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CONTENTS

SIXTY YEARS OF EUROPEAN INTEGRATION AND GLOBAL POWER SHIFTS

Avrupa Bütünleşmesi ve Küresel Güç Değişimlerinin Altmış Yılı

Mustafa Serhat KAŞIKARA*

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Kitap İncelemesi

ABSTRACT

The book called *"Sixty Years of European Integration and Global Power Shifts"* is an examination of the effects of sixty years of case-law and regulatory activities on the continent of Europe and the World. The book, edited by Prof. Dr. Julien Chaisse, focuses particularly on case-law, regulatory proceedings and general regulatory practices of the European Union. Again, in this framework, it critically analyzes the main components of the European Union integration and how this integration is perceived both internally and externally. In addition, this book examines the European Union's interactions with other countries and organizations in order to assess the role of the European Union in global governance. This point is so crucial for both non-member countries and member countries of the European Union.

This book is published as a part of the Series Modern Studies in European Law in Volume 97. In this context, the book consists of three main parts. The first of these sections is titled *"European Legal Integration: Process, Difficulties and Achievements". The second is titled "The European Union as a Global Actor: Issues and Partners". The last part is titled "European Union's Trade Policy: Global and Regional Trade Challenges".* This book, which describes the subject dealt in an order and in relation to each other, can be defined as a perfect resource for those who work in European Union law.

Keywords: European Union, EU integration, EU Law, European Legal Integration, EU's Trade Policy, EU's Common Commercial Policy, Global Economic Governance, civil law

ÖZET

"Altmış Yıllık Avrupa Entegrasyonu ve Küresel Güç Değişimleri" adlı kitap, altmış yıllık içtihat ve düzenleyici faaliyetlerin Avrupa kıtasına ve dünyaya olan etkilerinin bir incelemesidir. Prof. Dr. Julien Chaisse tarafından derlenen bu kitap, özellikle içtihat ve düzenleyici işlemler ile genel Avrupa Birliği düzenleyici uygulamalarına odaklanmaktadır. Yine bu çerçevede, Avrupa Birliği entegrasyonunun ana bileşenlerini ve bu entegrasyonun hem içeride hem de dışarıda nasıl algılandığını eleştirel bir şekilde analiz etmektedir. Ayrıca bu kitap, Avrupa Birliği'nin küresel yönetişimdeki rolünü değerlendirmek için Avrupa Birliği'nin diğer ülkeler ve kuruluşlarla olan etkileşimlerini incelemektedir. Bu nokta hem Avrupa Birliği üyesi ülkeler hem de üye olmayan ülkeler için çok kritik bir önem arz etmektedir.

This book review is a type of study that is not subject to or does not require the permission of the Ethics Committee.

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Bu kitap, Avrupa Hukukunda Modern Çalışmalar Serisi'nin 97. Cildinin bir parçası olarak yayınlanmıştır. Bu bağlamda kitap, üç ana bölümden oluşmaktadır. Bu bölümlerden ilki *"Avrupa Hukukî Entegrasyonu: Süreç, Zorluklar ve Başarılar"* başlığını taşımaktadır. Bu bölümlerden ikincisi *"Küresel Aktör Olarak Avrupa Birliği: Konular ve Paydaşlar"* başlığını taşımaktadır. Son bölüm ise *"Avrupa Birliği'nin Ticaret Politikası: Küresel ve Bölgesel Ticaret Zorlukları"* başlığını taşımaktadır. Ele aldığı konuları sırasıyla ve birbiriyle ilişkili olarak anlatan bu kitap, Avrupa Birliği hukuku alanında çalışanlar için biçilmiş kaftan olarak tanımlanabilecek bir kaynaktır.

Anahtar Sözcükler: Avrupa Birliği, AB entegrasyonu, AB Hukuku, Avrupa Hukuk Entegrasyonu, AB'nin Ticaret Politikası, AB'nin Genele Ticari Politikası, Küresel Ekonomik Yönetişim, Kıta Avrupası.

INTRODUCTION

The book called *Sixty Years of European Integration and Global Power Shifts* is an examination of the effects of sixty years of case-law and regulatory activities on civil law and the global world. This book, edited by Julien Chaisse, Professor at the City University of Hong Kong, School of Law, focuses particularly on case-law and regulatory proceedings. Again in this framework, the book critically analyzes the main components of the European Union (EU) integration and how this integration is perceived both internally and externally. In addition, this book examines the EU's interactions with other countries and organizations in order to assess the EU's role in global governance.

Looking at the book in general, the book is focused on the 60 years of European integration which have transformed civil law and the world. This point is really of great importance. Because when we look at the general organization of the EU, the effects of this on both EU member states and other non-EU countries are quite high. In fact, these effects often have consequences on the law and continue to do so.

Sixty Years of European Integration and Global Power Shifts is published as part of the Series Modern Studies in European Law in Volume 97. There are a lot of outstanding publications in these series. *The Series Modern Studies in European Law* includes the following important corpus: *"Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU"* edited by Daniel Thym; *"The European Union under Transnational Law: A Pluralist Appraisal"* by Matej Avbelj; *"Illegally Staying in the EU: An Analysis of Illegality in EU Migration Law"* by Benedita Menezes Queiroz; *"Social Legitimacy in the Internal Market: A Dialogue of Mutual Responsiveness"* by Jotte Mulder; *"The EU Better Regulation Agenda: A Critical Assessment"* edited by Sacha Garben and Inge Govaere; *"Administrative Regulation Beyond the Non-Delegation Doctrine: A Study on EU Agencies"* by Marta Simoncini; *"The Interface Between EU and International Law: Contemporary Reflections"* edited by Inge Govaere and Sacha Garben; *"The Rise and Decline of Fundamental Rights in EU Citizenship"* by Adrienne Yong; *"The*

Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis" edited by Valsamis Mitsilegas, Alberto di Martino and Leandro Mancano; *"The EU as a Global Regulator for Environmental Protection: A Legitimacy Perspective"* by Ioanna Hadjiyianni; *"Citizenship, Crime and Community in the European Union"* by Stephen Coutts; *"Critical Reflections on Constitutional Democracy in the European Union"* edited by Sacha Garben and Inge Govaere; *"Constitutional Law of the EU's Common Foreign and Security Policy: Competence and Institutions in External Relations"* by Graham Butler, and finally, *"The Juridification of Individual Sanctions and the Politics of EU Law"* by Eva Nanopoulos. This comprehensive corpus sheds light on the development of EU law and is therefore of great importance. It is believed that it will be very beneficial for those working on EU law to apply to this corpus, which is mentioned in their studies. Thanks to all, it is expected that the studies on EU law will be enriched by this corpus.

The book consists of three main parts. The first of these parts is titled *"European Legal Integration: Process, Difficulties and Achievements"*. Under this title, the difficulties encountered in these processes, as a result of the communication and cooperation network established through the long and complex dialogue processes between the EU member states, especially in the civil law, on the legal integration of Europe, and the success achieved as a result of intense efforts in the face of these difficulties are discussed.

The second of these parts is titled *"The European Union as a Global Actor: Issues and Partners"*. Under this title, the effective role of the EU in terms of both EU member states and non-member states has been examined. It is focused on whether the EU can be a global actor or not and what effects this will have on the other states.

The last part is titled *"European Union's Trade Policy: Global and Regional Trade Challenges"*. Whether in local markets or in global markets, the importance of trade for states is undeniably high today. In this respect, the commercial activities of the EU and the related trade policies are discussed especially on the legal basis. Therefore, how the EU's legal policies can be achieved not only within the scope of the EU region, but also in terms of integration into international practices is also the subject of examination.

This book examines the relationship between the members of the EU in the context of integration and the discourse in sustainability and future research. It offers comprehensive information on the current understanding of the EU Law and assesses the possible impacts of integration on the environment, economics, trade policy, legislation and society. The volume aims to encourage more dialogue and critical examinations of aspects of EU Law related to future sustainability. The data gathered from empirical research provides a vision for the future of sustainable integration, especially on global economic

governance. This point is so crucial for both EU member countries and non-member countries. It will be of interest to students and researchers in the EU and its law practice, sustainability and future studies, as well as individuals, global industry operators, trade policy regulators, politicians and governments.

The authors of the book outline EU law doctrines related to legal integration process, trade and common commercial policies and global economic governance. They present the developments in the EU law jurisprudence in international commercial for two reasons: First, to inform the reader regarding TO doctrinal transformations and especially legal integration process in EU law, and second, to achieve the perfect work of international commercial policies as an aspirational goal (eg. *common law* v.s. *civil law* countries).[1] To this end, examining the European influence on international trade and global economic governance is very important.

The authors suggest that EU law may help to overcome challenges arising out of cultural differences in global economic governance and especially in the EU zone. While doing so, there are important contrasting and competing principles to consider, which stand out as saliently competing paradigms. The authors indicate that giving equal weight to these competing principles in EU law might be a useful strategy to harmonize seemingly polar opposite propositions.

The book mainly focuses on the EU law and the EU regulations about trade policies and how it might be adopted in integration to develop efficiency in such proceedings.

Overall, the book contributes important discussions and suggestions to the literature. Also, the text presents analysis and suggested solutions with the help of leading principles developed by EU public and private law, which facilitate understanding these principles from the authors' perspective. While the book provides those valuable inquiries and discussions, the book review takes a critical approach towards them. The author of the review critically analyzes those suggestions.

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[1] Ernst-Ulrich Petersmann, 'Lessons from European Constitutionalism for Reforming Multilevel Governance of Transnational Public Goods in Asia?' in Julien Chaisse (ed), *Sixty Years of European Integration and Global Power Shifts* (1st edn, Hart Publishing 2019) 224: *"The history of European law confirms that intergovernmental power politics can be 'constitutionalised' in diverse ways through multilevel constitutional, parliamentary, participatory and deliberative 'democratic principles' (cf Articles 9–12 TEU) and multilevel, judicial protection of transnational rule of law accommodating very diverse constitutional traditions (eg of common law and civil law countries) inside EU Member States and third states insisting on participation in the common market without supra-national constitutional restraints (eg EEA member countries like Norway, EFTA member countries like Switzerland, authoritarian Muslim countries like Turkey)."*.

The book review is also compared to the other books that pursue a similar approach to European Legal Integration. How are justified suggestions in the book as well as their strong and weak points displayed in the review? Are all those suggestions in the book, correct? It should not be forgotten that the book looks into issues from an EU perspective and those suggestions come from EU law. However, this approach can be problematic in global economic governance. If there is a dominant legal system in global economic governance, how global can economic governance be? The review criticizes those contradictions and presents a comprehensive analysis of the book. According to the author of this review believes that an idea can only be developed if there is criticism against it. Therefore, those who are interested in the subject learning about the book edited by Prof. Julien Chaisse with a critical approach can find some gripping interesting insights from the review.

I. ABOUT THE THEME AND PROBLEMATIC OF THE BOOK

When the problematic of the book is analyzed, it can be seen that it aims at integrating the member states into the system and harmonizing them with a common shared legal system. In this sense, the book, which examines the last 60 years of the EU, examines whether the targeted harmonization and integration has been achieved within this period.

Regarding the subject of the book, it can be said that the book examines the success of the EU as a union in general. In particular, it examines the evaluation of the benefits and contributions of EU law in terms of integration into commercial life.

II. A BRIEF REVIEW AND GENERAL OUTLOOK ON THE BOOK

The book describes the adventure of European integration in 60 years of transformation both inside and outside the civil law. Because it offers us a general and critical analysis of civil law and the global world. At this point, the basic features of EU integration and how this integration is perceived are important. In this respect, the book also deals with other countries or organizations in order to evaluate them.

As it is known, the crises that have occurred in recent years have deeply affected the world. Naturally, the EU was also affected by this. This book deals with the immediate and distant effects of just that. Just a few years ago, the EU was shown as one of the greatest achievements in history in regional cooperation as an exemplary model of prosperity and peace.

It is discussed within the scope of this book that it is currently in decline with both its leaders and institutions and does not constitute an exemplary

model. Therefore, within the framework of the articles in the book, what kind of measures should be taken to solve the regional or global economic crises encountered so far and to eliminate the distrust of citizens towards the EU are discussed in a wide range in this book.

As a general review of the book, we can mention that the book highlights that it presents profitable reading not only for academics but also for practitioners as well. Especially the introductory article by editor Prof. Dr. Julien Chaisse heightens the expectations of the book, already high having simply read the title. In general, we can say that the book will satisfy the expectations that the reader may potentially have.

The book, edited by Prof. Dr. Julien Chaisse, brings a very important perspective when approaching EU perspective and EU integration on law. According to the editor, the EU has the capacity to turn diverging interests into common policies and this observation could summarize in itself the relevance of the concept of governance to analysis of both of the European political and commercial systems (and also policies).

Thus, the author rightly chose to analyze the European influence on trade policies. By doing so, doctrinal developments in the European legal system concerning commercial policy integration are analyzed excellently. Specifically, discovery methods in the EU legal system are analyzed through fundamental both common-law and civil law doctrines and also global economic governance. However, there could be sometimes *legal lacunae* for criticism towards those analyses, which is offered in the conclusion of the book itself.

This is the first, 2019 edition of the book. In this first edition of the book, the part called "Introduction", which is a type of article that can replace the "Foreword", was written by the editor Julien Chaisse, Professor at the City University of Hong Kong, School of Law. It is also the first chapter of the book. In this article, editor Chaise talks and mentions about the European Union's achievements, ongoing challenges and future prospects for the European Union. The editor also gives information about some important topics such as *the EU in Global Governance*, *the Evolution of a European Political Community* and *Emerging Global Challenges and Shifting Paradigms* and makes expansions about them.

According to the editor, linking the European states is intended to be done through the establishment of an integration organization, integration being simply the consequence of the awareness by sovereign States of their interdependence in the economic and social field. In other words, it was inevitable that this interdependence between states would lead to integration.

Therefore, according to the editor, if the integration organization is born, it is because the States are aware of their interdependence. European integration is going to be done in a progressive way, in another saying; *functional integration*.

We believe that mentioning the articles of the authors with academic and business backgrounds will be beneficial from the point of view of the book. Thus, we as the reviewers, prefer to present the authors who take part in the book as written in the original book itself.

To start with, *Julien Chaisse,* the editor, is a professor at the City University of Hong Kong, School of Law. He is an award-winning scholar of international law with a special focus on the regulation and development of economic globalization. His teaching and research include international trade and international investment law, international taxation, international arbitration, and internet law.[2]

Nilanjan Banik has a degree in economics from Delhi School of Economics, India; and Utah State University, USA. His work focuses on the application of econometrics in issues relating to international trade and development economics. Professor Banik has project experience with KPMG, India; Australian Department of Foreign Affairs and Trade, Australia; Laffer Associates, USA; Ministry of Commerce, Government of India; RIS and ICRIER, New Delhi; Center for Economic Policy Research, UK; Asian Development Bank Institute, Tokyo; Asian Development Bank, Manila; Copenhagen Consensus, Denmark; UNESCAPARTNeT, Thailand, Australia India Institute, University of Melbourne; and World Trade Organization, Geneva.[3]

Daniele Bianchi is Advisor-Senior Legal Expert of the Legal Service of the European Commission and contracting Professor of Food Law at Sorbonne University in Paris.[4]

Olga Boltenko is a chairperson of the ICC Hong Kong Commercial Law and Practice Committee and a partner in the Hong Kong office of Fangda Partners. She specializes in international trade, investment protection, and investment arbitration. She acted as legal counsel in investor-state disputes under the auspices of the Permanent Court of Arbitration and as tribunal secretary in dozens of commercial disputes, both ad hoc and institutional (including SIAC, ICC, HKIAC, SCC), in a wide array of industries including oil and gas, infrastructure, construction, telecommunications and pharmaceuticals.[5]

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2 Julien Chaisse (ed.)**,** *Sixty Years of European Integration and Global Power Shifts* (1st edn, Hart Publishing 2019) x.

3 ibid ix.

4 ibid ix.

5 ibid ix.

Debashis Chakraborty is an Associate Professor of Economics at the Indian Institute of Foreign Trade (IIFT), New Delhi. Previously he was associated with Rajiv Gandhi Institute for Contemporary Studies (RGICS), a policy think tank based in New Delhi. Debashis Chakraborty's research interests include international trade policy and WTO negotiations and environmental sustainability.[6]

Panagiotis Delimatsis is Professor of European and International Trade Law at Tilburg University, the Netherlands. He is Director of the Tilburg Law and Economics Center (TILEC), an interdisciplinary Center of Excellence, the biggest of its kind in Europe, studying the governance of economic activity. Panos leads the research cluster "Finance, Trade and Investment" within the TILEC Research Program and co-leads TILEC's work on standardization, competition and innovation.[7]

Fernando Dias Simões is Associate Professor at the Faculty of Law of the Chinese University of Hong Kong since January 2019. Before joining Chinese University of Hong Kong, Professor Dias Simões taught for 14 years in universities in Macau and Portugal; in addition, he practiced in a major law firm and served as in-house counsel to a water concessionaire company in his native Portugal. His research interests include international adjudication (in particular, commercial and investment arbitration), investment law and comparative contract law.[8]

Ian S Forrester is a Judge at the General Court of the European Union. He was previously a Partner at White and Case where he advised companies, as well as sovereign states and other governmental authorities, industry associations and private individuals, on European Union law, especially competition law, trade law, customs, internal market rules, intellectual property and constitutional rights in a variety of sectors, including broadcasting, chemicals, information technology, pharmaceuticals, software and sport.[9]

Danny Friedmann is an award-winning researcher and lecturer of Intellectual Property Law, especially trademark law, geographical indications and patent law. Professor Friedmann has been involved with WILMap of the Stanford Center for Internet and Society since 2014. His blog called IP Dragon, which he founded in 2005, is widely read. Friedmann also publishes in media, such as IP Kat, IP-Watch, SCMP and Hong Kong Free Press. Professor Friedmann is member of the editorial board of the Journal of Intellectual Property Law and Practice.[10]

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6 ibid x-xi.
7 ibid xi.
8 ibid xi-xii.
9 ibid xii-xiii.
10 ibid xiii.

Irene Sobrino Guijarro is an Associate Professor of Constitutional Law at the University of Seville, Spain. She holds a PhD from the European University Institute in Florence (Italy) and conducted postdoctoral research at Harvard Law School as a Fulbright scholar. Her research interests lie in the relationship between federalism and welfare state, the constitutional protection of social and economic rights, focusing in particular on the right to health care.[11]

Shintaro Hamanaka is currently Overseas Fellow of Institute of Developing Economies of Japan External Trade Organization (IDE-JETRO), stationed in Washington DC. He is holding a Visiting Fellowship at Reischauer Center for East Asian Studies at School of Advanced International Studies (SAIS), Johns Hopkins University. Before joining the IDE-JETRO in 2016, he worked for the Asian Development Bank (ADB) for eight years as an Economist at the Office of Regional Economic Integration.[12]

Helen E Hartnell Emerita Professor Helen E. Hartnell, Juris Doctor (JD), was a faculty member at Golden Gate University School of Law in San Francisco from 1997 until 2013. She was DAAD Guest Professor of Anglo-American Law at Freie Universität Berlin, Fulbright Visiting Professor at the University of Helsinki, and Visiting Scholar at the University of Cologne. Professor Hartnell has also taught at numerous other universities, including Tulane Law School and Harvard Law School. She teaches international economic law, European law, private international law, arbitration, commercial law, and courses offering a socio-legal perspective on law.[13]

Kirstyn Inglis currently works as Visiting Professor at the Institute of International Relations (IRI) at the University of São Paulo (USP). She is Vice-Coordinator of the Brazil-C-EU project, a Jean Monnet Support to Institutions project (2015–18) and Co-financed by the Erasmus + Programme of the European Union. Her research focus is on EU external relations law and policy generally, and more specifically focusing on Brazil's relations with the European Union in a broad range of subjects spanning trade, food and the environment.[14]

Sufian Jusoh is the Director and Professor of International Trade and Investment at the Institute of Malaysian and International Studies (IKMAS), Universiti Kebangsaan Malaysia, as well as the Chair for the ASEAN Integration Grand Challenge at the university. Sufian is a co-founder of the ASEAN Economic Integration Forum. He is an External Fellow of the World Trade Institute, University of Bern, Switzerland, a Distinguished Fellow at the Institute of Diplomacy and Foreign Relations, Ministry of Foreign Affairs,

11 ibid xiii.
12 ibid xiii-xiv.
13 ibid xiv.
14 ibid xiv.

Malaysia, and a Member of the Pacific Economic Cooperation Council Malaysian Chapter. Sufi an plays a key role in the reform of the investment laws in Myanmar, Timor Leste, Laos and the Federated States of Micronesia.[15]

Katharina L Meissner holds a PhD in Political and Social Sciences from the European University Institute. After having defended her PhD thesis in 2016, she moved to the Institute for European Integration Research (EIF), University of Vienna, as Assistant Professor. In 2013, she was awarded a Master of Research by the European University Institute. Parts of her research have appeared in outlets such as the Journal of Common Market Studies, the Journal of European Public Policy, Public Administration, or the Review of International Political Economy. Working at the intersection of European Union Studies, International Relations, and International Political Economy, her research interests include European Union external relations and Regional Integration.[16]

Rostam J Neuwirth is Professor at the Faculty of Law of University of Macau where he also serves as the Programme Coordinator of Master of International Business Law (IBL) in English Language. He received his PhD degree from the European University Institute (EUI) in Florence (Italy) and also holds a Master's degree in Law (LLM) from the Faculty of Law of McGill University in Montreal (Canada).[17]

Ernst-Ulrich Petersmann is Emeritus Professor for international and European law and former Head of the Law Department of the European University Institute (EUI), Florence. During 40 years, he has combined teaching of European and international law at numerous universities in Germany, Switzerland, Italy, the USA, South Africa, China and India with legal practice as legal advisor in the German Ministry of Economic Affairs, representative of Germany in UN, NATO and European institutions, legal counsellor in GATT, legal consultant for the EU, OECD, UNCTAD and the WTO, and secretary, member of chairman of numerous GATT/WTO dispute settlement panels. Professor Petersmann studied law and economics at the Universities of Berlin, Heidelberg, Freiburg (Germany), Geneva and the London School of Economics.[18]

Akhil Raina is Marie Curie Fellow and PhD candidate at the Leuven Centre for Global Governance Studies. He is an Indian lawyer specializing in international economic law and policy. After completing his bachelor studies

15 ibid xiv-xv.
16 ibid xv.
17 ibid xv.
18 ibid xv-xvi.

in science and law, he attended the IELPO LL.M. (Universidad de Barcelona) as an ELSA (Europeans Law Students association) scholar.[19]

Susana de la Sierra is Administrative and EU Law Professor at the University of Castilla-La Mancha (Spain). Master in German and Comparative Law at the University of Bayreuth (Germany). Her research has focused mainly on judicial review, comparative law and law on culture (film and audiovisual law). She is currently law clerk at the Spanish Supreme Court, Administrative Law Chamber.[20]

Manfred Weiss started as a research fellow at the Center for the Study of Law and Society of the California University in Berkeley from 1965 to 1966. From 1970 to 1972 he was assistant professor and from 1972 to 1974 associate professor at the Law School of the J.W. Goethe University in Frankfurt. Since 1974 he has been full professor for labour law and civil law, first (from 1974 to 1977) at the Law School of the University in Hamburg and then (since 1977) at the Law School of the JW Goethe University in Frankfurt. He is also a consultant to different governments abroad (especially South Africa and Eastern Europe), consultant to the International Labour Organization and Consultant to the EU Commission since 1986. In 2015 He got the award for outstanding contribution to labour law.[21]

Jan Wouters is Full Professor of International Law and International Organizations, Jean Monnet Chair *ad personam* EU and Global Governance, and founding Director of the Institute for International Law and of the Leuven Centre for Global Governance Studies, an interdisciplinary research centre with the status of both a Jean Monnet and KU Leuven Centre of Excellence, at KU Leuven. He is also President of KU Leuven's Council for International Policy. He has published widely on international and EU law, international organizations, global governance, and corporate and financial law, including 70 books, 130 journal articles and 200 chapters in international books.[22]

Chien-Huei Wu is currently Associate Research Professor in Academia Sinica, Taipei, Taiwan. He received his PhD degree in European University Institute, Florence in 2009. Since then, he worked as Assistant Professor in National Chung Cheng University, Chiayi, Taiwan for a short period. Before pursuing his doctoral degree in Florence, he worked for the Ministry of Justice in Taiwan as a district attorney. His research interests cover EU external relations law and international economic law. He follows EU-China and EU-

19 ibid xvi.
20 ibid xvi.
21 ibid xvi-xvii.
22 ibid xvii-xviii.

ASEAN relations and pays particular attention to Asian regionalism and WTO-IMF linkage.[23]

The first part of the book, titled *"European Legal Integration: Process, Difficulties and Achievements"*, focuses on the historical EU integration process with respect to key features and dynamics of the EU as we know it today. Many topics in this part have been written by different authors. Chapter 2 is written by *Judge Ian Forrester* and addresses the role of the rule of law in EU integration. Chapter 3 is written by *Rostam J Neuwirth* and entitled *"The European Union as an Oxymoron: From Contest via Contradiction to Constitution?"*. Chapter 4 is written by *Manfred Weiss* and entitled *"The Social Dimension of the EU"*. Chapter 5 is written by *Trygve Ben Holland* and entitled *"Geographical Scope and Diversity of EU Rules on Public Procurement"*. Chapter 6 is written by *Irene Sobrino Guijarro* and entitled *"Spatial Configurations of Welfare in the EU: The Case of Cross-border Healthcare"*. Chapter 7 is written by *Panagiotis Delimatsis* and entitled *"Godot is Finally Coming? The Great Convergence of Services Markets within the EU"*. Chapter 8 is written by *Susana de la Sierra* and entitled *"Government, Culture and Movies: In Search of a Common Understanding from a European Perspective"*.

The second part of the book titled *"The European Union as a Global Actor: Issues and Partners"*, focuses on global governance and global integrity. Many topics in this part have been written by different authors. Chapter 9 is written by *Jan Wouters* and *Akhil Raina* and addresses the European Union and global economic governance. Chapter 10 is written by *Ernst-Ulrich Petersmann* and entitled *"Lessons from European Constitutionalism for Reforming Multilevel Governance of Transnational Public Goods in Asia?"*. Chapter 11 is written by *Helen E Hartnell* and entitled *"The EU's Civil Justice Policy Field: Perspectives for Asia?"*. Chapter 12 is written by *Katharina L Meissner* and entitled *"Bilateralism in an Interregional World? From EU Negotiations with MERCOSUR to a Bilateral Strategic Partnership with Brazil"*. Chapter 13 is written by *Chien-Huei Wu* and entitled *"Reclaiming the Comprehensive Strategic Partnership through the EU–China Partnership and Cooperation Agreement: Taking Stock and Moving Forward"*. Chapter 14 is written by *Shintaro Hamanaka* and entitled *"Legalisation of International Economic Relations: Is Asia Unique?"*. As can be seen, the book contains considerably intriguing and noteworthy articles on EU law and EU integration policy.

The last part of the book, titled *"European Union's Trade Policy: Global and Regional Trade Challenges"*, focuses on the commercial challenges specific to the EU region. Many topics in this part have been written by different authors. Chapter 15 is written by *Fernando Dias Simões* and named *"Trade*

[23] ibid xviii.

for All? Transparency in the EU's Common Commercial Policy". Chapter 16 is written by *Daniele Bianchi* and *Kirstyn Inglis* and named *"Investor to State Dispute Settlement Mechanisms: A Comparison of Evolving Legal Approaches in Brazilian and Latin American Relations with the European Union"*. Chapter 17 is written by *Olga Boltenko* and named *"The Rise of the RCEP: Regional Multilateralism and its Impact on the EU–China BIT"*. Chapter 18 is written by *Sufi an Jusoh* and named *"The Comprehensive and Progressive Agreement for Trans-Pacific Partnership: Intellectual Property Chapter, Research in Biotechnology and Price of Medicine with Lessons from the European Union"*. Chapter 19 is written by *Danny Friedmann* and named *"Geographical Indications in the EU, China and Australia: WTO Case Bottling Up Over Prosecco"*. Chapter 20 is written by *Debashis Chakraborty* and *Nilanjan Banik* and named *"Indian Pharma Sector's Journey for the Innovation Panacea: Lessons from Negotiations with EU and RCEP"*.

To particularly emphasize, although each article in the book is independent in itself, they have been written completely linked with other articles, either directly or indirectly. From this point of view, it can be declared that the book is written with a holistic approach. It can also be stated that this is done in order to create both a convenience and a holistic approach for the readers.

Although there are three parts and twenty chapters in the book, it can be stated that there are also introduction and conclusion parts in a general and holistic sense. The first chapter gives a background on how the EU legal system was formed and transformed in the civil law over the past 60 years. The chapter points out the historically conventional view of integration in the EU and elaborates skepticism of achievements, ongoing challenges and future prospects in the EU member and non-member states. The reasons for bias against integration in the EU were that integration was not enforceable in equity, could not give rise to a cognizable cause of law practice, and would not constitute a viable ground for legislating the stay of a trade proceeding based on the identical underlying cause of law between the same parties or member states.

This skepticism and bias come to the EU by each member state's own practice. However, there has been some homegrown skepticism against integration in the EU, too, such as the notion that integration is only for simple disputes, not complex ones. This is a relatively short introduction chapter with only twenty-seven pages. Therefore, the author gives all the necessary information regarding this important background on the historical development of integration without boring the readers. Basically, the chapter concludes that all these obstacles and biases would be overcome, and a doctrine on integration has developed to its intended level, to confirm the equal status of integration about law.

The book has 502 pages in total, and none of those pages is spent wastefully. It is a significantly important and current topical issue. If a second book were written on the subject, it would be equally interesting since there are many other terms, standards, and rules to examine in relation to EU influence on member or non-member states. However, no book can be entirely complete, and this book, of course, has some shortcomings as well. First of all, EU integration and its law practice influence on commercial policy is not limited to the issues discussed in this book. There is the further influence of the EU law system. Next, the integration concept is not only under European influence, but is also under the influence of other states, and maybe less clearly, the influence of the civil law systems. Thus, further studies would be useful to inquire into whether other impacts on European integration could have been further examined. Thus, the book might be criticized for not discussing and comparing all European integration influence with that of some other major legal systems.

III. REVIEW OF THE BOOK

Chapter 1, *"The European Union: Achievements, Ongoing Challenges and Future Prospects"*, by Julien Chaisse, highlights the general theme of the book and suggests some solutions about the EU integration in general. Chaisse also discusses the current EU practices and their reflections on EU law for each member state.

Chapter 2, *"The Rule of Law and Integration in the EU"*, by Ian Forrester QC, addresses the role of the rule of law in EU integration. This chapter remarks that over the centuries in Europe, many treaties concluding international conflicts contain promises of eternal friendship but do not prevent future wars. At the same time, Forrester claims that the founders of what is now the EU are more successful. In this context, Forrester deals with the synthesis of the past and the future.

Chapter 3, *"The European Union as an Oxymoron: From Contest via Contradiction to Constitution?"*, by Rostam J Neuwirth, highlights that generally contradictions do not go well with the underlying educational and scientific paradigm prevalent in Europe of what is called "the law of the excluded middle", which is usually expressed by the claim that "everything must either be or not be". In other words, Neuwirth claims that the original idea underlying the EU is oxymoronic.

Chapter 4, *"The Social Dimension of the EU"*, by Manfred Weiss, provides a thorough analysis of the social dimension of the EU. In 1957, the Europeanisation of social policy and in particular of labour law was not on the agenda of the European Economic Community and this topic was left to the member states. In the meantime, he focuses on soft law and hard law on the EU level.

Chapter 5, *"Geographical Scope and Diversity of EU Rules on Public Procurement"*, by Trygve Ben Holland, points out the geographical scope and diversity of the EU rules on public procurement. Hence, the EU and its member states have developed detailed provisions on public procurement processes to ensure fair and transparent practices and application of impartial legal remedies. For him, these provisions apply within the Single Market and to a great extent outside the EU.

Chapter 6, *"Spatial Configurations of Welfare in the EU: The Case of Cross-border Healthcare"*, by Irene Sobrino Guijarro, indicates cross-border health care in the context of spatial configurations of welfare in the EU. In this perspective, despite the scarce explicit powers the EU has over social areas, that the EU law has a significant impact on the laws and practices of the member states in the area of welfare is broadly conceived. There are two main aspects to the claim that the EU has an important role in this field. The first relates to the transverse impact that EU economic law and policy have on existing national laws and policies in the area of social welfare. The second relates to the graduate emergence of elements though it is still in a fragmented form of a distinctive EU welfare dimension.

Chapter 7, *"Godot is Finally Coming? The Great Convergence of Services Markets within the EU"*, by Panagiotis Delimatsis, suggests an authoritative review of services regulation and a key aspect of the EU internal market. The Services Directive has been the EU's controversial reaction to the never-ending tale of completing the single market for services. Delimatsis reviews the first 10 years after the adoption of the Services Directive and its first enforcement period. In this regard, along with EU primary law, the chapter alleges that the Directive constitutes an additional legal instrument to be used by the Court of Justice of the EU (CJEU) judges with a view to further pursue the objectives of the fundamental freedoms of services and establishment.

Chapter 8, *"Government, Culture and Movies: In Search of a Common Understanding from a European Perspective"*, by Susana de la Sierra, twirls the attention to government, culture and movies to see whether there is a common understanding from a European perspective. Sixty years after the adoption of the Treaty of Rome, many conclusions can be drawn on the evolution of the European project. Clearly, social and economic developments are at stake daily in practical life and in the media.

Chapter 9, *"The European Union and Global Economic Governance: A Leader without a Roadmap?"*, by Jan Wouters and Akhil Raina, questions the EU approach *vis-à-vis* global economic governance. The EU has shown and claimed great attachment to multilateralism; however, in recent years, the EU has not hesitated to pursue bilateral negotiations in apparent contradictions with the multilateral agenda. They consider the causes and effects for these

seemingly conflicting policy options while trying to assess whether any options lead to greater achievements. The chapter demonstrates that the EU support for multilateralism lacks the formulation of a clear and coordinated strategy in economic bodies.

Chapter 10, *"Lessons from European Constitutionalism for Reforming Multilevel Governance of Transnational Public Goods in Asia?"*, by Ernst-Ulrich Petersmann, draws the lessons from European constitutionalism for reforming multilevel governance of transnational public goods in Asia. In this respect, "constitutionalism" has proven to be the most crucial political invention for protecting public goods.

Chapter 11, *"The EU's Civil Justice Policy Field: Perspectives for Asia?"*, by Helen E Hartnell, concentrates on the EU's civil justice policy field. Initially, it is based on a narrow conception of measures aimed at enhancing judicial cooperation in civil matters, civil justice now incorporates a wide array of issues relating to civil procedure, conflict of laws and the administration of justice.

Chapter 12, *"Bilateralism in an Interregional World? From EU Negotiations with MERCOSUR to a Bilateral Strategic Partnership with Brazil"*, by Katharina L Meissner, analyses the EU's shift from interregional negotiations with Mercosur to a Bilateral Strategic Partnership with Brazil. This chapter looks at these –to date little studied– material interests that have rendered the EU's foreign policy towards developing regions vulnerable to international factors.

Chapter 13, *"Reclaiming the Comprehensive Strategic Partnership through the EU–China Partnership and Cooperation Agreement: Taking Stock and Moving Forward"*, by Chien-Huei Wu, focuses on the EU-China Partnership and Cooperation Agreement both from the China side and from the EU side. In the trade and economy dimension, Chien-Huei Wu examines China's implementation of its World Trade Organization (WTO) commitments and the transparency, openness and predictability of China's trade regime.

Chapter 14, *"Legalisation of International Economic Relations: Is Asia Unique?"*, by Shintaro Hamanaka, extends the reflection by looking at legalization of international economic relations, and scrutinizes the questions of whether Asia is unique in terms of integration. Accordingly, Shintaro Hamanaka clarifies what we know about the difference between Europe and Asia with regard to legalization of economic relations, and discusses what should be studied to deepen our knowledge on the difference with regard to specific form *de jure* integration.

Chapter 15, *"Trade for All? Transparency in the EU's Common Commercial Policy"*, by Fernando Dias Simões, notes that the significant issue of

transparency for the EU trade policy. The negotiation of international trade and investment agreements have been attracting ample controversy. There is a growing anti-trade rhetoric in political speeches and campaigns across Europe.

Chapter 16, *"Investor to State Dispute Settlement Mechanisms: A Comparison of Evolving Legal Approaches in Brazilian and Latin American Relations with the European Union"*, by Daniele Bianchi and Kirstyn Inglis, points out Investor-to-State Dispute Settlement (ISDS) mechanisms and makes a comparison of evolving legal approaches especially in Brazil and Latin America with the EU. The reform of ISDS and potential alternatives to it is a priority for the EU today.

Chapter 17, *"The Rise of the RCEP: Regional Multilateralism and its Impact on the EU–China BIT",* by Olga Boltenko, provides an interesting analysis of normative influence, instead of only focusing on the EU–China investment negotiations in isolation of any other treaties. Boltenko relates the Regional Comprehensive Economic Partnership (RCEP), a broad trade and investment pact involving China and 15 other Asia-Pacific countries, to the current investment negotiations between China and the EU.

Chapter 18, *"The Comprehensive and Progressive Agreement for Trans-Pacific Partnership: Intellectual Property Chapter, Research in Biotechnology and Price of Medicine with Lessons from the European Union"*, by Sufian Jusoh, scrutinizes the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) to see whether some lessons can be drawn from the EU approach towards research in biotechnology and the price of medicines. Jusoh also argues that the research exemption flexibility in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) "Intellectual Property Chapter" has a neutral effect on the prices of medicine. The chapter makes comparisons with the similar research exemptions and biotechnology in the EU.

Chapter 19, *"Geographical Indications in the EU, China and Australia: WTO Case Bottling Up Over Prosecco"*, by Danny Friedmann, highlights the importance of the geographical indications and compares the geographical indications in the EU, China and Australia. The EU is ferociously protecting its Geographical Indications in the name of authenticity and rural development, not only in the countries of the EU, but internationally.

Chapter 20, *"Indian Pharma Sector's Journey for the Innovation Panacea: Lessons from Negotiations with EU and RCEP"*, by Debashis Chakraborty and Nilanjan Banik, discuss the lessons for India from negotiations with the EU and the Regional Comprehensive Economic Partnership (RCEP) with respect to the Indian pharma sector. It has been observed that there exists a both-way causality between health and income in many regions across the world, creating

room for possible policy interventions. With this background, this chapter intends to analyze the Intellectual Property Rights (IPR) protection scenario in India, the evolving policy orientations and competitiveness as reflected through emerging trade patterns, with respect to the pharmaceutical sector.

CONCLUSION

Overall, this is a forceful and purposive book that covers principal topics of the system of EU law in the framework of European integration. Authors in the book engage in an excellent analysis of European influence through doctrinal developments and reflections of the practice. They have a sharp wit, clever comments, and comprehensive critical analysis. They also show in-depth research output in their independent articles in the book since they refer to many examples of case law and relevant legislation in many situations or jurisdictions.

It is crucial to state that some legal systems have more influence than the others. On the other hand, some legal systems are more open to influence than the others. In other words, they are much more affected. One of the best examples for both is EU law itself. Therefore, considering all the articles in the book, it can be stated in this context that all EU practices and its legal structure affect both EU member states and other non-member states. For this reason, the regional nature of EU integration takes on a kind of global appearance.

In conclusion, the book opens the floor for great discussions on discovery in both EU practices and its legal structure through the integration and the method which could be the best to adopt among the members. Instead, the current EU rules on commerce or trade policies which are developed by many jurists coming from different legal backgrounds around the world or Europe are better to guide international commercial disputes. Those rules could be improved. However, this does not lower the value of the book and ideas in the book are extremely remarkable for anyone who is interested in the field. Thus, we would suggest this book to anyone who is keen on reading or doing research on topics we laid out so far by means of this review.

This comprehensive and timely book takes the readers on an intriguing journey by successfully capturing the exciting anticipation of EU law while at the same time highlighting the many potential challenges for the natural, social, commercial and political environments likely to be encountered in the harnessing of integration as the ultimate tourist activity.

Some of the future arguments set forth in the book seem promising for the future of the union. At a time when the negative impacts of integration activities seriously threaten the well-being of the European continent, this book combines business relations, sustainability and future-oriented research in a comprehensive and persuasive way. For this very reason, it would not be

wrong to express frankly that this book we have reviewed stands before us as a "must read" book for those who are interested in EU law and EU integration.

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A NEW SUGGESTION ON THE AMERICAN EXPERIENCE OF THE LIMITS OF MEDIATION CONFIDENTIALITY

Arabuluculuk Gizliliğinin Sınırlarına İlişkin Amerikan Deneyimine Dair Yeni Bir Öneri

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ABSTRACT

As mediation has somehow come to be a significant alternative to litigation, determination of boundaries of the protection of confidentiality rules for participants of mediation has become crucial on a global scale. The past few decades has shown that mediation is not, by itself, sufficient to facilitate the growth of solving disputes outside of the courtroom without confidentiality. However, vital importance of confidentiality in mediation inevitably reveals a conflict between encouraging mediation protections and discovering all relevant evidence. Due to this reason, since mediation process require an order, one of the foremost methods to amplify its effectiveness is lucidly putting in order its significant elements such as confidentiality by a statute.

Throughout this study, the vital importance of confidentiality in mediation will be stressed. The study argues that while strong protection of confidentiality encourages mediation, it introduces possible injustice by suppressing all communications from later judicial proceedings. Hence, possibility of a legislative protection of communications in mediation with enumerated confidentiality will be critically assessed in this study.

The study, in essence, contents that the enumerated confidentiality will be a best solution to protect for mediation communications' confidentiality and significant means of justice as well.

Keywords: Rules of disclosure, enumerated confidentiality, mediation privilege, secrecy, transparency

ÖZET

Arabuluculuk bir şekilde davaya önemli bir alternatif olarak ortaya çıktıkça, arabuluculuk katılımcıları için gizlilik kurallarının korunmasının sınırlarının belirlenmesi, küresel ölçekte önemli hale gelmiştir. Gizlilik olmaksızın tek başına arabulucuğun, ihtilafların mahkeme salonu dışında çözülmesini kolaylaştırmak için yeterli olmadığını geçtiğimiz birkaç on yıl göstermiştir. Bununla birlikte, arabuluculukta gizliliğin hayati önemi, arabulucuk korumalarını teşvik etmekle tüm ilgili kanıtların sunulması arasında kaçınılmaz bir çatışmayı ortaya çıkarmaktadır. Bu sebepten ötürü, arabuluculuk sürecinin etkinliğini arttırmanın en önemli yöntemlerinden biri, bir yasal düzenleme ile arabulucuğun gizlilik gibi önemli unsurlarını açık seçik bir şekilde ortaya koymaktır.

There is no requirement of Ethics Committee Approval for this study

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Bu çalışma boyunca, arabuluculukta gizliliğin hayati önemi vurgulanacaktır. Çalışma, gizliliğin güçlü bir şekilde korunmasının arabuluculuğu teşvik ederken, sonraki yargı süreçlerinden tüm arabuluculuk iletişimlerinin mahrum bırakılmasının olası bir adaletsizliği ortaya çıkaracağını ileri sürmektedir. Bu nedenle, istisnaları sayılmış bir gizlilik ile yasal koruma imkânı bu çalışmada eleştirel bir yaklaşımla değerlendirilecektir.

Çalışma, özünde, sınırları sayılı olarak gösterilmiş gizliliğin, arabuluculuk iletişimlerinin gizliliği ve adalete ulaşmanın yollarını korumak için en iyi çözüm olacağını içermektedir.

Anahtar Sözcükler: İfşaat kuralları, Sayılı/sıralanan gizlilik, Arabuluculuk imtiyazı, Mahremiyet, Şeffaflık

INTRODUCTION

Citizens in modern societies are faced with the problem of access to justice and trial within reasonable time. Access to justice and legal protection is considered a fundamental human right, guaranteed by Article 6 of the European Convention on Human Rights.

The problem of access to justice in modern legal systems derived from three primary factors:

1) the number of court cases in all countries is constantly increasing and the courts are overloaded with cases;

2) the procedures are complex and long-lasting;

3) court costs in the proceedings are exceptionally high.

In other respects, the diversity of dispute resolution, and the socially sanctioned choices in any culture, communicate the ideals people cherish, their perceptions of themselves, and the quality of their relationships with others. They indicate whether people wish to avoid or encourage conflict, suppress it, or resolve it amicably. Ultimately the most basic values of society are revealed in its dispute-settlement procedures.

The traditional approach in most cases has been for each partner to consult or be represented their own lawyer and hand over to a judge the responsibility for making decisions. The Judicial resolution of disputes, generally is characterized by an adversarial proceeding, impersonality, the lawyer control and the rule of centralized authoritarian orders.

Mediation, simply in the offer of a calm, safe forum for reasonable exchange, could provide the opportunity for the parties, not only to have the conversation they were unable to have on their own, but also to retain authority and regain control over their own affairs. The principles on which rests the mediation are: parties self-determination, voluntary, confidentiality, informality, equality, the mediator is independent, neutral and impartial.

"Informal process", "accompaniment of a neutral mediator without authority", "voluntary participation of parties" and above all "confidentiality" can be counted as distinctive features of mediation and these features create

a major contrast from other adjudicatory forms of dispute resolution such as hearings, arbitration and trials. Legal rules of procedure and evidence do not apply, witnesses are not called, attorneys often are not present, there are no limits on what information may be presented, no record is made and settlements need not be confined to strictly legal remedies in mediation process.[1] Because of these differences, mediation is a faster, cheaper and less adversarial method of resolving disputes than traditional legal proceedings.[2] Besides, these differences make it attractive for parties of conflicts. As a matter of fact that, from private agreement to collective bargaining or the commercial sector as part of the dispute resolution services provided by jurisdiction, mediation has become an essential component of resolving disputes involving every imaginable subject in a wide range of settings.[3]

However, sharing personal and business secrets, revealing deep-seated feelings about others and making admissions of fact and law are "sine qua non" for successful mediation and without confidentiality the parties are unlikely to make these moves.

Given this importance of confidentiality in mediation, it merits a full discussion in law and not just within the narrow focus of debate within need of creating a balance between justice and confidentiality concerning the legality of a limitless protection. Throughout this study, the vital importance of confidentiality in mediation will be stressed. The study argues that while strong protection of confidentiality encourages mediation, it introduces possible injustice by suppressing all communications from later judicial proceedings. Hence, the possibility of a legislative protection of communications in mediation with enumerated confidentiality will be critically assessed in this study. To this goal, need for confidentiality as a vital tenet in mediation will be addressed initially.

The need for consensus on appropriate disclosures, and the consistency it would bring to confidentiality, is now a pressing concern because of the increase of application of mediation as a assertive alternative of litigation. The mediation process fundamentally relies on the parties' ability to communicate openly with each other and discover common ground for negotiation. For this reason, protection of these communications against disclosure in an eventual litigation via confidentiality in mediation has a vital importance. However, for

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1 Moore, Christopher W. , The mediation process : practical strategies for resolving conflict, (4th edn, 2014) 13-19

2 Alan Kirtley, Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest, The, (1995) (1) J. Disp. Resol. 1, 8

3 Ellen E Deason, 'Predictable Mediation Condifentiality in the U.S. Federal System' (2002) (17) Ohio St. J. Disp. Resol. 239, 241

every protected communication, the justice system potentially loses evidence that may lead to the truth. While strong protection of confidentiality encourages mediation, it introduces possible injustice by suppressing all communications from later judicial proceedings. To provide a healthy environment for mediation as well as justice, it is necessary to draw a line somewhere. This study does not propose to revisit arguments of necessity of confidentiality in mediation, but concedes that, in the searching of justice, it might be useful a comprehensive regulation, which comprises all aspects of issue with clearly defined exceptions in this scope. In this sense, a legislative protection of communications in mediation with enumerated confidentiality might be a best solution to create an applicable balance between each of them.

I. THE HISTORICAL AND CONCEPTUAL OVERVIEW OF MEDIATION AND NEED FOR CONFIDENTIALITY AS A VITAL TENET

A. Overview

The inescapable adverse effects of developments as it continues to grow in modern World create pressure on societies. The incessant growing number of lawsuits is one of these side effects, and it has clung like a leech to the resources of judicial systems. Growing burden of litigation day by day is one of the biggest threats for access to justice to across the globe. It has been an unsolved problem in the last century extensively. Rather than being a regional problem, the new necessities of modern societies turns it into a big issue on a global scale. Although it has existed for a long time, needs of a viable solution has never historically been such an emergency. This rise of litigation count has led society to explore alternative means of dispute resolution.

Mediation, the use of a neutral third party to facilitate negotiation, was utilized throughout the ancient world, and continues to be used today in varying forms in almost all cultures of the World with great success.[4]

Mediation is defined by Black's Law Dictionary as "[a] method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution."[5]

Mediation, which can save time and money, is a popular form of ADR that has been used to settle disputes in courts, public agencies, and between private parties. Not only have its costeffective and time efficient attributes contributed to its use, but the judiciary and legislature have often encouraged its use in order to mitigate the number of cases in the court system.[6]

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4 Moore (n 1) 15

5 Black's Law Dictionary 453 (3d pocket ed. 2006).

6 Sarah Williams, 'Confidentiality in Mediation: Is It Encouraging Good Mediation or Bad

In modern terms, mediation first emerged in the United States in the late nineteenth century in reaction to the conflict between labor and management.[7] Forms of non-labor mediation started to grow and developed into the twentieth century.[8] "Dispute resolution," as an alternative to litigation, began to receive widespread attention in the mid-1970s.[9]

As a foremost form of alternative dispute resolution (ADR), Mediation, which is a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute, will help decrease work load density of court houses, facilitate community involvement in resolving parties' own disputes, as well as create a stronger belief in many applicant' perception that "justice" can be reached.

In the fight against the injustice, primarily used method is effective and much better adjudication. However, this goal has multi-faceted grounds, to name a few, political, economic, social and cultural. To reach complete fairness, all mentioned sides should be considered collectively. For that reason, mediation provides a golden opportunity. Because of mediation' party-centered and people oriented structure, it involves all aspects of society. Ultimately, individuals create societies. Unlike litigation, where laws are used to resolve a dispute,[10] mediation relies on the parties themselves to find a solution. This allows the parties to determine highly unique and individualized solutions. Perhaps the most significant difference between mediation and adjudication is that mediation often structures future relationships between the parties, something for which adjudication is ill-suited.[11]

Historically, mediation was often first used in the fields of family and labour disputes. By now, however, commercial disputes, family disputes, government cases, immovable property cases, torts, criminal cases and environmental cases can counted as subject-matter of Mediation. Mediation is a good tool which could be utilized in the world of commerce. People involved in business gives lot of importance to relationships, cost, money and above all time. Thus, for companies mediation could be a better option. Because of child support payments, visitation rights, child custody, divorcing process and financial arrangements, Mediation is strongly recommended for family

Conduct' (2005) 2005 J Disp Resol 209, 209

7 Sarah Rudolph Cole, 'Protecting Confidentiality in Mediation: A Promise Unfulfilled' (2006) 54 U Kan L Rev 1419, 1449

8 Coole (n 7) 1451

9 ibid 1452-1453

10 The definition of "litigation" includes: "lawsuit," "legal action," and "judicial contest." Black's Law Dictionary 934 (6th ed. 1990).

11 Eileen P Friedman, 'Protection of Confidentiality in the Mediation of Minor Disputes' (1982) 11 Cap U L Rev 181

disputes where relationships are at stake. Litigation has enormous destructive capacity precisely because of the high voltage emotions unleashed during family conflict and with its focus on the future, and its ability to salvage and better relationships, mediation is an appropriate technique for these disputes. Government cases stakes are always large because mostly these cases are related to taxes, property, licenses etc. Thus, in order to deal with the policy paralysis which is usually witnessed in Government cases, an immediate resolution could be reached through mediation. Torts of vehicular accidents due to negligent driving, torts of nuisance, torts of defamation and slander are taken seriously. The victims face helplessness due to delaying disposal of court cases. They need speedy justice and Mediation will be a safe harbour for them. Applying mediation to all types of criminal matters may not be a feasible option considering the gravity and seriousness of the subject matter which is normally involved in criminal cases. However, mediation is generally resorted to in the case of compoundable offences.

Mediation is part of a family of procedures called "alternative dispute resolution," or ADR. However, although mediation is a type of ADR, there are distinct differences that distinguish it from other other types of alternative dispute resolution, among them arbitration, ombudsman procedures, conciliation and structured negotiation. Mediation was characterized as a subtle and delicate process, where the mediator functions as a catalyst, and where privacy is a key element without which the process has little hope of success.'[12] The voluntary and flexible nature, the mediator's lack of adjudicatory competence and the self-determination of the parties can be counted it's distinctive signs.[13]

It is not a formal process like litigation process which completely depends upon evidence, examining witnesses etc. Therefore, Because the process of mediation is structured and organized, with clearly identifiable stages and thus saves lot of time. It is obvious that court process is more costly than mediation process. The process is relying upon the parties to negotiate in good faith which makes it highly flexible and cost saving. Mediation is a party-centered dialogue between the disputants. The parties are the focal point of the mediation and the process gives scope to the active and direct participation of the parties in resolving their dispute. If a settlement is reached at a prelitigation stage, then it is a contract, which is enforceable between the parties. In the event if the

12 'Protecting Confidentiality in Mediation' (1984) 98 Harv L Rev 441,444

13 "Whereas, for example, arbitrators and ombudsmen have the competence to issue (at least partly) binding decisions, in mediation it is up to the parties and not the mediator to decide whether and how to solve the conflict. A conciliator has greater influence on the outcome than a mediator as well, by, for example, announcing a (non-binding) conciliation decision. The mediator, instead, tries to empower the parties themselves to solve their conflict." Mediation in the European Union: An Introduction By Dr Felix Steffek LLM (Cambridge), June 2012

dispute is not settled, the report of the mediator does not mention the reason for the failure. The report will only say "not settled". Furthermore, the process does not restrict the right to appeal and to go further for traditional mechanisms such as arbitration or litigation. The dialogue between both the parties helps a lot to bring back the relationship on track. In Mediation, the disputing parties do not function like adversaries but like participants desirous of resolving their dispute. Hence, mediation helps salvage the relationship between disputing parties and it attempts to create an amicable situation. The nature of mediation is such that final agreement reached, will have consent of both the parties. Thus, there remains no ambiguity in the final agreement. These components in the process of mediation make it fair. The disputing parties accept the non-conventional remedies which satisfies their underlying long term and future interest. These remedies sometimes ignore the strict legal principles relating to their entitlements and liabilities. The concept of mediation gives lot of scope to creativity in dispute settlement mechanism. Mediation is conducted in a private and confidential manner in an informal and harmonious environment which helps the disputing parties lower their guards, unfold their issues and convert their role from being adversaries to being participants of the process to arrive at a suitable outcome. They are thus brought to a state where they can make fruitful talk and take time to understand each other˝s stand and accordingly work out a solution. While state court proceedings are in principle open to the public in most jurisdictions, the rule of mediation is opposite. It is a private procedure by nature. And its private character encompasses, among other things, confidentiality and secrecy[14]. After all these conceptual explanations, it can be clearly argue that "Time Saving", "Cost Saving" , "Party-centered Approach", "Non-Binding Nature", "Confidential", "Maintains Relationships", "Customized Agreements", "Fair Process" and "Non-Conventional" aspects can be counted as advantages of Mediation.

Professor McCrory goes as far as to say that if these characteristics are altered or if one or more is absent, then the process cannot be characterized legitimately as mediation.[15] In this manner, the confidential relationship between a mediator and the parties to a dispute is a fundamental characteristic of the mediation process. There is general agreement that mediation is a communication process in which the goal is a negotiated resolution of a dispute, or at least progress towards that end, with the mediator being tasked with the job of facilitating constructive dialogue between or among disputants.[16]

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14 Rafal Morek, Nihil silentio utilius: confidentiality in mediationand its legal safeguards in the EU Member States, ERA Forum (2013) 14: 421. https://doi.org/10.1007/s12027-013-0317-9, accessed 11 October 2021

15 John P McCrory, 'Environmental Mediation - Another Piece for the Puzzle' (1981) 6 Vt L Rev 49,56

16 Suzanne McCorkle and Melanie J. Reese, Mediation Theory & Practice (2nd edn, Sage

As a conclusion, mediation involves one or more neutral persons who help facilitate communication between the disputing parties to reach an agreement.[17] The mediator must remain neutral[18] and has no power to impose a decision on the parties.[19] Mediation is a process whereby third party neutrals, known as mediators, assist the parties in reaching a solution to their particular problem.

Publishing 2005) 33

17 Standards of Practice for California Mediators (Cal. Dispute Resolution Council 2000).

18 NLRB v. Macaluso, 618 F.2d 51, 54 (9th Cir. 1980)

19 "There, plaintiff sued a developer and general contractor for alleged construction defects. The court assigned a special master to mediate and rule on discovery motions ordered the parties to mediation, and the court's notice instructed that the parties were required to bring their experts and claims representatives. While plaintiff's attorney joined the session with nine experts, defendants' attorney believed his knowledge in the field of construction and did not bring any experts. The mediator, then, cancelled the session and relying upon a report to the court prepared by the mediator, the trial court sanctioned the defendants and their counsel for failing to bring their expert witnesses to a court-ordered mediation, and defendants appealed. The Court of Appeal worded that "balance against that policy recognition that unless the parties and their lawyers participate in good faith in mediation, there is little to protect," and concluded that "the Legislature did not intend statutory mandated confidentiality to create an immunity from sanctions that would shield parties who disobey valid orders governing the parties' participation...In sum, section 1121 was not intended to shield sanctionable conduct." According to the Court of Appeal, despite of explicit provisions (section 1119, which governs confidentiality of communications, and section 1121, which limits the content of mediators' reports), a mediator may reveal information necessary to place sanctionable content in context, including communications made during the mediation. By its interpretation, a "non-statutory exception" was created by the Court of Appeal. However, the court concluded that here, the report included more information than was necessary, and reversed the trial court's sanctions order. Then, plaintiffs appealed to the high Court. The Supreme Court of California affirmed the court of appeal's reversal of the sanctions order, but held that if, on remand, the plaintiff elected to pursue a sanctions motion, no evidence of communications made during the mediation could be admitted or considered. In this regard, the supreme court specifically rejected the notion that there is any need for judicial construction of Evidence Code sections 1119 or 1121, or that a judicially crafted exception to mediation confidentiality was necessary. The court reasoned that "the statutes are clear. Section 1119 prohibits any person, mediator and participants alike, from revealing any written or oral communication made during a mediation." The supreme court noted, however, that while Evidence Code section 1121 prohibits the mediator from advising the court about conduct during a mediation, it does not prohibit a party from so advising the court.86 The Supreme court reminded Rinaker v. Superior Court, (1998) 62 Cal.App.4th 155. In Rinaker, a mediator was compelled to testify at a juvenile delinquency proceeding regarding statements by the victim at a related mediation, concerning the identities of the juveniles. The Court of Appeal held that a minor's due process right of confrontation outweighs the right of confidentiality. The Supreme Court then held that here, "the plaintiff 's have no comparable supervening due process-based right to use evidence of statements and events at the mediation session." and "even were the court free to ignore the plain language of the confidentiality statutes, there is no justification for doing so here." Foxgate Homeowners Ass'n v. Bramalea Cal. Inc., 92 Cal. Rptr. 2d 916, 928 (Ct. App. 2000)

The parties are responsible for building their own consensus and to provide it they have to take control of the mediation process. In order for the mediation to have a chance at reaching a settlement, there are generally two prerequisites: first, the parties must have faith in the mediator's neutrality and, second, they must trust in the confidentiality of the process.[20]

B. Need for Confidentiality in Mediation

Mediation fosters an atmosphere to find a solution that works for all involved. Complex conflicts of parties can be cured by talking, listening, proposing new approaches and even haggling until parties leave the table with a workable resolution. For that to happen, sharing information openly between parties in negotiation is essential and this information sharing includes exposing weaknesses, giving up some demands, and discovering new common grounds. The way of sharing information openly can be achieved by establishing the mutual and procedural trust of the parties. Trust plays an essential role to establish relationship among people and trust is built on past positive experiences. On the contrary, adversaries, who know from past experience they should not trust each other, are thrust together against their will and expected to give their most immediate enemy the tools needed to cause great emotional pain and financial damage in mediation, due to implementation of confidentiality. The parties must not feel that they might be disadvantaged by any disclosure that may be used in legal proceedings, or in any other way. They need to know they have nothing to lose by resorting to mediation. Confidentiality is vitally important to mediation because it facilitates trust and lack of trust in negotiations is frequently an obstacle to settlement. Because mediation often follows on the heels of a failed negotiation, trust, or the lack thereof, is typically a major issue in the parties' underlying relationship.[21] Apart from a few opposing voices[22], it is commonly recognized that confidentiality is crucial to create this trust in mediation. Because, confidentiality in mediation provides willingness of parties to attend mediation and encourages parties to participate in good faith and to be candid with the mediator and each other and to reach a settlement. By way of confidentiality parties are more likely to be frank with each other, and are more likely to settle. İf they are not certain about whether their dialogues in mediation negotiations will be an evidence against them in subsequent proceedings, it is likely that they will not be candid in the

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20 Greg Dillard, 'The Future of Meditation Confidentiality in Texas: Shedding Light on a Murky Situation' (2002) 21 Rev Litig 137, 139

21 Julie Barker, International Mediation—A Better Alternative for the Resolution of Commercial Disputes: Guidelines for a U.S. Negotiator Involved in an International Commercial Mediation with Mexicans, (1996) 19 Loy. L.A. Int'l & Comp. L. Rev. 309,310

22 Eric D Green, 'A Heretical View of the Mediation Privilage' (1986) 2 Ohio St J on Disp Resol 1,23

mediation process and the probability of settlement of the cases in mediation is reduced. Because the parties generally tend to be reluctant to disclose private information. Providing reasons and explanations for their proposals by parties, which might require the exchange of personal, proprietary, or otherwise confidential information, is a key part of negotiations and it would be "impossible if the parties were constantly looking over their shoulders."[23] Without cover of confidentiality will be less likely to discover opportunities for settling the case. Thus, confidentiality promotes party candor and, in turn, the effectiveness of the mediation program in settling cases. Due to this reason, confidentiality is therefore considered a key principle of mediation, or even it has been described as the sine qua non of mediation.[24] Cornes highlights two primary reasons for the existence of confidentiality.[25] The first reason is that excluding certain statements from evidence helps to encourage the parties to settle.[26] The second reason is that there is an implied assumption of consequences from mediating without prejudice.[27]

"The salient features of mediation are an informal process, a neutral mediator without authority to command a result, disputants who participate voluntarily and settle of their own accord, and ... confidentiality of mediation communications."[28] This is the heart of confidentiality protections to allow parties to freely and openly discuss their disputes and make offers without worrying about having these statements used against them should full settlement not be reached.

Generally, parties be part of mediation in one of two ways. Either a court orders them to mediate, or the parties agree to mediation in a pre-or post-dispute agreement. In either case, at the beginning of the mediation, mediator typically reminds the parties that the mediation process is confidential and disclosures made during a mediation should not be revealed to a court or, for that matter, to anyone. If the court orders the parties to mediate, the court order states

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23 Jay Folberg and Alison Taylor, Mediation a Comprehensive Guide to Resolving Conflicts Without Litigation (San Francisco: Jossey-Bass, 1984) 264; Michael L Prigoff, 'Toward Candor or Chaos: The Case of Confidentiality in Mediation' (1988) 12 Seton Hall Legis J 1; Alan Kirtley, 'The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest' (1995) 1995 J Disp Resol 1, 8

24 Klaus Reichert, Confidentiality in International Mediation, (2004) 59, 4, Dispute Resolution Journal, 60, 66

25 David Cornes, Mediation Privilege and the EU Mediation Directive: An Opportunity? (2008), 74, Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Issue 4,395

26 Rush & Tompkins Ltd v Greater London Council [1989] A.C. 1280, HL.

27 Cutts v Head [1984] Ch. 290, CA.

28 Kirtley(n 2) 6.

that the mediation process is confidential. Mediation has numerous advantages over litigation and there are at least two ways in which confidentiality plays a critical role in providing these advantages.[29] The process itself creates these advantages. The mediation session is not open to the public's prying eyes.[30] It is "faster, less expensive," and above all better suited to tailoring outcomes to the needs of the parties. It affords the parties the freedom to participate fully by protecting both general communications and specific settlement offers from disclosure to either the courts or to third parties, and it also protects the integrity of the mediator's role in the process.

In more detail, Confidentiality plays a crucial role the mediation process for a number of reasons:

1-It provides the parties the freedom to participate fully by protecting both general communications and specific settlement offers from disclosure to either the courts or to third parties. If participants of process become alarmed about that their communications may later be used outside of the mediation to their possible disadvantage, the parties will be wary and guarded in mediation. Whenas, Parties must to be candid with the mediator and each other especially about the needs and interests that underlie their positions. Disclosure of these needs and interests by parties is essential to finding a satisfactory resolution. Without confidentiality, potential emergence of a litigation threats the parties and blocks them to reveal information about their basic needs and interests not just against to their present opponent and also against other adversaries or potential adversaries, including public authorities, in other present or future conflicts. Parties may also be concerned that disclosure of information they reveal in the mediation process may prejudice them in commercial dealings or embarrass them in their personal lives. Effective mediation requires candor.

2- The protection of confidentiality also creates a shared sense of "fairness" among parties to the dispute. In mediation, unlike the traditional justice system, parties often make communications without the expectation that they will later be bound by them. Subsequent use of information generated at these proceedings could therefore be unfairly prejudicial, particularly if one party is more wise than the other. Mediation thus could be used as a discovery device against legally naive persons if the mediation communications were not inadmissible in subsequent judicial actions. This is particularly important where a mediation program is affiliated with an entity of the legal system, such as a prosecutor's office.

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29 Kenneth R Feinberg, 'Mediation - A Preferred Method of Dispute Resolution' (1989) 16 Pepp L Rev 5

30 Lawrence R Freedman and Michael L Prigoff, 'Confidentiality in Mediation: The Need for Protection' (1986) 2 Ohio St J on Disp Resol 37,38

3- As previously stated that, Mediation asks its participants to identify the full range of their interests and encourages them to explore many ways to meet these interests.[31] Not only feeling free of parties from fear of disclosure of mediation communications to either the court or to third parties but also confidentiality is critical to the effectiveness of the mediator. In the context of mediation, confidentiality means that which is confidential both as between the parties as well as between the parties and the mediator. Confidentiality is important for maintaining the neutrality of the mediator. The mediator must be perceived as and act as neutrals, actors whose personal opinions are irrelevant to the process. "Both the appearance and the reality of the mediator's neutrality are essential to generating the climate of trust necessary for effective mediation."[32]

Court testimony by a mediator, no matter how carefully presented, will inevitably be seen as acting contrary to the interests of one of the parties, which necessarily destroys her neutrality.[33] This would destroy a mediator's efficacy as a neutral component of process as well mediation confidentiality in general. Neutrality of a mediator establishes an effective relationship between parties in the mediation. In mediations that use caucuses, one of the keys to reaching an agreement is often information that the parties convey to the mediator even though they do not want it disclosed to the other side.[34] Revealing this confidential information in a mediator's testimony is likely to be harmful of the functioning of the mediation process by undermining future parties' expectations of mediator neutrality.[35] Prohibition mediators from testifying can be seen in many legislatures as an exemption to achieve protection of confidentiality in mediation.[36] This serves two purposes. First, it protects the disputants from the introduction of mediation communication into evidence in court disputes. Second, it encourages community members to volunteer their services as mediators without fear of having to later testify in court.[37]

4-. Litigation takes place in public eye and privacy, which is provided by mediation, is an important reason for many to choose this process. Negative publicity can be extremely damaging to both reputations and finances. Parties generally be concerned that disclosure of information they reveal in the

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31 Kirtley(n 2) 9.; Freedman &Prigoff(n 31) 37.

32 İbid 38

33 NLRB v. Joseph Macaluso, Inc. 618 F.2d 51, 55-56 (9th Cir. 1980)

34 Ellen E Deason, 'The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability' (2001) 85 Marq L Rev 79,81

35 Marchal v. Craig, 681 N.E.2d 1160, 1163 (Ind. Ct. App. 1997)

36 California Evidence Code 703.5.

37 Aaron J. Lodge, Comment, Legislation Protecting Confidentiality in Mediation: Armor of Steel or Eggshells?, (2001) 41 Santa Clara L. Rev. 1093, 1098

mediation process may prejudice them in commercial dealings or embarrass them in their personal lives.[38]

5- Mediators, and mediation programs, need protection against distraction and harassment. Fledging community programs need all of their limited resources for the "business at hand." Frequent subpoenas can encumber staff time, and dissuade volunteers from participating as mediators. Proper evaluation of programs requires adequate record keeping. Many programs, uncertain as to whether records would be protected absent statutory protection, routinely destroy them as a confidentiality device.

Ultimately, confidentiality, which lies at the core of these advantages, means that communications made in mediation will not be disclosed to a judge, jury, or others connected with a legal proceeding[39]. It plays a significant role in the success of mediation. The basic issue in regards to confidentiality in mediation is whether, and to what extent, the statements made and the documents produced in the mediation session are discoverable and admissible in subsequent litigation.

II. COMPARATIVE ANALYSIS ON RULES OF DISCLOSURE

A. Introduction

It can be clearly argued that the significant cultural shift in favour of alternative dispute resolution (ADR) has contributed to a more sophisticated regulations and robust protection of mediation communications in sociaties justice systems globally. Increasingly, 'private' methods for resolving disputes, particularly alternative dispute resolution ("ADR") processes are being integrated into the traditional judicial litigation process. Especially in the judicial system of the United States, Mediation has long been used in order to its benefits like saving time, money and mitigating the number of cases in the court system.[40] These benefits of mediation have caused legislatures to create laws facilitating potential plaintiffs to consider mediation. Implementing alternatives to judicial dispute resolution has been a strong legislative policy since at least 1986.[41] Indeed, statutory protection for mediation both among the parties and between the mediator and the parties in labor conciliation have been extended to other arenas by recent legislations.[42]

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38 Owen V Gray, 'Protecting the Confidentiality of Communications in Mediation' (1998) 36 Osgoode Hall L J 667, 671

39 Laurence Freedman, Confidentiality: A Closer Look, In Confidentiality In Mediation: A Practitioner's Guide (1985) 47 NJC 19

40 Williams(n 6) 1

41 ibid 3

42 'Protecting Confidentiality in Mediation' (n 12) 446

As mentioned in the chapter one, according to general opinion, confidentiality is a vital component of the mediation process and successful mediation depends upon honest, open communication, thereby necessitating legislation providing for confidentiality in mediation proceedings. As a result of the popular belief that confidentiality is vital to mediation, legislatures across the globe either have enacted or are contemplating legislation that provides broad confidentiality for participants in mediation.[43] Allowing parties to protect knowledge occured during mediation as "privileged" exempting it from future admission in court is the common legislation. In almost all states, legislators and courts have balanced the interests and arrived at the same general conclusion: the interest in having society negotiate civil settlements through mediation outweighs the public's interest in having all relevant and probative evidence brought before the court.[44] Charlton suggesting that it has now taken on the status of 'an almost holy untouchable tenet'[45], In the United States, the concept of mediation confidentially first emerged in the 1980 case of NLRB v Joseph Macaluso, Inc.[46] In this case the Ninth Circuit Court of Appeal concluded, for public policy reasons, that public interest in neutrality, prohibited a mediator form being forced to testify in any future litigation. The rules of confidentiality in mediation ramified in the USA and across the globe from this initial decision to today. Mediation is a worldwide phenomenon and most jurisdictions protect communications made in mediation from discovery, to some extent. Rules of protecting confidentially of mediation communications and materials, which are regulated by jurisdictions in globe, are various and mostly labyrinthical. According to the Maryland Bar Association, the rules of mediation confidentiality are so complex that one must first be an expert in order to merely be competent.[47] Prominently, most states in the United States have statutes or court rules that address the confidentiality of mediation communications.[48] Some of these simply make all communications during a mediation inadmissible, whereas others more carefully define the terms used and provide for exceptions where the interest served by protecting

43 Ellen E Deason, 'Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality' (2001) 35 UC Davis L Rev 33, 39-40

44 Sarah R. Cole, Craig A. McEwen and Nancy H. Rogers, Mediation:Law, Policy& Practice (3rd edn, Thomson Reuters 2011) 214-221 ; John S. Murray, Alan Scott Rail and Edward F. Sherman, Processes of Dispute Resolution: The Role of Lawyers (2nd edn, Foundation Press 1996), 379-418

45 Ruth Charlton, Dispute Resolution Guidebook (2000, Law Book Company Information Service) 15.

46 NLRB v. Joseph Macaluso, Inc. 618 F.2d 51, 57 (9th Cir. 1980)

47 Stephen E. Moss, 'Confidentiality in Mediation' (2010) 43 Maryland Bar Journal 55, 61.

48 Christopher H Macturk, 'Confidentiality in Mediation: The Best Protection Has Exceptions' (1995) 19 Am J Trial Advoc 411, 422.

confidentiality is seen as being outweighed by other interests.[49] There are three main categories of statutory protection for mediation communications in the USA and worldwide:

> "(1) absolute confidentiality: blanket confidentiality, whereby no disclosure of any mediation communications may be made, (2) enumerated confidentiality: nearly absolute confidentiality, subject to enumerated exceptions, which vary by state statue, or disclosure only upon consent by all parties, including the mediator, (3) qualified confidentiality: providing mediation confidentiality but expressly recognizing judicial discretion to order disclosure in individual cases where needed to prevent a manifest injustice or to enforce court orders."[50]

This Chapter focuses on foregoing three main categories of statutory protection formediation communications primarily and outlines the salient samples of US' state statues as well as touches briefly EU Directive and Turkish regulation to explore current position of confidentiality rules across the world. Within this direction following sections gives information about roots of confidentiality rules and various applications, counts three main categories of statutory protection for mediation communications in the US and finally highlights EU Directive and confidentiality rules from Turkey. In spite of the fact that it is quite useful to understand the issue that the historical analysis of the development of the mediation in Turkey, it will not be mentioned in detail in order to protect the simplicity of the study's concept. One of the reasons for choosing these three examples from the USA is its pioneering feature of the American developments in this area.

B. Explanation of Three Main Categories of Statutory Protection for Mediation Communications

1. Absolute Confidentiality, California Sample:

Protection confidentiality with an evidentiary exclusion that makes all evidence of mediation communications inadmissible at trial has been chosen by a considerable number of states in the USA. Code of Civil Procedure section 1775 states that "the peaceful resolution of disputes in a fair, timely, appropriate, and cost-effective manner is an essential function of the judicial branch of state government . . . ."[51] as a strong evidence of California's positive policy to the settlement of çivil disputes. To actualize this attitude, the state legislature has clearly enacted mediation as a process that "provides parties

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49 Gray (n 38) 685.

50 Maureen A Weston, 'Confidentiality's Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation' (2003) 8 Harv Negot L Rev 29

51 California Code of Civil Procedure 1775(a)

with a simplified and economical procedure for obtaining prompt and equitable resolution of their disputes and a great opportunity to participate directly in resolving these disputes."[52] Evidence Code section 1115 is core of California's mediation confidentiality scheme, which defines the processes that qualify for confidentiality protection. Absolute confidentiality rules allow zero disclosure for parties communications, which are disclosured in any mediation. The State of California is one of the most vigorous advocates of these kind of protection and it has some of the most bizarre rules relating to mediation confidentiality[53].

The mediation statutes are contained at California Evidence Code Section 703.5, and in Sections 1115 to 1128.

Section 1119 regulates mediation confidentiality crystal clear: "Except as otherwise provided in this chapter:

(a) No evidence of anything purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled in any arbitration, administrative adjudication, civil action or other non-criminal proceeding in which pursuant to law, testimony can be compelled to be given. or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled in any arbitration, administrative adjudication, çivil action or other non-criminal proceeding in which pursuant to law, testimony can be compelled to be given.

(b) No writing, as defined in section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled in any arbitration, administrative adjudication, çivil action or other non-criminal proceeding in which pursuant to law, testimony can be compelled to be given.

(c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential."

The consequences for violating section 1119 are addressed in section 1128:

"Any reference to a mediation during any subsequent trial is an irregularity in the proceedings of the trial for purposes of section 657 of the Code of Civil Procedure. Any reference to a mediation during any other subsequent non-criminal proceedings is grounds for vacating or modifying the decision in the proceeding, in whole or in part, and granting a new or further hearing on all or part of the issues, if the reference materially affected the substantial rights of the party requesting relief."

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52 California Code of Civil Procedure 1775(c)

53 Williams (n 6) 217

Section 1120 provides in pertinent part that: "evidence otherwise admissible or subject to discovery outside of mediation does *not* become inadmissible or protected from disclosure solely by reason of its use in mediation." In other words, if a party sends a document to the mediator, and that document would be discoverable in the absence of the mediation, the document remains discoverable. Fair enough.

Section 1121 prohibits the use of any report, assessment, evaluation, recommendation, or finding of any kind, [prepared] *by the mediator* concerning the mediation, "*unless* all parties to the mediation expressly agree otherwise in writing..."

Similarly, section 1122 provides that "writings" are *not* confidential if all persons who participate in the mediation expressly agree to disclosure, *or* if the writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree to its disclosure, and the writing "does not disclose anything said or done or any admission made in the course of the mediation."

According to Section 1123, A written Settlement Agreement entered into as a result of a mediation is also *not* protected if it so expressly provides, *or* if it provides that it is "enforceable or binding or words to that effect," *or* if "all parties to the agreement expressly agree in writing…", *or* if the agreement is "used to show fraud, duress or illegality that is relevant to an issue in dispute." and Section 1124 says that *oral* agreements made in the course of or pursuant to mediation, are also *not* protected if "all parties to the agreement expressly agree in writing… to disclosure," *or*, "the agreement is used to show fraud, duress or illegality that is relevant to an issue in dispute."

Briefly, by statute, the only statement or writing made in connection with mediation which can be disclosed without the express consent of both parties is the agreement reached during the mediation itself. Except for limited exceptions created by the courts, nothing else said or written during or in the course of the mediation, or for the purpose of the mediation, can be received in evidence, compelled in discovery, or compelled as testimony in any proceeding.[54] It can be argued that the *Evidence Code* provides a great definition of confidentiality

[54] One case, In re Marriage of Eisendrath (2003) 109 Cal. App. 4th 351, summarized the confidentiality provisions of mediation as follows: "Section 1119 states the fundamental rule regarding confidentiality of mediation communications. It provides: '(a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any … civil action … in which, pursuant to law, testimony can be compelled to be given. … (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential."

because of these rules and California is still considered a State of "absolute confidentiality" in relation to mediation.

According these rules three important exceptions to the mediation privilege exist in California:

1- The privilege does not extend to evidence otherwise discoverable outside mediation.[55]

2- All persons involved in a mediation may "expressly agree in writing" to disclose the contents of the mediation.[56]

3-A party may not attempt to protect evidence from disclosure solely by introducing it in a mediation.[57]

At this point, it can be crucial to highlight that confidentiality statue of California protects only civil cases, and immunity does not apply to subsequent criminal proceedings.[58]

2.Enumerated Confidentiality, Maryland Sample and the Uniform Mediation Act[59]

Maryland has a legal definition of mediation, which is limited to court-referred mediation in Circuit Court:

> "Mediation' means a process in which the parties work with one or more impartial mediators who, without providing legal advice, assist the parties in reaching their own voluntary agreement for the resolution of the disputes or issues in the dispute. A mediator may identify issues and options, assist the parties or their attorneys in exploring the needs underlying their respective positions, and, upon request, record points of agreement reached by the parties. While acting as a mediator, the mediator does not engage in arbitration, neutral case evaluation, neutral fact-finding, or other alternative dispute resolution processes and does not recommend the terms of an agreement."[60]

If some exceptions are left aside, basically enumerated confidentiality is similar to absolute confidentiality. Establishing an absolute privilege but setting forth a series of specific exceptions, Maryland confidentiality rules prefer the enumerated confidentiality approach in light of The UMA. Under this rules mediation communications will not be disclosed to a judge or in a

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55 California Code of Civil Procedure 1120(a)

56 California Code of Civil Procedure 1120(a)(1)

57 California Code of Civil Procedure 1120(a)

58 Rinaker v. Superior Court, 74 Cal. Rptr. 2d 464 (Cal. Ct. App. 1998) and also Wimsatt v Superior Court. 152 Cal App 4th 137 (Cal Ct App 2007).

59 Hereafter: UMA

60 Maryland Lawyers' Rules of Professional Conduct r 17-102(d).

legal proceeding, including discovery and subpoenaed evidence. Establishing a mediation privilege while enumerating certain exceptions reflects a thoughtful a priori weighing of competing poicies between confidentiality and the need for disclosure.

The UMA contains limited exceptions to the mediation privilege for threats of bodily injury, communications used to plan or commit a crime, evidence of abuse or neglect, evidence of professional misconduct or malpractice involving a party, nonparty participant, or party representative. To disclose mediation communications, which are relating to abovecounted exceptions, claimer have to show that such information is otherwise unavailable. Nevertheless, mediation communications have a wide range of protection because of narrow construal of these exceptions.

In Maryland, the rules of confidentiality are composed of the Maryland Lawyers' Rules of Professional Conduct, Maryland Standards of Conduct for Mediators, the UMA and the common law.[61] However, these rules only apply to those already bound by the legal code of conduct and of course can be modified by any individual mediation agreement. The rule 17-102(e)[62] defines confidentiality as any "speech, writing or conduct made as part of a mediation, including communication made for the purpose of considering, initiating, continuing or reconvening a mediation or retaining a mediator."

This definition of confidential material is very broad and is essentially all encompassing. Consequently, to limit levels of exploitation, the rules also place certain limitations on confidentialityas well as defining specific circumstances where disclosure is allowed.[63]

According to rules, evidence, which is admissible under another rule of law, does not become inadmissible merely because it is disclosed during mediation.[64] By this way, parties' possible arriere pensee such as entering mediation to make certain evidence inadmissible is inhibited.

As a prominent exception of confidentiality, disclosure of confidential information by a mediator is regulated by the rules of professional conduct: "to prevent serious bodily harm or death, assert or defend against allegations of mediator misconduct or negligence, or to assert or defend claims for contract recession."[65] Conformably, if an another rule regulates that an evidence is admissible, it does not become inadmissible merely because it is disclosed

61 Moss(n 47) 56.

62 Maryland Lawyers' Rules of Professional Conduct r 17-102(e).

63 Andrea Wykoff, 'Mediation & confidentiality ' (2016), 4,1 Bond University Student Law Review 3, 15

64 Maryland Lawyers' Rules of Professional Conduct r 17-109(e)

65 ibid 66.; Maryland Lawyers' Rules of Professional Conduct r 17-109(d).

during mediation.[66] It is also, in Maryland, a mediator may refuse to disclose a mediation communication and may prevent any other person from disclosing a mediation communication of the mediator. By this way, parties can not waive confidentiality without consent of the mediator.

While, the Maryland professional conduct rules do not specifically identify child abuse as a limit to confidentiality, allowing the disclosure of evidence to any relevant authority or victim as otherwise allowed or compelled by law leaves the door open for this exception.[67]

Hereby, the Maryland Lawyers' Rules of Professional Conduct are a good example of balancing the competing interests in relation to disclosure and confidentiality. However, It can be criticised easily because of its' plain assumption that mediators will be solicitors, barristers or attorneys and thus already bound by an ethical code.

3. Qualified Confidentiality, Wisconsin Sample

Qualified confidentiality, providing mediation confidentiality but expressly recognizing judicial discretion to order disclosure in individual cases where needed to prevent a manifest injustice or to enforce court orders.[68]

Wisconsin, like Maryland applies the UMA, however, a separate statute also specifically recognises judicial discretion in this regard.[69]

The Wisconsin Statute permits disclosure "if necessary to prevent a manifest injustice of sufficient magnitude to outweigh the importance of protecting the principle of confidentiality in mediation proceedings generally."[70]

C. An Exploration of the European Current Position and confidentiality rules in Turkey

Mediative techniques have been used in Europe for many centuries. The institutionalisation of mediation as a mechanism of dispute resolution in the European Member States, however, dates back only a few decades, in some cases only a few years. Hence, mediation as a method of dispute resolution is still developing and legislatures are in the middle of the process of establishing adequate rules. Some Member States have embraced mediation longer or quicker than others, for example the United Kingdom and the Netherlands. Member States that have come forward with a comprehensive reform of mediation law since June 2008, when the Mediation Directive came into force, are, for example France, Germany, Greece, Italy and Spain. The development

66 ibid 67
67 ibid 67
68 Weston (n 50) 33.
69 Wisconsin Statute § 904.0085(4)(3) (201).
70 Williams (n 6) 217.

towards more intensive regulation of mediation seems to follow the example in the USA, the pioneer jurisdiction of mediation, which has seen a regulatory increase over the years.

According to the Green Paper released by the European Commission in 2004: "confidentiality appears to be the key to the success of ADR because it helps guarantee the frankness of the parties and the sincerity of the communications exchanged in the course of the procedure"[71] and this European awareness about importance of confidentiality in mediation was embodied by EU via "the European Union "Directive 2008/52/EC of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters"[72], which provides a framework for crossborder mediation.

The EU Directive states in its Preamble that "confidentiality in the mediation process is important and this Directive should therefore provide for a minimum degree of compatibility of civil procedural rules with regard to how to protect the confidentiality of mediation in any subsequent civil and commercial judicial proceedings or arbitration"[73] Directive gives definition of confidentiality in Article 9:

> "Unless otherwise agreed by the parties, all information relating to the conciliation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement. (. . .)"

and Article 7 regulates confidentiality in mediation:

> "1. Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:
>
> (a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or
>
> (b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

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71 Green Paper on Alternative Dispute Resolution in Civil and Commercial Law, COM/2002/0196 final, p. 29.

72 Hereafter: Directive

73 Recital 23

2. Nothing in paragraph 1 shall preclude Member States from enacting stricter measures to protect the confidentiality of mediation."

Besides, The Commission published Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes. The idea is to provide a simple, swift and inexpensive solution to disputes between consumers and traders without the need to take legal action. It requires States to set up alternative dispute resolution procedures through the establishment of independent, impartial, transparent, effective, fast and fair entities.

When roughly interpreted, the European directive is close to enumerated confidentiality due to the exemptions, which are regulated by article 7. However, it is easily understood that the article 7 of the EU Directive provides a lowest degree of compatibility and very basic standards only. Moreover, right to regulate of mediators' qualifications and requirements is empowered to the Member States by the Directive as well as the Directive grants the Member States the liberty to introduce stricter instruments of protection. As a consequence, the current regulations in the Member States differ vastly and this leads to uncertainty and unconformity within the EU. Such a situation is not acceptable, so further harmonization to establish higher standards and greater clarity is a bare fact for Europe.

Furthermore, the language of Article 7 in the Directive is astoundingly ambiguous because of dangerous of the provided exceptions. The article counts three exceptions for confidentiality:

1- Overriding considerations of public policy

2- The protection of the best interests of children

3- To prevent harm to the physical or psychological integrity of a person.

Who will define the term "best interests" or "overriding considerations of public policy"? What is the consept of "public policy", which is not defined anywhere? Or, where do the borders begin and end of this policy?

There is currently a strong promotion of mediation in Europe. The use of alternative dispute resolution in Europe is diverse. In some countries, mediation was poorly regulated, if at all. In other countries, mediation is well-developed and implemented. Mediation increasingly sounds like a universal language for conflict resolution.

Mediation has been recognized by the Turkish legal system with the announcement of the Turkish Mediation Act on Civil Disputes dated 22 June 2012 entered into force on 23 June 2013. Mediation has been defined in the Act as "a voluntary dispute resolution method implementing systematic techniques, enabling a communication process between parties and bringing them together for the purpose of negotiating, reaching an understanding and creating their

own resolution, conducted with the assistance of an impartial and independent third person who has relevant expertise training."

Mediators and the parties are prohibited from disclosing any documents and information received within the framework of the process, including conduct of the parties, unless otherwise agreed.

CONCLUSION

As it was mentioned before in this study, confidentiality has a vital importance for a number of reasons[74] and numerous commentators have concluded that confidentiality is central to the mediation process.[75] "Integrity of the dispute resolution process requires that the neutral maintain confidentiality."[76] On the other hand, excluding salient information, the justice system potentially loses accurate decision making and also confidentiality rules basically contradict to democratic principles of transparency and participation in public processes.[77]

Without a doubt, when people mediate their differences and come to a peaceful, nonadjudicatory agreement, society and perception of justice benefit from this event. However, confidentially and privilege provisions prevent courts from considering relevant evidence as they try to fulfill their duty to adjudicate fairly the claims and defenses which are before them. The fair adjudication of those claims and defenses id the essence of societies. When confidentially and privilege rules are adopted, naturally courts' consideration of relevant evidence and their fair adjudication ability are limited.

Fundamentally, there is a natural conflict exists between encouraging mediation protections and discovering all relevant evidence.[78] There are fundamental differences between the two systems. While mediation' primary goal is settlements, concern of adjudication is verdicts. Judicial institutions seek just facts and to arrive this target they ground to evidences, whereas mediation needs confidentiality. The need for some degree of confidentiality protection is recognised by law community but whether the scope should be broad or narrow is still contraversial. Some authors, such as Lawrence R. Freedman & Michael L. Prigoff, argue that a broad privilege is unnecessary because of adequate confidentiality protection in existing statutes, contractual agreements,

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74 Freedman &Prigoff (n 30) 39.

75 Deason (n 34) 38.; Freedman &Prigoff (n 30) 39.; Kirtley (n 2) 11.; Macturk (n 48) 424.

76 Linda I Hay and Carol M Carnevale and Anthony V Sinicropi, 'Professionalization: Selected Ethical Issues in Dispute Resolution' (1984) 9 Just Sys J 228, 230

77 Ellen E Deason, Secrecy and Transparency in Dispute Resolution: The Need for Trust as a Justification for Confidentiality in Mediation: A Cross-Disciplinary Approach, (2006), 54 Kan. L. Rev. 1387, 1389

78 ibid 39.

and rules of evidence,[79] whereas others believe that the broad confidentiality is a "sine qua non" for mediation success. In a word, confidentiality enters into rivalry with the litigation evidence norm and also competes with more specific values that can be advanced by knowledge of communications made in mediation.[80] Disclosures may be justified, for example, by policies that further making accurate decisions in criminal cases, preventing child abuse or neglect, responding to allegations of attorney or mediator misconduct, or ensuring that a settlement agreement is not enforced if it was procured by fraud or duress.

Apart from this natural conflict between individual's expectation of confidentiality and the court's interest in adjudicating all relevant evidence, polar differences among current laws make the situation even more complicated. Even the legal differences that exist only among the American states without a worldwide comparison are vary. Some states require mandatory mediation, while other states leave the decision to the parties. In addition, some states provide specific statutory enforcement to mediation agreements, but other states leave enforcement to the law of contracts. While most states have rules relating to mediation in their codes of civil procedure, others choose to expand mediation rules statutorily.[81]

Exceptions to mediation privileges also vary considerably. Legislative decisions make a preference between the benefits of mediation confidentiality and the benefits of disclosing the information. These judgments often involve close policy calls, with the result that both the form of exceptions and their content vary greatly among the jurisdictions. Some states have made an overall policy decision to subordinate mediation confidentiality to all statutory disclosure requirements. Alternatively, in some states exceptions take the form of separate legislative policy decisions for particular disclosures. Yet another approach assigns the task of reconciling competing policies to the courts through balancing on a case-by-case basis. Some jurisdictions have selected more than one of these approaches depending on the type of disclosure at issue.[82] The content of exceptions that permit disclosure is equally variable. Burden of reporting child or elder abuse and Professional misconduct generally could be seen as exceptions in statutes. Furthermore, court-created exceptions contribute an additional degree of uncertainty. While case-by-case balancing is built into some privilege statutes, courts also have made exceptions without guidance from statutory standards, only increasing the range of uncertainty

79 ibid 40.

80 Earl C Dudley Jr, 'Federalism and Federal Rule of Evidence 501: Privilege and Vertical Choice of Law' (1994) 82 Geo LJ 1781, 1802-1803

81 Cole (n 7) 1453.

82 Deason(n 3) 28.

in predicting confidentiality protections.[83] Whenas, if confidentiality is to have its intended effect in mediation, protection of communications must be predictable. However, all these different exceptions affect to mediation and ultimately perception of justice.

Under abovementioned circumstances, The question is, how confidentiality of mediation is protected? Menaces against the confidentiality may arise from different sources such as parties, third parties, mediators etc. So, every possibility must be taken into account to protect confidentiality.

A simple non-disclosure contract, which is signed by all parties, has often been seen as a primary source of confidentiality protection especially in common law. Although commentators have questioned the efficacy of using party agreements to protect confidentiality, participants of mediation generally use these kind of agreements and they play a significant role in process' privilege. They can influence the parties' behavior by reenforcing the importance of confidentiality and obtaining their personal commitment to this principle. However, contractual protection of confidentiality has limits and defects. Essentially, this kind of contract can not suffice to ensure confidentiality of mediation because of two main reasons:

(1) Such a contract cannot bind nonparties. If mediation communications are at issue in a suit involving parties who did not participate in the mediation and so did not agree to confidentiality, a court will likely find that the agreement undermines the public need for discovery and access to full evidence, and thus would declare the confidentiality provision void.[84]

(2) Any agreement of this nature will perhaps be viewed as an agreement to deliberately cover evidence, thereby running the risk of being declared void as against public policy.[85] Courts have often held that confidentiality agreements are unenforceable as a matter of public policy because “agreements between individuals are not permitted to restrict the court’s access to testimony in its pursuit of justice.”[86] In a nutshell, contract theory offers little to those interested in broadly protecting mediation communications.

Evidence law is another potential source of protection for mediation communications. As a device of protection "Evidentiary Protections", occured

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83 Olam v. Congress Mortgage Co., 68 F. Supp. 2d 1110 (N.D. Cal. 1999) ; Allen v. Leal, 27 F. Supp. 2d 945, 947 (S.D. Tex. 1998) ; Smith v. Smith, 154 F.R.D. 661, 664 (N.D. Tex. 1994); Randle v. Mid Gulf, Inc., No. 14-95- 01292, 1996 WL 447954 (Tex. Ct. App. Aug. 8,1996)

84 EEOC v. Astra USA, 94 F.3d 738, 745 (1st Cir. 1996) ; Hamad v. Graphic Arts Center, Inc., 72Fair Empl. Prac. Cas. (BNA) 1759, 1760 (1997)

85 Cole, McEwen and Rogers (n 44) 413

86 Mindy D Rufenacht, 'The Concern over Confidentiality in Mediation - An in-Depth Look at the Protection Provided by the Proposed Uniform Mediation Act' (2000) 2000 J Disp Resol 113; Kirtley (n 2) 11.

from common law, is also quite useless for mediation purposes because it only offers of compromise or settlement were inadmissible to prove liability or amount of the claim in subsequent litigation. Statements other than the offer could be admitted. Even the offer itself could be admitted to prove agency or bias or to impeach.[87] Although Federal Rule of Evidence 408 broadens the common law protection, it does not inadequately protects the confidentiality of information discovered during mediation.[88] It provides no protection against public disclosure outside the courtroom and also hinder disclosure of information only subsequent litigation for just parties of mediation even in the courtroom.[89]

In addition, it should not be overlooked that under common law, statements of fact made during compromise and settlement negotiations are admissible into evidence in subsequent litigation, unless carefully worded or framed.[90] Thus, the common law rule provides little help to a freewheeling mediation session.

In the light of all these explanations, counted three way, namely evidentiary exclusions, discovery limitations, and agreements of confidentiality, do not adequately protect confidentiality.[91] In that case, it can be clearly argued that, a statutory provision, which is guaranteeing the confidentiality of mediation in appropriate circumstances, can be a best solution and it will defuse ongoing tension between mediation and adjudication. However this statutory regulation should be crafted clearly. This is the only possible way to create a balance between mediation and adjudication, and also the current uncertain legal status of confidentiality can be restored with this kind of statute.

At first glance, protection of mediation communications with an absolute confidentiality seem clear, straightforward, and very protective of confidentiality. But in practice, this kind of absolute confidentiality is clearly imposible and unrealistic because of there are too many other values that compete with confidentiality. Also, previous experiences show that courts have searched any available evidences to reach justice and because of this they have resisted an absolute approach to confidentiality for mediation communications. They have created exceptions to exclusionary rules that reflect other values. This insatiable evidence hunger of courts actually creates less security for mediation confidentiality than appears on the face of the statute. They also lessen the protectiveness of evidentiary exclusions as a means to ensure confidentiality. Therefore, the inconsistency is confusing and the protection

87 Macturk (n48) 418.
88 Freedman and Prigoff (n30) 39.
89 ibid 419
90 Freedman (n 39)
91 ibid 40.

offered by absolute confidentiality statutes may be ambiguous because of courts' approach. As a good example for this reality, Dandong case[92] shows that the "absolute" word is not as "absolute" as the meaning actually given in the dictionary in implementation of mediation rules. As a result, confidentiality cannot be absolutely protected, and there will inevitably be some level of limits and the important thing is knowledge of the boundaries of confidentiality, which is clarified by a statute.

Above all, This kind of limittless and "absolute" confidentiality is ill suited for itself of mediation' ultimate aim. Briefly stated:

(1) If privilege precludes evidence of all mediation communications, however, then an agreement that results from offer and acceptance communicated during mediation will be unenforceable. The object of the privilege warrants an exception for disclosure to prove the terms of, and enforce, an agreement that results from mediation.[93]

(2) Existence of an agreement, which occurs in mediation, and its' confidential texture against third parties is a complicated issue, too. There is a common belief among commentators that third parties should at least be entitled to disclosure of such agreements to prove fraud, illegality, or duress, or where disclosure of the agreement would otherwise be required by law.[94]

(3) A mediation privilege should not be a potential cloak for mediator misconduct.

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92 "Providing broad assurances to encourage full participation and candidness in mediation, the Local Rules of the U.S. District Court for the Southern District of New York ensure that "the entire mediation process shall be confidential." like many forms of private mediation. However, it is not a taboo and Judges have struggled with defining when and under what circumstances a third party may obtain discovery of mediation materials. As a salient of this reality, in its decision in In re Teligent, the U.S. Court of Appeals for the Second Circuit drew a standard to be applied in considering an application by a third party for disclosure of mediation materials. the Second Circuit constituted a trilateral test a movant must meet to obtain mediation material: "(1) a special need for the confidential material, (2) resulting unfairness from a lack of discovery, and (3) that the need for the evidence outweighs the interest in maintaining confidentiality." Re Teligent test was applied by a court at first time in Dandong. Although court did not allow using of mediation materials after its consideration of alleged claim, it did not provide examples of circumstances of special or compelling need that might rise to that level in this case. Dandong illustrates that the In re Teligent test is imposing a heavy burden on those seeking discovery of mediation communications. However, that burden, while heavy, is not insurmountable and because it turns on the circumstances and arguments of the non-party to the mediation, rather than on the terms of the confidentiality agreement or order governing the mediation, there is little parties to a mediation can do to guard against later disclosure should a non-participant manage to show compelling need.

93 Kirtley (n 2) 452.

94 Erin L Kuester, 'Confidentiality in Mediation: A Trail of Broken Promises' (1995) 16 Hamline J Pub L & Pol'y 573,593

Additionally, ultimate goal of exertion to create a fruitful land for mediation is justice. However there is no one way that arrives to justice and means of justice comprises litigation mainly. A larger confidentiality umbrella than it should be may have been detrimental because it would exclude any evidence that fell under its umbrella, even highly relevant evidence, or perhaps the only evidence in a case. The mediation privilege could result in unfair or even unjust consequences. Strong protection of confidentiality encourages mediation but introduces possible injustice by suppressing all communications from later judicial proceedings. A broad confidentiality statute like California's is most likely to reduce the risk that party misuse of mediation communications will be overlooked but "Under the muzzle of absolute privilege, truth will suffers tremendously."[95] Moreover, a cloak of absolute privilege would render the mediation process vulnerable to abuse. Parties could intentionally reveal inculpating evidence for the sole purpose of protecting it from any future disclosure. Disputants could participate in a mediation, willing to say anything in order to obtain the best deal for themselves, but never intending to honor an agreement unless it favored them.[96]

Besides the rights of third parties could be severely harmed by a misinterpreted and unrestricted confidentiality rule. Absolute confidentiality does not necessarily result in improved access to justice. While the absolute confidentiality rules attempt to equally protect the rights of all mediation parties, this often results in an individual's access to justice being inhibited and a limitless confidentiality clause could be used as vehicle to commit or plan serious wrongdoings. Even if we leave all these negative possibilities, absolute confidentiality is far from perfect satisfaction. As it was given in chapter IV, although the scope of protection a vailable under California law, which is one of the most salient example of absolute confidentiality of statutory protection for mediation communications, is quite broad as compared to the others, both state and federal courts in California have crafted exceptions to confidentiality that allow mediators to testify, even though the incompetency provision is phrased in absolute terms and such judge-made exceptions are not authorized by the state statute.[97] Scholars still have recognized that "as a legal matter, there is still considerable uncertainty about the extent to which communications made during the process of mediating a dispute are protected from disclosure in subsequent legal proceedings."[98] Deason has asserted that ""currently, it is not an overstatement to say that no mediator or counsel in the country can, with confidence, predict the extent to which it will be possible

95 Lodge (n 37) 1117.
96 Lodge (n 37) 1114.
97 Rinaker v. Super. Ct. of San Joaquin County, 74 Cal. Rptr. 2d 464 (Cal. Ct. App. 1998).
98 Freedman and Prigoff (n 30) 39.

to maintain the confidentiality of a mediation."[99] Beyond these, Professor Eric Green has argued that "..blanket mediation privileges are unnecessary, unjustified, and counterproductive..", "..adequate protection may be found under current law and no empirical data exists to support special protection.." and most importantly "the rights of third parties could be severely harmed unless a confidentiality privilege is carefully construed and delimited."[100]

In addition to what is mentioned above, mediation confidentiality may not, however, be a situation where more protection is necessarily better protection. If a statute does not draw boundaries of clear legal framework for mediation confidentiality, it will create a risk that a court will not recognize a familiar construct with known boundaries.

Effective protection of confidentiality needs to statutorily created and well established regulations, which comprise its clear figured boundaries, with all general rules and definitely exceptions. Without allowing exceptions to a general "blanket" rule against disclosure, there is no safe-guard protecting the mediator or disputants, or even innocent third-persons, like children in family law mediation, against abuse.[101]

Unfortunately, with little legislative and practice history for the confidentiality statutes to use as a guidance, the task of this study, which is evaluation of which statutory protection for mediation is best one, is quite difficult one. However, considering that the absolute confidentiality provisions' negative effects, crafting a confidentiality provision with appropriate exceptions and flexibility is the sanest way. Without doubt, drafting this kind of statute is not simple. However, this difficulty does not override the need for a privilege where mediation is so vital to the effective functioning of our dispute settlement system and confidentiality is so important to mediation. Unfairness, an aura of suspicion, concealment of criminal acts, and general harm to third parties were counted in different parts of this study as a potential problem of confidentiality. All of these can be mitigated by welldrafted statutes and exceptions.

To provide this kind of statute, which statements will be protected from disclosure should be enacted clearly such as statements that are made orally, through conduct, or in writing or other recorded activity. Also some statutory exceptions should be listed by regulation because of the fact that procure a balance between privilege necessity of mediation and satisfy the evidence need of adjudication. A well-drafted body of confidentiality rules can serve the ultimate purpose of mediation. When examined recent statutes, have generally provided a broad statutory protection for mediation communications, lack of two important exceptions provided in the rules of evidence is noticed in these

99 Deason (n 3) 241
100 ibid 40
101 Macturk (n 48) 426

statutes. The first exception recognizes that confidentiality must yield to a demonstrable need for parol evidence when one of the parties to a mediation agreement sues to enforce or rescind that agreement. The second exception guards against abuse of the mediation process by allowing confidentiality to be pierced when a party brings suit alleging the breach of a duty owed by another party or the mediator in the course of mediation, such as an obligation to bargain in good faith.[102] By way of this kind of statutory protection, establishing a privilege against the disclosure of mediation communications that prohibits parties and mediators from disclosing or reporting to a court virtually anything said or done in mediation with limited enumerated exceptions.

Indeed, this goal was pursued by UMA. However, despite of the fact that most statutes in the USA have enacted some form of mediation confidentiality legislation, some even more expansive than the scope of the confidentiality privilege proposed in the UMA, these statutes, however, generally acknowledge the authority of a court to override the confidentiality privilege to enforce participation orders, address claims of participant misconduct, or to prevent abuse of process or professional ethics violations. However, this approach has created confusion and less security for mediation confidentiality than appears on the face of the statute. In addition that this confusion threatens the perception of justice and thrust in the justice system. As it was seen in Chapter I, the strong statutory protection for mediation confidentiality threatens a court's traditional power to monitor the litigation process and to sanction parties and attorneys when the offending conduct occurs in a mediation context. Foxgate case shows us that how broad mediation confidentiality statutes may bar courts access to reports of actions that are unethical, fraudulent, or contrary to court orders and also the California Supreme Court refused to recognize a judicially-created exception to a statute that prohibited disclosure of mediation communications in this case.

By way of conclusion, following the enumerated confidentiality approach, establishing an absolute privilege but setting forth a series of specific exceptions, seems one of the best solution to settle the matter. By this way, on the one hand, it can promote party candor and frank information exchanges in mediation, on the other hand it can prevent potential harms of confidentiality. Unlike some blanket confidentiality statutes, this kind of statute, which contains limited exceptions such as threats of bodily injury, communications used to plan or commit a crime, evidence of abuse or neglect, evidence of professional misconduct or malpractice by the mediator, or evidence of professional misconduct or malpractice involving a party, nonparty participant, or party representative, can create a balance between confidentiality and the need for disclosure. By this way, these two competing policies will reach a fair balance.

[102] 'Protecting Confidentiality in Mediation' (1984) 98 Harv L Rev 441,449

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READMISSION AGREEMENTS IN EUROPE AND THE EUROPEAN UNION-TURKEY READMISSION AGREEMENT: FROM PAST TO PRESENT

Avrupa'da Geri Kabul Anlaşmaları ve Avrupa Birliği-Türkiye Geri Kabul Anlaşması: Geçmişten Günümüze

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Araştırma Makalesi

ABSTRACT

Readmission agreements have been an implementation of the European Union (EU) over than 50 years due to irregular immigration. Recently, the EU's efforts in this area have intensified and become more strategic. Hereunder in this study, firstly, the concept of readmission has been examined and, readmission agreements of the EU have been divided into three periods in terms of their characteristics in the historical process. Secondly, the EU's attitude towards readmission agreements and the structure of them in EU law have been analysed. Finally, the focus of the study, the EU-Turkey Readmission Agreement which is one of the most strategic agreements in EU system and the obligations of the Agreement have been evaluated in detail and, improvement steps like the EU-Turkey Statement have been discussed.

Keywords: readmission, migration, law, European Union, Turkey

ÖZET

Avrupa Birliği (AB), düzensiz göçün önüne geçmek için 50 yılı aşkın bir süredir geri kabul anlaşmaları imzalamaktadır. Son zamanlarda AB'nin bu alandaki çabaları yoğunlaşmış ve daha stratejik hale gelmiştir. Bu çıkarımla yola çıkan çalışmada ilk olarak geri kabul kavramı incelenmiş ve AB geri kabul anlaşmaları, tarihi süreç itibariyle özellikleri bakımından üç döneme ayrılmıştır. Sonrasında, AB'nin geri kabul anlaşmalarına yönelik tutumu ve bu anlaşmaların AB hukukundaki yapısı ortaya konmuştur. Son olarak, çalışmanın odak noktası olan ve konuya ilişkin AB geri kabul sisteminde en çok öne çıkan anlaşmalardan biri olan AB-Türkiye Geri Kabul Anlaşması ile bu Anlaşma'nın yükümlülükleri ayrıntılı olarak değerlendirilmiş ve AB-Türkiye Mutabakatı gibi iyileştirme adımlarına değinilmiştir.

Anahtar Sözcükler: geri kabul, göç, hukuk, Avrupa Birliği, Türkiye

There is no requirement of Ethics Committee Approval for this study.

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INTRODUCTION

In world geography, from past to present, there have been mass migrations to Europe from regions where vital danger has emerged and, social and economic life has become unbearable. The European Union perspective characterizes the flow of migration to Europe as a crisis and, the EU has a distinct difficulty in managing this crisis. The increasing number of immigrants and refugees from regions with political instability such as the Middle East and Africa, Syrian asylum-seekers coming to Europe with the hope of a better life by fleeing war make the work of the EU policymakers complicated. The EU struggles with illegal immigration in various methods as policy instruments. One of them, the readmission agreement, is a significant action for the EU to fight illegal migration. Readmission agreements are prominent and functional solutions improved by the EU against the increasing immigrant flow since the 1970s. However, it seems that these agreements have recently been transformed into a strategic tool by EU bodies.

EU countries initially tried to sign readmission agreements with countries that were the source of irregular migration to prevent migrant flow. However, this method did not work for reasons such as the possibility of violation on the right to life of many immigrants who return to their countries of origin and lack of documents to prove which countries immigrants came. This trouble revealed the fact that readmission agreements should be made not only with the source countries but also with the transit countries which migrants pass to enter the EU territory. The EU's recently immigration policy has been on the axis of such readmission agreements. These readmission agreements, called third generation, specifically target the irregular migration mobility from third countries. These agreements are frequently signed with countries which have borderlines with EU or are close to the EU borders and which put pressure on migration to the EU.

The biggest refugee crisis since the World War II has been experienced in just south of Turkey that is at the EU's eastern borders. This crisis deepens day by day and causes serious human rights violations and many humanitarian problems. In contrast, the EU Member States follow a policy like keeping refugees out of their borders, as possible. In this context, the EU's expectation from Turkey is to accept refugees and to prevent irregular migration targeted at the EU territory by keeping away particularly Syrian refugees from the EU borders. Turkey is one of the main routes of illegal immigrants who wish to migrate from the Eastern Mediterranean to Europe. The Agreement between the European Union and the Republic of Turkey on the Readmission of

Persons Residing without Authorisation[1] which signed on 16 December 2013 between the EU and Turkey, and roadmap regarding to the Agreement should be evaluated from this perspective.

I. READMISSION AGREEMENTS IN INTERNATIONAL AND EUROPEAN LAW

Readmission agreements are briefly defined in the doctrine as agreements that require illegal immigrants to be sent from one of the state parties to the convention[2]. Basically, with these agreements, a contracting state is committing to withdrawing its own nationals, who are in the other contracting state and are in the position of illegal immigrants. However, in practice, not only nationals of the contracting states but also nationals of third states and even stateless persons can be included in the content of readmission agreements[3]. It is also emphasized in the doctrine that this situation can be seen especially in the agreements between the EU and some countries and, the scope of readmission is so wide in the mentioned agreements[4].

Readmission agreements are generally signed to prevent human trafficking and the movements of irregular migrants[5]. Undoubtedly, large-scale immigrant movements cause serious social, political and economic problems for transit and destination countries. Therefore, it can be claimed that these agreements were signed primarily to avoid such matters. In this regard, readmission agreements protect the target countries from irregular migrants and invite transit countries to head off such migration movements[6].

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1 In this study, it will be briefly referred to as the "EU-TR Readmission Agreement". See Agreement between the European Union and the Republic of Turkey on the Readmission of Persons Residing without Authorisation [2014] OJ L134/57, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2014:134:TOC> accessed 18 April 2021. It is published in Turkey's Official Gazette which numbered 29076 and dated 2 August 2014 as follows: Number of Decisions: 2014/6652 Approval of the annexed – "Agreement between the Republic of Turkey and the European Union on the Readmission of Unauthorized Residents" signed in Ankara on 16 December 2013 and approved by Law No. 6547 of 25/6/2014; upon the letter of the Ministry of Foreign Affairs dated 16/7/2014 and numbered 6702424, it was decided by the Council of Ministers on 21/7/2014 in accordance with Article 3 of the Law No. 244 dated 31/5/1963. Official Gazette of the Republic of Turkey, No: 29076, 2 August 2014, <https://www.resmigazete.gov.tr/eskiler/2014/08/20140802-1.htm> accessed 29 November 2021.

2 Nuray Ekşi, *Türkiye Avrupa Birliği Geri Kabul Antlaşması* (Beta 2016) 3.

3 ibid 3.

4 Annabelle Roig and Thomas Huddleston, 'EC Readmission Agreements: A Re-evaluation of the Political Impasse' (2007) 9 European Journal of Migration and Law 363, 364.

5 Ekşi (n 2) 6.

6 Esin Küçük, 'Türkiye'nin Taraf Olduğu Geri Kabul Antlaşmaları' (2008) 7(2) İstanbul Kültür Üniversitesi Hukuk Fakültesi Dergisi 99, 101.

A. The Concept and Scope of Readmission

In accordance with Article 13/2 of the Universal Declaration of Human Rights[7], everyone has the right to leave any country, including her own, and return to country of origin. This provision was further enhanced by the International Covenant on Civil and Political Rights[8]. As per Article 12/2 of this Covenant, everyone is free to leave any country, including their own country and, as per Article 12/4 of it, it cannot be arbitrarily deprived of anyone's right to enter their own country. A similar provision is also included in the Additional Protocol No. 4 of the European Convention on Human Rights[9]. However, in any of these legal texts, the right to return to country of origin is not regulated in detail and, the scope and limits are left uncertain.

It is controversial whether the state has an obligation to readmission of its nationals or foreigners under international law. The right to return to their countries, which are vested in international human rights conventions, imposes an obligation on states to accept them. However, discussed in the context of readmission agreements is not an obligation of readmission regarding the right to return, but whether or not a state has the obligation to readmit own national who illegally exists at other state[10].

Regardless of the right of individuals to return to country of origin, Kay Hailbronner argues that the principle of a state's readmission to their nationals

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7 Universal Declaration of Human Rights [1948] United Nations General Assembly Resolution 217A, <https://www.ohchr.org/en/udhr/documents/udhr_translations/eng.pdf> accessed 29 November 2021. It is published in Turkey's Official Gazette which numbered 7217 and dated 27 May 1949. See Official Gazette of the Republic of Turkey, No: 7217, 27 May 1947, <https://www.resmigazete.gov.tr/arsiv/7217.pdf> accessed 29 November 2021.

8 International Covenant on Civil and Political Rights, [1966] United Nations General Assembly Resolution 2200A (XXI), <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> accessed 29 November 2021. It is published in Turkey's Official Gazette which numbered 26250 and dated 5 August 2006 as follows: Number of Decisions: 2006/10692 Approval of the attached – "Optional Protocol to the International Covenant on Civil and Political Rights" signed in New York on February 3, 2004, approved by Law No. 5468 of 1/3/2006, together with the attached statements and reservations; Upon the letter of the Ministry of Foreign Affairs dated 7/6/2006 and numbered HUMŞ/226322, it was decided by the Council of Ministers on 29/6/2006 in accordance with Article 3 of the Law No. 244 dated 31/5/1963. Official Gazette of the Republic of Turkey, No: 26250, 5 August 2006, <https://www.resmigazete.gov.tr/eskiler/2006/08/20060805-1.htm> accessed 29 November 2021.

9 Gülnihan Ölmez Kıyıcı and Ummuhan Kaygısız, 'Avrupa Birliği'nin Geri Kabul Anlaşmalarının Avrupa Birliği Göç Politikaları ve İnsan Hakları Çerçevesinde Değerlendirilmesi' (2018) 10(25) Mehmet Akif Ersoy Üniversitesi Sosyal Bilimler Enstitüsü Dergisi 467, 478.

10 Kerem Batır, 'Avrupa Birliği'nin Geri Kabul Anlaşmaları: Türkiye ile AB Arasında İmzalanan Geri Kabul Anlaşması Çerçevesinde Hukuki Bir Değerlendirme', (2017) 15(30) Yönetim Bilimleri Dergisi 585, 586.

is generally regulated in the treaties signed under international law. Even he claims that because there is a standardized *opinio juris* and uninterrupted state practice, the readmission is an existing principle in customary international law[11]. This is related to the current nationals and, it has been determined that there is no general obligation for states to retake their former nationals since there is not enough state practice in readmission of the former nationals and, there is not enough standardized *opinio juris*.

Despite the provisions regarding the readmission of states' own nationals and the readmission agreements signed by the EU regarding the readmission agreements of other state nationals in transit from a third state to an EU Member State, because of no *opinio juris* and common practice between states, there is no obligation arising from customary international law regarding the readmission of third-country nationals - even if they come through the territory of the third state by transit[12]. However, Hailbronner claims that under the general principles of international law, third-country nationals living in a neighbouring state are under the obligation to readmission if their illegal immigration is tolerated or supported[13]. He bases this claim on the principle of good neighbourliness between states in international law. It should not be overlooked that this view is somewhat compelling and there is no clear principle in international law[14]. On the other hand, readmission agreements have become part of the law of international treaties, as both the readmission of nationals and the readmission of third-country nationals or stateless persons are included in the agreement texts. However, for a rule to be applied to all states, it must become a customary international law rule. There is no such customary rule in terms of readmission agreements, and these agreements are binding only for States parties.

It is possible to approach the discussions on readmission of third-country nationals from a different perspective, from the perspective of international refugee law. As the influx of refugees towards Europe in the 1970s and 1980s began to increase, European governments almost completely stopped legal migration, except for humanitarian reasons. Asylum applications increased during this period, but whether the applicants were asylum seekers or economic migrants became controversial. As states refrained from granting refugee status, applicants began applying for asylum in more than one state, and the situation

11 Kay Hailbronner, 'Readmission Agreements and the Obligation on States under Public International Law to Readmit their Own and Foreign Nationals' (1997) 57(1) Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 1, 34.

12 Roig and Huddleston (n 4) 364.

13 Hailbronner (n 11) 48.

14 Batır (n 10) 587.

has become a growing problem[15]. In this period, states improved the concept of 'the country where the first asylum application was made' by making changes in their laws. According to this concept, those who will apply for asylum will make their applications in the country where they first set foot. Thus, asylum applications coming from other states were not accepted and their return to the source states was came to the agenda.

In the 1951 Convention on the Status of Refugees[16], there is no regulation about which state is the application place to apply for asylum. Although it is not related to the application, the expression in Article 31 of the Convention, *"... coming directly from the country where their lives and freedoms are under threat ...*", indicates that the requests for asylum are made in the country of origin[17]. It is prohibited by Article 33 of the Convention to send asylum seekers back or return to the borders of states whose lives or freedoms will be threatened. Thus, it is possible to return the asylum-seekers through readmission agreements to a "safe third country"[18] where they come in transit and where their lives and freedoms are not threatened. Moreover, in EU law, the legal status of asylum seekers is assessed in the first phase after they arrive on the territory of a Member State, readmission agreements are used to ensure that those whose requests for protection are rejected under the EU Procedures and Qualification Directives are sent back to the state of origin or transit state[19].

B. The Brief History of Readmission Agreements

Readmission agreements date back to the early 19th century[20]. The obligation to readmit own nationals already existed in the treaties signed before 1950s[21]. World War II was a turning point in terms of readmission agreements. Because while the first readmission agreements are mostly related to the readmission of countries' own nationals, readmission of third-country nationals started to

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15 ibid.

16 Convention Relating to the Status of Refugees, [1951] United Nations. General Assembly Resolution 429 (V), <https://www.ohchr.org/Documents/ProfessionalInterest/refugees.pdf> accessed 29 November 2021. It is published in Turkey's Official Gazette which numbered 10898 and dated 5 September 1961. See Official Gazette of the Republic of Turkey, No: 10898, 5 September 1961, <https://www.resmigazete.gov.tr/arsiv/7217.pdf> accessed 29 November 2021.

17 Batır (n 10) 588.

18 The concept of a 'safe third country' is discussed in the doctrine. There are some who justifiably argue that this criterion should be abolished in order to provide a legal and proportional solution. This notion is not appropriate to provide for permanent solutions on human rights regarding refugee crisis. ibid.

19 Mariagiulia Giuffre, 'Readmission Agreements and Refugee Rights: From a Critique to a Proposa' (2013) 32(3) Refugee Survey Quarterly 79, 110.

20 Hailbronner (n 11) 6.

21 ibid.

be arranged in the later agreements[22]. The second period is between 1950 and 1960. In this period, by readmission agreements, Western European countries resolved the immigration issue about each other's regions. The third period, in the early 90s, Europe's readmission policy began to take shape[23].

Readmission agreements set out and define a country's own nationals' readmission obligations. Some readmission agreements also set out the conditions under which States parties have the obligation to readmission of third-country nationals passing through their territory[24]. These agreements are essentially only agreements for the readmission of irregular migrants. However, it is criticized that it could lead to refoulement of people who fall within the scope of the principle of non-refoulement. It is possible to classify readmission agreements as three separate generations from the date until today. In 1818-1819, a series of readmission agreements were signed between Prussia and other German states. The readmission agreement signed between Germany and the Netherlands in 1906 is considered to bring a similar method to the readmission agreements today[25]. In the 1950s and 1960s, European states signed readmission agreements between themselves[26]. Especially the agreements signed by the member countries of Benelux, which was established in 1958, had an impact on the deport and readmission of third-country nationals. Benelux signed readmission agreements with France in 1964, Austria in 1965 and Germany in 1966[27].

These agreements, which can be described as First Generation Readmission Agreements, were important during the period when border controls have not yet disappeared among the European Community (EC) countries and only workers and individuals engaged in an economic activity have benefited from the right to free movement. While these agreements include readmission of third-country nationals, persons whose readmission may be requested were limited to those previously legally present in the requested State. So, those

22 ibid 25.

23 Nils Coleman, 'European Readmission Policy, Third Country Interests and Refugee Rights' in Elspeth Guild and Jan Niessen (eds.), *Immigration and Asylum Law and Policy in Europe Vol. 16 (*Martinus Nijhoff Publishers 2009) 19.

24 Tineke Strik, 'Readmission Agreements: A Mechanism for Returning Irregular Migrants' (2010) Report of Committee on Migration, Refugees and Population Doc. 12168, 7, <https://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=12439&lang=EN> accessed 29 March 2021.

25 Coleman (n 23) 13.

26 For instance, Austria signed bilateral readmission agreement with Belgium in 1965. Julia Rutz, 'Austria's Return Policy: Application of Entry Bans Policy and Use of Readmission Agreements' (2014) International Organization for Migration, 51. <https://www.emn.at/wp-content/uploads/2017/01/EMNReturnStudy2014_AT-NCP_eng.pdf> accessed 30 March 2021.

27 Coleman (n 23) 15.

who illegally crossed through the territory of the State party to the agreement and reached the other State were not covered by readmission agreements. Although it has got out of practice by the completion of the EC domestic market, Member States needed a similar tool to combat irregular migration from third countries[28].

In the 1990s, following the collapse of the Eastern Bloc, the EU countries, which faced intense migration from Central and Eastern European countries, signed bilateral readmission agreements[29] with these countries, and sought to solve the problem individually[30]. According to these, also called Second Generation Readmission Agreements, irregular migrants from Central and Eastern European countries or those who travelled through these countries to the EU Member States were sent back. These bilateral agreements brought concerns about the protection of refugees, and the "safe third country" criterion used by European states has been criticized.

The readmission provisions included in the second generation readmission agreements generally consist of two parts. The first part includes the obligation of states to readmit their nationals, while in the second part there is a political commitment to negotiate a comprehensive readmission agreement, including the readmission of third-country nationals and stateless persons[31]. It is stated that the reason for the success of these agreements signed with the Central and Eastern European countries was the fascination of visa liberalization and the EU membership[32].

'Third Generation Readmission Agreements' are the agreements that the EU has directly signed with third countries about readmission. There are two important factors in EU experience that distinguish such agreements from others. The first is that these agreements are signed directly by the EU, not by the Member States, and the second is that they include not only the readmission of nationals, but also other nationals of the state transiting from the concerned country. The EU has signed these agreements since 2001. The first agreement was signed with the Hong Kong in November 2001 and came into effect on March 1, 2004[33]. Then, the agreements signed with many countries such as Macau, Sri Lanka and Albania followed it. However, in this process, many

28 Batır (n 10) 589.

29 Ölmez Kıyıcı and Kaygısız (n 9) 476.

30 As an example, Austria signed bilateral readmission agreements in 90s with Croatia (1997), Bulgaria (1998) and Lithuania (1998). Rutz (n 26) 51.

31 Batır (n 10) 589.

32 Daphne Bouteillet-Paquet, 'Passing the Buck: A Critical Analysis of the Readmission Policy Implemented by the European Union and Its Member States' (2003) 5 European Journal of Migration and Law 359, 364.

33 Coleman (n 23) 168.

third countries caused delays in every step in the negotiation process, signing and enforcement.

II. REFUGEE PROBLEM AND READMISSION POLICY OF THE EUROPEAN UNION

It is a fact that European countries have been exposed to mass migration movements throughout history. Undoubtedly, this situation has had serious effects in these countries in every aspect. However, the immigrant depressions on the European borders has been a grand and constantly rising matter for the last few years. The EU has been addressing the immigration problem as a problem for nearly two decades and is trying to check disordered immigration to Europe. This threat perception brought serious measures to the agenda with the end of 2015. So much so, as an example Hungary closed its border to Serbia and announced that it would build a wall along its border with Serbia. In addition, especially Germany and France and Austria, Czech Republic and Slovakia announced that they will start border checks, on the same dates. Even the Schengen implementation, which has been a source of pride for the EU countries for years, was opened discussion[34].

From the EU perspective, it has become compulsory to sign readmission agreements, which are considered as an effective strategy tool to struggle with irregular migration, especially with third countries[35]. It is stated that the content of readmission agreements is determined on a wide scale by the negotiation guidelines of the Council. However, since the guidelines are not published, their content is not officially known[36]. The signed readmission agreements give an idea of the unpublished directives since their texts is so similar.

One of the options offered to make EU readmission agreements attractive is to sign visa liberalisation agreements. While negotiating readmission agreements, the Commission simultaneously puts the agreement, which makes it easier for nationals of the relevant state to obtain visa on their travels to EU countries, on the negotiating table. In July 2004, the Council authorized the Commission to negotiate not only readmission but also visa facilitation. The connection between visa facilitation and readmission was made for the firstly with Russia and Ukraine[37]. In a study on these agreements, it has been determined that there is no increase in irregular immigration towards the EU

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34 Oğuzhan Ömer Demir and Yusuf Soyupek, 'Mülteci Krizi Denkleminde AB ve Türkiye: İlkeler, Çıkarlar ve Kaygılar' (2015) Global Politika ve Strateji, 28.

35 Ölmez Kıyıcı and Kaygısız (n 9) 475.

36 Coleman (n 23) 88.

37 Florian Trauner and Imke Kruse, 'EC Visa Facilitation and Readmission Agreements: Implementing a New EU Security Approach in the Neighbourhood' (2008) 290 Case Network Studies&Analyses, 21.

from the countries where visa facilitation agreement has been signed. Member States continue to have full control over visa issuance. Therefore, it was emphasized that visa facilitation agreements will be an important incentive to ensure that readmission agreements are signed[38].

Today, immigrants are called a direct threat with concerns such as security and employment. The loss of lives of dozens of people every day in the way to Europe, in particular with the spread of photographs, which Baby Ayla's lifeless body hit the Bodrum/Turkey coast at September 2, 2015, the European public has recalled human rights and human values again[39]. At this point, readmission agreements underpin the EU's foreign migration policy to achieve European border controls. Readmission agreements for the EU are among the most effective means of preventing irregular migration.

A. Readmission Agreements In European Union Law

With the entry into force of the Treaty of Amsterdam[40] in 1999, a new area has been added to the EU's mandate and a new chapter has been added to the EU agreements. The Treaty of Amsterdam empowered EU institutions to create secondary legislation in areas such as immigration, private law, civil procedure law, which are necessary for the right to freedom of movement, which is one of the four fundamental freedoms. Schengen treaties, which were not previously included in the acquis, were also included in EU legislation. With the inclusion of this field in the EU mandate, EU institutions have gained new powers in the fields of immigration, asylum and border controls. With this authority granted within the EU, the EU institutions have gained the authority to make agreements with third countries on the subject. In order to combat illegal immigration, the EU has developed a common visa policy and has attempted to set a return policy about persons already illegally in the Member States.

In the 1990s, the Amsterdam Treaty has granted powers in the area of readmission to the EC. In addition, the European Council has invited the Council of Europe to sign readmission agreements between the EC and third countries, or to set a standard readmission clause in other agreements. In the 2000s, the reason why the return of immigrants, who came to the Europe with irregular immigration and who were asked to leave the EU, could not be provided effectively has been based on the lack of cooperation between the EU

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38 ibid 4.

39 Demir and Soyupek (n 34) 31.

40 See. Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C 340/ 40, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:1997:340:TOC> accessed 03 December 2021.

and the countries of origin. In this process, it has been determined that the loss of the documents of the people to be returned is a major factor that makes it difficult to directly return the source country. In such a case, the Commission saw it as an alternative that sending irregular migrants whose identities were not identified but whose travel route was determined, to transit countries by signing readmission agreements instead of sending them to source countries[41].

According to the EU law, readmission agreements are international treaties for the re-shipment of nationals of a country that is illegally in a Member State, or third-country nationals and stateless persons who pass through the territory of that country under certain circumstances[42]. The EU has been a party to many readmission agreements to date[43]. The legal basis to sign these agreements is the Article 63.3(b) of the Treaty Establishing the European Community, amended by the Treaty of Amsterdam[44]. Pursuant to this article, the Council will take measures in the area of illegal immigration and unlawful residency, including the return of illegal residents to their country of origin within 5 years from the entry into force of the Treaty of Amsterdam[45]. With the enactment of the Treaty of Lisbon[46] in 2009, readmission agreements gained a stronger legal basis. Pursuant to Article 79/3 of the Treaty on the Functioning of the European Union, amended by the Treaty of Lisbon, the EU may sign treaties about readmission with third countries whose nationals are unable to meet the conditions of entering, residing or staying in the territory of one of the Member States. This provision gives the EU a clear mandate to conclude an agreement and sets out the scope of these treaties[47]. It also avoids the confusion

41 Roig and Huddleston (n 4) 365.

42 Aslı Bilgin and Pierluigi Simone, 'One Step Forward, Two Steps Back: Legal Arguments on the Visa–Free Travel of Turkish Citizens to the EU' (2019) 16(61) Uluslararası İlişkiler 75, 76.

43 For the countries which the EU has signed a readmission agreement with, see. Commission, 'Return and Readmission' (2020), <https://ec.europa.eu/home-affairs/what-we-do/policies/irregular-migration-return-policy/return-readmission_en> accessed 08 April 2021.

44 The term 'readmission' is not explicitly included in this Treaty. How to interpret the phrase "repatriation" mentioned in the Treaty has been the subject of discussion, and it is accepted that the word includes a wide acceptance and includes the readmission of the people concerned by the countries they came from and the countries they are nationals of. Batır (n 10) 593. See. Martin Schieffer, 'Community Readmission Agreements with Third Countries - Objectives, Substance and Current State of Negotiations', (2003) 5 European Journal of Migration and Law 343, 349.

45 Bilgin and Simone (n 42) 77.

46 See. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, [2007] OJ C 306/50, 17, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2007:306:TOC> accessed 03 December 2021.

47 Carole Billet, 'EC Readmission Agreements: A Prime Instrument of the External Dimension of the EU's Fight against Irregular Immigration. An Assessment after Ten Years of Practice', (2010) 12 European Journal of Migration and Law 45, 60.

of authorities that can be experienced between the EU and the Member States. Moreover, Member States continue to make bilateral readmission agreements[48]. It was put forward that the provisions of bilateral readmission agreements signed by France differ from the readmission agreements signed by the EU, and these agreements are more comprehensive than the EU's agreements[49]. However, if the EU has already concluded -or is negotiating- an agreement with a third state on readmission, Member States could not negotiate with the same third state anymore[50]. The readmission agreement signed by the EU with a third country precedes and is superior to the readmission agreements signed by the Member States with the same third country[51].

The procedure in readmission agreements operates as follows: The Council gives the Commission the duty to invite a state or a group of states to a bilateral or multilateral readmission agreement. Bilateral agreements between Member States and those states remain in force. However, as soon as the Commission has taken up the negotiating task, the Member States must give up negotiations. When the Council authorizes the Commission to sign an agreement on behalf of the EU, it must consult Parliament[52].

B. The Impact of Refugee Problem on European Union-Turkey Relations

The refugee problem has been such a growing crisis in Europe that it has been compared to the migration period, which caused the fall of the Roman Empire. The EU realised that the crisis cannot be handled without finding a common solution with Turkey and started to make some strategic moves. So, the EU made new and comprehensive initiatives to revive relationships which stagnant for a long time with Turkey[53]. In this context, on 26 June 2014 talks between EU officials with Turkey were carried out. In these negotiations, the EU has asked Turkey to take steps to ensure the refugees' stay in Turkey and has given commitment of financial support in return.

On the other hand, the EU countries also wanted to handle the refugee crisis from time to time without compromising much to Turkey and has resorted to different measures for this purpose. For example, by introducing a quota

48 Batır (n 10) 594.

49 Marion Panizzon, 'Readmission Agreements of EU Member States: A Case for EU Subsidiarity or Dualism?', (2012) 31(4) Refugee Survey Quarterly 101, 131.

50 Billet (n 47) 61.

51 Ölmez Kıyıcı and Kaygısız (n 9) 476.

52 Roig and Huddleston (n 4) 369.

53 Enes Bayraklı and Kazım Keskin, *Türkiye, Almanya ve AB Üçgeninde Mülteci Krizi* (Turkuvaz 2015) 10, <http://file.setav.org/Files/Pdf/20151130112435_turkiyealmanya-ve-ab-ucgeninde-multeci-krizi-pdf.pdf> accessed 10 April 2021.

system, asylum seekers are divided into the EU Member States and various mechanisms have been developed to prevent refugees from moving from Mediterranean to Europe. In addition, by giving "safe third country" status to Turkey and some Balkan countries, the EU has tried to return refugees to these countries and keep them in these. However, after all, the EU realized that all these measures would not be enough and decided to keep asylum-seekers away from the EU as the most goal. This certainly has increased once again the EU's attention on Turkey and put forth the importance of Turkey on migration and refugees[54]. In line with the planned objectives of the EU to combat irregular migration, this has become a rational and strategic necessity.

Turkey as located on the migration route of large masses has always been one of the most important countries on migration issue for the Europe. The EU always has carried an expectation from Turkey to fight with migration flows[55]. The idea of making a readmission agreement between the EU and Turkey has been first suggested in 2002. The EU Justice and Home Affairs Council, in a report prepared in 2002, has proposed the signing of readmission agreements with China, Albania and Turkey[56]. In that sense, Turkey is very important for the EU as it is one of the main departure routes to Europe of migrants. If this route can be tightly controlled, a firewall would be built on the border of Europe[57]. In this case, for dealing with the issue of the flow of migrants has been put on an inevitable readmission agreement between the EU and Turkey to the agenda[58].

III. THE EUROPEAN UNION-TURKEY READMISSION AGREEMENT

The EU Commission suggested the readmission agreement on 4 March 2003 for the first time to Turkey. The draft of readmission agreement, which was negotiated four rounds in 2005-2006, was discussed at the technical level in 2009 and 2010. As a result, it was initialled on 21 June 2012. The EU-TR Readmission Agreement was signed on 16 December 2013 and entered into force as an international treaty on 1 October 2014. As of this date, in the context of Article 24 of the Vienna Convention on the Law of Treaties[59],

54 ibid 24.

55 Küçük (n 6) 100.

56 Ekşi (n 2) 36.

57 Coleman (n 23) 178.

58 İlke Göçmen, 'EU-Turkey Readmission Agreement in the Wake of the Migrant Crisis: What might go wrong with it?' (UACES 46th Annual Conference, London, September 2016), <https://www.uaces.org/documents/papers/1601/gocmen.pdf> accessed 10 April 2021.

59 Vienna Convention on the Law of Treaties, [1969] United Nations Treaty Series/1155, 331, <https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf> accessed 29

it started to bear legal consequences. In accordance with Article 24/3, it is stated that the obligations regarding the readmission of third-country nationals and stateless persons can be applied three years after the date of entry into force of the Agreement. The contracting parties have gathered the 'Joint Readmission Committee' established with the Article 19 to get distance in visa liberalisation negotiations which go parallel with the Agreement process. With the Decision No. 2/2016 of this Committee, it has been decided that the provisions regarding the readmission of third-country nationals and stateless persons will be implemented as of June 1, 2016.

A. Preparation Process and General Content

The EU sent a draft of the Agreement in 2003 to Turkey. Turkey has indicated that negotiations could begin in 2004. In Brussels on 27 May 2005, negotiations for the Agreement were initiated by the parties[60]. In this process, the Commission has put pressure on Member States to convince Turkey. The beginning of the process, Turkey was reluctant to make a readmission agreement, then its attitude has changed and it began to look favourably on the idea of making a deal[61]. No doubt, Turkey's efforts to be a member of the EU and desire to benefit from visa liberalization is the reason[62]. With the continuation of the negotiations, Turkey insists to recognition for visa liberalization in return for the Agreement[63]. However, instead of opening a visa liberalization dialogue, EU officials committed to a very loose dialogue[64] on visa, mobility and migration.

At the beginning of concerns voiced by the Turkish side during the negotiations and the ratification of the Agreement was whether the gains that Turkish citizens have achieved, which comes with the framework of the EU-Turkey partnership or within treaties and case-law, lose or not. To resolve these concerns, the Preamble of the Agreement has stated the Agreement is not specified prejudice to the Ankara Agreement which establishs a partnership between European Economic Community and Turkey and, to the decisions of Association Council and, to the relevant case-law of the Court of Justice of the European Union (CJEU). Likewise, according to the Article 18/2 of the

November 2021.

60 Ekşi (n 2) 37.

61 Coleman (n 23) 179.

62 See. Ahmet İçduygu, 'The Irregular Migration Corridor Between the EU and Turkey: Is It Possible to Block It With a Readmission Agreement?' (2011) 10 Robert Schuman Center for Advanced Studies of the European University Institute, <https://cadmus.eui.eu/handle/1814/17844> accessed 12 February 2021.

63 Sarah Wolff, 'The Politics of Negotiating EU Readmission Agreements Insights from Morocco and Turkey' (2014) 16 European Journal of Migration and Law 69, 86.

64 ibid.

Agreement, the Parties fully respect the rights and obligations, including of those who have been legally residing and working on the territory of one of the contracting Parties, provided by the provisions of the Ankara Agreement and its additional protocols, the relevant 'Association Council' decisions as well as the relevant case-law of the CJEU[65].

The EU-TR Readmission Agreement consists of 8 sections and 25 articles. According to the Article 1/n, "*readmission shall mean the transfer by the Requesting State and admission by the Requested State of persons (nationals of the Requested State, third-country nationals or stateless persons) who have been found illegally entering, being present in or residing in the Requesting State, in accordance with the provisions of this Agreement.*" The Agreement is applied on illegal immigrants located in Turkey and the EU territory. Geographical coverage is the EU Member States and the territory of Turkey. The three exceptions to this scope are the United Kingdom, Ireland and Denmark[66]. The provisions of the Agreement do not include third-country nationals and stateless persons who have been determined as irregular migrants by the Requesting State and who left from the Requested state more than 5 years before[67]. With this aspect, the scope of the Agreement in terms of individuals includes nationals of the contracting States residing in these countries without permission, third-country nationals and stateless persons[68]. Pursuant to the Article 11, readmission requests are bound to a 6-month period and it is stated that the requests made without complying with these periods will be rejected[69]. This deadline begins as of the date when the state, which will request readmission, learned the situation.

The EU-TR Readmission Agreement basically foresees the return of persons, who have illegally logged in to an EU Member State from Turkey or to Turkey from an EU Member State, to the opposite side. In accordance with the principle of reciprocity, Turkey will be able to request from an EU Member State the readmission of irregular migrants who came from that State's territory and have illegally entered Turkey. However, since a significant migration from the EU countries to Turkey is not concerned, the EU-TR Readmission Agreement is interpreted as an agreement that brought more obligation on Turkey than the EU[70]. Indeed, Turkey's readmission obligations in the scope of the Agreement

65 Batır (n 10) 597.

66 United Kingdom, Ireland and Denmark being in a special situation and Community readmission agreements are neither binding to them. For more information, see. Schieffer (n 44) 351 ff.

67 Ekşi (n 2) 65.

68 Göçmen (n 58).

69 Ekşi (n 2) 76.

70 Mehmet Uğur Ekinci, *Türkiye - AB Geri Kabul Anlaşması ve Vize Diyaloğu*, (SETA 2016)

are mostly seen in practice. Furthermore, in preperation process, Turkey has not made an assessment in terms of the reservations about geographic limitations[71] it has made to the 1951 Convention on the Status of Refugees and the 1967 Protocol on the Status of Refugees. Regarding the readmission obligations by contracting states, Article 3 and Article 5 regulate the readmission of own nationals and Article 4 and Article 6 regulate readmission of third-country nationals and stateless persons.

B. Readmission of Own Nationals

As per Article 3/1, upon application by a Member State, Turkey shall readmit Turkish nationals who do not or who no longer fulfil the conditions in force under the law of that Member State or under the law of the EU for entry to, presence in, or residence on, the territory of the Requesting Member State. This readmission obligation will also include unmarried children of Turkish citizens who are subject to readmission regardless of their place of birth and nationality, and their spouses with citizenship of another country.

Similarly, due to Article 5/1, upon application by Turkey, a Member State shall readmit own nationals who do not or who no longer fulfil the conditions in force for entry to, presence in, or residence on, the territory of Turkey. This readmission obligation will also include unmarried children of Member State citizens who are subject to readmission regardless of their place of birth and nationality, and their spouses with citizenship of another country.

Article 3 and Article 5 regulate not only the return of own nationals, but also the readmission of those who have been deprived or waived the citizenship in the past[72]. Pursuant to Article 3/3 and Article 5/3, these persons will be readmitted if they have not been promised at least to be naturalized by the Member State in question. Article 3/4, Article 3/5, Article 5/4 and Article 5/5 regulate the issues related to travel documents in the readmission process. Accordingly, after the readmission to contracting States positively respond to application (or the expiry of the period in Article 11/2), Turkish or Member State consular authorities would prepare the three months valid travel documents within three days. If the person cannot be transferred within this period, documents with the same validity period will be issued once again.

21, <https://setav.org/assets/uploads/2016/07/tu%CC%88rkiye-ab_gka_.pdf> accessed 12 February 2021.

71 Turkey has stated a geographical limitation in the 1951 Convention on the Status of Refugees and the 1967 Protocol on the Status of Refugees by making reservations that it will only accept asylum regarding events that take place in Europe. M. Tevfik Odman, *Mülteci Hukuku* (AÜ. SBF. İnsan Hakları Merkezi 1995) 169.

72 Batır (n 10) 598.

C. Readmission of Third-Country Nationals and Stateless People

In accordance with Article 4/1, Turkey shall readmit, upon application by a Member State and without further formalities to be undertaken by that Member State other than those provided for in the Agreement, all third-country nationals or stateless persons who do not, or who no longer fulfil the conditions in force for entry to, presence in, or residence on, the territory of the Requesting Member State. In Article 4/2, the cases that the readmission obligation would not be concerned under Article 4/1 is counted.

Likewise, pursuant to Article 6/1, a Member State shall readmit, upon application by Turkey and without further formalities to be undertaken by Turkey other than those provided for in the Agreement, all third-country nationals or stateless persons who do not, or who no longer fulfil the conditions in force for entry to, presence in, or residence on, the territory of Turkey. In Article 6/2, the cases that the readmission obligation would not be concerned under Article 6/1 is counted.

IV. THE EUROPEAN UNION-TURKEY STATEMENT

After the EU-Turkey Readmission Agreement signed 6 December 2013, in order to ensure the functioning of the planning and visa dialogue with the perspective of the readmission operation, 28 EU Member States and Turkey issued a joint statement on 18 March 2016. The exact legal nature of the Statement is controversial in the doctrine. It is not an agreement according to CJEU. It is stated in the judgements of CJEU that the EU-Turkey Statement cannot be considered a treaty in the context of EU law[73]. There is no doubt that the Statement is not a binding treaty under international law. In order to speak of for a valid international treaty/agreement, it is required that to be approved in the national law of the contracting States at least. No such procedure has been followed for this Statement. It is legally independent of the Agreement and is not an additional protocol or etcetera to it. The Statement is more like a mutual political commitment between the EU and Turkey.

The EU-Turkey Statement is the effort of the EU to make the EU-TR Readmission Agreement more functional. As the EU members Bulgaria and Greece, which have both land and sea borders with Turkey, are signatories in the Statement, it is therefore so important to take the EU-Turkey Readmission

[73] CJEU made the legal qualification of the EU-TR Statement dated 18 March 2016 in three cases resolved on 28 February 2017 and concluded that this Statement is not an international treaty. The legal basis for the decision made by CJEU in these three cases is the Article 263 of the 'Treaty on the Functioning of the European Union'. Nuray Ekşi, '18 Mart 2016 Tarihli AB-Türkiye Zirvesi Bildirisinin Hukuki Niteliği', (2017) 1(1) İktisat ve Sosyal Bilimlerde Güncel Araştırmalar 47, 64.

Agreement into action. The Statement regulated that the immigrants, who has come illegally to the EU countries and in particular the Greek islands, are sent back to Turkey, and in return Syrians who are legally staying in Turkey accepted by Europe as a refugee. In substance, the Statement has aimed to promote solidarity between the EU and Turkey and joint into action prevention of irregular migration after the Agreement. The Statement was signed considering of the positive progress made in the implementation of the 'EU-Turkey Joint Migration Action Plan' as set forth in Brussels on 29 November 2015[74]. Its ultimate aim is to prevent irregular migrant influx to the Greek islands, to increase the measures against migrant smugglers by borderline countries and to end their humanitarian grievances in the Aegean Sea as soon as possible.

In the frame of the Statement, a Syrian from Turkey is going to be placed to the EU countries for each Syrians in Greek islands who is going to be accepted by Turkey. In the first period, the number of Syrians to be placed in the EU countries was determined as 72000. The EU has divided this according to the situation of the member countries and has determined quotas. If the number of 72000 is completed, it is requested from the member countries on the basis of volunteering to determine quotas. During the placement, Syrians who did not go or did not attempt to go to the EU illegally are prioritized and it is stated that the placement would be provided by the United Nations High Commissioner for Refugees, the EU Commission and the Member States.

According to the Statement, the EU have promised to Turkey that 3 billion Euros financial assistance and that take steps on visa liberalisation Turkish citizens and Turkey's accelerate to the EU accession process. As financial support, the EU has stated that it will accelerate the allocation process of 3 billion Euros financial resources to be provided on a project basis to the needs of Syrians in Turkey. It has committed to provide an additional 3 billion Euros by the end of 2018[75]. According to the Commission's press release of 10 December 2019, 4.3 billion euros of the 6 billion euro budget was committed to projects deemed appropriate and 2.7 billion euros were paid[76]. The confusion regarding visa liberalization and the EU membership process is going on and it is obvious that a distance cannot be exceeded in these issues in short term.

In the 4th year of the EU-Turkey Statement, the EU is reported that since the Statement has been in place, arrivals and deaths have decreased significantly. From 10000 people crossing in a single day in October 2015, daily crossings

74 Ekşi (n 73) 59.

75 Batır (n 10) 600.

76 Commission, 'The EU Facility for Refugees in Turkey: €6 billion to support refugees and local communities in need fully mobilised' (2019) <https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6694> accessed 21 April 2021.

have decreased to an average of 105 people per day. While the number of deaths in the Aegean Sea was 1175 twenty months before the Statement has been in place, it has decreased to 439[77].

CONCLUSION

Readmission agreements have an important place in the EU's foreign policy towards migration recently. For this reason, efforts have been made to sign readmission agreements with many states, especially neighbouring states. The most important problem experienced in the negotiations for readmission agreements is that non-nationals and stateless persons are also asked for readmission. If the EU excludes these people's return from readmission agreements, it will be able to sign these agreements with more states. This view has been defended in the literature recently and it is suggested to exclude this issue from readmission agreement texts that will be offered to countries other than the borders of the EU.

Readmission agreements lead the measures taken by the EU against the influx of immigrants. However, it is criticized that the EU's obligation to protect its external borders to third countries through these agreements and thus externalize the issue. Within the framework of the integrated migration management policy it has developed over time, the EU is being placed more heavily on third countries, but it does little work to tackle the root cause of the problem. Especially in this process, human rights have a slightly value and in secondory position. The EU should not consider the subject as a strategic and political tool and should focus both on illegal immigration and humanitarian aid and economic development support to reduce these migrations.

The EU-TR Readmission Agreement has been an important tool in the refugee crisis after the outbreak of the Syrian war. This Agreement implicitly abolishes the geographical limitation that Turkey has placed on the 1951 Convention on the Status of Refugees. Turkey has considered the Agreement as similarly with the EU as strategic and a package along with the visa liberalization process will be provided to Turkish citizens. Although the Agreement has come into force, there has been no significant progress in visa liberalization so far. To date, the pledge of the visa liberalisation to Turkey could not connect to a precise timetable. Consequently, in February 28, 2020 Turkey has decided to open own borders to the refugees and migrants who would pass by sea or land to the EU countries and to not to hinder them. These kinds of negative steps

[77] Commission, 'The EU-Turkey Statement Four Years On' March 2020, <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20200318_managing-migration-eu-turkey-statement-4-years-on_en.pdf> accessed 21 April 2021.

which based on the politic strategies also caused the negotiations on the EU-TR Statement to be clogged.

While the solution efforts are sacrificed among political conflicts, the crisis is deepening day by day. Meanwhile, some people continue a journey of hope by an inflatable boat in the middle of the sea. Even though they have a real brush with death. To abuse the readmission phenomenon, which is norm of law in fact, as a politic strategy, means putting human rights aside and to be blind to new humanitarian catastrophes.

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PRINCIPES GÉNÉRAUX DU DROIT EN DROIT INTERNATIONAL : LA CONDITION D'ÊTRE « RECONNUS PAR LES NATIONS CIVILISÉES » ET LA DÉTERMINATION DES PRINCIPES À APPLIQUER*

Uluslararası Hukukta Hukukun Genel İlkeleri: "Medeni Milletlerce Tanınmış" Olma Şartı ve Uygulanacak İlkelerin Belirlenmesi

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RÉSUMÉ

L'article 38/1-c du Statut de la Cour internationale de Justice définit les « principes généraux du droit reconnus par les nations civilisées » comme l'une des trois sources principales du droit international. Il y a eu beaucoup plus de débats doctrinaux sur les principes généraux du droit que sur les traités internationaux et la coutume internationale. L'objet de la présente étude est l'expression « reconnus par les nations civilisées » à l'article 38/1-c du Statut de la Cour internationale de Justice. Cette expression sera discutée sous deux aspects : Premièrement, l'expression des nations civilisées dans le Statut sera évaluée en fonction de l'interaction du droit international avec les éléments socio-politiques et les connotations de cette expression ; deuxièmement, l'effet de la condition de reconnaissance par les nations civilisées sur la détermination des principes généraux sera examiné. Les conclusions de cette étude peuvent être résumées comme suit : L'expression « nations civilisées » est considérée comme dépassée par la majorité des juristes internationaux. Aujourd'hui, chaque État membre de la communauté internationale est civilisé selon l'expression du Statut. D'autre part, il est possible d'interpréter le texte de l'article d'une manière qui sera acceptée par la communauté internationale et servira l'effectivité du droit international, avec une approche fondée sur le « principe de l'effet utile » en droit des traités. En particulier, l'élection de juges issus des grandes formes de civilisation et des principaux systèmes juridiques du monde stipulés à l'article 9 du Statut facilitera l'acceptation par la communauté internationale d'un principe général du droit choisi à l'unanimité parmi ces juges. Une telle méthode serait plus facile que la détermination d'un principe général de droit par une étude de droit comparé entre toutes les nations, ce qui serait impossible. Ainsi, la condition d'être « reconnus par les nations civilisées » dans le Statut prendra tout son sens.

Mots-clés: Droit International, Cour Internationale de Justice, Principes Généraux du Droit, Reconnus par les Nations Civilisées, Statut de la Cour, Sources du Droit International.

L'Approbation du Comité d'Éthique n'est pas requise pour cette étude

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ÖZET

Uluslararası Adalet Divanı Statüsü'nün 38/1-c maddesi, "medeni milletlerce tanınmış hukukun genel ilkeleri"ni, uluslararası hukukun üç asli kaynağından biri olarak nitelendirmektedir. Hukukun genel ilkeleri üzerine, uluslararası andlaşmalar ve uluslararası teamüle göre çok daha fazla doktrinel tartışmalar yapılmıştır. Çalışmanın konusu Uluslararası Adalet Divanı Statüsü'nün 38/1-c maddesinde geçen "medeni milletlerce kabul edilen" ifadeleridir. Bu ifade iki açıdan ele alınacaktır: İlk olarak, Statü'de geçen medeni milletler ifadesi, uluslararası hukukun sosyo-politik unsurlarla etkileşimi ve bu ifadenin yaptığı çağrışımlar bakımından değerlendirilecek; İkinci olarak da, hukukun genel ilkelerinin belirlenmesinde medeni milletlerce tanınma şartının etkisi incelenecektir. Bu çalışmada ulaşılan sonuçlar şu şekilde özetlenebilir: "Medeni milletler" ifadesi, uluslararası hukukçuların hakim çoğunluğu tarafından çağ dışı bulunmaktadır. Bugün itibariyle, uluslararası toplumun üyesi olan her Devlet, Statü'deki ifade bakımından medenidir. Öte yandan, andlaşmalar hukukunda "etki doğurma ilkesi" temelli bir yaklaşımla, madde metninin uluslararası toplum tarafından kabul görecek ve uluslararası hukukun etkinliğine hizmet edecek şekilde yorumlanması mümkündür. Özellikle de Statü'nün 9. maddesinde öngörülen belli başlı medeniyet biçimlerinden ve başlıca hukuk sistemlerinden gelen yargıçların seçilmesi, bu yargıçlar arasında ittifakla seçilmiş olan bir hukukun genel ilkesinin de uluslararası toplum tarafından kabulünü kolaylaştıracaktır. Böyle bir yöntem, imkânsız olan bütün milletler arasında yapılacak karşılaştırmalı hukuk çalışmasıyla bir hukukun genel ilkesinin tayin edilmesinden daha kolay olacaktır. Böylece Statüdeki "medeni milletlerce tanınmış" olma şartı bir anlam kazanabilecektir.

Anahtar Sözcükler: Uluslararası Hukuk, Uluslararası Adalet Divanı, Hukukun Genel İlkeleri, Medeni Milletlerce Tanınmış, Divan Statüsü, Uluslararası Hukukun Kaynakları.

ABSTRACT

Article 38/1-c of the Statute of the International Court of Justice defines *"general principles of law recognized by civilized nations"* as one of the three main sources of international law. There has been much more doctrinal debate on general principles of law than on international treaties and international custom. The subject of the study is the expression *"recognized by civilized nations"* in Article 38/1-c of the Statute of the International Court of Justice. This expression will be discussed under two aspects: First, the expression of civilized nations in the Statute will be assessed in terms of the interaction of international law with the socio-political elements and connotations of this expression; second, the effect of the condition of recognition by civilized nations on the determination of general principles will be examined. The conclusions of this study can be summarized as follows: The expression *"civilized nations"* is considered outdated by the majority of international jurists. To this day, each member state of the international community is civilized according to the expression of the Statute. On the other hand, it is possible to interpret the text of the article in a way which will be accepted by the international community and will serve the effectiveness of international law, with an approach based on the *"principle of effectiveness"* useful in treaty law. In particular, the election of judges from the major forms of civilization and the main legal systems of the world stipulated in Article 9 of the Statute will facilitate the acceptance by the international community of a general principle of law chosen unanimously among these judges. Such a method would be easier than the determination of a general principle of law by a study of comparative law among all nations, which would be impossible. Thus, the condition of being "recognized by civilized nations" in the Statute will gain a meaning.

Keywords: International Law, International Court of Justice, General Principles of Law, Recognized by Civil Nations, Statute of the Court, Sources of International Law.

INTRODUCTION

L'article 38/1-c du Statut de la Cour internationale de Justice définit les « *principes généraux du droit reconnus par les nations civilisées* » comme l'une des trois sources principales du droit international. Comparés aux deux autres sources, à savoir les traités internationaux et la coutume internationale, les principes généraux du droit ont fait l'objet de controverses doctrinales beaucoup plus intenses.

Ces discussions ont commencé avec l'ajout des principes généraux du droit au Statut de la Cour Permanente de Justice Internationale par le Comité Consultatif de Juristes lors des travaux préparatoires du Statut et se poursuivent toujours. Le sujet principal des sessions où les discussions sur les règles juridiques à appliquer étaient de savoir s'il fallait ou non inclure une autre source – ou règle juridique – dans le Statut à part ces deux-là. Au terme des négociations, l'expression « *principes généraux du droit reconnus par les nations civilisées* » a été comptée parmi les règles de droit international à appliquer.

Les principes généraux du droit, étant inclus dans le Statut de la Cour Internationale de Justice, sont l'une des sources de droit reconnues par l'organe de règlement des différends le plus important du système juridique international actuel. Avec l'ajout de principes de droit général au Statut de la Cour Permanente, des débats doctrinaux sur le sujet ont également émergé de manière intensive. Ces discussions peuvent être regroupées sous différentes rubriques. Les juristes internationaux ont avancé des points de vue différents sur la nature des principes généraux du droit en tant que source du droit, son contenu, son existence en tant que source autonome indépendante des deux autres sources, sa fonction, ses relations avec les deux autres sources et la hiérarchie entre eux, sur quels systèmes juridiques ces principes seront dérivés, sur la légitimité de l'échange et de l'analogie entre les systèmes juridiques et, en particulier, les systèmes juridiques nationaux et internationaux.

Dans le cadre de cet article, les discussions susmentionnées concernant les principes généraux du droit ne seront pas abordées. L'objet de l'étude est l'expression « *reconnus par les nations civilisées* » à l'article 38/1-c du Statut de la Cour internationale de Justice. Cette expression sera discutée sous deux aspects : Premièrement, l'expression des nations civilisées dans le Statut sera évaluée en fonction de l'interaction du droit international avec les éléments socio-politiques et les connotations de cette expression ; deuxièmement, l'effet de la condition de reconnaissance par les nations civilisées sur la détermination des principes généraux sera examiné.

I. CRITIQUES SUR L'ORIGINE COLONIALE DE L'EXPRESSION DU STATUT

Il convient de noter que l'expression « *acceptée par les nations civilisées* » figurant à l'article 38/1(c) du Statut de la Cour Internationale de Justice a été jugée « répugnante »[1] et critiquée par de nombreux auteurs. Ces critiques ont été formulées au stade de la rédaction du Statut de la Cour Permanente de Justice Internationale. De LaPradelle, un membre français du Comité des juristes, a fait valoir que le terme « nations civilisées » était problématique. Selon lui, cette expression est « *superflue puisque qui dit droit dit civilisation* ».[2] Comme on le sait, cette objection n'a pas été prise en considération par le Comité et les critiques qui s'ensuivraient dans la doctrine n'ont pu être évitées. L'objection de De LaPradelle n'a reçu aucune réponse positive ou négative des membres du Comité, et pour les procès-verbaux des séances, la discussion s'arrête là.[3] A la Conférence de San Francisco de 1945, l'expression « dont la mission est de régler conformément au droit international les différends qui lui sont soumis » a été ajoutée à l'introduction de l'article 38 du nouveau Statut de la Cour, avec la proposition du délégué chilien[4] ; pourtant, l'expression « *reconnue par les nations civilisées* » n'a pas été modifiée.[5]

Avant de passer à la possibilité d'accepter cette expression dans le Statut comme critère pour déterminer le principe général du droit à appliquer, il

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1 Vladimir Đuro Degan, *Sources of International Law* (Martinus Nijhoff Publishers 1997) 68.

2 Cour Permanente de Justice Internationale / Comité Consultatif de Juristes, *Les procès-verbaux des séances du comité*, 16 Juin – 24 Juillet, (Van Langenhuysen Brothers 1920), 335.

3 Se référant uniquement aux déclarations de De LaPradelle, Alain Pellet en déduit que les membres du Comité aussi « reconnaissent toutes les nations comme nations civilisées ». Cependant, il ne semble pas raisonnable d'interpréter le fait que les membres du Comité n'ont pas soulevé d'objections sur cette question car elles sont en ligne avec De LaPradelle. Voir : Alain Pellet, 'Article 38' in Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm ve Christian J. Tams (eds.), *The Statute of International Court of Justice - A Commentary*, (2nd edn, Oxford University Press 2012) 769. Sienho Yee, dans son article, qui contient de sérieuses critiques de l'expression « nations civilisées » et dit que l'expression devrait être supprimée du Statut, soutient également l'idée que le terme « nations civilisées » n'a pas beaucoup d'importance au sein du Comité, sur la base des déclarations de LaPradelle. Sienho Yee, *Towards an International Law of Co-progresiveness, Part II*, (Brill Nijhoff 2014) 24-25.

4 *Documents of the United Nations Conference on International Organization, San Francisco 1945*, Vol. XIII (United Nations Information Organizations 1945) 164. (ci-après: UNCIO Vol. XIII)

5 Degan pense que c'est probablement le manque de temps et d'engagement dans des questions politiques plus importantes qui ont empêché la Conférence de 1945 de reformuler -ce qu'il appelle- « cette formulation douteuse ». Degan (n 1) 69.

convient de noter que l'opinion générale est que l'expression « nations civilisées » est redondante. En particulier, au terme du processus de décolonisation, qui s'est systématiquement achevé depuis la Seconde Guerre Mondiale, les nations colonisées ont créé leurs propres États. Cette situation a ouvert la voie au développement sérieux de la communauté internationale et à la prise de conscience atteinte sur cette question. A cet égard, selon ces auteurs, la distinction entre « civilisé » et « non civilisé »[6] est aujourd'hui inacceptable.

[6] Pour ne pas aller au-delà de l'étude, on peut dire que les critères d'être civilisé en termes de développement historique sont les critères que chaque civilisation pose à sa manière et subjectivement. Tsurutaro Senga, un juriste japonais qui a vécu entre 1857 et 1929, a également souligné ces pensées et a déclaré : « *Chaque secte religieuse ou école de philosophie bénit son propre concept unique de civilisation. Lorsque les penseurs européens du droit international parlent de « civilisation » ou de « nations civilisées », ils le font avec leurs visions subjectives du monde.* » Il ne serait pas faux de dire que ces expressions résument au mieux la confusion des concepts et les discussions sur le sens à attribuer. D'autre part, en termes de droit international, on peut affirmer que « l'État moderne » a été considéré comme un critère de civilisation à une certaine époque. Au tout début de la pensée politique moderne, la distinction de Vitoria entre « nous » et « notre monde » et « indigènes » ou « barbares » et leurs « nouveaux mondes » en relation avec les découvertes espagnoles et les territoires occupés peut être donnée à titre d'exemple. Considérant que Vitoria est aussi un théologien et ne s'inscrit pas dans la lignée des penseurs modernes en termes de détermination de la source de légitimité, sa pensée ne peut être considérée comme faisant partie de la modernité, qu'il reflète aussi la pensée du Moyen Âge (une Europe chrétienne et d'autres), et on peut dire que de telles pensées sont en fait à la base d'autres compréhensions religieuses. Néanmoins, on peut affirmer que la « civilisation » est également un concept moderne, compte tenu notamment du sens qui lui est attribué en droit international et en droit public européen. De ce point de vue, les États occidentaux pensaient qu'ils apportaient aussi la civilisation aux sociétés qu'ils colonisaient. Bien sûr, une telle idée a également fait l'objet de vives critiques de l'intérieur et de l'extérieur. L'autorité de saisir les biens non réclamés du droit romain se transforme en occupation de pays non réclamés lorsqu'il s'agit du droit des gens. En définissant les sociétés sur les terres où ils sont allés comme « Société sans État », les États coloniaux ont créé une justification de leur occupation. D'autre part, Jörg Fisch, dans ses travaux sur le concept de « civilisation », précise que l'essentiel ici est que les sociétés politiques visitées sont caractérisées comme non civilisées par et en fonction des États européens et américains, qui fixent le critère d'être civilisés en premier lieu, et qu'ils peuvent être soumis à la souveraineté ou à l'occupation. David Fidler soutient que les sociétés occidentales ont autrefois utilisé le droit international pour imposer les institutions et les valeurs qui se sont développées dans la civilisation occidentale aux nations non occidentales. L'auteur définit également le droit international comme un système centré sur l'Europe et nomme le droit international comme la « civilisation de Westphalie ». Avec le XIXe siècle, l'idée qu'elles méritent le titre de « civilisées » par rapport aux autres sociétés, et que d'autres ne sont pas civilisées, s'est largement répandue parmi les penseurs européens, et au-delà, cette idée a été reprise dans des articles, des résolutions, des traités et des actes internationaux. La plus importante d'entre elles a peut-être été la Conférence de Berlin sur l'Afrique de l'Ouest de 1885. L'une des questions convenues par les États signataires est « *d'organiser les conditions les plus favorables au développement du commerce et de la civilisation dans certaines parties de l'Afrique* ». On peut dire que, contrairement à avant, le concept de civilisation est devenu le discours « officiel » de l'expansionnisme européen à partir de cette période. Il convient de noter qu'il y avait un accent sur les « nations civilisées » dans la clause de Martens, qui a été nommé d'après le délégué russe von Martens à la

D'ailleurs, il y a des auteurs qui décrivent cette expression dans le Statut comme « une qualification embarrassante »[7], « malheureuses reliques d'une époque arrogante au cours de laquelle un certain segment de l'humanité se considérait comme le gardien et l'organisateur de la race humaine »[8], « reste de la pensée coloniale »[9], « une expression eurocentrique offensive et arrogante ».[10]

Conférence de paix de La Haye en 1899 et basé sur sa déclaration. Les préparateurs du Statut de la Cour internationale permanente de Justice, qui fait également l'objet de cette étude, se sont sentis obligés d'utiliser le terme « nations civilisées ». En outre, outre l'article 38, l'article 9 sur l'élection des juges pointe également les « grandes formes de civilisation » – qui seront abordées dans l'étude. Il faut dire que les 1ère et 2ème guerres mondiales ont ouvert la porte à des divergences dans l'approche du concept de civilisation, comme dans bien d'autres questions. Outre le fait que cette transformation mentale est le résultat de concepts de base tels que les droits de l'homme, le libre-échange, la démocratie et surtout la mondialisation rapide dans la seconde moitié du 20e siècle, les critiques du concept de « civilisation européenne » de l'intérieur de l'Europe, qui était au centre des deux guerres mondiales. Néanmoins, les régimes de mandat et de tutelle sont des concepts intéressants en termes de la mission de « civilisation » susmentionnée et de la réflexion qui la sous-tend. Pour les sources utilisées pour le résumé de cette note et la place du concept de « civilisation », qui est un champ d'étude très large, dans la pensée et la pratique du droit international, voir. Liliana Obregón Tarazona, 'The Civilized and the Uncivilized' in Bardo Fassbender ve Anne Peters (ed.), *The Oxford Handbook of the History of International Law*, (Oxford University Press 2012) 917-939; Cemal Bâli Akal, *Modern Düşüncenin Doğuşu: İspanyol Altın Çağı* (4. Baskı, Dost 2010); Hakkı Hakan Erkiner, 'Grotius Öncesinde İlk Modern Uluslararası Hukuk Düşüncesinin Oluştuğu Tarihsel Koşullar ve Erken Klasik Dönemdeki Öğreti' (2012) 18(1) Marmara Üniversitesi Hukuk Fakültesi – Hukuk Araştırmaları Dergisi 51-146; David P. Fidler, 'The Return of the Standard of Civilization' (2001) 2(1) Chicago Journal of International Law 137-157. Voir également, Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press 2004); Antony Anghie, *Imperialism, Sovereignity and the Making of International Law* (Cambridge University Press 2004).

7 Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals: I*, (3rd edn, Stevens & Sons Limited 1957) 44.

8 Fidler (n 6) 138.

9 Gideon Boas, *Public International Law: Contemporary Principles and Perspectives*, (Edward Elgar Publishing 2012) 105.

10 Louis Henkin, 'General Course in International Law' (1989) 232 *Recueil des Cours de l'Académie de Droit International* (Martinus Nijhoff Publishers 1989) 61. On peut citer d'autres auteurs ayant une approche similaire. Degan déclare que l'interprétation littérale de ces déclarations est inacceptable. Akehurst – et Fitzmaurice en référence à lui – déclare qu'à partir de ce jour, toutes les nations devraient être considérées comme des nations civilisées. Selon lui, l'expression « épris de paix », qui est la condition d'être membre de l'Organisation à l'article 4 de la Charte des Nations Unies, est la nouvelle notion qu'il convient d'employer. Anthony Aust a fait valoir que le concept de « civilisé » ne doit pas être considéré comme une expression péjorative, car il y a peu de référence dans le Statut aux États qui ont atteint un niveau élevé de développement juridique. Hanna Bokor-Szegö exprime également l'opinion dominante qu'à partir d'aujourd'hui, tous les États souverains devraient être acceptés en tant que nations civilisées, quels que soient leur développement économique et leurs structures politiques, en référence à des juristes tels que Nguyen Quoc Dinh, Verdross/Simma et Géza Herczegh. Waldock fait remarquer que « nations civilisées » est une insistance inutile et

À ce stade, il serait utile de porter à l'article deux exemples tirés des pratiques de la Cour Internationale de Justice :

Tout d'abord, on peut mentionner que Sergei B. Krylov, l'un des juges de l'Avis consultatif sur la Réparation des dommages subis au service des Nations

désagréable et que cette disposition doit être comprise simplement comme « des principes généraux reconnus dans les systèmes juridiques des États indépendants ». Dans son étude de l'article 38, Alain Pellet (et Crawford en référence à lui) affirme qu'à partir d'aujourd'hui, tous les États doivent être considérés comme des « nations civilisées » et, en référence à Dupuy, que c'est « un terme obsolète » et ne doit pas avoir d'importance. Selon Bin Cheng, l'expression "nations" a progressivement été comprise comme "États", et l'expression "civilisés" devient redondante car tout État membre de la communauté internationale serait directement considéré comme "civilisé". Dixon déclare également qu'à ce jour, l'expression « nations civilisées » n'est pas pertinente et peut être ignorée. Thirlway et Gaja qualifient également cette expression d'inappropriée. Selon Hermann Mosler, la distinction entre nations civilisées et non civilisées a laissé sa place à la notion d'égalité des États souverains dans la période actuelle. On voit que Manfred Lachs a souligné l'inadmissibilité de cette expression dans sa conférence à La Haye en 1980. Enfin, Weeramantry dit que seul l'usage des « principes généraux du droit » est préférable à la phraséologie inappropriée des « nations civilisées ». Il ne serait pas faux de suggérer que l'opinion générale sur cette question en termes d'œuvres turques va dans le même sens. Aslan Gündüz précise que cette expression est un résidu colonial et n'a aucune valeur déterminante à ce jour. On voit qu'Acer/Kaya et Ünal soulignent également que le concept évoque la discrimination et que toutes les nations devraient être acceptées comme civilisées. Si Yusuf Aksar partage les mêmes réflexions, il mentionne également la nécessité d'écrire un nouveau Statut. Pour les ressources utilisées, voir Pellet (n 3) 769; Malgosia Fitzmaurice, 'International Protection of the Environment' (2001) 293 *Recueil des Cours de l'Académie de Droit International* (Kluwer Academic Publisher Group 2002) 116; Anthony Aust, *Handbook of International Law* (Cambridge University Press 2005) 8; Hanna Bokor-Szegö, 'General Principles of Law' in Mohammed Bedjaoui (Ed.), *International Law: Achievements and Prospects*, (UNESCO 1991) 214-215; Martin Dixon, *Textbook on International Law* (7th edn., Oxford University Press 2013) 42; John P. Grant and J. Craig Barker, *Parry and Grant Encyclopaedic Dictionary of International Law* (3rd edn, Oxford University Press 2009), 99; Malcolm Shaw, *International Law* (6th edn., Cambridge University Press 2008) 98; Manfred Lachs, 'The Development and General Trends of International Law in Our Time (General Course in International Law)' (1980) 169 *Recueil des Cours de l'Académie de Droit International* (Martinus Nıjhoff Publishers 1984) 196; Hugh Thirlway, 'Sources of International Law' in Malcolm D. Evans (Ed.), *International Law* (Oxford 2003) 131; Giorgio Gaja, 'General Principles of Law', in *Max Planck Encyclopedia of Public International Law*, Vol. 7 (Oxford University Press 2008) para. 2; James Crawford, *Brownlie's Principles of Public International Law* (8th edn., Oxford University Press 2012) 34; Andrew Clapham, *Brierly's Law of Nations* (7th edn., Oxford University Press 2012) 65; Hermann Mosler, *The International Society as a Legal Community* (Sijthoff and Noordhoff International Publishers 1980) 122; C. G. Weeramantry, *Universalising International Law*, (Martinus Nijhoff Publishers 2003) 266; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press 2006) 24-25; Aslan Gündüz, *Milletlerarası Hukuk Temel Belgeler ve Örnek Kararlar* (8th edn., Beta 2015) 24; Acer Yücel and İbrahim Kaya, *Uluslararası Hukuk Temel Ders Kitabı* (6th edn., Seçkin, 2015) 57; Şeref Ünal, *Devletler Hukukuna Giriş*, (Yetkin 2003) 48; Yusuf Aksar, *Teoride ve Uygulamada Uluslararası Hukuk I* (3rd edn., Seçkin 2015) 76.

Unies qui a été rendu en 1949, a omis le mot « *civilisé* » en énumérant les sources de droit qui la Cour se référera dans son opinion dissidente.[11] Bien que Krylov n'ait pas expliqué pourquoi il a suivi une telle voie dans son opinion, le juge Ammoun, dont les explications seront détaillées ci-dessous, a déclaré avoir fait ce choix délibérément, en référence à Krylov.

Comme deuxième exemple, on peut citer la critique sévère du Juge Ammoun à l'égard des termes « nations civilisées » dans son opinion individuelle sur les Affaires du Plateau Continental de la Mer du Nord. Pour résumer, selon le juge Ammoun, l'expression « nations civilisées » est incompatible avec les dispositions pertinentes de la Charte des Nations Unies. Selon lui, la distinction entre nations civilisées et non civilisées est l'héritage d'un processus inconnu des pères fondateurs du droit international, apparu plus tard - et abandonné à la date de l'arrêt en question - dans lequel les règles conventionnelles et coutumières établies par un nombre limité d'États s'appliquaient à toute une communauté de nations. L'idée de droit international européen a été confirmée et même soutenue par un certain nombre de conférences et même par certains penseurs de cette période -dont il a lui-même cité certains à titre d'exemples. Cependant, cette situation a changé avec la pensée des juristes européens et non européens du droit international.[12]

Ammoun a déclaré que cette déclaration, qui a été critiquée par les auteurs, contradiction absolue avec les dispositions de la Charte des Nations qui stipule « l'égalité souveraine » de tous les États tant au niveau de leur participation aux processus de préparation du droit international dans les organes des Nations Unies, notamment à la Commission du droit international dans laquelle toutes les nations sont appelées à siéger, qu'au niveau de leur participation aux processus d'application du droit international aux termes de l'article 9 du Statut de la Cour internationale de justice qui prévoit « *la représentation des grandes formes de civilisation et des principaux systèmes juridiques du monde* ».[13] Selon lui, il serait plus correct d'omettre le mot "civilisé" en se référant à la disposition 38/1-c du Statut par la Cour et de l'utiliser comme « *principes généraux du droit reconnus par les nations* » ou d'utiliser la formulation de Waldock comme « *principes généraux du droit reconnus par les systèmes juridiques nationaux* ».[14]

Suite à ces critiques du juge Ammoun, on constate qu'en 1971, dans le cadre des travaux sur la « Révision du Rôle de la Cour Internationale de Justice » au

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11 Opinion Dissidente de M. Krylov, *Réparation des dommages subis au service des Nations Unies*, Avis Consultatif (CIJ Recueil 1949) 219.

12 Opinion Individuelle de M. Fouad Ammoun, *Plateau continental de la mer du Nord (République fédérale d'Allemagne/Danemark)*, Arrêt, (CIJ Recueil 1969) 133-134.

13 Ibid 134.

14 Ibid 135.

sein des Nations Unies, les délégués du Mexique et du Guatemala ont proposé de supprimer le terme « nations civilisées » du Statut. Par exemple, le délégué mexicain propose de remplacer ces expressions, qu'il définit comme des « *vestiges du colonialisme du passé* », par l'expression « *par la communauté internationale* » - ou une expression similaire.[15] Cependant, il convient de noter que ces propositions n'ont pas reçu beaucoup d'attention.[16]

À ce stade, il serait approprié de parler de la doctrine socialiste, qui a apporté d'importantes critiques du système de droit international basé sur l'Occident, dans le contexte des pensées du juriste soviétique Grigori Tunkin. Selon Tunkin, l'exigence que les principes généraux du droit soient « acceptés par les nations civilisées » a été et est actuellement utilisée comme un argument contre les États socialistes et certains États en développement (dans son autre ouvrage « *aux nouveaux États asiatiques et africains* »[17]), en particulier dans des questions telles que l'expropriation de biens étrangers. Selon l'auteur, il s'agit ici d'imposer certains principes des systèmes juridiques *bourgeois* comme principes « obligatoires pour tous les États ». Une telle tendance, outre qu'elle n'est pas juridiquement légitime, peut également nuire aux relations entre les États.[18]

Certains auteurs proposent des formulations différentes à la place du libellé du Statut. Par exemple, Waldock propose l'expression « *principes généraux reconnus dans les systèmes juridiques des États indépendants* ».[19] Henkin, d'autre part, dit qu'une définition comme « *principes de droit commun dans les principaux systèmes juridiques du Monde* » peut être acceptée au cours de cette période.[20] Un exemple similaire est l'utilisation des « *les principes généraux de droit reconnus par l'ensemble des nations* » à l'article 15(2) du Pacte International relatif aux droits civils et politiques des Nations Unies. Au cours des négociations concernant cette disposition, l'expression « *principes généraux du droit reconnus par les nations civilisées* » a été suggérée, mais cette proposition a été rejetée par les délégués.[21]

Une proposition plus récente se trouve dans la présente étude sur les principes généraux du droit de la Commission du droit international des Nations Unies.

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15 United Nations General Assembly, *Review of the Role of the International Court of Justice: Report of the Secretary General*, A/8382 (15 September 1971) 23-25.

16 Gaja (n 10) para. 2.

17 Grigory I. Tunkin, *Theory of International Law*, William E. Butler (trans.) (Harward University Press 1974) 198.

18 Grigory I. Tunkin, 'International Law in the International System' (1975) 147 *Recueil des Cours de l'Académie de Droit International* (Sijthoff&Noordhoff, 1978) 100.

19 David J. Harris, *Cases and Materials on International Law* (6th edn., Sweet&Maxwell Ltd. 2004) 46; Clapham (n 10) 65, note 2.

20 Henkin (n 10) 61.

21 Nations Unies, *Recueil des Traités* (1976 Vol. 999) 193.

La Commission du droit international a inclus les « principes généraux du droit » dans son programme de travail en 2018 et Marcelo Vázquez-Bermúdez (Équateur) a été nommé rapporteur spécial.[22] Dans le premier rapport établi par le rapporteur spécial, une section spéciale est réservée à l'expression « nations civilisées ». En résumé, tant l'opinion générale du rapporteur[23] que l'approche des délégués de la commission dans les négociations ultérieures[24] sont que cette expression est ignorée ou du moins interprétée comme un terme faisant référence aux États en général. Dans ce contexte, selon le rapport, une formulation sous la forme de « *principes généraux de droit reconnus par les États* » semble plus préférable.[25] Dans son avant-projet, le projet de proposition du rapporteur sous le titre « *Condition de Reconnaissance* » est le suivant : « *Pour exister, un principe général de droit doit être généralement reconnu par les États.* »[26]

L'expression « nations civilisées » est également rarement utilisée dans les procédures de la Cour internationale de justice.[27] On constate que la Cour utilise des expressions telles que « le principe universellement admis devant les juridictions internationales »[28], « certains principes généraux et bien reconnus »[29], « un principe de droit bien établi et généralement reconnu »[30] lorsqu'elle se réfère aux principes généraux du droit.[31] En fait, selon Gaja, la Cour s'abstient de se référer spécifiquement aux règles de certains droits nationaux dans ses procédures, afin d'éviter d'offenser certains autres systèmes juridiques en étant considérée comme « moins civilisée ».[32] D'un autre côté, Anthony Anghie, dans son ouvrage examinant la relation entre l'impérialisme

22 Commission du droit international, *Premier rapport sur les principes généraux du droit (preparé par Rapporteur spécial Marcelo Vázquez-Bermúdez)* A/CN.4/732 (Doc. de l'ONU 2019) 55, para. 184.

23 Rapport de la Commission du droit international sur les travaux de sa soixante-dixième session, L'Assemblée générale de l'ONU Documents officiels, A/73/10 (Doc. de l'ONU 2018) 299, para. 363.

24 A/CN.4/732 (n 22) 55, paras. 185-186.

25 Commission du droit international, *Deuxième rapport sur les principes généraux du droit (preparé par Rapporteur spécial Marcelo Vázquez-Bermúdez)* A/CN.4/741 (Doc. de l'ONU 2020) 2, para. 3.

26 A/CN.4/732 (n 22) 55, para. 186.

27 Ibid 55, para. 187.

28 *Compagnie d'électricité de Sofia et de Bulgarie*, Ordonnance (Série A/B No.79, CPJI Recueil 1939) 199.

29 *Détroit de Corfou (Royaume-Uni de Grande-Bretagne et d'Irlande du Nord c. Albanie)*, Arrêt (CIJ Recueil 1949) 22.

30 *Effet de jugements du Tribunal administratif des Nations Unies accordant indemnité*, Avis Consultatif (CIJ Recueil 1954) 53.

31 Taslim Olawale Elias, *New Horizons in International Law* (2nd edn., Sijthoff and Noordhoff International Publishers 1980) 118.

32 Gaja (n 10) para. 2.

et le droit international, déclare que lorsque l'on examine les récents arrêts de la Cour, on constate que peu d'efforts sont consacrés aux systèmes juridiques et aux traditions de « États non-occidentaux ».[33]

II. OPINIONS SUR LA NÉCESSITÉ DE LA DISTINCTION CONCERNANT LES SYSTÈMES DONT DÉCOULENT LES PRINCIPES JURIDIQUES GÉNÉRAUX

On peut dire que l'expression « nations civilisées » reflète la pratique générale de l'époque où le Statut a été rédigé. Par exemple, dans la clause Martens, il est indiqué que « *En attendant qu'un code plus complet des lois de la guerre puisse être édicté, les Hautes Parties contractantes jugent opportun de constater que, dans les cas non compris dans les dispositions réglementaires adoptées par elles, les populations et les belligérants restent sous la sauvegarde et sous l'empire des principes du droit des gens, tels qu'ils résultent des usages établis entre nations civilisées, des lois de l'humanité et des exigences de la conscience publique.* »[34] Les critiques évoquées ci-dessus sont généralement liées au caractère colonial et eurocentrique de l'expression. Cependant, il est également possible de parler des points de vue avancés dans la doctrine concernant l'efficacité d'un tel critère avec une interprétation différente.

Il est à noter que surtout les juristes qui ont écrit et parlé avant la Seconde Guerre mondiale ont attribué un certain usage à ce terme. Lauterpacht définit les principes généraux du droit comme les principes généraux du droit qui peuvent être considérés comme les maximes de la science du droit, de nature privée ou publique, générale et fondamentale, issues de l'expérience juridique des nations civilisées.[35] Dans un autre endroit, il déclare expressément tenir compte du droit des nations civilisées, et non des communautés primitives, tout en décrivant la compétence de la Cour.[36] De même, on voit que Strupp[37],

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33 Anghie n'a pas hésité à préciser qu'il existe certaines exceptions. À titre d'exemple, il mentionne les efforts intenses du juge Weeramantry pour intégrer ces traditions juridiques à la jurisprudence de la Cour. Voir Anghie (n 6) 111. Dans son opinion séparée dans l'affaire Gabcikovo-Nagymaros, Weeramantry apporte des exemples de différentes civilisations à la décision de la Cour concernant la durabilité du développement en protégeant l'environnement. Voir Opinion individuelle de M. Weeramantry, *Projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie)* Arrêt, (CIJ Recueil 1997) 88-119.

34 James Brown Scott, *The Hague Peace Conferences of 1899 and 1907, Volume II – Documents* (The John Hopkins Press 1909) 110.

35 Hersch Lauterpacht, *International Law - Being the Collected Papers of Hersch Lauterpacht - Vol. I - The General Works*, Elihu Lauterpacht (Ed.) (Cambridge University Press 1978) 69.

36 Hersch Lauterpacht, 'Droit de la Paix' (1937) 62 *Recueil des Cours de l'Academie de Droit International* (Librairie du Recueil Sirey 1938) 164.

37 Karl Strupp, 'Justice Internationale et Équité' (1930) 33 *Recueil des Cours de l'Académie de Droit International* (Librairie du Recueil Sirey 1931) 450.

Le Fur[38] et Verdross[39] mettent également l'accent sur civilisé, mais il est à noter que les trois auteurs – et surtout Verdross – ont utilisé l'expression « *États civilisées »* au lieu de « nations civilisées ».[40]

Comme l'un des arguments -auquel l'auteur de cette étude a également participé- concernant la nécessité d'attribuer un sens à cette expression dans le Statut, on peut citer le « principe de l'effet utile ».[41] Les deux statuts ont été ratifiés et signés par les États qui constituent la grande majorité du monde. Dans ce cas, il semble approprié, au regard de la technique d'interprétation des traités, de donner un certain effet à ces expressions. Dans un tel cas, il serait possible de prévoir une utilisation bénéfique. En outre, une interprétation qui rendra l'expression opérative et sera acceptée par les parties au Statut, permettra d'appliquer le sens que les parties veulent lui donner, conformément aux règles d'interprétation des traités.[42]

En particulier, les régimes totalitaires qui ont émergé avant la Seconde Guerre mondiale et les destructions qui ont suivi la guerre ont conduit à la propagation de la croyance dans tout le continent que les États perçus comme civilisés pouvaient également être transformés. Comme on peut s'y attendre, l'exemple le plus commun donné à cet égard est celui des régimes national-socialiste/fasciste. À ce stade, l'avis consultatif de la Cour permanente de Justice internationale sur la « Compatibilité de certains décrets-lois Dantzikois avec la constitution de la Ville libre »[43] (ou décrets-lois Dantzikois en abrégé) de 1935 peut être donné à titre d'exemple.

Dans cette affaire, la Cour a été saisie par le Conseil de la Société des Nations d'un avis consultatif sur la constitutionnalité des deux décrets pris

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38 Louis le Fur, 'Droit International de la Paix' (1935) 54 *Recueil des Cours de l'Academie de Droit International* (Librairie du Recueil Sirey 1936) 205.

39 Alfred Verdross, 'Droit International de la Paix' (1929) 30 *Recueil des Cours de l'Academie de Droit International* (Librairie Hachette 1931) 302.

40 Selon Bin Cheng, l'expression "nations" a progressivement été comprise comme "États", et l'expression "civilisés" devient redondante car tout État membre de la communauté internationale serait directement considéré comme "civilisé". Voir Cheng (n 10) 24-25.

41 Fabian O. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (PhD Thesis, Amsterdam Center for International Law (ACIL) 2007) 56. Voir Oliver Dörr, 'Interpretation of Treaties' in Oliver Dörr and Kirsten Schmalenbach (Ed.), *Vienna Convention on the Law of Treaties - A Commentary*, (Springer 2012) ; Ümit Barış Bayındır, *Milletlerarası Andlaşmaların Evrimsel Yorumlanması* (On İki Levha 2021) 11.

42 *Convention de Vienne sur le droit des traités*, 1969, L'Article 31/4 : « Un terme sera entendu dans un sens particulier s'il est établi que telle était l'intention des parties. » (Nations Unies, Recueil des Traités 2005) 134.

43 *Compatibilité de certains décrets-lois dantzikois avec la constitution de la Ville libre*, Avis Consultatif (Série A/B No. 65, CPJI Recueil 1935).

par l'Assemblée de Dantzig. La Cour a déclaré qu'en matière de restriction des libertés des individus, la condition d'être réglementé par la loi est stipulée dans la Constitution. Les décrets précités, en revanche, créent une marge d'appréciation arbitraire pour le juge, qui n'est pas réglementée par la loi.[44] D'autre part, selon la Cour, deux perspectives et approches différentes sont possibles en termes de répression du crime. En abordant la question en termes de protection de l'individu contre l'Etat, le principe de *«* pas de peine sans loi *»* (*nulla poena sine legem*) sera pris comme base. Si l'objectif est de protéger la société contre le coupable, le principe « pas de crime sans punition » (*nullum crimen sine poena*) s'imposera. La Cour a déclaré que la Constitution de Dantzig était fondée sur la première approche. A cet égard, selon la Cour, les décrets en question sont incompatibles avec les droits individuels que la Constitution cherche à protéger.[45]

Si une évaluation est faite sur cette décision, il est clair que certains des principes de droit pénal apportés par le R*égime* Nazi n'étaient pas des principes « reconnus par les nations civilisées » selon la Cour.[46] Cette situation révèle la nécessité de distinguer les principes reconnus par les nations ou les États.

Hudson, Cheng et Virally associent l'expression « nations civilisées » à la sophistication du système juridique. Hudson, se référant à LaPradelle, fait remarquer que puisque toutes les nations sont civilisées, et que droit signifie civilisation, cette référence ne peut servir qu'à exclure les systèmes juridiques primitifs.[47]

L'arbitrage pétrolier d'Abu Dhabi de 1951[48] s'impose comme un exemple célèbre de distinction relative entre des règles de droit « civilisées » en termes de sources de droit à appliquer. Lord Asquith of Bishopstone, l'arbitre nommé pour trancher le différend en question, devait déterminer la loi à appliquer en premier. L'arbitre a déclaré la loi d'Abou Dhabi, qui à première vue semblait devoir être appliquée, inapplicable en l'occurrence pour le raisonnement suivant, entre autres.

> *« Quelle est la « Loi proprement dite » applicable dans l'interprétation de ce contrat ? Il s'agit d'un contrat conclu à Abu Dhabi et entièrement à exécuter dans ce pays. Si un système de droit municipal était*

44 Décrets-lois Dantzikois, Série A/B No. 65 (n 43) 56.

45 Ibid 56-57.

46 Degan (n 1) 70.

47 Manley O. Hudson, *Permanent Court of International Justice 1920-1942 - A Treatise* (The Macmillan Company 1943) 610 ; Cheng (n 10) 25 ; Michel Virally, 'The Sources of International Law' in Max Sørensen (Ed.), *Manual of Public International Law* (Palgrave McMillan 1968) 144.

48 Rudolf Dolzer, 'Abu Dhabi Oil Arbitration' in Rudolf Bernhardt (Ed.), 2 *Encyclopedia of Public International Law* (North Holland – Elsevier 1981) 1-2.

> *applicable, ce serait à première vue celui d'Abou Dhabi. Mais on ne peut raisonnablement dire qu'une telle loi existe. Le Cheikh administre une justice purement discrétionnaire avec l'aide du Coran ; et il serait fantaisiste de suggérer que dans cette région très primitive, il existe un ensemble établi de principes juridiques applicables à la construction d'instruments commerciaux modernes. Je ne vois pas non plus de base sur laquelle le droit interne anglais s'appliquerait. Au contraire, l'article 17 de l'accord, cité ci-dessus, repousse l'idée que le droit interne de tout pays, en tant que tel, serait approprié. Les termes de cette clause invitent, voire prescrivent, l'application de principes enracinés dans le bon sens et la pratique courante de la généralité des nations civilisées - une sorte de « droit moderne de la nature ».*[49]

Au lieu du droit interne, l'arbitre a appliqué les principes du *droit commun*, qu'il a appelé une sorte de « *droit moderne de la nature* ». Cheng pense que ces règles que l'arbitre a appliquées sont en fait des *«* principes généraux de droit *».*[50] Certains auteurs affirment que cette pratique de l'arbitre doit être comprise comme l'utilisation de la notion de « nations civilisées » dans la détermination de « systèmes juridiques suffisamment matures ».[51]

Sionhe Yee, en revanche, a abordé cette question sous un angle différent. À son avis, même s'il est supposé que l'arbitre a effectué le travail nécessaire sur le système actuel à Abu Dhabi et se justifie en l'absence de règles juridiques à utiliser ; ce qui est vrai, c'est que le système en question a été évité non parce qu'il était « primitif et non civilisé » mais « parce qu'il ne contenait pas les règles nécessaires ». Parce qu'aucun système ne peut être suffisamment sophistiqué pour inclure des règles et des principes permettant de résoudre toutes sortes de problèmes. De plus, les systèmes locaux peuvent parfois apporter des solutions beaucoup plus spécifiques aux problèmes des habitants. Dans ce cas, le fait qu'il ne contienne pas les normes à appliquer dans une matière concrète ne rend pas automatiquement un système « primitif ou non civilisé ». À cet égard, selon Yee, il faut être prudent de se référer à une telle décision, qui est intervenue 30 ans après la rédaction du Statut de la Cour permanente de justice internationale, dans le contexte du fondement du critère des « nations civilisées ».[52]

Si une contribution est faite à l'auteur à ce stade ; Il est clair que l'acceptation d'un critère de « civilisation » avec des motifs péjoratifs ne semble pas possible

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49 Wolfgang Friedmann, 'The Uses of 'General Principles' in the Development of International Law' (1963) 57(2) The American Journal of International Law 283-284.

50 Cheng (n 10) 25.

51 Voir Aust (n 10) 8; Boas (n 9) 105; Hugh Thirlway, 'Sources of International Law' in Malcolm D. Evans (Ed.) *International Law* (Oxford 2003) 131; Ademola Abass, *Complete International Law: Text, Cases and Materials* (2nd edn., Oxford University Press 2014) 49.

52 Yee (n 3) 28-29.

compte tenu de la structure du droit international constituée d'États souverains égaux. De ce point de vue, il est également important de savoir comment le critère à prendre comme base en pratique est atteint.

En dehors de la discussion ci-dessus, il est également nécessaire de mentionner l'existence d'auteurs qui, avec des arguments différents, pensent que l'expression « nations civilisées » devrait toujours être un critère valable. Par exemple, les États qui pratiquent encore aujourd'hui la torture et soutiennent le terrorisme ne seraient pas considérés comme civilisés comme l'indique le Statut et à cet égard, on peut dire qu'il est nécessaire de s'entendre sur un nouveau concept de « civilisation ».[53]

Selon un autre point de vue, bien que le terme "nations civilisées" porte l'arrogance européenne à la date de rédaction du Statut, l'expression "civilisée" a acquis de nouvelles significations à la suite du choc subi par les nations européennes avec l'expérience de la Guerres mondiales et Nazisme. Ces expériences ont montré que les États peuvent changer et qu'une nation autrefois admirée peut finir par sombrer dans la barbarie et le crime. A cet égard, les principes avancés par ces nations (il convient également de rappeler l'avis consultatif de la ville libre de Dantzikois ci-dessus) ne seront pas acceptés comme principes communs des nations civilisées. De même, les pays qui pratiquent le nettoyage ethnique dans la région qu'ils dominent ou où l'organisation étatique s'est effondrée ne peuvent être considérés comme des nations ou des États ayant les qualifications requises pour être efficaces dans la détermination des principes généraux du droit.[54]

III. SUGGESTIONS POUR L'EFFICACIT*É* DU TEXTE STATUTAIRE ET *É*TUDE DE DROIT COMPAR*É* DANS LA D*É*TERMINATION DES PRINCIPES G*É*N*É*RAUX DE DROIT

En ce qui concerne les décisions de la Cour internationale de Justice et de la Cour internationale permanente de Justice, il n'est pas clair si la distinction entre « nations civilisées » joue un rôle dans la détermination des principes généraux du droit. Comme indiqué précédemment, selon Gaja, la Cour s'abstient de se référer spécifiquement aux règles de certains droits nationaux dans ses procédures, afin d'éviter d'offenser certains autres systèmes juridiques en étant considérée comme « moins civilisée ».[55] Cependant, l'article 9, qui est commun aux Statuts des deux Cours, peut guider la disposition de 38/1-c pour gagner en sens. L'article 9 du Statut est ainsi libellé :

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53 Benedetto Conforti and Angelo Labella, *An Introduction to International Law* (Martinus Nıjhoff Publishers 2012) 40; Raymond Ranjeva and Charles Cadoux, *Droit International Public* (Edicef 1992) 63.

54 Christian Tomuschat, 'General Course on Public International Law' (2001) 281 *Recueil des Cours de l'Académie de Droit International* (Martinus Nijhoff Publishers 2001) 337-338.

55 Gaja (n 10) para. 2.

> *« Dans toute élection, les électeurs auront en vue que les personnes appelées à faire partie de la Cour, non seulement réunissent individuellement les conditions requises, mais assurent dans l'ensemble la représentation des grandes formes de civilisation et des principaux systèmes juridiques du monde. »*

L'interprétation conjointe des termes du Statut « *grandes formes de civilisation » et « nations civilisées » sera également conforme à la règle* générale d'interprétation de la Convention de Vienne sur le droit des traités[56], dans le contexte de l'intégrité du texte. Avec une interprétation à la lumière de ces termes, il est possible de conclure que les rédacteurs du Statut n'ont pas eu l'intention de faire une distinction civilisée et non civilisée, mais d'appliquer les principes généraux du droit acceptés dans « les *grandes formes de civilisation et des principaux systèmes juridiques du monde »*. Une telle interprétation peut être vue comme la transformation d'une formulation superficiellement exclusive en une formulation puissamment efficace et inclusive.[57]

Il conviendrait de dire que la condition de l'article 9 du Statut a également été confirmée en ce qui concerne la composition de la Cour actuelle.[58] En attirant l'attention sur cet article, Virally *déclare qu'il peut être conclu que tout principe que tous les juges de la Cour sont prêts à accepter comme le « principe général du droit » est « reconnu par les nations civilisées ». L'auteur a également souligné que ce système de la Cour internationale de justice, qui repose sur l'acceptation de principes généraux par les juges, plutôt que sur une large revue de droit comparé, est une méthode pragmatique en termes de pratique.*[59]

Cependant, il convient de noter qu'il existe l'opinion selon laquelle un principe général de droit qui sera utilisé dans un cas spécifique ne doit pas nécessairement avoir une apparence identique dans tous les systèmes

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56 *Convention de Vienne sur le droit des traités*, 1969, L'Article 31/1 : « Un traité doit être interprété de bonne foi suivant le sens ordinaire à attribuer aux termes du traité dans leur contexte et à la lumière de son objet et de son but. » (Nations Unies, Recueil des Traités 2005).

57 John H. Currie, *Public International Law* (2nd edn., Irwin Law 2008) 102 ; Schwarzenberger (n 7) 44.

58 Au 31 juillet 2021, la composition de la Cour était donc la suivante : Joan E. Donoghue (États-Unis), Présidente ; Kirill Gevorgian (Fédération de Russie), Vice-Président ; Peter Tomka (Slovaquie), Ronny Abraham (France), Mohamed Bennouna (Maroc), Antônio Augusto Cançado Trindade (Brésil), Abdulqawi Ahmed Yusuf (Somalie), Xue Hanqin (Chine), Julia Sebutinde (Ouganda), Dalveer Bhandari (Inde), Patrick Lipton Robinson (Jamaïque), Nawaf Salam (Liban), Yuji Iwasawa (Japon) et Georg Nolte (Allemagne), juges. Voir *Rapport de la Cour internationale de Justice* 2020-2021, Assemblée générale Documents officiels (Nations Unies 2021) 13.

59 Virally (n 47) 146.

juridiques.[60] Gutteridge, écrivant sur le droit comparé, est d'avis que le point clé ici est que le principe à retenir est substantiellement ancré dans les principaux systèmes juridiques et n'est pas appliqué d'une manière qui nuit à l'un de ces systèmes lors de son application.[61]

À ce stade, il peut être utile de mentionner brièvement une discussion secondaire : lors de l'adoption du Statut en 1920, Lord Phillimore a déclaré qu'il comprenait les principes du droit général « *acceptés par toutes les nations in foro domestico* ».[62] A ce jour, il semble pratiquement difficile d'inclure toutes les nations dans une telle évaluation. Van Hoof, d'autre part, attribue cette déclaration de Lord Phillimore au fait que le nombre d'États à cette époque était petit par rapport à aujourd'hui et présente une apparence homogène. De ce point de vue, l'auteur précise que ces États aux vues similaires se considèrent comme « civilisés » et les autres États qu'ils excluent du système comme « non civilisés ». A ce jour, à la fois le nombre d'États a augmenté et une structure hétérogène a émergé. Remplir la condition d'être accepté par « toutes les nations » comme l'exprimait Lord Phillimore et trouver des principes communs serait une interprétation stricte et c'est devenu très difficile.[63] Il est possible d'interpréter l'expression de LaPradelle *« l'unanimité ou la quasi-unanimité »* en interprétant ainsi le plan Root-Phillimore.[64]

Enfin, on peut citer les exemples dans lesquels sont donnés les noms de « grandes civilisations et grands systèmes juridiques » à utiliser comme ressources matérielles *:*

Par exemple, dans l'affaire du Droit de passage sur le territoire indien, Portugal a fourni un rapport comparatif sur l'existence de ce droit qui comprend les réglementations pertinentes du droit civil (dans ses branches de droit romain et allemand), la common law, le droit des républiques socialistes populaires, droit islamique, droit scandinave et droit asiatique.[65]

Les vues du juge Ammoun sur l'origine du principe d'équité sont également remarquables :

> *« Intégré dans les grands systèmes juridiques du monde moderne auxquels fait allusion l'article 9 du Statut de la Cour, le principe d'équité*

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60 Voir H. C. Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (Cambridge University Press 2015) 65 ; Friedmann (n 49) 284-285 ; Degan (n 1) 70-71.

61 Gutteridge (n 60) 65.

62 Procès-Verbaux (n 2) 335.

63 G.J.H. Van Hoof, *Rethinking the Sources of International Law* (Kluwer Academic Publishers, 1983) 141.

64 Procès-Verbaux (n 2) 336.

65 Hermann Mosler, 'General Principles of Law' in Rudolf Bernhardt (Ed.), 7 *Encyclopedia of Public International Law* (North-Holland – Elsevier 1984) 99.

se manifeste dans le droit de l'Europe occidentale et de I'Amérique latine, héritières directes du jus gentium romano-méditerranéen; dans la common law tempérée et complétée par I'equity dite accessoire, dans le droit musulman que fondent sur I'équité, et plus particulièrement sur son équivalent qu'est l'égalité, le Coran et l'enseignement des quatre grands jurisconsultes de I'lslam condensé dans la Sharia et comportant, parmi les sources du droit, l'lstihsan, autorisant les jugements d'équité: le droit chinois, avec la primauté de la loi morale et du sens commun de l'équité, en accord avec la philosophie marxiste-léniniste, le droit soviétique, qui fait place nettement aux préoccupations d'équité; le droit hindou qui convie « l'individu à agir et le juge à statuer selon sa conscience, selon la justice, selon l'équité, si aucune autre règle de droit ne s'impose à eux »; enfin le droit des autres pays d'Asie et des pays d'Afrique dont les coutumes incitent particulièrement le juge à ne pas s'écarter de I'équité et dont les Européens ont souvent méconnu « le rôle conciliateur et la nature équitable »; coutume dont est né un jus gentium constitué conjointement avec les règles de la common law dans les anciennes possessions anglaises, les lacunes étant à combler « suivant la justice, l'équité et la conscience »; et, dans les anciennes possessions françaises, avec le droit de l'Europe occidentale imbu de droit romain. »[66]

De même, comme le dit Bederman, *« Lorsque l'article 38 parle de « nations civilisées », il fait référence à des juridictions embrassant la tradition de la common law (le Royaume-Uni et ses anciennes colonies, ainsi que les États-Unis), le droit civil dérivé du droit romain antique (prévalent dans toute l'Europe continentale, l'Amérique latine et la plupart des pays d'Afrique et d'Asie), d'importantes cultures juridiques religieuses (y compris le droit islamique) et des systèmes juridiques idéologiques (y compris le droit socialiste tel qu'il est pratiqué en Chine et ailleurs)*. » Selon l'auteur, suggérer qu'un principe général de droit est contraignant en droit international nécessite un examen des principaux systèmes juridiques du monde et des références à ce principe dans autant de lois nationales que possible. La simple citation d'une maxime juridique latine ne suffira pas.[67]

CONCLUSION

Pour résumer, c'est une pensée qui a trouvé un appui sérieux dans la doctrine selon laquelle l'expression « nations civilisées » est un vestige de la période coloniale, notamment en termes de son origine. Cependant, l'expansion de

66 Op. Ind. de M. Fouad Ammoun (n 12) 139-140.

67 David J. Bederman, *International Law Frameworks* (3rd edn., Foundation Press 2010) 14.

la communauté internationale au fil du temps a amené deux interprétations différentes de ce concept :

Premièrement, l'expression « nations civilisées » a été jugée inacceptable lorsqu'elle est considérée en accord avec la conception eurocentrique et colonialiste dominante de la période allant jusqu'au début du 20e siècle. Une distinction artificielle centre-périphérie ou civilisé-non-civilisé entre les États qui composent les Nations Unies est contraire à l'esprit du système. De plus, étant donné que presque tous les auteurs sur le sujet ressentent le besoin d'expliquer ou de critiquer ce concept, on peut dire que c'est un concept qui peut causer de l'inconfort. Il est prévisible que les États et les nations qui ont été exposés à l'expérience du colonialisme seront plus sensibles à cet égard.

En revanche, le critère d'être « reconnus par les nations civilisées » dans le Statut peut devenir utile selon le sens à donner ou l'interprétation à en faire. Par exemple, il n'est pas possible pour la communauté internationale de prendre en compte certains des principes avancés par un État qui maintient la discrimination raciale dans sa politique officielle.[68] De plus, en tant qu'expérience du régime nazi, il n'est peut-être pas possible de classer certaines nations comme « civilisées » à chaque période, juste par leur nom. Dans ce cas, l'expression « nations civilisées » peut être utilisée comme critère de détermination de principes dans des cas concrets, sans offenser les États membres de la communauté internationale.

Lorsque l'on considère la Cour internationale de justice, le fait que les membres viennent de différentes parties du monde facilitera l'acceptation d'un principe convenu. D'une part, l'application d'un principe général de droit en tant que règle de droit international obligatoire en comptant un nombre limité de systèmes et de traditions juridiques peut entraîner certaines difficultés ; mais d'autre part, une étude de droit comparé dans laquelle les systèmes juridiques de tous les États et sociétés sont examinés séparément semble difficile dans la pratique. Si la répartition équitable des juges de la Cour internationale de Justice, telle que stipulée à l'article 9 du Statut de la Cour, est assurée, le consensus atteint sur cette question pourra produire des résultats effectifs.

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[68] Tomuschat (n 54) 338. Voir aussi les commentaires du juge Tanaka dans son opinion dissidente dans l'affaire du Sud-Ouest africain : Opinion Dissidente de M. Tanaka, *Sud-Ouest africain (Ethiopie c. Afrique du Sud), Deuxième phase*, Arrêt, (CIJ Recueil 1966) 250-324.

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LIMITING/DISSOLVING POLITICAL PARTIES DUE TO TERRORISM: NATIONAL RESPONSES OF THE UK, SPAIN, AND TURKEY UNDER THE REVIEW OF THE ECtHR

Terörizm Gerekçesiyle Siyasi Partilerin Kapatılması/Sınırlandırılması: AİHM İncelemesi Işığında Birleşik Krallık, İspanya ve Türkiye'nin Tedbirleri

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ABSTRACT

Political parties are the main players in a democratic system with a multi-party system. The fundamental principles of democracy consist of free election, the right of criticism, and the right to organise political opposition. However, democracy provides available ground for party politics to abuse or misuse democratic institutions and procedures to harm or overturn democracy. In some cases, political parties aim to replace a democratic regime with their non-democratic ideology. For instance, a political party advocates violence or aims to overthrow the existing constitutional order through armed struggle, terrorism, or subversive activity. So, political parties might also play a role in causes of terrorism. From past to present, many examples can be founded that political parties have involved in or created terrorist organisations, based on different types of relationships. National authorities have adopted measures against such relationships through restricting or dissolving political parties. The United Kingdom, Spain and Turkey are some of these countries that have developed different approaches to interfere with the linkage between political parties and terrorist organisations (the Irish Republican Army (IRA), Basque Homeland and Freedom (ETA) and Kurdistan Workers' Party (PKK)), within the democratic system. This study analyses the legal framework established by these countries and the European Court of Human Rights against such linkages.

Key Words: Limiting/Dissolving Political Parties, Terrorism, the ECtHR

ÖZET

Siyasi partiler temel ilkeleri özgür seçim, eleştiri hakkı ve siyasi muhalefetin örgütlenme hakkı olan demokrasinin ana oyuncularıdır. Fakat bununla birlikte, demokrasi, demokratik kurum ve prosedürleri suiistimal ederek veya kötüye kullanarak demokrasiye zarar vermeyi veya devirmeyi amaçlayan siyasi partiler için uygun zeminde sağlamaktadır. Bazı durumlarda, siyasi partiler demokratik bir rejimi demokratik olmayan ideolojileriyle değiştirmeyi amaçlamaktadır. Buna özellikle, şiddeti, silahlı mücadele, terörizm veya yıkıcı faaliyetler

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yoluyla mevcut anayasal düzeni devirmeyi amaçlayan siyasi partiler dahildir. Dolayısıyla siyasi partiler terörün sebeplerinde de rol oynayabilirler. Geçmişten günümüze siyasi partilerin farklı ilişki biçimlerine dayalı olarak terör örgütlerine dahil oldukları veya oluşturdukları birçok örnek bulunmaktadır. Ulusal makamlar, siyasi partileri sınırlayarak veya kapatarak bu tür ilişkilere karşı önlemler almıştır. Birleşik Krallık, İspanya ve Türkiye demokratik sistem içerisinde siyasi partiler ve terör örgütleri (İrlanda Cumhuriyet Ordusu (IRA), Bask Yurdu ve Özgürlük (ETA) ve Kürdistan İşçi Partisi (PKK)) arasındaki bağlantıya yönelik olarak farklı yaklaşımlar geliştiren örnek ülkelerdir. Bu çalışma söz konusu ülkelerin ve Avrupa İnsan Hakları Mahkemesinin bu tür bağlantılara karşı oluşturduğu yasal çerçeveyi ele almaktadır.

Anahtar Sözcükler: Siyasi Partilerin Kapatılması/Sınırlandırılması, Terörizm, AİHM

INTRODUCTION

Global recognition of democracy has been achieved since 1950s as the best way of forming a government to rule a country. Democratic states and societies which provide rights to frame their association to fulfill common aims with the freedom to participate or not, to associations such as trade unions, religious association, political parties, and any many other associations have been assured under their constitutions.[1] The main political players in a democratic system are the political parties and their activities based on a multi-party system. In a democratic society, public debate must be widespread and political parties should be free to discuss the country's issues without interference.

The freedom of association has not only the democratic meaning, but also it might be restricted for the reason of the irresponsible and dangerous exploitation of democracy by violent nature.[2] In a democratic system, political parties have some limits in their activities. Political parties possess the right to advocate changing politics, constitution, and the law of the country, but to what extent do they have these rights? For example, their rights such as changing laws cannot be fully illegal and anti-democratic.[3]

Dissolving a political party not for any reason to do with criminal activities but for their ends and methods is incompatible with democracy. More strikingly, restricting or dissolving a political party might be seen as a way of protecting the democratic system against associations that have undemocratic aims or advocate the use of violence.[4] In this study, political parties are considered as a prerequisite for democracy, but they are also considered as actors that may play a role in

1 White, Jacobs and Ovey, The European Convention on Human Rights, (Fifth ed., OUP 2010)

2 Jean-Francois Flauss, `The European Court of Human Rights and the Freedom of Expression` (2009) 84 Indian Law Journal 809, 810

3 Leslie Turano, `Spain: Banning Political Parties as a response to Basque Terrorism` (2003) 1 INT'L J.CONST. L. 730, 736

4 Kapani Munci, Kamu Hurriyetleri, (Ankara Universitesi Hukuk Fakultesi Yayini 1981) 192-193; See Erdogan Teziç, `100 Soruda Siyasi Partiler` (Gercek Yayinevi, Istanbul 1976) 131-133.

causes of terrorism. From past to present, there are many examples that political parties have involved in or created terrorist organisations, based on different types of relationship. National authorities have responded to such relationships through restricting or dissolving political parties. Here interfering political parties due to terrorism has been the case in the United Kingdom, Spain, and Turkey that will be analysed. These countries have developed different approaches responding to the linkage between political parties and terrorist organisations such as the Irish Republican Army (IRA), Basque Homeland and Freedom (ETA) and Kurdistan Workers' Party (PKK), respectively, with restrictions on and dissolution of political parties. The European Court of Human Rights (hereinafter the ECtHR) reviewed their responses in the scope of the European Convention on Human Rights (hereinafter the Convention).

I. RESTRICTING/DISSOLVING POLITICAL PARTIES IN DEMOCRACIES

Democracy is described as an open and never-ending process in which the freedom of all citizens should be accomplished.[5] The fundamental principles of democracy consist of free election, the right of criticism, and the right to organize political opposition.[6] Teziç defines 'political parties' as a constant formation intends to obtain and utilize the political competence and struggles to ensure the support of the people in this regard.[7] Katz states that political parties play two main roles that, they perform the function of interest articulation through their manifestos and propaganda.[8] First, they act as 'speakers' of themselves, citizens, and other interest articulators. They voice up or facilitate desires, demands, aspirations, fears, or expression of citizens and any social, economic, cultural organizations. Second, they perform the function of interest aggregation and then being held accountable, as the agents of the electorate in the process of governing.

However, the characteristic of democracy provides available ground for the activities of groups and individuals who want to harm or overturn democracy by abusing or misusing democratic institutions and procedures such as free elections, freedom of speech, and freedom of association. Political parties

5 Resolution 1547, 'State of Human Rights and Democracy in Europe', adopted by the Assembly on 18 April 2007 (15th Sitting), para. 42.

6 Jure Vidmar, `Multiparty Democracy: International and European Human Rights Law Perspective` (2010) 23 Leiden Journal of International Law 209-240

7 Erdogan Teziç, Anayasa Hukuku (20. Baskı Beta 2016) 375; There are different definitions for political parties. See also, Ensar Yılmaz, `Sociology of Political Parties' Closure Regime` (2009) 3 African Journal of Business Management 831, 831

8 Richard S. Katz, 'Democracy, and the Legal Regulation of Political Parties', in Ingrid van Biezen & Hans-Martien ten Napel (eds.), Regulating Political Parties European Democracies in Comparative Perspective (Leiden University Press, 2014) 19

might, in some cases, aim to replace a democratic regime or change the rules of democracy with the intention of introducing their non-democratic ideology. The Parliamentary Assembly of the Council of Europe has often referred to the rise of non-democratic and extremist parties and movements as a common threat to fundamental values.[9] Such extremist political activities are very often based on ideology and its political practices and conducts intolerance, exclusion, xenophobia, anti-Semitism, and ultra-nationalism.[10] The Venice Commission noted that "dissolution of political parties may only be justified in the case of parties which advocate the use of violence or use violence as a political means…"[11] As a result, restriction on or dissolution of political parties can be justified only if it is needed by a democratic society, with concrete evidence that reveals a party is engaged in activities threatening democracy and fundamental freedoms. This includes only a political party advocates violence or aims to overthrow the existing constitutional order through armed struggle, terrorism, or subversive activity.[12] Accordingly, the Venice Commission adopted a set of guidelines on the dissolution of political parties: they can be restricted if they advocate violence in their programme and/or activities.[13] The grounds for restrictions on democratic rights must also be relevant, sufficient, persuasive, and narrowly interpreted, with consideration of the balance between rights and exceptions.[14]

The ECtHR has mainly adopted a liberal democratic approach against limiting and dissolving political parties in the context of Article 9(2), 10(2) and 11(2) of the European Convention on Human Rights in many cases. If a political party aims to destroy the rights and freedoms of others and exploit anti-democratic ideology, article 17 of the Convention aims to prevent totalitarian movements from using human rights as a vehicle for their causes.[15]

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9 Council of Europe, Parliamentary Assembly Resolution 1344 (2003)1 Threat Posed to Democracy by Extremist Parties and Movements in Europe

10 Council of Europe, Parliamentary Assembly Resolution 1344 (2003)1 Threat Posed to Democracy by Extremist Parties and Movements in Europe

11 Venice Commission, `European Commission for Democracy through Law Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures` (Strasbourg, 10 January 2000) 3

12 Venice Commission Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures Adopted by the Venice Commission at its 41st plenary session (Venice, 10 – 11 December 1999) para 10

13 Venice Commission, Guidelines on Political Party Regulation by Osce/Odihr and Venice Commission Adopted by the Venice Commission at its 84th Plenary Session, (Venice, 15-16 October 2010)

14 Steven Greer, Exceptions to Articles 8-11 of the European Convention on Human Rights (Council of Europe 1997) 15

15 Paul Harvey, 'Militant democracy and the European Convention on Human Rights` (2004) 29 European Law Review 407, 411-2

According to the ECtHR, it is the duty of the respondent state to demonstrate the existence of the pressing social need behind given interference.[16] In other words, in order to restrict or to dissolve political parties, their interventions must meet `pressing social need` as set out by the ECtHR in that there must be (1) a risk of destruction of democracy; (2) reasonable evidence that proves the risk to democracy; (3) acts and speeches of the leaders and members of the political party which can be attributable to the party as whole, and (4) these acts and speeches structured a whole which gave a picture of a model of society defended by the party which is not compatible with the concept of democracy.[17] The ECtHR has only agreed with preventative measure of the states to prevent a political party from the destruction of human rights and democracy before it takes steps to implement a policy which is incompatible with the standards of the Convention and democracy.[18]

Furthermore, national authorities might have different approaches in terms of restricting political parties through their national law due to different understandings of human rights and democracy. Democratic countries have two broad models of responses to violent anti-system threats. One is a tolerant approach prioritising freedom of expression/association and greater political inclusion of extremists in democratic processes. Other is intolerant and suppressive approach to use more repressive legislative measures based on protecting the substantive values of democracy.[19] Unsolicited political actors might find a place in society to grow, or just to remain as a small minority that holds this political stance. These two different political scenarios create two main questions. First, if only a small minority holds unsolicited views, then why bother banning a political party when there are advantages to be gained by legitimizing this small group and absorbing them into the system? Second, if a large group espouses these views, then again, what is the point of banning them as a political group?[20] Democratic systems in different counties have found different answers for these questions. Some countries such as Turkey, Italy, Germany, Poland, Spain, and France have legitimized dissolution of

16 Donna Gomien, Short Guide to the European Convention on Human Rights (3th Ed, Council of Europe Publishing 2005) 76

17 Olgun Akbulut, `The State of Political Participation on Minorities in Turkey – an Analysis under the ECHR and the ICCPR` (2005) 12 The International Journal on Minority and Group Rights 375, 385

18 Refah Partisi (The Welfare Party) and others v. Turkey, Application no: 41340/98, 41342/98, 41343/98 (ECtHR 13.2.2003) para 102

19 Matthew Whiting, Sinn Féin and the IRA: From Revolution to Moderation (Edinburgh University Press 2018) 126

20 Yigal Mersel, `The dissolution of political parties: The problem of internal democracy` (2006) 4 International Journal of Constitutional Law 84, 92

political parties through constitutional or legislative mechanisms.[21] Some other countries such as the United States or United Kingdom do not need to dissolve such parties because of the weakness of the extremist veins and the strong homogeneity of society.[22] In this context, countries have developed various approaches to response to the political parties that have linkages with terrorism.

II. THE LINKAGE BETWEEN POLITICAL PARTIES AND TERRORISM

The image of political parties has a distinct liberal democratic bias, and almost always linked to the electoral process and the selection of candidates for public office.[23] They are mostly regarded as pursuing their goals through legitimate and non-violent means.[24] Yet this is a stereotype that has not been confirmed through the history of political parties since the 18th century.[25] Terror was embedded in the nineteenth century, in the years following the end of the Napoleonic era, various secret societies organised for the purpose of keeping alive the goals of the French Revolution, violent opposition to monarchism and support for national unification.[26] For instance, groups associated with political parties were dedicated to the overthrow of monarchy by the doctrine of "Governments were to be overthrown by rebellion and assassination".[27] When we look at the inter-war period between 1919 and 1939, European party politics were frequently militarized or para-militarized due to the atmosphere created by World War I, the Bolshevik Revolution and the Great Depression.[28] Paramilitary organisations were created by socialist, communist and fascist political parties in pre-Fascist Italy, Weimar Germany, Austria, and Russia, to advance their cause by means of other than the ballot box and other institutions of parliamentary democracy.[29] Party politics have kept its close ties with terrorism even today, but the relationship between political party activities and terrorism has been eliminated in Western and Central Europe after World War

21 Ibid

22 Robert A. Dahl, The American Oppositions: Affirmation and Denial, in Political Opposition in Western Democracies (Yale Univ. Press, 1968) 34

23 Alan Ware, Political Parties and Party Systems (New York: Oxford University Press 1996) 3.

24 Ibid

25 See. Leonard Weinberg, Ami Pedahzur and Arie Perliger, Political Parties and Terrorist Groups (Routledge 2008)

26 Walter Laqueur, A History of Terrorism ((Third Ed.) Boston, MA: Little, Brown & Co 2002) 3-21.

27 Martin Miller, 'The Intellectual Origins of Modern Terrorism in Europe' in Martha Crenshaw (ed.), Terrorism in Context (University Park, PA: Pennsylvania University Press 1995) 33.

28 Weinberg (n 25) 11.

29 Weinberg (n 25) 41.

II. Yet in developing and third world countries, after World War II, political parties played a major role for the cause of national liberation, while expelling British, French, and other European colonial powers.[30] In such countries, "all the main political parties had their private armies . . ."[31] Political parties and political violence including terrorism have emerged at the same time with mutual interaction.

Any group of people might rely on terrorist violence as its primary means of political expression as a "terrorist group". A political group may exercise terrorism in conjunction with other forms of political activities.[32] The linkage between terrorist violence and party politics might be established with interactions instigated by one group, to control another. Or they may be reciprocal with the actions of two (or more) groups influencing each other's behaviour.[33] This linkage occurs in different forms with various scenarios. An instance among many,[34] a terrorist organisation for its own aims and allegations may find it advantageous to develop a "political wing," to "better convey its message to the public, win parliamentary representation and, concomitantly achieve a degree of popular sympathy or acceptance".[35] Aims and allegations of terrorist organisations are impossibly succeeded with only acts of political violence.[36] Sinn Fein with respect to the Irish Republican Army (IRA) in Northern Ireland, Batasuna with respect to ETA in Spain, and (dissolved parties; People's Labour Party (HEP), Freedom and Democracy Party (ÖZDEP), Democracy Party (DEP), People's Democracy Party (HADEP), Democratic Society Party (DTP)) the Peoples' Democratic Party (HDP) and the Democratic Regions Party (DBP) with respect to the PKK in Turkey, has played such roles. These cases reveal different responses to political parties embedded with terrorism, under the review of the ECtHR

A. Restrictions on Sinn Fein due to its Linkage with IRA

The Irish Republican Army (IRA) fought in Irish War of Independence against the British government in Ireland, and it became as the legitimate army of the Irish Republic in April 1921. IRA was recognised by the parliament

30 See, Palombara Joseph La and Weiner Myron, 'The Origins and Development of Political Parties' in La Palombara and Weiner (eds), Political Parties and Political Development, Princeton (NJ: Princeton University Press 1966) 3–42.

31 Walter Laqueur, Guerrilla Warfare: A Historical and Critical Study (Boston, MA: Little, Brown 1976) 286.

32 Weinberg (n 25) 3.

33 For a discussion of the concept of "linkage" in the study of party politics see Kay Lawson, Political Parties and Linkage (New Haven, CT: Yale University Press 1980) 3–24.

34 See for more scenarios, Weinberg (n 25)

35 Weinberg (n 25) 25.

36 Weinberg (n 25) 25.

of the revolutionary Irish Republic as the National Army, also known as the Government forces. IRA divided into two opposing camps after the Republic of Ireland created in 1922 by the Anglo-Irish Treaty. The pro-treaty IRA disbanded and joined the Irish National Army but, the anti-treaty IRA stayed active with demands especially for Northern Ireland, created in 1921 by the Government of Ireland Act 1920, as part of the United Kingdom.[37] Before the Irish War of Independence, in July 1918, Sinn Fein Organisation and Sinn Fein Clubs, along with several other republican organisations, were declared as 'dangerous' associations in accordance with the Criminal Law and Procedure (Ireland) Act 1887, due to encouraging and aiding "persons to commit crime and promote and incite to acts of violence and intimidation and interfere with the administration of law and disturb the maintenance of law and order".[38] Northern Ireland government banned five republican organisations - The Irish Republican Brotherhood, the IRA, the Irish Volunteers, the republican women's organisation Cumann Na m'Ban and the youth organisation Fianna Na h'Eireann, under the Special Powers Act between 1922 and 1972.[39] Yet, the IRA initiated a military campaign in Northern Ireland during this time, and there had been severe sectarianism, political violence, rioting, arson, and disorder. Sinn Fein used different tactics to escape proscriptions and restrictions, by launching new political parties. For instance, in 1931 Saor Éire, a socialist party replaced Sinn Féin, but it was proscribed.[40] Another new political party under the name of Cumann Poblacta na h'Eireann established in 1936, but it was also included into the list of proscribed organisations.[41] Sinn Fein was affected negatively by these proscriptions, and it became the "political ancillary" of IRA in 1948.[42] Sinn Fein was a legal party under Northern Ireland's Special Act but it had been banned by the NI Home Affairs Minister (there was an Ulster Unionist party government in that time) until 1956.[43] It was banned after Sinn Fein won seats at the House of Commons and the IRA's 1956-62 Border Campaign (Operation Harvest based on guerrilla tactics).[44] Most of its

37 Angela K. Bourne, "Political Parties and Terrorism: Why ban Batasuna?" Paper presented at Elections, Public Opinion and Parties Annual Conference University of Exeter, 9-11 September 2010, 6

38 Ibid 5-6.

39 Laura K. Donohue, 'Regulating Northern Ireland: The Special Powers Act 1922-1972' (1998) 41(4) The Historical Journal 1089, 1112

40 Brian Hanley, The IRA 1926-1936 (Four Courts Press Dublin 2002) 179-180

41 Donohue, (n 39) 1112.

42 Brian Feeney, Sinn Fein: A Hundred Turbulent Years (Dublin: O'Brien. 2002) 189

43 See in, Angela Bourne, Security or Tolerance? The proscription of Political Parties in Democratic States. (2014). Paper Presented at European Consortium of Political Research, Salamanca, Spain. 8

44 Richard English, Armed Struggle, The History of the IRA (OUP 2003) 73

leaders were considered as members of the IRA, and the party was subjected to expulsion orders and broadcasting bans.[45]

Sectarian violence escalated in Northern Ireland during the 1960s and the British Government introduced direct rule over Northern Ireland on 24 March 1972 and the Emergency Powers Act 1973 was introduced.[46] These were temporary measures aiming to establish new political institutions for both communities (unionist and republicans).[47] The Direct rule did not help to reduce violence in the short term but the IRA increased the level of violence.[48] However, IRA (the Provisionals) took political negotiations into consideration rather than relying on only bombing campaign to precipitate British withdrawal.[49] Sinn Fein began to use political and parliamentary tactics with both ballots and arms together.[50] IRA announced the ceasefire in late June 1972 because there was a pressure among the Catholic community and from constitutional nationalists to defuse the violent tension.[51] IRA announced a truce (9 February 1975 to 23 January 1976) and talks were conducted between IRA and British government, and then Sinn Fein was legalized on 4 April 1974.[52]

From October 1988 to September 1994, the British government the Secretary of State for the Home Department issued two directives, adopting several restrictions related to broadcasts of the voices of representatives of Sinn Féin on television and radio in the UK. Such restrictions were already applied on legal organisations and on democratically elected officials.[53] The restrictions were introduced in a heightened period of violence and reflected the UK government's belief in a need to prevent Sinn Féin making offensive statements on the air, using the media for political advantage, increasing the fear in the society.[54] These directives prohibited interviews and direct statements from representatives and sympathisers of these listed organisations, at the British broadcasters.[55] Through such ban, the government used censorship

45 https://www.britannica.com/topic/Sinn-Fein

46 Ian McAllister and Sarah Nelson, 'Modern Developments in the Northern Ireland Party System' (1979) Parliamentary Affairs 279, 308

47 Michael Cunningham, British Government Policy in Northern Ireland 1969-2000 (Manchester UP 1991) 24.

48 Ibid 47.

49 Ibid 47.

50 https://www.britannica.com/topic/Sinn-Fein

51 Cunningham (n 47) 47.

52 John Bew, Frampton Martyn and Gurruchaga Inigo, Talking to Terrorists (New York: Columbia University Press 2009) 53

53 Geoffrey Bennett, 'The Northern Ireland Broadcasting Ban: Some Reflections on Judicial Review' (1989) 22 Vanderbilt Journal of Transnational Law 1119, 1146

54 In the House of Commons debate, Home Secretary Douglas Hurd argued. 139 PARL. DEB. H.C. (6th ser.) 1082 (1988). See also, Bennett (n 53) 1122-3.

55 McLaughlin Greg and Baker Stephen, The Propaganda of Peace: The Role of Media and

as a weapon in the propaganda war. Even before these directives, the British government put consistent pressure on the broadcasters to censor Republican voices.[56] Yet such indirect restrictions failed due to the British broadcasters' resistance on several occasions, so the British government clearly believed that there was a need for more control over the British broadcast media. All these restrictions on media freedom were based on the 'oxygen of publicity' of terrorism, then so the 'suffocation of censorship' was the 'necessity'.[57]

In May 1989, the British High Court decided that the Home Secretary had acted lawfully and the Appeal Court upheld the decision in December 1989.[58] The broadcasting ban ended after the IRA ceasefire on 31st August, 1994, the peace process began. These directives and their impacts were taken to the review of the ECtHR by Sinn Fein leaders and members, and by some journalists complain of a violation of the right to freedom of expression, in the 1990s. British government defended its directives at the ECtHR that they would not directly reduce the number of terrorist acts in the UK, they rather reduce the impact and influence of the advocates and supporters of such acts, and that they correspond to the need to prevent the giving of overt support for certain organisations.[59] The directives were designed to "deny representatives of known terrorist organisations and their political supporters a possibility of using the broadcast media as a platform for advocating their cause, encouraging support for their organisation and conveying the impression of their legitimacy".[60] The ECtHR emphasised that radio, television and the print media can be restricted, because the media has duties and responsibilities in a situation where politically motivated violence is widespread and the violation seeks to be incited with accessing mass media for propaganda.[61] Sinn Fein leaders and members complained at the ECtHR about the directives that they were prevented to (direct) access and contribute to the broadcast media, and to comment on economic and political developments.[62] Television producers and journalist complained that directives caused direct and continuing

Culture in The Northern Ireland Peace Process (Intellect 2010) 51-52

56 Before the broadcasting ban was introduced, more than 70 programmes have been cut or delayed. See in, Bill Rolston. 'Resistance and Terror: Lessons from Ireland', in Scraton Phil. (ed.) Beyond September 11: an Anthology of Dissent (London: Pluto Press 2002)

57 Max Pettigerew, The Oxygen of Publicity, and the Suffocation of Censorship: British Newspaper Representations of The Broadcasting Ban (1988- 1994) (UMI Dissertation Publishing 2011) 42

58 Brind and Others v. UK Application No. 18714/91 (ECtHR 12 July 1993) 3

59 Mclaughlin v. UK Application No. 18759/91 (ECtHR 9 May 1994) 10; Brind and Others v. UK 10

60 Purcell and Others v. Ireland Application no 15404/89 (ECtHR 16/04/1991) para.14

61 Ibid 16-17.

62 Mclaughlin v. UK Application p.10; Brind and Others v. UK para.10

interference and the "chilling effect" on the coverage of issues in Northern Ireland.[63] The ECtHR notes that the scope of the directives provided limited interference because the applicant "can broadcast his views on the airwaves, and the directives do not have any impact on the words that can be spoken or the images that can be shown on television or the radio."[64] Persons subjected to the directives, their words may be broadcasted, so the directives had no major impact on the applicant's democratic role.[65] The ECtHR has highlighted the special challenge in combating terrorism, to have a striking fair balance between the requirements of protecting freedom of expression (especially the free flow of information from the media) and the requirements of protecting the State and the public against terrorist organisations seeking to overthrow the democratic order and human rights.[66] The ECtHR notes that Sinn Fein's "support [for violence] is an intrinsic part of the policy of Sinn Fein".[67] Yet, the Home Secretary did not define Sinn Fein as unlawful organisaiton, only issued the directives to target terrorism,.[68] The ECtHR notes that the interference with the applicant's freedom of expression was proportionate to the aim sought to be pursued.[69]

Another case at the ECtHR related the linkage between Sinn Fein and the IRA is about an exclusion order (on 19 October 1993) under the Prevention of Terrorism Act 1989, prohibiting the first applicant (the President of Sinn Fein) from "being in, or entering, Great Britain".[70] It is because the first applicant was deemed in the commission, preparation or instigation of acts of terrorism.[71] The first applicant was invited to speak to members of parliaments (MPs) and several journalists in the House of Commons. This order was backed up with the basis that the first applicant would not attempt personally in acts of violence but that "he might say things which could lead to the instigation of terrorism".[72] Lord Justice Steyn noted that the President of Sinn Fein did not deny their connections with the IRA. He noted that the president of Sinn Fein has at least substantial connections with and the "ability to speak to the IRA".[73]

63 Brind and Others v. UK 10
64 Mclaughlin v. UK 10; Brind and Others v. UK 10
65 Mclaughlin v. UK 10; Brind and Others v. UK 10
66 Mclaughlin v. UK 11; Brind and Others v. UK 11
67 Mclaughlin v. UK 11
68 Mclaughlin v. UK 11; Brind and Others v. UK 11
69 Mclaughlin v. UK 11; Brind and Others v. UK 11
70 Adams and Benn v. UK, Application No. 28979/95 and 30343/96 (ECtHR 13 January 1997)
71 Adams and Benn v. UK 2,6
72 Ibid 2,6.
73 Adams and Benn v. UK 3,6

The ECtHR highlights that the Government order was the measure to prevent ideas and opinions which might, arguably, "purport to lend legitimacy to the use of violence in pursuit of political aims".[74] Applicants in this case can receive and impart their views by other means or not only in Great Britain but also in Northern Ireland.[75] The ECtHR draw attention to the political context of the time where ongoing efforts to establish a peace process and also the threat of renewed incidents of violence remained real and continuous.[76] The reasons above and the exclusion order was lifted after the announcement of the ceasefire by the IRA, so the complains became manifestly ill-founded. The broadcasting ban and exclusion order were both applied to reduce the impact and influence of the advocates and supporters of terrorism in the heightened period of violence. The ECtHR gave wider margin for the UK authorities to counter terrorism in terms of limiting party politics.

The broadcast ban and an exclusion order were applied to Sinn Fein while it was a lawful political party. Here the ECtHR agreed with the national authority that the ban was applicable to persons who supported violence as it is part of an organisation's policy. In this context, the ECtHR especially draw attention to fair balance between the requirements of protecting freedom of expression and protecting the State and the public against terrorist organisations. The ECtHR draw attention to evaluation of the context of restrictions with consideration of 'who the speaker is', 'how expression was delivered to audience', 'where expression was published or made', 'the time when the expression was delivered' or 'what the background of the case is'.[77]

B. Dissolution of Batasuna due to its Linkage with ETA

Basque Homeland and Freedom (ETA) was founded in 1959, to respond to the repression of the dictatorship of General Francisco Franco. ETA was led by the youths of the civil war generation of Basque nationalists and Basque Nationalist Party (PNV).[78] ETA has aimed to establish an independent socialist state, encompassing Basque provinces in Spain and France.[79] After General Franco's death in 1975, ETA formed a political party called the Basque Left,

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74 Purcell and Others v. Ireland Application no 15404/89 (ECtHR 16/04/1991) para 70

75 Adams and Benn v. UK 7

76 Ibid

77 Adams and Benn v. UK 7; See more cases, Ireland v. the United Kingdom, App no. 5310/71 (ECtHR, 18 January 1978) para 11; Zana v. Turkey App 69/1996/688/880 (ECtHR, 25 November 1997) paras 59-60; United Communist Part of Turkey and Others v. Turkey App no 133/1996/752/951 (ECtHR, 30 January 1998) para 59; Sürek v. Turkey (no. 3) App no 24735/94 (ECtHR, 8 July 1999) para 40

78 Diego Muro, 'Nationalism and Nostalgia: The Case of Radical Basque Nationalism' (2005) 11 Nations and Nationalism 571–89.

79 Ibid

which participated in democratic elections, and discussed statute of the Basque autonomy and constitution, as well as the renounced violence.[80] ETA defined the Basque Country as an occupied territory and has fought for national liberation against Spain. ETA launched an armed campaign for the national liberation and pursued a revolutionary war to defeat the state security services in Basque territories.[81]

Basque nationalists founded the Patriotic Socialist Coordinator (KAS) as a leading political party in 1975, covering trade union, youth, and women's organizations.[82] The KAS turned to be a whole social tapestry of groups supporting ETA - religious, cultural, ecological, women's, students' and among others as a centre of action for Herri Batasuna (HB).[83] In 1978, a coalition of parties, including a leading political party (People's Socialist Revolutionary Party, dissolved in 1992) HASI, formed the HB as a vehicle to represent ETA in elections. ETA and its supporters as collective body were known as the Basque National Liberation Movement (MLNV) or more generally, the radical nationalist left.[84] HB represented the MNLV in the electoral arena, so HB was designed as a tactical instrument for pursuing the 'accumulation of forces' which means to strengthen the MLNV, to become a focal point for the Basque radicalism through the cause of the independence by taking on various social grievances.[85] The 'symbiotic relationship' between these organisations (HB, KAS and ETA) was reflected in the presence of ETA and through Batasuna's leadership, elected representatives, and candidates.[86]

The Spanish Supreme Court in 2003 banned the HB, Euskal Herritarrok (EH) and Batasuna therefore it was the first-time the democratic Spain banning political parties.[87] The Spanish Supreme Court sought to establish that these parties were part of "a terrorist strategy of tactical separation" as they were a "single entity, namely, the terrorist organisation ETA." They were entitled as "having substantially the same ideology ... and, moreover, tightly controlled by that terrorist organisation".[88] A special chamber of the Supreme Court ruled that these parties violate democratic principles.[89] It ruled that the HB,

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80 Jan Mansvelt-Beck, Territory and Terror: Conflicting Nationalisms in the Basque Country (Routledge, 2005) 135-137

81 Muro (n 78) 571–89.

82 Jan Mansvelt-Beck (n 80) 188, 206.

83 Bourne (n 37) 4.

84 Jan Mansvelt-Beck (n 80) 190.

85 Ibid 203-207.

86 Diego Muro, Ethnicity and Violence (London: Routledge 2008) 127-131

87 Bourne (n 37)

88 Herri Batasuna and Batasuna v. Spain, Applications nos. 25803/04 and 25817/04 (ECtHR 30 June 2009) para 30

89 Bourne (n 37) 5.

EH, Batasuna and their leading members, had explicitly or tacitly supported, excused, or minimized the significance of terrorist acts; tried to neutralize and isolate opponents of terrorism; used terrorist symbols; collaborated with organizations supporting terrorism; and promoted or participated in the acts of homage to terrorists.[90] This ruling was later endorsed by both the Spanish Constitutional Court and the ECtHR.

In Spain, article 6 of the Constitution requires political parties to respect the Constitution, law and democracy in their internal structure andfunctioning. There is no direct regulation to ban political parties. Article 22 of the Constitution specifies associations (including political parties) illegal, if they "pursue ends or use means classified as criminal offences". Article 515 of the Spanish Penal Code also rules out that unlawful association, which has paramilitary nature or promotes, discrimination, hate or violence against persons, group, or associations due to their ideology, belief, or religion. Article 9 of the Organic Law on Political Parties rules that "a political party shall be declared illegal when its activity violates democratic principles" and "supplement and politically support the actions of terrorist organisations to achieve their objectives of subverting the constitutional order or seriously disturbing the public peace".

Dissolution of Batasuna were taken to the review of the ECtHR with the complain of a violation of the right to freedom of association.[91] The ECtHR held that the dissolution of Batasuna is compatible with a legitimate aim.[92] The ECtHR sets out that the protection of territorial integrity furthered the interest of national security and thus it constituted a legitimate aim. Likewise, the dissolution of Batasuna was not only in the interests of national security and territorial integrity but also necessary to ensure public safety and protect the rights and freedoms of others that are determined aims under the meaning of the article 11 of the Convention jurisprudence. In the case of Batasuna, the ECtHR dealt with the dissolution of a political party found guilty of supporting terrorism and violence. These political parties advocated and called the use of force and violence as a political weapon.[93] The entity of a political party for that purpose as a political wing for a terrorist organisation is incompatible with democratic principles. Batasuna had a position on the perpetuation of terrorist violence, which states enables the states to justify the reason for dissolution of political parties.[94] Spanish authorities brought evidence about the Batasuna that sought to prove its linkage with terrorist strategy of ETA. For instance, one of

90 Herri Batasuna and Batasuna v. Spain, para 33-38
91 Ibid
92 Ibid 92.
93 Ibid 88-89.
94 Ibid 46.

the Batasuna`s Cabinet Members threatened "if President Aznar wants war, the abertzale [left] and Euskal Herria [Basque Country] will respond with war." [95] Members of the Batasuna directorate were involved in cheers supporting E.T.A, "gora E.T.A. militarra" (long live E.T.A.). Batasuna's statements were made at the time of brutal ETA attacks on civilians. The ECtHR conducts an evaluation of political statements and activities in question, paying particular attention to their context which Bask region as a politically sensitive region with many terror activities for years.[96] In this regard, time and place played an important role in evaluating the Batasuna's link with ETA.[97] In this case, political parties and their members supported terrorist violence and they declared their political stance as being on the side of the terrorist organisations.[98] This political behaviour brought death and rising social tension. Dissolution of Batasuna was a requirement of public order and safety.[99] There is no protection of such expression/association under the Convention as fundamental rights. However, it is possible to find justifications for states` interferences to ensure rights and the continuation of democratic society.[100]

The ECtHR compares the party`s program (the Batasuna claimed it was a democratic association) with its activities.[101] The Court considered the speeches and activities of the Batasuna officials and members. For instance: the elected Batasuna members did not condemn fatal bombings and they rejected help for the victims of bombing attacks and their families; besides this, one spokesperson of Batasuna stated that he "does not wish that ETA stops killing". They called a terrorist prisoner a political prisoner and Batasuna`s organs, electoral list and parliamentary groups consisted of some ETA militants with criminal records.[102] Furthermore, it is worth mentioning that the Convention does not count just a political speech as supporting terrorism but, in Batasuna case, evidence was regarded as relevant and sufficient to reveal that Batasuna supported terrorism. The ECtHR ruled that Spain was responding to a pressing social need while it banned Batasuna because of its official`s support of violence and terrorism.[103]

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95 Ibid 34, 85.

96 Ibid 89.

97 Herri Batasuna and Batasuna v. Spain, See also, Leroy c. France App no 36109/03 (ECtHR, 2 October 2008) (Turkish Translation) para 45 and Zana v. Turkey, Application no 69/1996/688/880 (25 November 1997) para 51

98 Herri Batasuna and Batasuna v. Spain para 80, 88

99 Ibid 64, 94.

100 Ibid 91, 93.

101 Herri Batasuna and Batasuna v. Spain para 88

102 Ibid 33.

103 Thomas Ayres, `Batasuna Banned: The Dissolution of Political Parties Under the European Convention of Human Rights` (2004) 27 Boston College International and Comparative Law Review 99

In Batasuna case, the ECtHR ended up with its decision under the conditions of the attacks of 11 September 2001 (9/11). In this regard, the ECtHR refers in Batasuan case to the European Council framework decision on combating terrorism, Resolution 1308 (2002) of the Parliamentary Assembly of the Council of Europe on restrictions on political parties in the Council of Europe member States; and the Council of Europe Convention for the Prevention of Terrorism (2005) (specifically refers to incitement to terrorism [apology and glorification of terrorism]). These international documents oblige national authorities to take measures to suppress the "active and passive support" to terrorist organisations and individuals.[104] Specifically, the Convention for the Prevention of Terrorism (2005) consists of similar features of the United Nations Security Council Resolution 1624 (2005) and the European Union Framework Decision on Combating Terrorism (2008)), involved in criminalizing indirect incitement to terrorism in the pro-9/11 era. These documents provide basis for restrictions for national authorities to intervene with "the dissemination of messages praising the perpetrator of an attack, the denigration of victims, calls for funding for terrorist organisations or other similar behaviour". These documents encourage to introduce provisions "to criminalise the distributing or otherwise making available of a message to the public advocating terrorist offences."[105] The post-9/11 era with these international instruments has suggested and encouraged criminalisation of indirect incitement after 9/11 incidents.[106] The ECtHR through Batasuna case introduced such developments in its case law. The ECtHR in the post 9/11 era (the 'war on terror' concept), approved the evidence brought by the Spanish authorities, which were the Batasuna officials' statements supporting violence and their concurrent membership with ETA.

C. Dissolution of the Political Wings of PKK

Kurdistan Workers' Party (PKK) was founded in November 1978 and Abdullah Öcalan was elected as the General Secretary.[107] The PKK has an ideology based on revolutionary socialism and Marxism-Leninism with Kurdish nationalism, seeking the foundation of an independent communist

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104 Herri Batasuna and Batasuna v. Spain para 90; Leroy c. France para 37, See Further, Martin Scheinin, 'Limits to Freedom of Expression: Lessons from Counter-Terrorism' in Tarlach McGonagle and Yvonne Donders (Ed.), The UN and Freedom of Expression (CUP: 2015) 437-8

105 Explanatory Report on Council of Europe Convention on the Prevention of Terrorism, 16 May 2005, para 94-96

106 Bibi van Ginkel, Incitement to Terrorism: A Matter of Prevention or Repression? (ICCT Research Paper, August 2011) 15-24

107 Halil Şen, PKK: Terör ve İdeoloji (Yeditepe Akademi, 2021) 77

"Kurdistan".[108] The PKK has sought to create an independent "Kurdistan" including lands from Turkey, Iraq, Syria, and Iran. It became the dominant organisation among other left-wing groups through eliminating them by force and coercion.[109] The PKK has started its full-scale insurgency on 15 August 1984 and since then committed many terrorist attacks on civilians and Turkish security forces. In 1999, the PKK leader Öcalan was captured and imprisoned, and PKK declared ceasefire until July 2004. The PKK renewed its structure and set up the Kurdistan Communities Union (KCK) in May 2007, as an umbrella organisation of "Kurdish" organisations.[110] The PKK through KCK aims to gather PKK related all municipals, NGOs, political parties under a single roof to coordinate and to manage all the mass activities.[111] All the elements within the KCK system have been attributed to Öcalan's absolute leadership.[112] The PKK has adopted the concept of "democratic autonomy" relying on the strategy to spread the terrorist violence to the cities from rural areas.[113] As part of the peace process in 2013, the PKK declared a ceasefire and promised to withdraw its members and weapons to the North of Iraq, but PKK broke down the ceasefire and declared 'self-governance' in July 2015.[114] The PKK gained experience and ability of the type of "war" to fight in city centres through PYD, its branch in Syria, by establishing "cantons" in the North of Syria during the civil war in Syria since 2011. So, the PKK has transferred such "war" to the Turkish cities and districts. The PKK has resumed its terrorist attacks with such "war", together with the assistance of municipalities by its political wings HDP and

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108 Ibid 71-74.

109 Rahman Dağ, Ideological Roots of The Perception Between Pro-Kurdish and Pro-Islamic Political Streams in Turkey (Cambridge Scholars Publishing, 2017)

110 The Kurdistan Communities Union (Kurdish: Koma Civakên Kurdistanê, KCK) is a "Kurdish" political organization committed to implementing Abdullah Öcalan's ideology of democratic confederalism. The KCK also serves as an umbrella group for all the democratic confederalist political parties of Kurdistan, including the PKK (The Kurdistan Workers' Party)/HPG (The People's Defense Forces) in Turkey, PJAK (The Party of Free Life of Kurdistan)/YRK (East Kurdistan Defense Units) in Iran, PYD (The Democratic Union Party)/ YPG (The People's Protections Units) in Syria and Kurdistan Democratic Solution Party (PÇDK) in Iraq. See also, Rahman Dağ, 'The Spillover Effect of the Syrian Crisis on the Peace Process in Turkey' (2018) 53 (8) Journal of Asian and African Studies, 1251, 1259-60.

111 Şen (n 107) 100.

112 KCK Convention

113 Şen (n 107) 113-114.

114 TRTWorld, A timeline of the PKK's war on Turkey: 1974-2019, 16 OCT 2019 <https://www.trtworld.com/magazine/a-timeline-of-the-pkk-s-war-on-turkey-1974-2019-30618> accessed 08.08.2021

DBP,[115] and used weapons and ammunition stored during the peace process period after mid-2015.[116]

As the party politics of the PKK, it had taken steps to organise itself in the political arena in late 1980s and finally, it decided to prioritise its political aspects, along with military aspects in its congress on 31 December 1990.[117] Political wings of the terrorist organisation have also been active in Turkey with the aim of making their propaganda, introducing their views and opinions, reflecting their thoughts, and achieving their purpose. The PKK has become the major Kurdish nationalist movement from the 1980s to the 1990s before the establishment of a legal political party stream with HEP in 1990.[118] As part of this decision, HEP was founded on 7 June 1990 and won seats in the Grand National Assembly of Turkey (TBMM). After the dissolution of HADEP, the leader of the PKK directly by himself gave an order to found a new political party, named it as 'Democratic Society Party' (DTP), terminated DEHAP and to join into DTP.[119] In other words, there has been close personal and ideological relationships between the PKK and its political parties.[120]

There have been around 10 prominent political parties founded by PKK led groups. HDP and DBP which are the legacy of all these dissolved parties (HEP, ÖZDEP, DEP, HADEP, DTP),[121] play the role of the political wings of the PKK, as its legal entities. These political parties have been under the control of the PKK, have carried out actions in accordance with the orders and instructions received from the Central Committee of the PKK, and have not accepted the PKK as a terrorist organisation.[122] On the 17 March 2021, the State Prosecutor to the Court of Cassation filed a lawsuit before the Constitutional Court demanding the closure of the HDP due to its ties with the PKK and its activities against the unity of the state.[123] The indictment called for a five-year

115 Interior Ministry, 'Belediyelerdeki Kayyum Sistemi Ve Mevcut Durum Raporu', p.10-18 < https://www.icisleri.gov.tr/kurumlar/icisleri.gov.tr/IcSite/illeridaresi/Yayinlar/KayyumRaporu/kayyum_nihai_rapor.pdf> accessed 08.09.2021

116 Şen (n 107) 118-121.

117 Nihat Ali Özcan, PKK: Tarihi, İdeolojisi ve Yönetimi (ASAM Yayınları 1999) 119-120

118 Dağ (n 109) 53.

119 The Constitutional Court, E:2007/1 K:2009/4, 11.12.2009. 13, 24

120 See, Watts, N. F. 'Activists in Office: Pro-Kurdish Contentious Politics in Turkey' (2006) 5(2) Ethnopolitics, 125-144

121 The Constitutional Court, E:1992/1 K:1993/1, 14.7.1993.; E:1993/1 K:1993/2, 23.11.1993.; E:1993/3 K:1994/2, 16.6.1994.; E:1999/1 K:2003/1, 13.3.2003.; E:2007/1 K:2009/4, 11.12.2009.

122 The Constitutional Court, E:2007/1 K:2009/4, 11.12.2009. 335-6; Yargıtay Cumhuriyet Başsavcılığı, İddianame, Konu: Halkların Demokratik Partisi (HDP) Sayı: 6321649/2021/1, 17.03.2021. 26-27, 564

123 Yargıtay Cumhuriyet Başsavcılığı, İddianame, Konu: Halkların Demokratik Partisi (HDP) Sayı: 6321649/2021/1, 17.03.2021.

political ban for many of the HDP executives and members, and economic sanctions on the HDP assets. The State Prosecutor to the Court of Cassation's indictments were accepted by the Constitutional Court for trial on the 21 June 2021. In this trail, the State Prosecutor to the Court of Cassation listed 580 persons who were/are central/local committee executives of, PMs and mayors elected from HDP. They are sentenced, filed a public lawsuit, or investigated for crimes related terrorism.[124] For instance, Demirtaş, Yüksekdağ and Tuncel and many more chairpersons, executives of, and MPs from HDP (in different times), and many mayors, for instance Mızraklı who was the mayor of Diyarbakır, sentenced for being a member of, or making propaganda for a terrorist organisation, namely the PKK.[125]

PKK led groups have always kept a reserved or a spare political party as a back seat, in case of the Constitutional Court dissolved them, as a gateway to avoid disadvantages of dissolution of the political party. Even today, it is true that, if the Constitutional Court decides to dissolve HDP, DBP will be its spare party to resume in the same path. From HEP to HDP/DBP, this is a kind of continuation of a process, that shares same aims, methods, and human resources.[126] Persons, who committed terrorism related crimes, have been

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124 Some examples for those who are convicted but their trial is in the appeal. Ağrı 1. Ağır Ceza Mahkemesine 05.09.2017 2016/48 Esas, 2017/360 K., (Halil Aksoy was PM elected from HDP in 24. parliamentary term, was convicted for the crime of being a member of an armed terrorist organization); Van 2. Ağır Ceza Mahkemesi 22.03.2018 2016/490 E., 2018/174 K., (Lezgin Botan was PM elected from HDP in 25. and 26. parliamentary terms and executive of HDP in 2013, was convicted for making propaganda for a terrorist organization and being a member of an armed terrorist organization); For more examples, see Yargıtay Cumhuriyet Başsavcılığı, İddianame, Konu: Halkların Demokratik Partisi (HDP) Sayı:6321649/2021/1, 17.03.2021.

125 İstanbul 26. Ağır Ceza Mahkemesi E: 2017/173 K: 2018/152 (07.09.2018) (Selahattin Demirtaş who was MP elected from HDP in 24. parliamentary term, executive in 2018 -20 and, chairmen of HDP 2014-8, was convicted for making terrorist propaganda); Malatya 5. Ağır Ceza Mahkemesi E: 2018/1, K: 2019/49 (01.02.2019) (Sebahat Tuncel who was MP elected from HDP in 24. parliamentary term, executive in 2014 and, chairmen of HDP in 2013, was convicted for the crime of being a member of an armed terrorist organization and making terrorist propaganda); Ankara 13. Ağır Ceza Mahkemesi E:2016/8 K: 2017/25 (06.06.2017) (Figen Yüksekdağ Şenoğlu who was chairman of HDP in 2014 and PM elected from HDP in the 25. and 26. parliamentary term, (multiple times) convicted for making terrorist propaganda); Şanlıurfa 5. Ağır Ceza Mahkemesi E: 2016/29 K: 2018/139 (01.03.2018) (Dilek Öcalan was PM elected from HDP in 25. and 26. parliamentary terms, was convicted for making terrorist propaganda); Diyarbakır 9. Ağır Ceza Mahkemesi E: 2017/129 K: 2020/128 (09.03.2020) (Adnan Selçuk Mızraklı who was PM elected from HDP in 27. parliamentary term, executive of HDP in 2018 and mayor of Diyarbakır in 2019, was convicted for the crime of being a member of an armed terrorist organization) For more examples, please see: Yargitay Cumhuriyet Başsavciliği, İddianame, Konu: Halkların Demokratik Partisi (HDP) Sayı: 6321649/2021/1, 17.03.2021.

126 See: The Constitutional Court, E:1999/1 K:2003/1, 13.3.2003.; Yargıtay Cumhuriyet

doing 'politics' in the layers of these political parties. Even the European Court approve such realty that the DTP (the latest dissolved political party) was born from the pro-Kurdish left political movement and political parties.[127]

The Constitutional Court dissolved these political parties through the evaluation of the speeches and activities of the party executives and members which propagate and facilitate PKK's terrorist activities.[128] Political party's program (specifically DEP's call for peace)[129] and their declarations, meetings, and demonstrations,[130] were crucial documents and evidence for the Constitutional Court in its evaluation for the final decision. The Constitutional Court also considered the criminal record of members of attributed political parties who committed crimes listed under the Law on Fight Against Terrorism, such as being member of a terrorist organisation, aiding and abetting terrorist organization, and making propaganda to recruit new militants for the PKK.[131] The Constitutional Court also considered the materials retained by the security forces' raid to these political parties' facilities.[132] Another important matter is that the Constitutional Court paid attention to the testimonies made by those arrested by the security forces in counter-terrorism operations.[133] There were many testimonies revealing the link between the PKK and these parties. For instance, one of the common testimonies given was that the provincial and district organisations of these parties became the recruitment offices of the PKK.[134]

Activities of political parties are guaranteed with some limitations under the article 68 and 69 of the Constitution.[135] The Constitutional Court dissolved

Başsavcılığı, İddianame, Konu: Halkların Demokratik Partisi (HDP) Sayı: 6321649/2021/1, 17.03.2021. 565

127 DTP and Others v. Turkey Application No. 3840/10, 3870/10, 3878/10, 15616/10, 21919/10, 39118/10 and 37272/10 (12 January 2016) para 75

128 The Constitutional Court, E:1992/1 K:1993/1, 14.7.1993. p.123, 125, 181; E:1999/1 K:2003/1, 13.3.2003. 3 (the Constitutional Court specifically evaluated HADEP's activities that disrupt the territorial integrity of national unity of Turkey and understood that HADEP was PKK's political wing.); E:2007/1 K:2009/4 (11.12.2009) 1

129 The Constitutional Court, E:1993/3 K:1994/2, 16.6.1994.; E:1993/1 K:1993/2, 23.11.1993.

130 The Constitutional Court, E:2007/1 K:2009/4, 11.12.2009. 294-295

131 The Constitutional Court, E:1992/1 K:1993/1, 14.7.1993. 124-125; E:1999/1 K:2003/1, 13.3.2003. 113-114

132 The Constitutional Court, E:1999/1 K:2003/1, 13.3.2003. 21, 34; E:2007/1 K:2009/4, 11.12.2009. 291-294; E:2007/1 K:2009/4, 11.12.2009. 295-298

133 The Constitutional Court, E:1999/1 K:2003/1, 13.3.2003. 37-46

134 Ibid 44-7.; See more, Talha Kose, PKK's dirty gamble with Kurdish Youth, 7 September 2019 <https://www.setav.org/en/pkks-dirty-gamble-with-kurdish-youth/< accessed on 13.09.2021

135 Turkey has colourful political environment where 116 political parties are actively operating. Ministry of Interior, <https://www.icisleri.gov.tr/turkiye-genelinde-116-aktif-siyasi-parti-var> accessed 01.10.2021

pro-PKK parties due to the reason as becoming the centre against "the indivisible integrity of the state with its territory and nation" and to create racial discrimination.[136] The Constitutional Court decided in the case of HADEP that the party provided aid to and supported terrorism, against the indivisible integrity of the State with its territory and nation.[137] The party became the centre of acts that consist of an unconstitutional nature. The Constitutional Court sought to find whether HADEP's activities and discourses were in parallel with the activities and discourses of the PKK.[138] Here it is important to explain the meaning of being "centre" defined by Article 69 of the Constitution, amended in 2001. So a political party become 'centre' against the Constitution, if it carries out its actions "intensively by the members of that party or the situation is shared implicitly or explicitly by the grand congress, general chairpersonship or the central decision-making or administrative organs of that party or by the group's general meeting or group executive board at the Grand National Assembly of Turkey or when these activities are carried out in determination by the abovementioned party organs directly." Thus, as to whether decide dissolution of a party, its actions must be intensively, "implicitly or explicitly" and determinately made by specified incumbents.[139]

Moreover, the ECtHR has already examined several applications concerning the permanent dissolutions of pro-PKK political parties: HEP, OZDEP, DEP, HADEP and DTP.[140] These parties were dissolved with an immediate effect, their assets were liquidated and transferred to the Treasury and its leaders were banned from carrying on certain similar political activities. These political parties were dissolved by the Constitutional Court due to becoming a centre of illegal activities undermining the territorial integrity and of the State and the unity of the nation.[141] However, the ECtHR found violations of article

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136 The Constitutional Court, E:1999/1 K:2003/1, 13.3.2003. 186; E:1992/1 K:1993/1, 14.7.1993. 181; E:1993/1 K:1993/2, 23.11.1993. 62; E:2007/1 E:2009/4, 11.12.2009. 339

137 The Constitutional Court, E:2007/1 K:2009/4, 11.12.2009. 218-221

138 The Constitutional Court, E:1999/1 K:2003/1, 13.3.2003. 2

139 The Constitutional Court, E:1999/1 K:2003/1, 13.3.2003. 182,186; E:2007/1 K:2009/4, 11.12.2009. 338; see also, Bülent Algan, 'Dissolution of Political Parties by the Constitutional Court in Turkey: An Everlasting Conflict Between the Court and The Parliament?' (2011) 60 (4) AUHFD 809

140 Yazar and Others v. Turkey, Applications Nos. 22723/93, 22724/93 And 22725/93 (ECtHR 9 April 2002); Freedom and Democracy Party (ÖZDEP) v. Turkey, Application No. 23885/94 (ECtHR 8 December 1999); Dicle for DEP v. Turkey, Application No: 25141/94 (Turkish Translation) (10 December 2002); HADEP And Demir V. Turkey, Application No. 28003/03 (14/03/2011); DTP and Others v. Turkey, Application no. 3840/10, 3870/10, 3878/10, 15616/10, 21919/10, 39118/10 and 37272/10 (12 January 2016)

141 The Constitutional Court, E:1992/1 K:1993/1, 14.7.1993. 181; E:1993/1 K:1993/2, 23.11.1993. 62; E:1993/3 K:1994/2, 16.6.1994. 106; E:1999/1 K:2003/1, 13.3.2003. 186; E:2007/1 K:2009/4, 11.12.2009. 338

11 in all these cases and their dissolutions were disproportionate to the aim pursued and consequently unnecessary in a democratic society.[142] The ECtHR held that political parties should have the chance to introduce themselves into public debate in an attempt to seek solutions for the country`s problems and to maintain the proper functioning of democracy.[143] No doubt, political parties as the key actors in a democratic society must have freedom to define their policies, even they might be incompatible with the constitutional system. Otherwise, the constitutional system strengthens its political and legal status quo.[144] The ECtHR noted that the limits of permissible criticism are wider regarding the government rather than a private citizen. The actions or omissions of national authorities are under scrutiny of the press and public opinion.[145] The ECtHR considered the activities and statements of the pro-PKK parties, as public debate to find solutions to general problems concerning politicians of all persuasions.[146]

The ECtHR has got these parties off the hook, while the Constitutional Court submitted the activities and statements which revealed deemed link between the PKK and these pro-PKK political parties. The Court did not regard evidence brought by the Constitutional Court, as sufficient to equate the activities and statements of these political parties, involved with the activities of the terrorism.[147] The ECtHR sought a connection between the speeches, activities, party program, declarations, meetings, demonstrations and the criminal record of these party members, and the terrorist actions of the PKK. Yet, the ECtHR ruled that none of these activities and statements made by these parties' members encouraged violence, armed resistance or insurrection.[148] Even the ECtHR has laundered them and defined (for example DTP) as a significant political party which support a peaceful solution for the Kurdish question.[149] However, these political parties supported the creation of 'Kurdish' province and asserted that the 'Kurdish' separatist group (PKK) were freedom

142 HADEP And Demir V. Turkey para 80

143 Yazar and Others v. Turkey para 58

144 Birol Akgun and Yusuf Sevki Hakyemez, `Limitations on the Freedom of Political Parties in Turkey and the Jurisdiction of the European Court of Human Rights` (2002) 7 Mediterranean Politics 54–78

145 Castells v. Spain, Application no. 11798/85 (ECtHR 23/04/1992) para 46

146 Yazar and Others v. Turkey para.58; Dicle for DEP v. Turkey 8-9; Freedom and Democracy Party (ÖZDEP) v. Turkey, para 44; HADEP and Demir v. Turkey para 78-79; DTP and Others v. Turkey para 78; Vogt v. Germany para 52, and United Communist Party of Turkey para.57

147 Yazar and Others v. Turkey para.59; Dicle for DEP v. Turkey 9; Freedom and Democracy Party (ÖZDEP) v. Turkey, para 54; HADEP and Demir v. Turkey para 70; DTP and Others v. Turkey para 109-110

148 HADEP and Demir v. Turkey para 70

149 DTP and Others v. Turkey

fighters and advocated self-determination for the Kurds, in the territory of a sovereign state.[150] They have promoted the tolerance of terrorist acts, justified and gave confidence to their acts of violence.[151] There are only rare examples of admitting that the ECtHR noted that pro-PKK politicians approved violence as a political way, provoked prejudices among different social groups to be committed deadly attacks, and justified use of violence.[152] For instance, the former mayor of Diyarbakir, Zana said, "I support the PKK national liberation movement; on the other hand, I am not in favour of massacres. Anyone can make mistakes, and the PKK kill women and children by mistake …"[153]

Two scenarios distinguished in these ECtHR cases; firstly, as the ECtHR asserts, the Turkish authorities fail to explain the link between these parties and the PKK. Turkey in these cases preferably aimed to bring the evidence explaining separatism rather than the linkage with the PKK. The ECtHR notes that when a group of people calls for autonomy or even requests secession of a part of the country's territory and demanding fundamental constitutional and territorial changes, these cannot be adequate to prohibit its association because these demands do not automatically introduce a threat to the state`s territorial integrity and national security.[154] Yet in the cases of HEP, OZDEP, DEP, HADEP and DTP, HDP, DBP, all these parties have been under the control of the PKK as its political wing and determined to fulfill such changes with the methods that the PKK has adopted. Separatism is closely associated with terrorism in the cases of pro-PKK parties. The post-9/11 era, as discussed above, did not make any changes on the ECtHR's approach to the disclosure of pro-PKK political parties, while they have had their direct rather than indirect linkage with terrorism. The ECtHR had more restrictive ground with the European Council framework decision on combating terrorism 13 June 2002, Resolution 1308 (2002) of the Parliamentary Assembly of the Council of Europe on restrictions on political parties in the Council of Europe member States; the Council of Europe Convention for the Prevention of Terrorism (2005). Yet the ECtHR failed to detect the linkage between these political parties and PKK/KCK. Even the reality of terrorism in Turkey was much more imminent and intense than Spain and the UK. The post 9/11 era (the 'war on terror' concept) did not helped Turkey in the cases of the ECtHR to have wider degree of margin to interfere with the political wings of the PKK.

Second scenario, the ECtHR has judicial bias that did not allow to identify the linkage between pro-PKK parties and the PKK. It had a liberal perspective

150 Yazar and Others v. Turkey para 22

151 Yazar and Others v. Turkey

152 Dicle for DEP v. Turkey 9-10

153 Zana v. Turkey, para 12

154 Stankov and the United Macedonian Organisation Ilinden v. Bulgaria, Applications nos. 29221/95 and 29225/95 (ECtHR 02/01/2002) para 97

in cases of HEP, OZDEP, DEP, HADEP and DTP in compression with cases of Batasuna and Sinn Fein. On the one hand, Batasuna's refusal to condemn violence against a backdrop of terrorism, and the directives against the Sinn Fein executives as to "deny representatives of known terrorist organisations and their political supporters", were considered as the linkage with terrorism.[155] On the other hand, the ECtHR, in these five cases of pro-PKK parties, failed to detect such linkage, even the ECtHR discovered that the executive of the DTP avoid defining PKK as a terrorist organisation.[156] The sensitive and complex issues of terrorism in Spain and the UK were elaborated rigorously by the ECtHR, but not in Turkey,[157] despite the scale of the conflict in Turkey has been much deadly, intense and complicated. In comparison with Spain and the UK cases, the ECtHR failed to evaluate the content and context of expression and activities of members of these pro-PKK parties to detect their linkage with terrorism. Yet the linkage between HEP, OZDEP, DEP, HADEP, DTP, HDP and DBP and the PKK/KCK, is a well-known fact, has been identified in political and legal circles in Turkey, Europe, and elsewhere.

CONCLUSION

The modern political parties play a regular and indispensable systemic role in democracies specifically through organising and legitimising the election process and forming the government. Thus, political parties are collective platforms for the citizens to practice their right to associate and express. However, there have been some activities of groups and individuals whose aim to establish a system or society incompatible with democracy through abusing or misusing democratic institutions and procedures. This is also true that the image of political parties has a distinct liberal democratic bias, and they are considered mostly engaging in legitimate and non-violent means.[158] Yet this is a stereotype, if considering the history of political parties, terror has been rooted in political parties since 18th century. Having this historical background in mind, democracy needs to ensure its own safety, if political parties exercise terrorism in conjunction with other forms of political activities.[159]

Moreover, democratic countries adopted two broad models of responses to terrorism in party politics. One is a tolerant approach to give greater political inclusion of extremists in democratic processes and the other is intolerant and suppressive approach using repressive legislative measures on extremist

155 Brind and Others v. UK 10
156 DTP and Others v. Turkey para 108
157 Adams and Benn v. UK p.7; Herri Batasuna and Batasuna v. Spain para 89
158 Ware (n 23) 3.
159 Weinberg (n 25) 3.

to protect values of democracy.[160] The United Kingdom, Spain, and Turkey adopted different forms of measures on deemed link between political parties and terrorism. Such linkage occurred, if a terrorist organization find it advantageous to develop a "political wing," for their own aims and allegations, to convey their message to the public, to win parliamentary representation and, to concomitantly get a degree of sympathy or acceptance.[161] The restrictions implemented on these political parties by national authorities have been also reviewed by the ECtHR. While national authorities restricted these political parties due to their unconstitutional aims by violent means, the ECtHR sought that is there a risk to destruct democracy with reasonable evidence and entire picture drawn by the acts and speeches of the leaders and members of a political party. [162] The ECtHR has approved under its review, these two types of approaches to restrict/dissolve political parties if legal measures meet with its criteria. So, it is not the matter of adopting the liberal or restrictive approach. The ECtHR specifically seeks a "pressing social need" to impose a restriction on the rights as necessity for a democratic society. Yet, the UK and Spain's response to the parties in question considered by the ECtHR as proportionate measures with the Convention, but Turkey's dissolution of pro-PKK/KCK parties considered as a violation of the Convention.

The linkage between aforesaid parties and terrorist organisations has been identified in political and legal spheres in the UK, Spain, Turkey, Europe. Yet, the ECtHR determinedly had a different angle in five cases of pro-PKK parties in compression with Batasuana and Sinn Fein politics. The ECtHR agreed that omissions or a lack of response to terrorism is that politician's stance was overtly supportive action. The ECtHR elaborated to the historical and social context of the fight against terrorism in Spain and the sensitive and complex issues in the UK. Yet, the ECtHR ignored a contextual relationship between escalation of terrorism and pro-PKK parties. Similarly, while the PKK imbedded autonomous or separatist demands in these parties, the ECtHR found such demands unconvincing to reveal that pro-PKK parties involvement with terrorism. Furthermore, the ECtHR referred to the criminalisation of public provocation under the CoE Convention on the Prevention of Terrorism in the case of Batasuna. On the other hand, the Court regarded pro-PKK political parties' statements and activities as dissenting activities playing its role in a democratic country where there was escalation between Turkish security forces and PKK, in the meantime, many deadly terrorist attacks committed by

160 Whiting (n 19) 126.
161 Weinberg (n 25) 25.
162 Akbulut (n 17) 385.

PKK since 1984.[163] It is very surprising that the ECtHR did not even identify such linkage in the context of terror wave in the last three decades and in the post-9/11, 'war on terror' concept.

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[163] DTP and Others v. Turkey para 98; Sürek v. Turkey (No. 4) Application no. 24762/94 (8 July 1999) para 58

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ENFORCEMENT IN TURKEY OF FOREIGN ARBITRAL AWARDS: THE CHALLENGE OF BUSINESS LOCATION

Yabancı Hakem Kararlarının Türkiye'de İcrası: İşyerinin Bulunduğu Yer Sorunu

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ABSTRACT

Turkish arbitration policy has progressed in tandem with international arbitration developments, overcoming a number of shortcomings in the process. Turkish arbitration law is, in essence, still a developing field. There are still problems and gaps in Turkish arbitration law that must be addressed in order to create a more functioning arbitration system. One of the problems related to arbitration stems from the business location. In Turkish arbitration law, the parties may waive their right to apply to court for annulment of arbitral awards in part or fully. Parties who have their domiciles, habitual abode, or place of business outside of Turkey may waive their right to annulment. However, a Turkish company cannot waive its chance to seek an action for annulment. The challenges of business location in terms of enforcing arbitral awards under the New York Convention and Turkish law are examined in this paper, and remedies are suggested.

Key Words: arbitral award, advanced waiver of annulment, New York Convention, business location

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ÖZET

Türk tahkim politikası, eksikliklerini gidererek zaman içerisinde, uluslararası tahkim gelişmelerine paralel olarak ilerlemiştir. Türk tahkim hukuku özünde hala gelişmekte olan bir alandır. Daha işlevsel bir tahkim sisteminin oluşturulması için Türk tahkim hukukunda hala çözülmesi gereken sorunlar ve giderilmesi gereken eksiklikler mevcuttur. İptal davasından feragat hakkı bağlamında işyerinin bulunduğu yere ilişkin sorun bunlardan bir tanesidir. Türk tahkim hukukunda taraflar, hakem kararlarının iptali için mahkemeye başvurma haklarından kısmen veya tamamen vazgeçebilirler. Yerleşim yeri, mutat mesken veya iş yeri merkezi Türkiye dışında olan taraflar iptal davası açma hakkından feragat edebilirler. Bu durum iş yeri merkezi Türkiye'de bulunan şirketin iptali hakkından feragat sorununu doğurmaktadır. Bu bağlamda, bu makalede, New York Konvansiyonu ve Türk hukuku kapsamında hakem kararlarının uygulanması açısından iş yerinin bulunduğu yer sorunu ele alınacak ve çeşitli çözüm önerilerinde bulunulacaktır.

Anahtar Sözcükler: hakem kararı, iptal davasından feragat, New York Konvansiyonu, işyerinin bulunduğu yer

There is no requirement of Ethics Committee Approval for this study.

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INTRODUCTION

The main and ultimate goal of arbitration is that arbitral awards should be binding and final; therefore, an internal appellate mechanism does not exist in commercial arbitration.[1] In the case that it exists, the losing party may improperly use the appellate authority to prevent the arbitral decision from being enforced.[2] This will eventually stray from the aim of arbitration; as a result, it is preferable that the courts stay out of the arbitration processes.[3] If the arbitral award is in conflict with Turkish arbitration rules, the parties may seek the courts to have the award vacated.[4] The right to appeal is a legal privilege granted to parties for examining and amending a decision that they believe is incorrect. The basic objective of the right to appeal is to recognize that a higher court can examine a decision before it is final and binding. In litigation, requesting that a higher authority review the case takes numerous forms, such as appellate review and judgment revision. Arbitration, which has its own procedure, does not use traditional methods of appealing a higher authority.[5] There is no appeal arbitral tribunal or higher authorities that can overturn a decision in arbitration. The only legal remedy available against an arbitrator's judgment in Turkish arbitration law is the vacation of the award.[6] The Turkish policy and approach to alternative dispute resolution methods, specifically arbitration, is strongly tied to vacation situations.[7] Turkish arbitration law is still in its infancy; hence, there are still jurisdictional difficulties. The location of the business is a contentious issue under Turkish arbitration rules in this case. Solutions to the challenge of business location in Turkey are provided in this paper by assessing grounds for vacating arbitral awards. Business location is important in terms of enforcement of arbitral awards. If there is an unambiguity of the business location, the award can be vacated. Certain fundamentals must be established from the outset in order to better grasp the issue at hand.

This study focuses on the enforcement of arbitral award and the challenge of business location in Turkish arbitration. The remainder of this paper is divided into three sections. The first section discusses the concept of recognition and enforcement of arbitral awards in Turkey, as well as their efficiency. The second

1 Noam Zamir and Peretz Segal, 'Appeal in International Arbitration—an Efficient and Affordable Arbitral Appeal Mechanism' (2019) 35 Arbitration International 79, 79.
2 Ali Yeşilırmak, *ICC Tahkim Kuralları ve Uygulaması* (Onikilevha 2018) 13.
3 Zamir and Segal (n 1) 80–83.
4 Cemal Şanlı, *Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları* (7th edn, Beta Publishing 2019) 349–352.
5 Thomas E Carbonneau, *The Law and Practice of Arbitration* (Juris 2012) 13–14.
6 Ziya Akıncı, *Milletlerarası Tahkim* (4th edn, Vedat 2016) 251.
7 ibid 253–254.

section examines business location challenge and makes some suggestions. Finally, the third section provides concluding remarks.

I. THE RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS

The most important and crucial factor in the effectiveness of any non-judicial adjudicatory procedure is that it be recognizable and enforceable within legal systems. [8] That is to say, an arbitration decision must be legally binding and enforceable; if it is not, parties with an unenforceable award can seek other mechanisms to carry out a judgment, such as litigation, but this will not satisfy the need for a quick, efficient, and cost-effective resolution of multinational disputes. [9] As a result, if arbitration is to be used to encourage international business and investment, the arbitral awards must be valid, recognized, and enforceable in other countries.[10] Various multilateral conventions on the binding effect of foreign arbitral awards have been held for this purpose over the years[11]. As a result of these conventions, such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[12], foreign arbitral awards are as powerful and enforceable as a court judgment. [13]

The term "recognition" refers to foreign courts acknowledging the legality of a rendered award, barring a new process originating from the same issue and disputing the arbitration agreement's validity.[14] The phrase "enforcement" refers to the procedure of ensuring that the arbitral ruling is followed. [15] In order for a foreign arbitral award to be enforceable in Turkey, the award must be legally recognised by Turkish courts, otherwise the rendered award will be worthless in terms of resolving disputes. [16] There are several standards in legal

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8 Carbonneau (n 5).

9 Leonard V. Quingley, 'Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Awards' (1961) 70 The Yale Law Journal 1049, 1049; Gerald Herrmann, 'The Arbitration Agreement as the Foundation of Arbitration and Its Recognition by the Courts' in Albert Jan van den Berg (ed), *International Arbitration in a Changing World* (1994) 42.

10 Gary B. Born, *International Arbitration: Cases & Materials* (Aspen Publishers 2010) 1000.

11 Geneva Treaties, the 1923 Protocol on Arbitration Clauses and the 1927 Convention on the Execution of Foreign Arbitral Awards, by League of Nations is a culture of recognizing and enforcing arbitral awards.

12 Born (n 10) 1001.

13 Carbonneau (n 5) 792.

14 Herbert Kronke, Patricia Nacimiento and Dirk Otto, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International BV 2010) 7.

15 ibid

16 Akıncı (n 6) 355.

systems to recognize and enforce an arbitral decision. Some legal orders seek the same recognition and enforcement requirements as others, while others do not. [17] Furthermore, courts cannot assess the merits of the disputes in both the recognition and enforcement processes, and may only evaluate if the rendered award satisfies the condition of validity.[18] The requirements for recognizing and enforcing arbitral awards are not the same in Turkey. The requirements for enforceability varies slightly from the requirements for recognizing an award. [19] The judicial review of enforceability by Turkish courts is limited to the grounds of the dispute, and they are not permitted to reexamine it.[20]

In Turkey, there are two procedures for recognizing and enforcing international awards. The first is through the Turkish International Private and Procedural Code (TIPPC) [21], which is rarely used to recognize and enforce international awards made in Turkey. [22] Second, where the arbitration takes place outside of Turkey, the United Nations Convention on the Recognition and Enforcement of Foreign Awards, more commonly known as the New York Convention, to which the Republic of Turkey acceded on July 2, 1992, allows for the recognition and enforcement of foreign awards. In terms of recognition and enforcement, the rendered arbitral award is not deemed foreign, and it has the same power as a domestic arbitral decision.[23] While a foreign arbitral award is recognized and enforced by Turkish courts, providing it the potential to be carried out in Turkey, a non-foreign arbitral award does not require confirmation *ipso facto*, according to Turkish law.[24] The ICC Arbitration Rules judgement has *res judicata* consequences and is as enforceable as Turkish court judgments. [25]

The recognition of an arbitral award, which only reveals the validity and finality of the award, has no enforcement power in a foreign jurisdiction. However, parties seek recognition of an arbitral award by foreign courts in order to use claim preclusion as an affirmative defense in foreign jurisdictions. [26] When one party brings a dispute to court despite possessing a binding arbitral award, the opposing party can claim that the arbitral award was recognized under the doctrine of *res judicata*, which prevents additional adjudication on

17 Kronke, Nacimiento and Otto (n 14) 7.
18 Born (n 10) 1135.
19 Akıncı (n 6) 337.
20 ibid 336.
21 Official Gazette of the Republic of Turkey 12.12.2007 (Act No.5718).
22 Akıncı (n 6) 338.
23 ibid.
24 Feriha Tanrıbilir and Banu Şit, 'Milletlerarası Tahkim Müessesi ve Yeni Tahkim Kanunu' (2011) 22 Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni 819, 827.
25 Akıncı (n 6) 345.
26 Kronke, Nacimiento and Otto (n 14) 7.

the same subject matter.[27] Articles 60, 61, and 62 of the TIPPC set out the rules for the recognition and execution of foreign arbitral awards in Turkish law.[28] There is no explicit title for "recognition" in those articles. In practice, Turkey does not separate the process for recognizing arbitral awards from the procedure for enforcing them, as required by the New York Convention, to which Turkey is a signatory.[29]That is to say, the mechanism for recognizing and enforcing international and domestic arbitral decisions is the same; as a result, the recognition requirement must meet the enforcement criteria of arbitral awards, as specified in the TIPPC.[30] The enforcement of an arbitral decision ensures that a decision made by arbitrators in another nation is executed properly. A foreign award that cannot be enforced is nothing more than a pile of paper; thus, the grounds for the vacation of arbitral awards' recognition and enforcement are a crucial and important topic. There have been significant developments in the enforceability of awards, ranging from League of Nations' Conventions on the implementation of arbitral judgements to United Nations Conventions. The New York Convention, which has been ratified by 168 of the United Nations' 193 member states, is the most important of these international treaties. [31] In respect of rules of recognition and enforcement, Turkish arbitration law has always followed the New York Convention. [32] When it comes to enforcing an arbitral judgement on Turkish land, Turkey adheres to the New York Convention's criteria. [33] When pursuing enforcement of an arbitral judgement in Turkey, parties must show that the award does not contradict Turkish law by getting an official order of enforcement from Turkish courts, often known as "exequatur." [34] The court order for enforcement is just as important as the award itself. The award will not be implemented in Turkey if Turkish courts refuse to grant an exequatur. Parties and their successors are eligible to request the initiation of enforcement procedures and court orders under Turkish arbitration legislation. Third parties, on the other hand, do not have the right to seek an exequatur from the courts.[35] Article 61 of the TIPPC, which overlaps with the

27 Leonard V. Quingley (n 9) 1063.

28 Akıncı (n 6) 347.

29 Ergun Özsunay and R. Murat Özsunay, 'Interpretation and Application of the New York Convention in Turkey' in George A. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards - The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 975.

30 Akıncı (n 6) 348.

31 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Contracting States < http://www.newyorkconvention.org> accessed 21 August 2021.

32 Turgut Kalpsüz, 'Hakem Kararlarının İcrası' (2009) 25 Banka ve Ticaret Hukuku Dergisi 5, 14.

33 Ergun Özsunay and R. Murat Özsunay (n 29) 963.

34 Akıncı (n 6) 17.

35 ibid 351.

provisions of the New York Convention, lists the documentation that must be submitted when seeking enforcement of foreign awards in Turkish courts.

A. The Recognition and Enforcement under the New York Convention

The New York Convention acts as the international standard for commercial arbitration. The New York Convention addresses (1) the enforceability of international awards and (2) the validity of arbitration agreements.[36] The New York Convention is a standardized multilateral treaty that ensures the enforcement of an arbitration award;[37] however, the Convention cannot be used to recognize or enforce decisions reached through other forms of alternative dispute resolution, such as mediation or conciliation, and it also does not apply to foreign judgments.[38] If a State (such as the United States of America)[39] seeks particular reciprocity, simply being a signatory to the Convention is sufficient to use the Convention as a tool for award enforcement, as signatory status meets the necessity for reciprocity.[40] This illustrates that, in terms of enforceability, the arbitral proceeding is the most secure approach for an investment. In Article V of the New York Convention, which serves as a security mechanism for both the contracting state and the parties to the arbitration, the grounds for refusing a foreign arbitral award are stated.[41] In Turkey, the same grounds for refusing to enforce a foreign arbitral award are applicable.[42] The grounds are as follows:

1. Incapacity and Invalidity

Parties must have a valid agreement to enforce the award in a foreign jurisdiction under the New York Convention, and the validity of the arbitration agreement is established by the applicable law.[43] Disputes arising from the arbitration agreement must be resolved according to the applicable law selected by the parties.[44] If the parties do not choose a law in the arbitration agreement, the Convention states that the law of the location of arbitration will apply.[45] While the New York Convention requires arbitration agreement be "in

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36 Carbonneau (n 5) 784.

37 *See Yusuf Ahmed Alghanim & Sons, WLL v. TOYS "R" US, Inc.*, 126 F.3d 15 (2d Cir. 1997).

38 Born (n 10) 1002.

39 *See National Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326 (5th Cir. 1987).

40 Born (n 10) 1137.

41 Senem Bahçekapılı Vincenzi, 'Verildiği Ülkede İptal Edilen Hakem Kararlarının New York Konvansiyonu Uyarınca Tenfizi' (2016) 36 Public and Private International Law Bulletin 73, 77.

42 ibid 75.

43 Born (n 10) 1137.

44 Gary B. Born, *The New York Convention: A Self-Executing Treaty*, 40 Mich. J. Int'l L. 115, 121 (2018).

45 George A. Bermann, 'Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts' in

writing" to be valid; failing that, the award is unenforceable[46], Turkey does not require a written arbitration agreement to enforce it.[47] Parties must be able to make an arbitration agreement, and if a party does not sign the arbitration agreement himself and instead appoints a representative for the signature procedure, the representative who signed the arbitration agreement must be specifically authorized to make an arbitration agreement on behalf of the party, or the agreement will be invalid. [48]

2. Violation of Due Process:

The lack of due process is a cause for refusing to enforce an arbitral award, according to the New York Convention. Due process is violated in two ways: (1) denial of opportunity to present a party's claims and defenses, and (2) the procedural irregularity of an arbitration.[49] In the arbitration proceedings, the parties must be treated equally.[50] The right to a fair trial may first be violated during the arbitral tribunal selection process. [51] The parties' right to a fair trial is violated unless they are informed of the tribunal's selection. Similarly, the fact that the parties are not informed about the trial is also a due process violation,[52] which might cause the refusal of the enforcement of the award.[53] The arbitral tribunal should hear the parties' claims stemming from the violation of due process. [54] The tribunal should consider due process violation claims and make a decision on them first; if that fails, parties can take their claims to the courts. [55] Furthermore, parties cannot file a lawsuit alleging due process violations that they did not submit during the arbitration. [56]

3. Arbitral Awards beyond the Scope of Submission to Arbitration

Parties define the scope of the arbitral tribunal's authority on the subject matter while drafting the arbitration agreement.[57] Arbitrators should resolve

George A. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (2017) 5.

46 Born (n 10) 1050.

47 Akıncı (n 6) 122.

48 Matti Kurkela and Santtu Turunen, *Due Process in International Commercial Arbitration* (Oxford University Press 2010) 35.

49 Born (n 10) 1156.

50 George A. Bermann (n 45) 46.

51 ibid 43.

52 S. I. Strong, 'Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns' (2008) 30 University of Pennsylvania Journal of International Law 1, 57.

53 Kurkela and Turunen (n 48) 38.

54 Akıncı (n 6) 444.

55 Kurkela and Turunen (n 48) 15.

56 Akıncı (n 6) 444.

57 George A. Bermann (n 45) 46.

the case within certain parameters; otherwise, due to the arbitrators' excessive power, enforcement of the award may be rejected. As a result, arbitrators should refrain from deciding on issues that are not covered by the parties' submission to arbitration. When an arbitral tribunal rules on a matter that is not covered by the arbitration agreement, the arbitral award's enforcement may be partially denied if it does not jeopardize the arbitral award's integrity.[58] Countries such as Portugal, Israel, and Czechia report that parties have not used Article V(1)(c) of the New York Convention, which covers the arbitral awards beyond the scope of submission to arbitration, to annul arbitral awards in their courts.[59] Some countries, such as Switzerland, evaluate these claims under the doctrine of *iura novit curia*, [60] which removes the barrier to award enforcement. In Turkey, courts occasionally apply the grounds of an arbitral ruling that go beyond the scope of the arbitration agreement. [61]

4. Irregularities of Composition of the Arbitral Tribunal or Arbitration

The arbitral tribunal must be established in accordance with the parties' consent and the arbitration agreement, and the procedural rules of arbitration and how arbitrators conduct the arbitration proceedings may be determined by the parties. Arbitrators must obey the procedural rules agreed upon by the parties while conducting the arbitration. [62] Courts may reject an award if the arbitral tribunal's composition does not match the parties' intent, or if the tribunal does not follow the procedural requirements that the parties agreed to. In terms of the arbitral tribunal's composition, Turkish arbitration law specifies that it must be made up of odd numbers.[63] It is sufficient reason to refuse to enforce the arbitral award.

5. Non-binding or Vacated Awards:

The fact that the arbitral ruling is binding and final is the most important feature of arbitration as an alternative dispute resolution method. If a situation that affects whether an arbitral award is binding emerges, such as suspension, vacation or the setting aside of the award by a court of arbitration place, the enforcement of the arbitral award is to be refused in a foreign jurisdiction.[64] Even if the arbitral decision is enforced in a foreign jurisdiction, the finalization and

58 ibid.
59 Kurkela and Turunen (n 48) 29.
60 Andrea Bonomi and David Bochatay, 'Iura Novit Curia in International Arbitration' in Franco Ferrari and Giuditta Cordero-Moss (eds), *Iura Novit Arbiter in Swiss Arbitration Law* (2018) 337.
61 George A. Bermann (n 45) 48.
62 ibid 49.
63 Akıncı (n 6) 444.
64 George A. Bermann (n 45) 52.

binding nature of the award are decided by the law of the arbitration location. It is frequently used as the basis for the vacation of foreign arbitral awards in Turkish arbitration law. [65]

6. Non-Arbitrability:

Arbitration is not applicable to a subject matter that cannot be resolved through arbitration, such as a public law dispute. [66] An arbitration proceeding that's not restricted to arbitrable subjects is indeed not valid, and the rendered award isn't binding or enforceable. In with the TIAC and the New York Convention, the rules governing domestic arbitration regarding non-arbitrability is valid.

7. Violation of Public Policy

While violation of public policy is frequently claimed as a reason for foreign courts not to enforce an award, its successful application in terms of morality and justice is uncommon.[67] Because a violation of public policy is intimately tied to national values, customs, and morality[68], it should not be vigorously interpreted by national courts[69]. Additionally, it necessitates judicial assessment of the merits of the awards.[70] There are three grounds in Turkish arbitration law for refusing to enforce an arbitral award owing to a violation of arbitration: (1) non-arbitrable subject matter, (2) lack of impartiality and independence of arbitrators, and (3) an irregular arbitral procedure.[71]

To conclude, there are criteria that prevent the foreign arbitrator's award from being enforced under the New York Convention. In the case that one of the listed situations arises, foreign courts have the ability to refuse the demand of enforcement. Despite the existence of the grounds set forth in the New York Convention, the foreign court may opt to enforce the arbitral award.

B. The Recognition and Enforcement of Arbitral Awards under the TIPPC

As Turkey is a signatory to the New York Convention, any arbitral award made in relation to signatories to the New York Convention will be recognized and enforced in accordance with the New York Convention. A small number

65 ibid.
66 Born (n 10) 1199.
67 George A. Bermann (n 45) 61.
68 ibid 62.
69 From an Anglo-American standpoint, it is a landmark case that clearly states that courts must interpret public policy narrowly. *See Parsons & Whittemore Overseas Co. v. Societe Generale De L'industrie Du Papier*, 508 F.2d 969 (2d Cir. 1974).
70 Carbonneau (n 5) 796.
71 Akıncı (n 6) 333.

of countries has not ratified the Convention.[72] In Turkish arbitration law, an arbitral award rendered in a non-signatory country is subject to specific enforcement rules established by the TIPPC.[73] The TIPPC follows the New York Convention in terms of its provisions. The clauses are practically a literal translation of the New York Convention's provisions. Likewise, the TIPPC's Article 68 grounds for refusing to enforce arbitral rulings overlap with the New York Convention.[74][75] If the grounds for refusal emerge, Turkish courts have to reject the enforcement of arbitral awards. In terms of the business location challenge, when the problem emerges regarding the location, the award can be annulled.

II. VACATING ARBITRAL AWARDS: THE BUSINESS LOCATION

An arbitration ruling and award cannot be appealed in Turkish arbitration law. The only way to eliminate arbitral awards through courts is annulment of the arbitral award.[76] The appeals system was not introduced as part of Turkey's arbitration policy in order to avoid the Turkish Court of Cassation from intervening in arbitral decisions. An arbitral award must be vacated for certain reasons. If these grounds are established, Turkish courts have the power to intervene in the arbitral process and overturn the decision.[77] According to Article 15 of the Turkish International Arbitration Code (TIAC) [78], a vacation filing against an arbitral award must be submitted with the courts within 30 days.

The submission period to the courts for the vacation typically starts on the date the arbitrators notify the parties of the tribunal's decision. In Turkish law, applying the courts for the annulment of an arbitrator's decision stops the execution of the arbitrator's decision.[79] If one of the parties does not begin the vacation process within the period set by the TIAC, the arbitral award becomes final, and the other party can begin the enforcement process. If the right to

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72 For a detailed list *see* https://www.newyorkconvention.org/countries.

73 Adnan Deynekli, 'Yabancı Hakem Kararlarının Türkiye'de Tanınması ve Tenfizinde Karşılaşılan Sorunlar' (2014) 16 Dokuz Eylül Hukuk Fakültesi Dergisi 105, 106.

74 Aysel Çelikel and B Bahadır Erdem, *Milletlerarası Özel Hukuk* (16th edn, Beta 2020) 836; Erman Eroğlu, *Turkish Construction Arbitration: An International Perspective* (Adalet 2021) 121.

75 Aysel Çelikel and B Bahadır Erdem, *Milletlerarası Özel Hukuk* (16th edn, Beta 2020) 836.

76 Akıncı (n 6) 251.

77 Ali Cem Budak, 'Hakem Kararlarının Maddi Hukuka Aykırılık Sebebiyle İptal Edilebilir Mi? Hakem Kararlarının İptal Müessesi' (2020) 40 Public and Private International Law Bulletin 557, 559.

78 Official Gazette of the Republic of Turkey 5.7.2001 (Act No.4686).

79 Akıncı (n 6) 260.

appeal a decision is waived, the decision becomes final and enforceable. Any party can relinquish their right to vacate in part. A party that waives his right is unable to pursue legal action. Any party who resides outside of Turkey can waive his right to vacate. According to the TIAC, non-Turkish parties only choose to waive their right to vacation on a limited basis, and those residing in Turkey never waive their vacation rights.[80] A waiver of the right to vacate might be mentioned as part of the arbitration agreement, or it can be agreed to independently by the parties. Only two circumstances apply to the validity of a waiver of the right to vacate. The first is that the waiver be clear and certain, and the second is that it is written.

A. Grounds for Vacating Arbitral Awards

The restricted grounds for vacation are defined in the Turkish arbitration. The validity and enforceability of the arbitral award are not affected by grounds not listed in the TIAC.

1. The Ex Officio Reasons for Vacation to be Taken into Consideration by the Court

a. Arbitrability

Arbitration processes cannot be held in circumstances where arbitration is not permitted. When arbitration on a non-arbitrable matter is completed and a final decision is rendered, the award becomes invalid. Articles 1 and 15 of the TIAC define arbitrability, including its scope and limitations. There are two types of problems that are not suitable for arbitration in Turkish arbitration: disputes deriving from real property rights and matters that are not subject to the parties' discretion.[81] An arbitration agreement concerning real property rights, on the other hand, is valid if the immovable is located outside of Turkey, even if one of the parties is Turkish. As legal actions involving immovable property in Turkey are considered within the scope of public policy, they cannot be arbitrated. Parties may arbitrate real rights to immovable property outside of Turkey's territory as long as it does not affect Turkey's public policy. Due to the fact that these are matters pertaining to the state's sovereignty, which is directly tied to public policy, arbitration proceedings cannot be held on subjects of criminal law or in disputes deriving from administrative law.[82]

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80 ibid 2633–266.

81 Esra Öğünç, 'Verildiği Ülkede İptal Edilen Hakem Kararlarının Tanınması ve Tenfizi' (2021) 70 Ankara Üniversitesi Hukuk Fakültesi Dergisi 801, 821.

82 Burak Huysal, *Milletlerarası Ticari Tahkimde Tahkime Elverişlilik* (Vedat Publishing 2010) 11–19.

b. Public Policy

On the basis of public policy, Turkish courts may overturn the arbitral ruling.[83] In both domestic and international law, the concept of public policy may have different meanings; nonetheless, there is no explicit understanding of what public policy is. Similarly, under Turkish law, it is impossible to define what constitutes public order. In domestic law, public policy refers to all of the rules that safeguard Turkish society's essential structure and fundamental interests, which are protected by the Turkish Constitution's fundamental rights and freedoms, the basic concept of Turkish law, and the foundation of Turkish customs and morals.[84] In international law, public policy is a collection of norms that safeguards a global society's essential structure and interests. The term "public policy" refers to the fundamental norms as well as the social, political, and economic institutions that govern a country or community. Because each country's political, social, and economic structures are unique, a violation of one state's public policy may not be incompatible with another's. Similarly, a country's public policy criteria may change over time; yet, it is self-evident that anything that violates due process rights is against public order everywhere at all times.[85]

2. Parties' Application for Vacation

a. Lack of Legal Capacity and Invalid Arbitration Agreement

To begin with arbitration, the parties must first sign a valid arbitration agreement stating that they have the legal power to sue. The arbitration agreement is not legitimate and binding if one of the parties lacks the legal power to sue.[86] The concept of legal capacity in Turkish law is taken into account in arbitration proceedings where the TIAC is used. The TIAC outlines the legal rights and capacity for litigation. It will be considered if the parties agree on the applicable law that will establish the validity of the arbitration agreement. If no applicable law is determined, Turkish law will be applied in accordance with the TIAC's Article 4. A common question in Turkish law is whether a person selected by the parties, such as an agent or officer, is authorized to make an arbitration agreement. In fact, the representative needs special approval to enter into an arbitration agreement. If a representative is not expressly allowed to sign an arbitration agreement, the arbitration agreement

83 ibid 153–154.

84 Cemile Demir Gökyayla, *Yabancı Mahkeme Kararlarının Tanınması ve Tenfizde Kamu Düzeni* (Seçkin Publishing 2001) 26.

85 Zehra Derya Tarman, 'Yabancı Mahkeme ve Hakem Kararlarının Türkiye'de Tenfizinde Karşılaşılan Sorunlara İlişkin Bazı Tespitler' (2017) 37 Public and Private International Law Bulletin 798, 811–815.

86 Çelikel and Erdem (n 74) 836.

must be approved by the party. Otherwise, an arbitration agreement will not bind the party. The issue of whether the representative has exclusive authority to make an arbitration agreement must be examined.[87]

b. Failure of the Selection of Arbitrators

Parties have the power to appoint any person as an arbitrator. The number of arbitrators is the only restriction on the composition of the arbitral panel, which should be uncommon. The arbitral award, on the other hand, can be vacated if the arbitral tribunal's structure is not constituted in accordance with Turkish arbitration legislation. When the parties appoint a specific individual as an arbitrator in the arbitration agreement, the designated arbitrator must be a member of the arbitral panel and should supervise the proceedings. An arbitration agreement cannot be conducted out by anyone except the authorized arbitrator; otherwise, the award could be overturned by the courts. In general, both parties must appoint one arbitrator, and then the third arbitrator, who is also the chair of arbitration, is chosen by a group of two arbitrators. If one party chooses an arbitrator but the other does not, the Turkish courts have the authority to appoint an arbitrator in place of the party who does not. If the parties and arbitrators are unable to agree on a third arbitrator, the Turkish courts will be able to do so.[88]

c. The Time Period for Rendering the Award

Arbitrators have a set amount of time once the arbitration processes begin to make their decisions.[89] If these deadlines are not met, the arbitrator's decision may be considered invalid. Within one year after the meeting, the arbitrators must make an arbitration decision.[90]

d. Exceeding the Scope of the Power of Arbitrators

Arbitrators can determine on their authority under Turkish law. Objections to the arbitrators' powers must be made as soon as possible. When an objection to an arbitrator's power is raised, the tribunal must decide whether the objection is valid or not.[91] The tribunal's decision on the authority of arbitrators objection is final and binding, and the parties cannot appeal to the court to have the decision overturned. Once the parties have agreed on the matters to be decided by the arbitrators, the arbitrators should only deal with those problems. In arbitration proceedings, arbitrators are not allowed to exceed their jurisdictional authority. Arbitrators are only permitted to deliver decisions on the subject matter stated

87 Akıncı (n 6) 289-290.
88 ibid 297–298.
89 Çelikel and Erdem (n 74) 836.
90 Akıncı (n 6) 299.
91 Çelikel and Erdem (n 74) 836.

by the parties in an arbitration agreement; that is, arbitrators must exercise their arbitral powers within the parameters established by the parties. The parties have the right to challenge the arbitrators' decisions if they are made outside of their subject matter jurisdiction, and they can bring an annulment action against the decisions. Any claim submitted in the arbitration proceedings must be decided by the arbitrators. The parties may ask the arbitrators to make a complementary decision or go to litigation to vacate the arbitral award. The arbitrators do not have the ability to set their own fee, nor can they increase it. The award may be partially annulled if they increase or change their fee.[92]

e. Procedural Irregularities:

If the parties agree on applicable procedural rules for the arbitration, the proceeding must follow those rules; otherwise, the parties might use it as a basis for challenging the judgment. Any procedural irregularities must have a substantial impact on the merits of awards; otherwise, the decision will not be vacated under Article 15 of the TIAC. The impartiality and independence of arbitrators, failure to inform the parties, and violations of due process rights are all common grounds for award vacation in arbitral practice. If arbitrators change the language of the procedures in a way that is not in accordance with the parties' agreement, and the parties are unable to properly express themselves, the award may be vacated.[93]

f. The Violation of the Equality Principle

In arbitration processes, the notion of fair treatment is critical. Objections and defenses must be made equally by both parties. Similarly, the party-appointed arbitrators must maintain an equal distance from all parties; otherwise, the decision may be vacated. Equal treatment, or the concept that all parties should be treated equally throughout the process, is *conditio sine qua non.* [94]

B. The Challenge of Business Location: A Time to Change

The parties may waive their right to go to court for annulment in part or entirely, according to TIAC Article 15. Parties whose domiciles, habitual residence, or place of business are located outside of Turkey may waive their right to seek an annulment. [95] It is not possible for a Turkish firm to waive its right to file an annulment case in this circumstance. As a result, both parties' domiciles, habitual residence, or place of business must be outside Turkey in

92 Akıncı (n 6) 301–306.

93 ibid 307–308.

94 Maxi Scherer, Dharshini Prasad and Dina Prokic, "the Principşe of Equal Treatment in International Arbitration" (September 3, 2018) available at <https://ssrn.com/abstract=3377237 > accessed 18 August 2021.

95 Akıncı (n 6) 264.

order to file an annulment case. In construction arbitration, for example, the contracting party could be a group of companies, such as a joint venture. The arbitration must include all parties of the joint venture. When a dispute emerges, they must all file an arbitration case. If one of the joint venture partners is a Turkish company, it is unclear if the annulment case will be waived. Stating the grounds above, there is no explicit definition whether the arbitration award may be vacated in terms of business location challenge.

From the past to the present, Turkish arbitration law has evolved. As a result, there are various areas that need to be developed, as well as several jurisdictional issues that need to be addressed. One of the uncertainties that needs to be answered is the company's location. Over the course of time, the requirements of business life may lead to deficiencies in the law. While business life is flowing rapidly, keeping the rules stable may affect their effectiveness. Turkish arbitration law has also changed over time and has adopted many new issues in order to keep up with the requirement of business life. Turkish arbitration law needs revision on some issues. In practice, it is possible that this situation can be remedied with a simple amendment to the TIAC. A clear statement about business location challenge will heal all the problems arising from it. The way to settle the dispute from the outset is mandatory provision regarding business location challenge in arbitration agreement.

CONCLUDING REMARKS

In summary, Turkish arbitration is continuously evolving in great harmony with contemporary arbitration rules, and Turkish arbitration is more likely to satisfy the parties' demands in arbitration proceedings. With regard to the enforcement of arbitral awards in the context of business location, Turkey needs to adopt a more arbitration-friendly policy and should make rules. A provision in the TIAC may solve the entire problem at once. As the legal community, we are proceeding towards a future where arbitration becomes the rule and court trial becomes the exception. The solutions suggested in this study are devoted to a future with fewer problems in arbitration towards seeking for the *de lege ferenda.*

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A CRITICAL EVALUATION OF THE PROVISIONS INCLUDING THE CONCEPT OF 'REASON' IN THE TURKISH CRIMINAL PROCEDURE CODE

Ceza Muhakemesi Kanunu'nda 'Gerekçe' Kavramına Yer Veren Hükümlerin Eleştirel Bir İncelemesi

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ABSTRACT

In the third paragraph of Article 141 of the Constitution, it is stated that the decisions of all courts shall be written with reason, and in accordance with this regulation, it is emphasized in Article 34 of the Criminal Procedure Code that all kinds of decisions rendered by the judge and courts, including dissenting opinions, shall contain reasons. However, the legislator has not confined itself to these constitutional and general regulations and has preferred to specifically regulate that the reason would be sought in certain matters, such as transferring of a lawsuit, expertise, and pre-trial detention in some articles of the CPC. This approach has been continued by the amendments made, and the number of articles that include the concept of reason has gradually increased. Considering these amendments, which were undoubtedly made in order to secure the right to a reasoned decision, along with the already existing problems regarding the concept of reason stemming from the legislation, they have mostly led to the exact opposite of what was intended. These drawbacks could be minimized by the suitable amendments to the CPC, to Articles 34, 230, and 232 in particular.

Key Words: Reason, reasoned decision, motion, hearing, judgment, appeal on (fact and) law

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ÖZET

Anayasa'nın 141. maddesinin üçüncü fıkrasında mahkemelerin her türlü kararının gerekçeli olarak yazılacağına yer verilmiş ve bu düzenlemeyle uyumlu olarak Ceza Muhakemesi Kanunu'nun 34. maddesinde de hâkim ve mahkemelerin her türlü kararının, karşı oy da dâhil, gerekçeli olması gerektiğine vurgu yapılmıştır. Ancak kanun koyucu anayasal ve genel nitelikteki bu düzenlemelerle yetinmemiş ve davanın nakli, bilirkişilik, tutuklama gibi belli hususlarda da gerekçe aranacağını CMK'nin bazı maddelerinde özel olarak düzenleme yoluna gitmiştir. Yapılan değişikliklerle bu anlayış sürdürülmüş ve gerekçe kavramına yer veren maddelerin sayısı giderek artmıştır. Gerekçe olgusuna ilişkin mevzuattan kaynaklanan mevcut sorunlarla birlikte düşünüldüğünde, gerekçeli karar hakkının güvence altına alınması amacıyla yapıldığında kuşku bulunmayan bu değişiklikler çoğu zaman amaçlananın tam aksine sonuçların doğmasına sebebiyet vermiştir. Başta CMK'nin 34, 230 ve 232. maddeleri olmak üzere, yapılacak amaca uygun değişikliklerle bu sorunların asgariye indirilmesi mümkündür.

Anahtar Sözcükler: Gerekçe, gerekçeli karar, istem, duruşma, hüküm, istinaf/temyiz

There is no requirement of Ethics Committee Approval for this study.

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INTRODUCTION

In its simplest form, the reason, which may be defined as the element of a judicial decision indicating how that decision is reached,[1] constitutes the legitimacy of the decision in criminal procedure law and is accepted as an indispensable component of the right to a fair trial.[2] The reason, which is an explanation that determines the relationship between the abstract norm and the concrete fact,[3] must be clear and understandable due to its restrictive dimension in criminal procedure.

The reason has many functions that make it essential, such as forcing the decision-makers to be more attentive, thus preventing arbitrariness, ensuring that judicial decisions are reviewed and adopted by the parties and the public, contributing to the restoration of trust in the judiciary, and developing the science of law.[4]

In order to fulfill these functions, the legislation has a significant position as much as the practitioners. As a consequence of this, the concept of reason, which is included in the third paragraph of Article 141 of the Constitution[5] as 'The decisions of all courts shall be written with reasons', is embraced in detail by the Criminal Procedure Code[6] in accordance with the constitutional regulation.

Indeed, it is seen that the concept of reason is included in the CPC a total of forty times, including the headings, in twenty-one different articles. Moreover, considering the amendments made following the entry into force of the CPC, this number is likely to increase even more. However, despite the sensitivity on this issue and all the amendments made in the legislation, the fact of lack of reason continues to constitute one of the most current and controversial issues in criminal procedure.[7]

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1 M. Nedim Bekri, 'Gerekçeli Karar Hakkı' (2014) 3 ABD 203, 208.

2 Mustafa Alp, 'Anayasa Hukuku Açısından Mahkeme Kararlarında Sözde (Görünürde) Gerekçe', 'Prof. Dr. Mahmut Tevfik Birsel'e Armağan' (2001) DEÜY, 425, 427; Hilmi Şeker, 'Strazburg Yargı Kararlarında Doğru,Haklı,Yasal ve Makul Gerekçe Biçimleri' (2007) 65(2) İBD 179, 181; Muharrem Kılıç, 'Gerekçeli Karar Hakkı: Yargısal Kararların Rasyonalitesi' (2021) 47 TAAD 1, 7; Zühal Aysun Sunay, 'Gerekçeli Karar Hakkı ve Temel İlkeleri' (2016) 143 DD, 7,7.

3 Kılıç (n 2) 5; Ömer Faruk Atagün, 'Temel Bir İnsan Hakkı Olan Adil Yargılanmanın Unsuru Olarak Gerekçeli Karar Hakkı' (Master's thesis, University of Hacettepe 2020) 70.

4 The Court of Cassation of Turkey, General Assembly of Criminal Chambers 1098/212 [14 March 2019] 7; Atagün (n 3) 67-70, 135-141; Bekri (n 1) 210; Alp (n 2) 428.

5 The Constitution of Republic of Turkey, Law Number: 2709, Ratification: 18 October 1982, Issue: 09 November 1982 - 17863 (Repeating) (TR), https://www.mevzuat.gov.tr/MevzuatMetin/1.5.2709.pdf accessed 08 November 2021.

6 Criminal Procedure Code, Law Number: 5271, Ratification: 04 December 2004, Issue: 17 December 2004 – 25673 (TR), https://www.mevzuat.gov.tr/MevzuatMetin/1.5.5271.pdf accessed 08 November 2021.

7 Çetin Aşçıoğlu, 'Yargıda Gerekçe Sorunu' (2003) 48 TBBD 109, 110-114.

When the articles that include the concept of reason in the CPC are examined, the problems arising from phrases leading to uncertainties, incoherencies, and misunderstandings, insufficient explanations, misuse of punctuation marks, article references, statements limiting the obligation to give reasons to the decision-maker or the type of the decision, poor wording, the use of adverbs such as 'absolutely' and 'clearly' when pointing out the requirement of stating reasons draw the attention. Elimination of these drawbacks arising from the legislation, which may trigger or increase the long-standing implementation mistakes regarding the reason, would undoubtedly contribute to the solution of the problem of reason in Turkish criminal procedure.

In this study written for the purpose concerned, the texts of the articles that include the concept of reason in the CPC is subjected to a detailed evaluation under the headings formed by considering the general system of the CPC, the problematic aspects of the article in question are determined as a result of the discussions made on the basis of the notion of reason, and appropriate solutions and alternatives to these problems are tried to be proposed in order to ensure the right of reasoned decision as well as the right to an effective remedy and to a fair trial.

I. HOLDING THE HEARING ELSEWHERE

The principle of a natural judge, regulated in Article 37 of the Constitution,[8] requires that the court which has jurisdiction to try the case shall be determined by the law before the crime is committed or the conflict arises.[9] However, in practice, some situations exist where a court, which is later established or appointed by law, hears the case. In this respect, the third paragraph of Article 19 of the CPC titled 'Transferring of the lawsuit and holding the hearing elsewhere' specifies that 'The court may decide to hold the hearing elsewhere within the provincial borders by reasons of factual grounds or security. […]'[10]

Having the feature of being the first article in the CPC where the concept of 'reason' is included, this regulation which is not in the original version of the CPC was added to the Article as the third paragraph with The Law No. 6763.[11]

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8 Article 37 of the Constitution titled 'Principle of a natural judge' is as follows: 'No one may be tried by any judicial authority other than the legally designated court. Extraordinary tribunals with jurisdiction that would in effect remove a person from the jurisdiction of his legally designated court shall not be established', for the English translation of the Article: https://global.tbmm.gov.tr/docs/constitution_en.pdf accessed 08 November 2021.

9 Nur Centel and Hamide Zafer, *Ceza Muhakemesi Hukuku*, (13th edn, Beta, 2016) 607.

10 Feridun Yenisey, *Turkish Penal Procedure Code*, (3rd edn, Kutup Yıldızı, 2017) 8; The English translations of the articles included in this study have been obtained from the cited book, on some occasions, however, necessary changes have been implemented on the translations in line with the purpose of the study.

11 The Law about Amending Criminal Procedure Code and Some Laws, Law Number: 6763,

It should be noted that the Article clearly states the reasons for the decision about holding the hearing elsewhere instead of mentioning that the decision must be reasoned as in other related articles in the CPC. However, it is unclear what the 'factual grounds' are that caused the hearing to be held elsewhere. In the reasoning of Article 22 of the Law No. 6763 which added the third paragraph to Article 19 of the CPC, the phrase 'factual grounds' is explained as 'grounds related to the lack of space such as the excess number of offenders and victims', while the concept of 'security' is expressed as 'security reasons that do not threaten public safety'.[12] Nonetheless, it is difficult to suppose that these explanations remove the uncertainty in question. Despite this, the Constitutional Court dismissed the annulment action, filed with the allegation that the phrase '… may decide … by reasons of factual grounds or security' in the paragraph violates the principles of legal certainty and natural judge as well as the right to a fair trial.[13] According to the Court, since the aforementioned 'factual grounds' and 'security reasons' may arise in different ways, it is not obligatory for them to be determined in advance by the legislator and enumerated one by one in the law.[14] In addition, as the aforementioned paragraph is related to the trial procedure, the regulation of this issue remains within the discretion of the legislator, pursuant to Article 142 of the Constitution.[15]

While the use of the phrase 'by reasons of' (*gerekçesiyle*) for both 'factual grounds' (*fiili sebepler*) and 'security' (*güvenlik*) does not cause any grammatical mistake in English, the use of 'by reasons of' with 'factual grounds' in Turkish is incorrect. Therefore, amending the paragraph concerned by adding the phrase 'due to' before the phrase 'factual grounds' would eliminate the aforementioned negligence. On the other hand, it can be argued that the clause 'by reasons of' is used in the meaning of 'due to' in the Article. In fact, the use of 'factual grounds' before the word 'security' in the text of the Article also supports this determination.

II. REASONS REQUIRED AT DECISIONS

Stating reasons for judicial decisions ensures both the 'independence and impartiality' and 'transparency and accountability' of the judicial authorities before the public, by preventing arbitrary decisions, and providing a basis for the parties to apply to higher-level judicial authorities in terms of the right

Ratification 24 November 2016, Issue: 02 December 2016 – 29906 (TR), https://www.resmigazete.gov.tr/eskiler/2016/12/20161202-1.htm accessed 08 November 2021.

12 The Government Bill on The Law on the Amendment of the Criminal Procedure Code and Some Laws, 4059 [22 October 2016] 20-26 (TR), https://www2.tbmm.gov.tr/d26/1/1-0775.pdf accessed 09 November 2021.

13 The Constitutional Court, Case 326/81 [11 July 2018] paras 32-47.

14 Ibid. para 39.

15 Ibid. para 42.

to a fair trial.[16] As a continuation of this idea, Article 34 of the CPC titled 'Reasons required at decisions' states in its first paragraph that 'All kinds of decisions rendered by a judge and courts, including dissenting opinions, shall be delivered in a written form and contain the reasons. While writing the reasons, Article 230 shall be considered. […]'[17]

It is observed that this general article that regulates the requirement of motives for decisions is accordant with Article 141 of the Constitution. However, by specifying that the decisions of judges and courts shall be reasoned, the Article creates a situation as if decisions made by the public prosecutor, for instance, do not need to contain motives. As will be examined in the following sections of the study, it is accepted that the motions of the public prosecutor for pre-trial detention (Article 101) and appeal (Articles 273 and 295) must be reasoned. Moreover, pointing out that appellants shall declare their grounds for appeal on law, Article 295 of the CPC indicates that this obligation is not limited to the public prosecutors either. In this sense, it would be appropriate to make a regulation on the aforementioned Article, including that the motions of the public prosecutors and appealing parties shall also contain motives in cases that are clearly regulated by law. Such a regulation would not only protect the right to a reasoned decision but also have positive effects in terms of the integrity of the CPC.

The second drawback of the Article stems from the reference to Article 230 of the CPC with regard to the writing of the reasoned decisions. Not regulating the motions of the public prosecutor and appealing parties, Article 230 also includes many flawed provisions as discussed in detail in the relevant section of the study. In this regard, it would be beneficial to remove the reference to Article 230, which might cause confusion in practice regarding how to write a reasoned decision.

III. PROVISIONS REGARDING THE EXPERTS

A. The Appointment Of The Experts

In criminal procedure, apart from the issues which are possible to be solved with the general and legal knowledge required by the profession of the judge, where a special or technical knowledge for the solution of some cases is required, it may be decided to obtain the vote and opinion of an expert.[18] Expert

16 Atagün (n 3) 63-68.

17 Yenisey (n 10) 13.

18 Centel and Zafer (n 9) 279; Feridun Yenisey and Ayşe Nuhoğlu, *Ceza Muhakemesi Hukuku* (5th edn, Seçkin 2017) 220-221; Handan Yokuş Sevük, 'Ceza Muhakemesi Hukukunda Bilirkişilik' (2006) 64(1) İÜHFM 49, 49;Yaprak Öntan, *Ceza Muhakemesi Hukukunda Bilirkişilik*, (Yetkin, 2014) 54; Burcu Dönmez, 'Yeni CMK'da Bilirkişi Kavramı' (2007) 9

evidence mediates to reach the factual truth, which is the purpose of criminal procedure. For the resolution of the case subject to investigation or prosecution, in case the votes and opinions of other professional groups are needed or the law requires them in some cases,[19] the public prosecutor, judge, or court would appoint an expert. Pursuant to the second paragraph of Article 63 of the CPC, 'Appointing an expert and, by giving reasons, determining its number more than one belongs to the judge or court. If motions on appointing more than one expert are denied, the decision shall meet the same requirements'.[20]

The first point that draws attention in the paragraph is that it causes incoherency due to subject-verb disagreement. In the first sentence whose subject is 'appointing an expert and by giving reasons determining its number more than one', the phrase 'the decision of' or 'the authority to' must be added to the subject by making grammatical corrections in order for the predicate 'belongs' to be used without causing incoherency. Considering that the word 'authority' is included in the third paragraph of Article 63 regulating that the public prosecutor is also entitled to exercise the aforementioned authorities[21], changing the subject of the sentence to 'The authority to appoint an expert and by giving reasons determining its number more than one' would eliminate this drawback.

Furthermore, no obvious explanation exists both in the paragraph and the reasoning of Article 63 as to why the obligation to give reasons for appointing more than one expert is specifically established. On the other hand, in the face of the existence of Article 34 of the CPC, which may be considered as the general regulation with regard to the concept of reason, there is no need to mention such an obligation. Having stated that determining the number of experts more than one by giving reasons, the paragraph may lead to some misunderstanding, as if giving reasons is not required for decisions, such as appointing a single expert unless otherwise clearly provided in the article text.

(Special Issue) DEÜHFD 1145, 1146; M. Onursal Cin, 'Ceza Yargılamasında Bilirkişilik ve Uygulama Sorunları' (2021) 4(1) NEÜHFD 170, 171; The Court of Cassation of Turkey, General Assembly of Criminal Chambers 541/194 [04 May 2021] 11.

19 Centel and Zafer (n 9) 282-283; Yenisey and Nuhoğlu (n 18) 221-222; Dönmez (n 18) 1145-1146; Cin (n 18) 171; Sevük (n 18) 62-63; Öntan (n 18) 208; For instance, according to the first paragraph of Article 73 of the CPC, 'In crimes related to falsification, committed on currency and values such as stock papers and treasury checks, all seized items of the currency and values shall be asked to be examined by those authorities in the center or their affiliated units in the country having responsibility for circulating the original materials ' Yenisey (n 10) 30.

20 Yenisey (n 10) 25.

21 The third paragraph of Article 63 of the CPC provides that 'The public prosecutor shall also be entitled to exercise the authorities regulated in this Article, during the investigation phase', Yenisey (n 10) 25.

The same applies to the second sentence of the paragraph, which requires reasons for denial of motions on appointing more than one expert. Again, this form of regulation is flawed as it paves the way for understanding that the decision may not contain reasons when these motions are approved. However, it is without doubt that the rights of parties, at least their right to a reasoned decision, could be violated even in case of approval of such motions. Therefore, these types of phrases must be eliminated in order for the aforementioned paragraph to be in harmony with Article 34 of the CPC.

B. Oath Given In A Written Form

The legislator has assigned some duties and responsibilities to the expert in order to ensure that the expertise could be carried out in an effective way. One of these duties and responsibilities is taking the oath of the expert.[22] The experts, who are placed on the expert-lists, give an oath, repeating the following words before the judicial commission at the courts of ordinary jurisdiction: 'I swear on my honor and conscience, that I shall fulfill my duty pursuing the justice and in accordance with sciences and technology, in an impartial manner'.[23] The experts who are not included in the lists, on the other hand, take the oath in the above-mentioned manner in the presence of the authority that appointed them when they are assigned. Nevertheless, it is not always possible to give the oath orally. In this sense, the seventh paragraph of Article 64 of the CPC titled 'Individuals who are eligible to take the expert stand' establishes that 'In cases where there are obstacles, the oath may be given in a written form and the text of it shall be attached to the file. However, the reasons for this must be laid down at the decision.'[24]

Considering the legal regulation, it is understood that giving the oath in a written form is exceptional. There is no explanation both in the text of the paragraph and in the reasoning of the Article regarding this exception, which is stated as 'in cases where there are obstacles'. On the other hand, temporary or permanent speech impediments and certain diseases that prevent or make it difficult to speak could be given as examples of this exception.

Since the decision to give the oath in a written form in certain cases is also within the scope of 'all kinds of decisions' referred to in Article 34 of the CPC, it is not necessary to include a separate requirement of giving reasons in the paragraph. Yet, the inclusion of this requirement for such an exceptional case does not necessitate an amendment to the seventh paragraph of Article 64.

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22 Süha Tanrıver, 'Bilirkişinin Sorumluluğu' (2005) 56 TBBD, 133, 147; Centel and Zafer (n 9) 285; Öntan (n 18) 107; Cin (n 18) 174; Sevük (n 18) 79; Dönmez (n 18) 1161; Yenisey and Nuhoğlu (n 18) 228-229.

23 The fifth paragraph of Article 64 of the CPC.

24 Yenisey (n 10) 26.

C. The Decision On The Appointment And The Course Of Examination By The Experts

Experts must complete their examination within a certain time and notify their votes and opinions to the authority that appointed them. Sometimes, due to the nature of the work, it may be possible for experts to make the examination and express their opinion in a short time. Most of the time, however, time will be needed and the authority appointing the experts will determine this period in accordance with the law.[25] According to the first paragraph of Article 66 of the CPC,

> The decision granting an expert examination shall clarify the questions to be answered requiring specialized and technical knowledge, the subject of the examination, and the duration within which this task is to be accomplished. This duration shall not exceed three months, according to the qualifications of the duty. In cases where special grounds make it necessary, the appointing authority may prolong this duration upon the demand of experts, with a decision that includes reasons, for no longer than three months.[26]

In the first paragraph of the Article, it is highlighted that the decision to prolong the duration of the expert examination due to the necessity of 'special grounds' shall be reasoned. However, there is no clear explanation of what is meant by 'special grounds' in both the text of the paragraph and the reasoning of the Article.[27] Taking into account the nature of the expert's duty in criminal procedure, 'special grounds' in question may be qualifications or complexity of the duty, the excess of documents or items to be examined, the need for information, documents, or items during the examination.

Incidentally, it should be noted that the obligation of the judge and courts to give reasons for their decisions continues even when the duration is not prolonged upon the demands of experts. Undoubtedly, acting contrary to this requirement would amount to a violation of Article 6 of the ECHR, regarding the right to a reasoned decision, Article 141 of the Constitution, and Article 34 of the CPC.

As a conclusion of the failure of experts to deliver their written votes and opinions within the determined time, the second paragraph of Article 66 provides that

> Experts who do not deliver their written opinion within the determined duration may be immediately replaced. In such instances, the aforementioned shall submit a written report, explaining what has

[25] Öntan (n 18) 146.
[26] Yenisey (n 10) 26.
[27] Öntan (n 18) 146.

been conducted up to that point and shall immediately return items and documents delivered to them in connection with their duty. In addition, without prejudice to the provisions regarding legal and criminal liability, it may be decided not to make any payment to the expert under the name of wage and expense, and the regional council of expertise shall be requested to apply the necessary sanctions by explaining the reasons.[28]

The last sentence of the paragraph, including the concept of reason, has taken its current form as a result of the amendment made in the CPC with Article 44 of the Law No. 6754 dated 03.11.2016.[29] It is beyond doubt that at least the facts and reasons shall be stated when sanctions concerned are requested, and this eliminates the need to specifically mention that the request to imply sanctions must contain reasons. This issue is not mentioned in the reasoning of the amended paragraph either. It is only stated in the reasoning that the amendment was made in order for Article 66 of CPC to comply with Articles 8 and 13 of the Law No. 6754.[30]

D. Experts Who Have Different Views Or Dissenting Opinions On The Common Outcomes

Within the scope of their discussion obligation, more than one expert could be appointed for the same examination in order to enable them to reach more accurate outcomes in the field of inspection by exchanging views. Nonetheless, it is always possible for experts to reach different conclusions or have divergent views on common outcomes regarding the dispute to be solved while fulfilling their aforementioned obligation.[31] In this sense, the second paragraph of Article 67 of the CPC declares that 'If there is more than one expert appointed and they have different views or opinions on common outcomes, they shall write this instance along with their reasons in the written expert opinion.'[32]

First of all, it could be argued that the paragraph contains several grammatical errors. The phrase 'more than one expert appointed' amounts to 'experts who are appointed more than once' rather than 'more than one expert who is appointed for the same examination' as intended to be emphasized in the paragraph. On the other hand, the noun 'experts' must be used in singular form after the pronoun 'more than one', since indefinite pronouns must be followed

28 Yenisey (n 10) 26-27.

29 Expertise Law, Law Number: 6754, Ratification 03 November 2016, Issue: 24 November 2016 – 29898 (TR), https://www.mevzuat.gov.tr/MevzuatMetin/1.5.6754.pdf accessed 09 November 2021.

30 The Government Bill on Expertise Law, 683 [04 March 2016] 46 (TR), https://www2.tbmm.gov.tr/d26/1/1-0687.pdf accessed 09 November 2021.

31 Öntan (n 18) 117.

32 Yenisey (n 10) 28.

by a singular name in such cases. For the reasons explained, amending the beginning of the paragraph to 'More than one expert who is appointed for the same examination' would eliminate the aforementioned errors.

In the legal regulation, it is stated that if the appointed experts reflect different views on the report or have dissenting opinions on the common results, they must give reasons for these issues. By doing so, it is aimed to provide reasons for the different or dissenting opinions put forward by the experts in their written reports so that they could be evaluated by the Court. However, expert reports, which should be based on technical data, are expected to contain reasons of their own. In this sense, if a warning is to be included in the text of the Article regarding the requirement of reason, although not necessary, this must be done for not only different or dissenting opinions but also all the opinions put forward by the experts. On the other hand, this regulation complies with Article 34 of the CPC, which states that even dissenting opinions must be justified.

E. Asking A New Written Expert Opinion And Putting The Motions Of Opposition

In criminal procedure, it is rather important to allow the views of the parties to be taken regarding the written opinion of experts in order to resolve the dispute in a proper fashion and to reach the factual truth. In this regard, the fifth paragraph of Article 67 of the CPC is as follows:

> After the expert has finished the inspection, the public prosecutor, the intervening party, his representative, the suspect or the accused, his defense counsel, or the legal representative shall be given a specified time limit to ask any new expert opinion or to put motions of opposition against this given written expert opinion. If the motion filed by these individuals is denied, a reasoned decision shall be produced in this respect within three days.[33]

As seen, the fifth paragraph points out that following the completion of expert examinations, if the motions on asking a new written expert opinion or opposing against the given report are denied, a reasoned decision shall be rendered.

The time limit to be determined for a request for a new expert examination or for the parties to report their objections is not clearly specified in the law. The fact that this period, which may vary due to the difficulty and complexity of the issue to be resolved, is not specified in the law, draws attention as a positive practice. However, in terms of securing the right to be tried within a reasonable time, it would be appropriate to set an upper limit for the time limit concerned.

[33] Ibid.

Again, the obligation to give reasons mentioned in the paragraph should not be limited to the decisions of rejection. This idea would both prevent the misconception that stating the reasons for the acceptance of the claims is not compulsory, and ensure the right to a reasoned decision of parties.

IV. THE DECISION FOR PRE-TRIAL DETENTION

A warrant of pre-trial detention against the suspect or accused may be rendered if there are concrete reasons showing the existence of a strong suspicion of a crime and a ground for pre-trial detention, provided that it is proportionate to the importance of the case, expected punishment, or security measure.[34] In this regard, the first paragraph of Article 101 of the CPC titled 'The decision for pre-trial detention' specifies that

> During the investigation phase, upon the motion of the public prosecutor, the Justice of the Peace in Criminal Matters shall issue a pre-trial detention warrant for the suspect, and during the prosecution phase the trial court shall issue a pre-trial detention warrant for the accused upon the motion of the public prosecutor, or by its own motion. In the aforementioned motions, the reasons shall absolutely be shown, and legal and factual grounds, which states that judicial control would be insufficient, shall be included.[35]

It is quite remarkable that the adverb 'absolutely' is included in the paragraph. This word, which is presumed to be used to emphasize the importance of the reasoned decisions regarding the pre-trial detention, causes a misunderstanding that giving reasons is not absolute in the other articles of the CPC pertaining to reasons, and it weakens the obligation to state reasons, which is guaranteed by the Constitution and Article 34 of the CPC.

In the paragraph that requires the motion on pre-trial detention to be 'absolutely' reasoned, there is no regulation on how to act if the motion of the public prosecutor does not include reasons. In such a case, the judge or court may request the public prosecutor to make a statement on this matter, or the motion on pre-trial detention may be returned without inspection.[36]

Prior to the amendment made by Article 97 of the Law No. 6352 dated 07.07.2012,[37] the second paragraph of the Article, which affirms that

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34 Tuğrul Katoğlu, 'Tutuklama Tedbirine İlişkin Sorunlar' (2011) 4 ABD 17, 21; Nur Centel, 'İnsan Hakları Avrupa Mahkemesi Kararları Işığında Tutuklama Hukukuna Eleştirel Yaklaşım' (2011) 17(1-2) MÜHFD 49, 50 ff; Centel and Zafer (n 9) 363-364; Yenisey and Nuhoğlu (n 18) 358.

35 Yenisey (n 10) 46.

36 Centel and Zafer (n 9) 372; Hasan Sınar, *Ceza Muhakemesi Hukukunda Tutuklama*, (1st edn, On İki Levha, 2016) 239-240.

37 The Law about Amending Some Laws for the purpose of Enhancing the Judicial Services,

> The decisions on pre-trial detention with a warrant, continuation of the pre-trial detention, or a decision denying the motion of release from pre-trial detention, must be furnished with the legal and factual grounds and reasons. The contents of the decision shall be explained to the suspect or accused orally, additionally a written copy of the decision shall be handed out and this issue shall be mentioned in the decision[38]

already contained the obligation to give reasons. After the amendment, however, the paragraph emphasizes that the evidence indicating a) a strong suspicion of a crime, b) the existence of the reasons for pre-trial detention, and c) the proportionality of the pre-trial detention measure shall be clearly demonstrated by justifying specific facts in aforementioned decisions. In the reasoning, the underlying cause for this amendment is explained as the criticism of the decisions made by the European Court of Human Rights regarding the application for pre-trial detention without sufficient reason.[39]

By the amendment made by Article 14 of the Law No. 7331 dated 08.07.2021,[40] a subparagraph (d) was added to the second paragraph, including the phrase 'insufficiency of judicial control'. Thus, it is accepted that in the decisions on pre-trial detention with a warrant, continuation of the pre-trial detention, or a decision denying the motion of release from pre-trial detention, the evidence indicating that the application of judicial control would be insufficient shall also be demonstrated, in addition to the issues specified in the other subparagraphs.

After all of these amendments, the final version of the paragraph is as follows:

> In the decisions on pre-trial detention with a warrant, continuation of the pre-trial detention, or a decision denying the motion of release from pre-trial detention, the evidence indicating
>
> a) A strong suspicion of a crime,
>
> b) The existence of the reasons for pre-trial detention,
>
> c) The proportionality of the pre-trial detention measure,

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and Postponing of the Public Claim and Punishment regarding the Crimes through Press, Law Number: 6352, Ratification: 02 July 2012, Issue: 05 July 2012 - 28344 (TR), https://www.mevzuat.gov.tr/MevzuatMetin/1.5.6352.pdf accessed 09 November 2021.

38 Ibid 11687.

39 The Government Bill on the Law about Amending Some Laws for the purpose of Enhancing the Judicial Services, and Postponing of the Public Claim and Punishment regarding the Crimes through Press, 544 [30 January 2012] 51/54 (TR), https://www2.tbmm.gov.tr/d26/1/1-0687.pdf accessed 09 November 2021.

40 The Law about Amending Criminal Procedure Code and Some Laws, Law Number: 7331, Ratification: 08 July 2021, Issue: 14 July 2021 – 31541 (TR), https://www.resmigazete.gov.tr/eskiler/2021/07/20210714-8.htm accessed 09 November 2021.

d) Insufficiency of judicial control shall clearly be indicated by being reasoned through specific facts.[41]

In the reasoning of the amendment, it is emphasized that when deciding on pre-trial detention, which is considered as an exceptional measure, whether the application of judicial control is sufficient should be taken into consideration on a preferential basis. Thus, the first two paragraphs of the Article have been harmonized with the stipulation that it is necessary to include matters indicating that the application of judicial control would be insufficient, in both the motions and the decisions regarding pre-trial detention. On the other hand, it should be noted that this amendment, which aims to prevent unlawful pre-trial detention decisions, has the potential to have favorable results in terms of the protection of the right to liberty and security and to a reasoned decision. However, the use of the verb 'to indicate' twice in the same sentence, by including the phrase 'the evidence indicating [...] shall clearly be indicated […]' in the second paragraph does not constitute an example of effective wording.

Speaking of which, by emphasizing in the first paragraph that the motions of the public prosecutor for pre-trial detention shall contain reasons, the aforementioned determination, including that there should be an amendment to Article 34 of the CPC is supported.

V. THE DURATION OF PRE-TRIAL DETENTION

The word 'reason' is included in the first two and the fourth paragraph of Article 102 of the CPC. According to these paragraphs, which are related to the maximum period of pre-trial detention based on the courts that would issue a pre-trial detention warrant, whether the pre-trial detention warrant is issued during the investigation phase, which Law or which Section of the TPC the crime concerned is regulated in, and whether the crime is committed collectively:

(1) Where the crime is not within the jurisdiction of the court of assize, the maximum period of pre-trial detention shall be one year. However, in necessary cases, this period may be extended for six more months, by explaining the reasons.

(2) Where the crime is under the jurisdiction of the court of assize, the maximum period of pre-trial detention is two years. In necessary cases, this period may be extended by explaining the reason; the extension shall not exceed three years for ordinary crimes, and five years for the crimes defined in the Fourth, Fifth, Sixth, and Seventh Parts of the Fourth Chapter of the Second Volume of the Turkish Penal Code No. 5237 and the crimes falling within the scope of the Anti-Terror Law No. 3713 dated 12/4/1991.[42]

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41 Criminal Procedure Code (n 6) 9126-1.

42 Yenisey (n 10) 46-47.

> (4) During the investigation phase, the period of pre-trial detention shall not exceed six months where the crime is not within the jurisdiction of the court of assize, and one year where the crime is under the jurisdiction of the court of assize. However, for the crimes defined in the Fourth, Fifth, Sixth, and Seventh Parts of the Fourth Chapter of the Second Volume of the Turkish Penal Code, the crimes falling within the scope of the Anti-Terror Law and crimes committed collectively, the maximum period of pre-trial detention shall be one year and six months, and this period may be extended for another six months by explaining the reasons.[43]

As observed, the legal regulation generally points to the obligation to provide reasons in decisions regarding the extension of the maximum period of pre-trial detention. However, since the punctuation marks are not used appropriately in the last sentence of the first paragraph, amended by the Law No. 5560 dated 06.12.2006,[44] some ambiguity arises. Indeed, the first paragraph leads to an understanding as if the reasons should only be given in necessary cases, as a comma is not used after the phrase 'in necessary cases'. In the second paragraph that immediately follows, this time, a comma is used after the phrase concerned, and thus the paragraph is written in a way that could be understood as intended.

Another point that draws attention in the legal regulation is that the word 'reason', used as a plural in the last sentence of the first paragraph, while it appears as a singular form in the second paragraph. It is not easy to comprehend the reason for such a difference in these sentences with the same meaning and structure.

In the fourth paragraph added to the Article with the Law No. 7188 dated 17.10.2019,[45] it is stated that the reason must be given in the decisions regarding the extension of the pre-trial detention period in terms of certain crimes during the investigation phase. As seen, the paragraph does not include the phrase 'in necessary cases' unlike the first two paragraphs. In addition, the ambiguity, stemming from the misuse of plural suffixes and commas does not exist. Therefore, it could be claimed that this paragraph presents a better example of effective wording, which is in accordance with the purpose expected from it.

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43 Criminal Procedure Code (n 6) 9127.

44 The Law about Amending Various Laws, Law Number: 5560, Ratification: 06 December 2006, Issue: 19 December 2006 – 26381 (TR), https://www5.tbmm.gov.tr/kanunlar/k5560.html accessed 09 November 2021.

45 The Law about Amending Criminal Procedure Code and Some Laws, Law Number: 7188, Ratification: 17 October 2019, Issue: 24 October 2019 – 30928 (TR), https://www.resmigazete.gov.tr/eskiler/2019/10/20191024-25.htm accessed 09 November 2021.

VI. THE OBJECTION TO THE DECISION ON NO GROUND FOR PROSECUTION

After mentioning in the first two paragraphs that the victim may oppose the decision on no ground for prosecution by the public prosecutor, and what matters must be included in the petition of opposition, the third paragraph of Article 173 of the CPC titled 'Opposition against the decision of the public prosecutor' affirms that

> If the criminal judgeship of peace deems it necessary to broaden the investigation in order to render its decision, it may demand this from the office of chief the public prosecutor by clearly specifying this issue; if sufficient grounds for opening a public claim are not discovered, it shall deny the motion and give reasons for doing so, inflict the costs on the opposing party and send the file to the public prosecutor. The public prosecutor shall notify the decision to the opposing party and the suspect.[46]

In the third paragraph, it is stated that the criminal judgeship of peace, evaluating the objection against the decision on no ground for prosecution, shall deny the motion by giving reasons, in case sufficient grounds for opening a public claim is not discovered. The fact that the motion to the decision on no ground for prosecution shall be denied by stating reasons, was included in the paragraph before the amendments made by both Law No. 5353 dated 25.05.2005[47] and the Law No. 6545 dated 16.06.2014.[48] Although the authorities that would evaluate the objection to the decision on no ground for prosecution changed after each amendment, the fact that the decisions in question must contain reasons has remained stable, and this could be interpreted as an indicator of the importance that the legislator attaches to the concept of the reason for these decisions. However, taking the general regulation in Article 34 of the CPC into account, it is not essential to include the phrase 'by giving reasons' in the paragraph, as the denial of the motion against the decision on no ground for prosecution is in the nature of 'a decision rendered by judge'. In the reasoning of the Article what needs to be understood by 'reason' is explained as specifying why the issues on which the motion is based are not considered valid in the decision.[49] On the other hand, the phrase concerned lays the groundwork

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46 Yenisey (n 10) 92.

47 The Law about Amending Criminal Procedure Code, Law Number: 5353, Ratification: 25 May 2005, Issue: 01 June 2005 - 25832 (TR), https://www5.tbmm.gov.tr/kanunlar/k5353.html accessed 09 November 2021.

48 The Law about Amending Turkish Penal Code and Some Laws, Law Number: 6545, Ratification: 18 June 2014, Issue: 28 June 2014 - 29044 (TR), https://www.resmigazete.gov.tr/eskiler/2014/06/20140628-9.htm accessed 09 November 2021.

49 The Government Bill on the Criminal Procedure Code, 1020 [07 March 2003] 73 (TR),

for the paragraph to be read that the criminal judgeship of peace does not need to give reasons when making a request for the broadening of the investigation but instead state this issue 'clearly'. Considering the fourth paragraph of the Article which states that 'If the criminal judgeship of peace determines that the motion is justified, then the public prosecutor shall prepare an indictment and submit it to the court',[50] it is observed that the aforementioned misinterpretation is also valid for the decisions regarding the acceptance of motions.

As previously mentioned, the word 'reason' placed in the texts of the articles with some motives despite the general regulation in Article 34 of the CPC sometimes results in the opposite of what is intended, by leading to the perception that the reason is not required when the legal regulation concerned does not include this word.

On the other hand, it is important to point out that even the opposition petitions must contain some kind of reason by including the phrase 'it is obligatory to indicate facts, evidence, marks, vestiges, and signs that may justify the opening a public claim' in the reasoning of the Article.[51]

VII. THE OPEN COURT PRINCIPLE

The principle of open court, which is stated to be one of the general characteristics of the hearing stage, a principle that provides the guarantee of a good justice and general prevention in terms of crime in the reasoning of Article 182 of the CPC, means that the hearing is open and accessible to the public.[52] However, the second paragraph of Article 182 enables the court to rule that the main hearing be conducted partially or as wholly closed to the public in cases where it is strictly necessary with respect to public morale or public security.[53] In this context, the third paragraph of Article 182 of the CPC notes that 'The decision about exclusion of the public, which shall be furnished with reasons, as well as the judgment, shall be announced in the open main hearing'.[54]

It is emphasized in the Article that the decision regarding the exclusion of the general public from the trial shall be reasoned. According to the reasoning of the Article, the decision in question absolutely must be reasoned, and this reason could only be based on 'the absolute necessity of public morality and

https://www2.tbmm.gov.tr/d22/1/1-0535.pdf accessed 09 November 2021.

50 Yenisey (n 10) 92.

51 The Government Bill on the Criminal Procedure Code (n 49) 73.

52 Ibid 77; Centel and Zafer (n 9) 698-699; Yenisey and Nuhoğlu (n 18) 726 ff; The Court of Cassation of Turkey, General Assembly of Criminal Chambers 15/106 [16 March 2021] 16-18.

53 Centel and Zafer (n 9) 701; Yenisey and Nuhoğlu (n 18) 730.

54 Yenisey (n 10) 97.

safety'.[55] Despite the general regulation in Article 34 of the CPC, the fact that the decision to exclude the general public from the trial, which is in the nature of a judge or court decision, must be reasoned, could be explained by how cautious the lawmakers are about the right to a public trial. The fact that the violation of the principle of open trial in the judgments passed as a result of the oral hearing is regulated among the cases are considered absolute violations of the law[56] also supports this judgment. By the same token, the Court of Cassation considers the violation of the principle of open trial a reason for annulment.[57]

VIII. THE CONTENT OF THE RECORD OF THE MAIN HEARING

Whether or not the legal forms stipulated by the law are complied with may only be understood by observing the record of the main hearing. From this point forth, Article 221 of the CPC titled 'Content of the record of the main hearing' is as below:

> The record of the main hearing shall contain the following;
>
> […]
>
> g) Motions, reasons in case of their denial,
>
> h) Rendered decisions,
>
> i) The judgment.[58]

The subparagraph (g) of the first paragraph of the Article, which regulates the outlines on which the course and results of the hearing would be based, emphasizes that the reasons for denial of the motions made shall be stated in the record of the main hearing. The first of the criticisms about the Article is that it is written in a way that could be understood that stating reasons is not required in case the motions are accepted. Secondly, there is no indication that reasons must be given for the 'rendered decisions' and 'the judgment' specified in subparagraphs (h) and (i) of the paragraph, respectively. Although from a more general perspective it could be argued that this situation arises from Article 34 of the CPC, it is perplexing why the paragraph specifically states that the reason is sought in the decisions of denial of motions, which are in the nature of a judge or court decision. Moreover, considering that the denial of motions mentioned in subparagraph (g) is also a decision, it remains unclear in what way the phrase 'rendered decisions' in subparagraph (h) differs from the decisions of denial of motions and which decisions it covers. Since

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55 The Government Bill on the Criminal Procedure Code (n 49) 78.

56 The subparagraph (f) of the first paragraph of Article 289 of the CPC.

57 The Court of Cassation of Turkey, General Assembly of Criminal Chambers 82/231 [13 October 2009] 2-3.

58 Yenisey (n 10) 109.

the phrase 'The judgment' is included separately in subparagraph (i), the fact that subparagraph (h) evidently does not cover judgments supports this idea. As seen, Article 221 of the CPC is written in a way that could be interpreted in many different ways. In order to eliminate this problem, the Article needs to be rearranged by taking into account the above determinations.

IX. DISSENTING OPINION AND ITS REASON IN THE RECORDS

Dissenting opinions force the majority opinion to be reasoned in an altogether more profound and communicative fashion. They produce the paradoxical effect of legitimating the majority as it becomes evident that alternative views were considered even if ultimately rejected.[59] Considering the importance of dissenting opinions, the second paragraph of Article 224 of the CPC titled 'Quorum of the votes at decisions and judgment' provides that 'Dissenting opinion shall be included in the records; its reason shall be indicated in the records as well.'[60]

As seen the second paragraph gives priority to the requirement of including dissenting opinions and their reasons in the records rather than the repetition of Article 34 of the CPC which states that even dissenting opinions shall contain reasons. However, it would set a better example of effective use of language if the paragraph is written as 'Dissenting opinion and its reason shall be included in the records'.

In the meantime, it is worth noting that the reasoning of the Article remarks that dissenting opinion of the judge who is in the minority shall absolutely be included in the records while its reason shall only be indicated.[61] This statement, which is in line with Article 34 of the CPC, may be understood as that dissenting opinion is not necessarily justified.

X. ISSUES TO BE SHOWN IN THE REASONS FOR THE JUDGMENT

As a continuation of the regulation in the third paragraph of Article 141 of the Constitution, Article 230 of the CPC demonstrates separately what and in what order the reasons for the judgment must include, in terms of conviction,

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59 Katerina Simackova, 'Dissenting Opinions in Constitutional Courts: A Means of Protecting Judicial Independence and Legitimising Decisions', 1 https://echr.coe.int/Documents/Intervention_20210415_Simackova_Rule_of_Law_ENG.pdf accessed 10 November 2021; Katalin Kelemen, 'Dissenting Opinions in Constitutional Courts' (2013) 14(8) GLJ 1353-1354; Venice Commission, 'Report on Separate Opinions of Constitutional Courts' [17 December 2018] 932/2018 CDL-AD(2018)030 4.

60 Yenisey (n 10) 111.

61 The Government Bill on the Criminal Procedure Code (n 49) 95.

acquittal, and other judgments and decisions. Regardless of the type of judgment, there is no doubt that the reason must be legal, sufficient, and valid, in accordance with law and factual case, and must indicate the logical chain that leads to the conclusion without interruptions and gaps.[62] In this regard, Article 230, which contains the most detailed regulations regarding the concept of reason in the CPC, specifies that

> (1) The reasons for the judgment on the conviction of the accused shall contain the following issues:
>
> […]
>
> c) The reached opinion, the criminal conduct of the accused, that is deemed as proven, and the definition of it; determining the punishment according to the order and principles which are defined in Articles 61 and 62 of the Turkish Penal Code, taking into consideration the motions that are put forward; again, according to the provisions of Article 53 and following Articles of the Turkish Penal Code determining the measure of the security instead of, or along with, the punishment.
>
> […]
>
> (2) The reasons for an acquittal shall contain an explanation thereof on which of the points that are indicated in the second paragraph of Article 223 the ruling of the court is resting.
>
> (3) The reasons for a judgment related to no need to inflict punishment shall contain an explanation thereof on which of the points that are indicated in the third and fourth paragraphs of Article 223 the ruling of the court is resting.
>
> (4) In cases where a decision or a judgment is rendered that are beyond the judgments mentioned in the above subparagraphs, then the grounds for this shall be included in the reasoning.[63]

As explained, in the Article, the issues that shall be included in the reasons for the judgments and decisions are tried to be stated separately in each paragraph. First of all, it should be noted that such a detailed regulation may appear to be an appropriate choice at first glance, as it guides the judges who render the judgments. However, due to the issues as will be mentioned below, it causes some confusion about the reasons of the judgments. Perhaps the decisions of reversal rendered by the Court of Cassation because of the violation of this Article offer the clearest indication yet that producing well-written reasoned

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62 The Court of Cassation of Turkey, General Assembly of Criminal Chambers 1190/302 [22 June 2021] 11-13.

63 Yenisey (n 10) 113-114.

judgments is extremely challenging.[64] In addition, the fact that improving the effectiveness of decision-writing continues to be one of the most controversial current debates in criminal procedure law[65] supports this determination.

The first criticism is directed at the Article might be that only the word 'judgment' is included in the title. Indeed, after mentioning some judgments, including conviction, acquittal, and 'no need to inflict punishment' in the first three paragraphs, the Article, in the fourth paragraph, states that if a decision or a judgment is rendered that is different from the aforementioned judgments, the grounds for this shall be included in the reasoning. As seen, the title does not relate in full to the content of the Article due to not including the word 'decisions'. Therefore, amending the title as 'Issues to be shown in the reasons for judgments and decisions' would be more inclusive with the content of the Article.

Even though the Article regulates the issues to be contained by the reasoning of the judgment on the conviction in detail may seem favorable, it is noteworthy that the phrase 'determining the punishment according to the order and principles specified in Articles 61 and 62 of the Turkish Penal Code'[66] in subparagraph (c) is a cause of perplexity. The determination of the punishment is regulated in Article 61 of the TPC, and the following Article is related to whether the discretionary mitigation would be applied to the accused after the punishment is determined. By including the provision

> The punishment according to the above paragraphs will be finally determined by taking the following into consideration and in this order: attempt; jointly-committed crimes; successive crimes; unjust provocation; minor status; mental disorder, personal circumstances requiring a reduction of the penalty and discretionary mitigation[67],

the fifth paragraph of Article 61 of the TPC clearly emphasizes that discretionary mitigation is not about determining the punishment mentioned in Article 230 of the CPCbut rather the final punishment. For this reason, it is both confusing and unnecessary to touch upon Article 62 of the TPC in subparagraph (c).

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64 Jeffrey A. Van Detta, 'The Decline and Fall of the American Judicial Opinion, Part I: Back to the Future From the Roberts Court to Learned Hand – Context and Congruence' (2009) 12(1) BLR, 53, 55; Frank B. Cross, 'The Ideology of Supreme Court Opinions and Citations' (2011-2012) 97(3) ILR 693, 742; S. I. Strong, 'Writing Reasoned Decisions and Opinions: A Guide for Novice, Experienced, and Foreign Judges' (2015) 2015(1) JDR, 93, 95-96.

65 John F. Duffy, 'Reasoned Decisionmaking vs. Rational Ignorance at the Patent Office' (2019) ILR 104 2351, 2353 2351-2386; Adam Rigoni, 'Common-Law Judicial Reasoning and Analogy' (2014) 20 LT 133, 133-134; Strong (n 64) 94.

66 Turkish Penal Code, Law Number: 5237, Ratification: 26 September 2004, Issue: 12 October 2004 – 25611 (TR), accessed https://www.mevzuat.gov.tr/MevzuatMetin/1.5.5237.pdf 10 November 2021.

67 The fifth paragraph of Article 61 of the TPC.

Another subject of criticism regarding the Article is that subparagraph (d) of the first paragraph does not refer to 'the delaying of the pronouncement of the judgment' that must be considered by the court on a preferential basis in comparison to other individualization reasons, such as alternative sanctions for short-term imprisonment and suspending the sentence of imprisonment, pursuant to the seventh paragraph of Article 231 of the CPC[68] and settled case-law of General Assembly of Criminal Chambers.[69] It could be argued that it is not required to mention 'the delaying the pronouncement of the judgment' in subparagraph (d), since the fourth paragraph of the Article already includes it within the scope of 'other judgments and decisions' and it is regulated in the next Article. However, taking into consideration a large number of decisions of reversal rendered by the Court of Cassation due to not discussing the delaying of the pronouncement of the judgment on a preferential basis, it is not possible to agree with this opinion.

What is more, the Article seems to contradict Article 141 of the Constitution and Article 34 of the CPC, as it is written in a way as if the judgments apart from the conviction are not necessarily justified. Indeed, the second and third paragraphs of the Article, regulating reasons for 'acquittal' and 'no need to inflict punishment', could lead to a misunderstanding that a single explanation thereof on which of the points that are indicated in the related paragraphs of Article 223 the ruling of the court is resting is sufficient when stating the reason.

Last but not least, in the last paragraph of the Article, it is stated that if a decision or a judgment is given other than the judgments specified in the above subparagraphs, the reasons for this shall be indicated in the reasoning. Although it is possible to determine the judgments other than those mentioned in the paragraph by referencing the reasoning of Article and Article 223 of the CPC, what the decisions referred to in the paragraph are remain unclear.

It is difficult to understand why the legislator, who prefers to adopt detailed regulations on other decisions including interim decisions, as in the provisions regarding the expert examination and pre-trial detention, is content with merely stating that the decisions in question, including even those that have the qualification to conclude the case, shall be written with purely justification despite the existence of Article 34 of the CPC.

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68 The seventh paragraph of Article 231 of the CPC is as follows: 'In the judgment, of which the pronouncement is delayed, the inflicted imprisonment term shall not be postponed, and in cases where the punishment is a short term imprisonment, it shall not be converted into the alternative sanctions', Yenisey (n 10) 115.

69 The Court of Cassation of Turkey, General Assembly of Criminal Chambers 114/99 [11 March 2021] 8.

XI. THE PRONOUNCEMENT OF THE JUDGMENT

When the public prosecution is concluded, it is rather important for the parties to be notified of the outcome of the judgment, and the legal remedies that are open to the parties, the time limits for the motion, where to apply, and formalities of the application in terms of ensuring the right to an effective remedy and to a fair trial. Pursuant to the first paragraph of Article 231 of the CPC titled 'Pronouncement of the judgment and delaying the pronouncement of the judgment', 'At the end of the main trial, the outcome of the judgment that is taken into the records of the trial according to the rules as indicated in Article 232, shall be read out and the main outlines of the reasons shall be explained'.[70]

As seen, the paragraph is relating to reading the judgment and explaining the outlines of the reasons at the end of the main trial. In the reasoning of the Article, it is stated that the judgment shall be pronounced by reading the final judgment, and the reasons if written. Otherwise, the pronouncement shall be made by reading the final judgment taken into the records and explaining the main outlines of its reason orally.[71] In this regulation with respect to conveying the final judgment to the parties, any deficiency regarding the concept of reason does not draw attention.

XII. THE REASONS FOR THE JUDGMENT AND THE ISSUES TO BE INCLUDED IN THE FINAL JUDGMENT

Article 232 of the CPC regulates the time limit for the reasons of the judgment and, if any, of the dissenting opinions to be taken into records, and decisions and judgments would be signed by the judges who participated in the decision-making, specific to the subject of the study. At this point, the third and the fifth paragraphs of Article 232 of the CPC provides that

> (3) In cases where the reasons of the judgment and, if any, the reasons of the dissenting opinion is not taken into the records completely, it shall be added into the files within fifteen days after the pronouncement of the judgment.
>
> (5) Following the pronouncement of the outcome of the judgment, if the judge dies or becomes unable to sign the decision for any reason before the reasoned decision is signed, the successor judge shall personally write and sign the reasoned decision in accordance with the judgment pronounced. If such a case happens in the courts of collective judges, the judgment shall be signed by other judges, and the reason for this shall

[70] Yenisey (n 10) 114.

[71] The Government Bill on the Criminal Procedure Code (n 49) 97.

be noted and signed under the judgment by the president, or the most experienced judge who participates in the decision-making.[72]

Even though the reasons for the judgment and the dissenting opinion are mentioned in the third paragraph of the Article, it is more related to the period where the reasons for the judgment are not taken into the records completely, rather than the concept of reason.

With the amendment made by Article 31 of the Law No. 6763, the phrase 'and, if any, the reasons for the dissenting opinion' was added to the paragraph to come after the phrase 'reasons of the judgment' to be in line with Article 34 of the CPC. In the reasoning of Article 31, it is stated that the amendment was made in order to accelerate the judicial proceedings by ensuring that the reasons for the dissenting opinion are included in the file within fifteen days.[73]

Following the amendment, it is seen that the word 'reason' is unnecessarily used twice in the paragraph. Replacing the phrase 'the reasons for the judgment and, if any, the reasons for the dissenting opinion', which is the subject of the one-sentence paragraph, with 'the reasons for the judgment and, if any, the dissenting opinion' would eliminate this problem.

In the fifth paragraph, it is stipulated that if the judge dies or becomes unable to sign the decision for any reason after the outcome of the judgment is pronounced, the successor judge would write and sign the reasoned decision in accordance with the judgment pronounced. In the reasoning of Article 31 of the Law No. 6763, which amended the paragraph, it is mentioned the aim of eliminating the deficiency which may arise from the fact that the procedure to be followed in the courts heard by a single judge is not included in Article 232 of the CPC.[74] However, this provision, which is rather controversial even before the amendment, continues to be debated, as it enables to write the reasons for a decision already rendered. It could be claimed that the provision does not pose any problem in terms of natural judge principle, since the paragraph states that the reason for the decision to be written by the successor judge shall be in accordance with the judgment pronounced, and this issue is always possible to be reviewed by the appellate courts. Nevertheless, this view may lead to serious drawbacks regarding the independence of judges. As known, under Article 138 of the Turkish Constitution, judges shall give judgment pursuant to the Constitution, laws, and their personal conviction conforming to the law. The aforementioned provision, on the other hand, obliges the successor judge to write the reasoned decision in accordance with the judgment pronounced,

72 Yenisey (n 10) 117.

73 The Government Bill on the Law on the Amendment of the Criminal Procedure Code and Some Laws (n 12) 23/26.

74 Ibid.

even if the judgment is not in compliance with the Constitution, laws, and his/her personal conviction.

In addition, there are some circumstances where the reason, which cannot be considered independent of the judgment, is at least as significant as the judgment itself. For instance, assume that the judgment which had been pronounced by the judge, who died or became unable to sign the decision for any reason, is an acquittal due to insufficient evidence in accordance with subparagraph (e) of the second paragraph of Article 223 of the CPC.[75] The successor judge, who is of the opinion that the accused must be acquitted pursuant to subparagraph (b) of the second paragraph of Article 223,[76] regulating the type of acquittal where it is proven that the charged crime is not committed by the accused, would not be able to reflect this point on the reasoning. In such a case, there would be dire consequences against the accused due to the significant differences between the grounds of acquittal mentioned above, arising from the fifth paragraph of Article 232 of the CPC.

Another problem in the paragraph is relating to the regulation on the courts of collective judges. In the second sentence of the paragraph, it is stated that if such a case occurs in the courts of collective judges, the judgment shall be signed by the president, or the most senior judge, but it is not mentioned by whom and how the judgment would be written. Yet, even in the courts of collective judges, in order to avoid the aforementioned drawbacks, for the reasoning to be stated by the president, or the most experienced judge, the judge who is unable to sign the judgment for any reason should at least not vote against.

XIII. THE MOTION OF APPEAL ON FACT AND LAW AND ITS TIME LIMIT

Stating that non-submission of the grounds of the application in the petition or the declaration shall not prevent the inspection for accused and the individuals who acquired or have the right to acquire the status of the intervening party in the fourth paragraph of Article 273 of the CPC,[77] the following paragraph stipulates that

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75 According to the subparagraph (e) of the second paragraph of Article 223 of the CPC, 'If it is not proven that the charged crime is committed by the accused', Yenisey (n 10) 110.

76 The subparagraph (b) of the second paragraph of Article 223 of the CPC is as follows: 'If it is proven that the charged crime is committed by the accused', Ibid.

77 Pursuant to the fourth paragraph of Article 273 of the CPC 'If the accused and the individuals who have acquired the status of the intervening party according the provisions of this Code, as well as individuals who have filed a petition of intervention and their request is not ruled upon, is denied; or the individuals who have suffered damages that would justify the status of the intervening party, have not submitted the grounds of their application in the petition or in their declaration, this shall not prevent the inspection', Ibid 138-139.

> The public prosecutor shall submit the grounds of filing a motion of appeal on fact and law together with the written motion, writing them clearly, together with the reasons. This motion shall be notified to the concerned individuals. The concerned individuals may submit their responses in this respect within seven days after the date of the notification.[78]

As understood from the paragraph, the public prosecutor must clearly indicate the reasons for filing a motion of appeal on fact and law in a written form. However, it is uncertain why the legislator, who already admits that the grounds of filing a motion of appeal on fact and law shall be submitted along with the reasons, requires the public prosecutor to write them 'clearly' as well. Considering that the motion of the public prosecutor for appeal on fact and law shall be notified to the relevant parties so that they have the opportunity to submit their responses, the legislator may intend to secure the principle of equality of arms[79] and the right of the accused to have facilities for the preparation of a defense,[80] pursuant to subparagraph (b) of the third paragraph of Article 6 of the European Convention on Human Rights, by requiring the public prosecutor to clearly indicate the reasons for filing a motion of appeal on fact and law.

On the other hand, a lack of clarity exists in the CPC as to how the court should act in cases where the public prosecutor does not submit the reasons for filing a motion of appeal on fact and law. The reasoning of the Article provides that the public prosecutor must indicate the reasons for filing a motion of appeal on fact and law in a written form but it does not clarify the issue as well.[81] Despite different opinions in the doctrine, in such a case, returning the case file to the public prosecutor by the court in order to state the reasons for the appeal may be considered as a solution to this problem, since there is no regulation similar to Article 298 of the CPC[82] with regard to the appeal on fact and law.

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78 Ibid 139.

79 Stefania Negri, 'The Principle of Equality of Arms and the Evolving Law of International Criminal Procedure' (2005) 5 ICLR 513, 513; Karin Calvo-Goller, *The Trial Proceedings of the International Criminal Court*, (Martinius Nijhof, 2006) 46; Sibel İnceoğlu, *Adil Yargılanma Hakkı – Anayasa Mahkemesine Bireysel Başvuru El Kitapları Serisi 4* (European Commission, 2018) 115 ff; Osman Doğru and Atilla Nalbant, İnsan Hakları Avrupa Sözleşmesi – Açıklama ve Önemli Kararlar 1. Cilt (Council of Europe, 2012) 636.

80 Doğru and Nalbant (n 79) 646-647; İnceoğlu (n 79) 324.

81 The Government Bill on the Criminal Procedure Code (n 49) 117.

82 Pursuant to Article 298 of the CPC, 'If the Court of Cassation determines that the petition on appeal on law is not submitted in time, that the judgment cannot be appealed on law, that the individual appealing does not have standing, or that the appellate written application does not include the grounds for appeal on law, the motion for appeal on law shall be rejected', Yenisey (n 10) 148.

XIV. NOTIFICATION OF THE REASONS

In terms of ensuring the right to an effective remedy, the judgment, including the reasons must be explained to both the public prosecutor who has the obligation to submit the reasons of filing a motion of appeal on fact and law and the parties who do not have such an obligation. Within this framework, the second paragraph of Article 275 of the CPC provides that

> If the judgment, including the reasons, is not explained to the public prosecutor or to the parties who file the motion of appeal on fact and law, then the reasons shall be notified within seven days after obtaining the knowledge by the court, that the judgment has been attacked with a motion of appeal on fact and law.[83]

The word 'reason' is used twice in the paragraph. The first of which is relating to the notification of the reason to the parties in order to ensure their right to an effective remedy. The second one, as clearly stated in the reasoning of the Article, aims to indicate that the seven-day period would start from the date when the reason for the judgment is written and attached to the file.

In the second paragraph of Article 293 of the CPC, titled 'The effect of the petition of appeal on law', the same regulation is included, this time regarding the appeal on law. According to this paragraph, 'If the judgment and its motives have not been explained to the appealing public prosecutor or the related parties, the motives shall be notified within seven days, after the regional court of appeal on fact and law has the knowledge of the appeal on law'.[84]

It is noteworthy that both Articles include the phrases 'obtaining the knowledge/has the knowledge of' regarding application to appeal on (fact and) law. Since it is stated in the first paragraph of Article 273 of the CPC that the motion of appeal on fact and law shall be lodged to the court that rendered the judgment, it would be more appropriate to use the word 'determining' instead of the phrase 'obtaining the knowledge by the court,' in the paragraph. The same explanations are also valid in terms of appeal on law due to the statement in the first paragraph of Article 291 of the CPC that 'A motion of appeal on law must be filed … to the court that rendered the judgment'.[85] In this sense, replacing the phrase 'has the knowledge of', included in the second paragraph of Article 293, with the verb 'determines' would be a better way of wording.

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83 Ibid 139.

84 Ibid 146.

85 According to the first paragraph of Article 291 of the CPC, 'A motion of appeal on law must be filed within seven days after the pronouncement of judgment by either submitting a written application to the court which rendered the judgment or by making a declaration to the registration clerk and having him/her prepare the necessary documents; the declaration shall be included in the records and be approved by the judge. The provision of Article 263 related to the accused under arrest with a warrant has precedence', Ibid 145.

Another important point to be emphasized is that both Articles do not include the consequences of not notifying the reasons within seven days. However, considering the first paragraph of Article 277 of the CPC,[86] it is evident that the notification of the written application of appeal on fact and law or a copy of the record about the declaration to the opposite party would be delayed. As for the appeal on law procedure, the start of the seven-day period for the additional written application to be submitted to the regional court of appeal on fact and law would be delayed, as the grounds of appeal on law are not declared in the petition, pursuant to the first paragraph of Article 295 of the CPC, which is examined in the following sections of the study.

XV. EXCEPTIONS

Due to the unique nature of the appeal on law, some exceptions have been made to the general rules of criminal procedure in matters such as the preparation of the hearing, the conduct of the hearing, and the making of a decision, while the regional court of appeals conducts a hearing examination. One of the exceptions in question is the reading of the reasoned judgment given by the court of the first instance. According to Article 282 of the CPC,

> When the main trial is opened, apart from the exceptions listed below, the provisions related to the preparation of the main hearing, main hearing, and decision of this Code shall be applicable:
>
> […]
>
> b) The final judgment of the court of the first instance, which is furnished with reasons, shall be read as well.
>
> […][87]

According to the Article, in case the main trial is opened within the scope of appeal on fact and law process, the reasoned judgment of the first instance court shall be explained as an exception to the provisions of the CPC regarding the preparation of the main hearing, the main hearing, and the decision. It is thought that this exception stems from the distinctive structure of the appeal on fact and law process. Among the provisions of the CPC regarding the decision, the above-mentioned inconveniences, particularly those arising from Articles 230 and 232, would undoubtedly affect the process of the appeal on fact and law in a negative way.

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86 The first paragraph of Article 277 of the CPC is as follows: 'If the written application of appeal on fact and law is not rejected in accordance with Article 276 by the court which rendered the judgment, the written application of appeal on fact and law or a copy of the record about the declaration shall be notified to the opposite party. The opposite party may give his response in writing within seven days after the date of notification', Ibid 140.

87 Ibid 142.

XVI. THE ABSOLUTE VIOLATION OF LAW

Violation of law, defined as the non-application or erroneous application of a legal rule in the second paragraph of Article 288 of the CPC, may be of material or procedural law. Violations of the procedural law constitute a reason for annulment to the extent that they affect the judgment.[88] The Court of Cassation also held that violations of the procedural law, which do not affect the basis of the judgment and do not change the judgment to be established after the reversal, cannot be considered as grounds for reversal.[89] However, the legislator has regulated that some violations of the procedural law shall absolutely constitute grounds for reversal, regardless of whether they would affect the judgment or not. Within this scope, Article 289 of the CPC emphasizes that

> Although it may not be mentioned in the written application or declaration of appeal on law, the following points are considered absolute violations of the law:
>
> […]
>
> g) If the judgment does not include reasons according to the Article 230;
>
> […][90]

As understood from the Article, although it is not shown in the petition or statement of appeal on law, the fact that the judgment does not contain reason in accordance with Article 230 of the CPC is accepted as one of the points of absolute violation of law. Therefore, the Court of Cassation, which determines that the judgment does not include legal and sufficient reason pursuant to the provisions of the Constitution and the CPC, would decide to reverse. In this respect, the General Assembly of Criminal Chambers, in its consistent decisions, maintains that the matter of whether the decisions contain sufficient reason must be evaluated primarily during the proceedings of legal remedies for being an essential element of the proceedings and a right for the parties, preventing arbitrariness, inconsistencies and legal uncertainties, ensuring that the concerned individuals use their right to an effective remedy by explaining why they are regarded as fair or unfair, and reviewing the judgment.[91] While the Article is rather favorable in emphasizing the importance of the reason, it

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88 Yenisey and Nuhoğlu (n 18) 939; Friedrich-Christian Schroeder and Torsten Verrel, *Ceza Muhakemesi Hukuku* (Salih Oktar tr, Yetkin 2019) 236; Serap Keskin, *Ceza Muhakemesi Hukukunda Temyiz Nedeni Olarak Hukuka Aykırılık* (Alfa 1997) 110; Bahri Öztürk (ed) , *Ana Hatlarıyla Ceza Muhakemesi Hukuku* (5th edn, Seçkin 2018) 530.

89 The Court of Cassation of Turkey, General Assembly of Criminal Chambers 1422/695 [25 December 2018] 7-10.

90 Yenisey (n 10) 145.

91 The Court of Cassation of Turkey, General Assembly of Criminal Chambers 986/554 [22 November 2018] 8.

becomes problematic by referring to Article 230 of the CPC, which contains many of the problems identified above.

XVII. THE MOTIVES FOR APPEAL ON LAW

As a result of the fact that the appellant must indicate in the petition on what ground he/she requests the judgment to be reversed, Article 295 of the CPC includes explanations regarding the time limit and how to submit the additional petition containing the reasons for the appeal on law. Pursuant to the first and third paragraphs of Article 295 of the CPC titled 'Motives for an appeal on law',

> (1) If in the petition for appeal on law or in the declaration the grounds of appeal on law is not declared, the appealing party shall submit, within seven days, starting from the expiration of the period, that is set in order to submit a written application of appeal on law, or within seven days starting from the notification of the decision of the judgment, that contains the motives, an additional written application to the regional court of appeal on fact and law shall be submitted. The public prosecutor shall clearly state in his written application of appeal, whether the appeal is put forward in favor or against the accused.
>
> (3) If the accused does not have a defense counsel, he may declare his grounds for appeal on law to the registration clerk, which shall be taken into the record; and this record must be approved by the judge. With respect to the legal representative of the accused and his spouse, the provisions of Article 262 and about the accused under arrest, of Article 263 has precedence.[92]

The first paragraph of the Article points out that even the motion of appeal on law must contain reasons, and then explains when and how these reasons shall be submitted. Although the phrase 'is set' in the paragraph does not pose a major problem, replacing this phrase with 'is specified in Article 291' would remove the ambiguity, causing the paragraph to be understood that a separate time may be given to the public prosecutor or the concerned individuals for the appeal on law.

In the third paragraph, it is stated how the accused, who does not have a defense counsel, may declare its reasons for the appeal on law. It should be noted that the Article, which requires the appeal on law to be reasoned and contains detailed regulations on the submission of the grounds of appeal on law, is highly effective in using the right to a reasoned decision. However, once again, it is clear that Article 34 of the CPC needs to be reorganized in a way that emphasizes the requirement of the reason for even the motions of the public prosecutors.

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92 Yenisey (n 10) 146.

CONCLUSION

The right to a reasoned decision, which amounts to that the decisions of all courts, including the dissenting opinions, must be written with reasons, is regulated in detail in our national legislation and key international human rights documents, and this issue is frequently examined by academic circles. The concept of reason is evaluated in detail by the settled case-law of the Court of Cassation and due to lack of reason, a great number of reversal decisions are rendered as a guide to the courts of the first instance. In this sense, the General Assembly of Criminal Chambers provides that a sufficient and reasonable reason, in accordance with law and logic, covering the trial process, evidence, and events, indicating how the judge reaches his/her personal conviction and comprehends the concrete case, and what intellectual and legal discussions the decision is made of, is as the legal basis and prerequisite on which a good decision is built.

Undoubtedly, the legislation constitutes to be one of the factors for the continuation of the problems related to reason, as well as the mistakes arising from the practitioners in the field of criminal procedure. In order for the reason to be an essential element of the proceedings, to prevent arbitrariness, inconsistencies, and legal uncertainties, to enable the relevant parties to use their right to an effective remedy by explaining why they are deemed right or wrong, to contribute to the formation of trust in the judiciary and the development of legal science, amendments to be made in the problematic articles of the CPC would contribute significantly to the solution of these problems.

Within this scope, phrases leading to uncertainties, incoherencies, and misunderstandings should be eliminated. Making a regulation on Article 34, including that the motions of the public prosecutor and appealing parties shall also contain motives in cases that are clearly regulated by law, would be appropriate in terms of the right to a reasoned decision and the integrity of the CPC. Moreover, insufficient explanations, misuse of punctuation marks, article references which might cause confusion regarding how to write a reasoned decision, statements limiting the obligation to give reasons to the decision-maker or the type of the decision, the use of adverbs such as 'absolutely' and 'clearly' when pointing out the requirement of stating reasons should be removed. Furthermore, the approach to the additional obligation to state reasons for the decisions which are in the scope of 'all kinds of decisions rendered by the judge and court' in Article 34 must be abandoned.

On the other hand, the number of articles, such as the amended first paragraph of Article 101, that have the potential for favorable results in terms of the protection of the right to liberty and security and the right to a reasoned decision need to be increased.

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THE INTERNATIONAL JURISDICTION OF COURTS IN DISPUTES CONCERNING INTELLECTUAL PROPERTY LAW

Fikrî Mülkiyet Hukukuna İlişkin İhtilaflarda Mahkemelerin Milletlerarası Yetkisi

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ABSTRACT

In our study, the international jurisdiction of the courts in disputes related to intellectual property law is discussed. In this context, first of all, our work has been evaluated and examined under two main headings for disputes regarding intellectual property law, namely, the international jurisdiction of Turkish courts, and the international jurisdiction of courts within the scope of the European Union. The international jurisdiction of Turkish courts in disputes regarding intellectual property law is determined within the framework of the principles set forth in the International Private and Civil Procedure Law (IPCPL). Article 40 of IPCPL, which regulates international authority, regulates that the international jurisdiction of Turkish courts will be determined by the jurisdictional rules of domestic law. In this sense, the relevant authority is determined according to the type of dispute and whether there is a convention or not. Within the framework of the European Union regulations, the Brussels I Regulation of 2012 has been discussed in our study and the determination of the international jurisdiction of the courts in disputes regarding intellectual property law has been examined.

Key Words: International Jurisdiction, Intellectual Property Law, International Jurisdiction of Turkish Courts, Brussels I Regulation

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ÖZET

Çalışmamızda, fikri mülkiyet hukukuna ilişkin ihtilaflarda mahkemelerin milletlerarası yetkisi ele alınmıştır. Bu kapsamda öncelikle çalışmamız, fikri mülkiyet hukukuna ilişkin uyuşmazlıklarda Türk mahkemelerinin milletlerarası yetkisi ve Avrupa Birliği kapsamında mahkemelerin milletlerarası yetkisi olmak üzere iki ana başlık altında değerlendirilmiş ve incelenmiştir. Fikri mülkiyet hukukuna ilişkin uyuşmazlıklarda Türk mahkemelerinin milletlerarası yetkisi, Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun (MÖHUK) kapsamında belirtilen esaslar çerçevesinde belirlenmektedir. Milletlerarası yetkiyi düzenleyen MÖHUK m. 40 hükmü ise Türk mahkemelerinin milletlerarası yetkisini, iç hukukun yer itibariyle yetki kurallarının tayin edeceğini düzenlemiştir. Bu anlamda, uyuşmazlığın türüne ve arada sözleşme olup olmamasına göre yetkinin belirlenmesi söz konu olmaktadır. Avrupa Birliği düzenlemeleri çerçevesinde ise 2012 tarihli Brüksel I Tüzüğü, çalışmamızda ele alınmış ve fikri mülkiyet hukukuna ilişkin uyuşmazlıklarda ise mahkemelerin milletlerarası yetkisinin tayini incelenmiştir.

Anahtar Sözcükler: Milletlerarası Yetki, Fikri Mülkiyet Hukuku, Türk Mahkemelerinin Milletlerarası Yetkisi, Brüksel I Tüzüğü

There is no requirement of Ethics Committee Approval for this study.

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INTRODUCTION

I. INTERNATIONAL JURISDICTION OF TURKISH COURTS IN INTELLECTUAL PROPERTY LAW

Jurisdiction[1] determines the competent judicial (law) court, where it has the right to hear a case. Whether or not a court has jurisdiction in a dispute that has a foreign element is expressed as "international jurisdiction". It may be thought that the concept of "international jurisdiction[2]" expresses an international order or rules of jurisdiction that is attributable to the laws of the entire state, but this concept actually specifies whether or not a particular country's court has jurisdiction in cases with a foreign aspect[3].

The rules of international jurisdiction are determined freely by each country. The international jurisdiction of Turkish Courts has been stipulated in IPCPL[4] articles 40-49. The international jurisdiction of Turkish Courts in disputes with foreign elements is determined according to the jurisdiction rules in domestic law per IPCPL article 40. This is a general provision. Articles 41-46 of IPCPL stipulate the jurisdictions concerning cases on the personal status of Turkish citizens, as well as some cases on the personal status of foreigners, inheritance cases, employment contracts and employment relation cases, and also cases on consumer and insurance contracts[5].

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1 Baki Kuru, İstinaf Sistemine Göre Yazılmış Medeni Usul Hukuku, İstanbul 2016, p. 103; Ramazan Arslan, Ejder Yılmaz and Sema Taşpınar Ayvaz, Medeni Usul Hukuku, 2. Edition, Ankara 2016, p. 201 ff.; Ömer Ulukapı, Medeni Usul Hukuku, 3. Edition, Konya 2015, p. 159-160; L. Şanal Görgün, Medeni Usul Hukuku, 5. Edition, Ankara 2016, p. 155; Hakan Pekcanıtez, Oğuz Atalay and Muhammet Özekes, Medeni Usul Hukuku Ders Kitabı, 4. Edition, Ankara 2016, p. 106 ff.

2 "*The concept of international authority can be used in two different ways. International jurisdiction, in the first sense, expresses the jurisdiction of the courts of the country in disputes arising from transactions and relations with foreign elements. In the second sense, it refers to the geographical impact of the decisions made by a foreign state court in international disputes. The rules governing both issues are called international jurisdiction rules. However, when 'rules of international jurisdiction' are mentioned, it would not be wrong to say that the rules that determine whether the courts of a particular country are competent in a dispute with a foreign element, usually express the first meaning*", Cemal Şanlı, Emre Esen and İnci Figanmeşe-Ataman, Milletlerarası Özel Hukuk, 5. Edition, İstanbul 2016, p. 358; For reference, please see Vahit Doğan, Milletlerarası Özel Hukuk, 4. Edition, Ankara 2016, (Milletlerarası Usul), p. 38.

3 Merve Acun Mekengeç, Ayni Haklardan Doğan Uyuşmazlıklarda Uygulanacak Hukuk ve Yetkili Mahkeme, İstanbul 2016, p. 269; Aysel Çelikel and B. Bahadır Erdem, Milletlerarası Özel Hukuk, 13. Edition, İstanbul 2014, p. 509.

4 Official Journal, Date 12.12.2007, Issue 26728; IPCPL art. 1: "*The law to be applied in transactions and relations regarding private law with a foreign element, the international jurisdiction of Turkish courts, the recognition, and enforcement of foreign judgments are regulated by this Law*".

5 Şanlı, Esen and Ataman-Figanmeşe, p. 361-362; Acun Mekengeç, p. 270; İzzet Doğan,

A. The General Jurisdiction Rule

According to IPCPL article 40 "*The international jurisdiction of Turkish courts is determined by the jurisdictional rules of domestic law*". The general jurisdiction rule for disputes that have a foreign element and which are not covered by the special jurisdiction rules in the International Private and Civil Procedure Law is covered in article 40 of IPCPL. With this article, the international jurisdiction of Turkish Courts in disputes with a foreign element has been tied to the jurisdictional rules of domestic law in terms of location. According to this, if there is a competent court in Turkey in terms of location, for a case with a foreign element, the task is assigned to determine the international jurisdiction of Turkish Courts. The rules of jurisdiction in our domestic law, which have also been given the task of regulating international jurisdiction with the article 40 of the IPCPL, are regulated in various laws, primarily the Code of Civil Procedure and the Civil Code[6] [7]. There are also jurisdictional rules in the international agreements that Turkey is a party to.

The provision of article 40 of the IPCPL has referred to all the rules of jurisdiction in terms of the place of the domestic law in establishing the international jurisdiction of Turkish courts in terms of disputes not included in the scope of special jurisdiction rules in the Law. While the rules of jurisdiction are used in the determination of international authority, the fact that the parties to the lawsuit are Turkish citizens or foreigners does not play a role[8].

B. The Authority of Turkish Courts in Intellectual Property Law

1. General Explanation of IPR

Intellectual property rights mean the absolute dominance over intangible goods that are the product of the human brain's thought[9]. Intellectual property rights can be established on intangible goods. There is no question of a right

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Öğretide ve Uygulamada Milletlerarası Aile Hukuku ve Milletlerarası Usul Hukuku, Ankara 2010, (Milletlerarası Aile) p. 114.

6 Official Journal, Date 08.12.2001, Issue 24607.

7 Şanlı, Esen and Ataman-Figanmeşe, s. 365-366; Doğan, Milletlerarası Usul, s. 58; Acun Mekengeç, s. 270-271; "*For an example of the main regulations in which the rules regulate the territorial jurisdiction and therefore the international jurisdiction of the Turkish courts, see CPC art. 6-19; Execution and Bankruptcy Law art. 154, Civil Code a. 25, 32, 168, 177, 201, 207, 214, 283, 326, 411, 430, 433, 463, 576; Highway Traffic Law a. 110, Industrial Property Law No. 6769 art. 156; Commercial Enterprise Pledge Law a. 22, Turkish Commercial Code art. 82, 561, 661, 890, 1063, 1087, 1292, 1348, 1354 ff"*see Şanlı, Esen and Ataman-Figanmeşe, p. 366, footnote 90.

8 Ergin Nomer, Devletler Hususi Hukuku, 21. Edition, İstanbul 2015, p. 455.

9 Bahadır B. Erdem, Fikri Hukukta Türk Mahkemelerinin Milletlerarası Yetkisi, İstanbul 2003, (Fikri Haklar), p. 21

that can be established on a tangible good[10]. The concept of intellectual property includes intellectual and artistic works including computer programs and databases, patents, brands, utility models, designs, geographical names and signs, the topography of semiconductors or integrated circuits, chips known as layouts, and digital communications, and it can be used to express all of these[11].

Intellectual property legislation is comprised of two main elements which are legislation on intellectual (copyright) rights and industrial property rights. Copyrights include all regulations aiming to protect the rights of the creators of all kinds of intellectual and artistic products such as science, literature, music, fine arts or cinema works; and it also encompasses the regulations that are established for the purpose of protecting neighbouring rights (related rights) that include the rights of performing artists, radio and television companies and film producers that made the initial determination of the film. Industrial property rights cover quite a wide area including trademarks, patents, designs, utility models and integrated circuit topographies[12].

As a result of laws in the field of industrial rights being prepared according to the European Union Harmonization Laws and the laws on the intellectual property being prepared in accordance with Community Directives in our country, the number 551 Statutory Law on the Protection of Patent Rights has been issued for patents, the number 556 Statutory Law on the Protection of Brands been issued for brands, the number 554 Statutory Law on the Protection of Industrial Designs has been issued for industrial designs, the number 555

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10 Ahmet M. Kılıçoğlu, Sınai Haklarla Karşılaştırmalı Fikri Haklar (Sınai Mülkiyet Kanunu'na Gore), 3. Edition, Ankara 2017, p. 1.

11 Orhan Çerçi, Fikri Mulkiyet Haklarinda Hakların Tükenme İlkesi, Unpublished MA Thesis, Suleyman Demirel University SBE, Isparta 2013, p. 3; Mehmet Yüksel, Fikri Mülkiyet Haklarının Tarihsel Temelleri, <http://www.ankarabarosu.org.tr/siteler/ankarabarosu/frmmakale/2001-2/4.pdf>, p. 89; "*Intellectual property is images, names, symbols, works on literature and fine arts, discoveries used for trading purposes*", See. http://www.wipo.int/about-ip/en/; <https://www.bl.uk/business-and-ip-centre/articles/what-are-intellectual-property-rights> Accessed 04 July 2021.

12 http://www.ab.gov.tr/72.html (Access Date: 04.07.2021); "*The most important feature that distinguishes intellectual property rights from industrial property rights is that the right arises from the act of "creation"; In terms of the birth of the right, there is no need for the registration process of the administration. This principle has been expressed in article 5/2 of the 1886 Bern Convention, which is one of the main international documents on this subject and has affected the national legislation. It is possible to examine intellectual property rights in two groups as rights on the work and related rights. These rights, which were expressed as copyright for a long time in our country, started to be expressed more commonly as "rights on the work" after the related rights were included in Law No. 5846 on Intellectual and Artistic Works in 1995*", See. Ayşe Saadet Arıkan, Avrupa Topluluğu'nda Fikri-Sınai Mülkiyet Hakları ve Son Gelişmeler, Ankara Avrupa Çalışmaları Dergisi, Vol. 7, No:1 (Fall: 2007), p.149-173, p. 153, <http://dergiler.ankara.edu.tr/dergiler/16/1125/13243.pdf> Accessed 05 July 2021.

Statutory Law on the Protection of Geographical Signs has been issued for geographical signs, and for integrated circuit topographies, the number 5147 Law on the Protection of Integrated Circuit Topographies has been issued. However, the provisions and legal institutions concerning all of these subjects under the Statutory Laws specified above, have been gathered systematically under one umbrella avoiding repetition, and the Industrial Property Law number 6769 has been published in the Official Gazette on [13] 10.01.2017 to go into force. Intellectual rights are protected by the Intellectual and Artistic Works Law number 5846[14].

The most common type of dispute in the field of intellectual property law is the disputes arising from the existing contracts between the parties. Because there are many contracts that contain intellectual property rights. License agreements, distribution agreements, franchising, computer agreements, Joint Venture agreements, mergers and acquisitions are the main agreements related to intellectual property rights. In the doctrine, in terms of disputes arising from contracts, contracts regarding intellectual property rights are examined in three categories. These are namely; license agreements on intellectual property rights, agreements on the transfer of intellectual property rights and agreements on the development of intellectual property rights. In case of any dispute arising from the contract, it would be appropriate for the parties to prepare the contracts that they will sign with precision in order to protect their intellectual rights. However, the dispute does not arise only between the contracting parties; as there are also disputes regarding the violation of the intellectual property right or the ownership of the intellectual property right outside the scope of the contract[15].

According to IPCPL article 40, the international jurisdiction of Turkish courts is determined by domestic law rules on jurisdiction in terms of location. When determining the international jurisdiction of Turkish courts with this regulation, IPCPL has referred to the jurisdiction rules of domestic law[16]. It appears that special jurisdiction rules have been accepted concerning intellectual property law related cases.

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13 Official Journal, Date 22.12.2016, Issue. 29944.

14 Kılıçoğlu, p. 28-78.

15 Mehmet Sarı, Fikri Mülkiyet Hukukuna İlişkin Davalarda Türk Mahkemelerinin Milletlerarası Yetkisi, <http://www.ahmetyum.av.tr/fikri-mulkiyet-hukukuna-iliskin-davalarda-turk-mahkemelerinin-milletlerarasi-yet> Accessed 05 July 2021; François Dessemontet, "Fikri Mülkiyet ve Tahkim", FMR, Vol. 7, 2007/1, Translator Cem Çağatay Orak, p. 85-98, p. 89 ff.; Yusuf Çalışkan, Uluslararası Fikrî Mülkiyet Hukukunda Uyuşmazlık Çözüm Mekanizmaları: WIPO Tahkimi ve Dünya Ticaret Örgütü, İstanbul 2008, p. 17-18.

16 Ibid.

2. Jurisdiction Provisions in IPR Legislation

a. Industrial Property Law

With the article 156 in the Industrial Property Law, the official and authorized courts for all industrial property rights have been determined, and unity, clarity, and convenience have been ensured in practice. It has been accepted that the solely authorized courts in cases that are filed in the scope of the Law against decisions issued by the Turkish Patent and Trademark Institute[17] are Ankara courts and also special authorities have been adopted for lawsuits that third parties will file amongst themselves. It has been mandated that if the plaintiff does not have a domicile in Turkey, then the court where their attorney resides, and if they do not have an attorney, the court where the Turkish Patent and Trademark Institute headquarters is located shall be the authorized court[18].

The jurisdiction provisions in previous regulations concerning intellectual rights in art. 137 of 551 Statutory Law on the Protection of Patent Rights, art. 63 of number 556 Statutory Law on the Protection of Brands, art. 49 of number 554 Statutory Law on the Protection of Industrial Designs, and art. 25 of number 555 Statutory Law on the Protection of Geographical Signs has been organized with special jurisdiction rules. All of these rules on jurisdiction are governed in the same manner. The only difference in the articles on jurisdiction is that it changes as per the plaintiff's and defendant's intellectual rights topic, the brand owner, the industrial design right's owner, and the geographical sign right's owner. In these jurisdiction provisions, if the rights of an intellectual right owner are violated or infringed on by a third party, the provisions on the jurisdiction in violation lawsuits to be filed against the infringing third parties and in lawsuits filed by third parties against an intellectual right owner regarding the invalidity of the intellectual right were being regulated by the same article[19].

In Statutory Decrees, the authorized court in "lawsuits concerning the violation of intellectual rights" has been organized with priority in two clauses. The owner of the intellectual right may first file a lawsuit against third parties who violate their intellectual right in the court of their domicile. Since the violation of the intellectual right is considered a tortious act, they may also file this lawsuit in court at the location of the violation or at the location where the effects of the violation are seen. Statutory Decrees express this as the court being located at the place where the crime was committed or where the effects

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17 See. <http://www.turkpatent.gov.tr/TurkPatent/commonContent/History> Accessed 06 July 2021.

18 Fatma Özer, "6769 Sayılı Sınai Mülkiyet Kanunu'nun Genel Bir Değerlendirmesi", Terazi Aylık Hukuk Dergisi, Vol. 12, Issue 128, April 2017, p. 131-167, p. 131 ff.

19 Erdem, Fikri Haklar, p. 191.

of the violating act are seen. In other words, the intellectual right owner may file an infringement lawsuit with the court that is located where the violating act was committed or with the court located where the infringement shows its effect if its effects and consequences are generated in another location[20]. This regulation in the Statutory Decrees has also been maintained in the art. 156/3 of the Industrial Property Law.

With this regulation, in which lawmakers maintain art. 156/3 of the Industrial Property Law in its exact form, filing lawsuits has been made easier for intellectual property right owners for cases concerning the violation of intellectual property rights by allowing them to file their case 'at the court of the plaintiff's domicile' in place of the 'court of the defendant's domicile' as mandated in the general jurisdiction provision in art. 6/1 under the Code of Civil Procedure. This jurisdiction provision is intended to protect the intellectual right owner who thinks that their intellectual right has been violated and to facilitate their filing a lawsuit. The plaintiff, who is the intellectual right owner, may file this infringement lawsuit at a court in their own domicile as well as a court where this infringement constituting a tortious act has occurred, or in terms of the Law, the court where the crime has been committed, or if the effects of the infringement are felt elsewhere, the case may be filed with a court located where these effects are felt[21].

If a Turkish intellectual right owner that is registered with and protected by the Turkish Patent and Trademark Institute does not have a domicile in Turkey, lawmakers have also established an authorized court in Turkey for such intellectual right owners. In this regulation that is included in the Statutory Decrees, art. 156/4 of the Industrial Property Law has been maintained. If the Turkish intellectual rights of a Turkish intellectual right owner without domicile in Turkey is violated, then this individual may file a lawsuit concerning this infringement in a court located where their registered representative resides. However, the registration of their representative may have been erased. A final authorized court has been established in Turkey for such a case, in which the court is located, where the headquarters of the Turkish Patent and Trademark Institute is located.

The purpose pursued in the Industrial Property Law and the old regulation Statutory Decrees is primarily to protect a Turkish intellectual right owner who will file an infringement lawsuit against third parties and to facilitate their filing a lawsuit. Therefore, the first jurisdiction rule has been established as

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20 Ibid, p. 192; B. Bahadır Erdem, "Fikri Haklara İlişkin Davalarda Türk Mahkemeleri'nin Milletlerarasi Yetkisi", Legal Fikri ve Sınai Haklar Dergisi, 3/2005, p. 688–699, (Yetki), p. 693.

21 Ibid, p. 192; Erdem, Yetki, p. 693.

'the court of the plaintiff's domicile' opposite to the Code of Civil Procedure[22] (CCP) art. 6/1. However, this rule which gives authority to the 'court at the domicile of the plaintiff intellectual right owner' established in the Industrial Property Law, cannot override CCP art. 6/1 in cases concerning intellectual right infringement. In the interest of protecting the intellectual right owner plaintiff and facilitating their filing an infringement lawsuit, article 156 of the Industrial Property Law has brought the ability to file a lawsuit at 'a court in their own domicile' in addition to the general jurisdiction rule in CCP art. 6/1. The intellectual right owner plaintiff can file their infringement lawsuit with a court located at their own domicile in accordance with art. 156 of the Industrial Property Law; or if they wish, with a court at the domicile of the defendant third party who has committed the act of infringement in accordance with CCP art. 6[23].

The objective in this regulation is for the Industrial Property Law and the old Statutory Decrees to facilitate the intellectual right owner in lawsuits concerning the infringement of intellectual rights, and to establish a provision that assigns jurisdiction to various courts in an effort to make sure there is an authorized Turkish court for these cases. The jurisdiction of all of these courts that have been facilitated are of a special nature and these provisions on jurisdiction cannot override the jurisdiction of courts that have gained this authority per CCP art. 6 and other articles. In other words, the Industrial Property Law article 156/3 and 156/4 jurisdiction rule is not a definitive jurisdiction rule in terms of domestic law[24].

As established the same in the Industrial Property Law art. 156/5 and the old Statutory Decrees, the authorized court in cases filed against the owner of an intellectual right regarding the registration or invalidity of an intellectual right, is the court at the domicile of the defendant intellectual right owner. The rule, which is regulated in the same way as the general jurisdiction rule in CCP Article 6, also protects the intellectual right owner in line with the purpose of both the Industrial Property Law and the old Statutory Decrees[25]. If the intellectual right owner does not reside in Turkey, the court located where the intellectual right owner's registered representative has a workplace has been rendered as the authorized court with reference to the jurisdiction provision in

22 Official Journal, Date 04.02.2011, Issue 27836.

23 Erdem, Fikri Haklar, p. 193; Erdem, Yetki, p. 693-694; *For the opinion that overrules the rule of "court of the residence of the defendant", the provisions that authorize the 'court of the residence of the plaintiff' in the infringement lawsuits to be filed against third parties by the intellectual right owner, regulated in the Decree-Law, which is the general jurisdiction rule CCP art. 9,* see. Ünal Tekinalp, Fikri Mülkiyet Hukuku, 2. Edition, İstanbul 2002, p. 441, 552, 613.

24 Erdem, Fikri Haklar, p. 194; Erdem, Yetki, p. 695.

25 Ibid, p. 195-196; Erdem, Yetki, p. 696.

infringement cases. There is a final court that is authorized to have jurisdiction in any case if the record of the registered representative has been erased, and hence, this is the court that is located where the headquarters of the Turkish Patent and Trademark Institute is.

According to the Industrial Property Law art. 156/2, it has been accepted that the definitive authorized courts in cases that are filed in the scope of the Law against decisions issued by the Turkish Patent and Trademark Institute are Ankara courts.

This definite authority rule, which is included in Article 156/2 of the Industrial Property Law, was regulated in the same way in the old decree laws. Accordingly, the provisions regarding the jurisdiction of the courts in cases regarding the invalidity of the intellectual right are also in the nature of 'exclusive jurisdiction'. The purpose of the provision is to both protect the defendant intellectual right holder and to establish a competent Turkish court in invalidation cases to be filed by third parties against him/her. In a lawsuit regarding the invalidity of a Turkish intellectual right registered and protected by the Turkish Patent and Trademark Office, the existence of an authorized Turkish court as the court of the state protecting this intellectual right is also in line with the principle of territoriality of intellectual rights. In the case of the invalidity of the intellectual right of third parties against a Turkish intellectual right owner, the presence of a competent Turkish court is a must due to the nature of the intellectual rights. The jurisdiction of these courts, which is a definite authority in terms of domestic law, is an "exclusive authority" in terms of international procedural law. In other words, if the lawsuit to be filed by third parties regarding the invalidity of a Turkish intellectual right is not filed in the courts authorized by the Industrial Property Law, but in the courts of another state, then the judgment of the foreign court cannot be enforced pursuant to article 54/b of IPCPL (International Private and Civil Procedure Law)[26].

b. Law on Intellectual and Artistic Works

Due to the difference brought about by the fact that intellectual (copyright) rights are created only by the owner of the work, without the need for registration of any authority, such as patents, trademarks, industrial designs and

[26] Ibid, p. 197; Erdem, Yetki, p. 697; Aysel Çelikel and Bahadır B. Erdem, Milletlerarası Özel Hukuk, 14. Edition, Istanbul 2016, (2016), p. 553; "*The Court of Justice, in Duijnstee v Goderbauer case, states that 'the courts of the Contracting States where the application for deposit and registration is filed have international jurisdiction because, due to the validity of the patent or the existence of the registration and deposit, these courts are the best places to settle disputes arising therefrom*'", See. Erdem, Fikri Haklar, p. 196; Erdem, Yetki, p. 696.

geographical indications, which are among other intellectual property rights[27], the jurisdiction of the courts in cases related to copyright is different from the jurisdiction of the courts regarding the industrial rights subject to registration[28].

The fact that copyrights arise without the need for any action and registration results in the fact that the principle of territoriality is not as valid in these rights as it is in other intellectual rights, and that the principle of personality is more prominent in intellectual rights and is valid. The fact that copyrights are created only by the owner of the work, without the need for registration or any other process of any country, and that these rights approach the principle of personality rather than territoriality, results in the fact that the courts of no country do not have exclusive jurisdiction in cases related to these rights[29].

In Turkish law, the only provision regarding the jurisdiction of the courts in terms of intellectual property has been regulated in Article 66 of the Law on Intellectual and Artistic Works in terms of the cases of ref of the infringement (stopping the attack, art. 66-68) and prohibiting the infringement (preventing the attack, art. 69). According to Law of Intellectual Property Rights article 66, "…*The owner of the work can file a lawsuit for ref and prohibition of infringement at his/her place of residence*". This regulation, in order to protect and facilitate the owner of the work as an intellectual right owner, as in the Industrial Property Law and the old decree laws, contrary to the court of the domicile of the defendant, which is the general provision in Article 6 of the Code of Civil Procedure, the court of the domicile of the owner of the work, who is the plaintiff, has jurisdiction in the cases of the ref of the infringement and the prohibition of the infringement, which are infringement cases. This special authorization provision in Article 66 of the Law of Intellectual Property Rights is an alternative authorization provision granted to the claimant[30].

If the owner of the work wishes, instead of the opportunity provided by the Law of Intellectual Property Rights article 66, he/she can file his/her case in the court of the defendant's place of residence in accordance with the jurisdiction provision in Article 6 of the Code of Civil Procedure. In addition to this condition, since the ref lawsuit filed with the aim of eliminating the infringement against the rights of the author was filed for the purpose of refusing the infringement constituting a tort, according to Article 16 of the Code of Civil Procedure, the court of the place where the tortious act was committed, is also authorized in the case of abolishing the infringement. In

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27 For detailed information, see Kılıçoğlu, p. 18; "*Intellectual property is the right over one's creations based on thought and artistic skill. Here, the work created by the person is protected*", Kılıçoğlu, p. 18.

28 Erdem, Fikri Haklar, p. 198-199; Erdem, Yetki, p. 698.

29 Ibid, p. 198-199; Erdem, Yetki, p. 698.

30 Kılıçoğlu, p. 97; Erdem, Fikri Haklar, p. 199; Erdem, Yetki, p. 698.

compensation cases, the courts that have jurisdiction pursuant to the general and special jurisdiction provisions of the Code of Civil Procedure may hear the case[31].

All of the courts that have gained jurisdiction pursuant to all these provisions of jurisdiction also have international jurisdiction in accordance with Article 40 of the International Private and Civil Procedure Law[32] and the jurisdiction of any of these courts is not a definitive jurisdiction provision in terms of domestic law and an exclusive jurisdiction provision in terms of international procedural law. Therefore, each of these lawsuits can be filed in courts abroad and can be enforced if they meet the enforcement conditions in article 54 of the International Private and Civil Procedure Law[33].

3. Jurisdiction of Authorised Courts Regarding IP-Related Contracts

Agreements on intellectual property rights are divided into two as agreements regarding the transfer of an intellectual right in its entirety and agreements regarding the transfer of the right to use an intellectual right, or in other words, license agreements regarding intellectual rights. License agreements regarding intellectual property rights can be made in various types depending on the use of the licensee. E.g; patent license agreements; according to the type of use, development licenses and rebuilding licenses are divided into production licenses, assembly licenses, usage licenses, import licenses, export licenses, sales licenses[34]. There may also be agreements to commit IP rights as capital in a company.

When it comes to the issue of the jurisdiction of the courts in cases arising from contracts regarding intellectual property, there is no special jurisdiction provision regarding the jurisdiction of the courts in this regard. For this reason, the jurisdiction of the courts in cases arising from agreements regarding the transfer of an intellectual right and license agreements related to the transfer of the use of an intellectual right will be determined according to the provisions of

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31 Erdem, Fikri Haklar, p. 199; Erdem, Yetki, p. 698; Sarı, Fikri Mülkiyet Hukukuna İlişkin Davalarda Türk Mahkemelerinin Milletlerarası Yetkisi, <http://www.ahmetyum.av.tr/fikri-mulkiyet-hukukuna-iliskin-davalarda-turk-mahkemelerinin-milletlerarasi-yet> Accessed 07 July 2021; Supreme Court 11. CC, D. 30.04.2014, M. 2014 / 5862, D. no 2014 / 8134; "*as the alleged action also constitutes a tort, in accordance with Article 16 of the CCP, the court of the domicile of the injured person is also competent. In this respect, giving a decision of lack of jurisdiction is against the procedure, and since there is a regulation on unfair competition in LIPR no. 5846 a. 84 ff, it should also be accepted that the court is in charge of the intellectual property rights law court in the dispute.*", For decision, see <https://www.sertels.av.tr/avukat/hukuk/fsek-yargitay-kararlari/fsek-haksiz-fiil-yetkili-mahkeme-yargitay-11-hd-k2014-8134.html> Accessed 07 July 2021.

32 Çelikel and Erdem, p. 553.

33 Erdem, Fikri Haklar, p. 199; Erdem, Yetki, p. 698.

34 Çelikel and Erdem, p. 395; Kılıçoğlu, p. 290-291.

the CCP. As it is known, according to Article 10 of CCP, "*The lawsuits arising from the contract can also be filed in the court of the place where the contract will be executed*". In the case of breach of intellectual property agreements, the competent court will be determined according to the Article 10 of the CCP. The court determined according to Article 10 of the CCP, IPCPL art. 40, it will also have international authority,[35] and this authority is not an exclusive jurisdiction provision. This means that the parties to a contract on intellectual property can, if they wish, file lawsuits arising from the contract between them regarding the intellectual property in a foreign state court and may have the foreign court's judgment enforced in Turkey if it meets the conditions of Article 54 of the IPCPL[36].

In disputes arising from license agreements, the lawsuit can also be filed in the court of the place where the agreement will be executed. However, it is necessary to determine the place where the contract will be executed. The place of performance in license agreements must be determined in accordance with the substantive law to be applied to the agreement. The substantive law to be applied indicates the conflict of laws rules. According to the Turkish conflict of laws rules, International Private and Civil Procedure Law article 28, if Turkish substantive law rules are applied to license agreements, the place of performance of the agreement will be determined according to the Turkish Code of Obligation[37] (TCO) article 89. First of all, according to the article, the place of performance of the debt is determined according to the express or implicit will of the parties. If the parties do not agree on the place of performance of the contract, the provisions of article 89 of the TCO are applied[38]. If the parties have agreed on the place of performance, the establishment of this place of performance by the international court will result in the parties having actually made a contract of jurisdiction[39].

C. Authorization Agreement

The powers of the courts are regulated by law (Constitution article 142). According to article 142 of the Constitution[40], the parties should not be able to

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35 Sarı, Fikri Mülkiyet Hukukuna İlişkin Davalarda Türk Mahkemelerinin Milletlerarası Yetkisi, <http://www.ahmetyum.av.tr/fikri-mulkiyet-hukukuna-iliskin-davalarda-turk-mahkemelerinin-milletlerarasi-yet> Accessed 07 July 2021.

36 Erdem, Fikri Haklar, p. 198; Erdem, Yetki, p. 697-698.

37 Official Journal, Date 04.02.2011, Issue. 27836.

38 For the international jurisdiction of Turkish Courts in Franchise contracts, see. Sema Çörtoğlu Koca, "Franchise Sözleşmelerinde Esasa Uygulanacak Hukuk ve Mahkemelerin Milletlerarası Yetkisi", Prof. Dr. Tuğrul Arat'a Armağan, Ankara 2012, p. 749-780, (Franchise), p. 764.

39 Doğan, Milletlerarası Usul, p. 72

40 Official Journal, Date 09.11.1982, Issue 17863.

authorize a court that is legally incompetent by contract. However, the Code of Civil Procedure accepts as a principle that the parties can make a contract of authority but puts some limits on it. In cases of definite authorization, an authorization agreement cannot be made. For this reason, in cases of final authorization, the objection to authorization is not a first objection, but a condition of action. The parties can raise the final authority objection at any stage of the case, and the final authority is observed ex officio by the court. A contract of authority cannot be concluded on matters that the parties cannot freely dispose of. E.g; An authorization agreement cannot be made for divorce, separation, paternity cases. Persons other than traders and public legal entities cannot enter into a contract of authorization[41].

Provided that it is a merchant or a public legal entity, the contract made by the parties in order to authorize a court that is not legally authorized for a certain case (dispute), in fact, is called a contract of authorization. A contract of authority is a contract of procedural law. With the authorization agreement, a court that is not actually authorized becomes authorized[42].

In the comparative law and Turkish Law, it is only accepted in the field of debt relations to make an agreement of authority in disputes with an international element. In disputes arising from debt relations with an international element, foreign courts may also be authorized for a dispute in which Turkish courts, which do not have international jurisdiction, are authorized by an agreement of jurisdiction[43].

1. Selection of Turkish Courts

In cases where the Turkish courts are not authorized locally and therefore international jurisdiction does not arise, the parties may decide that a certain Turkish Court may be authorized by agreement of jurisdiction. With the authorization agreement, the parties are given international authority by their will to a Turkish court, which does not have international jurisdiction, since there is actually no competent court. In cases of definite authority, a contract of authority cannot be concluded on matters that the Parties cannot freely dispose of. E.g; An authorization agreement cannot be made for divorce, separation, paternity cases[44].

The opportunity to conclude an authorization agreement is only available to traders and public legal entities. According to the law, merchants or

41 Kuru, p. 116-117; Arslan, Yılmaz and Taşpınar Ayvaz, p. 220-221.

42 Arslan, Yılmaz and Taşpınar Ayvaz, p. 220; Kuru, p. 117; Görgün, p. 170 ff.

43 Doğan, Milletlerarası Usul, p. 73.

44 Nomer, p. 477; "For example, it is not possible to conclude authorization agreements for cases related to the same property, bankruptcy cases, and divorce cases", Nuray Ekşi, Türk Mahkemelerinin Milletlerarası Yetkisi, İstanbul 1996, p. 110.

public legal entities may authorize one or more courts with an authorization agreement (authorization agreement or authorization condition) regarding a dispute that has arisen or may arise between them. Unless otherwise agreed by the parties, the case can only be filed in this court or courts determined by the contract (Code of Civil Procedure Art. 17). In other words, the parties establish "exclusive" competent courts in the sense of international procedural law for the court or courts they have authorized with a jurisdiction agreement[45].

The form and validity conditions of a jurisdiction agreement authorizing Turkish courts are subject to Turkish procedural law, lex fori. Accordingly, in order for the authorization agreement to be valid, it must be made in writing, the legal relationship arising from the dispute must be specific or identifiable, and the authorized court or courts must be indicated[46] (Code of Civil Procedure Art. 18/2). According to these conditions, agreements of jurisdiction between parties that are not merchants or public legal entities, which are not made in writing or on which the parties can freely dispose of and for which disputes are unclear, or where the authorized court or courts are not clearly specified, or where Turkish courts have certain jurisdiction, are not valid in terms of Turkish law. E.g; The record "*Turkish courts are authorized*" is not sufficient. It is necessary to have a record such as "*Istanbul courts are authorized*" or "*Istanbul or Bursa courts are authorized*"[47].

It is not necessary that the case or the subject of the case have any relation with Turkey. Regardless of their nationality, the parties may authorize a specific Turkish court for any particular dispute between them[48]. The authorization agreement can be concluded before or after the dispute arises[49].

Even if the parties have not drawn up a jurisdiction agreement between them, it is stated that there is an implied jurisdiction agreement between the parties, unless the defendant makes a first objection to this jurisdiction, in case the case is filed in a Turkish court that does not have international jurisdiction. It is accepted that this situation is an implied authorization agreement as well as express authorization agreements. According to the justification, the defendant is deemed to have accepted the jurisdiction of the court by not making the first objection and entering the merits of the case. In that case, this is an authorization agreement established with the will of the parties[50].

In a case related to intellectual property law, even if the Turkish courts are not authorized according to the provisions of the domestic law (Industrial Property

45 Ibid, p. 477.
46 Ibid, p. 477.
47 Çelikel and Erdem, p. 603.
48 Nomer, p. 478.
49 Nur Bolayır, Medeni Usul Hukukunda Yetki Sözleşmeleri, İstanbul 2009, p. 149.
50 Çelikel and Erdem, p. 604.

Law, Law of Intellectual Property Rights and Code of Civil Procedure), they can try the case by gaining international jurisdiction with a valid authorization agreement made by the parties in accordance with Article 18 of the Code of Civil Procedure.

2. Selection of Foreign Courts

In disputes where there is a competent court according to Turkish international jurisdiction rules, the parties may, by mutual agreement, authorize a foreign country court. According to the regulation in Article 47/1 of the International Private and Civil Procedure Law, certain conditions are stipulated for the conclusion of the authorization agreement[51]. Accordingly, in order for the parties to exclude the authority of Turkish courts and to authorize the courts of foreign states with an agreement; the dispute that is the subject of the authorization agreement must be;

a) Concerning matters for which Turkish courts are not appointed on the basis of exclusive jurisdiction,
b) Having a foreign element and
c) it must arise from debt relationships.

In addition, it is necessary to look for the conditions that the dispute that constitutes the subject of the contract of authorization and the court that is authorized should be "determined and identifiable"[52].

In cases where the domestic jurisdiction of Turkish courts and, accordingly, their international jurisdiction is determined on the basis of exclusive jurisdiction, another country's court does not become authorized by a contract of jurisdiction. What is meant by the exclusive jurisdiction in the private law of the states and the exclusive jurisdiction in the procedural law is that only a certain state jurisdiction has the authority to decide on a certain dispute. If a jurisdictional rule is set to ensure that the subject of dispute is heard only in Turkish courts, it means that the Turkish court has exclusive jurisdiction in this matter, and the jurisdiction agreement authorizing a foreign state court will not be valid for this dispute[53].

According to Article 47/2 of the International Private and Civil Procedure Law, "*The jurisdiction of the courts specified in Articles 44, 45 and 46 cannot be eliminated by agreement of the parties*". According to this regulation, Turkish courts are deemed to have exclusive jurisdiction in favour of the worker, the consumer, the insured, and the beneficiary in disputes arising from employment contracts and business relations, consumer contracts, and insurance contracts.

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51 Doğan, Milletlerarası Usul, p. 73; Şanlı, Esen and Ataman-Figanmeşe, p. 399-400.
52 Şanlı, Esen and Ataman-Figanmeşe, p. 400.
53 Erdem, Fikri Haklar, p. 201.

In disputes arising from these contracts, the jurisdiction of the Turkish courts, determined by International Private and Civil Procedure Law articles 44, 45 and 46, cannot be abolished by a contract of jurisdiction[54].

In contracts with a foreign element regarding intellectual law, it is possible for the contracting parties to authorize a foreign state court with the authorization agreement concluded in accordance with the terms of Article 47 of the International Private and Civil Procedure Law. They may authorize a foreign state court for the future disputes arising from the transfer of an intellectual and industrial right or the transfer of use through a license agreement. However, this authorization agreement must meet the conditions specified in article 47 of International Private and Civil Procedure Law. The jurisdiction of the authorized foreign court is exclusive. If the case is filed in a Turkish court instead of the authorized foreign court, despite the authorization agreement, the party filing the case may face an objection of lack of jurisdiction. If it is filed in the Turkish Court while being heard in a foreign state court, this time a pending objection may be encountered. However, if the foreign state court considers itself to be incompetent or if no objection is made in the Turkish court, the case can be heard in the authorized Turkish court. In addition, since the violation of intellectual property right also constitutes a tort, it is possible to conclude an authorization agreement in debt relations arising from tort in accordance with article 47 of International Private and Civil Procedure Law[55].

II. INTERNATIONAL JURISDICTION OF COURTS REGARDING INTELLECTUAL PROPERTY LAW IN THE PROCEDURE OF THE EUROPEAN UNION

A. In General

The member states of the European Economic Community were aware that the effects of the decisions made by the courts of the member states should be accepted in other member states in order to establish a real common internal market. Therefore, in the 1960s, they adopted the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention), which simplifies the recognition and enforcement procedure and conditions, and introduces a uniform regulation. Towards the end of the 1990s, the member states started working on a new convention among themselves, which introduced more liberal regulations on recognition and enforcement than the regulations of the Brussels Convention, and also clarified the problems

[54] Çörtoğlu Koca, Franchise, p. 769; For detailed info, see Çörtoğlu Koca, Sema, Zayıf Tarafin Korunduğu Sözleşmelerde Mahkemelerin Milletlerarası Yetkisi (İş, Tüketici ve Sigorta Sözleşmeleri), Ankara 2016, (Yetki), p. 252 ff.

[55] Erdem, Fikri Haklar, p. 203.

that arose in the implementation of the Brussels Convention. As a result, the Regulation No. 44/2001 and dated 22 December 2000 on Jurisdiction in Legal and Commercial Matters and the Recognition and Enforcement of Judgments[56] (2001 Regulation) was adopted[57].

On 21 April 2009, the Commission's report on the implementation of the Brussels I Regulation was adopted. As a result of the report, it was concluded that the Regulation was functioning properly; however, it has been expressed that it is desirable to improve the functioning of some of its provisions, to facilitate court decisions more freely and to improve access to justice. Since many amendments to the by law were considered appropriate, it was deemed appropriate to adopt a new Bylaw in terms of legal certainty. The Regulation[58] No. 1215/2012 on Jurisdiction in Legal and Commercial Matters and the Recognition and Enforcement of Judgments (Regulation 2012) entered into force on 10 January 2013. However, the implementation of the Recast Regulation by the courts of the member states started on January 10, 2015, pursuant to the transitional provision in Article 66[59]. The Regulation determines the jurisdiction of the courts in civil and commercial law cases for all European Union member states. The Regulation is applied in the courts of twenty-eight member states of the European Union[60].

The Regulation of 2012 applies to legal and commercial disputes regardless of the nature of the court. The tax does not apply to customs or administrative cases and to the responsibilities of states arising from acts and omissions related to the exercise of their sovereign powers (Art. 1/1). Statute, status and capacity of natural persons, marriage or property regimes in a relationship having the same effects as marriage under applicable law; bankruptcy, liquidation of bankrupt companies or other legal entities, concordat and similar procedures; social insurance; arbitration; maintenance obligations arising from family, custody, marriage or kinship; The provisions of the Regulation are not applicable to inheritance and testament, including alimony obligations due to death[61].

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56 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Al33054> Accessed 08 July 2021.

57 Ceyda Süral, "Avrupa Birliği Usul Hukuku", Ed. Işıl Özkan, Ceyda Süral and Uğur Tütüncübaşı: Avrupa Birliği Devletler Özel Hukuku, Ankara 2016, p. 25.

58 Regulation (Eu) No 1215/2012 of The European Parliament and of The Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF> Accessed 08 July 2021.

59 Süral, p. 26.

60 Çörtoğlu Koca, Yetki, p. 98.

61 Süral, p. 26.

The Brussels I Regulation of 2012 applies where the defendant is domiciled in EU member states (Art. 4/1, 6/1). In terms of the application of the provisions of the statute, the citizenship or place of residence of the plaintiff is not taken as a basis[62].

B. Authorization Rules

1. General Authority Rule

Article 4 of the new regulation is based on the defendant's residence in a member state (art. 4/1) Regardless of nationality, the defendant is subject to the jurisdiction of the court of the Member State in which he/she resides. The defendant, who is not a national of a Member State, will also be subject to the jurisdiction of the Member State in which he/she resides, as a partner with its nationals (art. 4/2). Item 4 has a dual function. First, it oversees the territorial implementation of authority. Second, it is the general rule of authority. It is the same as Article 2 of the old regulation. Pursuant to Article 5, it is prohibited to designate another court within or outside the European Union as a "more appropriate" court. Article 6 deals with defendants who do not reside in a Member State. In this regard, national authority rules are applied. Article 6/1 determines the exception to the national authority rules. There are two new exceptions. These are the exclusive competences of the member states with regard to consumer and worker protection. The other is the authorization agreement (art. 18(1)) (art. 21/2) (art. 24.) (art. 25.)[63].

2. Special Authorization Rule

The rules contained in Article 5 of the Brussels I Regulation (Recast Regulation articles 7-9) authorize courts outside the defendant's country of residence. This is optional and is subject to the plaintiff's choice. For this issue, there should be a closer relationship between the dispute and the court. Article 5 of the Brussels Recast I Regulation governs that a person residing in one member state can only be prosecuted in the court of another member state on matters covered by sections 2-7. The rules in Article 5 of the Brussels I Regulation (Recast 7 article) are special authorization rules. These are contracts, wrongful acts, cases connected with criminal proceedings, recovery of cultural property, branches, agencies and other organizations, trust, and litigation relating to the salvage of goods at sea[64].

The subject of the Brussels I Regulation 5(1) (Recast Art. 7/1) is the contracts. This provision differs from the provision in the Brussels Convention. According

62 Ibid, p. 27.
63 Ibid, p. 44-46.
64 Ibid, p. 47-62.

to the Convention, in contractual matters, a resident of one Member State may be sued as a "place of performance" in the courts of another Member State. Since this provision was problematic, it was amended first in the Convention and then in the Bylaws. According to the Regulation, unless otherwise agreed by the parties, the place of performance of the contract is pursuant to Article 5/1(a) (new 7/1(a)) of the Brussels I Regulation; In the sale of goods, it is the place where the goods are delivered or can be delivered. In service contracts, it is the place where the service is provided or can be provided (5/1-b). Where 5(1)(b) (7/1(b)) does not apply, (a) applies. This provision is also included in paragraph 1(a)(b)(c) of Article 7 of the Recast Brussels I Regulation. In this way, although the old rule is preserved, it has brought an exception to two important contract types. These are the sales contract and the service contract. If these are not applied, the old rule will continue to apply[65].

When a dispute arises regarding the transfer of an intellectual property right that is not covered by the regulation regarding the sale of goods or a service contract, or the transfer of its use, namely a license agreement, the courts of the place of performance of the aforementioned contracts shall have international authority pursuant to the special jurisdiction rule in accordance with the Article (7/1(a)) of the Recast Brussels I Regulation. The plaintiff, who is a party to an intellectual right contract, can file his/her suit arising from the violation of the contract in the "*court of the defendant's residence*" in Article 4 of the Regulation, or in the court of the place of performance of the Regulation (7/1(a)). According to Article 5(3) (Recast 7(2)) of the Brussels I Regulation, the rule of jurisdiction in cases of torts that are important in cases regarding intellectual property rights, *"The courts of the place where the damage occurred or may occur... in matters related to tort, tort-like acts faced by a person residing in one member state in another member state shall be competent*"[66].

3. Exclusive Jurisdiction

The Brussels Regulation regulates the situation in which a member state has exclusive jurisdiction, regardless of the residence of the plaintiff or the defendant, with Article 22 (Recast art. 24), apart from the courts of general jurisdiction and special jurisdiction. One of these exclusive powers (Art. 24/4) concerns intellectual property rights. It authorizes the courts of the country where these rights are registered or stored. The first reason for this is the production of intellectual property in this country, and the second reason is the prevention of conflicting decisions. 24(4) includes patents, trademarks, designs and similar rights. Copyrights are not included. Exclusive authorization

65 Ibid, p. 49-50.

66 Erdem, Fikri Mülkiyet, p. 61.

relates only to the validity of the rights in registration (24/1) or 24(4). License agreements are not covered by 24(4) (subject to clause 42 or 7(2))[67].

C. Authorization Agreement

In article 23 of the Brussels I Regulation (Recast art. 25), it recognizes the jurisdiction agreement of a member state court. For this, one or more of the parties must reside in a member state and they must agree that any current or future disputes that may arise from a particular person will be heard in a member state's court or courts. Unless the parties agree otherwise, this jurisdiction is an exclusive jurisdiction and abolishes the jurisdiction of other courts. Contracting parties may choose one of the internationally competent courts related to the case, or they may choose a court that does not have an international jurisdiction in the case[68].

The contract may be made in writing or, if not in writing, in a practical or known manner in international trade. Electronic communication is also considered equal to written agreement. No other Member State court may hear the case unless the chosen court declares its jurisdiction. Filing an action in another member state court cancels the jurisdiction agreement. Although the authorization agreement forms part of the contract, it is considered independently of the contract. The validity of the contract and the validity of the authorization agreement or condition are separate from each other (Recast art. 25/5)[69].

Recast Brussels article 25/5 introduces three additional amendments to the Brussels I Regulation (art. 23). The scope of application of the authorization agreement has been expanded and it is considered valid even if none of the parties reside in any of the member states. The applicable law regarding the validity of the agreement has been determined. It is accepted that the law of the chosen court is authorized in the validity of the contract. Moreover, in the provision added to 25/5, it has been accepted that such agreements are separate from the other provisions of the contract. The most important change is an exception to the "lis pendens" rule. According to this provision, when the courts of one member state have been given an

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67 Ibid, p. 59-60; Süral, p. 70-71; "*As in the case of GAT v. Luk, the Court has recognized that where the validity of an intellectual property right is at issue, the court must rule on its jurisdiction ex officio without waiting for a party's objection.*", Süral, p. 71; "*In cases regarding the infringement of an intellectual right, apart from the "court of the defendant's residence", which is regulated as a priority rule in the Brussels Treaty, the other court that finds the most application area and is applied is the "court of the place where the tortious act took place", which is regulated in Article 5/3*", Erdem, Fikri Mülkiyet, p. 62.

68 Çörtoğlu Koca, Franchise p. 773.

69 Süral, p. 72.

exclusive jurisdiction by a contract, the courts of the other member state must stop the proceedings (art. 25)[70].

It is not possible to conclude an authorization agreement that eliminates the exclusive jurisdiction rule in cases regarding the registration or validity of intellectual property rights. In contracts related to intellectual rights, the parties to the contract shall make a contract of authority and determine the competent court or courts in disputes arising from or may arise from the contract regarding intellectual property Recast Brussels a. 25, it is possible even if the parties do not reside in the member states, provided that the court chosen is the court of the member state. In our opinion, it seems possible to conclude an authorization agreement between the parties in case of violation[71] of intellectual property.

CONCLUSION

According to IPCPL article 40, the international jurisdiction of Turkish courts is determined by domestic law rules on jurisdiction in terms of location. With this regulation, IPCPL referred to the jurisdiction rules of domestic law while determining the international jurisdiction of Turkish courts.

In accordance with IPCPL article 40, the authorization rule in the Industrial Property Law will be applied for industrial rights. With the newly introduced regulation, the competent and authorized courts for all industrial property rights have been determined and unity, clarity, and convenience have been ensured in practice. It has been accepted that the Ankara courts are definitively the authorized courts in the lawsuits to be filed within the scope of the Law against the decisions made by the Turkish Patent and Trademark Office, and special powers are adopted for the lawsuits to be filed by third parties among themselves. If the plaintiff does not have a domicile in Turkey, the court of the place where the headquarters of the Turkish Patent and Trademark Office is located is authorized in the attorney's domicile.

When it comes to the issue of the jurisdiction of the courts in cases arising from contracts regarding intellectual property, there is no special jurisdiction provision regarding the jurisdiction of the courts in this regard. For this reason, the jurisdiction of the courts in cases arising from agreements regarding the transfer of an intellectual right as well as license agreements regarding the

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70 Ibid, p. 75.

71 "Although In the event that the infringement of intellectual property also constitutes a tort, though it seems legally possible according to Article 17 to create a jurisdiction convention that excludes the jurisdiction of the courts of the place where the tortious act took place (Article 5/3), which have been given a special authority, as well as the courts in the domicile of the defendant (Article 2 of the Brussels Treaty), in our opinion, it is not suitable for the nature of the tortious act", Erdem, Fikri Mülkiyet, p. 70.

transfer of the use of an intellectual right will be determined according to the provisions of the CCP.

The authority rule regarding intellectual property rights is regulated in Article 66 of the Law of Intellectual Property Rights. This provision, in contrast to the court of residence of the defendant, which is the general provision in Article 6 of the Code of Civil Procedure, authorizes the court of residence of the owner of the work, who is the plaintiff, in the cases of refining the infringement and prohibiting the infringement, which are infringement cases. This special authorization provision in Article 66 of the Law of Intellectual Property Rights is an alternative authorization provision granted to the claimant. The parties may enter into a contract of jurisdiction and authorize Turkish or foreign courts, provided that they fulfil the conditions for the dispute between them.

In the European Union regulations, the Brussels I Regulation of 2012 applies to legal and commercial disputes regardless of the nature of the court. When a dispute arises regarding the transfer of an intellectual property right that is not covered by the regulation regarding the sale of goods or a service contract, or the transfer of its use, namely a license agreement; then the courts of the place of the execution of the aforementioned contracts shall have international authority pursuant to the special jurisdiction rule in accordance with the Article (7/1(a)) of the Recast Brussels I Regulation. If the plaintiff, who is a party to an intellectual right contract, wishes to file suit arising from the violation of the contract in question, they can do so in the court of the place of execution of the contract (7/1(a)) as per the Regulation (7/1(a)) in the "court of the defendant's residence" in the article.

In contracts related to intellectual rights, the parties to the contract shall make a contract of authority and determine the competent court or courts in disputes arising from or may arise from the contract regarding the intellectual property; Recast Brussels a. 25, it is possible even if the parties do not reside in the member states, provided that the court chosen is the court of the member state.

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