UNLAWFUL TREATMENTS EXPERIENCED AFTER 15 JULY 2016 IN TURKEY IN THE FIELDS OF SOCIAL SECURITY AND RETIREMENT

EXECUTIVE SUMMARY

Social security is a set of systems providing assurances against certain social, economic and professional risks for persons regardless of their incomes. The point of departure for social security policies has been prevention and mitigation of the impacts of social risks on individuals.

Social security has been recognized as a "human right" in the international documents and has maintained its development along with human rights.

Social security is an insurance scheme functioning in accordance with certain legal bases. Yet unlawful treatments arose in Turkey especially after 15 July 2016 in the field of social security among many other fields. Examples of these are non-retirement of disabled persons, non-payment of retirement gratuity, denial of retirement for certain arrested persons, a specific cessation of employment code for dismissals through Decree Laws (KHK) and non-performance of social assistances.

In the present report, the unlawful treatments experienced following 15 July in Turkey in the fields of social security and retirement will be expounded.

Introduction

Social security is one of the fundamental needs of humanity. It can be considered that the need of social security, following the other needs like food, water and sex, takes place as a sub-title of the security ranked the second in Maslow's hierarchy of needs. Therefore, the concept of social security and the need for social security have maintained their importance and have remained on the agenda as long as the humanity exists.

Social security, notwithstanding the incomes of people, is an assurance protecting individuals from the harms of social dangers undermining the welfare and tranquility of the society, through establishing certain systems with or without premiums in the context of 'the human rights' and particularly 'the duties of the state'.

The right to social security is a concept stipulated in domestic and international instruments.

One of the main factors rendering the concept of social security an international concern is the fact that it has been recognized as a human right in the international documents. (Arıcı, 2015:44). It is seen that the right to social security has developed in line with human rights.

The first developments regarding the right to social security took place after the 1st World War. As the 2nd World War was a war of freedom against the oppressive regimes that absolutely rejected the concept of human rights and democracy, issues of human rights and the right to social security rapidly developed in the wake of this war (Arıcı, 2015:97).

The very first step ensuring the development of the right to social security is the issuance of the Universal Declaration of Human Rights (UDHR). The legal basis of this Declaration is the provisions of the United Nations Charter pertaining to the human rights and fundamental freedoms. The Human Rights Commission established within the body of the UN drafted the UDHR on 10.12.1948 (Arıcı, 2015:97). Article 22 and 25 of the UDHR are related to the right to social security. The right to social security is enumerated among the human rights in its article 22.

The UDHR, after defining the right to social security, describes under which conditions it can be realized. The right to social security and other connected rights are considered relevant to the human dignity and protection of material and moral development of individuals (Turan, 2004:9). The remaining part of article 22 encompasses economic, social and cultural rights; article 25 sets out that everyone has the rights to food, clothing, housing and medical care and the right to social security in case of unemployment, sickness, disability, widowhood, old age and lack of livelihood.

Apart from the UDHR, other UN Conventions contain certain provisions in field of the right to social security.

* The Convention Relating to the Status of Refugees, which was adopted in Geneva in 1950 and entered into force in 1954,

* The Convention Relating to the Status of the Stateless Persons, which was adopted in New York in 1954 and entered into force in 1960,

* The International Covenant on Social, Cultural and Economic Rights, which was opened for signature in 1966 at General Assembly of the UN and entered into force in 1976,

* The Convention on the Elimination of All Forms of Racial Discrimination, which was opened to signature in 1965 and entered into force in 1969,

* The Convention on the Elimination of All Forms of Discrimination against Women, which entered into force in 1981,

* The Convention on the Rights of the Child which entered into force in 1990,

* The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

Some of the conventions and recommendations of the International Labour Organization (ILO) have been influential on the development of the right to social security too. In this regard, the Declaration of Philadelphia was adopted in the 26th International Labour Conference of ILO held in the US on 10.05.1944 and it was added into the ILO Constitution in 1946. In the context of this Declaration, it is set forth that social security measures should be taken for everyone in need of protection with a view to ensuring minimum income.

The Convention Concerning Minimum Standards of Social Security (No.102) adopted in the 35th International Labour Conference in 1952 enlists nine major social security risks. Among these risks are occupational accidents and professional diseases, illness, maternity, invalidity, old-age, death, unemployment and insufficiency of family income.

It has been envisaged that states willing to sign this Convention should provide protection with regard to three out of those nine risks at least. One of those three risks should be unemployment, old-age, occupational accidents and professional diseases, invalidity or death. Besides, individuals to benefit from the protection of those risks have to correspond at least 50% of the overall labour force or 20% of active population (Turan, 2004:11). Turkey ratified this Convention with the Decision of Council of Ministers, No. 7/7964, dated 01.04.1974.

Article 51 of Rome Treaty dated 23.05.1959 contains provisions requiring realization of legal arrangements in the field of social security with a view to ensuring free movement of workers and its article 118 sets forth that member states should cooperate in the field of social security.

Under article 12 of the European Social Charter (ESC), entitled 'Right to Social Security', which was signed on 18.10.1961 by member states of the Council of Europe (CoE) and entered into force on 26.02.1965, state parties are obliged to form a social security system or to keep the existing system for the implementation of social security. ESC was ratified by Turkey on 24.11.1985.

As a general overview, in the wake of 2nd World War, international organizations such as the UN, ILO and CoE prepared significant and leading documents and made decisions regarding the right to social security along with the human rights movements.

The right to social security is clearly set forth in the article 60 of the Constitution of the Republic of Turkey as follows: '**Everyone has the right to social security. The State shall take the necessary measures and establish the organization for the provision of social security'**.

The general structure of social security depends upon the understanding of the social state as well as the principles of insurance business. The conditions and the extent of the insurance assistance to be extended to insured people have been envisaged beforehand and insurance services have been provided in long and short term insurance branches. Long term insurance branches are invalidity, old-age and death insurances. Short term insurance branches are insurances of health, maternity and occupational accidents and professional diseases.

Insured people, in return for the premiums which they pay or are paid on behalf of them, are entitled to be retired and to get retirement gratuity provided that they reach the age of retirement and complete the minimum insurance period.

Certain unjust treatments experienced by civil servants, who were dismissed from the public office with the State of Emergency Decrees (KHK) in the wake of 15 July, will be expounded in the following sections of the present report.

1. NON-PAYMENT OF RETIREMENT GRATUITY

In compliance with the conditions of the entitlement to severance pay prescribed in article 14 of Labor Law No 1475,[1] retirement gratuity[2] is paid to civil servants[3] who entitled to receive a pension (retirement, invalidity or old-age pension) as a result of combining[4] the period of civil service with other terms of employment[5].

The article 14(1)(1) of Labor Law No. 1475 specifies the situations mentioned in the article 25 of the Labor Law No 4857 as the justified termination grounds and bases for non-payment of severance pay. Those reasons are consideration of health, acts in contradiction with ethics and good faith, force majeure and absence of the worker as a result of detention or arrest. In this regard, persons, ***who were punished with removal from public office in pursuance of Law No. 657, other relevant laws or a judgment****, are not entitled to receive retirement gratuity for the term of public service.[6]*

Considering the case-law of the Court of Cassation[7], in case one of **the justified terminations grounds** is present, employer has **the right to immediately terminate** the employment contract and is not obliged to pay the worker at issue the termination indemnity. However, in case of a termination depending on a **valid reason**, employment contract can only be terminated based on the certain situations specified in the Law, notification period for the termination should be observed or the payment in lieu of notice should be made and the severance pay to which the worker entitles should be paid.

The article 25 of the Labor Law no. 4857, entitled ***'Right of Employer to Immediate Termination on Justified Grounds'*** reads as follows:

"*The employer may terminate the fixed-termed or permanent labor contracts, before the expiry of its period or without waiting for the notification period, in the following situations:*

I- Health reasons:

a) *In situations where the worker suffers from an illness or disability which will arise from his/her intention or disorganized living or alcohol addiction, when the absence due to such reason lasts three consecutive business days or more than five business days in a month.*

b) *In situations where it is established by the Health Board that the illness that the worker suffers cannot be treated and the employment of the worker at the business is inconvenient.*

The employer shall become entitled for termination of the labor contract without notification in cases such as illness, accidents, birth and pregnancy, other than the reasons

[1] Following the amendments of the Law No. 6270 on 17.01.2012.
[2] Except the situations prescribed in the article 89(4) and the provisional article 223 of the Law No. 5434
[3] Persons who worked in civil services in the context of the article 4(C) of Law No. 5510
[4] In compliance with the article 8 of Law No. 2829
[5] Working period under other social security institutions
[6] The term of employment in the sense of provisional article 4 of Law No. 5510.
[7] In the light of the reference made in the article 89 of Law No 5424 to the article 14 of the Law No. 1475.

indicated in the sub-clause (a), six weeks after the duration of the specified cases exceeds the notification periods envisaged in Article 17 depending on the employment period of the worker at the business. In cases of birth and pregnancy, such period shall begin at the end of the period set forth in Article 74. However, the wage shall not apply for the periods in which the worker cannot go to work as the labor contract is suspended.

II- Situations contradicting with the ethics and good faith and similar situations:

a) *If the worker misled the employer at the time of conclusion of the labor contract by asserting that he/she met the qualifications or conditions required for one of the essential points of the contract although he/she did not meet them or by providing inaccurate information, or making misstatements.*

b) *If the worker uses expressions or behaves in a manner that will harm the honor and dignity of the employer or one of the members of his/her family or makes groundless denunciations or allegations harming the honor and dignity of the employer.*

c) *If the worker committed sexual harassment against another worker of the employer.*

d) *If the worker bullies the employer or one of his/her family members, or another worker of the employer or comes to the work under the influence of alcohol or narcotic drugs or uses those at work.*

e) *If the worker behaves in a sort of way inconsistent with integrity and loyalty, such as misuse of the trust of the employer, theft and disclosure of professional secrets of the employer.*

f) *If the worker, at the business, commits a crime, which leads to imprisonment for more than seven days or the penalty of which is not deferred.*

g) *If the worker, without the permission of the employer or without any justification, does not come to work for two consecutive working days or two working days in a month on days following any holiday or three working days within one month.*

h) *If the worker insists on not performing the duties assigned to him/her although he/she is reminded thereof.*

ı) *If the worker jeopardizes the safety of work due to his/her own will or negligence or causes damage and loss on the machines, installations or other property and materials that belong to the business or do not belong to the business, but are available there, to the extent that he/she cannot compensate with the amount of his/her thirty-day wage.*

III- Force majeure:

If a force majeure event, which prevents the worker from being present at the business for more than one week, occurs.

IV- Situations where the worker is detained or arrested and his/her absence exceeds the notification period indicated in the article 17.

The worker may resort to legal remedies in the context of the articles 18, 20 and 21, alleging that the termination does not comply with the reasons set forth in the above subparagraphs.“

Although Social Security Institution (SGK) made a reference to the said article in its response letters, none of the situations set forth in this article corresponds to the dismissals of civil servants from public office through KHK.

Besides, as the ground for the non-payment of the severance pay, it was stated in the response letters of SGK to the petitioners that the persons at issue were dismissed from the public office in the context of ‘*the right of the employer to immediate termination on justified grounds*’ in pursuance of the Law No 657, other relevant laws or a judgment. Nevertheless, persons dismissed through KHK were not sacked as a result of a disciplinary punishment or a

judgment. But they were 'CONSIDERED DISMISSED' as their names were on the lists attached to KHK.

The end of public office through KHK rather than through the Law No 657, other relevant laws or a judgment, do not correspond to one of the grounds allowing non-payment of severance pay that was prescribed in the article 14 of Law No 1475. Yet persons dismissed through KHK were removed from the civil service by adding their names to lists attached to KHK. They were fired without conducting an investigation, without enjoying the right of defense and without observing any assurances envisaged in the relevant disciplinary regulations. Such dismissal acts correspond to none of the situations which were exhaustively specified in the article 14 of Law No 1475 and which impede receiving severance pay. Hence, the mentioned act depriving public officers of retirement gratuity under the guise of operating a clause impeding such payments is unlawful.

Furthermore, the judgment of the 11th Chamber of Council of State, Judg. No. 2015/5301, and the judgment of the Constitutional Court, dated 5.2.2009 and Judg. No. 2009/17, set legal precedents in regard to the payment of retirement gratuity.

2. NON-RETIREMENT OF PERSONS WITH DISABILITIES

The article 39(j) of the Law No. 5434 reads as follows: 'Persons, who have at least 15 years term of office and at least 40% disability ascertained in the disability report issued in compliance with the Regulation on the Medical Board Reports, are pensioned upon their requests'.

The provisional article 4(6) of the Law No 5510 is as follows:

"If the individuals, who started to work as being subject to the provisions of Law No. 5434 before the entry into force of the present Law, and received, before starting to work, a medical board report issued in compliance with the relevant legislation, displaying that they are at least 40% disabled; as well as the individuals, who document that they are at least 40% disabled from the birth; are insured as of the date of the retirement request in the scope of sub-paragraph (c) of the first paragraph of article 4 of the present Law; old-age pension is granted them in compliance with this article, upon their request, with the condition that they paid at least 5400 days of long term insurance branch premium or retirement deduction payment. But, after starting to work, by virtue of examination of reports which are to be duly issued by medical boards of health service providers authorized by the Institution, and of supporting medical documents; if it is determined that the insurance holders have a ratio of loss of workforce;

a) from 50% to 59% and at least 5760 days,

b) from 40% to 49% and at least 6480 days,

of long term insurance branch premium, the provisions of this paragraph are applied for those insurance holders by the Health Board of the Institution."

As stated in the abovementioned provisions; to be able to benefit from the article 39(j) of the Law No. 5434, the person at issue should be participant, in other words, he/she should be working;

Besides, in order to benefit from the provisional article 4(6) of Law No. 5510, the person at issue should be participant of the Retirement Fund of Civil Servants as of the date of

entry into force of the this Law and should be insured in the context of the article 4(1)(c) of this Law,

As the disabled officers who fired through KHK have been dismissed from the public office, the provisions of this Law have not been operated for the disabled former officers who are currently not active employees.

3. ARRESTED PERSONS WHO HAVE NOT BEEN PENSIONED UPON ORAL INSTRUCTIONS

Insured individuals can retire and receive pension in return for the premiums, which are paid by themselves during their term of office or paid on behalf of them, after reaching the legally required age, date and insurance period.

However, considering the post-July 15 practices of Turkey, arrested persons, who were also dismissed through KHK, have not been pensioned, although they are entitled to that. Despite their rights accorded by the laws, persons dismissed through KHK and their families are victimized upon the oral instructions of politicians and directors of public institutions.

4. CANCELLATION BY SGK OF RETIREMENT OF MILITARY OFFICERS, WHO WERE DISMISSED THROUGH KHK AND SUBSEQUENTLY PENSIONED OFF DIRECT BY THEIR COMMANDS

Military personnel, who were fired through KHK, were pensioned off in the context of the article 39(e) of the Law No. 5434 by their commands and their retirement pensions were accrued by SGK which is the institution in charge of accruing the pensions. However, after receiving pension for a long period, SGK stopped their pension payments. In this regard, SGK provides a justification that they should have been pensioned off in the context of the article 39(ç) of the Law instead of the article 39(e) of this Law and they should have submitted a petition of retirement rather than being directly pensioned off. As a result, SGK requested them to repay all the pensions that were paid them until the date of their applications to the Institution.

On the other hand, if the case is as SGK has claimed, this should have been considered as the mistake of their command, the date that the command pensioned them off should have been accepted as the date of retirement application and the pension payments made to them should have been deemed valid from the beginning.

5. CESSATION OF EMPLOYMENT CODE FOR PERSONS FIRED THROUGH KHK

As the cessation of employment code for the persons sacked through KHK is identified as ‘KHK’ in records of SGK, they have been blacklisted. Given that hiring such persons is considered within the scope of aiding and abetting a terrorist organization without being member of the organization, employment of such individuals is de facto hindered. When they are hired by an employer, most of the case they work informally. As a result they are deprived of the right to social security and other constitutional rights and, thereby, exposed to a social exclusion.

Examining the Annexed dismissal codes of SGK, it is understood that code 36 is used for the shutdown of the business through KHK and code 37 corresponds to the situation of persons dismissed through KHK. An employer can see the cessation of employment codes of applicants via online SGK systems before the recruitment.

6. NON-PERFORMANCE OF SOCIAL ASSISTANCES

Although the requirements in regard to disability allowance and residential care pay that are envisaged in the Law No. 2022 are met, these social assistances have not been extended to the disabled public officers who were dismissed through KHK and to the disabled dependents of dismissed public officers.

7. CIVIL SERVANTS OBSTRUCTED FROM INDEBTING TO RETIREMENT FUND

Personnel, who were removed through KHK and who do not have sufficient term of office to be retired, are not allowed to utilize the legal procedure of indebting a certain period of service to the Retirement Fund of Civil Servants. Thus they have been prevented from completing the remaining period to be retired on the account that they are currently not active employees.

8. PREVENTION OF PARTICIPATION IN VOLUNTARY INSURANCE SCHEME

The article 12 of the Law No. 5434 accords resigned public officers a right to participate in voluntary insurance scheme to enable them to retain pension opportunity from the Retirement Fund of Civil Servants. However, this right has been denied with regard to personnel fired through KHK.

CONCLUDING REMARKS

As detailed in the above sections, several unlawful treatments have been experienced in Turkey in the fields of social security and retirement among others since 15 July 2016.

Many people who served in the public office positions of academician, soldier, police, and teacher throughout years were dismissed without any concrete justification, as their names were added to the lists attached to KHK. They were purged without conducting an investigation, without enjoying the right of defense and without observing the guarantees in disciplinary regulations.

They not only lost their jobs but also deprived of pension rights and retirement gratuity and invalid ones were not pensioned off. Besides most of them failed to find a new job, since the employers take into account the online SGK records showing that they were dismissed from the public office through KHK.

In short, in the wake of 15 July, persons dismissed through KHK and their families have been literally condemned to social exclusion, civil death and poverty/starvation.

OUR REQUESTS

The government of the Republic of Turkey, after 15 July 2016, has done arbitrary and unlawful acts and transactions distancing from a precise and law-abiding social security system.

In the above sections, certain irregularities have been clarified. In general, those completely arbitrary and extralegal practices can be summarized as follows:

- Non-payment of retirement gratuity to the participants of Retirement Fund who want to be pensioned off (on the basis of justified termination by employer),

- Non-retirement of disabled civil servants because of being removed from the office through KHK,

- Non-retirement of arrested former officers,

- Revocation by SGK of retirement of military officers who were sacked and then ex officio pensioned off,

- Prevention from finding new jobs through use of cessation of employment codes 36 and 37 with regard to persons dismissed through KHK,

- Non-performance of social assistances,

- Denial of right to be indebted to Pension Fund,

- Prevention from participating in voluntary insurance scheme.

Recommondations

- Turkey should eliminate deprivations of victims with a view to granting everyone the right to social security and particularly rights related to retirement set forth in international and domestic instruments in an equal and fair way.

- The State of the Republic of Turkey should immediately refrain from such unlawful and arbitrary practices mentioned above in *'Our Requests'* part and fulfil its duties as a state