

Observing the position of fair hearing principles in Iran's administrative courts

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Abstract: One of the most important and well-known rights among humans is the justice and right during the “fair hearing“, which it has been emerged during the changes in juridical civilization among humans. The justice and right both attributes to the England's principle. Surely, the right is in accordance with the human's inherence and wisdom, in which divine religions have attracted the humans to the point “justice and right”. As a matter of fact, fair hearing is a judicial proceeding that is conducted in such a manner as to conform to fundamental concepts of justice and equality. Fair hearing means that an individual will have an opportunity to present evidence to support his or her case and to discover what evidence exists against him or her. The present paper is a case study, in which the position of fair hearing principles in Iran's administrative courts has been considered ; it could be mentioned that the administrative hearing is one of the important and new units of hearing, in which observing the fair hearing and principles in the hearing is interesting to be discussed. Nonetheless, some prerequisite preconditions in courts and administrative hearings, have made some rights related to fair hearing in courts and punitive, civil and international hearings, which based on particular characteristics of administrative system in different perspectives particularly structure and qualification, this matter could be defined.

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Introduction

In today 's administrative law and with regard to the lack of comprehensive regulations, general principles of administrative legislation are so important in the courts, which this is provided to control the process of administrative decision making. For this reason, since each general legislative principle indicates a particular foundation and philosophy, thus these principles could be used as “guidance principles” for judges, governments and citizens. Along this, it could be said that administrative assessments and decisions, with the aim of protecting rights of citizens against administrative authorities, guaranteeing structures of a proper administrative system and codifying administrative investigations, are the functions of principles which have been emerged through regulations, rules and judgments of courts and juridical procedures over the years. These are unwritten principles which should be necessarily observed by all administrative judges while making decisions. In this basis, the courts investigating the administrative violations in Iran are obliged to observe the principles and criteria like other administrative authorities, in which these courts have been established in accordance with present legislation for investigating the administrative violations, to investigate administrative violations in governmental employees, and the employees in non-governmental organizations. In following, the

legislation for investigating the administrative violations and the administration process have both been discussed. what is followed in this paper is not only discussing about the necessity and presence of legislations, but also the point which is provided in this paper is actually discussing about the manner of performance, and the course of rules in the justice administration systems of Iranian administrative investigation, which this is provided with the perspectives of philosophy and nature of rules and regulations.

In particular administrative authorities, rule of legislation would be realized at the time while people refer to the independent and impartial authorities, and also people could adjudicate while the administrative organization violates the legislation ; Also people in case of incurring damages, could claim for indemnity and they could request the administrative officials to observe the legislation by revoking the decisions which are in contradictory with the legislation, in this case the administration could be stopped. Along this, all statutory legislations should be investigated, and the department should follow the hierarchy of formulated legislations and regulations which are applied in different situations. In contrast with the validity of a court's decision which is usually relative, when an administrative authority annuls an administrative decision, actually this decision is binding for all. moreover, since judgments of the boards for

investigating the administrative violations are appealable in court of administrative tribunal, in this case the right of litigation in the authority would be increased. In this basis, article 173 of the constitution and article 1 of legislation for the court of administrative tribunal involve the right of litigation to the court of administrative tribunal and article 170 of the constitution states people 's right of litigation from bylaws and enactments to the tribunal, in which it is announced that everyone may request court of administrative tribunal for revocation of these regulations.

Independence means the protection from political or administrative influence and control (Trechsel, 2006, p.49). Prerequisite of independence may be defined as a rule in which the absence of a relationship between the judge and other people, who are empowered de facto, or by virtue of legislation, some decisions may be annihilated in this case. Even the absence of apparent independence should be avoided, since this issue severely affects sense of trust in courts in a democratic society. Some standards of independence are inferred from jurisprudence of European court of human rights, which includes independence in structure, independence in jurisprudence and independence in judges.

Main body

The principle of non- retroactivity of criminal and quasi- criminal laws

The security of civilians makes it necessary that the present condition and gained rights must not be included in the new laws before the enactment of this new law. This issue is called the principle of non-retroactivity of law. Documents of human rights also emphasize this issue in the internal and international levels (especially section 1 of article 15 related to the convention of political and civil rights, section 2 of African bill of rights, article 9 of American civil rights convention, and article 7 of European convention of human rights). Some documents determine that this principle could never be ignored even in special conditions. (Wisebort and Friedrichsen, 2007, p:164) In the law of Iran, this principle has been accepted in principle 169 of constitution, "no previous acting or not acting is considered a crime regarding a recently enacted law".

However this law is not an absolutely fixed law, it has some expectations such as interpretive laws, collective laws and slight laws. These laws are usually retroactive laws, unless they are against individuals' gained rights. (Goldouzian, 2007, p:33). The court of administrative justice in consideration of various votes have paid attention to the performance or non performance of principle of non- retroactivity, therefore, based on this consideration it has

invalidated some of the administrative decisions and acts. The first vote issued by the court is related to the invalidation of some of the issues in executive regulations related to law of urban lands enacted in 1981. The court invalidated sections 5 and 6 according to the fact that they have got retroactive.

In administrative rights of Iran, this principle does not exist like accepted criminal and civil laws, however, to avoid disorder the attempt is not to let administrative laws get retroactive. But, assuming that the principle of non- retroactivity is not performed, there is no executive guarantee in the court of administrative justice and special administrative entities. Moreover, about considering administrative violations, guardian council regarding principle 169 of constitution could point out problems related to criminal crimes.

The principle of proportionality

The principle of proportionality or the equality of defense capabilities is one of the principles of fair hearing. This principle is a concept of equality principle in front of law which is pointed to, in article 26 of international convention of political and civil rights. Equality means that there should be no discrimination (religious, sex, financial, or positional discrimination) against one party and in favor of the other party. In other words, hearing process for accusations imposed on individuals must be equal for all classes of people except special cases such as considering military crimes.

This principle is very important in administrative considerations in which the government as the representative of general power stands as one party of the administrative lawsuit. In fact, the other party should be provided with enough chance and capabilities to defend his right. For instance, if the government representative is able to be present in the process of consideration or to be aware of content of the other party's case or to represent his reasons..., the other party should also be able to do the same acts. (Bradley and Erving, 1999, 789) In the law of the court of administrative justice, this principle is not explicitly declared, however, it could be implied from some laws or it could be tracked back in some votes invalidating administrative decisions. For instance, by considering peoples' complaints and protests against officials, offices and governmental regulations which are against law, the court of administrative justice was founded. (principle 173 of constitution and article 1 related to law of court of administrative justice). People are allowed to ask court of administrative justice to invalidate these regulations. (principle 170 of constitution)

Principle of correspondence (defense law)

Literally, the word correspondence means discussing and arguing with each other. In law field, some say it is synonym of defense law and some say is the execution of respect principle and finally, some call it the guarantee of equality of two parties. (Shams, 2003, p: 59-86)

It means that two parties could represent their documents and reasons and also challenge the reasons represented by the opposite party. (Taziki nejad and Shafii sar dasht, 2006, p: 352-375). In administrative law of England and France this principle has been declared as the necessity to listen to both parties which it is an aspect of the principle of (law considerations).

However, in the law of Iran, this principle is not predicted with this title anywhere and just in some internal laws related to criminal considerations this principle is implied. Article 18 related to executive regulations of law of addressing administrative violations declares that the accused employee is allowed to submit his defensive written response and documents to the board in the specified deadline after getting aware of all accusation issues. Otherwise, the board is able to consider the accusations and issue the needed vote. Article 21 of regulations also declares, "the board, after completing considerations, and considering the available documents in case and noticing the defense of the accused, issues the vote and takes a certain decision." The presumption of innocence principle

Every one charged with a criminal offence is considered innocent until he is found guilty according to law. This principle which is a fundamental principle in all juridical organizations in judgment could be called a common juridical heritage among all developing countries of the world. From world announcement to regional conventions of human rights (especially article 10 of human rights announcement, section 2 of article 14 of international convention of political and civil rights, section 2 of article 6 of European convention of human rights, section 2 of article 8 of American convention of human rights, article 126 of American announcement of human rights and duties, article 84 of rules of the least treatments with jailors, article 19 of Islamic announcement of human rights, article 8 of African bill of rights related to human rights) and international convention of political and civil rights all declare this principle. Innocence principle in the law of Iran is influenced by Islamic commandments. Principle 37 of constitution of Iran declares, "based on innocence principle, every one charged with a criminal offence is considered innocent until his crime is proved in a fair trial." This principle is fundamental in criminal trials; this principle supports

peoples' rights against power of general entities. (Javanmard, 2007, p: 10-21)

Civil procedure governing hearing process

The right to appeals, the right of asking for consideration in a logical period of time and the right of having a lawyer are included in the civil procedure governing hearing process. These three rights would be explained hear.

Right to appeals

Since the possibility of making mistakes is inevitable in all human activities, and since humans have a right to make mistakes and the process of hearing is not an exception either, supporting individuals against juridical mistakes is a necessity. (Fazaeli, 2008, p:455)

This right is considered in human rights documents especially section 5 of article 14 related to convention of political and civil rights, it is also a right that will not be separated from the right of having a fair hearing. In especial administrative entities such as general entities, consideration has three stages: Initial, research and ultimate stages. In initial and research stages the consideration is generally substantive, while in ultimate stage consideration is formal. Votes issued by administrative entities may be uncertain (substantive and research reviewable) or certain (formal and ultimate reviewable) just like in juridical institutes. (Mahmoudi, 2007, p: 223-240) in the law of addressing administrative violations, each way of objection (reconsideration, ultimate, asking for hearing) is observable. In this law the administrative penalties are captured, and appealable issues in appeals boards are mentioned. According to article 25 of regulations, the specified time for appeals to boards of magistrates vote by the accused employee or his lawyer is considered just 30 days from the date of announcement, article 24 also makes boards of magistrates write in the vote form whether the vote includes right to appeals or not. The new law of court of administrative justice has underestimated the right to appeals, because in contrast with the content of previous laws which gave the rights to appeals to the votes issued by court branches, in new law, according to article 7 of it, the issued vote by court branches are considered certain and confirmed. Maybe the lawgiver wanted to shorten the time of hearing by omitting the right to appeals stage. (Mahmoudi, 2007, p: 223-240). However, right to appeals in its absolute sense is not omitted from the court and in some especial cases the appeals right exists. One of the conditions of making the recognition court branches, is the type of right to appeals. The other condition is formal or substantive mistake in

consideration, for instance, if one of the two judges or two of three judges issuing the vote make a formal or substantive mistake in the consideration, they write a documented, valid announcement and send the case to court to be referred to the recognition branch. (article 16 related to the new law of court of administrative justice enacted in 2006). The other condition is not observing religious rules or law of court according to the recognition of master of court or master of judiciary, in this condition, the case is also sent to recognition branch for consideration. (Article 18 of the mentioned law) Therefore, we can say that the new law of court of administrative justice has limited the right to appeals, but it has not omitted it completely. (Gorji, 2008,p: 149-190)

Consideration in the logical period of time

One of the principles of fair hearing is that the consideration must be done in a logical period of time and without unacceptable delay. If this right was ignored, the result of hearing would not be effective in the suitable time. In the law of Iran, this right is not declared explicitly. Section 3 of principle 32 in case of criminal considerations declares, "the introductory case should be sent to juridical entities in the period of 24 hours and the basis of hearing must be provided soon..." in administrative considerations which are simple and done very soon, this principle has a special position. According to variety of juridical entities, type of lawsuit which is considered, the amount of complicity or simplicity of a lawsuit, the importance of time for the libellant in making a decision (for instance, about an employee's suspense or firing from office or another immediate hearing case), the behavior of libellant, and the behavior and finally, consideration of the lawsuit by entities and courts, the considered logical period of time is different. (Yavari, 2007,p:285)

In administrative consideration, there are approaches to accelerate the consideration process, these approaches does not exist in general courts. For instance : the formation of administrative stage of consideration and agreement of parties, informal considerations(without necessity to represent reasons and documents, reference to a juridical process such as violations related to employer and contractor),simple formal rules and civil procedure, the certainty of votes of some magistrates entities and omitting the right to appeals. However, in practice there are some problems lengthening the process of hearing such as: ambiguity, neglecting, variety and complicity of laws, lack of useful plans in avoiding the committing of violations(for instance, to get people aware of their rights and duties in the interaction with executive entities and increasing their general awareness), lack of the presence of

lawyer in some institutes, lack of experienced officials, general unawareness of society about rules and regulations, lack of or sometimes absence of consideration branches in some regions and institutes.

The right of having a lawyer

The right of having a lawyer gives the accused, the opportunity to defend himself effectively. This right strengthens the chance of having a fair hearing and increases general trust to hearing system. Sometimes, without considering considerations of a fair hearing, this right is ignored in order to avoid complicity, lengthening the hearing process, high costs and delay in hearing. However, regarding the consideration devoid of mistakes, the need for having a lawyer finds necessity. The right of having a lawyer is explicitly declared in internal laws of Iran. According to the principle 35 of constitution of Iran, "in each court, both parties have a right to choose lawyers for themselves, however, if they do not have the ability to choose one, the opportunity for choosing a public defender would be provided for them". This principle is completely in accordance with international documents, meaning that not only the right of having a lawyer is allowed, but also this lawyer could be chosen by parties and if parties cannot afford it public defenders would be provided for them. Moreover, section 2 of single article related to the law of respecting religious freedoms and maintaining civil rights enacted in 2004, makes courts provide opportunity for the accuses ant libellant to have lawyers. In special administrative entities such as juridical entities, the lawsuit is acceptable with the title of lawyering, mandate and representation. Though having a public defender is accepted in criminal courts based on the severity of crime and punishment, in civil affairs and also administrative hearing the necessity of having a public defender is not mentioned and it seems that administrative hearing does not include the necessity for having a public defender.

Discussion and results

In boards considering the administrative violations, there are the factors involving the equal behavior in the boards. For example, the seventeenth article of administrative legislation related to administrative violations announces that post doing all the investigations, the boards considering the administrative violations have to impart the accusation factors to staffs, and then in this case, ten days would be reprieved to staffs in order to defend from themselves ; and eighteenth article of administrative regulation refers to the submission of defensive documents and sending the written

response through the culprit in a certain period to the board.

Correspondence principle is actually a precondition in approving the fair hearing in administrative boards, in which the parties in unequal levels, would be manifested more than others. For example, in administrative justice forum, a branch receiving the documents, has to consider and get the specifications from each parties the presented complaint. to provide the probable response, it is obvious that the against parties have to be presented in administrating the Correspondence principle. Even the parties could consider and read the cases and documents which are in governmental units and institutes and municipalities, in which these units have to send the case or documents in a particular period of time.

There are some administrative violations in some administrative hearings, which these violations are involved of punitive aspect, and based on the point that government and officials are in the other side in these situations, and in this case misusing from power may be realized, thus applying the fair hearing approves, particularly the acquaintance principle is obligatory to be used. moreover, even for the other administrative violations which are not that much important in comparison with other administrative violations, and in these administrative violations, less damage would be occurred in citizens 's rights and freedoms. but according to the point that everyone has the right to be involved of security, in this case the principle in accordance with violation would be named crime. Along this, the factors providing the probability of misusing the principle, and also the general advantages have to be considered.

The point which is considered about the reconsideration principle, is the point that in which some administrative punishments would be possible to be accomplished without referring to the boards considering the administrative violations, and this principle is possible to be applied for staffs, whereas this principle, consideration and issuing the vote about the same violation, could not be accomplished in the consideration boards except while the written agreement has been taken from the officials and authorities. This principle along with contradicting the principle 36 of constitutional legislation, questioned the reconsideration right, but in any case, the decisions through reconsideration boards and officials in twelfth article in the framework of the case with the regulations referring to the groups, is actually in accordance with the regulations, in which the groups could complain about them. (Abbasi and Mir hoseini, 2008)

In the legislation relating to the administrative violations, considering the reasonable respite has been mentioned in some cases. For example, to proliferate collecting the reasons, providing and completing the data and documents which could proliferate the consideration, one or some investigation groups through consideration boards of administrative violations has been mentioned as an possible affair in the fifth article. it has been mentioned in the thirteenth article that board of magistrates and appeal board are responsible to consider the administrative violations, in which the accused 's case has to be considered in a particular period of time through these boards. Also, in case of observing indifferences in the supreme supervision board, some decisions and boards could be nullified in this case.

In the legislation, considering the administrative violations and administrative regulation, considering the cases of administrative violation has not been mentioned, in which only in the twenty fifth 's administrative regulation about considering the administrative violations, it has been announced that asking to reconsider the number of votes in board of magistrate has to be received in only 30 days through the legislative representative. From this legislation, it could be concluded that in the boards considering the administrative boards, taking a lawyer or juridical consultant has been accepted, but it has not been specified that whether the legislative representative is the justice lawyer who authorizes the licensee of lawyering, in which the justice lawyer has to be involved in considering the cases. Thus more alterations are needed to be accomplished, in which the considering the violations has to be specified thoroughly.

With regard to the rule of legislation in judgments of administrative dispute settlement boards, article 21 of administrative bylaw of the legislation for investigating the administrative violations has bound board 's judgments to be law – documented and legislation-reasoned. Also, article 19 of the legislation stipulates, in case the employee 's violation is regarded as one of the offences involving in penal laws, board of investigation in administrative violations is obliged to investigate the violation, issue a legal judgment based on the legislation and inform the competent judicial authority for investigating the nature of offense. Generally, one can say that right of administrative litigation is not absolute in Iran, right of administrative access faces considerable limitations according to procedures of the Guardian council, the constitution and other ordinary regulations. these limitations include lack of branches of court of administrative tribunal in counties, absence of appeals authorities for some particular

administrative authorities or hard access to some authorities, limited insight in the definition of plaintiff, defendant, and subject of claim (Gorji, 2008, pp.149-190)

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