, if the appellate court mistakenly rejects an appeal as inadmissible due to time limit, although it was time inserted, that violate Article 6 (1)\(^{36}\). The ECHR also decided that not to claim in time limit because of the delay of the courts violates Article 6 (1)\(^{37}\). If a time limit for appeal to constitutional court expires, even though an appeal to Supreme Court has been filed, however, the court has discretion about the acceptance of that\(^{38}\).

Another important issue about the time-limitation is the date when the period should start. In case of *Sabri Günes v. Turkey*, the ECHR decided that in terms of compensation for bodily injury, time-limit should start from the time when individuals can effectively evaluate the damage they have suffered. Otherwise, the courts could substantially shorten the time for appeal or make any action impossible through delaying the applying to expertise\(^{39}\). In case of *Esim v. Turkey*, the ECHR indicates the different judgment of Turkish Supreme Administrative Court and the Supreme Military Administrative Court about the interpretation of the time limit and stated that the Supreme Military Administrative Court does not take into consideration the date on which the damage stabilizes to count time-limit, just take the time of action. Nevertheless, the ECHR decided that it is unreasonable to expect the applicant to have lodged his claim within time limit since he was unaware of the bullet in his head on the accident’s date. The ECHR emphasizes that the right of action must be exercised when the litigants are actually able to assess the damage that they have suffered. The ECHR concluded that the Supreme Military Administrative Court’s strict interpretation of the time-limit precluded a full examination of the merits of the case, thus, by imposing a disproportionate burden on the applicant, the Supreme Military Administrative Court impaired the very essence of the applicant’s right of access to a court\(^{40}\). Conversely, if

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37 Freitag v. Germany, para. 39-42.

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the applicant is responsible from the delay, the ECHR refuses the application. 41

Another important issue about the time-limit, they have to be foreseeable from the point of view of applicant. In case of Melnyk v. Ukraine, the ECHR stated that

“it is necessary to examine whether the calculation of the period for the running of the time-limit could be regarded as foreseeable from the point of view of the applicant.” 42

The ECHR also takes into consideration that at which stages of the proceedings the local courts refuse the case because of time limit. In one case, the local courts rejected the case after more than 20 years later since the time-limit passed, the ECHR decided that this lead to applicants, who had been conducting in good faith and with sufficient diligence, deprived once and for all of any possibility of asserting their right to compensation for their olive grove, which was first occupied and later expropriated by the Greek State. 43

3. Configuration of Legal Aid

States do not have to provide legal aid for all disputes in civil proceedings. 44 States have to provide right to access to court efficiently, but, they are free to choose the means of it. 45 In one case, the State does not have a legal aid system, but offer a legal aid ex gratia to the applicant and applicant did not accept it. The ECHR decided that States are free to choose the way of providing effective and practical access to court, and that ex gratia offer provides that access. 46 However, in certain situations, Article 6 obliges States to provide legal aid. 47 Fairness of the proceeding will be the key factor to decide. The importance of what is at stake for the applicant, the complexity

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41 7.12.2010, 50330/07, Seal v. UK, para. 82.
44 In this respect, there is a clear difference with Article 6 (3), which guarantees right to free legal aid for criminal proceedings. 26.2.2002, 49384/99, Essaadi v. France, para. 30.
46 Andronicou and Constantinou v. Cyprus, para. 200.
48 Steel and Morris v. UK, para. 61.
of the relevant law or procedure⁴⁹, the applicant’s capacity to represent him or herself effectively⁵⁰, and existence of the statutory requirement to have legal representation⁵¹ would lead to obligation of provision of legal aid⁵².

If the law of the State provides a legal aid, also, the rules of it have to be applied in order to guarantee reasonable protection to the rights in Article 6. In case of Staroszczzyk v. Poland, the ECHR decided that

“In discharging obligation to provide parties to civil proceedings with legal aid, when it is provided by domestic law, the State must, moreover, display diligence so as to secure to those persons the genuine and effective enjoyment of the rights guaranteed under Article 6”⁵³.

If the conditions of granting are made, the proceeding must also offer sufficient guarantee against arbitrariness⁵⁴. Under this condition, the grant of legal aid can be made depended to sufficient chance of success. The ECHR states that “legal aid system can only operate if machinery is in place to enable a selection to be made of those cases qualifying for it”⁵⁵. Thus, the States can ask from the applicants provide well-founded claim⁵⁶. The ECHR also accepts that provision of legal aid can depend on formal requirements like submission of the form on income and financial circumstances. The ECHR, in principle, leaves the State Courts to determine the poverty of the person concerned, but, the ECHR determines the violation of Article 6 when they noticed inconsistencies⁵⁷. It also requires that States have to justify if they refuse legal aid’s requests⁵⁸.

⁴⁹ Airey v. Ireland, para. 26.
⁵¹ Airey v. Ireland, para. 26; Gnahore v. France, para. 41.
⁵³ 22.3.2007, 59519/00, Staroszczyk v. Poland, para. 129. See also: 18.12.2001, 29692/96, R.D. v. Poland, para. 44.
⁵⁶ However, in case of Aerts v. Belgium, the ECHR stated that refusing of the legal aid on the ground that appeal did not appear well-founded by Legal Aid Board, impair the very essence of the right to access to court, since the Court of Cassation will decide whether it is well-founded or not. 30.7.1998, 25357/94, para. 60.
To provide completely equality of the arms between the parties, the State should not produce through the use of public resources, as long as, each party has the possibility to lead their case and has no substantial disadvantage against their opponent—that is the definition of the equality of arms according to the ECHR\textsuperscript{59}.

The States may offer an attorney in order to provide right to access to courts, however, just providing attorney is not sufficient. If the person concerned is attached to a lawyer, it is the liability of the States to justify breaches of these lawyers. For example, if the negligence of the lawyer is notified credible\textsuperscript{60}, or there is a known representation problem\textsuperscript{61}, the States are accepted as responsible. A lawyer can refuse to appeal a hopeless remedy or claim. However, in order to prevent arbitrarily avoidance from procedural guarantee, particularly the time and form of the refusal has to be provided. A very late refusal has not to be allowed, when there is not sufficient time to search another representative\textsuperscript{62}. Also the refusal has to be justified in writing\textsuperscript{63}.

4. Execution of the Final Decision

The right to access to a court includes that the final judgments should be respected, which follows the rule of law that is pointed in the preamble of the EConHR, and these are required for the principle of legal certainty. Since right to access otherwise becomes an illusory, the final judgments of the courts have to be undoubted and enforced\textsuperscript{64}. It would be inconceivable if the Article 6 provides detailed procedural guarantee without the protection of enforcement and execution of the judgments. Thus, the execution of the judgments is the integrated part of the fair trial\textsuperscript{65}. In addition to this, if the judgment is directed to State or Institution of the State, the applicant should not to set special enforcement procedure to move, and State must pay. However, if the judgment is directed to private party, then the State has to create effective and reasonable instrument for enforcement\textsuperscript{66}, and in this

\textit{Biziuk v. Poland}, para. 29.


\textsuperscript{60} 19.10.2000, 45995/99, \textit{Rutkowski v. Poland}.

\textsuperscript{61} 22.3.2007, 59519/00, \textit{Staroszczyk v. Poland}, para. 122.


\textsuperscript{63} \textit{Staroszczyk v. Poland}, para. 136.


\textsuperscript{66} 3.2.2005, 2577/02, \textit{Fociac v. Romania}, para. 69.
respect, the State is responsible if the authorities do not react reasonably. Naturally, if the enforcement of the judgment is not possible, then the authorities are not responsible. The ECHR accepts that there can be a certain time between the final decision and the enforcement of the decision, but, if it is too long that will touch the essence of the Article 6. Passing of so much time, besides the Article 6, violates often also Article 1 Additional protocol 1. How much the time can be, depends on the situation. The ECHR considers the difficulty of the enforcement, the behavior of the applicant and authorities, as well as the amount and the type of requirements.

5. Immunity of States and Other People

The other States and their institutions granted immunity by international law in order to reach a legitimate aim that is being compatible with the international law and having good relations between the States. In this context, States have more flexible than the others. The ECHR decided that "Just as the right of access to a court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the rule of State immunity".

If any State provides such a rule, which complies with the rule of the international law, this is not unproportional limit to the access to courts, because also the EConHR, as far as possible, must be interpreted by reference to other rules of international law. In Fogarty v. UK case, the ECHR accepted that immunity for work relations in the embassy is compatible with Article

67 In case of G. L. v. Italy, the ECHR stated that non-provision of police assistance for execution of the vacation of the tenant for more than 3 years violates Article 6 (1), right to access. 3.8.2000, 22671/93, para. 31-41.
69 7.5.2002, 59498, Burdov v. Russia, para. 35.
73 C. Grabenwarter, Europäische Menschenrechtskonvention, (Beck München 2009) 358.
74 29.6.2011, 34869/05, Sabeh el Leil v. France, para. 49.
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676. In another case, the ECHR accepted that providing immunity for claim of damages because of the behavior of the soldiers in a foreign country is compatible with Article 677. However, for commercial transactions with private parties and employment contracts do not accepted within the scope of the State immunity78.

States also provide immunity for other people because of some reasons and if it is proportionate, the ECHR accepts that they are compatible with Article 679. Under the Article 6 application, if the State provides immunity unconditionally and without examination of the competent courts and exclude for a whole range of civil disputes, and grants for a huge group of people, this would be incompatible with the rule of law as well.

The ECHR also makes distinction between immunity from liability, a material limitation of the claim, and the immunity from legal prosecution, a procedural restriction80.

The immunity provided for members of parliament, in principle, is justified, since it follows a legitimate aim, which is immunity of the MPs, to guarantee their free speech, and granting the separation between the legislation and judiciary81. The ECHR decided that

"the Court believes that a rule of parliamentary immunity, which is consistent with and reflects generally recognized rules within signatory States, the Council of Europe and the European Union, cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 (1)"82.

This is not a personal guarantee, it is provided for their status. In this respect, States have a right of discretion. The more comprehensive the immunity and the less related with their parliamentary protection, the more compelling the reasons must be for its justification83. If there is a lack of connection with parliamentary activities, the proportionality requires special emphasis on investigating84. So the immunity violates the Article 6, if it is

76 21.11.2001, 37112/97, Fogarty v. UK.
78 14.3.2013, 36703/04, Oleynikov v. Russia, para. 70.
81 Grabenwarter, 358.
not granted only to the activities that are connected with the exercise of parliamentary rights.85

6. Court Fees

Court fees are also permitted on the conditions mentioned above, thus, it mustn’t touch the essence of the right to access a court and mustn’t make it unreasonable and unproportinate. The ECHR accepts that aims of the court fees are to fund the functioning of the judicial system and to act as a deterrent to frivolous claims for the general administration of the justice.87 The ECHR tries to make a balance between the interest of the State in collecting court fees for dealing with claims and, on the other hand, the interest of the applicant in vindicating his claim through the courts.88 It depends on the amount of fees and ability of the person concerned to make payments, the stage of the proceedings in which the fee is charged, and the dispute.89 The ECHR also accepts that the order for the payment of security for costs clearly pursued a legitimate aim: to protect defendant from being faced with the impossibility to recover its legal fees if the applicant was unsuccessful in the appeal.90 However, if the amount of the security is too high for the applicant, then, it will violate the Article 6 (1)91. Normally, court fees cannot be regarded as unlawful restriction of the access to court.92 Nevertheless, in case of Kreuz v. Poland, the ECHR decided on violation because of the unreasonably high fees.93 In case of Mehmet and Suna Yigit v. Turkey, the ECHR also found violation because the court fees that has to be paid was four time higher than the monthly minimum wage at that time, and applicant had no income.94 In case of divorce, the ECHR calculates the court fees and stated that

“the judicial authorities refused to accept the applicant’s argument that she was unable to pay the court fees and they assessed her financial situation solely on the basis of the lump sum of PLN 300,000 which she had received.

86 19.6.2001, 28249/95, Kreuz v. Poland, para. 60; 17.7.2007, 52658/99, Mehmet and Suna Yigit v. Turkey, para. 34.
88 Kreuz v. Poland, para. 66; Mehmet and Suna Yigit v. Turkey, para. 34.
89 26.7.2005, 39199/98, Podbielski and PPU Polpure v. Poland, para. 64.
92 5.6.2003, 74789/01, Reuther v. Germany.
93 The total amount has to be paid was equal to the average salary in Poland at that time. Kreuz v. Poland, para. 60.
94 Mehmet and Suna Yigit v. Turkey, para. 38. See also; 14.10.2008, 6817/02, Iordache v. Romania, para. 39; 24.5.2006, 63945/00, Weissman and Others v. Romania, para. 39.
or was to receive from her ex-husband in the proceedings for the division of marital property... Nevertheless this sum constituted apparently her only asset and it did not seem reasonable to demand that she spend part of it for court fees, rather than build her future and secure her and her minor children’s basic needs after the divorce.”

Conversely, in case of Urbanek v. Austria, the ECHR did not found violation where the applicant has to pay EUR 2,405,374.44, because of the fact that “the conduct of the proceeding did not depend on the payment of court fees, that the system linking court fees for pecuniary claims to the amount in dispute does not in itself appear disproportionate and that the system here at issue provides for a certain degree of flexibility, the Court finds that the very essence of the applicant’s right of access to a court has not been impaired in the present case”.

The question has to be answered here about the case we are analyzing in this paper is that, whether it is against the right to access or not, if the fees are taken after all stages of proceedings ended. This means, the applicants can access the courts initially, to all stages of proceedings, but, in the end, there is some amount of fees or fines that has to be paid by applicants.

The ECHR applies same criteria for the fees which are taken at the end of the proceedings and sometimes finds unproportionate limitation to access to courts. In case of Stankov v. Bulgaria, the ECHR decided that “the imposition of a considerable financial burden due after the conclusion of the proceedings may well act as a restriction on the right to a court”.

Thus, it is important to draw a line between compatible and incompatible with Article 6 (1). The line has to be founded from the decision of the ECHR, who interpret EConHR autonomously.

Toyaksi and others v. Turkey case is about the fine punishment to the applicants because of the unsuccessful request for rectification of the Court of Cassation decision. According to Article 442 of the Code of Civil Procedure

95 Kniat v. Poland, para. 44.
97 Para. 54. This is the case about the payment of court fees after getting final decision. The applicant applies to a court for non-pecuniary damages, in the end, he is granted some amount of non-pecuniary damage, but the court fees for the rejected part covers the 90% of the granted amount. The ECHR stated that people cannot foresee the total amount of the non-pecuniary damages, even if they are lawyer. Also the applicant demanded these damages because of more than one year unlawful detention, which means he tried to value his freedom. Thus imposing this much amount non-pecuniary damages is unproportionate limitations to access to court.
98 20.10.2010, 43569/08, Toyaksi and Others v, Turkey.
1086\textsuperscript{99}, the applicant can be imposed fine to the certain amount if the request is rejected. In \textit{Toyaksi} cases, the court imposes fines on applicants ranging among 120 to 170 TL\textsuperscript{100}. The ECHR stated that fines imposed on them merely constituted a penalty for having occupied the higher courts in a vexatious manner and any of the applicants did not contest that they could not pay that amount\textsuperscript{101}. The ECHR accepted that in order to prevent the build-up cases, States can provide fines and this will not violate per se Article 6 (1).

In case of \textit{G.L. v. Italy}\textsuperscript{102}, court of cassation also ordered fine because the appeal is rejected under the former Italian code of criminal procedure Article 549 which provides fine to certain amount. The ECHR stated that fine punishment did not prevent the applicant to appeal and also applicant did not claim that it was a serious impediment to appeal, and even though that the courts did not give reasons for judgments of fine, the court analyze all reasons of appeal in detail and refused each of them, thus, justification for dismissal of appeal is sufficient for fine punishment.

In case of \textit{Karakasoglu v. Turkey}\textsuperscript{103}, a payment order was sent to the applicants and the applicants contested to Execution Office, claiming that they did not have a debt to the creditor. The creditor initiated proceedings before the Istanbul Commercial Court, requesting the annulment of the objection filed by the applicants and relying on Article 67 of the Code of Enforcement and Bankruptcy and demand compensation amounting to 40% of the sum due, since the applicants had denied paying their debt in an unjust manner. The court decided that the applicants had failed to prove that they did not have any debt to the creditor, thus dismissed the case and annulled their objection against the payment order and also ordered the applicants to pay compensation, amounting to 40% of the sum due, for unjustly filing an objection against the payment order. The ECHR stated that in present case the applicants had opportunity to examine their case at three levels of proceeding, and this compensation is provided for to avoid delay because of unjust objection\textsuperscript{104}. The ECHR also emphasizes that the law also provides same possibility for the debtor, if creditor applies unjustly, thus this is not also against the equality of arms\textsuperscript{105}. Thus, the ECHR concluded that, at the

\textsuperscript{99} Even though the code of Civil Procedure 1086 was repealed by new code, the Article 442 is still valid due to the transition clause.
\textsuperscript{100} Ranging among 60 to 90 Euros at that time.
\textsuperscript{101} Para. 1.
\textsuperscript{102} 9.5.1994, 15384/89, G.L. v. Italy.
\textsuperscript{103} 10.4.2012, 39105/09, Karakasoglu v. Turkey.
\textsuperscript{104} Para. 13.
\textsuperscript{105} Para. 13.
end of the adversarial proceeding, when the debtor filed an unjust objection against a payment order, ordering of a certain amount of compensation to the creditor does not constitute a breach of access to court.\(^{106}\)

### D. Consequences of these judgments

Article 6 (1) of the EConHR provides an effective legal protection.\(^{107}\) Access to independent and impartial court, which is established by law, is the central point of the procedural guarantees of Article 6.\(^{108}\) It is clear that Article 6 (1) provides also right to access to court, since otherwise, the all other rights and guarantees will be meaningless.\(^{109}\) Instead of an unreasonably long trial, States may just prevent the suits, and this cannot be regarded as less violation. In this respect, rule of law requires also access to court.\(^{110}\) Therefore, the ECHR accepted since a few years that the States must actually guarantee to access to court and this must be also effective, not theoretical and illusionary.\(^{111}\)

It is also obvious that right to access is not absolute; there will be some grounds to limit it, like legal certainty or improving relationships between equal and independent States.\(^{112}\) The question is at which point a limit will be incompatible with Article 6 (1). Since Golder v. UK case, the Court decides many times about the limitations, and all of them, the Court accepts that limitation may change according to place and time.\(^{113}\)

The ECHR, in all of its judgments, developed three principles; the

\(^{106}\) Para. 14.


\(^{108}\) Grabenwarter, 355.


\(^{110}\) Peters/Altwicker, 151.

\(^{111}\) Grabenwarter, 355.

\(^{112}\) Peters/Altwicker, 152; Grabenwarter, 356; J. J. Fawcett, „The Impact of Article 6 (1) of the ECHR on Private International Law“, (56 (1) International and Comparative Law Quarterly 2007) 2.

\(^{113}\) For example, States can prevent misuse of the judicial system with unfair or repeated claims. Grabenwarter, 356.

\(^{114}\) Peters/Altwicker, 151; Grabenwarter, 356.

\(^{115}\) This is also called “Ashingdane Test” due to the fact that the court establishes these principles first time in case of Ashingdane v. UK 28.05.1985, 8225/78. Peters/Altwicker, 154; J. A. Frowein/W. Peukert, Europäische Menschenrechtskonvention, (Engel 2009) 185; Yolcu, 382; Kloth, 13.
government’s regulations have to satisfy that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired, and have to pursue a legitimate aim and there has to be reasonable relationship of proportionality between the means employed and the aim sought to be achieved. To sum up, the Court checks three elements in order to decide whether the regulation is compatible with Article 6 (1) or not. First of all, the regulation should not impair the very essence of the right. However, it also required to interpretation to decide what the essence of the right to access a court. The ECHR emphasizes that the rights provided in the EConHR should not stay as theoretical or illusory, but also has to be applied in effective and practical manner. In order to have effective right to access to courts, individuals must have “a clear, practical opportunity to challenge an act that is an interference with his rights”. Thus, if the government regulation makes the right to access a court meaningless, then, it can be said that this regulation impairs the essence of the right. Second, it has to pursue a legitimate aim. The States cannot limit the rights by just to limit it. However, these limits can be decided according to related rights, type of Courts and related law system. Lastly, the aim and the means used have to be proportionate. The States cannot claim only that they follow a legitimate aim, but also their means to limit to access to court has to be proportionate with their aim. This means, if they can reach the same result with another less restrictive rule, the more restrictive rule will be a violation of the Article 6 (1). When a plaintiff has to pay an amount that is equal to his/her yearly income in that country as court fees, this cannot be regarded as proportionate, because it is clear that s/he cannot afford it. The State does not have to provide financial aid, however, shall care that the individual access to the courts is not impossible for economic reasons, where in the design of modalities matter.

Condition for the admission of the Case, such as time limitations, compulsory representation with attorney before court, regulations of form, court fees and cost of security,immunities are all limitations to access to court. All of these serve a legitimate aim that we have already discussed.

116 Grabenwarter, 356. Cakir and Others v. Turkey; Ülger v. Turkey; Z and Others v. UK.
119 Grabenwarter, 356.
120 Grabenwarter, 357.
121 Peters/Altwicker, 152; Grabenwarter, 357.
122 Grabenwarter, 357.
above. It is far away from doubt that right to access also covers the after proceeding impediments, since such an obstacle may prevent the applicants to apply even if he or she can apply. For example, when you have to pay 1000 as fine, in case of lose of suits and it is four times bigger than your salary, you most probably hesitate to sue and in the end may give up. Thus, after proceedings regulations may also limit to access to court, and have to be analyzed under the Article 6 (1). In this respect, it has to comply with the ECHR judgments that we explained above\textsuperscript{123}. Thus, our concrete case has to be analyzed in accordance with these three principles.

First of all, article 134 of the Code 2004, as explained above, provides fine in case of demand of annulment of action is refused, that is 10% of the amount of dispute. The applicants can apply all level of proceedings, but if s/he loses at the end of the proceedings, has to pay some amount money. It is clear that this is a limitation to access to court. However, since plaintiff can reach all phase of the courts, in this respect, it cannot be said that it impairs the essence of the right.

Second, the reasons of the Article 134 have to be analyzed. The rationale behind it as followings: It tries to discourage vexatious litigants and aims to prevent build up cases. It provides to avoid unjust claims through the applicant may delay the payment. It also aims to safeguard the right to a hearing within a reasonable time and through to ensure the proper administration of justice. In this respect, it can be said that Article 134 of the Code 2004 follows a legitimate aim.

Lastly, we have to analyze that whether it is proportionate or not. Firstly we will analyze three cases. In cases of \textit{Toyaksi and Others v. Turkey}, and \textit{G.L. v. Italy}, the regulations provide fine automatically if the appeal to Court of Cassation rejected, and it also provides minimum and the maximum amount of the fine. This fine will be paid to State. In case of \textit{Karakasoglu v. Turkey}, the regulation does not provide minimum and maximum limits, but instead just indicate the percentage. In first two cases, the fine is paid to government, and courts will order automatically if they reject application, but in latter case, it is paid to the opponent party, and the opponents have to demand and justify that application is not just rejected but also it is unjust.

In Article 134 of the Code 2004, the fine, that is 10% of total amount, is paid to government, and the judge has to order fines automatically if s/he rejects application. In other words, defendants do not have to demand it. Also fine is paid to State.

\textsuperscript{123} It should not impair the essence of right, has legitimate aim and must be proportionate.
The *Karakasoglu v. Turkey* case, in this respect, is different from others that, in fact, it provides a kind of fine of private law. For our cases, cases of *Toyaksi and Others v. Turkey*, and *G.L. v. Italy* have to be taken into consideration, because they are same with the conditions; paid to State and automatically decided. However, in Article 134, there is no minimum or maximum limit for the amount of fine. Also, in cases of *Toyaksi and Others v. Turkey*, and *G.L. v. Italy*, courts have discretion to decide the amount, but, according to Article 134, courts have no discretion on amount, just 10% of the object of the dispute\(^{124}\). This can be 100 Euro or 1.000.000 Euro. In our concrete cases, it was around 140.000 Euro. Thus, our case is different from the cases of *Toyaksi and Others v. Turkey*, and *G.L. v. Italy*, because of the discretion of judges and minimum and especially maximum limits. This difference has to be analyzed.

In order to be a proportionate limitation, the aim of that regulation and the way to reach it has to be appropriate to each other. This means, to reach that aim, it is needed to have this limitations, and also same result cannot be reached with another easier way. As we have already explained, article 134 of code 2004 has legitimate aim and this rule is a way to reach that aim. However, we must check that is there any less restrictive way or not. In this respect, the other two cases show that there is a less restrictive solution to prevent build up cases and discourage the vexatious litigants. Providing minimum and maximum limits to fine and giving discretion to judge will resulted in same result. There is no need to provide limitless fine in case of dismissals of unjust appeal. Hence, the Article 134 of the Code 2004 cannot be regarded proportionate. 140.000 Euro fine, in any case and any applicants, is too high and cannot be regarded as proportionate. Thus, we agree the decision of the ECHR.

**E. Amendments Proposal**

Article 134 of the Code 2004, as explained above, follows a legitimate aim, but the measure provided there is not proportionate. In fact, compliance of the Article 134 with the Constitution dealt by Turkish Constitutional Court in 2012, but, by majority vote, the annulment demand was rejected\(^{125}\). The Constitutional Court argued that the Article 134 follows a legitimate aim,

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\(^{124}\) Articles 68, 68/a, 169/a and 170 of the Code 2004 provides that debtor or creditor has to be ordered to pay a fine amounting to 10% of the object of the dispute if debtor or creditor refuses signature on the document and as a result, their rejection is denied on merits by Courts. These articles require same conditions with article 134, and same interpretation is valid for them as well.

\(^{125}\) Constitutional Court, 68/182, 22.11.2012, Official Gazette No. 28601.
punishment which is relative with the disputed amount is proportionate, and parties can apply the court if they want at first, and also Article provides that if the case is rejected on procedural grounds, no punishment will be decided. However, Turkey is the party of the EConHR, and the ECHR has exclusive right to interpret it. Thus, we have to take into account the judgments of the ECHR.

As explained above, the ECHR accepts also a punishment at the end of the proceeding as violation of Article 6, if it is not complied with three principles explained above. The ECHR accepts that there can be after proceedings punishment in order to punish bad faith applications. However, the ECHR emphasizes three elements in order to accept that regulation as proportionate. First of all, the ECHR states that the regulation has to provide upper limits. Second, it has to provide discretion to the judge to decide the punishment and the amount of the punishment. Finally, it cannot based on just refusal of the demand, not just non-proof of claim, but the ECHR emphasizes that the punishment will be imposed in case of the applicant acts in bad faith, tries to delay the proceedings or payment. Therefore, Article 134 of the Code 2004 has to be amended. There must be provided minimum and upper limit for the punishment of fine. For example it may provide that in case of refusal, the applicant will pay 100 Turkish Liras to 10.000 Turkish Liras. Through these minimum and upper limits, judge may decide the total amount by taking into consideration of the conditions of the concrete cases and situations of the applicants. The Constitutional Court is right that the Article 134 follows legitimate aim, but fine which is relative to disputed amount does not have to be proportionate to reach that aim. 140.000 Euro fine, in any case and any applicants, is too high and cannot be regarded as proportionate. Lastly, it has to be expressly stated that the fine will be imposed if the courts identify that the application is made in order to delay payments. Thus, Article 134 will be amended as follow; “In case of annulment demand of the auction is refused, and it is identified that the applicant has bad faith, the court may impose a fine, which is in the amount from 500 Turkish Liras to 10.000 Turkish Liras.”

VIII. Conclusion

It has to be accepted that right of access to courts is guaranteed by the Article 6 (1), and it also covers provisions which regulate the end of the all level of proceedings. However, access to court is not absolute, and may be subject to some limitations. In this respect, States have discretion. However, in any cases, these limitations should not impair the essence of the right, have to follow legitimate aim and be proportionate. Provision of a fine after the
dismissal of the proceedings is also within the concept of access to court, and without maximum limits, discretion of the judges amount of it and deciding bad faith, does not impair the essence of the right and has legitimate aim, but is not proportionate. Thus, Regulations, which provides fine punishment at the end of the proceedings, have to provide also upper limits and discretion to the judges in order to allow them decide on amount by taking into consideration the conditions of the concrete case, and also it depends on the grounds of bad faith of the applicant, like delay of payment of proceedings.

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