

Principles of Law of Civil Procedure

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A civil law system, Turkish jurisprudence has incorporated numerous principles from doctrines, judicial decisions and legal norms which can be defined as constitutional norms of private procedural law. These principles are as follows;

- Principle of disposition
- Principle of contest
- Principle of concentration of proceedings *ple de ex officio*
- Principle of 'determination of the truth by the court'
- Direct access to the evidence
- Immediateness
- Right to a fair trial
- Right to a hearing
- Principle of efficiency of proceedings
- Principle of transparency
- Principle of written and oral pleading
- Court language
- Obligation to tell the truth and act in good faith

Any breach of the aforementioned principles is deemed as a major judicial miscarriage, especially a breach of fundamental principles, such as the "right to a fair trial" and the "right to a hearing," which may mean deviation by the judiciary from the Constitution and may result in a lawsuit filed in the European Court of Human Rights. Since judicial rules and even the legislative process are shaped by these principles, they are to be regarded as significant in any judgment. Both the court and the parties are under obligation to these principles at every stage of a trial. For example, when parties are filing and executing a lawsuit, they should abide by the "principle of disposition," "principle of contest" and "principle of procedural brevity;" they should not expect the judge to consider claims, defenses and evidence not provided before the trial phase; and finally they should act in good faith. On the other hand, the judge should do his/her best for a fair trial and assess all due explanations, statements and evidence provided by the parties directly, in accordance with the "right to a hearing" and issue his/her decision on the case with its justification within a reasonable time. Of these principles, only those regulated under the Code of Civil Law no. 6100 ("CCL") entering into effect on October 1, 2011, shall be elaborated upon.

Principle of Disposition

As per Article 24 of the CCL, which regulates this principle, judges are not authorized to file, investigate or rule on a dispute on their own initiative, without any application from either party. Unless otherwise explicitly stated in law, no one may be compelled to file a lawsuit in his favor and demand his own rights. This right of parties to decide freely on the subject of the case continues after a lawsuit is filed as well. The "principle of disposition" means that (i) the judge cannot file a lawsuit without a request from either party; (ii) parties have the authority to determine the matter of the lawsuit and the lawsuit itself; (iii) and the judge is bound by any requests or motions brought by the parties. In other words, the judge only conducts a case upon a party's request and parties are free to file, pursue and dismiss a lawsuit. The third clause of Article 24 explicitly states that the free will in private legal relationships still applies in lawsuits, despite their gaining a public nature upon filing, that is, in procedural law.

Principle of Contest

In accordance with Article 25 of the CCL, judges cannot *ex officio* consider or state anything, even as a reminder, unless it is stated to the court by one of the parties, or gather evidence except for exceptions regulated by law. The "principle of contest" means the facts and evidence presented to the court by the parties form the basis of the claim and defense. Accordingly, the judge examines the case considering only the information provided by the parties. However, the judge does not have to examine all the evidence provided, but rather only that which is relevant to the case. This principle is applied in litigious matters; however, in *ex parte* proceedings the "principle of *ex officio* examination" is applied. Evidence is also covered by the principle of contest. As a rule, evidence is provided by the parties, and the judge cannot *ex officio* refer to other evidence. However, nothing prevents the judge from interrogating the parties and examining evidence based on investigation by and testimony of expert witnesses. Additionally, in every phase of a trial, the judge may hear both parties' assertions and instruct the parties to provide the evidence required.

Principle of Adherence to Plea

As stated in Article 26 of the CCL, the judge is limited to the claims and motions of the parties, and cannot find for compensation higher than the amount requested or on a different motion. In certain cases, however, the judge may find for less than the amount requested. The provisions of law as to when a judge is not bound by parties' requests are limited.

Right to a Hearing

Apropos Article 27 of the CCL, the parties in the case, intervening parties and any other related persons, have a "right to a hearing" as part of their civil rights. This right includes (i) being informed of the trial, (ii) having an opportunity to testify and offer evidence, (iii) the court's evaluation of testimony given and (iv) clear and explicit justifications for rulings. The objective of enactment of this article is as follows:

"The right to a hearing, which is regulated under Article 36 of the Constitution and Article 6 of the European Convention on Human Rights, is the most significant component of the right to a fair trial. The Constitution dictates that in judicial processes, in addition to the fact that parties shall take part in proceedings physically, they are entitled to have all the information, to use their rights to testify and offer evidence in full equality, and that judicial bodies should properly evaluate all these statements and then make a judgment accordingly. This 'right to a hearing,' which is also defined in international law texts, is commonly known as the 'right to testify and defend.' However, the 'right to a hearing' is a more comprehensive concept than the 'right of testify and defend.'"

This right does not only apply to the parties directly involved, but also any intervening parties or parties subject to the ruling. However, each party to the proceeding has this right in proportion to their involvement. The basic components of this right are stated in law individually in order to preclude any uncertainty or doubt that may arise about the implementation of this fundamental judicial right. Parties must be informed of actions taken both by judicial bodies and by any other parties. In principle, taking an action and delivering a judgment unbeknownst to any party is not possible as a fundamental rule. The second element of this right is the right to testify and provide evidence. Parties have the right to make statements regarding the trial and the right to pro- pound and prove their testimony and defenses. Both

parties have an equal right to these recourses, which is also known as the "principle of equality of arms." The third element of this right is that judicial bodies are to take all parties' assertions and defenses into consideration and make their judgment based on this information. Writing an incomplete or perfunctory opinion constitutes a violation of this right. Having assessed the parties' claims and defenses, judicial organs have to reiterate the material facts and legal reasons for the judgment in their opinions.

The decision should not be totally contradictory to the general norms of law, legislation, and established precedent; in other words, a surprise. Thus, it is also called the "no surprise decisions rule." Judicial bodies can of course issue new decisions differing from existing precedents, but in that case, they should provide and establish the reasons and grounds for the decision and assess the parties' counterclaims. All the elements of the "right to a hearing," which is considered the most fundamental judicial right and appears in international treaties and conventions, are stated and regulated under Article 27 of the CCL.

Principle of Transparency

As per Article 28 of the CCL, notification of notices of hearings and judgments are open to the public. However, hearings may be held in private partially or wholly, but only for compelling reasons of public dignity or safety, as determined by the court ex officio, or upon the request of any one of the parties.

The judge examines and evaluates the parties' requests for privacy in a private hearing, in accordance with the provisions regulating preliminary questions. The judge explains the reasons for privacy in the final opinion on the substance of the case.

The judge warns observers of the private hearing not to disclose any information obtained there. The judge shall apply the sanctions and provisions of the Turkish Penal Code no. 5217 dated September 26, 2004 for any breach of privacy recorded. In the preamble, the objective of this article is stated as follows;

"The article, in principle, emphasizes that judicial procedures are open to the public. Lawmakers considered the provisions under Article 141 of the Constitution and Article 6 of the European Convention on Human Rights, and accordingly preferred to entitle the principle regulated under Article 28 of the CLL "public hearing or closed hearing" instead of "open hearing." The first clause of this article sets forth the scope of the "principle of transparency"

and states that the principle includes the publication of decisions. Under certain conditions the “principle of transparency,” which is one of the fundamental rights, is restricted as necessary within the standards of the Constitution and the European Convention on Human Rights. These standards are articulated explicitly under the second clause of this article. Pursuant to the third clause of this article, a private hearing determining “privacy” is to be conducted and justification of the privacy decision is to be included in the final opinion. In each phase of the trial, it is compulsory to investigate, question parties, and gather and examine evidence in order to reach a decision.”

Even in the course of fulfilling this obligation, it may not be appropriate to share explanations that go against the spirit and objective of privacy. For the same reason, declaration of the reasons for the decision of privacy shall be delayed until the end of trial in accordance with Article 141/3 of the Constitution. It is also important to protect the privacy granted by court decisions, and Article 162/2 of the Turkish Penal Code states how to keep information in judicial documents private. Besides criminal proceedings, this is also considered a matter of judicial discipline and therefore the duty of warning the attendees regarding privacy and taking this warning on record is assigned to the court as a task to maintain judicial discipline. Finally, the fourth clause of this article regulates the notification procedure for sanctions.

Obligation to Tell the Truth and Act in Good Faith

As outlined in Article 29 of the CCL, parties have to abide by the principle of acting in good faith and make true statements regarding litigious matters. The purpose of the regulation of this article is stated as follows;

“The first clause of this article regulates the principle of acting in good faith, and the second clause regulates the principle of telling the truth, which are both regarded as limits to “one-party domination.” This first clause is another aspect of the Turkish Civil Code’s principle of “acting in good faith” in civil procedure law. This rule applies to all litigious procedures and the court shall prevent anything contrary to the principle in question. The obligation to tell the truth is one the judicial obligations of parties that is to be abided by over the course of trial. Pleas and evidence are included in this principle. Parties’ acts contradictory to these fundamental rules shall not be accepted as valid, even if they take place during trials. Various articles regarding trial process regu-

late some sanctions to prevent actions of bad faith. The basis of all these provisions is the promotion of acts of good faith. The second clause of the article regulates the obligation to tell the truth, which is a specific and significant element of the principle of “acting in good faith.” Parties are free to choose anything to submit to the court for their own benefit. However, material submitted to the court should be correct, and declarations and testimony should reflect the truth. Parties are not expected to testify against themselves and should not mislead the court in statements made regarding either themselves or the other party. The obligation to tell the truth applies to both written and oral declarations and testimony. In case of any breach of this obligation, declarations shall not be considered and evaluated. Additionally, the deliberate telling of a lie may be classified as willful fraud.”

Principle of Efficiency of Proceedings

Following with Article 30 of the CCL, the judge is obliged to conduct the case in an orderly fashion and a reasonable time period, and also to ensure that no unnecessary costs are incurred. The purpose of this article is stated as follows;

“The article is directly relevant to the right to a fair hearing regulated under Article 6 of the European Convention on Human Rights. Lengthy trials damage the belief individuals have in the protective mechanisms afforded by the law and in the legal system itself. Judgments, so often overdue, lose their relevance, and their enforcement often results in material injustice rather than redressing a wrong. On the other hand, ruthless enforcement through speedy trials limits the ability to clarify the facts of the case and therefore adversely affects the foundations and correctness of the judgment. It is more important for a code of procedure to offer a reasonable system, which both ensures that the facts are accurately determined and trials are conducted in a timely fashion. The functionality of this provision depends on the application of the remaining articles of this law.”

Principle of Determination of the Truth by the Court

In accordance with Article 31 of the CCL, in situations where clarification of the dispute is necessary, the judge may request the procurement of evidence by the parties, request testimony, or ask questions regarding issues that are ambiguous or contradictory in the material or legal sense. The purpose of this article is stated as follows;

“According to the regulation, which articulates the competencies of the judge to clarify the dispute, in these situations the judge may request the procurement of evidence or explanations from the parties or ask questions. With the developments in comparative law, the contemporary interpretation is that the judge’s duty is to ask the parties questions, point out issues and negotiate. Thus, the judge will be able to analyze the factual and legal issues of the occurrence and legal dispute with the parties as necessary and request explanations on important facts to resolve the dispute in a timely manner and especially to ensure that the parties add any missing facts, present evidence and file the necessary requests.”

Supervising and Managing Trials

According to Article 32 of the CCL, judges supervise and manage trials, taking all precautions necessary to ensure that order is maintained during the trials. An appropriate amount of time is given for the resubmission of petitions which are illegible, inappropriate or irrelevant, and such petitions are also kept on file. If a new petition is not submitted within the time allotted, further delays may not be granted. The purpose of this article is stated as follows;

“Even though the lawsuit is, in terms of procuring evidence, the parties’ act, a trial involves public law and a “procedural relationship” arises between the parties and the court when the lawsuit is filed. The judge manages trials. The term “trial” encompasses both hearings and sessions. In comparative law, management authority is understood in two ways; formal and material. Acts such as assigning court days and deciding to serve notifications are related to the formal management of the trial. Acts regarding the clarification of evidence are understood as related to material management.”

Applying Law

Article 33 of the CCL states that the judge ex officio applies Turkish law. The term “Turkish law” includes customary law and the international agreements to which the Republic of Turkey is a party, in addition to legislation. This provision reiterates a classical principle. Procedural law and substantive law are equally covered by this article.