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CONTENTS

LE PRINCIPE DE COMPÉTENCE-COMPÉTENCE EN DROIT TURC DE L'ARBITRAGE

Türk Tahkim Hukuku'nda Hakemin Kendi Yetkisini Kendisinin Belirlemesi İlkesi (Competence-Competence İlkesi)

The Principle of Competence-Competence in Turkish Arbitration Law

Asst. Prof. Dr. Ebru AY CHELLI*

RESUME

Le principe de compétence-compétence accorde aux arbitres le pouvoir d'être juge de leur propre compétence sans l'obligation de surseoir à statuer dans l'hypothèse d'une saisine parallèle d'une juridiction étatique. L'arbitre a ainsi le pouvoir de statuer sur toute question touchant à sa compétence ou, en d'autres termes, à l'efficacité de la convention d'arbitrage en tant que telle.

Le principe, souvent présenté par ses deux effets, implique que l'arbitre puisse juger la contestation relative à sa compétence. Cette possibilité constitue l'effet positif du principe de compétence-compétence. Cet aspect est majoritairement consacré par les droits nationaux et récemment par le droit turc.

Quant à son effet négatif, il interdit au tribunal étatique, saisi d'un litige faisant l'objet d'une convention d'arbitrage, de juger sur sa compétence alors que l'arbitre ne s'est pas prononcé sur la validité de la convention d'arbitrage. Même si en droit turc, le juge doit envoyer les parties devant l'arbitre, ce dernier n'a pas de priorité par rapport au juge saisi. Le juge turc conserve de nombreux pouvoirs. L'aspect négatif du principe de compétence-compétence semble pour l'heure une spécificité française.

Mots clés: Convention d'arbitrage, arbitre, principe de compétence-compétence, contrôle du juge étatique, exception.

ABSTRACT

The principle of competence-competence grants arbitrators the power to be judge of their own jurisdiction without the obligation to stay proceedings in the event of a parallel referral to a court. The arbitrator has the power to determine any question relating to his jurisdiction or, in other words, the effectiveness of the arbitration agreement.

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The principle, often presented by its two effects implies that the arbitrator can judge the dispute over jurisdiction. This possibility is the positive effect of the principle of competence-competence. This is mainly devoted by national laws and recently by Turkish law.

As for its negative effects, it forbids the state court, hearing a dispute subject to an arbitration agreement, to judge on its jurisdiction when the arbitator did not rule on the validity of the arbitration agreement. Although in Turkish law, the judge must send the parties before the arbitrator, the latter does not have priority over the court seized. The Turkish judge retains many powers. The negative effect of the principle of competence-competence has not been widely accepted and seems for now a French specificity.

Keywords: Arbitration agreement, arbitrator, principle of competence competence, jurisdiction, negative effect.

ÖZET

Compétence-compétence ilkesi, hakemlerin, uyuşmazlığın devlet mahkemesi önüne götürülmesi durumunda bunun sonucunu beklemeden kendi yetkileri hakkında karar verebilmelerini ifade eder ve tahkim şartının bağımsızlığı ilkesi ile birlikte tahkim hukukunun belkemiğini oluşturur. Bu ilkeye göre hakem, kendi yetkisi ile ilgili diğer bir deyişle tahkim anlaşmasının işlevselliği ile ilgili her türlü sorun hakkında karar verme yetkisine sahiptir.

İlke, genel olarak iki etkiye sahiptir. Olumlu etki, hakemin kendi yetkisi hakkında karar verebilmesini ifade eder ve Türk hukuku da dâhil olmak üzere birçok milli hukuk tarafından kabul edilmiştir. Olumsuz etki ise, tahkim anlaşmasına konu uyuşmazlığın devlet mahkemesi önüne götürülmesi varsayımında, devlet mahkemesinin hakemin tahkim anlaşmasının geçerliliği konusunda karar vermesini beklemeden, kendi yetkisi hakkında karar vermesinin yasak olmasıdır. Böyle bir durumda Türk hukukunda devlet mahkemesinin tarafları hakeme yönlendirmesi öngörülmüşse de hakemin devlet mahkemesine göre önceliği yoktur. Türk hâkimi hâlâ birçok yetkiye sahiptir. Competence-competence ilkesinin olumsuz etkisi Fransız hukukuna özgü bir uygulama olarak karşımıza çıkmaktadır.

Anahtar Kelimeler: Tahkim anlaşması, hakem, yetki, kendi yetkisi hakkında karar verme, devlet mahkemesi, denetim, itiraz.

♦♦♦♦

INTRODUCTION

Parmi une multitude de définitions qui ont été formulées pour l'arbitrage[1],

[1] Pour une définition de l'arbitrage voir Ch. Jarrosson, La notion d'arbitrage, LGDJ,1987,

celle proposée par René David se distingue par le fait qu'elle souligne le fondement conventionnel de l'arbitrage:

«l'arbitrage est une technique visant à donner la solution d'une question intéressant les rapports entre une ou plusieurs personnes, par une ou plusieurs autres personnes, l'arbitre ou les arbitres, lesquels tiennent leurs pouvoirs d'une convention privée et statuent sur la base de cette convention, sans être investis de cette mission par l'État»[2].

Le fondement conventionnel constituant la source de la compétence des arbitres, leur investiture et leur compétence dépendent l'une et l'autre de l'existence de la convention d'arbitrage.

La convention d'arbitrage peut être définie comme une convention par laquelle les parties s'engagent à soumettre à l'arbitrage soit des litiges qui pourraient naître entre elles, soit un litige déjà né. C'est la définition généralement avancée par la doctrine et par certaines sources législatives internes ou internationales regroupant en un seul concept les deux catégories classiques: le compromis, qui est la convention par laquelle les parties à un litige déjà né, soumettent celui-ci à l'arbitrage, et la clause compromissoire qui est la convention par laquelle les parties à un contrat s'engagent à soumettre toutes les contestations pouvant naître de ce contrat à l'arbitrage.

Aujourd'hui, un grand nombre de pays dotés de législations modernes sur l'arbitrage utilisent l'expression «convention d'arbitrage» qui englobe la clause compromissoire et le compromis.

Tel est le cas en Turquie de la Loi sur l'Arbitrage International[3] (ci-après dénommée la LAI) qui n'institue aucune distinction entre la clause compromissoire et le compromis[4].

L'article 4 de la LAI dispose qu'«une convention d'arbitrage est une convention par laquelle les parties décident de soumettre à l'arbitrage tous les dif-

Paris, n° 785, p. 372. M. Jarrosson relève que la notion d'arbitrage n'a pas de définition légale, op. cit., n° 779, p. 368. En effet, la plupart de lois sur l'arbitrage ne définissent pas l'arbitrage. Le droit turc échappe à ce principe en définissant l'arbitrage dans la loi n° 4501 sur les contrats de concession. Ainsi, selon l'article 2 de ladite loi, l'arbitrage est «la voie juridictionnelle privée qui repose sur la volonté des parties, exprimée dans une convention, d'investir un arbitre ou un tribunal arbitral de la mission de trancher des litiges nés ou qui vont naître entre elles et dont la procédure est définie par elles-mêmes».

2 R. David, L'arbitrage dans le commerce international, Economica, 1982, p. 9.

3 Loi n° 4686 du 21 juin 2001, JO du 5 juillet 2001, n° 24453.

4 E. Nomer, N. Ekşi, G. Öztekin Gelgel, Milletlerarası Tahkim (Arbitrage international), tome I., b. 4., Istanbul 2013, p. 2 ; B. Kuru, R. Arslan, E. Yılmaz., Medeni Usûl Hukuku (Le droit de procédure civile), Ankara, 2013, p. 782 ; H. Pekcanıtez, O. Atalay, M. Özekes, Medeni Usûl Hukuku (Droit de procédure civile), Ankara, 2013, p. 1070.

férends ou certains des différends qui se sont élevés ou pourraient s'élever entre elles au sujet d'un rapport juridique contractuel ou non contractuel».

En matière interne, la distinction est retenue par l'article 412 du Code de procédure civile[5] selon lequel «l'arbitrage peut résulter soit d'un compromis lié à propos des contestations existantes, soit d'une clause compromissoire portant que certaines contestations éventuelles seront soumises à des arbitres».

L'expression de la «convention d'arbitrage» est également utilisée par le législateur français à l'article 1442 du Code de procédure civile français. La jurisprudence française a affirmé en 2002 que «la distinction entre la clause compromissoire et le compromis s'abolit en matière internationale, pour se voir substituer la seule catégorie de convention d'arbitrage laquelle intervient indifféremment à l'égard d'un litige né ou éventuel»[6]. Le prononcé de la Cour paraît excessif. Tout d'abord, dans la pratique, les deux types de conventions se différencient tant au niveau de la rédaction qu'au niveau du moment où elles interviennent dans les rapports entre les parties. La première convention vise à régler les éventualités qui peuvent se présenter a posteriori alors que la deuxième doit déterminer avec précision le litige qui va être résolu par l'arbitrage. De plus, la distinction des deux types de conventions peut présenter un intérêt à l'égard de la partie faible à laquelle on peut interdire de conclure une clause compromissoire tout en l'autorisant à conclure un compromis, les droits protégés devenant disponibles une fois le litige né[7].

Les conventions multilatérales relatives à l'arbitrage, à leur tour, atténuent la distinction de ces notions. La Convention de New York par exemple, définit les deux notions en une seule disposition «la convention écrite par laquelle les parties s'obligent à soumettre à un arbitrage tous les différends ou certains des différends qui se sont élevés ou pourraient s'élever entre elles au sujet d'un rapport de droit déterminé». La même définition est retenue dans la loi type de CNUDCI sur l'arbitrage commercial international du 21 juin 1985, l'article 7 qui a largement inspiré les dispositions de la LAI.

Dans le cadre de la présente étude, il est choisi de suivre la terminologie générique de «convention d'arbitrage» qui est utilisée par la plupart des législations.

Cependant la simple existence d'une convention d'arbitrage n'est pas

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5 Hukuk Muhakemeleri Kanunu (HMK), loi n° 6100, JO n° 27836 du 31 mars 2011.

6 Cour d'appel de Paris, 17 janvier 2002, Rev. arb. 2002, p. 391, note J.-B. Racine.

7 Ch. Seraglini, L'arbitrage commercial international, in Droit du commerce international sous la direction de Jacques Béguin et Michel Menjucq, Litec, 2005, n° 2449, p. 866. V. infra, l'arbitrabilité objective, n° 383 et s.

suffisante pour que le mécanisme d'arbitrage soit opérationnel, encore faut-il que la convention d'arbitrage soit valide. Ce n'est qu'en présence d'une convention d'arbitrage valide que les parties peuvent accéder à l'arbitrage. Mises à part les parties, l'investiture et la compétence des arbitres dépendent également de la validité de la convention d'arbitrage.

La LAI venant en concurrence avec d'autres législations nationales récentes qui se veulent toutes favorables à l'arbitrage, essaie de se placer avantageusement dans le monde de l'arbitrage international. Ses objectifs avoués sont très ambitieux: l'amélioration du climat d'investissements, la dynamisation des relations avec l'extérieur afin de conférer à l'économie nationale davantage de compétitivité et de lui permettre de s'intégrer dans l'économie internationale[8].

La promotion de l'arbitrage international passe par un régime de validité favorable à la convention d'arbitrage.

La question est alors de savoir si les récentes réformes en matière d'arbitrage international en droit turc, ont produit l'effet escompté, à savoir, ériger un cadre plus favorable à la validité de la convention d'arbitrage.

La convention d'arbitrage doit, en effet, être renforcée par les principes qui ont «un objectif commun d'assurer l'efficacité de la convention d'arbitrage»[9]. Voulant favoriser la validité de la convention d'arbitrage international le droit turc reconnaît pour la première fois expressément les deux principes: le principe de séparabilité à l'article 4, alinéa 4 de la LAI et le principe de compétence-compétence à l'article 7, H de la LAI.

Le droit turc admet aux articles 4, alinéa 4 et 7, H de la LAI deux principes consacrant le même but: assurer la validité de la convention d'arbitrage[10].

Le principe de séparabilité et le principe de compétence-compétence sont souvent présentés comme les principes qui assurent la validité de la convention d'arbitrage[11].

En 1961, le Congrès international de l'arbitrage à Paris avait émis deux vœux: l'autonomie de la convention d'arbitrage et l'admission du pouvoir

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8 V. Milletlerarası Tahkim Konusunda Yasal Bir Düzenleme Gerekir mi?, II, Taslaklar, Tartışmalar, Öneriler (Y a-t-il besoin d'une législation sur l'arbitrage international? Ébauches, propositions), Institut de recherche du droit bancaire et du droit commercial, Ankara, 1999, p. 3-46.

9 A. Dimolitsa, «Autonomie et Kompetenz-Kompetenz», Rev. arb. 1998, p. 305.

10 V. T. Clay, «L'efficacité de l'arbitrage», Pet. aff., 2 oct. 2003, n° 197, p. 4 ; A. Dimolitsa, «Autonomie et 'Kompetenz-Kompetenz'», Rev. arb. 1998, p. 305.

11 A. Dimolitsa, loc. cit..

pour les arbitres de statuer sur leur propre compétence, ces deux principes étant nécessaires pour garantir l'efficacité de l'arbitrage[12].

En effet, le principe de séparabilité vise à conférer à la convention d'arbitrage une complète autonomie par rapport au contrat principal en la considérant comme un contrat distinct suivant un régime juridique propre. Elle immunise la convention d'arbitrage contre le sort du contrat principal **(I)**. Le principe de compétence-compétence, quant à lui, accorde aux arbitres le pouvoir d'être juge de leur propre compétence sans l'obligation de surseoir à statuer dans l'hypothèse d'une saisine parallèle d'une juridiction étatique. L'arbitre a ainsi «le pouvoir de statuer sur toute question touchant à sa compétence ou, en d'autres termes, à l'efficacité de la convention d'arbitrage en tant que telle»[13].

Le principe de compétence-compétence, souvent présenté par ses deux effets[14], implique que l'arbitre puisse juger la contestation relative à sa compétence. Cette possibilité constitue l'effet positif du principe de compétence-compétence (**1**). Cet aspect est majoritairement consacré par les droits nationaux et récemment par le droit turc.

Quant à son effet négatif, il interdit au tribunal étatique, saisi d'un litige faisant l'objet d'une convention d'arbitrage, de juger sur sa compétence alors que l'arbitre ne s'est pas prononcé sur la validité de la convention d'arbitrage. Même si en droit turc, le juge doit envoyer les parties devant l'arbitre, ce dernier n'a pas de priorité par rapport au juge saisi. Le juge turc conserve de nombreux pouvoirs. L'aspect négatif du principe de compétence-compétence semble pour l'heure une spécificité française (**2**).

I – L'effet positif du principe de compétence-compétence

Bien que l'aspect positif soit largement consacré par les droits nationaux et par les conventions internationales (**1**), cette règle soulève de nombreuses questions.

Ainsi, les difficultés peuvent surgir quant à l'ouverture d'un recours immédiat contre la décision sur la compétence (**2**).

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12 F. E. Klein, "Du caractère autonome et procédural de la clause compromissoire", Rev. arb. 1961, p. 48.

13 A. Dimolitsa, loc. cit.

14 M. Boucaron-Nardetto, Le principe compétence-compétence en droit de l'arbitrage, Thèse, Université Nice Sophia Antipolis, 2011. Cette thèse y rajoute un troisième effet lorsque l'arbitre s'est prononcé sur la compétence, le juge étatique la vérifie à travers le contrôle de la sentence, au stade post-arbitral. C'est l'effet positif de la compétence-compétence des juridictions étatiques.

1 – Le sens du principe

La compétence-compétence de l'arbitre se confond généralement avec le principe de séparabilité. Il convient alors démontrer l'articulation entre les deux principes (**A**) et la consécration de l'effet positif du principe par le droit comparé et par le droit turc (**B**).

A – L'expression de compétence-compétence et son articulation avec le principe de séparabilité

Le principe de compétence-compétence trouve son origine dans le droit allemand et dans la capacité des arbitres de se prononcer sur leur propre compétence. Toutefois en droit allemand l'expression semble avoir un sens autre que celui retenu par la littérature internationale. Ainsi, la kompetenz-kompetenz du droit allemand impliquerait «le pouvoir des arbitres de juger en dernier ressort, et sans contrôle judiciaire aucun de leur compétence»[15]. Or cette possibilité de jugement définitif n'a jamais été admise, les ordres juridiques se réservant la possibilité de contrôler la compétence.

Le principe de compétence-compétence signifie en effet que «les arbitres ont le pouvoir de statuer sur leur propre compétence et ne sont pas obligés de surseoir sur le fond du litige, après avoir affirmé leur compétence, lorsque cette question est contestée devant un juge étatique»[16] . Dans la doctrine française la notion de compétence-compétence est décrite au moins concernant certains de ses aspects, polymorphe, assez équivoque[17]. Le principe est « un objet juridique non identifié» ou, tout au moins mal identifié[18].

Le principe, au moins en ce qui concerne son effet positif, se justifie tant au niveau pratique que théorique. En pratique, elle permet d'éviter toute tentative visant à retarder le déroulement de l'arbitrage et permet ainsi de faire échec à d'éventuelles manœuvres dilatoires[19]. Grâce à ce principe une partie

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15 Ph. Fouchard, E. Gaillard, B. Goldman, Traité de l'arbitrage international, Litec, 1996, n° 205.

16 A. Dimolitsa, «Autonomie et kompetenz-kompetenz», op. cit., p.328.

17 L. Ravillon, « Retour sur le principe de compétence-compétence », Le juge et l'arbitrage, sous la dir. de S. Bostanji, F. Horchani et S. Manciaux, Pédone, 2014, p.88.

18 M. Boucaron-Nardetto, «La compétence-compétence: le point de vue français», Cahiers de l'arbitrage, janvier 2013,n° 1, pp. 37 et s.

19 P. Mayer, «L'autonomie de l'arbitre international pour statuer sur sa propre compétence», RCADI, 1989, V, t. 217, p. 333; A. Dimolitsa, op. cit, p. 325; E. Gaillard, «Les manœuvres dilatoires des parties et des arbitres dans l'arbitrage commercial international», Rev. arb. 1990, p.771; Ph. Fouchard, «La nullité manifeste de la clause compromissoire, limite à la compétence-compétence de l'arbitre», note sous Cour de cassation, 1ère ch. civ., 1 décembre 1999, Rev. arb., 2000, p. 98 ; J.-F. Poudret, S. Besson, Droit comparé de l'arbitrage international, Bruylant, LGDJ, Schulthess, 2002, p. 408.

ne peut se prévaloir de l'invalidité de la clause compromissoire qui fonde la compétence de l'arbitre pour se soustraire à l'arbitrage.

Quant au fondement théorique, la volonté des parties a été considérée comme la justification du pouvoir des arbitres de statuer sur les questions litigieuses y compris sur leur compétence. Toutefois, lorsque l'arbitre se déclare incompétent, ce fondement qui s'appuie sur la clause compromissoire s'écroule car «les arbitres ne peuvent se fonder que sur une règle qui ne doit rien à la volonté des parties, par définition inexistante ou entachée d'un vice»[20]. Le fondement théorique à retenir découle alors de «la permission légale généralisée provenant de tous les ordres juridiques nationaux qui pourraient être appelés à reconnaître la sentence»[21].

Il convient de préciser que même s'ils traduisent la volonté des parties et ont la même fonction de garantir l'efficacité de la clause compromissoire, le principe de séparabilité et de compétence-compétence sont différents[22]. Ils se distinguent par leur nature juridique. Le principe de séparabilité est une question de fond alors que celui de compétence-compétence est une question de procédure[23]. Par ailleurs, ils ont un objet différent: «si en vertu du principe de l'autonomie, l'arbitre est compétent pour statuer sur toute contestation de l'existence ou de la validité du contrat principal, en vertu du Principe de compétence-compétence, l'arbitre a le pouvoir de statuer sur toute question touchant à sa propre compétence ou, en d'autres termes, à l'efficacité de la convention d'arbitrage en tant que telle»[24].

Le législateur turc a adopté à l'alinéa 1er de l'article 7, H de la LAI, la formulation de l'article 16, alinéa 1 de la loi-type de la CNUDCI pour régir la compétence- compétence de l'arbitre. Ce dernier dispose que: «le tribunal arbitral peut statuer sur sa propre compétence, y compris sur toute exception relative à l'existence ou la validité de la convention d'arbitrage. À cette fin, une clause compromissoire faisant partie d'un contrat est considérée comme une convention distincte des autres clauses du contrat», alors que l'article

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20 E. Gaillard, «L'effet négatif de la compétence- compétence», Études de procédure et d'arbitrage en l'honneur de Jean-François Poudret, Univ. Lausanne, 1999, p. 389.

21 A. Dimolitsa, op. cit, p. 325; Ph. Fouchard, E. Gaillard, B. Goldman, op. cit., p. 414.

22 V. M.T. Birsel, A.C. Budak, Milletlerarası Tahkim Konusunda Türk Hukuku Açısından Sorunlar ve Öneriler, Türk Tahkim Hukuku ve Uncitral Kanun Örneği, Milletlerarası Tahkim Konusunda Yasal Bir Düzenleme Gerekir mi, Sempozyum Bildiriler, Tartışmalar (Les problèmes du droit de l'arbitrage turc et leurs solutions, l'exemple de la loi-type de la CNUDCI), Ankara 11 Nisan 1997, p. 214-259; Berber Keser L., «Hakem Mahkemesinin Yetkisi Hakkında Karar Verme Yetkisi (Kompetenz-Kompetenz)» (La décision de l'arbitre sur sa propre compétence), Prof. Dr. İrfan Baştuğ Armağanı (Mélanges offerts au Prof. Dr. İrfan Baştuğ), Ankara 2001, p. 125.

23 R. David, op. cit., n° 207 et s.

24 A. Dimolitsa, op. cit., p. 305.

7, H, 1 de la LAI prévoit que: «l'arbitre ou le tribunal arbitral peut statuer sur sa compétence ainsi que sur l'existence ou la validité de la convention d'arbitrage. En prenant cette décision, la clause compromissoire faisant partie d'un contrat doit être appréciée indépendamment d'autres dispositions du contrat».

La formulation de la loi-type, utilisant l'expression «à cette fin» permet de déduire que l'indépendance de la clause compromissoire est consacrée pour garantir le principe de compétence-compétence[25]. A l'inverse de ce raisonnement de l'article 16, alinéa 1 de la loi-type, certains auteurs[26] estiment que la compétence-compétence de l'arbitre doit être considérée comme l'instrument procédural du principe de séparabilité qui l'habilite à statuer sur la nullité du contrat principal.

Le législateur turc a adopté la disposition de la LDIP suisse concernant le principe de séparabilité. En revanche, quant au principe de compétence-compétence, il a suivi la loi-type de CNUDCI, cette dernière utilisant les deux principes dans le même article. Pour diminuer le risque d'amalgame entre les deux notions, le législateur turc devrait prendre le soin de distinguer le principe de séparabilité et la compétence-compétence dans deux différents articles.

Traité indépendamment ou non du principe de séparabilité, il est certain qu'aujourd'hui la majorité des ordres juridiques reconnaissent l'effet positif du principe de compétence-compétence.

B – Son application

L'effet positif du principe de compétence-compétence est aujourd'hui généralement admis par les droits nationaux (ii). Le droit turc l'admet pour la première fois dans un texte législatif (i).

i – En droit turc

La règle de la compétence-compétence est désormais une règle matérielle légale du droit turc de l'arbitrage interne et international.

En matière interne, le principe est admis à l'article 422 du Code de procédure civile, entrée en vigueur le 1er octobre 2011. L'ancien code prévoyait dans son article 519 un recours simplifié et accéléré à la partie qui contestait la compétence des arbitres devant les tribunaux étatiques[27]. La Cour de

[25] J.-F. Poudret, S. Besson, op. cit., p. 136.

[26] Idem.

[27] A. Taşkın, "Hakem Mahkemesinin Kendi Yetkisi Hakkında Karar Vermesi" (La décision de l'arbitre sur sa propre compétence), Ankara Üniversitesi Hukuk Fakültesi Dergisi (Revue de

cassation déclarait souvent dans ses arrêts que l'arbitre devrait surseoir à statuer jusqu'à ce que le juge étatique saisi d'une contestation sur la validité de la convention d'arbitrage se prononce sur sa compétence : «les arbitres ne peuvent pas statuer sur leur propre compétence. En cas d'exception d'incompétence, les arbitres doivent surseoir à statuer et envoyer la partie devant le juge pour une action en constatation conformément à l'article 519 du Code de procédure civile. Ce n'est que suite à ce jugement qu'ils peuvent poursuivre la procédure ou se déclarer incompétent»[28].

En matière internationale, la LAI explique les modalités de la mise en œuvre de la règle, en reprenant partiellement l'article 16 de la loi-type de la CNUDCI. L'article 7, H de la LAI prévoit que: «l'arbitre unique ou le tribunal arbitral peut statuer sur sa compétence ainsi que sur l'existence ou la validité de la convention d'arbitrage... L'objection quant à l'incompétence de l'arbitre ou du tribunal arbitral doit être soulevée au plus tard dans le document contenant la première réponse. Le fait que les parties aient désigné personnellement les arbitres ou aient participé à leur désignation n'exclut pas leur droit de faire objection… L'arbitre unique ou le tribunal arbitral examine l'exception d'incompétence sous forme de question préalable et statue à son sujet. S'il décide qu'il est compétent, la procédure se poursuit et il est statué sur le litige».

Selon la loi turque, lorsqu'une exception d'incompétence[29] est soulevée, l'arbitre ou les arbitres examinent cette exception à titre préalable. Les parties échangeront alors des mémoires exposant leur position respective et cette situation sera probablement suivie d'une audience préliminaire au cours de laquelle les représentants des parties développeront leurs arguments et administreront les preuves. L'arbitre, pour se déclarer compétent ou incompétent, devra trancher sur la validité de la convention d'arbitrage.

Ainsi, dans une sentence *ad hoc*[30] le tribunal arbitral s'est déclaré compétent, en se référant à l'article 7, H de la LAI. Dans cette affaire, un tribunal arbitral siégeant à Istanbul était tenu de statuer sur un litige découlant de l'inexécution d'un contrat de construction dont les parties au contrat étaient

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la faculté de droit de l'Université d'Ankara), 1997, p. 180.

28 Cour de cassation, 15ème ch. civ., 13 avril 1995, pourvoi n° 6228-2250, in E. Ertekin, İ. Karataş, Uygulamada İhtiyari Tahkim ve Yabancı Hakem Kararlarının Tenfizi, Tanınması, Ankara, 1997, p. 112

29 Il convient ici d'opérer une distinction entre la notion d'exception d'incompétence et de l'exception d'arbitrage. La première vise la compétence de l'arbitre alors que la seconde celle du juge étatique.

30 Arbitrage *ad hoc* du 15 novembre 2005, sentence tranchée par MM. T. Kalpsüz, Y. Alangoya, O. Imregün. Sentence inédite.

d'une part la «Commission de préparation aux Jeux Olympiques d'Istanbul», créée par une loi du Parlement turc[31] et d'autre part un consortium, composé de deux sociétés françaises et d'une société turque.

Par un protocole signé entre les parties, une clause compromissoire avait été insérée dans le contrat principal. Selon la clause, la loi applicable au contrat était le droit turc et les litiges découlant du contrat principal étaient soumis à la LAI.

Suite à l'inexécution du contrat, le consortium a saisi les arbitres. Le défendeur ayant soulevé l'exception d'incompétence, le tribunal arbitral, par une décision préliminaire du 1er décembre 2004, a déclaré que «selon l'article 7, H de la LAI, le tribunal arbitral doit se prononcer sur l'exception d'incompétence comme une question préalable, après l'échange des répliques et des dupliques des parties sur le sujet».

Par ailleurs, le fait qu'une partie ait participé à la mise en œuvre de la procédure, ne signifie pas qu'elle a perdu le droit de soulever l'incompétence du tribunal arbitral. L'article 7, H, déclare expressément que: «le fait que les parties aient désigné personnellement les arbitres ou aient participé à leur désignation n'exclut pas leur droit de faire objection». Par conséquent, une partie peut prendre les mesures qui s'imposent dans un arbitrage jusqu'au moment de soumettre son mémoire en défense sans perdre le droit de soulever une exception d'incompétence.

En reconnaissant expressément l'aspect positif du principe de compétence-compétence, le législateur turc a minimisé le risque de manœuvres dilatoires de la partie qui voudra paralyser la procédure arbitrale comme d'ailleurs de nombreuses législations qui consacrent ce principe.

ii - En droit comparé

Aujourd'hui la plupart des lois récentes sur l'arbitrage international confère à l'arbitre le pouvoir de statuer sur l'étendue et les limites de son investiture. Il en est ainsi de l'article 186, alinéa 1er de la LDIP suisse, de l'article 1697 du Code judiciaire belge, de l'article 61 du Code d'arbitrage tunisien, de l'article 1502 de la loi néerlandaise sur l'arbitrage international.

Quant aux conventions internationales, la Convention de Washington de 1965 dans son article 41, ainsi que la Convention de Genève dans son article V, 3 prévoient le principe de compétence-compétence.

La jurisprudence américaine se montre réticente eu égard à l'acceptation

[31] Loi n° 3796 du 30 avril 1992.

de ce principe et le rejette lors de la contestation de la validité de la clause d'arbitrage *per se*.

Certaines décisions américaines ont même ordonné à l'arbitre de surseoir à statuer[32].

Dans l'affaire Buckeye Check Cashing, Inc. c. Cardegna[33], la Cour suprême américaine a jugé que la compétence pour statuer sur la validité d'une clause compromissoire revient au tribunal arbitral lorsque l'exception d'incompétence repose sur une action en nullité portant sur le contrat dans sa totalité. Selon la Cour, lorsque le contrat dans sa totalité fait l'objet de l'action en nullité, c'est bien l'arbitre, et non la Cour, qui est compétent pour statuer sur la demande. Mais si l'objection concerne uniquement la clause compromissoire, la Cour constituerait-t-elle l'organe compétent pour statuer sur cette dernière?[34] Selon un auteur, «l'énonciation inverse du principe est ici suggérée à défaut d'être exprimée: si la prétendue nullité touche uniquement la clause compromissoire, la décision sur le fond revient à la Cour compétente»[35].

En droit français, la règle de compétence-compétence est consacrée pour l'arbitrage interne par l'article 1465 du Code de procédure civile. Ce même article s'applique également lorsqu'un arbitrage international est soumis à la loi française, en raison du renvoi fait par l'article 1506 du Code de procédure civile. L'article 1465 dispose que: «Le tribunal arbitral est seul compétent pour statuer sur les contestations relatives à son pouvoir juridictionnel».

Toutefois, même avant législation, la jurisprudence a donné à cette règle dans l'arrêt *Impex*, une portée générale, indépendamment de la loi applicable à l'arbitrage[36]: «il est de principe que le juge saisi est compétent pour statuer sur sa propre compétence, ce qui implique nécessairement que lorsque le juge est un arbitre dont les pouvoirs tirent leur origine d'une convention des parties, la vérification de l'existence et de la validité de la convention d'arbitrage»[37].

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32 Affaire Roger Jakubowski v/ Nora Beverages Inc. Cour suprême de l'État de New York du 21 septembre, 1995, ordonnant le sursis de la procédure arbitrale CCI n° 8552, inédite.

33 546 US (2006), note B. Derains, E. Ordway, Cahiers de l'arbitrage, 17 octobre 2006, 2006/2.

34 F. Gonzalez de Cossio, «Compétence-compétence à la mexicaine et à l'américaine: une évolution douteuse», Gaz. Pal. 17 juillet 2007, n° 198, p. 27.

35 Idem.

36 V. Cour de cassation, com., 22 février 1949, *Caulliez*, JCP 1949, éd. G., II, 4899 ; Cour d'appel de Colmar, 29 novembre 1968, *Impex*, Rev. arb. 1968, p. 149, JCP, 1970, II, 16246, note B. Oppetit et P. Level.

37 Cour d'appel de Colmar, 29 novembre 1968, *Impex*, arrêt précité.

La jurisprudence française, depuis l'arrêt *Zanzi*[38], ne se réfère à aucun texte du Code de procédure civile ni à aucune convention internationale en désignant la compétence-compétence comme «principe». Dans cet arrêt, la Cour de cassation avait relevé d'office le moyen «pris de la validité de la clause compromissoire dans l'ordre international». Elle avait cassé l'arrêt de la Cour d'appel pour méconnaissance de la compétence de l'arbitre pour statuer sur sa propre compétence.

Avec l'arrêt *Société Metu*[39], la Cour de cassation semble aller trop loin en énonçant que ce principe permet à l'arbitre «de se prononcer le premier» mais surtout ajoute qu'il lui permet «de se prononcer seul». Or, même en droit français, si la compétence de l'arbitre est prioritaire, elle n'est en rien exclusive. Le contrôle judiciaire a posteriori est le nécessaire contrepoids du pouvoir reconnu à l'arbitre.

Les droits nationaux consacrant majoritairement la compétence-compétence des arbitres, il en est autrement pour la question du contrôle de la décision du tribunal arbitral par l'autorité étatique.

2 – Le recours contre la décision de l'arbitre sur sa compétence

Au cours de la procédure arbitrale, l'une des parties peut soulever l'incompétence du tribunal arbitral, en se basant sur l'invalidité de la convention d'arbitrage, car l'arbitre peut se déclarer compétent ou incompétent.

Un recours peut être interjeté alors contre la décision de l'arbitre qui s'est déclaré compétent, immédiatement ou avec la sentence finale (**A**). En cas d'une décision d'incompétence la question est de savoir si cette décision qui met fin à la compétence de l'arbitre met aussi fin à la clause compromissoire (**B**).

A – La décision de compétence de l'arbitre: recours reporté jusqu'à la sentence finale

La LAI ne reconnaît pas un recours immédiat[40] au tribunal étatique contre

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38 Cour de cassation, 1ère ch. civ. 5 janv. 1999, *Zanzi*, Rev. arb. 1999 p. 260, note Ph. Fouchard; Rev. crit. DIP, 1999, p. 546, note D. Bureau; JDI 1999, p. 784, note S. Poillot-Peruzzetto; RTD. com., 1999, p. 380, obs. E. Loquin; 1ère ch. civ., 1 décembre 1999, *Sté Métu Système*, Rev. arb. 2000, p. 260, note Ph. Fouchard.

39 Cour de cassation, 1ère ch. civ., 1 décembre 1999, *Sté Métu Système*, précité.

40 T. Kalpsüz, Türkiye'de Milletlerarası Tahkim, Banka ve Ticaret Hukuku Araştırma Enstitüsü, Ankara, 2007, p. 58; Z. Akıncı, Milletlerarası Tahkim, İstanbul, 2013, p. 283; N. Deren Yıldırım, UNCITRAL ve Milletlerarası Tahkim Kanunu Çerçevesinde Milletlerarası Tahkimin Esaslı Sorunları, İstanbul, 2004, p.75; B. Yeşilova, "Tahkim İlk İtirazı Üzerine Mahkemece Yapılacak Denetim ve Sonuçları" (Le contrôle de l'exception d'arbitrage par le tribunal

la décision de compétence du tribunal arbitral même si cette possibilité apparaissait dans les travaux préparatoires[41]. Le défendeur pourra toutefois attaquer la sentence arbitrale en demandant son annulation[42], conformément à l'article 15, A, 1, d de la LAI qui prévoit que la sentence peut être annulée si «l'arbitre unique ou le tribunal arbitral s'est prononcé de manière erronée sur sa compétence ou son incompétence».

En ne reconnaissant pas un recours immédiat contre la décision de l'arbitre sur sa compétence, cela évoque que le législateur turc a voulu donner au principe de compétence-compétence, tout son sens, en empêchant qu'un contrôle étatique intervienne si tôt dans la procédure arbitrale.

En effet, l'adoption d'un recours immédiat pourrait engendrer des complications inutiles voir même hostiles à l'esprit de faveur à l'arbitrage. Les dangers d'un tel recours peuvent se présenter surtout dans l'hypothèse de la contestation de la compétence de l'arbitre fondée sur l'invalidité de la convention d'arbitrage. Or, les incidences négatives de ce genre sur la convention d'arbitrage mettent en question non seulement le principe de compétence-compétence mais aussi l'efficacité de l'arbitrage. L'admission d'un tel contrôle étatique ne serait donc pas bienvenue.

La solution de l'article 7, H semble donc adéquate.

Ce n'est pourtant pas l'opinion d'une partie de la doctrine turque[43] qui n'approuve pas le recours différé contre la décision de l'arbitre sur sa compétence et critique l'adoption partielle de l'article 16, al.3 de la loi-type de la CNUDCI. La suite dudit article autorise l'arbitre de rendre une sentence provisoire sur sa compétence qui peut être attaquée dans un délai de trente jours.

Ce système permettrait aux parties de savoir à quoi s'en tenir dès le début de la procédure et d'éviter de perdre du temps et de l'argent lorsque la procédure d'arbitrage s'avère dépourvue de validité.

La jurisprudence a autorisé, en droit français, un recours immédiat contre une décision incident[44] considérant que celle-ci constitue une sentence contre

étatique et ses conséquences), Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi (Revue de la faculté de droit de l'Université de Dokuz Eylul) , tome 11, édition spéciale, 2009, p. 804.

41 Ébauche n° 2, article 13, alinéa 3 et ébauche n° 3, article 13, alinéa 5. V. Milletlerarası Tahkim Konusunda Yasal Bir Düzenleme Gerekir mi?, II, Taslaklar, Tartışmalar, Öneriler, op.cit., p.128 et s.

42 Une solution similaire se trouve dans l'article 20 para. 2 de la loi brésilienne de 1996.

43 N. Deren Yıldırım, UNCITRAL ve Milletlerarası Tahkim Kanunu Çerçevesinde Milletlerarası Tahkimin Esaslı Sorunları, op. cit., p. 76.

44 Cour d'appel de Paris, Société Belin c/ Société d'aide technique et de coopération SATEC, 7 juin 1984, Rev. arb. 1984, p. 504, note E. Mezger.

laquelle un recours en annulation est ouvert[45].

Une attitude qui tend à encourager le recours aux juridictions de droit commun au cours de la procédure d'arbitrage ne devrait pas être privilégiée, car l'instance arbitrale doit se dérouler, si possible, sans interférence. De plus, en permettant de recourir aux tribunaux étatiques au cours de l'instance arbitrale, on court le risque d'encourager les manœuvres dilatoires de la part du défendeur qui participe à l'arbitrage à contrecœur. Sans oublier qu'il semble improbable qu'un arbitre ordonne, sans motif grave, des mesures coûteuses, ou ne rende des décisions engendrant un préjudice irréparable aux parties[46]. La solution du législateur turc semble donc appropriée.

B – Le droit de se déclarer incompétent

L'arbitre peut se déclarer incompétent en se fondant sur une clause compromissoire invalide. Mais si cette décision met fin à la compétence arbitrale, met-elle également fin à la clause compromissoire? Pour répondre à cette question, il faut fixer le moment où les parties vont retrouver leur liberté d'action et savoir si elles pourront saisir les juridictions étatiques pour contester la décision d'incompétence. Car, selon certains auteurs[47], en cas de réponse négative, la décision d'incompétence de l'arbitre mettra fin non seulement à l'instance arbitrale mais aussi à la clause compromissoire.

La plupart des systèmes juridiques prévoient un recours devant les juridictions étatiques contre une décision d'incompétence.

En droit turc, les parties peuvent recourir en annulation de la sentence finale en se fondant sur l'article 15, A, 1, d de la LAI qui prévoit comme motif d'annulation la décision erronée de l'arbitre sur sa compétence.

Comme le droit turc, le droit suisse prévoit un recours à l'article 190, alinéa 2 de la LDIP contre la décision d'incompétence de l'arbitre, ainsi que les droits français[48], anglais[49] et belge[50].

Le recours contre la décision d'incompétence de l'arbitre n'est pas envisagé par la loi-type de la CNUDCI ni dans son article 16, alinéa 3 relatif au principe de compétence-compétence ni dans l'article 34 sur le recours en

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45 Cour d'appel de Paris, Verbiese c/ SEE et autre, 10 novembre 1995, Rev. arb. 1997, p. 596, note J. Pellerin.

46 E. Mezger, note sous la Cour d'appel de Paris, 7 juillet 1987, Pia Investments Ltd c/ L. B. Cassia, Rev. arb. 1988, p. 656.

47 J.-F. Poudret, S. Besson, op. cit., n° 480.

48 Article 1492, al.1 du Code de procédure civile.

49 Article 67 de l'Arbitration Act de 1996.

50 Article 1690 du Code judiciaire belge.

annulation dans lequel aucun motif d'annulation d'une telle décision[51] n'est mentionné.

Le fait d'exclure tout recours ou action contre une décision d'incompétence est contesté par la doctrine[52]car une telle décision mettrait fin également à la convention d'arbitrage. Or, selon une autre opinion[53], le fait que le tribunal arbitral décline sa compétence met fin à l'instance arbitrale mais non à la convention d'arbitrage. L'inconvénient d'une telle solution réside dans le fait qu'on voit le demandeur débouté, se saisir sans limites des arbitres[54].

En règle générale, la décision d'incompétence de l'arbitre mettant fin à l'instance mais pas à la convention d'arbitrage et en particulier à la clause compromissoire, il semble opportun d'admettre un recours contre cette décision, comme l'a fait le législateur turc.

II – L'effet négatif de la compétence-compétence

L'effet négatif de la compétence-compétence interdit aux juridictions étatiques de trancher la question de la compétence des arbitres qui leur serait soumise par une partie avant que les arbitres eux-mêmes ne se soient prononcés sur ce point.

La question est donc de savoir «si les juridictions saisies d'un litige en dépit de l'existence d'une convention d'arbitrage doivent, en cas de contestation, vider immédiatement le contentieux de la validité et de l'étendue de cette convention ou s'en tenir à la constatation de l'existence et de la validité *prima facie* de la convention d'arbitrage pour s'abstenir de connaître du litige en attendant que les arbitres eux-mêmes aient pu se prononcer sur leur propre compétence, sous le contrôle ultérieur du juge de l'annulation»[55].

Le droit turc reconnaît l'effet négatif du principe de compétence-compétence mais différemment du droit français. Il admet que le juge doit envoyer l'affaire devant les arbitres mais ce renvoi n'est pas automatique. Il exerce un contrôle sur la validité de la convention d'arbitrage. Il en découle que le droit turc n'admet l'effet négatif que partiellement (**1**).

D'autres systèmes se montrent plus libéraux quant au contrôle de la validité de la convention d'arbitrage par le juge en cas d'exception d'arbitrage (**2**).

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51 J.-F. Poudret, S. Besson, op. cit., n° 481.

52 Idem.

53 Broches, Handbook IV, UNCITRAL-Broches, n° 49-52 ad art. 16, cité par J.-F. Poudret, S. Besson, Droit comparé de l'arbitrage international, LGDJ, 2002, n° 481.

54 J.-F. Poudret, S. Besson, idem.

55 E. Gaillard, «L'effet négatif de la compétence-compétence», Études de procédure et d'arbitrage en l'honneur de Jean-François Poudret, 1999, p. 390.

1 – L'appréciation de la validité de la convention d'arbitrage par le juge turc

L'incompétence de l'arbitre peut être soulevée devant le juge par une exception d'arbitrage. Celle-ci est prévue à l'article 5, alinéa 1 de la LAI adoptée de la loi type de la CNUDCI (**A**). Si la formulation de l'article est floue, dans certains arrêts, les tribunaux turcs se sont déclarés favorables à l'effet négatif du principe (**B**).

A – L'exception d'arbitrage: une transposition malheureuse de la loi-type de la CNUDCI en droit turc

Lorsque le juge étatique est saisi d'une demande au fond et ce au mépris de l'existence d'une convention d'arbitrage, l'exception d'arbitrage doit être soulevée dans un temps limité. Le législateur turc en s'écartant du texte de la loi-type de la CNUDCI a adopté des dispositions floues (**ii**).

Mais avant d'examiner ces dispositions, il convient de se pencher sur la nature juridique de l'exception d'arbitrage, laquelle, jusqu'à l'entrée en vigueur de la LAI, faisait l'objet de discussions (**i**).

i – Détermination de la nature juridique de l'exception d'arbitrage

L'article 5, alinéa 1 de la LAI dispose que l'exception d'arbitrage est soumise «aux dispositions du Code de procédure civile concernant les moyens préjudiciels».

Selon le Code de procédure civile, le défendeur doit respecter un délai de deux semaines à partir de la notification de la requête du demandeur conformément aux articles 116 et 127, ceux-ci régissant les exceptions de procédure.

Ces exceptions sont énumérées à l'article 116 du Code de procédure civile d'une façon limitative. Elles comprennent ainsi les exceptions d'incompétence et d'arbitrage.

Les traductions françaises non-officielles de la LAI[56] utilisent l'expression «moyen préjudiciel» pour définir l'exception d'arbitrage. Or, une question préjudicielle est une question qui doit être résolue par une autre juridiction que le tribunal saisi de l'affaire[57]. L'usage du terme «question préalable», comme il est prévu à l'article 16, alinéa 3 de loi-type de la CNUDCI, serait à

[56] Traductions de V. Seviğ, «La nouvelle législation turque sur l'arbitrage international», Rev. arb. 2002, p. 217et s. ; K. Dayınlarlı, Loi sur l'arbitrage international, Dayınlarlı, Ankara, 2001.

[57] V. J. Vincent, S. Guinchard, Procédure civile, Précis, 2003, n° 393 et s.

notre sens plus approprié. En effet, il existe des ressemblances entre les deux notions dans la mesure où il s'agit de questions à trancher avant de pouvoir statuer au fond, la question préalable doit être résolue par le tribunal saisi de l'affaire[58]. En matière interne, avant l'entrée en vigueur du Code de procédure civile en 2011, la jurisprudence turque[59] et la doctrine[60] ne s'accordait pas sur la qualification de l'exception d'arbitrage. Une partie de la doctrine[61] la considérait comme une question préalable, tandis qu'une autre[62] la définissait comme une fin de non-recevoir. La différence qui en découle était que dans le deuxième cas, le défendeur n'était pas limité en temps et pouvait soulever l'exception d'arbitrage à tout moment, quelle que soit l'instance en cours, sous réserve du principe du contradictoire et de la clôture.

Avec le nouveau Code de procédure civile, l'exception d'arbitrage est admise comme une «question préalable» à l'exemple de la LAI. Cette position apparaît conforme à l'économie de moyens et évite aussi les défendeurs de mauvaise foi de soulever l'exception après examen au fond du droit[63].

ii – Les points de divergence entre la LAI et la loi-type de CNUDCI

A la simple lecture de l'article 5, alinéa 1, il apparaît que le législateur turc n'a adopté l'article 8, alinéa 1 de la loi-type qu'en partie. La réserve formulée par la loi-type de la CNUDCI au sujet de la nullité de la convention d'arbitrage[64] n'existe pas à l'article 5 de la LAI.

L'article 8, alinéa 1 de la loi-type de la CNUDCI dispose que: «le tribunal

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58 G. Couchez, Procédure civile, Sirey, 2006, n° 90.

59 Les arrêts de la Cour de cassation turque admettaient en matière interne l'exception d'arbitrage comme une fin de non-recevoir: Cour de cassation, 19ème ch. civ., 19 avril 2000, n° 2000/2591, 2000/2974 in www.kazanci.com; 15ème ch. civ., 8 avril 1985, n° 4298/1176 in I. Karatas, Uygulamada İhtiyari Tahkim (L'arbitrage volontaire dans la pratique), 1999, p. 81 ; 4ème ch. civ., 6 avril 1972, n° 956/3075, in idem ; 4ème ch. civ., 7 décembre 1967, n° 10716/987, in idem. Pour ce qui est de la question préalable; Cour de cassation 15ème ch. civ. 18 avril 1988, n° 1470/1534, in idem.

60 V. Y. Alangoya, Medeni Usûl hukukunda Tahkimin Niteliği ve Denetlenmesi (Nature juridique de l'arbitrage en droit de procédure civile), Istanbul, 1973, p. 107 ; İ. Postacıoğlu, Medeni Hukuk Dersleri (Cours de procédure civile), 6ème éd., Istanbul, 1975, p. 789.

61 Y. Alangoya, op. cit. p. 63; S. Üstündağ, Medeni Yargılama Hukuku (Droit de procédure civile), Istanbul, 1989, p. 783.

62 İ. Postacıoğlu, op.cit, p. 792 ; E. Ertekin, İ. Karataş, Uygulamada İhtiyari Tahkim ve Yabancı Hakem Kararlarının Tanınması, op. cit., p. 105.

63 Z. Akıncı, Milletlerarası Tahkim, op. cit., p. 124.

64 L'article 8, alinéa 1er de la loi-type de la CNUDCI dispose que: «le tribunal saisi d'un différend sur une question faisant l'objet d'une convention d'arbitrage renverra les parties à l'arbitrage, si l'une d'elles le demande au plus tard lorsqu'elle soumet ses premières conclusions sur le fond du différend, à moins qu'il ne constate que ladite convention est nulle, inopérante ou non susceptible d'être exécutée».

saisi d'un différend sur une question faisant l'objet d'une convention d'arbitrage renverra les parties à l'arbitrage, si l'une d'elles le demande au plus tard lorsqu'elle soumet ses premières conclusions sur le fond du différend, à moins qu'il ne constate que ladite convention est nulle, inopérante ou non susceptible d'être exécutée».

Cette réserve est substantiellement identique à celle employée par l'article II, 3 de la Convention de New York à savoir: «…à moins qu'il ne constate que ladite convention est caduque, inopérante ou non susceptible d'être appliquée»[65].

Cette formulation semble permettre au tribunal étatique d'exercer un contrôle approfondi et non *prima facie* sur la validité de la convention d'arbitrage. En effet, dans les travaux préparatoires de la loi-type de la CNUDCI, la proposition quant à l'ajout du mot «manifestement» devant le mot «nulle» avait été rejetée[66]. Le but de cette proposition était de limiter le contrôle des juges en un contrôle *prima facie*[67]. Mais visiblement les rédacteurs ont préféré la vérification de la validité de la convention d'arbitrage par les juges avant de renvoyer les parties aux arbitres.

En revanche le texte de l'article 5, alinéa 1 de la LAI ne contient pas cette réserve.

Elle dispose que: «si au sujet d'un différend visé par une convention d'arbitrage, un procès a été intenté devant un tribunal ordinaire et que le défendeur oppose l'exception d'arbitrage, cette opposition et la solution du différend relatif à la validité de la convention d'arbitrage sont soumises aux dispositions du Code de procédure civile concernant les moyens préjudiciels. Si le tribunal estime fondée l'opposition, il rejette la demande par un jugement d'avant dire droit».

Toutefois, même si l'article 5 de la LAI ne consacre pas une telle réserve, seule une clause valable et efficace peut dessaisir la juridiction étatique.

Il convient alors de savoir de quelle manière le juge turc va statuer sur l'exception d'arbitrage. Exercera-t-il une vérification approfondie ou *prima facie* de la validité de la convention d'arbitrage?

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65 Dans la version anglaise, les termes utilisés sont «null and void». Selon Poudret et Besson, cet article est applicable lorsque le siège de l'arbitrage est situé à l'étranger ou n'a pas encore été fixé au moment où le juge étatique se prononce sur la validité de la convention d'arbitrage, J.-F. Poudret, S. Besson, op. Cit., n° 71, p. 53.

66 H. M. Holtzmann, J. E. Neuhaus, A Guide to the UNCITRAL Model Law on International Commercial Arbitration. Legislative History and Commentary, Deventer, Kluwer, 1989, p. 303.

67 Idem.

La formulation de l'article 5 de la LAI est floue. Il prévoit que «si le tribunal estime fondée l'opposition, il rejette l'action du point de vue de la procédure».

Professeur Akıncı a recherché le sens à donner à cette formulation, particulièrement à l'expression suivante: si l'arbitre «estime fondée l'opposition». Quand le tribunal étatique peut-il «estimer» qu'une opposition est fondée, quelles en sont les conditions? Le tribunal étatique devra-t-il seulement constater l'existence d'une convention d'arbitrage ou doit-il également vérifier sa validité? Si cette traduction française est juste, la traduction littérale du texte turc serait la suivante: «si le tribunal étatique admet l'exception d'arbitrage». Akıncı, en partant du verbe «admettre», en a déduit qu'il devrait y avoir avant tout une convention d'arbitrage «admissible» donc valide pour qu'une exception d'arbitrage soit «admise» donc fondée[68]. Les juges étatiques devront ainsi trancher sur la validité de la convention d'arbitrage, avant les arbitres.

Le même auteur approuve cette position car, même si la priorité est donnée aux arbitres pour se prononcer sur la validité de la convention d'arbitrage, leur décision est susceptible d'être annulée en vertu de l'article 15, A, 1 de la LAI. Or, un jugement étatique empêcherait de perdre du temps et de l'argent si la convention d'arbitrage n'est pas valide. Inversement, si la convention est valide, les parties ne pourront pas recourir en annulation de la sentence en se fondant sur l'article 15, A, 1. Ainsi, la priorité donnée aux juges provoquerait un gain de temps et d'argent.

Toutefois, l'un des avantages du système de priorité de l'arbitre consiste en l'empêchement du double contrôle de la sentence arbitrale. En effet, le double contrôle de la sentence est contraire à l'économie des moyens et est source de décisions contradictoires[69].

L'article 8, alinéa 2 de la loi-type de la CNUDCI retient les compétences

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[68] Z. Akıncı, Milletlerarası Tahkim, op. cit., p. 128. Aussi, N. Ekşi, Milletlerarası Deniz Ticareti Alanında 'Incorporation' Yoluyla Yapılan Tahkim Anlaşmaları (Les conventions d'arbitrage par référence dans le commerce international maritime), Istanbul, 2004, s.65 ; E.Esen, « Uluslararası Tahkime Tâbi Bir Uyuşmazlığın Devlet Mahkemelerine Götürülmesi Halinde Tahkim Anlaşmasının Geçerliliğine İlişkin İtirazların İncelenmesi ve Kompetenz-Kompetenz Prensibi », (L'examen des objections tenant à la validité de la convention d'arbitrage en cas de saisine du tribunal étatique d'un différend soumis à l'arbitrage international et le principe de Kompétenz-Kompétenz), Galatasay Üniversitesi Hukuk Fakültesi Dergisi (Revue de la Faculté de droit de l'Université de Galatasaray), 2011/1, Prof. Dr. Atâ SAKMAR'a Armağan (Mélanges offerts au Prof. Dr. Atâ Sakmar), p.356.

[69] J.-F. Poudret, «L'originalité du droit français de l'arbitrage au regard du droit comparé», RIDC, pp. 133-151, 2004, p.133.

concurrentes entre le juge et l'arbitre quelle que soit l'autorité saisie en premier. Il prévoit que, parallèlement au tribunal étatique, la procédure arbitrale puisse être engagée ou continuée: «lorsque le tribunal est saisi d'une action visée au paragraphe 1 du présent article, la procédure arbitrale peut néanmoins être engagée ou poursuivie et une sentence peut être rendue en attendant que le tribunal ait statué».

Le législateur turc n'a pas adopté l'alinéa 2 de l'article 8 de la loi-type. Son similaire n'existe pas non plus dans la loi. Peut-on en déduire que le législateur a voulu empêcher le développement des procédures parallèles et reconnaître la priorité aux arbitres? Ou qu'il a voulu adopter un système de priorité chronologique? Ce n'est pas notre point de vue. La formulation de l'article 5, alinéa 1 ne va pas dans ce sens et exige un contrôle de validité approfondi.

Même si les formulations de l'article 5 et 7, H reconnaissent au juge la liberté d'examiner la validité de la convention d'arbitrage, il existe un arrêt où la Cour de cassation a procédé à un seul examen *prima facie* de la convention d'arbitrage.

B – Une interprétation partagée de l'article 5, alinéa 1 de la LAI par la Cour de cassation turque

Les solutions retenues par la Cour de cassation turque seront examinées à travers de deux arrêts seulement, n'ayant connaissance d'aucun autre arrêt à ce jour.

En vertu de l'article 5, alinéa 1 de la LAI, le juge a une liberté de contrôle de la convention d'arbitrage, comme le précise un arrêt de 2004[70].

En l'espèce, la Société M. Enerji et le demandeur X avaient conclu un contrat de vente comportant une clause compromissoire. Celle-ci prévoyait un arbitrage CCI dont le siège était Istanbul. Par ailleurs, une autre société, Société M. Corp. était chargée du financement du projet. Le bénéficiaire de la garantie bancaire, M. Enerji, avait appelé la banque en garantie alors que selon le demandeur X, le donneur d'ordre, la Société M. Enerji n'ayant pas exécuté ses prestations découlant du contrat de vente, ne pouvait appeler la garantie. Ainsi, il voulait empêcher le paiement de la garantie. C'est pourquoi le demandeur X a saisi le tribunal étatique.

Suite à l'exception d'arbitrage soulevée par la Société M. Enerji devant le tribunal étatique, celui-ci s'est déclaré incompétent et a renvoyé les parties, ainsi que la Banque I en tant que garant, devant les arbitres.

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[70] Cour de cassation, 19ème ch. civ., 11 mars 2004, pourvoi n° 2003/2654-2004/2603, www.kazanci.com.

Le demandeur X et la Banque I ont alors formé un pourvoi contre la décision. Ce dernier soutenait qu'il n'était pas partie au contrat et donc à la convention d'arbitrage. La Cour de cassation a renvoyé le demandeur X et la Société M. Enerji devant les arbitres car ils avaient conclu une clause compromissoire, alors que la Banque I, n'ayant pas été partie au contrat de vente, la clause compromissoire ne pourrait pas s'étendre à celle-ci.

Récemment, un arrêt de la Cour de cassation de 2007 a déclaré que le tribunal étatique ne devrait faire qu'une considération *prima facie* de la validité de la convention d'arbitrage et non un contrôle approfondi. Même si la motivation de la Cour se fondait sur l'article 7, H relatif à l'effet positif du principe de compétence-compétence, il s'agissait en effet de l'application de l'article 5, alinéa 1 de la LAI.

Dans cette affaire, la 15ème chambre civile[71] de la Cour de cassation a cassé la décision[72] des juges qui avaient retenu leur propre compétence en déclarant que la clause compromissoire n'était pas valide. La Cour de cassation en se fondant sur l'article 7, H de la LAI a affirmé que: «lorsque le litige se trouve devant les arbitres, ce sont ces derniers qui doivent se prononcer sur leur compétence. S'ils se déclarent compétents la procédure arbitrale continue. Selon l'article 15 de la LAI, la compétence du tribunal arbitral ne peut être contrôlé par le juge étatique qu'au stade d'un recours en annulation si l'une des parties le demande. En l'espèce, dans ce stade de procédure, le juge ne peut pas vérifier la validité de la clause compromissoire».

Il ressort de cet arrêt que le juge exerce un contrôle limité sur la convention d'arbitrage. La Cour rappelle seulement la formulation de la clause compromissoire des parties, l'objet de contestation, sans vérifier la validité de celle-ci. Toutefois, il semble évident que le juge devra dégager la nullité apparente ou formelle de l'acte ou une violation flagrante de l'ordre public de la convention d'arbitrage. La Cour souligne par ailleurs dans cet arrêt le caractère relatif de la compétence des juridictions étatiques, la sentence de l'arbitre ne pouvant être contrôlée qu'au stade de recours en annulation de la sentence conformément à l'article 15 de la LAI.

D'une manière générale, la jurisprudence est, pour l'heure, partagée sur l'interprétation concernant les dispositions de la LAI sur le contrôle de validité de la convention d'arbitrage en phase de l'exception d'arbitrage. Il existe des arrêts où la Cour de cassation interprète ce contrôle de manière restrictive et favorable à l'arbitrage. C'est également le cas du droit français qui dispose,

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71 Cour de cassation, 15ème ch. civ., 27 juin 2007, n° 2007/2145-2007/4289, in www.kazanci.com.

72 La décision ne précise pas de quel ressort il s'agit.

contrairement au droit turc, dans le Code de procédure civile que le juge est incompétent pour contrôler la validité de la convention d'arbitrage.

2 – La nécessité d'un régime de contrôle plus libéral

L'acceptation de l'effet négatif du principe dans les ordres juridiques nationaux reste incomplète, les juges étatiques conservant le pouvoir de procéder à un contrôle approfondi de la compétence arbitrale indépendamment du moment de leur saisine. Seul le droit français admet complètement l'effet négatif du principe de compétence-compétence (**A**).

Le grand avantage de reconnaître la priorité à l'arbitre se trouve dans l'empêchement des procédures parallèles entre le juge et l'arbitre. Mais il existe d'autres solutions pour prévenir aux décisions contradictoires, sans pour autant perdre du temps et de l'argent dans la procédure arbitrale (**B**).

A – Le cas du droit français

En droit français, le principe est prévu à l'article 1448, applicable en matière internationale et interne, dispose ainsi que « lorsqu'un litige relevant d'une convention d'arbitrage est porté devant une juridiction de l'Etat, celle-ci se déclare incompétente sauf si le tribunal arbitral n'est pas encore saisi et si la convention d'arbitrage est manifestement nulle ou manifestement inapplicable. La juridiction de l'Etat ne peut relever d'office son incompétence».

L'article fait donc une distinction quant au moment de la saisine du juge. Ainsi, lorsque le tribunal arbitral est saisi, la juridiction étatique doit se déclarer incompétente sans aucune appréciation de la validité de la convention d'arbitrage, et elle doit également se déclarer incompétente même lorsque le tribunal arbitral n'est pas encore saisi sauf si la convention d'arbitrage est manifestement nulle ou manifestement inapplicable.

La doctrine française s'accorde sur la constatation que cette nullité manifeste ne doit en aucun cas déboucher sur un examen au fond du litige par le juge. Selon Philippe Fouchard, la nullité manifeste vise «une nullité évidente et incontestable qu'aucune argumentation sérieuse n'est en mesure de mettre en doute»[73]. Professeur Gaillard, préfère la définir comme une nullité «immédiatement détectable» ou encore une nullité qui «saute aux yeux» sans qu'un examen même peu approfondi soit nécessaire[74]. Ainsi serait manifestement nulle une convention confiant à un arbitre le règlement d'un litige

[73] Ph. Fouchard, «La coopération du président du tribunal de grande instance à l'arbitrage», Rev. arb. 1985, p. 27.

[74] E. Gaillard, Juris-classeur droit international, fascicule 586-5-1, p. 73 et s. ; V. aussi procédure civile, fascicule 1043.

portant sur l'état des personnes ou sur un droit clairement indisponible[75].

L'article 1448 et la jurisprudence française[76] y ajoutent la réserve de l'inapplicabilité manifeste[77] de la convention d'arbitrage, cette dernière englobant l'inexistence de la convention d'arbitrage ainsi que son étendue quant aux litiges[78].

Pour défendre ce devoir d'abstention des juges, Professeur Gaillard[79] invoque le fait que celui-ci soit de nature à préserver l'organisation des compétences, mise en place par le décret du 12 mai 1981. La création de deux instances parallèles serait de nature à perturber le déroulement de l'arbitrage. Si les juridictions étatiques pouvaient vider l'incident de compétence sans attendre la décision des arbitres, le contentieux de la validité de la convention d'arbitrage se trouverait nécessairement dispersé devant toutes les juridictions pouvant être appelées à connaître au fond du litige. En 1981, le contentieux a été centralisé devant la Cour d'appel. De plus, ne pas connaître l'aspect négatif vide de sa substance le principe de compétence-compétence, en incitant les arbitres à attendre que les juridictions étatiques tranchent la question.

Mis à part l'avantage d'empêcher les procédures parallèles, le principe de l'effet négatif permet aux arbitres de se prononcer en premier sur des questions touchant à leur compétence et ceci s'avère moins néfaste que de laisser les plaideurs de mauvaise foi de retarder et de paralyser l'arbitrage.

Comme l'objectif du principe de compétence-compétence est d'éviter le retard dans le déroulement de l'arbitrage, admettre une compétence prioritaire ou même concurrente du juge étatique pour trancher la question de la

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75 Cour de cassation 1ère ch. civ., 1er décembre 1999 Ste Métu système c/ Sté Sulzer, arrêt précité ; Cour de cassation 1ère ch. civ., 1er décembre 1999, Sté Exporties c/ Sté Rusbois, Rev. arb. 2000, p. 96, spéc. 102, note Ph. Fouchard.

76 Cour de cassation, 1ère ch. civ., 16 octobre 2001, Rev. arb. 2002, p. 917, note D. Cohen; Gaz. Pal. 21-23 juillet 2002, p. 23, obs. M.-L. Niboyet.

77 La Cour d'appel de Versailles a estimé que la convention d'arbitrage est «manifestement inapplicable à l'instance, la clause compromissoire ayant pour objet le règlement des différends découlant ou en relation avec un contrat de distribution, dès lors que l'action introduite tend à rechercher la responsabilité du partenaire sur le fondement de l'article 1382 du Code civil, à raison de la brusque rupture de pourparlers engagés entre les parties en vue, notamment, de la création d'une société commune, projet étranger au contrat de distribution liant les parties et distinct de celui-ci par son objet», Cour d'appel de Versailles, 31 mars 2005, RG n° 04/06430, BICC n° 630 du 1er décembre 2005, n° 2241.

78 I. Fadlallah, «Priorité à l'arbitrage: entre quelles parties?», Gaz. Pal. 6 juin 2002, n° 157, p. 26.

79 E. Gaillard, note sous l'arrêt de la Cour de cassation, 1ère ch. civ., 21 mai 1997, Renault c/ Sté V 2000, Rev. arb. 1997, p. 537. 190

compétence de l'arbitre conduirait à vider le principe de tout son contenu.

Toutefois, à l'inverse, les adversaires du principe estiment que privilégier la voie judiciaire, censé être plus rapide, permettrait d'éviter des coûts et une perte de temps.

Comme le précise Professeur Mayer, «pourquoi imposer à la partie qui conteste l'existence de la convention d'arbitrage les frais et la perte de temps d'un examen par l'arbitre, dont la position pourra de toute façon être remise en cause par la suite?»[80].

Si la conception française de l'effet négatif empêche les procédures parallèles, cet avantage reste relatif tant que les juges étrangers ne l'adoptent pas[81].

Certains auteurs ont alors suggéré d'autres solutions qui éviteraient le développement des instances parallèles.

B – Organisation d'un système de litispendance: un remède aux décisions contradictoires

Une partie de la doctrine[82], loin de reconnaître une priorité absolue aux arbitres, a suggéré d'organiser un système de litispendance[83] qui consiste à faire surseoir à statuer l'autorité saisie en second. Même si la solution ne pose aucun problème quand le juge est saisi en second, il en est autrement lorsqu'il est saisi en premier. A cet égard, la jurisprudence du Tribunal fédéral suisse[84] mérite l'attention. Ainsi, selon cette jurisprudence, le tribunal arbitral siégeant en Suisse suspend la cause, dès lors qu'un tribunal étatique étranger est saisi d'une exception d'arbitrage, dans la mesure où cette décision étrangère est susceptible d'être reconnue en Suisse. La nécessité d'éviter des dé-

80 P. Mayer, «L'autonomie de l'arbitre international pour statuer sur sa propre compétence», RCADI, 1989, V, t. 217, p. 347.

81 Ch. Seraglini, L'arbitrage commercial international, op. cit., n° 2550, p. 945.

82 Ch. Seraglini, n° 2551, p. 945.

83 Il convient ici de souligner la différence entre l'exception d'arbitrage et l'exception de litispendance. La litispendance existe lorsque deux juridictions distinctes du même degré et compétentes sont saisies simultanément d'un même litige. En effet ici, «plus que de litispendance au sens stricte entre un tribunal arbitral et un juge étatique, il s'agit d'un problème de compétence et de développement de procédures parallèles et, plus précisément de déterminer qui va décider quelle autorité, du juge ou de l'arbitre, est effectivement compétente», Ch. Seraglini «Brèves remarques sur les recommandations de l'association de droit international sur la litispendance et l'autorité de la chose jugée», Rev. arb. 2006, p. 919.

84 Tribunal fédéral suisse, Fomento de Constructionnes y Contrats S.A. c/ Colon Container Terminal S.A., Rev. arb. 2001, p. 835, note J.-F. Poudret.

cisions contradictoires étant d'ordre public[85], cela impose à l'arbitre siégeant en Suisse de suspendre la procédure arbitrale dans une telle hypothèse.

La solution de la jurisprudence suisse n'a pas été adoptée dans les recommandations de l'Association de droit international sur la litispendance[86] que suggère dans la recommandation n° 4, que le tribunal arbitral poursuive l'arbitrage lorsque le défendeur à l'arbitrage introduit une action parallèle devant une juridiction étatique ailleurs qu'au siège de l'arbitrage. L'association n'a donc pas pris en compte le facteur chronologique[87] prévu dans la jurisprudence suisse qui imposait à l'arbitre se trouvant en Suisse de suspendre la procédure arbitrale.

De toute manière, la solution de litispendance ne pourrait être satisfaisante que si tous les États l'adoptaient par une convention internationale[88]. Une telle convention inciterait les États à prendre des mesures pour éviter les problèmes de décisions contradictoires. Ainsi, si le juge étatique est saisi en premier, il serait obligé de prendre une décision avant dire droit et l'arbitre qui est saisi en second, où qu'il soit, serait tenté de suivre la solution pour que sa sentence ne risque pas d'être annulée.

A l'heure actuelle, une telle réglementation internationale n'est pas atteinte.

Le législateur suisse a modifié, le 1er mars 2007, l'article 186 de la LDIP, pour résoudre les difficultés liées à la question de savoir si la décision étrangère à venir pourrait être reconnue en Suisse. L'alinéa ajouté à l'article 186[89] dispose que: «[l'arbitre] statue sur sa compétence sans égard à une action ayant le même objet déjà pendante entre les mêmes parties devant un autre tribunal étatique ou arbitral, sauf si des motifs sérieux commandent de suspendre la procédure».

La disposition permet ainsi de ne plus chercher à déterminer si la clause compromissoire est valable selon un droit autre que la lex arbitri suisse, ou bien si la décision étrangère présente un caractère pouvant être reconnu en Suisse. Dorénavant, en droit suisse, le principe est celui de la priorité de la décision de l'arbitre quant à sa compétence sur celle des tribunaux étatiques, ou d'un autre tribunal arbitral, alors même qu'il existe une action pendante

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85 Article 9 de la LDIP suisse.

86 Association de droit international, recommandations sur la litispendance, Session de juin 2006, Toronto, Rev. arb. 2006, p. 1120.

87 Ch. Seraglini, «Brèves remarques sur les recommandations de l'association de droit international sur la litispendance et l'autorité de la chose jugée», op. cit., p. 923.

88 Ch. Seraglini, L'arbitrage commercial international, in op. cit., n° 2551, p. 945.

89 V. Réforme du droit suisse de l'arbitrage, Informations, Rev. arb. 2007, p. 146.

ayant le même objet entre les mêmes parties[90].

D'autres solutions sont possibles suivant la doctrine[91]. Selon l'une des propositions, l'arbitre doit se prononcer sur sa compétence par une sentence préliminaire. Celle-ci pouvant faire l'objet d'un recours immédiatement recevable, permettrait de régler rapidement la question de la compétence. Le droit turc ne dispose pas d'une telle solution. Ensuite, cette obligation de surseoir à statuer pourrait être limitée en cas de nullité manifeste de la convention d'arbitrage.

Aujourd'hui il n'existe pas de telles solutions en droit turc. Pourtant, le projet de la LAI[92] prévoyait dans son article 8, alinéa 2 que l'arbitre pouvait statuer sur le litige même si une action ayant le même objet était pendante devant un tribunal étatique. La proposition n'a pas été adoptée par la suite. Il existe donc une incertitude concernant la position du tribunal arbitral siégeant en Turquie, dès lors qu'un tribunal étatique étranger est saisi d'une exception d'arbitrage. A notre avis, la solution de l'article 16, alinéa 3 de la loi-type qui consiste en la prononciation de l'arbitre sur sa compétence par une sentence préliminaire devrait être adoptée par les tribunaux turcs pour permettre de ne pas gêner le déroulement de la procédure arbitrale.

CONCLUSION

Le principe de compétence-compétence s'avère très importants quant à la validité de la convention d'arbitrage, puisqu'il renforce la convention d'arbitrage et la rend plus efficace. Le droit turc admet aujourd'hui expressément ce principe par la nouvelle loi sur l'arbitrage international et par le Code de procédure civile et favorise la validité de la convention d'arbitrage.

Contrairement au principe de séparabilité appliqué déjà par la jurisprudence, le principe de compétence-compétence n'avait jamais été admis par les tribunaux turcs. Aujourd'hui il assure la validité de la convention d'arbitrage. Toutefois, la législation turque n'a pas complété l'aspect positif du principe par son aspect négatif qui consiste à reconnaître aux arbitres de statuer avant les juges lorsque ces derniers sont saisis en premier. Ainsi, selon la LAI, avant d'envoyer les parties devant les arbitres, le juge exerce un contrôle sur la validité de la convention d'arbitrage. Mais la Cour de cassation, a déclaré, dans un arrêt récent, qu'un seul contrôle *prima facie* suffirait pour envoyer

90 D. Baizeau, «Modification de l'article 186 de la LDIP suisse: procédures parallèles et litispendance, clarification du législateur après la jurisprudence Fomento», Gaz. Pal., 24 avril 2007, n° 114, p. 19.

91 Ch. Seraglini, L'arbitrage commercial international, in op. cit., n° 2551, p. 945.

92 Première ébauche de la loi sur l'arbitrage international in Milletlerarası Tahkimde Yasal Bir Düzenleme Gerekir mi?, II, op. cit., p. 327.

la question de compétence devant les arbitres, sans exercer un contrôle approfondi.

Le législateur turc a essayé de favoriser le régime juridique de la convention d'arbitrage pour maximiser sa validité et donc son efficacité. L'évolution est certaine par rapport au droit ancien. Toutefois, si on le compare avec les droits «modernes» de l'arbitrage international, l'amélioration des dispositions de la LAI semble être nécessaire.

Abréviations

CNUDCI	:	La Commission des Nations unies pour le droit commercial international
Gaz. Pal.	:	Gazette du Palais
LAI	:	Loi sur l'arbitrage international
Pet. aff.	:	Petites Affiches
Rev. arb.	:	Revue d'arbitrage
RIDC	:	Revue international de droit comparé

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INCREASING SHAREHOLDER COMMITMENTS AT JOINT-STOCK CORPORATIONS UNDER TURKISH COMMERCIAL LAW

Türk Ticaret Kanunu çerçevesinde Anonim Şirketlerde Pay Sahibinin Taahhütlerinin Arttırılması

Asst. Prof. Berna TEPE[1] [2] [3]

ABSTRACT

The principle that the shareholder of a joint-stock company is under the single obligation of depositing his contribution to the capital is in force within the framework of the Turkish Commercial Code. It appears that the single obligation principle replaced the norm of subjecting increase in shareholders' commitments to unanimous vote. That being emphasized, since Turkish Commercial Code provides deviations to the single obligation principle in addition to the fact that the notion of increase is shareholders' commitments is not obsolete from the Code, the doctrine for subjecting increases in shareholders' commitments to unanimous vote is to an extent still relevant within the context of the Turkish Commercial Code.

Keywords: Turkish Commercial code, joint-stock corporations, principle of single obligation, shareholder commitments, increase in shareholders commitments, reduction of shareholder rights, mergers, rescission of general assembly decisions, voidability of general assembly decisions.

ÖZET

Türk hukukunda - yeni Türk Ticaret Kanunu çerçevesinde- anonim şirketlerde pay sahibinin tek borcunun sermaye taahhüdünden doğduğunu ve bunun da şirkete karşı bir borç olduğu ilkesi yasal temelde yürürlüktedir. Bu ilke, normatif olarak, ortak taahhütlerinin arttırılabilmesi için genel kurulda oybirliği aranması kuralının yerine geçmiş görünmektedir. Diğer yandan kanun, ilkesel tek borç dışında pay sahibine başka yükümlülüklerin de ileri sürülmesini mümkün kılmaktadır. Bu sebeple, ortak taahhütlerinin arttırılmasında pay sahibinin rızası aranması hakkındaki hukuksal norm ve anlayış, yeni Türk Ticaret Kanunu bağlamında ortadan kalkmamıştır.

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Anahtar Kelimeler: Türk Ticaret Kanunu, anonim şirket, tek borç ilkesi, pay sahibi yükümlülükleri, pay sahibi taahhütlerinin arttırılması, pay sahibi haklarının azalması, şirket birleşmeleri, genel kurul kararının iptali, genel kurul kararının butlanla sakatlığı

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INTRODUCTION[4]

Under Turkish law, commercial companies are comprised of a variety of commercially oriented entities: corporate partnerships (*şahıs şirketleri*), *viz.* collective partnership (*kollektif şirket*) and partnership in commendam (*komandit şirket*) , in addition to corporate capital companies (*sermaye şirketleri*), *viz.* joint-stock corporation (*anonim şirket*), limited liability corporation (*limited şirket*), partnership in commendam by shares (*sermayesi paylara bölünmüş şahıs şirketi*), in addition to the distinct cooperative partnership (*kooperatif şirket*). The scope of the present article is related to joint-stock corporations for which the liability of each partner is, in principle, restricted with the amount of his concrete contribution for the constitution of capital and *vis-à-vis* the relevant company.

Each company regulated under the Turkish Commercial Code is vested with legal capacity as an entity. For a corporation to enjoy its legal capacity distinct from the person(s) who provided for the constitution of the corporation, the corporate "will" needs to form ideally as a result of the deliberations within and by resolutions of the person(s) who have provided for and maintain the corporation, i.e., the general assembly of shareholders.

Corporate logic is based on investment for future gain and dependency among its various organs rather than immediate actualization of shareholders' own interests. For the actualization of company's economic objects such as to serve the interests of the shareholders in the long run, codependency exists between the company and the shareholder(s). Rule of majority reigns for the corporation to run rather than the independent will and intention of each shareholder which is relevant and "presumed" rather for creation of contracts. According to the Civil Code, Article 2, everyone should abide by norms of integrity when enjoying rights and discharging obligations while the legal order is not to protect abuse of a right. As such, a legal entity's enjoyment of its legal capacity by its machinations must end, the farthest, where another person starts. It is the shareholder who has expressed his will in order to establish a legal entity to perform commercial activity within the framework of an opted type of corporation. On the other hand, such will has

[4] All legislative clarifying statements (*kanun gerekçeleri*) referred to in the present article are accessible via www.basbakanlik.gov.tr

been expressed for predictable if not specific terms of activity which must be maintained under the guarantee of legal security. Based on the foregoing, a condition which has prior importance is therefore whether the obligation favors the interests of the corporation for which the shareholder had legitimately expressed his will at the first place by participating to the corporation, as a reflection of the *affectio societatis* element of the memorandum of association.

Under Turkish law, three elements which distinguish the formation of a company from the formation of a regular contract as well as from an assembly of goods or an assembly of persons by law, constitute of (i) the contract, (ii) the persons, and (iii) the capital. Among them, "the contract's being a component of the company emphasizes that the company is a product of a consensual agreement"[5]. By rule, a type of consideration must be articulated for the formation of a contract, yet consideration is simply an object of exchange between the parties and therefore differs from the notion of capital. However, there is the characteristic of *affectio societatis* which further distinguishes a company from other contractual formations and also influences how the capital must be perceived: *affectio societatis*, "in its broader sense, expresses the intention of each shareholder to actively participate to the accomplishment of a company's purpose"[6].

The corporation is not a representative of the shareholder who is a person separate from the corporation or another shareholder. It is further noteworthy that, as an organ of a corporate company, the general assembly is composed of shareholders, each having a mindset on how the purpose and the objectives of the company within the framework of the company's purpose can be achieved while each considering also his own legitimate interests, accordingly asserting an individual will. Such distinction between the corporate interests and individual interests becomes very apparent, for instance, within the context of repurchase of own shares by a company; at a final analysis, "when a company repurchases its shares, it transfers company assets (the purchase price) to the members from whom the shares are purchased"[7].

Therefore, is the shareholder really expected to act purely to the benefit of the shareholding separate from the shareholder's other legitimate interests? Taking the shareholder out of the equation for decisions which can however be imposed on any shareholder is neither fair nor realistic since such

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5 Domaniç, Hayri "Anonim Şirketler Hukuku ve Uygulaması" , Temel Yayınları, 1988, p.19

6 Domaniç, *ibid.*, p.27

7 Cahn, A. and Donald, D. "Comparative Company Law", Cambridge University Press, 2010, p. 241

would keep the company too independent from the shareholder's will and circle of interests.

Obligations which are sufficiently specific to which the shareholder has individually committed do not cause a concern since they are in conformity with the contractual logic. İf "the shareholder is constrained to transfer a value above the amount he has committed to pay, or perform an act which has not been expected at the outset"[8], if "a decision of the company obliges the shareholder to make an expense or discharge an obligation which was not present in the original agreements"[9], then there is a clear case of increase in shareholder obligations. Such occurrences generally arise due to reasons favoring the corporation or third parties. Although constraining the shareholder to obligations in an unagreed manner, not all cases may be that clear as explained. Some vices thrive in the absence of any detection. Therefore, framing certain obligations as shareholder commitments initially serves concerns of legal security. Secondly, the shareholder's will should be in line with the obligations which such shareholding is conducive to, that is in a predictable and measurable manner to the extent any contractual obligation must be while the principle of equality among shareholders under the same circumstances must also be satisfied.

In some countries, the doctrine of increasing shareholder commitments by unanimous vote, i.e. the requirement to seek unanimous vote of the general assembly, thereby consent of each shareholder whose commitments increase by various transactions of the company. In this article, it is analyzed to which extent this doctrine is relevant to joint-stock corporations under 2011 Turkish Commercial Code.

I. Commitments of shareholders

The classification adopted by the 2011 Turkish Commercial Code prioritize commitments of financial nature.

I.A. Primary commitments

A primary commitment of the shareholder consists of obligations and commitments which are to enable the formation of a company's capital: It is asserted in a provision common to all types of corporate companies of

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[8] Houpin and Bosvieux, "Traité général théorique et pratique des sociétés civiles et commerciales" vol. II, n° 1262, cited in Rizzo, Fabrice "Le principe d'intangibilité des engagements des associés" RevueTrimestrielle de Droit commercial, 2000, p. 27 ff.

[9] Hamel, Lagarde and Jauffret "Traité de droit commercial" vol. I, 1980, n° 697, cited in Rizzo, Fabrice "Le principe d'intangibilité des engagements des associés" RevueTrimestrielle de Droit commercial, 2000, p. 27 ff.

the 2011 Turkish Commercial Code that "each shareholder is liable vis-à-vis the company for the amount of capital it has undertaken in the memorandum of association duly draft and signed"[10].

The commitments that a shareholder can make in the form of obligations to the company for constitution of the capital depend on the type of company. Registration of a commercial corporation by the commercial registry as well as acquiring title over its shares require the deposit of liquid or non-liquid assets. According to the 2011 Turkish Commercial Code, Article 581 and Article 342, liquidity and transferability determines the types of assets which can be deposited as capital: commercial prestige, labor or other types of services cannot be deposited as capital to a limited liability corporation or a corporate capital company in a consecutive manner; such do not even qualify as an asset for the formation of capital.

As far as corporate capital companies are concerned, for both the limited liability corporation and the joint-stock corporation, the major commitment of a shareholder vis-à-vis the company is the obligation to extend capital.

I.B. Auxiliary commitments

Generally speaking, there are commitments other than the obligation to paying in for constitution of the capital of a corporation. Especially when managing the capital of the company, the organisational "will" of a corporation is also inclined to ask for commitment, impose conditions or simply become part of situations which favorably or adversely acts upon shareholders' interests.

Financial commitments other than paying in capital can however be considered as commitments independent from the obligations to constitute the capital. On the other hand, legal security requires that if a financial commitment is of a primarily contractual nature, it should abide by norms concerning contracts. [11]

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[10] 2011 Turkish Commercial Code, Article 128, para. 1

[11] Legislative Clarifying Statement of the 2011 Turkish Commercial Code, Article 480, alinea (1), available at www.basbakanlik.gov.tr reads as: *Madde 480 - Birinci fıkra: 6762 sayılı Kanunun m. 405 (1)'in bazı değişikliklerle - yerini alan ve tek borç ilkesine açıkça yer veren bu hüküm, anonim şirketlerde, Tasarı ile ona dayalı esas sözleşme düzenini egemen kılmayı, borçlar hukuku sözleş meleriyle oluşturulabilecek yan düzenin esas sözleşme düzenini ortadan kaldırmasına sınırsız bir şekilde izin vermemeyi amaçlamaktadır. "Paysahipleri sözleşmesi" veya "ortaklar sözleşmesi" diye Türkçeye çevrilen, ancak dünyada "shareholders agreement" terimi ile adlandırılan, bazen de "joint-venture sözleşmesi" başlığını taşıyan, son yılların dünya çapında en "populer" atipik sözleşmesi olan bu sözleşme, yabancı öğretide kullanılan terim ile esas sözleşme düzeni yanında, çoğu kez ona ve kanuna hükmeden veya ikisini de birden bertaraf eden bir "yan düzen" yaratmıştır.*

A difference between the limited liability corporation and the joint-stock corporation in terms of the explicit wording is that supplementary financial commitments are enabled by the 2011 Turkish Commercial Code, Article 573, para.2 relevant to the limited liability corporation.[12] The component of person is much less prevalent as far as a joint-stock corporation is concerned such that a commitment is attached to the shareholding rather than to a certain person even when he has a single unit of shareholding at the company. Therefore, the principle of single obligation of the shareholder was introduced by the 2011 Turkish Commercial Code. The said principle is explicitly articulated in its Article 480, para.1 such that each shareholder is under the single commitment to contribute by capital for his shareholding. By barring the imposition of any obligation on him other than for his shareholding and, if applicable, any premium above the nominal value of the relevant shares, does the legislature means to set the financial boundary of the shareholder of the typical joint-stock company? The provision where the single obligation principle is asserted explicitly concerns the memorandum of association. That being said, according to the legislative clarifying statement of the specific provision, the underlying primary aim is upholding the memorandum of association as the constitution of the joint-stock corporation. The legislature sounds anxious not to legally acknowledge agreements in the 2011 Turkish Commercial Code since such agreements frequently thrive along the memorandums of association. On the other hand, even such aim as stated in the legislative clarifying statement is explicitly limited to not permit that contractual obligations and rights by means of agree-

Ulusal hukukun uygun görmediği ve bu sebeple emredici hükümlerle koruma altına aldığı hemen hemen her menfaat veya hak (çoğu kez) yan düzenle ya zedelenmekte ya da sınırlandırılmaktadır. Bu yan düzen güçlüye, hukukunu getirmek, hakimiyet kurmak, istediği an istediği fiyatla karşı tarafın paylarını almak veya paylarını satmak hakkını sağlamaktadır. Veto hakları da bu düzenin önemli silahıdır. Kara Avrupası hukukları olabildiği o--randa bu yan düzeni sınırlamaya çaba harcamaktadır.

Tek borç ilkesi, hükümde "esas sözleşmeyle paysahibine, pay bedelini veya payın itibarî değerini aşan primi ifa dışında borç yükletilemez" şeklinde ifade olunmuştur. Bu hüküm, yan düzenin esas sözleşmeyle düzenlenmesine engel olduğu kadar emredici niteliği sebebiyle yan düzenin bazı hükümlerini sorgulanabilir konuma getirmektedir. Hüküm başka kanunlara engel olucu bir aracı içermemekte, bu görevi sınırlı bir şekilde 340 ıncı maddenin son cümlesi üstlenmiş bulunmaktadır.

İlke yönünden 6762 sayılı Kanunun 405 inci maddesinin birinci fıkrasının ifadesinde değişiklik yapılmıştır. Mevcut metin "fazla bir şey ödemeye esas mukavele ile dahi mecbur tutulamaz" diy erek ödeme sözcüğünü vurgulamıştı. Bu da, Türk öğretisinde, hükmün sermaye ve prim borcu dışındaki diğer para borçlarını kapsamadığı görüşünün ileri sürülmesine sebep olmuştu. Onun için 480 inci maddede "borç yükletilemez" ifadesi bilinerek kullanılmıştır. Hükümdeki borç sözcüğü geniş anlam taşımaktadır.

12 *Cf*. Can, M. E. "*Limited Şirket Ortağının Borçları ve Yükümlülükleri*", Gazi University, *Gazi Üniversitesi Hukuk Fakültesi Dergisi*, 2011/4, p. 3

ments of which the formation is subject to the Code of Obligations override the clauses of the memorandum of association regulated by law.

It is noteworthy that the 2011 Turkish Commercial Code introduced a restrictive norm which is significant and relevant also to the single obligation principle: according to its Article 340, the memorandum of association of a joint-stock cannot deviate from the provisions specified in relation to this type of company unless such a deviation is explicitly permitted by the Commercial Code. Moreover, provisions of another (statutory) act permissive of complementary clauses within a memorandum of association would be applicable within the framework of and limited to such an act. The rule of the 2011 Turkish Commercial Code sets forth a rule of interpretation and is meant to debar loopholes in the statutory regulation of joint-stock corporations[13] and control the previously assumed liberty to get commitments from shareholders by various means, e.g. a shareholders' agreement parallel to a memorandum of association. Moreover, the legislator asserts in the legislative clarifying statement that the notion of "obligation" of the single obligation principle is to be conceived in its broad sense[14].

Given the restrictive norm of interpretation, the provisions of the Code related to the joint-stock corporations are to be shed a brighter light on in order to detect any explicit wording which enables deviation from the single obligation principle. Indeed, within the context of conditions of amending the memorandum of association, the 2011 Turkish Commercial Code, Article 421, para.2, alinea (a) provides that a decision which imposes a liability to balance a negative account [or auxiliary liabilities/(commitments)] requires unanimous vote of all shareholders at the general assembly. According to the scholarly opinion, the provision enables deviation from the single obligation principle only for the stated aim of balancing a negative account[15]. Nevertheless if that deviation calls for a change, it is possible by amending the memorandum of association by unanimous consent of all shareholders. Further, underlying the 2011 Turkish Commercial Code, it is stated in various provisions' legislative clarifying statements, *viz*. those of Article 391, Article 421, para.2, Article 476, para. 2, that balancing a joint-stock corporation's negative account constitutes an exception as a supplemental financial liability to be assumed by the

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13 Cf. R. Karasu, "6102 sayılı Türk Ticaret Kanunu'na göre Anonim Şirketlerde Emredici Hükümler İlkesi", 6102 sayılı Yeni Türk Ticaret Kanunu'nu Beklerken" University of Marmara, Faculty of Law, Hukuk Araştırmaları Dergisi, 2012, Special Issue of the proceedings held between 10-12 May 2012, vol. 18, no.2, p. 311 ff.

14 Legislative Clarifying Statement of the 2011 Turkish Commercial Code, Article 480, alinea(1)

15 Poroy, R, Tekinalp, T, Çamoğlu, E. "Ortaklıklar ve Kooperatif Hukuku", Vedat Kitapçılık, 2014, p. 607

shareholders while requiring unanimous consent of the shareholders.

To an extent, 2011 Turkish Commercial Code has dispensed with the notion of increase of shareholder commitments by adopting the principle of single obligation for the shareholder as far as joint-stock corporations are concerned. If attention is be paid to Swiss law, a clause providing an auxiliary commitment need to be individually analysed to see whether the clause imposes an obvious financial burden to the shareholder. [16]

However, not all clauses are explicit as concerns the possible financial burden for a shareholder. The criteria of "obvious financial burden" has been used however in order to not permit occurrences where the financial loss for a shareholder was highly obvious and measurable rather than cases where the financial loss is not predictably measurable at the first place. For instance, getting a commitment from the shareholder as to subject his transfer of shares to a much lesser value than the market value is in fact a disguised restriction or even an prohibition on transferring shares.

I.C. Non-monetary commitments

As a very general norm, commitments focused on performance can be made as to constitute the capital of a company, as such enabling a shareholder to discharge its obligation to acquire shares by way of performing some acts. Indeed, performance commitments can be of commercial value for those who benefit even if they do not constitute assets as such. As a matter of fact, such is enabled by 2011 Turkish Commercial Code, Article 127 which states to be a provision applicable to all types of corporations unless provided otherwise by law[17]. Therefore, as a general rule, commitments for personal performance can be exchanged for title to corporate partnership. The related obligation is the performance of some act by the shareholder. Such acts are generally active labor or active management which are supposed to benefit the corporation. As a matter of fact, it has been an item of which the evaluation has been generally difficult or impossible to be represented and entered into corporate accounts in monetary terms. Nevertheless, the Turkish Court of Cassation pronounced in 1968 that a corporation is entitled to coerce the shareholder to perform the duties he is obliged to perform.[18] Unless the act cannot be performed due to reasons where the shareholder cannot be held liable for nonperformance[19],

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16 Poroy *et alias, ibid*, p. 607

17 For exceptions, see the subtitle below in the text of the present article.

18 Decision of the Court of Cassation (Commercial) dated 26 November 1968, numbered 1968/6301 cited in Domaniç, Hayri, "Türk Ticaret Kanunu Şerhi", Vedat Kitapçılık, c.1., 1988, p. 600

19 See, Nomer, Haluk "Borçlar Hukuku – Genel Hükümler", Beta Basım A.Ş., 2013, pp. 265 - 270

then at worst, damages can be claimed from the shareholder. Therefore, even if the performance of such act has not been represented in monetary terms in the company accounts, the performance of an act still has a value as a participation to the capital. If a personal performance commitment has been made by a shareholder, his shareholding is the direct product of his commitment to perform unless there is a substantial reason not to reframe a commitment of personal performance as participation to the capital.

However, not all corporation types enable a shareholder to participate to the capital with personal performance. Indeed, 2011 Turkish Commercial Code, Article 581, Article 342 and Article 307 consecutively excludes acts of service and personal labor from the capital of a limited liability corporation, the capital of a joint-stock corporation and the capital extended by a partner whose liability is limited in a corporate partnership in commendam.

A further difference is introduced between the limited liability corporation and the joint-stock corporation: according to its explicit wording, auxiliary commitments are enabled by the 2011 Turkish Commercial Code, Article 573, para. 2 for the limited liability corporation while the joint-stock corporation is to be run primarily in accordance with the "principle" of single obligation assumed by the shareholder.

When the provision is construed as a principle, it calls for interpretation whether the principle is relevant only to financial commitments vis-à-vis the joint-stock corporation, or the "single obligation" principle is also meant to debar any other commitments especially if they are not monetary: the legislator asserts that "the notion of obligation of the single obligation principle is to be conceived in its broad sense"[20] .

Shareholder commitments are framed by the 2011 Code of Commerce as commitments for capital requirement, primary commitments and secondary commitments. The (i) commitment for capital requirement is well structured because the single obligation principle is primarily applicable to the constitution of capital; (ii) other primary commitments can arise only to balance a negative company account, therefore for the maintenance of capital; (iii) secondary commitments are not explicitly enumerated by law.

The 2011 Turkish Commercial Code, Article 421, para.2, alinea (a) is relevant in the present context since it enables imposition of an auxiliary liability to balance a negative account of the joint-stock corporation, that is by the unanimous vote of all shareholders at the general assembly. Since in various provisions' legislative clarifying statements, *viz*. those of Article 391, Article

[20] Legislative Clarifying Statement of the 2011 Turkish Commercial Code, Article 480, alinea(1)

421,para.2, Article 476,para. 2, it is clarified that balancing a joint-stock corporation's negative account and other commitments related to non monetary performance constitutes an exceptional financial liability to be assumed by the shareholders.

If the courts are to construe clauses as to whether they survive the single obligation principle, due regard is be paid to the implied financial burden on the shareholder if the clause is complied with. "Options" are put under focus from this regard: an option is a unilateral declaration of intention which gives the right to make an agreement or entitles the holder of the option to prolong an agreement[21]. Call and put options create legally qualified new occurrences initiated by unilateral declarations of intention extended by the holders of such options. The contract will be formed not before a declaration stemming from a call or put option, but once it has been received by the other party. Making an agreement by unilateral declaration of intention means that it does not matter whether other party accepts this declaration or not. The contract is formed upon the receipt of due notification.

Gained more weight upon the introduction of the 2011 Turkish Commercial Code, the scholarly opinion to the effect that while a call option is not viable due to the weakness of any related negotiations, the right of first offer survives the single obligation principle.[22] The same scholarly works suggest that under Swiss Law which influenced the legislature, such clauses are tested by the implied financial burden if the commitment was abided by. [23] From this perspective, there is no reason why should not be compatible with the single obligation principle, innocent options like the tag-along right of a minority shareholder who is vested with the right to join the deal and sell their stake at the same terms availed by the majority shareholder who is the initial seller.

We believe it is an artificial attempt to reframe obligations arising out of options as shareholder commitments. Since the legislature justifies introduction of certain provisions in the 2011 Turkish Commercial Code by the existence of critical risks which arise out of contractual agreements among the shareholders or between the shareholder(s) and the corporation, then such suggests the requirement to acknowledge that the legislature has taken on a regulatory attitude even for joint-stock corporations which are not publicly

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21 Buz, Vedat "Medeni Hukukta Yenilik Doğuran Haklar", Yetkin Yayınları, 2005, p. 160 ff.

22 Poroy, R, Tekinalp, T, and Çamoğlu, E. "Ortaklıklar ve Kooperatif Hukuku", Vedat Kitapçılık, 2014, p. 607. *Cf.* Bahtiyar, Mehmet "Anonim Ortaklıkta Payların Üçüncü Kişilere Satılması Durumunda Diğer Ortaklara Önalım Hakkı Tanıyan Anasözleşme Hükümleri ve Etkileri", Banka ve Ticaret Hukuku Araştırma Enstitüsü, BATİDER, vol. XXI, no. 2, 2001, pp. 94 – 95

23 Poroy, R, Tekinalp, T, Çamoğlu, E. "Ortaklıklar ve Kooperatif Hukuku", Vedat Kitapçılık, 2014, p. 607

listed. The courts' judgment cannot be independent from such an attitude. It is pertinent to simply emphasize that law cannot protect abuse of any right. The shareholder's will should be in line with the implications of commitments for the shareholder and it should be taken into account in the case of a contract, the law of parties meant to be formed is based on the shareholding. Such contractual obligations which aim to construct the law of the parties although they directly relate to a regulated area of law like the transferability of shares can only form and be maintained in a healthy manner if the liabilities can be assessed in a predictably measurable manner. Further, it should be possible to assert that there the contractual obligation is based on free will which have formed in a sufficiently concrete manner at the first place.

Moreover, it is stated in the 2011 Turkish Commercial Code, Article 480, para. (4) that in case transfer of shares is subjected to the approval of the joint-stock corporation, then in addition to the obligation to extend capital, commitments can be obtained from shareholders which require them to perform various acts in a periodical (/repetitive) manner provided that the subject-matter is not monetary.

As concerns the subject-matter of such a commitment, the subject-matter being non monetary calls for interpretation. Under both legal terminology as well as financial terminology, when the subject-matter is "non-monetary", such excludes cash and not other rights, values or assets. Secondly, it is noteworthy that under Turkish law, (contractual) obligations are being classified in the doctrine also from the perspective of the frequency of performance involved in order to discharge an obligation: obligations of instant performance, periodical performance and continuous performance constitute the types of obligations from this aspect[24]. Other than those specified in the 2011 Turkish Commercial Code, by enabling certain obligations of periodical performance in its Article 480, para. (4), the stated provision excludes other obligations of instant performance or continuous performance even if their subject-matters are non-monetary.

Obligations based on continuous performance are based on various degrees of trust between its parties. Therefore in principle, the legislature maintains the previous understanding that a joint-stock corporation is not based on or meant to be conducive to an understanding where trust characterizes the relationship among the shareholders, or that between the corporation and the shareholder(s).[25]

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[24] See, Eren, Firket "Borçlar Hukuku – Genel Hükümler", Beta A.Ş., 2008, pp. 99 - 100

[25] See, Hamamcıoğlu, Esra "Anonim Şirketlerde Anasözleşme Değişikliği", PhD thesis in private law defended at the Marmara University, 2011, p. 28, accessible via www.yok.gov.tr

The nature and scope of such commitments of periodical performance which are enabled by Article 480, para. (4) can be written on the back of the share certificates or receipts as applicable.

Finally, such legislative stance does not rule out regulation of critical risk by law or contract when it is the minority shareholder's legitimate interest which is at stake. Indeed, the 2011 Turkish Commercial Code enables by its Article 531 the minority shareholder(s) to request termination of the company due to rightful/legitimate reasons which can be conducive to such termination, transfer of shares or other suitable and acceptable solution by the decision of the court. Although of ex post effect, such statutory regulation of minority shareholder's risk is especially meaningful at situations where transfer of shares is subjected to the approval of the corporation.

Shareholder commitment not to compete against the company is a shareholder commitment which can be analyzed in this vein. Provisions to rule out competition of shareholders against the company are contained in the 2011 Turkish Commercial Code, but there are variations depending on the type of company in question. Prohibition to compete may (further) be regulated within the memorandum of association of the relevant company. If no norm is specified in relation to a type of company, and if compatible, the 2011 Code of Obligations, Article 626 applies such that the shareholders cannot perform acts favorable to others while impeding the company's achievement of its objective or otherwise to the detriment of the company. It cannot be said that competitive activities or exercise of separate activities in the same sector as the company at which one is a shareholder are necessarily to the company's detriment. It calls for clarification albeit basic that the specified prohibition to compete is an extension of the duty of loyalty or is simply out of integrity. According to a legislative clarifying statement in relation to the 2011 Turkish Commercial Code which is noteworthy also in the present context, although the notion of shareholder loyalty neighbors the prohibition to compete, it is distinct from it.[26]

From the perspective of a corporation's interests, organizational sophistication of the company as a distinct entity, the shareholder's access to information, increased involvement in the company's business and right of vote are considered to justify a prohibition to compete. That being said, when it is a joint-stock corporation which is concerned, the general principle of "single obligation" of shareholders is deemed relevant also in terms of nonfinancial commitments; authors who conceive the term "obligation" in its broad sense

[26] Legislative Clarifying Statement for the 2011 Turkish Commercial Code, Article 613 *re* duty of loyalty (and proscription to compete) of shareholders of limited liability corporations

and not just financial such as to validate the principle's restrictive effect on all types of commitments, emphasize that nonfinancial commitments could rather be sustained, if applicable, as contractual obligations[27]. If it can be deduced from the "single obligation" principle that a shareholder of a joint-stock corporation cannot be prohibited from competing with the company, than we assume that the prohibition to compete is a type of shareholder commitment which cannot be sustained even if contractually. Indeed, such commitments are among those occurrences which have provoked the regulatory attitude of the legislature and need to be weighed by courts also against principles and other rights which such commitments conflict with, in addition to taking into account the resulting financial burden for the shareholder. However such commitments cannot find a favorable justification at the 2011 Turkish Commercial Code as far as joint-stock corporations are concerned.

At situations where an obligation which consists of a periodical performance is enabled, obtaining a new performance commitment is conducive to following the procedure for amending the memorandum of association.

II. Commitments for execution of preexisting commitments

Given the single obligation principle as well as Article 421, para.2, alinea (a) and Article 480, para. 4 of the 2011 Turkish Commercial Code about other commitments, specifying each commitment is an ideal for the soundness of not only the original general commitment, but also that of an act in order to implement a clause or decision binding on the shareholder. The doctrine subjecting increase in shareholders' commitments to unanimous vote also emphasizes seeking shareholder consent for such acts of implementation would hamper the efficient functioning of a company.[28] Such concern challenges any view that the obligations to which the shareholder has committed must been predictably measurable.

III. Amendments to the Memorandum of Association

Within the context of conditions of amending the memorandum of association, the 2011 Turkish Commercial Code, Article 421, para.2, alinea (a) provides that a decision which imposes a liability or auxiliary liabilities/ commitments to balance a negative account requires unanimous vote of all shareholders at the general assembly. Given the single obligation principle, the provision requires that in order to impose a liability to a shareholder as to

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27 Poroy, R, Tekinalp, T, and Çamoğlu, E. "Ortaklıklar ve Kooperatif Hukuku", Vedat Kitapçılık, 2014, p.529 ff.

28 Monsèrié-Bon, Marie-Hélène, "Encore l'augmentation des engagements des associés", Revue Trimestrielle de Droit Commercial, Dalloz, 2004 p. 551

balance a negative company, such should be with the decision of the general assembly which could decide favorably only with unanimous vote. When the provision is interpreted in a teleological manner, the purpose is to subject such impositions of liability to the favorable vote of all shareholders during the general assembly of the joint-stock corporation.

IV. Mergers: Issues of increase in shareholder commitments

When a merger is considered to require amendment of the relevant corporations' memorandum of association, such would be subject to the statutory and regulatory provisions regulating amendment of a corporation's memorandum of association. However, the 2011 Turkish Commercial Code regulates merger operations in a separate manner and distinct from the provisions related to amending memorandum of association.

IV. A. Compatibility Between Types of Corporations

The legislative clarifying statement of the 2011 Turkish Commercial Code, Article 137 is expressive rather about the limitation on liabilities vis-à-vis the creditors as an underlying reason behind the compatibility required between various types of companies, that is by especially taking into account the form of the acquiring or the final emerging company.

A merger can realize by way of acquisition or by way of establishing a new incorporation. The 2011 Turkish Commercial Code, Article 137 ff. specifies compatible types of companies which can merge.

Companies compatible for merger	Corporate capital company *(sermaye şirketleri)*	with	Corporate capital company
			Cooperative partnership
			Corporate partnership *(only if it is the acquired)*
	Corporate partnership *(şahıs şirketleri)*	with	Corporate partnerships
			Corporate capital companies *(only if it is the acquiring)*
			Cooperative partnership *(only if it is the acquiring)*
	Cooperative partnership	with	Cooperative partnership
			Corporate capital company
			Corporate partnership *(only if it is the acquiring)*

In essence, while introducing a distinction between corporate capital companies and corporate partnerships in its Article 124, para. 2, the 2011 Turkish Commercial Code does not allow for corporate partnerships to be the acquiring party when merging with a type of corporation other than that of such intended acquirer. That being said, the classification serves to determine whether the element of "persons" or rather the element of "capital" characterizes the delimitation of the shareholders' obligations and rights related to the corporation.[29] At corporate partnerships, there is always a partner liable vis-à-vis the creditors of the company in an unlimited manner while shareholders of a corporate capital company does not accommodate such.[30] The 2011 Turkish Commercial Code permits rather the corporate capital company to be the acquirer if a merger also involves a corporate partnership. Such principle is introduced thanks to another principle in its Article 158, the Code prevents release of those shareholders from liability from an obligation of the acquired partnership vis-à-vis the partnership's creditor for a period of three years starting from the date by which the decision for merger was publicly announced.

In essence, the point of focus for compatibility in mergers is the shareholder rather than the creditor. It can be deduced that the limitation on shareholder commitments from the perspective of the shareholder has been influential on the legislature's perspective for enabled mergers.

IV. B. Rule of Majority for Mergers

The 2011 Turkish Commercial Code permits for a merger operation to be conducive to supplementary financial obligations, other personal performance commitments, personal duties or other obligations for the shareholders by the will of the merging corporations or due to the variation in the type of company merged into; according to the Commercial Code, Article 147, alinea 1(g) and (h), such duties should be made explicit in the merger report the draft of which is requisite. Even such merger report can be dispensed with under certain conditions sought by law.

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29 See Köse, *ibid*, p. 882

30 For collective corporations, see 2011 Turkish Commercial Code, Article 211 according to which partners are liable vis-à-vis the creditors of the corporation in an unlimited manner. For corporate partnerships in commendam, the 2011 Turkish Commercial Code, Article 304 and Article 319 are relevant in this context; individuals may become partners to the latter with unlimited liability vis-à-vis the creditors of the corporation in addition to any other person whose corporate partnership should be conducive to liability vis-à-vis the creditors upto the amount he has participated to the equity-capital.

The merger needs to be approved by the general assembly of the merging corporations unless the acquirer already holds a qualified majority of the other corporation's shares. For approval of the merger, the general assembly quora sought for equity-capital companies vary. For a limited liability corporation, the quorum sought is three-fourths of the shareholders which should be representative of three-fourths of the equity-capital. Apart from the limited liability corporation, as concerns the other two types of corporate capital company, viz. the joint-stock corporation or corporate partnership in commendam by shares, a quorum of three-fourths is sought for the general assembly to approve the merger which should be representative of the majority of the actual or issued equity-capital as applicable.

The 2011 Turkish Commercial Code specifies that the merger agreement "may" provide for a remunerated opt-out of the relevant company being subjected to merger. Moreover, it is explicitly permitted that the merger agreement provides only for remunerated opt-out[31]. That being said, a provision for remunerated opt-out should be voted separately as to seek a quorum of ninety percent of the votes existing at a corporate capital company, or the unanimous vote of the shareholders vested with voting rights at a corporate partnership as applicable[32].

IV. C. Simplified procedure for mergers

A point in legislation where the notion of increasing shareholder commitments has been held in consideration is when introducing a simplified procedure applicable to mergers. Only if recourse can be made to the simplified procedure for mergers, then it is not necessary to submit the merger agreement and other documentation to the general assembly. 2011 Turkish Commercial Code, Article 155, a merger can be effected by simplified procedure if the acquiring corporation owns all of the to-be-acquired company's shares vested with voting rights. Even if the acquirer owns not all, but at least ninety-five percent of the shares vested with voting rights, recourse to the simplified procedure is possible provided that the merger would not be conducive to any supplementary monetary liability, personal performance obligation or personal responsibility against the shareholder(s) holding the remainder. Therefore, the individual consent of such shareholders is sought to deviate from the full procedure for mergers according to which the merger agreement was to be vote by the general assembly.

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31 "Opt-out" is specified in 2011 Turkish Commercial Code, Article 141.

32 2011 Turkish Commercial Code, Article 151, para.5

IV. D. Requisite general assembly quorum for a decision on merger

As a rule, decisions of mergers need to be taken at the general assemblies of the involved companies after works involved in order to realize the merger. As concerns joint-stock companies whose shares are not listed on the stock-exchange markets, the decision quorum sought for the general assembly is three-fourths of those present at the assembly provided that such quorum represents the majority of the equity-capital or of the issued capital as applicable. Therefore, unless more than a quarter of those present at the general assembly opposes the merger, shareholder(s) representing the majority of the capital can issue a decision favorable to the merger.

The merger of a joint-stock corporation into a limited liability corporation is conducive to a regime which is not covered by the single obligation principle applicable to joint-stock corporations. Indeed, pursuant to the 2011 Turkish Commercial Code, Article 151, para.4., when a joint-stock corporation is to be acquired by a limited liability company and if the merger is conducive to or increases auxiliary commitments or personal performance commitments, then the merger should be approved by unanimous vote of the relevant general assembly. Such requirement is parallel to the doctrine of increase of shareholders commitments.

V. Recourse to the judiciary for violation

A general assembly decision can contravene the principles or other norms concerning shareholder commitments by failing to satisfy procedural requirements, the quorum sought or due to its content.

V.A. Challenging a general assembly decision

A.1. Action to have a general assembly decision rescinded

2011 Turkish Commercial Code provides that a general assembly decision in violation of statutory norms, or the memorandum of association, and especially a decision not observing norms of integrity can be rescinded by a request to the commercial court. 2011 Turkish Commercial Code, Article 446 is worded as to entitle shareholders, the board of directors and members of the board of directors in an individual manner.

(1) Such a shareholder who can ask for rescission should be in a position to either (i) prove that their interest in such a result as requested is not only legitimate, but also they have opposed to the decision in the general assembly, or (ii) justify that he's entitled to initiate an action by asserting that failures to comply with certain procedural rules are (at least) among those factors which enabled such a decision to be taken. The provision's wording reads such that

a shareholder cannot avail of this course of action if he simply did not or could not oppose the decision except if a procedural failure was influential in enabling the decision to being taken;

(2) Also the board of of directors is entitled to initiate an action for rescission in its capacity as an organ of the corporation;

(3) Even a member of the board of directors can lodge for the rescission of such a general assembly decision if he would be vulnerable to a risk of being held liable for executing the relevant decision.

Different from requests for rendering a general assembly decision null and void, action for rescission should be initiated within a term of three months starting from the date by which the decision was issued.

A.2. Action to render a general assembly decision null and void

A novelty of the 2011 Turkish Commercial Code is the provision that a general assembly decision can be declared null and void, that is acknowledging the invalidity of a decision, in addition to situations where a general assembly is rescinded. Taking into account rather the "content" of the decision, a general assembly decision can be declared to be null and void according to Article 447 if the decision restricts a shareholder's right which stems from the law or contravenes the main structural features of joint-stock corporations.

V.B. Comparison of the two types of actions against a general assembly decision

Despite the substantive and procedural differences between rescission of a general assembly decision and declaring it null and void, the 2011 Turkish Commercial Code regulates common points of these actions. The 2011 Turkish Commercial Code specifically provides certain interim measures upon pleadings, that is while hearing a case for rescission of a general assembly decision, or to declare it null and void:

(i) the board of directors is required to duly announce the pleadings and the date of hearing, as such especially have that information announced on the internet site of the relevant company;

(ii) after hearing the board of directors on the matter, the court may – in the interim - rule for suspense of the relevant decision;

(iii) the court may order the plaintiff to deposit a caution for an eventual loss of the relevant company to arise due to the proceedings. If the court orders deposit of a caution upon the defendant's request, the court is to decide on the type and amount of the caution.

Different from grounds for rescission however, grounds for declaring a general assembly decision null and void stems from concerns of public order. Within the context of the present subject analyzed, it is noteworthy that according to the doctrine subjecting increase of shareholders commitments to unanimous vote, "in order to sue for having such a general assembly decision null and void, it is not necessary to have voted against it"[33]; such approach is valid if the single obligation principle is considered not to override, but to be taken in conjunction with the doctrine in a manner as to form a main structural feature of the joint-stock company constituting a norm of public order.

Finally, whether for rescission or declaring a general assembly decision null and void, a favorable court ruling would be effective with regard to all shareholders and not just those persons who have initiated the action.

V.C. Challenging the validity of a resolution of the board of directors

Another possibility is that a resolution of the board of directors contravenes the principles or other norms concerning shareholder commitments by failing to observe especially the separation of functions or due to the content of the resolution.

C.1. Action for rescission of a resolution

At a private joint-stock corporation, if the board of directors has been authorized to increase the equity-capital of the company up to the registered amount of equity-capital, the 2011 Turkish Commercial Code, Article 460, para.1 enables the board to decide for increasing the equity-capital in accordance with the Code and within the limits of its power set forth by the company's memorandum of association. As such, for the board of directors to issue shares for a value above the nominal value or restrict the existing shareholders's rights to acquire new shares, it is required that the board's authority is provided by the memorandum of association. In case of failure to observe the said rules, 2011 Turkish Commercial Code, Article 460, para. 5 permit recourse to the court aiming at rescission of such a board resolution. By explicit reference of the Code, its provisions from Article 448 to 451 relevant to the rescission of a general assembly decision applicable to joint-stock corporations are applicable also in respect of the rescission of such a resolution of the board of directors.

[33] Saintourens, Bernard "L'annulation, à la demande d'un associé, d'une décision d'assemblée emportant augmentation des engagements des associés votée à l'unanimité", Revue des sociétés 2004 p. 97 ff.

C.2. Action to render a resolution null and void

The 2011 Turkish Commercial Code, Article 391 enables the competent court to "declare" a resolution of the board of directors null and void "particularly" for lack of conformity with mandatory provisions and for lack of conformity with main principles in respect of the functioning of a joint-stock corporation. Such main principles include acting in accordance with the main structure of a joint-stock corporation as well as separation of functions among the company's bodies.

CONCLUSION

2011 Turkish Commercial Code tends to replace the notion of increase of shareholder commitments by adopting the principle of single obligation for the shareholder as far as joint-stock corporations are concerned; the doctrine of increasing shareholder commitments by unanimous vote rarely figures as a structural feature of the joint-stock corporation. The legislature rather emphasizes other principles as genuineness of capital, principle of single shareholder obligation and maintenance of capital in addition to the notions underlying those principles. Nevertheless, due to deviations from the single obligation principle, the doctrine concerning increase in shareholder commitments is not entirely overridden. For instance, the notion is preserved with respect to mergers absorbing a joint-stock corporation. Moreover, deviations from the single obligation principle being exceptional, such should be precisely specified in content. Finally, the distinction introduced by the referred doctrine to distinguish reduction of rights from increase in shareholder commitments can be considered to be still pertinent: if a shareholder right or interest is reduced or not sustained, *per se*, such does not translate to an obligation for the shareholder, therefore not by itself challenging the single obligation principle. Therefore, we believe that there are normative grounds for the referred doctrine to be upheld in conjunction with the principle of single obligation for the resolution of conflicts.

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PERFORMACE EVALUATION SYSTEM AS AN OBLIGATION IN PUBLIC SECTOR AND ITS LEGALITY TOWARDS RECENT AMENDMENTS

Kamu Sektöründe Bir Zorunluluk Olarak Performans Değerlendirme Sistemi ve En Son Değişiklikler Doğrultusunda Kanuniliği

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ABSTRACT

Public sector has both similarities and differences with the private sector. On the other hand, public sector and its employees have been criticized with inefficiency by citizens, politicians, academicians and other relevant counterparts. These critics or "accusations" also were articulated with the belief of having similar processes between public and private sector and so performance based reform studies have accelerated in the public sector. All these global changes are also valid for the Turkish public administration and personnel system.

In this study, the main dinamics of public and private sectors will be explained by outlining similarities and differences and individual performance evaluation system will be touched on as a tool of effectiveness and efficiency. The details of designing and implementation phases of individual performance evaluation system will be included in this context. Finally, existing and main legal basis of Turkish public personnel system and performance evaluation system will be shared; also jurally the implementation legality of performance evaluation system will be propounded in company with current amendments and studies.

Key Words: Public and private sector, performance evalaution system, public emploee, legal basis.

ÖZET

Bir takım farklılıkların yanı sıra kamu sektörü özel sektörle bazı benzerliklere sahiptir. Diğer yandan, kamu sektörü ve çalışanları vatandaşlar, politikacılar, akademisyenler ya da diğer ilgililer tarafından düşük performansla çalışmakla eleştirilmektedir. Bu eleştiri ve "suçlamalar" kamu sektörü ve özel sektörün benzer süreçlere sahip olduğu inancı ile de eklemlenmiş ve kamu sektöründe performans tabanlı reform çalışmaları hızlanmıştır. Tüm bu küresel değişiklikler Türk kamu yönetimi ve personel sistemi için de geçerlidir.

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Bu çalışmada benzerlikler ve farklılıklar üzerinden kamu sektörü ve özel sektörün ana dinamikleri anlatılacak ve bir etkinlik ve verimlilik aracı olarak bireysel performans değerlendirme sistemine değinilecektir. Bu kapsamda bireysel performans değerlendirme sisteminin kurgulanması ve uygulanması aşamalarındaki ayrıntılara yer verilecektir. Ardından Türk kamu personel sisteminin ve performans değerlendirme sisteminin mevcut ve temel yasal dayanakları paylaşılacak; güncel değişiklik ve çalışmalar eşliğinde performans değerlendirme sisteminin hukuki açıdan da uygulama mesruiyetinin varlığı ortaya konulacaktır.

Anahtar Kelimeler: Kamu sektörü ve özel sektör, performans değerlendirme sistemi, kamu personeli, yasal dayanaklar.

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INTRODUCTION

Public and private organizations have both similarities and differences. Some of these similarities are objectives, goals, personnel, units and activities which are common for both. All organizations regardless of being public or private, have objectives related to their goals even though their aims and policies are different. Furthermore, they have to possess their own human resources and departments in order to achieve these targets.

Generally, private organizations have been more inclined to measure and evaluate their personnel's work related activities. However, over time, public sector has also started to take interest in this area. Especially, there have been some new approaches to public administration with impacts of liberalism, globalization, privatization, and localization. Traditional public administration (or bureaucracy) has started to peremptorily abandon itself and new approaches lıkeHuman Relations School, Team Building, Total Quality Management, New Public Management (NPM) have started to direct most of activities and processes in thepublic sector (and bureaucracy) (Jreisat, 2012:77). As a new perspective, NPM,emphasizes transferring a set of private sector techniques, methods, and processes to thepublic sector (Homburg at al, 2007: 196, Lyons and Dalton, 2011: 239). Moreover, it is possible to say public sector has a broad range of external stakeholders such as private companies, non-profit organizations, volunteers, even clients while producing and delivering public services (Alford and O'Flynn, 2012: 3). These new perspectives include a "governance concept", which is really different from the government, by means of its collaborative structure which includes many "hands" and many "powers" (Paquet, 2013: 35).

Actually, not only public management but citizens' expectations from the state has alsochanged around the same period. Even the alteration of

public administration perspectives was a conclusion of the alteration of citizens' expectations and demands. Therefore, public services have to be redesigned around the needs of citizens and businesses (Archmann and Iglesias, 2010: 32). One of the results of this alteration and transformation process has beenputtingperformance evaluationunderconsideration.With this rapid change, individual performance evaluation systems (PES) have been initiated throughout government institutions.

The seeking of productivity, efficiency and effectiveness in the public sector is one of the most sigificant parts of thenew transformation process. In this new process that aims to escalate productivity and efficiency, public employees have become the core element of focus, increasing the importance of PES.As a result, a well-designed PES is important for increasing public employees' performance and productivity; and raisingthe quality of public services and contributingtoorganizational improvement.

I. THE MAIN DYNAMICS OF PUBLIC AND PRIVATE SECTOR

Organizations have many similarities and differences regardless of being in the public or private sector. However, these differences don't alter "seeking of performance and efficiency rising" which is their basic commonality, nowadays.

All structures possess human resources, managers, labor relations, units, missions, vision, aims, goals, several minor or major policies, a certain budget, anda set of rules. The basic working mentality based on achieving goals and aims are determined in accordance with definite rules in advance.

In spite of these similarities the general trend has been to restrict government and public organizations' power and to extend private companies' activities (Rainey, 2006: 7). The common idea is that; public organizations have lower performance and efficiency but private sector can maximize all resources and run much more efficiently. Therefore, if general ideas and the results are in this direction, there should be some factors, inputs and reasons which explain this situation. Probably, all factors and reasons will have a strong relationship with dissimilarities between public and private sectors. Therefore structures, main goals, proper and certain roles should be scrutinized elaborately to be able to apprehend public and private organizations.

A. Processes of the Public and Private Sector

Traditional public administration is perceived to be considerably different from private sector because of its more hierarchical and centralist concept, red tape, bureaucracy, seniority or length of service oriented implementa-

tions (not performance oriented) (Heywood, 2010: 453; Homburg at al., 2007: 3). However, nowadays there is a convergence between public and private sector activities. Thus, they are able to have several similar processes while still having some discrepancies. Each of different processes causes sui generis implementations for the public sector against theprivate sector.

Public organizations generally meet the needs of citizens and they use tax revenues while serving so we can mention a high level of responsibility towards citizens. Public organizations carry out their duties based on acts which are enacted by parliaments via deputies and representatives who are elected by citizens. Public sector and its activities generally include a social approach and generally government or public organizations cannot avoid providing a public service to citizens. There are no alternativesor freedom of choice for them in contrast with the private sector or company owners.

All these special situations impact many processes in public sector such as recruitment, promotion, payments. For instance, public organizations generally have to obey some official regulations or laws, maybe have some imperative phases or exams, when they want to employ new employees but companies do not have such a process except from some constitutional obligations concerning employment rights. Another example can be shared which is related to payments; public employees get their rise with a collective decision or collective bargaining so there is no personal implementation for each of the public employees. However, managers in private sector can pay a different salary for each employee; they may regard individual performance, working enthusiasm or some other conditions and values rather than seniority, stage or position.

B. The Similarities between Public and Private Organizations

There were several studies carried out regarding the separation of public or private organizations in PES by many authors and scholars. Their work-mainly tries to determine which factors influence performance, efficiency and effectiveness. On the other hand some of their work pointed to some identical dimensions for public and private organizations. For instance, James Thompson is known for his works on this issue which say public and private organizations have more similarities than differences. Herbert Simon (1995) also emphasized some commonalities among public and private organizations and emphasises that they have some identical or similar dimensions.

There is an analogous and entangled view for public and private organizations. Since they may have similar functional analogies (such as secretaries, computer engineers, schools, hospitals), similar human resources structures or processes (such as human resources departments and experts or

staffing, promoting, training activities), and similar duties or work processes. Organizations active in either public or private sector also have some interrelations with each other. It can be a contractual relationship, public-private partnership, monetary relationship based on a tender (e.g. subcontracting some of services such as security and cleaning or purchasing some materials with bidding) (Hisrich and Al-Dabbagh, 2013:113, Rainey, 2006: 62-65). With recent decades, public services have transformed to a more integrated and responsive structure and public, private, and non profit collaborations have increased and have become more prominent significantly (Alford and O'Flynn, 2012: 254).

Generally, making an organizational classification is really difficult for public and private sectors. Since it is hard to draw a line between public and private sectors and their activities.Many researchers (Atkinson and Halversen, 1986; Chubb and Moe, 1988) prefer to make a comparison between public and private organizations in terms of their functions so they try to determine their similarities and dissimilarities when they carry on their duties. Probably, to focus on the similarities between public and private organizations will make it easier to design a PES for the public sector. Public managers and human resources departments can benefit from processes and experiences of theprivate sector while aimıng to risetheperformance and efficiency in public organizations.

On the other hand, recent aproaches and perspectives in the area underline that it is an incontestable fact that "citizens" are "consumers" of public sectorgoods and servıces. This marketization continuum, which is valid for public sector goodsand services,has created a very important similiarity between public and private sector (Clarke, 2007:100).

C. The Differences between Public and Private Organizations

There are some specialties such as size, number of employees, duties, services which can affect and determine structures and dynamics of organizations (Rainey, 2006: 80). These features may not be of vital importance for an organization in terms of production, but they should not be missed out in forming a performance evaluation system. On the other hand, some main discrepancies are vital and human resources experts should bear them in mind. One of these main differences are goals, thus, public and private organizations have different roles and behaviorsbecause of their different targets.

There are many differences between public and private organizations. Disparity of goals, complex goal structure, level of formality (or bureaucracy), employment and purchasing processes (flexibility on these areas), consideration of satisfaction, risk taking level, focusing areas, level of rationalization

can be named as some of these differences. (Hisrich and Al-Dabbagh, 2013:4-7; Reddick, 2011: 7-9; Tozlu, 2014: 75-76). Benn and Gaus (1983) touched on a similar classification and they mentioned three major factors for explaining the distinction between public and private sectors; interests affected, access to facilities, resources or information; and agency (i.e., whether a person or organization acts as an individual or for the community as a whole).

Public organizations have different goals but generally companies only focus on making profit. This reality for public sector has not changed after globalization and NPM approach because according to the Bretschneider (1990) public managers and organizations are still more concerned with controlling costs instead of obtaining the benefits.This interpretation refers to some arguments underlining that red tape and excessive expensesare more common in public sector but making profit is not a part of these institutions agenda. All public managers try to achieve an organizational goal in addition to their individual or departmental goal. Furthermore public organizations have multiple goals while companies try to get profit as their main (or single) goal. Especially evaluation process of public organizations is hard because of this complex goal structure. Managers or human resources experts should measure several factors and criterion to reach an evaluation result. Generally public organizations have to obey several restrictive rules, there are many formal processes which impact public employees. The “red tape” issue should not be forgotten about thepublic sector. The other issue which is related is the recruitment and purchasing or bidding processes in the public sector. Managers sometimes cannot hire an employee which they want so they may have to work with an unqualified candidate because of rules, legislations or some official recruitment processes (such as an exams, getting a certificate or score etc.). However, managers in private organizations actmore rationallyin comparisonto their colleagues in thepublic sector because they only seek employees who can fulfill their conditions and help achieve targets. They aren’t restricted with limitations such as official rules or policies which ease their work processes.

Moreover public administrators should respect relevant and required legal regulations when purchasing any goods or services for theirorganization. Regarding issues like subcontract cleaning works, security affairs or other types of purchasing, public managers or relevant departments usually have to carry out some types of bidding formalities etc.However generally thereare much less restrictions for managers in private companies.

It should bementioned that the sense of satisfaction is really different in public sector because of its nature, duties and complex and social-based goals. This is also valid for both public managers and public employees so

there should be different incentives for them even though monetary incentives usually are thefirst thing that comes to mind to increase employees' performance. However it may work differently in public sector so not only monetary but also non-monetary incentives can be used for promoting them. On the other hand public managers may not be satisfied like their colleagues in the private sector, their satisfaction level or style ıs generally different (Reddick, 2011: 9).

Responsibilities and financing can be mentioned as other main differences between public and private sectors. Actually these two dissimilarities have a strong relationship with each other because public organizations use citizens' tax while serving or working so they have several responsibilities related to them. Tax payers want to know how their money is spent by governmentsand this demand brings more fairness, openness, accountability, and honesty (Rainey, 2006: 86). However private companies and their activities are financed by their owners, getting more profit or losing money is the only important point for owners, citizens or other groups aren't as significant.

While private companies usually don't have a strong external impact on their activities there can be several interventions such as political pressures or lobbying on the activities of public organizations. Therefore, public managers may not perform rationally as required (Simon, 1946).

All thesedissimilarities also impact the evaluation process of public organizations and private companies. Creating a PES with objective criterions for public sector may be harder to do when compared to the private sector. Objective criterions are described as "golden standards" in terms of public administrations and they are accepted as optimum measurements because reaching real and necessary results thereby minimizing judicial discretion is only possible through them (Andrews at al., 2006:16). Additionally, outcomes are not obtained quickly and easily in public sector, asuring the quality of a service requires much more time and patience (Cole and Parston, 2006: 43). However it is a difficult and complicated process to generate objective criterions for public organizations and their activities. A lot of performance criterions may be correlated with profits or costs in private sector but most of the time public organizations do not have the same opportunity(Tozlu, 2014: 25).

D. Being a Manager and/or Employee in an Organization

Another significant topic is the positions or rules in a work place. Actually being a manager or employee should be discussed in the context of two main dimensions, one of them is working in the public or private sector as a manager and employee; the other one is disparities of being a manager or an employee.

Generally, being a manager or an employee are the same concepts both inpublic and private sector. Both of these roles require a set of responsibilities and competencies which are related to human resources management. Managing, analyzing, planning, cooperating, organizing, leading, deciding, enterprising, interacting, recruiting, deciding, adapting, motivating, rewarding, communicating can be counted as some competencies of managerial positions. However, competencies sometimes can be more specific in the public sector organizational procedures such as fiscal management, budgeting and investing knowledge (Wheeland, 1994). On the other hand, some constraints, complicated structures, multi-tasks, and multi-goals allow public managers less decision making capacity and flexibility than their private counterparts. There may also be political pressures or insufficientclear performance measures for public managers (Rainey, 2006: 86-87).

If we compare both managers and employees regardless oftheir sector, the main difference and question is "How do managers work with an environment of multiple and complex constraints" (Ban, 1995:2). Definetely, being a manager or an employee requires different responsibilities and liabilities so it brings some details and differences in relation to their evaluation process. Individual performance evaluation is not only valid for employees but also managers. Especially modern methods include several stakeholders as an evaluator; for instance, 360 Degree Evaluation System, which is also called as team feedback system or multidimensional evaluation system, enables employees to assess their managers and managers also can assess employees as one of the evaluator stakeholders (Pynes, 2013: 315).

II. PERFORMANCE EVALUATION SYSTEMS IN THE PUBLIC SECTOR

The earlier practices of PESwereinitiated in the USA Armed Forces and after a while it began to expand to other areas. Especially the industry sector had several performance evaluation examples relavent to its nature and public sector had some experiments in time.

Public organizations have been criticized withinefficiency, unproductivity and ineffectiveness for many years. The critiques have focused on costs and quality of services, because they should meet the citizens' (customers) needs and expectations besides organizations should spend citizens' money consciously; thus citizens are tax payers (KarwanAnd Markland, 2006:348). There are two main reasons regarding the initiation process of PESin addition to other several goals. Firstly, public organizations and managers can dominate and control their personal's activities, skills, weaknesses and even recruitment process with the help of a well-designed PES. An information bank will be created thanks to system and it will give flexibility to managers (Agere

and Jorm, 2000:1; OECD, 2008:49). Secondly; the employees' contribution to aims, goals and some other criterions can bedetermined easily and managers can make some changes on their organization's work-flow (Hatry, 1999:4).

Performance management is the systematic process by which an agency involves its employees, as individuals and members of a group, in improving organizational effectiveness in the accomplishment of agency mission and goals. Therefore, if there is an idea of optimization for public organizations, individual evaluationmust be made as a vital part of performance management. This consideration has started to be depicted with NPM determinedly and insistently. When we look at the main components and arguments of NPM, the significance of performance evaluationcancan be observed easly (Akcakanat, 2009: 7; Dahlström and Lapuente, 2009:578; McDavid and Hawthorn, 2006: 286-287; Osborne and Gaebler, 1992: 264, Persson and Goldkhul, 2010: 53; Reddick, 2011: 84-85);

- Decentralization in government
- Less hierarchy and increased participation (with governance)
- Vision, mission, goal and result orientation
- Tending market instruments and mechanisms
- Performance based evaluation for employees and organizations
- Flexibility in labor life and relations
- Focus on cost efficiency and productivity
- The idea of earning government (not only spending)
- Customer oriented service approach (a convergence of citizen and customer)
- Preventative and proactive approach

A. The Main Components of Performance Evaluation System

Performance measurement and evaluation are components of performance-based management which involve determining what to measure, identifying data collection methods, and collecting the data. These are main milestones of a PES, some other phases of creating an evaluation system apart from these are:

Constituting a working group: First of all, a working group should be composed within the organization to be able to constitute a PES. This structure should be able to work readily and flexibly,furthermoreparticipation of some legist members from each of theunits is important for a rational conclusion

(Eraslan and Tozlu, 2011: 55-56). Moreover, some professional human resources experts may also need to get involvedwith the group. Undoubtedly, one of the most significant duties of working group will be informing and awareness rising for employees about PES (Hatry, 1999: 256).

Organizational analysis, job analysis, and job description: The working group should start to make a workload analysis in addition to organizational analysis and job analysis, job description. It will give a brief of the organization so managers can observe firm workload of every unit and some of the unbalanced workload easily (Cornetta at. al. 2008: 365).

Determining performance criterions and indicators: Performance criterions generally can be classified under some contexts such as input, output, quality, profitability, productivity, efficiency and outcome. Every organization may have some measures related to each of these contexts. However, objective-subjective criterion separation is the more important part. A modern individual evaluation system should be constituted on objective criterions which focus on quality of service and employees' job related performance rather than relativity, individual observations of evaluators and individual features of employees. Individual performance evaluation criterions should have some specialties and qualifications in literature:

- Must be related to vision, mission, aim and main goals of organization
- Must be written, comprehensible and updatable
- Must not conflict with each other
- Must encourage employees to work and compete,alongside having a balance in the level of dificulty
- Must not cause significant cost

On the other hand, focusing only on electedcertainactivities will be better and lesscomplicated rather than measuring all activities of anorganization while generating performance criterions.

Deciding performance evaluation method and period: Performance evaluation methods have an affiliation with legislation, working cycle, structure, culture, expectations and human resources policy of organizations. There is a broad range of evaluation systems, classic or modern, such as 360 degree evaluation system, imperative distribution method, graphic rating scale, critical incident evaluation, control list method, self-evaluation etc. However in recent trends, methods that have more stakeholders are been preferred. Managers, human resources experts, colleagues, employees (for managers), citizens can be mentioned as some evaluator samples (Vaughan, 2003: 371).

Evaluation period may be arranged as monthly, quarterly, half yearly or yearly. The evaluations which have excessive long term intervals or exact opposite may have some risks and disadvantages such as forgetting past events or missing some details related to work. This issue is also related with the proper functioning of organizations because employees must have sufficient time in order to be evaluated by their evaluators (De Conzo and Robbins,1996: 335).

Creating a bond between evaluation outcomes and human resources activities: A well-functioning PES will have significant and serviceable outputs. However what is more important is thateach of theseresults should be directed to a human resources activity such as promotion, paying, training etc. If a PESis not human resources oriented then all information obtained from the system will be raw and non-functional.

B. The Necessity of Performance Evaluation System in the Public Sector

There have been some arguments and assertions regarding to public organizations and civil servants which explain the necessity of performance evaluation in public sector. "Public employees work unproductively", "Their works and activities are not assessed objectively and properly", "They have a comprehensive job security and have a guaranteed earning every month" can be counted as some of these arguments and criticisms. Performance measurement and evaluation improves the management, delivery and quality of products and services. It also helps justify government's activities and their costs by this way it demonstrates the accountability of citizens', who are owners of resources as taxpayers money.

However, why are there so many criticismsand if they are true why is therea decrease in performance related issues with public employees and organizations? In literature, some commoncauses havebeen stated such as; lacking a fair and incentive rewarding mechanism, nonfunctional human resources policy (which is about promotion, rewarding, paying etc.), staffing faults, inadequate education, training, and qualification, work overload, unbalanced and unfair work distribution, extreme hierarchy and inflexibility, limited career opportunities.All these conditions cause performance decrease and so they prove the necessity of a PES for public employees

C. Performance Evaluation Process and Benefit

Performance evaluation process requires a performance measurement inherently. Organizations need data to be able to measure employees' working performances and they also have to organize a systematic human resources department. Obtainingdata and information related with theorganization, departments, and employees and having a functional human resources de-

partment will render much more rational to each of activities and processes of public organizations.

Some benefits of applying an individual PES in public sector, are shared below (Akcakanat, 2009: 10-11; Frederickson, 2006: 676; OECD, 2008: 50; Robson, 2005: 138);

• It puts together required information and data which is essential for an efficient management.

• It provides a classification of employees, according to their qualifications and experiences.

• It helps human resources departments and managers in theirdecisions resulting in promotion, training, wage policy etc.

• It enhances the connection between wages and work performance.

• It supports accountability, transparency and other principles in the public sector.

• It provides information to public organizations in budgeting, staffing, allocation of resources, strategic planning and other main processes.

• Itharmonises individual and organizational aims and goals.

• It redounds some power and flexibility to public managers on their employees.

III. GLANCE TO THE BASIC LEGISLATION REGARDING TO PUBLIC EMPLOYEES AND PERFORMANCE EVALUATION

A. The Constitution and No. 657 State Personal Law

With State Personal Law no. 657 coming into effect on 23.07.1967 there were three different types of civil servants defined; state civil servants, contract employees and servants with daily payments called as per diem employees. This implementation was modified in 1974 which has come to this day. With the mentioned modification the types of state employees were increased to four named as state civil servants, contract employees, temporary personal and workers. In time some professions have been removed from the scope of Law no.657 being regulated by separate laws. The main groups of this separate group of state employees are judges and prosecutors, academic personnel, military personal etc. On the other hand, with Law no.657 fundamental principles for the civil servant system - including all state employees - has been named as classification, merit and career principal.

Civil servants and other state employees have been defined in the 1982

Constitution as personnel who carry out the fundamental and continues duties belonging to the state, government business enterprises and other public entities according to the general administrative principals. The list of state institutions who are obliged to work according to general administrative principals have been declared by the council of ministers in 1975. According to this list Turkish Republic Presidency, ministries, affiliated institutions, local authorities/municipalities etc. are held responsible to supply public services according to general administrative principals whereas establishments of local authorities like water, gas, bus transportation managements have been left outside the mentioned list.

In the area of civil servants the fundamental and the most comprehensive legislation is State Personal Law no. 657, apart from this law Turkish Armed Forces Personnel Law no. 926, Higher Education Personnel Law no. 2914, Judges and Prosecutors Law no. 2802 are the other basic regulations enforced on particular occupation groups. Thus, it can be said that a need has developed to regulate separate occupational groups with independent sovereignty areas regarding their work. In all these groups separate employee groups have been defined similar to the four group definitions in State Personal Law no. 657. For example, in Higher Education Personnel Law no. 2914 academic members have been defined in three separate groups as teaching assistants, lecturers and associates. A similar separation has been made as officer, sergeant and specialized private in the Turkish Armed Forces Personnel Law no. 926. When PDS or another evaluation system is configured it is important to take into account the differences between the groups and the dıfferences within the groups themselves. Thus, taking into regard differences in institutional and employment structures will contribute in building a just, objective and rational evaluation system.

Clause 128 “Provisions regarding public servants” of the 1982 Constitution states the most fundamental matters regarding public servants declaring that “Fundamental and continues duties belonging to the state, government business enterprises and other public entities are carried out by civil servants and other state employees according to the general administrative principals.” With this provision the institutions that civil servants can work in and the types of services that they can perform are defined.

With the change in the Constitution in 2010 a rule came in about civil servants and other public servants having preserved their financial and social rights with a collective bargaining agreement. Later on this provision was also regulated with a separate law. With this change in law, it was stated that a collective bargaining agreement will be signed regarding issues of civil servants on the clause that Law 4688 will be the basis for the regulation of finan-

cial and social rights of civil servants. With the changes made structures like Public Employers Committee, Public Servants Arbitration Board, Public Servants Advisory Committee and Public Servants Union Committee were built. Thus with these changes civil servants rights will be discussed according to social dialogue and a more open democratic process.

The registry system was revokedby Law. No. 6111, which amended Law. No. 657 and opened the way to evaluate the individual success, productivity and efforts of public employees,in 2011. After that change, State Personnel Agency has initiated the preparation of a secondary legal regulation addition to several policies and proposals which were regulated in main documents such as the Five Year Development Plan and Annual Programs.

B. Main Documents

Tenth Development Plan (2014-2018) was approved by The Grand National Assembly of Turkey on 1 July 2013. It has a "Human Resources in Public Sector" part in the "Qualified People, Strong Society" which mentions issues about public employees, their efficiency and performance evaluation system. Therefore the policy number384 says "In order to increase the efficiency of public sector staff, an effective performance system will be created and linkages between the service, the staff, and the wage will be improved."

On the other hand, 2015 Annual Program (as a sub-document of the 10th Development Plan) states several diffirent targets related with the performance of public employees. According to this annualy monitored program; a human resources program model will be developed for public institutions and a separate model will be designed for career experts. A second target is to prepare a guideline for the performance evaluation of public employees furthermore the program envisages to establish an information system for public employees as well.

As seen from the documents above, the issue of performance evaluation of public employees is stated firmly in national documents which will be monitored on a regular basis. This demonstreates an intention to move forward in public institutions towards a PES similar to the private sector.

CONCLUSION

When citizens' expectations and demands change, it is not possible for public sector mindset and services to stay the same. For instance, citizens have demanded e-services and as a result "placeless public services" have become a prominent issue (Pollitt, 2013: 196-197). However, this transformation also can be related to public employees' work processes, for example-

flexibleworking types, flexible evaluation systems or performance-based implementations have become new but vitalissues concerning to public sector.

Public sector and private sector have a set of similarities and disparities so interchanges between these sectors are normal even itwill be renovator and improver for both sectors. Especially the processes and activities of human resources will have to follow the same path; an example is the new methods forperformance measurement and evaluation.

In the modern era financial concerns were raised resulting from lack of public service mesurement, in order to resolve these problems some new strategies to widen information technology, increase usage of performance management and measurement in public sector were put into force. (Greener, 2013: 185). Under these circumstances, if the point in question is increasing employee performance, efficiency and productivity then transferring some perspectives, processes, and implementations of the private sector to public sector should be comprehended. Individual performance measurement and evaluation is one of them and it can be designedexclusively for managers, employees or both.

There are some advices or steps when designing a PES for public employees. These phases are also valid for the private sector but they are very crucial for public sector designation processes. Public sector has some sui generis features that surely affects human and laborrelations. Therefore PES designers, human resources departments and human resources experts should be more careful about delicate relations in public sector. After institutions design an individual PES for public employees, the system designed should be implemented objectively. Additionally, it is important to remember that the PES process should be updated with time. The PES is a part of performance management cycle which includes “planning, acting, monitoring and planning (again)”.

One of the most significant principles of a public employee PES is the harmony at the work place, so the system should be designed in a way to protect work place relations. Another issue is choosing the incentives to motivate the employees. Probably, it will depend on some features of organization and employees’ expectations. Therefore, making a survey to determine public opinion in the work place will be good. Moreover PES process should be objective and transparent because employees’ confidence to the system is crucial. However, probably themost important phase of a PES is deciding on which outcomes and results will there be after the measurements are finalized, because it is clear that evaluation without rewards, tranings, and sanctions will not be succesful. It is essential that the system includes a set of logical cause

and effect relations between human resources activities (such as; promotion, training, waging, some benefits etc.) and the evaluation results. This will ease the managers' responsibilities and liabilities, furthermore it will help them to achieve a set of managerial aims such as evaluation, control, budgeting, motivating, celebration, learning, improvement (Greener, 2013:202).

Measuring and evaluating employees is a necessity both inpublic and private organizations because measurement and evaluation will provide an understanding regarding the functioning of the organization. This will increase the quality of the organizational environment of public institutions and these institutions also will benefit by the increase in personnel quality and citizen satisfaction.

Along with these global developments regarding PES, the Turkish public institutions and regulations have also evolved in time. The constitution and state personal law have both changed, enabling the evaluation of public employees according to individual success and productivity. Along with these changes, PES has been inserted in major national plan and programs which is a sure sign that further major steps will be taken in this are in the near future.

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THE CHALLENGES AND PREJUDGEMENTS TURKEY HAS EXPRIENCED THROUGH ACCESSION PROCESS TO THE EUROPEAN UNION

Türkiye'nin Avrupa Birliğine Üyelik Sürecinde Karşılaştığı Zorluklar ve Önyargılar

Gökhan SERTÖZ*

ABSTRACT

Turkey has been struggling to become a full member to the European Union since the year 1959. Achieving Turkey's dream of full membership to the EU is interconnected to its determination in fulfilling the Copenhagen Political Criteria; however it is also undoubtedly contingent upon the EU freeing itself of its prejudice against Turkey.

The foregoing essay dwells upon Turkey's strive to become a full member to the European Union for over fifty years, analyses the fundamental challenges and prejudgments it has experienced through this process.

Keywords: The EU-Turkey relations, the Copenhagen criteria, Turkish-Islamophobia, military coups, the Cyprus issue, human rights, the Kurdish issue, the Armenian issue.

ÖZET

Türkiye 1959 yılından beri Avrupa Birliğine tam üye olma mücadelesi vermektedir. Kuşkusuz, Türkiye'nin AB 'ye tam üyelik hayalinin gerçekleşmesi, Türkiye'nin Kopenhag Üyelik Kriterlerinin hayata geçirme yönünde göstereceği kararlılığa bağlı olduğu kadar, AB' nin de önyargılarından sıyrılmasına bağlıdır.

Bu makale, Türkiye'nin elli yılı aşkın süredir Avrupa Birliği'ne tam üye olma mücadelesini, bu süreçte karşılaştığı temel zorluk ve önyargıları analiz etmektedir.

Anahtar Kelimeler: Avrupa Birliği-Türkiye İlişkileri, Kopenhag kriterleri, Türk-İslam Fobisi, askeri darbeler, Kıbrıs meselesi, insan hakları, Kürt sorunu, Ermeni meselesi.

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1. INTRODUCTION

Turkey has been seeking full membership of the European Union (hereinafter EU) since 1959, and it is an undeniable fact that Turkey has faced more challenges than any other country in this process. As the EU's arbiter position around the globe has weakened due to the latest economic problems, the debates over this issue within such an unpredictable political arena have become more intriguing. The once solid ethos of unity of the EU is now facing challenges due to the dissemination of phenomena such as xenophobia, anti-immigrant tendencies and isolationism across Europe. That is why a vast majority of people both in Turkey and the EU have been discussing the implications of Turkey's prospective EU membership more fiercely.

Turkey has almost spent fifty years trying to become a member of the European Union. Despite the complications that have emerged regarding relations between Turkey and the EU, Turkey has managed to preserve its stance and attitude towards the Union. All the political difficulties Turkey has faced have not prevented it from proceeding in the accession process in a committed and determined manner. Through all these years, however, Turkey has repeatedly been excluded from membership.

Therefore, revealing the underlying reasons for this rejection would play a crucial part in determining which steps to take in the future. One of the greatest challenges that Turkey has faced was the decision by the European Council establishing that negotiations on eight chapters would not be opened due to the restrictions imposed on the Republic of Cyprus by Turkey. Another problem that accelerated the tension within the accession process was the blockage imposed on ten other chapters by the Greek Cypriot Administration and France. Considering the fact that Turkey has a huge population and size, a critical geographical location, and a significant potential in the fields of economy, security and military in addition to a cultural and religious diversity, Turkey's membership to the EU would undoubtedly be distinctive compared to former enlargement rounds. Therefore, in order to get a better understanding of the long lasting delay in Turkey's accession to the Union this paper will primarily dwell upon the main problem areas faced by Turkey in its EU membership process.

The primary focus will be on the historical development of prejudice in Europe against Turkey. Secondly, the paper will make an attempt to analyze the impact of the military coups experienced in Turkey on the membership process. Thirdly, a detailed review will be provided on the emergence and development of the Cyprus dispute along with the reasons why it could not be resolved. Another topic is focusing on criticisms against Turkey on human rights issues. The

paper will also make an attempt to analyze the impact of Alevi, Kurdish and Armenian issues on Turkey's EU process. The final focus will be on the other factors, which might play a role in the postponement of membership.

2. THE MAIN OBSTACLES FOR TURKEY IN ITS ACCESSION TO THE EU

2.1. Historical Turkish And Anti-Muslim Prejudice

In the course of history, the Turks and the Western Christian world have had close interaction. Europe and the Ottomans became neighbours in the Balkans and across the Mediterranean when the Ottomans extended their domain westwards.[1] During their extended presence in Europe, for around seven hundred years, a certain image of the Ottomans and Turks has developed for a variety of reasons. These include battles, religious dissimilarities, cultural differences, conventions and traditions, human psychology, and positive or negative stereotypes and clichés.[2]

Right up to the middle of the fifteenth century, when the Ottoman Empire was growing and extending its boundaries, the Turks were considered to be different, as others, to Europeans because of the expanding nature of the Ottoman Empire and their religion. They were mistrusted and perceived to be 'cruel', barbaric and devastating', and considered 'a potential threat to the existence of Christianity'. Throughout its history, despite serious internal conflicts and differences in beliefs and practices between the different sects of Christianity in Europe, when it was believed that Christianity itself was under threat from the Ottomans because of their different faith, the different sects became united against the Muslims, their 'common enemy'. It is of interest that in most European documents, both of the terms 'Ottomans' and 'Turks' have been used, without making any distinction between them, both being linked to Islam. Ottomans and Turks were regarded as the representatives of Islam and considered to be the 'enemy of Christianity'.[3]

For most Europeans, the fall of Constantinople in 1453 was a tragic historical disaster, a defeat of Christendom which could never be rectified. For most

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1 Renda G., The Image of the Turks in European Art, http://www.turkey-now.org/Default.aspx?pgID=663 (Accessed 01.07.2014)

2 Burçoglu N, K, "A Glimpse at Various Stages of the Evolution of the Image of the Turk in Europe: 15th to 21st Centuries to the Present-Political and Civilization Aspects", The Isıs Press, Istanbul, 2003, page 24.

3 Burçoğlu N. K, From Vision to Reality: A Critique, in LaGro E, Jorgensen K. E., "Turkey and The European Union, Palgrave&Macmillan, Hampshire,2007, page157, Holbraad C., "Middle Powers in International Politics", ,MacMillan, London 1984, page34, Bac -Müftüler,, M., Through the Looking Glass: Turkey in Europe, Turkish Studies, Vol.1, No.1, Spring,2000, page 27.

literate West Europeans, the connotations of the words "Turk" and "Turkey" are complex and emotional and associated with a history of antipathy; for East Europeans the traditional picture of the domineering Turk plays an integral part in national folk-lore. Richard Knolles, the historian of the Turks, expressed the feelings of Europe when he spoke of the Turk as "the present terror of the world." [4] Even in distant countries such as Iceland, men prayed to be delivered "from the cunning of the Pope and the terror of the Turk."[5] In fact, Luther argued that God sent the Turks to punish the Christians in the same way as he had sent war, plagues and earthquakes. [6]

In modern Europe, the historical categorisation of the Ottoman Empire as Europe's "other" still persists and it is argued that Turkey may not be European purely on account of its Islamic culture and roots.[7] This view of the Turks has been sustained even following the establishment of the modern and secular Turkish Republic.

Even in the process of Turkey's Membership of the EU, the leaders of the European Christian Democrat Parties, the German Chancellor and the Prime Ministers of Spain, Italy and Belgium, have all made statements to the effect that the European Union was a civilization project based upon Christian values that Turkey did not share.[8] In fact, the President of the European Convention on the Future of Europe, Valery Giscard d'Estaing, argued that Turkey was not a European country [9] and that to allow admission of this huge Muslim, non-European state into the EU, would mean the end of the European Union due to the fact that Turks had not experienced "Enlightenment".[10] Similarly, in the opinion of former EU Commissioner, Frits Bolkestein, accepting Turkey into the European Union would nullify the defeat of the Muslim Ottomans at the gates of Vienna in 1683 by German, Austrian and Polish troops. [11]

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4 Knolles R, The Generall Historie of the Turkes, Islip, London, 1603, page 42.

5 Lewis B, Europe and the Turks: The Civilization of the Ottoman Empire, http://www.historytoday.com/bernard-lewis/europe-and-turks-civilization-ottoman-empire (Accessed 01.07.2012)

6 Karlsson I, The Turk as a threat and Europe's "other", International, http://www.nurope.eu/stambul_pics/The%20Turk%20as%20a%20Threat.pdf, (Accessed 22.07.2014)

7 Baç- Müftüler M, and Stivachtis A, Y, Turkey-European Union Relations, Dilemmas, Opportunities, and Constraints, Lexington Books, Lanham, 2008, page 2.

8 Arikan H., Post-Helsinki: Is Turkey in the EU Accession Process, in Neuwahl N., "European Union Enlargement, Law and Socio Economic Changes", Montreal, 2004, page 275.

9 Ash T,G, "A Bridge Too Far?" The Guardian,14 November 2002.

10 Kirisci K, Is Turkey too big, too poor and too different for the European Union: Asset or Liability? In Lang P, Timmerman C, Rochtus D, Mels S, European and Turkish Voices in Favour and Against Turkish Accession to the European Union, Die Deutsche Bibliothek Published, Brussels, 2008, page 127.

11 Turkish accession: why frank discussion is vital,

Not long after Turkey's application to become a member of the European Community, in an article in Time magazine, a German Diplomat was reported as saying that even though not often expressed explicitly, there was a feeling in Western Europe that Muslims, whose roots lay in Asia, were not part of the western family. Turkish membership would lead to a loss of the EC's "European-ness"[12]

The underlying fear is that Turkey, with its significant Muslim population, would cause the preponderance of Islam in Europe due to it holding the majority within many EU institutions. The key factor stated by opponents to Turkey's membership, is difference due to its religion.[13]

Also, some claimed that it would be difficult to admit a Muslim country, not only because of the continuing anti-Muslim feeling within Christian nations, but also because of concern that Muslim ideals might clash with Western cultural values and so Turkey's accession might erode them as a consequence.[14] In the same way, Samuel Huntington, one of the most famous political scientists, in his famous work "The Clash of Civilizations" argued that the value systems of humanism, individualism and democracy were historical acquisitions of the Western world only, and that other civilizations, specifically Islam, did not tolerate democratic and humanist values. According to this approach, the conclusion is that Turkey with its Muslim population does not belong in the European Union.[15] It is interesting to note that in contradiction, Turkey is providing an example to Europe and the rest of the world on how democracy, secularism and Islam can successfully co-exist.

Moreover, on the question of whether Turkey's accession would lead to 'a clash or enrichment of cultures', Pope Benedict XVI, German Cardinal Joseph Ratzinger, responded that it would be a 'mistake' to connect Turkey with Europe. Describing Europe as a 'culture', Ratzinger argued that Turkey has never been a part of Europe, since Turkey belonged to another continent, offering as evidence events such as the wars against Byzantium, the fall of Constantinople and the siege of Vienna. This statement caused a furore in the mass

http://www.europeanvoice.com/article/imported/turkish-accession-why-frank-discussion-is-vital/50624.aspx, (Accessed 01.07.2014)

12 Pagden A,The Idea of Europe:from antiquity to the EU, University Press, Cambridge, 2002, page 211.

13 Rochtus D, European and Turkish Voices In Favour and Against Turkish Accession to The EU, Bruxelles: New York: P.I.E. 2006 page 25.

14 Arvanitopoulos C, Turkey's Accession to the European Union: An Unusual Candidacy, Springer, Berlin 2009, page 24.

15 Topcu F, The Civilized Clash Between Turkey and the EU, www.inclusionexclusion.eu/site/wp-content/.../04/Topcu-Fatih.doc, (Accessed 25.07.2014)

media and divided public opinion in the EU, during the discussion on whether to start negotiation talks with Turkey.[16]

Furthermore, according to a survey carried out in 2008, there would be strong opposition to Turkey's accession to the EU even if Turkey were to implement the reforms desired by EU members. Much of the opposition seems to have had a religious justification and confirmed the presence of increasing popular concern on the effect a large upsurge of Muslim immigrants would have on social stability.[17] Also it is argued that the rejection of the EU Constitution in Netherlands and France focused on the opposition to the admission of Turkey into the EU.

There is no doubt that the existence of anti-Turkish feeling within the EU elite is obvious. Former French President, Nicolas Sarkozy, and German Chancellor, Angela Merkel, are both against full Turkish Membership.[18] Sarkozy has clearly propounded his opposition by declaring: "Whether Turkey meets the conditions for entry or not does not solve the problem. On this matter, I have always been clear: I do not think Turkey has a right to join the European Union because it is not European"[19] At this juncture it is worth mentioning the EU President, Herman Van Rompuy's consideration concerning EU borders and Turkey: "Turkey is not a part of Europe and will never be part of Europe. An expansion of the EU to include Turkey cannot be considered as just another expansion as in the past. The universal values which are in force in Europe, and which are fundamental values of Christianity, will loose vigour with the entry of a large Islamic country such as Turkey."[20]

On the other hand, a statement made during the Helsinki summit provided a convincing argument to the Turkish authorities and public that the EU did not perceive itself to be exclusively Christian.[21] The European Council declared that Turkey was a candidate state destined to join the EU on the basis of the same criteria as applied to the other candidate states.

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16 Kubosova L,Vatican signals support for Turkey EU bid, http://euobserver.com/15/24163 (Accessed 24.07.2014)

17 Larrabee F, S, Rabasa A, The rise of Political Islam in Turkey, Rand ,Santa Monica,2008, page 77.

18 Toghill J, Polis Journal Vol. 6, University of Leeds, http://www.polis.leeds.ac.uk/assets/files/students/student-journal/ug-winter-11/james-toghill.pdf (Accessed 25.07.2014)

19 The National Interest, Making France a Power for the Future, http://nationalinterest.org/commentary/making-france-a-power-for-the-future-part-i-1536,(Accessed 25.07.2014)

20 The Telegraph, http://www.telegraph.co.uk/news/worldnews/europe/eu/6600570/EU-president-Herman-Van-Rompuy-opposes-Turkey-joining.html, (Accessed 28.07.2014)

21 McLaren L, M, Turkey's eventual Membership of the EU: Turkish Elite Perspectives on the Issue,Journal of Common Market Studies, Volume 38, 2000, page 119.

On 3rd October 2005, following a meeting in which it was agreed that accession negotiations with Turkey could commence, the Portuguese Minister of Foreign Affairs stated that the decision was a victory for Europe and a bitter defeat for Osama Bin Laden. Moreover this decision to start accession talks was welcomed by many on the basis that the idea concerning 'the EU as an entirely Christian Club' had been proved wrong and this decision would improve the prospects of a dialogue between the two worlds.[22]

Turkey can be considered as an example of the compatibility of Islam with democracy and modernization. Moreover, admitting Turkey to the EU would demonstrate that the view of the EU as an exclusive Christian club was no longer prevalent in Europe. Failure to admit Turkey so could result in further alienation of Muslims already residing in Europe. With this in mind, the commencement of accession negotiations with Turkey indicated the EU's readiness to form a genuine democratic and multicultural political space. Therefore, Turkey stands as a test of the EU's acceptance of multiculturalism.[23]

During the progress of relations between Turkey and the EU, it would be advantageous for EU policy makers to promote the idea of unity in diversity, thereby indicating that Turkish culture and the Islam religion were compatible with European culture and Christianity and eliminating the idea that the EU was an exclusively Christian Club.[24]

To summarise, Turkish accession would provide the EU with a golden opportunity to deal with the challenges of cultural diversity and multiculturalism. Its accession would enable increased dialog between different cultures in Europe, and would serve to transform the Union into a cosmopolitan structure. [25] In the new world order, Turkey's membership would represent the possibility of uniting different cultures within the framework of common values and thereby reinforce cultural plurality.[26]

In the development of an anti-Muslim and anti-Turkish bias throughout Europe the situation of migrant Turkish workers offers another aspect. After the World War II, in order to rebuild and strengthen the economy, Europe needed to supplement its workforce on a grand scale. In the period from 1961

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22 Supra fn 10, page 129.

23 Dismorr A., Turkey Decoded, Saqi Books, Lebanon, 2009, page 18.

24 The Telegraph, http://www.telegraph.co.uk/news/worldnews/europe/eu/6600570/EU-president-Herman-Van-Rompuy-opposes-Turkey-joining.html, (Accessed 28.07.2014)

25 Bac Muftuler, M, The European Union and Turkey, Democracy, Multiculturalism and European Identity , Recon Working Paper, İstanbul, 2011/20, page 17.

26 Kalin Y, M, The Implications of EU Admittance of Turkey on Turkish-EU Relations, Strategy Research Project, 2005, page 13, http://www.strategicstudiesinstitute.army.mil/pdffiles/ksil42.pdf, (Accessed 18.07.2014)

until 1973, Turkey was one of the largest suppliers of migrant workers to the Union. In particular, the Federal Republic of Germany, Austria, Belgium, the Netherlands, France and Sweden recruited around 800,000 people as guest workers.[27] The number of Turkish immigrants reached three million in Germany, in the 1980s. During this period, the German government presumed that these guest workers would go back home after accumulating sufficient wealth. However, a large number of these workers decided to settle down and the number increased steadily due to family reunification, asylum seeking and natural birth. Additionally, German governments did not take concrete measures to integrate the Turkish immigrants into German society. [28]

Within this context, the arrival of Turkish workers created other unforeseeable results. The controversy is indicated by the Swiss author, Max Frisch, as follows: "we were looking for a work force, but human beings came".[29] As a matter of fact, until going to Europe most Turkish workers were living in the rural areas of Turkey. Their education level was low and they had not even been to a city in Turkey. Hence, social integration problems was arose for both parties: the host European countries experienced difficulty in accepting these immigrants as equals, whereas the workers and their families experienced alienation and inability to integrate into the new society. This problem became highlighted due to the establishment of ghettos in which the migrants shut themselves in and refused to adopt European culture. Eventually, this vicious cycle between Turks and Europeans became too difficult to resolve. [30]

Conversely, in general second/third generations tend to be more willing to integrate and accept the host population's culture. Especially third generation Turks, who were born and grew up in Europe and have been better educated, have a better professional status and have transformed classical Turkish society into a Euro-Turk society which is more interactive and sociable, and has therefore broadly overcome problems related to integration into German society. [31]

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27 Soysal Y, "Workers in Europe: Interactions with the Host Society", in Heper M, Öncü A., Kramer H., "Turkey and the West", London, 1993, page 220.

28 Yilmaz B., Turkey's Membership in the EU: Realistic or Merely Wishful? http://hir.harvard.edu/turkey-s-membership-in-the-eu-realistic-or-merely-wishful (Accessed 23.02.2015)

29 Jackson G,Civilization & Barbarity in 20.Century Europe, Humanity Books,New York, 1999, page 217.

30 Burçoğlu N. K, From Vision to Reality,: A Critique, in LaGro E, Jorgensen K. E., "Turkey and The European Union", Hampshire, Palgrave & Macmillan, 2007, page 167.

31 Kılıçlı A, Turkish Migrants in Germany, Prospects of Integration, Observatory of European Foreign Policy, 2003, page 3, http://www.iuee.eu/pdf-dossier/12/rXNHUsicpVwS6Cd7AQHA.PDF (Accessed 23.02.2015)

However the current situation is that this disagreeable image of Turkish workers has started to fade out, and, since the 1980s, Turkey has been represented in Europe by Turkish academicians, students and bureaucrats.[32]

As described above, anti-Turkey and anti-Islam tendencies observed in Europe may be considered as predominantly resulting from the historical wars along with religious and cultural differences among many others. Turkey is still described as the "other" within the European Union due to its religious, cultural, historical and geographical differences.

2.2. Military Coups And Their Adverse Effects

The army has always held a dominant and autonomous place in the state tradition of Turkey, and possessed a strong voice in Turkish political life. The military do not limit the scope of their duty to the security of the country alone, but have also always been heavily involved in the shaping of Turkey's political, social and economic life. The armed forces have been trying to regulate, drive and guide all spheres of politics directly and indirectly.[33] The role of the army in Turkish politics is a significant issue in the country's European Union membership process, since one of the crucial political factors stipulated by Brussels for fulfilling the Copenhagen political criteria and obtaining full membership has been the civilian control of the military. [34]

In order to specify the autonomous role of the Turkish military in the politics of the country, it is necessary to examine the past and look at the historical heritage which has shaped the backbone of its ideology.[35] The legacy of military involvement in Turkish politics originates from the times of the Ottoman Empire. The military played a key role in the rise of the Ottoman Empire, since having a strong army enabled the territory to be extended. [36]

The army started to evolve at a time when institutions developed in line with Western models were established. The army's modernization process was driven by a new generation of reformist officers. These officers regard-

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32 Kurt L, An Unwritten Condition for Turkey in its Accession to the EU, Master Thesis, Essex, 2008, page 34.

33 Civilian- military relations , the security sector and civil control, Istanbul, http://www.tr.boell.org/web/19-815.html, (Accessed 01.08.2014)

34 Yıldırım Ç, The Role of Military in Turkish Politics and the European Union Membership, http://sabanciuniv.academia.edu/CagriYildirim/Papers/829534/The_Role_of_the_Military_in_Turkish_Politics_and_European_Union_Membership_Negotiations , (Accesed 01.08.2014)

35 Guney A, Karatekelioglu P, "Turkey's EU Candidacy and Civil-Military Relations: Challenges and Prospects"Armed Forces and Society,Vol. 31,No.3, 2005, page 441.

36 Ahmad, F, The Making of Modern Turkey, London and New York, Routledge,1993, page 2.

ed themselves as the initiators of enlightenment.[37] They pioneered political modernization by leading the 1876 revolution and also the Young Turk revolution of 1908. The legacy of military intervention in which the armed forces play a leading role, brought about new reforms, changed significant aspects of the political and social systems.[38]

After Mustafa Kemal Atatürk rose to become a political and military leader, following success in the Turkish War of Independence, he and other generals were able to create the modern Turkish nation-state and lead the introduction of various reforms to transform the society and structure of the state. This vanguard role of the Turkish army is the reason they are considered to be the founders of the Republic.[39]

During the first year of the Republic, Mustafa Kemal Ataturk sought to separate the armed forces from open involvement in party politics. To this effect, a law was passed in 1923 which obliged serving officers who were elected as members of parliament to resign from the army. Mustafa Kemal Ataturk's intention was not only to prevent the military from exercising direct political influence, but also to disengage it from the daily routine of political rhetoric.[40] Nevertheless, Ataturk did not completely remove the army from politics because he believed it to also perform the role of guardian of the secular, reformist, and democratic goals of the Republic.[41]

Consequently, the army has ever since assumed a responsibility for the protection of the society from various threats and for maintaining the principles of the Kemalist Republic. In the past, when it was felt that the Republic and its principles were under threat, the army took responsibility for its protection.[42]

This principle was included in the Turkish Armed Services Internal Service Code, Article 35, which provides that "the duty of the armed forces is to protect and safeguard Turkish territory and the Turkish Republic as stipulated by the Constitution." Four instances of intervention in he country's politics under the aegis of national security have since occurred justified on this legal basis.[43]

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37 Hale W., The Turkish Army in Politics, 1960-1973. London and New York: Routledge,1990, page 55.

38 Zurcher E, Turkey a Modern History, IB Tauris ,London, 2001 page 122.

39 Songun S, The Civil-military relationship in Turkey and the European Union membership,Izmir University of Economics, 2006, p.24.

40 Heper M & Tachau F,The State, Politics and the Military in Turkey. Comparative Politics, 1983, page 19.

41 Supra fn 34.

42 Supra fn 37, page 56.

43 Bac- Muftuler M, Turkey's Relations within a Changing Europe, Manchester University

27 May 1960

In the first open Turkish general election, which was held on 14.May.1950, the Democrat Party won and ruled the country for the next ten years between 1950 and 1960. The first years of the new government were successful years in which industry was opened up to private enterprise and the national income grew by 40 per cent. However, opposition to the ruling party began in the second half of the decade when economic indicators became worse. After 1954, economic growth slowed, and the inflation rate and balance of payments deficit rose. As the economic discontent escalated, the government became more politically repressive. [44]

In addition, the government was also criticized for bestowing too many privileges upon the Islamic conservatives. The mounting opposition to the government was revealed through large scale student protests.[45] Apart from the internal factors, the external factors such as the accession of Turkey to NATO and the consequent decline in the traditional central role of the military elite constituted another principal cause of unrest throughout the country. [46]

Due to all these factors, in 1960, military leaders became convinced that the Menderes government had departed dangerously from the principles of the Republic's founder.[47] On 27 May 1960, the military overthrew the government of the then-Prime Minister Adnan Menderes. Menderes and his fellow Democrat Party (DP) members were tried in 14 separate cases in Yassıada, and resulting in a ruling of three death penalties, twelve life sentences and hundreds of long-term imprisonments.[48] In September 1961, Prime Minister Adnan Menderes, along with his foreign and finance ministers, was executed.[49]

Subsequent to the 1960 Intervention, the Turkish Constitution of 1924 was repealed and replaced with the 1961 Turkish Constitution, which included more detail on civil liberties**.** [50]

Press, Manchester, 1997, page 77.

44 Supra fn 39, page 27-28.

45 Ibid 28.

46 Burak B, The Role of Military in Turkish Politics: To Guard Whom and From What, European Journal of Economic and Political Studies,Vol:4 No:1 Page 150.

47 Turkey - Acknowledgments and Preface**,** http://www.mongabay.com/reference/country_studies/turkey/all.html, (Accessed 02.08.2014)

48 A tale of a military coup: How did they overthrow Menderes, http://english.yenisafak.com/mobil/news/a-tale-of-a-military-coup-how-did-they--2022735 (Accessed 1.03.2015)

49 Global Security Watch--Turkey: by Kibaroğlu M, Kibaroğlu A, Talât Sait Halman, Greenwood Publishing Group, Wesport,2009, page 84.

50 Supra fn 46, page 150.

The military coup in 1960 delayed Turkey-EEC negotiations. This disruption of the democratic process was considered a turning point in modern Turkey's history because after this, the military forces became an autonomous institution, assuming the self declared role of guardian of the regime. A National Security Council was established to enable the armed forces to take part in daily politics.[51]. The Chief of General Staff was again made responsible to the prime minister rather than the Minister of Defence, which had a significant impact on civil-military relations.[52]

12 March 1971

After the 1960 intervention, the army handed authority to the elected civilian government. Turkey drafted its most liberal constitution in which human rights were protected and some measures were taken to prevent the emergence of an authoritarian regime, [53] but the ruling government at that time was not effective and strong enough to handle the mounting public disorder and address the anarchical situation in the country. The universities became inoperative due to student unrest and fighting, and, equally, in the factories the workers went on strike and adopted a militant stance [54].

Eventually, on 12 March 1971, the government was made to resign when the commanders of the Turkish Army Forces (TAF) gave an ultimatum to the president: The TAF demanded that the current government should step down to make way for a "strong and capable government" which could halt the growing chaos spreading through the country. If this demand was not met then TAF would assume responsibility for the administration of the country.[55] Confronted with this ultimatum, the government had no choice but to immediately resign.[56] In the history of Turkey, the 1970s were characterized by the reinforcement of the state authority over individual rights and liberties.[57]

12 September 1980

The foremost reason for the military intervention on 11 September 1980 was the growing political and economic instability during late 1979. In total, 5,241 people died and 14,152 were wounded in the years 1977 to 1980 due

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51 Supra fn 32 page 47.

52 Sakallıoğlu, U C., "The Anatomy of the Turkish Military's Political Autonomy", Comparative Politics, Vol. 29, No.4, 1997, page159.

53 Hale W, Turkish Politics and The Military, London, Routledge, 1994, page 138.

54 Ahmad F, The Turkish Experiment in Democracy 1959-1975. London, page 204.

55 Supra fn 46, page 150.

56 Harris S, G., "Turkey; Coping with Crisis", Croom Helm Ltd, Kent,1985, page 62.

57 Supra fn 46, page 151.

to militant acts and terrorism.[58] Economically, by the late 1970s, the country had serious problems with an inflation rate in excess of 80% and unemployment at around 15%. By 1980, the balance of payments deficit had risen to 3.4 billion. This domestic economic predicament exacerbated political tensions.[59]

Due to the results of the general elections held in 1973 and 1977, weak coalition governments had been formed which could not maintain stability. The military also became highly critical of these governments due to their inability to tackle the economic problems in the country and to suppress challenges to basic political values.[60]

On 12 September 1980, because of the situation of strong economic and social decline in the country, the military staged a third coup declaring their intention to re-establish democracy.[61]

The crisis which gave rise to the1980 coup had a variety of causes ranging from economic breakdown and civil unrest, to open challenges to fundamental principles such as secularist nationalism. Despite this, the military maintained that the failure of the economic and social systems was the almost entirely due to the loss of governmental authority.[62]

28 February 1997

Being the largest party, the Welfare Party (WP) received 22.5 percent of the votes in the 1995 general elections, and formed a government. [63] The party was known for its religious rhetoric and when this was carried into action, the military became concerned. Some of the WP's practices included "the adoption of Ramadan (the holy month of fasting in Islam) hours in governmental organizations, increasing the financial strength of religious entities, and increasing the number and activities of religious orders as well as prayer leader and preacher schools".[64] Mr. Erbakan, the leader of the Welfare Party, believed that his policies posed no threat to secularism in Turkey. He maintained that the intention behind his proposal to allow female civil servants to wear Muslim head scarves, for example, was merely to offer more freedom of

58 Momayezi N, Civil-Military Relations in Turkey, International Journal on World Peace, Vol. 15, No. 3 September, 1998, p 4.

59 Supra fn 39, page 32.

60 Songun S, Bahcesehir Üniversitesi Civilian Control Over the Military: The Case Of Turkey with Special Focus on Internal Threats on Its way to European Union Membership, Master Thesis, Istanbul, 2008, page14.

61 Supra fn 39, page 32.

62 Supra fn 40, page 25.

63 Ayata S, "AK Party Foreign Policy Orientation" in Martin L. G., Klerides D., The Future of Turkish Foreign Policy, Cambridge, The MIT Press, 2004, page 244.

64 Supra fn 35, page 447.

choice.[65] However, the military officials, who regarded themselves to be the principal guardians of Turkish secularism, interpreted the developments in a different way. [66]

The military began to respond to these developments, although it did not initially intervene directly;[67] instead, the National Security Council (hereinafter NSC) gave the Prime Minister a list of 18 actions they required in order to reduce Islam's influence on the functioning of government.[68]

The decisions of 28 February 1997, were perceived as an ultimatum by the civilian government, and this "indirect intervention" in Turkish politics was considered a "silent coup d'état" or a "post-modern coup" and resulted in the resignation of Prime Minister Erbakan.[69]

Consequently, the military regained its political influence once more, not by direct intervention, but by forcing the civilian government to step down to be replaced with one more in sympathy to the values of the military. [70]

This dominant position of the military in Turkish politics was deemed to be one of the principle obstacles on the road to membership and was widely criticised by the EU in the Turkey Progress Reports. The main criticisms directed by the EU towards the Turkish military were in relation to constitutional items and democracy. Specifically at issue were: the status of the chief of the general staff under the prime minister (instead of the Ministry of National Defense), the role of the NSC in Turkish political life, and the lack of effective civilian or parliamentary control over the military budget.[71]

However, the standpoint of the Turkish army in Turkish politics in considering itself to be a "guardian" of the Republic was in direct conflict with the EU's principles of no military involvement with politics, and caused a problem in Turkey-EU relations. The reasons why the European Union has been encouraging Turkey to reform its civil-military relations were because of the Copenhagen criteria, which concerned three distinct areas: political, economic, and those related to the obligations of the EU membership.[72]

EU candidacy has certainly contributed to the democratization of civil-mil-

65 Supra fn 58, page 4.
66 Ibid page 10.
67 Narli N., "Civil –Military Relations in Turkey",Turkish Studies ,Volume 1, Issue 1, 2000, page 115.
68 Supra fn 58 page 11.
69 Supra fn 35 page 448.
70 Supra fn 39 page 34.
71 Supra fn 35 page 443.
72 Supra fn 34. (Accesed 01.08.2014)

itary relations in Turkey.In the 2011 Turkey Progress Report, the progress made by Turkey in ensuring the civilian oversight of the military is summarized as follows: "Good progress has been made on consolidating the principle of civilian oversight of security forces. Decisions of the Supreme Military Council were opened to civilian judicial review. Civilian oversight of military expenditure was tightened and a revised National Security Plan adopted. Furthermore, legislation intended to increase civilian oversight of the military (the Court of Accounts Law and the draft Ombudsman Law) was amended in parliament."[73] Additionally in 2012 Turkey Progress Report, the following remarks were made by EU Commission "There was further consolidation of civilian oversight of the security forces. The introduction of parliamentary oversight of the defence budget was positive, although this, too, is limited in practice. The General Staff generally refrained from exerting direct or indirect pressure on political issues."[74] Regarding this issue, in the 2013 Turkey Progress Report it was underlined that "the progress was made in consolidating civilian oversight, in particular with the parliamentary investigation into past military coups and legislative amendments, confirming the profound shift in the balance of civil-military relations in favour of the civilian authorities".[75]

In this framework, during European Union membership process, legal barriers and traditional practices preventing political control over the armed forces, which is one of the most distinctive features of western democracies, have been gradually diminished since 2010.

2.3. The Cyprus Issue

In 1571, Cyprus was captured from the Venetians by the Ottoman Empire, who ruled there until 1878. At the end of the Russo-Turkish war, the United Kingdom adopted administrative control of the island. When the United Kingdom declared war against the Ottomans, during World War I, the annexation of the island was also declared unilaterally. Then, with the signing of the Lausanne Treaty of 1923, Turkey and Greece handed over Cyprus to the United Kingdom.[76]

In the fifties, despite not having ruled Cyprus since the 11th century, Greece

[73] http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/tr_rapport_2011_en.pdf, page 14 (Accessed 09.08.2014)

[74] Turkey 2012 Progress Report, http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/tr_rapport_2012_en.pdf, page 12 (Accessed 18.09.2014)

[75] Turkey 2013 Progress Report, http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/brochures/turkey_2013.pdf,page 11 (Accessed 18.09.2014)

[76] The facts about Cyprus issue, http://archive.worldhistoria.com/printer_friendly_posts.asp?TID=2896, (Accessed 15.02.2015)

demanded transfer of the island to their control, based on the fact that the majority of the inhabitants were of Greek origin. Their view was that "the Greek Cypriot people are entitled to self-determination and the right to statehood and that the Turkish Cypriots are just a subject".[77]

The independence of the Republic of Cyprus was finally declared in 1960 following what was known as the London-Zurich Agreement.The agreement followed discussion between Turkey, Greece and the United Kingdom, and resulted in a joint government, which would have a Greek Cypriot president and a Turkish Cypriot vice-president to ensure that Turkish Cypriots were represented in matters of state. There was also a section in the agreement which permitted Turkey or Greece a military presence on the island if they felt that either of their respected communities was threatened by the other.[78]

Fighting broke out between the two communities on several occasions, notably in 1963, 1964 and 1967, following a move by the Greek Cypriots in 1963 to exclude Turkish Cypriots from governmental matters. Although Turkey brought in military aid to protect its population on the island, it desisted from the direct military intervention permitted under the 1960 Treaty of Guarantee. [79]

However, a few years later, in July 1974, the Turkish army began to land troops in Cyprus [80] in order to prevent enosis and bring the tragic results of the conflict between the Greek Cypriots and the Turkish Cypriots to an end.[81] Following this intervention, the island became split into two areas with Turkish Cypriots in the north and Greek Cypriots in the south. Due to the Cyprus crisis in 1974, relations with the European Union were suspended.[82] The progress of Turkey's accession process to the European Union also suffered a severe setback on 15 November 1983 when Turkish Cypriots announced that the northern part of Cyprus was to become independent and subsequently known as "The Turkish Republic of Northern Cyprus" in early 1995. This new state was recognised only by Turkey itself.[83]

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77 Bac -Muftuler M, The Cyprus debacle: Bilkent University, Ankara, page 561.

78 Tozun Bahceli, Theodore A. Couloumbis, Patricia Carley, Greek-Turkish Relations and U.S. Foreign Policy, Cyprus, the Aegean, and Regional Stability, page 2, http://www.usip.org/sites/default/files/pwks17.pdf, (Accessed 13.02.2015)

79 Supra fn 77 page 562.

80 James H. Meye, Turkey's Cyprus Policy and the Interventions of 1974, http://wws.princeton.edu/research/cases/cyprus.pdf (Accessed 03.07.2014)

81 Supra fn 80.

82 Supra fn 23, page 39.

83 Faucompret E, Konings J, Turkish accession to the EU, Satisfying the Copenhagen Criteria, Routledge Published, London,2008, page,177.

There have been various attempts to reunify Cyprus after its division in 1974, particularly on the part of the UN.[84] The most recent and effective of these was the Annan Peace Plan, instigated by UN Secretary General Kofi Annan,[85] which includes a proposal for a way to achieve unification of the island as a United Cyprus Republic.[86] Although the majority of Turkish Cypriots were in favour of the proposal, presented in a referendum on 24 April 2004,[87] 76% of the Greek Cypriots rejected it outright. [88]

Although criticised by EU members for its rejection of the proposal for reunification, Greek Cyprus became a member of the European Union a week later and the commitments made by the EU to the Turkish Cypriots were not fulfilled.[89] Of course, on consideration of the policy of good, which requires that candidate countries peacefully settle their border conflicts, it is clear that alternative scenarios might have occurred; for instance a postponement of any Cypriot accession to the EU until after a political settlement concerning the island had been achieved. Nevertheless, despite the hesitation of several key EU countries such as France, Italy and Holland, the intimidation of Greece regarding the possibility of using veto power to block the entire enlargement process involving Central and Eastern Europe lead to Southern Cyprus becoming an EU Member State.[90] The rejection of the Annan Plan showed that the involvement of the EU had so far transformed the situation into a new impasse, with the Greek Cypriots inside the EU, Turkish Cypriots outside and the island still divided.[91] Currently, despite the fact that the Annan Plan was rejected by the Greek Cypriots, Cyprus is now, as a member of the EU, attempting to block Turkish accession to the EU unless reunification is achieved.[92] Many Turks believe that the Turkish government and the Turkish

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84 Santagostino A, A candidate different from the others Turkey in the European Union Club Publishing, Brescia2005, page 43.

85 Muzaffer E Y, The Cyprus Conflict And The Annan Plan: Why One More Failure? page 31. http://eab.ege.edu.tr/pdf/5/C5-S1-2-M4.pdf (Accessed 04.02.2015)

86 George V, Cypriot Accession to the EU and the Solution to the Cyprus Problem, http://interactioncouncil.org/cyprus-accession-to-the-eu-and-the-solution-of-the-cyprus-problem, (Accessed 28.07.2014)

87 The Final Negotiations For Peace ın Cyprus http://www.hri.org/docs/annan/Final_Negotiations.html (Accessed 28.07.2014)

88 Cyprus: What has Happened? http://www.mfa.gov.tr/cyprus_-what-has-happened_.en.mfa (Accessed 04.02.2015)

89 Vatansever M,Turkish-Greek Relations: http://www.usak.org.tr/EN/makale.asp?id=2107 (Accessed 08.07.2014)

90 Ismael Y Tareq, Aydin M, Turkey's Foreign Policy in the 21st Century, Burlington,Ashgate,2003, Page 51

91 Verney S, Ifantis K, Turkey's Road to European Union Membership, National Identity and Political Change, Routledge Published, Abington, 2009,page 36.

92 Henderson J, The Case for Turkish Accession to the EU, http://www.affectjournal.co.uk/

Cypriots made painful political comprises in order to promote and achieve a political settlement on the island, but the Greek Cypriots voted against that settlement and were rewarded with EU Membership. [93]

The long-term dispute over Cyprus has greatly affected relations between Turkey and the EU right from the beginning. In fact, this issue was cited directly as the main impediment to Turkey's further integration into the Union in a 1989 Commission Report. Nearly a decade later, the issue was still a stumbling block, when Turkey was excluded from the list of applicant countries at the 1997 Luxembourg Summit. The decision was said to be made due to the strained relationship between Turkey and Greece, plus Turkey's continued military presence in Cyprus. The European Commission in the same year declared that the issue of Cyprus had to be settled before Turkey could enter into any negotiations regarding EU membership.[94]

In July 2005, Turkey signed the Additional Protocol to the Ankara Agreement, but made it clear that its signature did not imply recognition of the Republic of Cyprus. It also stressed that Turkey was not going to open its seaports and airports to Cyprus-registered ships and aircraft. The reasons lying behind these decisions were that Turkey wanted new international efforts to be made in order to find a diplomatic solution for the island.[95]

In December 2006, EU leaders decided unanimously that until Turkey met the conditions given in the Additional Agreement, namely extending the Customs Union to the Republic of Cyprus, negotiations on eights chapters could not be opened and nor could any be provisionally closed. Turkey responded that it had complied with the Agreement in that it readily accepted goods originating from the south of the island, just not those from the ports of the Republic of Cyprus. The EU, however, regarded this as non-compliance.[96]

It can be said that the main driving force of the EU while making these decisions was related to its unwillingness to entertain the idea of Turkey's EU Membership. Therefore the EU used this conflict as a strategy to postpone the possibility of actual Turkish Membership in a foreseeable future. [97]

There is no doubt that the Cyprus conflict has created a major obstacle

HendersonVblack.pdf,(Accessed 08.07.2014)

93 Gordon P, Taspinar O, Winning Turkey, The Brookings Institution Published,Washington, 2008, page 80.

94 Supra fn 77, page 569.

95 Supra fn 83, page 179.

96 Ilgaz M, Toygur İ, EU-Turkey Accession Negotiations,the State of Play and the role of the new Turkish Foreign Policy, Madrid, 2011, page 3.

97 Supra fn 83, page 174.

preventing Turkish progress towards membership. However the unbalanced approach of the EU is widely criticized and is not justifiable, since the EU has placed the burden of moving toward a solution on Turkey's doorstep alone. On the Cyprus problem it can be concluded that from the outset the international community has long rejected that there is a shared burden between Turkey and the Republic of Cyprus (and arguably Greece and United Kingdom) to resolve the Cyprus conflict.[98] Turkey is aware of the fact that if the Cyprus problem was solved through a viable comprehensive settlement, Cyprus would be transformed from a bone of contention into a bridge of peace and between Turkey and Greece. Nevertheless, this settlement would require the efforts of both parties and could only be achieved through good neighbourly relations on the basis of principles of the United Nation Charter. [99]

2.4 Human Rights

One of the most common arguments put forward against Turkey's accession to the European Union is the one about whether Turkey is competent enough to comply with European Human Rights standards. [100] In this context, the defenders of this argument refer to the gaps regarding the failed attempts to settle the Kurdish and Alevi issues, the unfair confiscation of the non-Muslim foundations' properties and, last but not least, the unjust and abusive limitations imposed on freedom of expression as regards to the violations of human rights, cited in the Accession Partnership Documents, Progress Reports and other related documents of the EU.[101]

As suggested by the political Copenhagen Criteria which reserves the guarantee of human rights as a precondition, 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for minorities' is a condition for accession to the EU.[102] One of the biggest hindrances Turkey has faced against its membership to the EU has been its failure to comply with the standards set by the Copenhagen political criteria regarding human rights and democracy.[103] However, a series of legal reforms have been initiated to elimi-

98 Hughes E, Turkey's accession to the European Union, The Politics of Exclusion, Routledge Published, New York, 2011, page 2.

99 Jacovides A, http://www.foreignaffairs.com/articles/67752/andrew-jacovides/turkeys-cyprus-problem, (Accessed 18.02.2015)

100 Flanagan S, Turkey,s Evolving Dynamics, Strategic Choices for U.S.-Turkey relations, Center for Strategic and International Studies, Washington, 2009, page 23.

101 Cizre U, Secular and Islamic Politics in Turkey, The making of the Justice and Development Party, Routledge Published , Oxon,2008, page 187.

102 Müflenhoff H, Transnational Exchange and the Need for Turkey's EU Membership, Economic Development Foundation Working Paper, 2010, page 10.

103 Toktas S, Aras B, http://sam.gov.tr/wp-content/pdfs/3.pdf, page 2, (Accessed 18.02.2015)

nate the gaps in these fields and substantial advancement has been achieved in Turkey for the sake of empowerment of human rights through constitutional amendments, since being granted with candidate status in 1999.

Examples of the reforms carried out in the field of human rights between the years 2002 and 2010 can be listed as follows: By means of harmonization packages and constitutional amendments, capital punishment has been abolished without reservation, impositions for criticizing state institutions and the armed forces have been minimised, the limitation of using only the Turkish language in broadcasting and education has been eliminated allowing the usage of languages other than Turkish such as Kurdish, cultural rights have been expanded, confinements regarding the organization of demonstrations and establishing associations have been lifted, equality between genders have been reinforced, and non-Muslim religious foundations have been granted with the right to buy and sell real estate. With all these reforms, more and more of the requirements of democracy have been complied with.[104]

In order to consolidate human rights and take necessary precautions against abusing state powers, relevant laws have been amended in addition to the harmonization packages and constitutional amendments which have had a direct and radical effect on the daily life in Turkey.[105] Additionally, in 2014, the 'Action Plan for the Prevention of Violations of the European Convention on Human Rights', adopted in March, represent a significant step towards bringing Turkey's legal framework in line with ECtHR case-law.[106]

It is without doubt that Turkey still has some way to go in its journey to EU membership, however EU's failure to focus on what is necessary, especially in the field of human rights, must also be acknowledged. Issues such as the right to free speech or the rights of minorities as cited in the Progress Reports and other documents have continue to trouble many members of the EU, including Romania and Bulgaria. Referring to these problems as if they were unique to Turkey reinforces the argument that Turkey is being treated differently. [107]

As frequently underlined by the EU and peer review reports regarding freedom of expression in Turkey, although there have also been changes in the practice of the judiciary towards giving freedom of expression more attention in balancing with reasons for limitations, further legal amendments

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104 Supra fn 102, page 11.

105 Bagıs E, Political Reforms in Turkey, Ministry of Foreign affairs Secretariat General for EU Affairs Published, Ankara, 2007, page 19.

106 2014 Turkey Progress Report, http://www.abgs.gov.tr/files/onemlibelgeler/2014_progress_report.pdf ,page 14, (Accessed 12.03.2015)

107 Supra fn 98, page 2.

must be made to the provisions of the Turkish Criminal Code, the Anti-Terror Law and the Code of Criminal Procedures in order to ensure that these legislation are not used as means for restricting freedom of expression and freedom of the press that are required to be in line with the European Convention on Human Rights and the case law of the European Court of Human Rights. [108]

The status-quo in Turkey regarding the freedom of expression and freedom of press was criticized in the 2014 Turkey Progress Report as "the high number of violations of freedom of expression raises serious concerns."[109] In addition it was suggested in the report that freedom of the media was restricted. The imprisonment of journalists and the confiscation of an unpublished manuscript were listed as the leading causes for these concerns. [110] However, while interpreting the present circumstances one has to keep in mind that most of these investigations were carried out on charges concerning offences against the constitutional order and membership to a terrorist organization. Such allegations cannot be associated with journalistic activities.[111]

As regards the Alevi issue, the EU has demanded from Turkey that Turkish Alevis are recognized as a separate religious community several times. However, there is a widespread tendency in Turkey to regard Alevism simply as different interpretations of the Islam religion and, as a result, Cem Houses where Alevis carry out their religious activities are deemed as cultural centres. Nevertheless, at present it can be said that Alevism has evolved from being merely a religious belief into some kind of political opposition movement and has managed to develop a cultural identity.[112] In people's minds, it has been shaped as an external threat and a means of state oppression rather than a fully acknowledged code of theology. In this context, the Turkish government has taken the initiative by organizing workshops and discussing the problems in order to meet the expectations of the Alevi people.

About the confiscation of properties owned by non-Muslim foundations, following the Helsinki Summit, in order to eliminate the problem of lack of legal personality and enable the purchase and selling of properties, reform

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108 Report on the findings and recommendations of the Peer Review Mission on Freedom of Expression (Istanbul and Ankara, 12-16 May 2014), Prof. Dr Wolfgang Benedek, http://avrupa.info.tr/fileadmin/Content/Files/File/Docs/Turkey_report_rev_WB_KNM_final_Jan_2015.pdf , (Accessed 10.03.2015)

109 2014 Turkey Progress Report, http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-turkey-progress-report_en.pdf, page 4 (Accessed 18.09.2014)

110 Ibıd page 4 (Accessed 18.09.2014)

111 The echo, lack of Press Freedom in Turkey Criticized Again, http://sofiaecho.com/2011/02/22/1048009_lack-of-press-freedom-in-turkey-criticised-again (Accessed 22.01.2015)

112 Supra fn 98, page 2.

packages has allowed the foundations of non-Muslim minorities to register the properties they make use of, as long as the duration required to prove ownership.[113] Later, the new Law on Foundations was enacted in 2008. Thanks to this law, non-Muslim foundations are now allowed to be represented in the Council of Foundations and it is intended to expand the property rights of these foundations. In order to ensure that cultural rights of non-Muslim minorities are safeguarded and that they are able to exercise these rights, a Circular on the rights of minorities was published in 2010.[114]

As can be inferred, Turkey displays great commitment to fulfilling the human rights requirements of the EU. Effective protection and promotion of human rights is among the political priorities of Turkey. In this respect, in the field of human rights a comprehensive reform process was kicked off in 2005 by EU membership negotiations, and it aims at strengthening democracy and the rule of law while ensuring full respect to fundamental rights and freedoms. Although there are still some significant steps to be taken for the implementation of democracy and the principle of the rule of law in line with relevant international standards, EU membership process has played an important role in the improvement of Turkey's human rights score card.

2.5 The Kurdish Issue

It was 1984 when the fierce armed struggle started between the Turkish State and the guerrillas of the Kurdistan Workers Party (PKK), who since then, have been attempting to accomplish the goal of "an autonomous Kurdistan"[115] While trying to achieve its ultimate cause of taking hold of the south eastern part of Turkey, the terrorist organisation has engaged in violent actions against Turkish military forces and citizens. Moreover, it is a well known fact that they do not refrain from harming Kurdish civilians residing in the region.[116] Many state buildings, and people who they thought were associated with the state, have been targeted by the PKK since the beginning of the aforementioned armed conflicts. The reaction by the government to such actions of the PKK has been to deploy more and more soldiers in the region in addition to commissioning Village Guards who are, in fact, local people from the region. [117] This has created a vicious circle in the Kurdish areas of the

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113 Keyman E. F., Düzgit S. A., "Europeanization, Democratization and Human Rights", in LaGro E., Jorgensen K. E., "Turkey and The European Union", Palgrave&Macmillan, Hampshire, 2007, page 81.

114 Yılmaz G, Is there a puzzle? Compliance with minority Rights in Turkey Uppsala University Department of Government, Spring Term 2011Master's Thesis, 2011, page 23-25.

115 Supra fn 23, page 116.

116 Supra fn 32, page 34.

117 Anderon C, Kurds in Turkey, http://www.beyondintractability.org/casestudy/anderson-

southeast and eastern parts of the country, inevitably causing these regions to remain underdeveloped where unemployment and poverty prevail.

Figures indicate that during the course of the violent actions by the PKK, some 3000 villages have been partially or entirely destroyed, around 3 million people have had to leave their homes to settle in various parts of the country and more than 40.000 people have lost their lives.[118] Permanent settlement of this dispute can only be achieved by an immediate termination of terrorist and rebellious actions by the PKK and determination by the state authorities to put an end to the increasing tension and violence across the region. To this end, since the beginning of this century -when it was certainly accepted that engaging in close combat was not the solution to this problem- the government has launched a series of reforms in the constitution and in other legal areas in addition to those carried out to figure out the question of language.[119]

Nevertheless, continued violence in the region was imposed obstacles and resulted in an unsteady process of improvement. Speaking or writing in the Kurdish language was banned by the constitution. People were not allowed to use it in the press or in any kind of publication whatsoever until the Constitutional amendment which stipulated that any language could be used by all Turkish citizens in a variety of fields including private conversations, press, as well as commercial dealings and public gatherings. Another reform brought about by the amendment is that Turkish citizens who do not speak Turkish have the right to speak in their mother tongues to defend themselves in legal hearings.[120]

Strides made by the Turkish government to settle the Kurdish problem are not limited to those listed above. The anti-democratic provisions of the Law on the Fight against Terrorism were eliminated. Another breakthrough has been that the right to re-trial based on the European Court of Human Rights judgments has been granted. Other advancements have included the endorsement of the United Nations' two main human rights covenants and the enforcement of the Law on Compensation of Losses Resulting from Terrorist Acts [121]

kurds (Accessed 07.03.2015)

118 Gunter M. M., "The Kurdish Problem in International Politics", in Joseph S. J., "Turkey and the European Union", First Edn. Hampshire: Palgrave&Macmillan ,2006, page 101,

119 http://www.crisisgroup.org/en/regions/europe/turkey-cyprus/turkey/213-turkey-ending-the-pkk-insurgency.aspx (Accessed 07.07.2014)

120 http://www.tesev.org.tr/Upload/Publication/6233670f-ac67-49fa-9e9e-f86698f4b56e/gsr-almanac-2006-08.pdf (Accessed 07.07.2014)

121 Erdoğan B., "Turkey's Compliance with European Union Democratic Conditionality: Resistance or Transformation of Identity?", Netherlands Institute of Human Rights

When the accession negotiations with Turkey were officially initiated by the European Union on 3 October 2005, the interest in the state of affairs regarding the Kurdish problem was greater than ever as it is a well known fact that the settlement of the Kurdish question is one of the prerequisites for Turkey's accession to the EU.[122]

Turkey has the EU's support in its fight against terrorism as can be gathered from the fact that the EU has publicly criticized the violence in Turkish territory in the strongest terms and protested about all the terrorist attacks across the Turkish border underlining its favour for peace in the region. Additionally, several times EU parliament highlighted its full support for the solution of the Kurdish problem. The former European Commissioner Stefan Füle stated that at the "Dialogue for peaceful solution to the Kurdish problem" in Strasbourg that "the successful completion of peace talks will speed up Turkey's EU membership negotiations." To this end, the EU has emphasized that necessary steps must be taken regarding human rights and fundamental freedoms such as the freedoms of expression and association.[123]

The EU also expresses its belief in the requirement that the legal reforms that have been taking place recently must be sustained, attributing a particular importance to those about the anti-terror law and the criminal code and their interpretation by the courts.[124] No matter how strongly it condemns the terrorist attacks in Turkey and suggests that, through politics, a peaceful solution can be found to the Kurdish issue, it is more than clear that the EU is not competent to settle this issue on its own. However, a vast majority of people in Turkey are of the opinion that a democratic atmosphere will prevail in settling all these issues peacefully once the gaps referred to in the EU documents are eliminated and the Copenhagen political criteria are met. As a step to resolve this deep-rooted problem, a new initiative has been taken in the very recent past. "Turkey is sincerely in an attempt to relieve its bleeding wounds and desires to put an end to terrorism and blood"[125] is one of many statements regarding this issue made by the former Turkish Prime Minister Recep Tayyip Erdogan.

(SIM),Vol. 25/1, 2007, page 36.

122 The Kurdish Issue between Turkey and the Eu,5 March 2010, http://avant-gardes.com/2010/03/the-kurdish-issue-between-turkey-and-the-eu/ (Accessed 07.07.2014)

123 Hürriyet daily News, EU Parliament shows full support for Kurdish solution, http://www.hurriyetdailynews.com/eu-parliament-shows-full-support-for-kurdish-solution.aspx?pageID=238&nID=40638&NewsCatID=351(Accessed 5.12.2014)

124 http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/tr_rapport_2010_en.pdf (Accessed 08.07.2012)

125 http://www.hurriyet.com.tr/english/domestic/11765413.asp?scr=1(Accessed 08.07.2014)

Additionally in 2014, referred to as the "Democratization Package" by the general public, the Law No. 6529 on the Amendments on Certain Laws to Enhance Fundamental Rights and Freedoms was adopted by the Turkish Grand National Assembly on 02/03/2014.

The law is aimed at expanding the scope of freedom of expression as a human right, enhancing the exercise of the right to elect and be elected as well the right to assembly and demonstration, and preventing discrimination against an individual based on a certain attribute of his/hers.

Changes Introduced by the Law as follows:

• Political propaganda in different languages and dialects other than turkish by political parties and candidateshas been enabled.

• durations designated for meetings and demonstrations have been extended and the scope for theexercise of these rights has been expanded.

• opening of private schools for education in languages and dialects traditionally used by turkish citizens in their daily lives has been permitted.

• in an effort to expand the scope of freedom of religion and conscience, acts of preventing individuals from fulfilling their obligations of their religious belief, and intervening in the lifestyle choices of a person based on his/her belief, thought or opinion have been criminalized. [126]

New rights and freedoms introduced by the democratization package were welcomed by a large majority, except for radical groups. It is without doubt that the democratization package, which can be described as one of the signals of progress in the field of democracy in Turkey, is a step serving for the termination of the conflict environment that has existed for several years.

2.6. The Armenian Deadlock

The Negotiating Framework for Turkey asserts that the advancement of negotiations with Turkey will be guided by Turkey's progress in meeting the requirements set by the EU Council. One of the, those against which the progress will be measured, is Turkey's complete commitment to good neighbourly relations and the resolution of any outstanding border disputes by following the principles of peaceful settlement of disputes in accordance with the United Nations Charter, including, if necessary, the jurisdiction of the International Court of Justice.[127]

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[126] Law No: 6529, Law no: 6529on Amending Some Laws for the Development of the Fundamental Rights and Liberties", published in the Official Gazette in 03/13/2014, http://www.resmigazete.gov.tr/eskiler/2014/03/20140313-15.htm, (Accessed 13.04.2015)

[127] Turkey Negotiating Framework, http://ec.europa.eu/enlargement/pdf/turkey/

In this respect, the Turkey- Armenian dispute could be considered as one of the obstacles on Turkey's path to membership. A number of interconnected problems affect the relationship between Turkey and Armenia. One of these is the lack of clarity around whether *Anatolian* Armenians were actually deported from sensitive borderlands during the Ottoman-era and this remains one of the main sources of conflict between the two nations. A main aim of Armenian foreign policy is to ensure the recognition of genocide in the international arena, and even now, this is having a severe impact on efforts to normalize the relationship between the two countries.[128] More recently, the conflict between Azerbaijan and Armenia, which began in 1988 because of Armenian territorial claims over Azerbaijan and the subsequent occupation of 20 percent of Azerbaijan, including the Nagorno-Karabakh region and its seven surrounding districts, by Armenian Armed Forces,[129] accounts for the other subject of disagreement.

When it comes to so-called Armenian Genocide it must first and foremost be stated that Armenians and Turks had been already living together for 800 years prior to the start of World War I. Nevertheless, the regions in which Christians and Muslims had been living together relatively peacefully were torn apart when Russia invaded the Caucasian Muslim lands in the Russo-Turkish war of 1823-1829. During the course of the war, a significant number of Armenian people sided with Russia.[130] Under the shadow of such a threat to security, in 1915 the Ottoman government embarked on a mass deportation of Armenians into Syria. The deportation resulted in a high death toll as a result of famine, cold and civil war. Turkey's official position on genocide allegations can be summarized as follows: the experiences in the past were a great tragedy and both parties suffered heavy casualties, but it is impossible to define these incidents as genocide.[131]

Many scholars such as Professor Bernard Lewis affirm the approach of the Turkish government, being of the opinion that the deportation of the Armenian population was the result of a massive Armenian armed rebellion against the Turks and confirming the lack of evidence of a decision to massacre.[132]

st20002_05_tr_framedoc_en.pdf (Accessed 04.09.2014)

128 Gorgulu A, Turkey- Armenian Relations, A Vicious Circle, Tesev Publications, 2008, page 19.

129 Hurriyet Daily News, http://www.hurriyet.com.tr/english/world/10973281.asp, (Accessed 21.07.2014)

130 Presentation by Prof. Justin McCarthy at the TGNA on "The Reality of Armenian Issue", http://www.mfa.gov.tr/presentation-by-prof_-justin-mccarthy-at-the-tgna-on-_the-reality-of-armenian-issue_-conference-on-march-24_-2005_.en.mfa, (Accessed 06.07.2014)

131 Supra fn 128 page 20

132 Statement of Professor Bernard Lewis, http://www.ataa.org/reference/pdf/lewis.pdf,

In the debate over what happened to Armenians in World War I, Armenian Historians argue that Ottoman forces killed more than one million Armenian people in a deliberate action of genocide while it is widely acknowledged by others that although there were thousands Armenian fatalities, the question was whether they resulted from a deliberate act of genocide or from fighting and famine.[133]

Article 2 of the UN Convention on Genocide, adopted in December 1948, defines genocide as acts committed with the intent "to destroy in whole or part, a national, ethnical, racial or religious group".[134] Nevertheless, there is no documentary evidence in the Ottoman Archives regarding the Armenian case proving there was a deliberate policy or intention of genocide.[135]

In 2005, in order to find a peaceful way to solve this highly controversial and sensitive issue, Turkey officially proposed to the Armenian government that they jointly establish a historical commission composed of historians and other experts from both sides which would work together on the events of 1915, and also open the archives of Turkey, Armenia, and those of all relevant third-party countries and share their findings publicly. So far, the two parties have not reached an agreement on this proposal.[136]

Genocide allegations have also had an influence on the relations between Turkey and EU. For instance, the European Parliament issued a resolution in which the Armenian genocide on June 18, 1987 was recognised, and it also requested that the European Commission call on Turkey to accept the recognition of genocide as a prerequisite for EU membership.[137] In the meantime, the European Parliament made the significant point that the Republic of Turkey could not be expected to be found responsible for an act carried out by the Ottoman Empire, and so give legal or monetary reparations.[138] With this in mind, the Commission declared on several occasions, and contrary to the

(Accessed 19.07.2014)

133 Guclu Y, Will Untapped Ottoman Archives Reshape the Armenian Debate,volume 16, No:2, 2009, page 35.

134 Convention on the Prevention and Punishment of the Crime of Genocide, http://www.icrc.org/ihl.nsf/full/357?OpenDocument, (Accessed 77.07.2014)

135 Asian Tribune, Siddiqui H, http://www.asiantribune.com/news/2012/02/05/letter-america-armenian-genocide-%E2%80%93-fact-or-fiction-%E2%80%93-part-1, (Accessed 14.07.2014)

136 Hurriyet Daily News, http://www.hurriyet.com.tr/english/world/9511535.asp?scr=1, (Accessed 07.03.2015)

137 Arikan H,Turkey and the Eu: An Awkward Candidate for Eu Membership, Ashgate Publishing Burlington,2003, page 122.

138 Terzi O, The influence of the European Union on Turkish Foreign Policy, Ashgate Publishing Limited, Burlington, 2010, page 89.

demands of some Member States, that the genocide claims would not be a factor in Turkey's EU Membership process but that any progress with respect to this issue would be appreciated and welcomed by the EU. [139]

Relations between Turkey and France have deteriorated once again due to a development surrounding Armenian genocide allegations made in early 2012. The French Senate passed a bill that criminalized the denial of officially recognized genocides, including the Armenian genocide. However, arguing that the bill conflicted with freedom of expression and communication, the French Constitutional Council repealed the bill stating that those denying the Armenian genocide allegations should be condemned to one-year imprisonment and a fine of 45.000 Euros.[140]

Armenia's continuing occupation of Nagorno-Karabakh and Azerbaijani lands and Turkey's response in the closure of its border with Armenia in 1993, along with the suspension of diplomatic relations have created another obstacle to the improvement of Turkish-Armenian relations.[141] However, the importance of achieving of good Turkish-Armenian relations has risen since 2002. Given its close political, economic, social and cultural ties with the region, there is no doubt that stability, prosperity and a cooperative atmosphere in South Caucasus are vital to Turkey.[142] As a part of Turkey's desire to adopt a cooperative policy in the region, to normalize its relations and resolve its bilateral problems, it adopted two protocols on the Establishment of Diplomatic Relations and the Improvement of Bilateral Relations. These protocols, which were signed in 2009, initiated a negotiation process and formed a new phase.[143] Despite there being a few setbacks in the ratification process of the two protocols in Armenia, it could be concluded that if Armenia were to commit to this solution of the Nagorno-Karabakh conflict, Turkey could re-establish diplomatic ties with Armenia, and the land border between the countries would be opened once again. [144] As can be inferred from this approach, Turkey shows "good will" to overcome a century-old animosity between the neighbouring countries.

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139 Supra fn 128, page 21.

140 Reuters, http://www.reuters.com/article/2012/02/28/us-france-turkey-idUSTRE81R1G220120228, (Accessed 07.09, 2014)

141 Larrabee S, Turkey as a US Security Partner, Rand Corporation Published, Santa Monica, 2008, page 116.

142 Gorgulu A, Towards a Turkish- Armenian Rapprochement, Insight Turkey, Vol 11/ No 2/ 2009/ page 19.

143 Ministry of Foreign Affairs, http://www.mfa.gov.tr/relations-between-turkey-and-armenia.en.mfa, (Accessed 05.07.2014)

144 Supra fn 93 page 78.

Therefore, the EU approach to the issue of the Turkish- Armenian border, which still remains closed, is that it has never been considered as a Copenhagen political criterion with which Turkey has to comply; the Commission has never explicitly specified in any of its written papers that the border should be opened and has not referred to the situation as an obstacle. However, it is highlighted in Turkey Progress Reports that although the Turkish-Armenian border remains closed, the EU would welcome efforts to change the status quo. Nevertheless, Armenia and various EU based Armenian lobbies are still attempting to place this issue on the Turkey-EU political agenda as an item of significance.[145]

2.7. Other Possible Reasons

The primary argument against Turkey's accession to the EU is based on the popular slogan that Turkey is simply "too big, too poor, and too different" to become a Member State.[146] This line of reasoning highlights concerns that with more than 70 million people, Turkey would put the EU labour market under considerable pressure, and having such a large population, Turkey would dominate the discussions within EU institutions and profoundly alter its decision-making mechanisms. [147]

It is beyond doubt that population is an important determining factor for the representation of EU Member States in the EU Parliament. In this framework, if Turkey becomes an EU Member State, it will have the second largest group in the European Parliament after Germany. However, this does not mean that Turkey will be the only effective state in the decision-making of the European Parliament.

However, it must be underlined that most of these European concerns surrounding Turkey's memberships are based on common misconceptions. Turkey is not a newcomer to Europe. It has been playing a part in European defence, politics, culture, and sports for many generations.[148]

There is no doubt, however, that Turkey's accession would have an impact on the institutional structure and decision making mechanisms of European institutions, with complicated results. For instance, on the budget and funds, and some significant policies such as the Common Agricultural Policy and free

[145] Balamir- Coskun B, Demirtas-Coskun B, The European Union and Its Neighbours, Universal Publishers, 2009, Baco Raton,, page 388.

[146] Lang P, European and Turkish Voices in Favour and Against Turkish Accession to the European Union, ,PIE,Brussel,008, page 127.

[147] Supra fn 26,page 9.

[148] Akcapar B, http://yalejournal.org/wp-content/uploads/2011/01/061204akcapar-chaibi.pdf (Accessed 09.03.2015)

movement of persons, would all be considerably affected, if a large country such as Turkey were to become a full member. [149] The issue of migrant workers would also stand as a complex issue. With a large amount of labour force and around 50% of the population under 18, a significant migration of labour is expected upon Turkey's accession. [150]

The provisions of the Lisbon Treaty have radically altered EU's decision-making procedures. To put it more clearly, instead of unanimous decisions, qualified majority voting has been extended in the Council of Ministers. Qualified majority requires that, starting from 2014, decisions of the Council of Ministers will need the support of two types of majority: 55 % of the Member States (minimum 15), representing at least 65% of the European Union population.[151] In this respect, the population of Turkey represents 14% of the EU, whose population has now reached approximately 570 million people. This means that Turkey will not gain any advantages in the first case, whereas in the latter, Turkey's significance will be the same as that of Germany. Therefore, it is a misperception to argue that Turkey will totally dominate the decision making process alone. [152] However, it must be noted that larger countries such as Germany and France are not willing to share their power, which may account for some of the concern over Turkey's membership.[153]

Another substantial obstacle standing in the way of Turkey's path of accession to the EU is the internal debate about migration. The former EU Commissioner Olli Rehn's following statement on this issue highlights the misperception giving rise to this argument: "People fear that Turkey joining the EU will mean further unwelcome immigration. In reality, this is unlikely to be a major policy problem since by the time Turkey joins the EU labour market and demographic profile will have changed radically. In any case, the EU has policy tools to address any potential problems." [154]

Furthermore, Turkey's accession would also promote multiculturalism as a fundamental feature of EU identity. Turkey's membership would contribute

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149 Baykal S, Unity in Diversity? centers.law.nyu.edu/jeanmonnet/archive/papers/05/050901.rtf (Accessed 24.03.2015)

150 Toghill J, http://www.polis.leeds.ac.uk/assets/files/students/student-journal/ug-winter-11/james-toghill.pdf (Accessed 23.03.2015)

151 Your Guide to the Lisbon Treaty, http://ec.europa.eu/publications/booklets/others/84/en.pdf (Accessed 23.03.2015)

152 Supra fn 26, page 9

153 Balkananalysis, http://www.balkanalysis.com/turkey/category/interview/ (Accessed 24.03.2015)

154 EU Commissioner for Enlargement What's the future for EU enlargement? http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/578&format=HTML&aged=1&language=EN&guiLanguage=en (Accessed 24.03.2015)

to the building of a geo-political and cultural connection between Europe and Islam as well enabling a more multicultural structure to be established in the EU. [155] Any concerns over immigration can be mitigated by referral to the Negotiation Framework, which gives the possibility of considering long transitional periods, derogations, specific arrangements or permanent safeguard clauses.[156]

Turkey's accession would demonstrate that Muslim and Christian communities are able to coexist in peace under the European umbrella. Therefore, the EU should welcome Turkey, which offers an example of how Islam can be in complete harmony with democracy, progress and human rights. Turkey's membership would also contribute to a worldwide dialogue between Christianity and Islam.[157]

Turkey's exclusion, based on the presumption that *it is too different,* is quite contradictory to the fundamental philosophy of the European Union, which seeks to establish uniformity in diversity.

3. CONCLUSION

The Republic of Turkey has played a key part in the political, economic and security affairs of Europe since the day it was founded. The point where Turkey's EU journey began is when Turkey applied for associate membership to the EEC in 1959. Thenceforward, a lasting fluctuation has put its stamp on the relations between Turkey and the EU and it is an undeniable fact that the accession process of Turkey has been more challenging compared to any other candidate country.

The Helsinki Summit, where Turkey was granted with candidacy status, can be regarded as another corner stone along the journey. Since 1999, Turkey has been working more diligently than ever to meet the EU criteria required for initiating the accession negotiations. The decision from the Brussels Summit of 16-17 December 2004 was to open accession negotiations with Turkey on 3 October 2005. The accession negotiations were initiated on the scheduled date and negotiations on 35 distinctive chapters have been in progress since then. However it is extremely difficult to foresee what the outcome will be as the accession negotiations process has an open-ended nature. There-

[155] Aksoy S, Senyuva O, Ustun C, Turkey watch EU memberstates perceptions on Turkey accession to the EU http://sinan.ces.metu.edu.tr/dosya/turkey_watch_en.pdf (Accessed 25.03.2015)

[156] http://ec.europa.eu/enlargement/pdf/st20002_05_tr_framedoc_en.pdf (Accessed 25..03.2015)

[157] http://debatepedia.idebate.org/en/index.php/Debate:_Turkey_EU_membership (Accessed 25.03.2015)

fore, it is inevitable that Turkey's prospective membership will continue to be widely discussed both in Turkey and across the EU as long as the negotiations proceed.

The military coups that took place in Turkey constituted an impediment for accession to the EU in the past. At present, among the challenges Turkey face are the conflict over Cyprus, human rights issues and the Kurdish question, these being the issues that Turkey needs to settle before becoming a part of the European Union.

However, it is needless to say that today the most insuperable obstacles Turkey faces are the prejudice against Turkey that goes a long way back and the stance of some of the most influential European leaders who did not refrain from insidiously poisoning Turkey's accession progress. A good example of such hindrance took place in 2007 upon former French President Nicolas Sarkozy's unilateral blockage of five chapters that were crucial to Turkey's ultimate membership, arguing that Turkey did not belong in the EU as it wasn't even part of Europe geographically.

It is an undeniable fact that both Turkey and the EU have to fulfil one another's expectations if this accession is to come to pass. Turkey needs to relentlessly proceed in its efforts to comply with the Copenhagen membership criteria while the EU displays the same stance towards Turkey as it did with other candidate countries. In this regard, conclusion of the negotiation process with the grant of full EU membership to Turkey as desired and building up of stronger relations will require greater efforts from both sides.

Within this framework, Turkey is entitled to be treated fairly and free of prejudice in the negotiation process, as was the case for former candidate countries, as a response to the considerable number of Turkish people who are of the opinion that the European Union fails to respect the principles of equal treatment in its relations with Turkey. The biased attitude is particularly reflected in the Cyprus issue and constrains progress in the accession process. Many people believe that the EU applies a double standard to Turkey, mainly in the fields of human rights and the protection of minorities, compared to other candidate countries and Member States.

Based on the presumption that the EU is determined to transform Turkey into a country with higher standards of democracy, it is clear that the EU has to encourage the process by playing a more active part. In this regard, the EU must give priority to eliminating the assumption that Turkey is not treated objectively compared to other Member States.

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http://sinan.ces.metu.edu.tr/dosya/turkey_watch_en.pdf

THE LAW OF SEARCH IN U.S.A.
Advices and Critics on Turkish and American Search Law

AMERİKA BİRLEŞİK DEVLETLERİ ARAMA HUKUKU
Türk ve Amerikan Arama Hukuku Hakkında Tavsiyeler ve Eleştiriler

Selahattin DOĞAN*

ABSTRACT

It can be said that the common law system is more elastic to adapt new rules in accordance with recent alteration and modification. It looks stable and predictable (precedent and *stare decisis*), adaptable and flexible (can change to reflect changes in society), and avoids delays and political bargaining inherent in legislative lawmaking. In reality, however, this statement about common law system is not true partly because judges do not have enough knowledge about the progression in technology and its usage, or partly because of the judicial process by which a case can come before the Supreme Court 4-5 years later, and precedential role of higher courts' earlier decision: binding *stare decisis,* horizontal or vertical, and persuasive *stare decisis*.

As a common law, American search law desire to be examined. That law can be elaborated as a sample for balance between protection of freedom and ensuring the security. The documents and evidence for issuing a search warrant, time limit of warrant, the scope of warrant, the content of warrant, affidavit and exigent circumstances will be analyzed. As the conclusion, advices and critics on Turkish and American search law will be presented.

Keywords: Search, search warrant, exigent circumstances and exceptions, affidavit, level of suspicion for search, limitation to search, abusing authority, plain view, consent to search, comparison of US and Turkish Legal System.

ÖZET

Teamül hukuku uygulayan ülkelerdeki sistemin hayatın değişen şartlarına ve yeni gelişmelere karşı daha esnek olduğu düşünülürse de, aksine, önceki kararların bağlayıcılığı ve üst mahkeme kararlarına uyma zorunluluğu, ayrıca dava süreci, bu varsayımın o kadar da doğru olmadığını göstermektedir. Ek olarak, hâkimlerin teknoloji hususundaki yetersizlikleri de bir engeldir. Göründüğünün aksine, kıta avrupası hukuku, ya da yazılı kurallar hukuku, yeni gelişmelere daha acıktır. Zira hükümetler ve siyasiler, teknolojik gelişmeler

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sonucu polisin eline geçen soruşturma tekniklerini, derhal çıkardıkları kanun ve yönetmeliklerle sınırlayabilmektedir. Bu da temyiz sürecinin beklenmesini gerektirmeyerek kurallara müdahale zamanını kısaltır.

Teamül hukuku olarak Amerika Birleşik Devletleri arama hukuku incelemeye değerdir. Özgürlüklerin korunması ve güvenliğin sağlanması arasındaki ince dengede bir örnek olarak alınabilir. Arama kararının dayanağı olan belgeler ve kararın içeriği, geçerlilik süresi, kapsamı, arama başvurusu ve arama kararı gerektirmeyen haller bu yazıda incelenecektir. Bu incelemenin ardından Türk ve Amerikan arama hukukuna yönelik tavsiye ve eleştiriler sunulmaya çalışılacaktır.

Anahtar Kelimeler: Arama, arama kararı, arama kararı istisnaları ve istisnai durumlar, aramada şüphenin derecesi, armanın sınırları, yetkinin kötüye kullanılması, açıkta bulunan eşya, arama izni, Türk-Amerikan hukuk sistemi karşılaştırması

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INTRODUCTION

Criminal investigation procedures somewhat differentiate among countries on the ground they used to be ruled and of sort of ruling background they have been subjected. Administration is, in the earlier ages and middle ages, almost the same as government, legislation, and litigation. Later, depending on the states' democratic structures and untrustworthiness to the governing body, all three powers have separated from each other. The separation level is different in all countries, and it also depends on their level of democratic and totalitarian background, and the cosmopolitan social structure or desire of citizens.

Until a few centuries ago, the governing power of a country had huge authority over the investigation procedure. Generally, torture and unlimited searches were the nature of the criminal procedure. In the course of time, people's and government's understanding about criminal procedures have changed almost all over the world. At first, although there were more general rules and courts gave large authority to police, like in the 1800's in the USA territory, the writ of assistance was utilized by customs officers to search buildings for smuggled items[1]. Later governing powers, especially in democratic countries, have made some rules about the conduct of criminal procedure. Perhaps the most popular example on the importance of procedure is the *Powell v. Alabama* case in the USA[2].

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1 N. Lasson (1937); *The History and Development of the Fourth Amendment to the United States Constitution* ch. 2

2 The supreme Court Reporter, *Powell v. Alabama*, 53 S. Ct. 55 (Supp. Ct. U.S. 1932).In this case, nine black people alleged to rape two white women who were known prostitutes and transients; they had not been appointed an attorney and were accused as guilty by newspapers. At the end of trail they were convicted by jury which consisted of white peo-

Although the Fourth Amendment of the U.S. Constitution was in force, the U.S. Supreme Court directed the lower courts by reversing the decision, mentioning some procedural rule which lower courts and investigation bodies should have applied.

All states have their own written or customary rules in almost all law practice areas in the USA. However, the interpretation of the USA Constitution shall bind all states. Therefore, the interpretation of the Fourth Amendment, which includes rules on search and seizure, have bound all states. States can extend rights of their citizens by limiting the power of the police and prosecutors, but they cannot limit the rights which are bestowed through the Constitution and the Supreme Court interpretations.

At first glance, it can be said that the common law system is more elastic to adapt new rules in accordance with recent alteration and modification. It looks stable and predictable (precedent and *stare decisis*), adaptable and flexible (can change to reflect changes in society), and avoids delays and political bargaining inherent in legislative lawmaking. In reality, however, this statement about common law system is not true partly because judges do not have enough knowledge about the progression in technology and its usage, partly because of the judicial process by which a case can come before the Supreme Court for 4-5 years later, and precedential role of higher courts' earlier decision: binding *stare decisis,* horizontal or vertical,[3] and persuasive *stare decisis*.[4] Nonetheless the civil law system is prone to new improvement partly because the legislations and governments desire to limit the police power, partly because the Supreme Court's interpretation in not strictly binding to lower courts.

The difference between the U.S. and Turkish law system is great and it is, therefore, difficult to say which country's rules are better than the other's. But, by comparing the rules, each of us can evaluate which rules are applicable to our own country. On the other hand, such detailed regulations show that legislative and administrative authorities do not believe their officials will conduct in a professional manner and thus, try to regulate in detail. These authorities are forced

ple. The Court held that the defendant was denied due process of law and equal protection of law in terms of 1) fair, impartial and deliberate trial, 2) the right of counsel, and 3) people who were their own race were excluded from jury. The court reversed the imposition of death penalty. As the decision mentioned, procedure must be a major issue in criminal prosecution to protect innocent people.

3 Higher court decision in same court system is binding for lower court. For example, Indiana Supreme Court decision is binding appellate courts and trial courts in Indiana. The U.S. Supreme Court decision on interpretation of the constitution in binding for all states.

4 Lower court's decision and other states' court's decision is not binding. For example, Indiana Courts' decision is not binding in Illinois, or Federal district court decisions are not binding for other federal district courts.

to make additional regulations when officials abuse the power which is given by regulations.

Making additional regulations can be a solution; however, there is one other solution for abusing authority through which a judge can invalidate the evidence, and thus punish investigation and prosecution power. The procedure regarding lawfulness of evidence which is seized in a search incident is motion to suppress evidence, in such a way that parties can ask the court about evidence asserting that the evidence was seized unlawfully and must be suppressed. The process, motion to suppress evidence, an example of which is attached this paper, shall give the opportunity not to evaluate the evidence in trial.

In order to ensure professionalism in judgment, prosecution, and investigation, this process has to be put into force in addition to the opportunity to bring civil action against the officials at fault. Thus, the trial court will not be affected by unlawful evidence while deciding the case, and the officials will recognize the result of their fault and ineffectiveness of their unlawful efforts.

In General

Search, in general, is to try to find something by looking or otherwise seeking carefully and thoroughly.[5] Search, in law, has the same meaning as in general, which requires a crime or sometimes at least a misdemeanor and must be conducted by official representatives. As a precaution measurement, search includes an intrusion to free, honored and peaceful living. To protect public order and to struggle with crimes, however, it is essential to confine rights and freedom to be enjoyed. Therefore, a border must be drawn by law, and there must be reasonable evidence to believe that a suspected individual committed a crime or has criminal evidence, and search can be conducted based only upon probable cause.[6]

A state must both protect and respect individuals' rights. Individuals' essential rights and freedoms which are derived from their humanity and declared in the Universal Declaration on Human Rights and some other treaties have to be protected and ensured to be enjoyed by governments. Actually, this is derived from the understanding that citizens are not subjects of king or power but owners of the state. However, as nothing is shoreless, rights and freedom can be limited by law. Search is one kind of these limitations. Nevertheless, the state cannot boundlessly limit enjoying these rights and freedom. In common law countries,

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5 Retrieved:http://www.oxforddictionaries.com/definition/english/search?q=search, 10/23/2013

6 Chemerinsky, E.& Levenson, L.L. (2008), *Criminal Procedure: Investigation*, Aspen Publishers, New York, p.29

constitutions, statutes and courts, by interpreting the statutes, can limit the enjoyment of rights and freedom and the power of the state therewithal.

The U.S. has only general rules about criminal procedures in the Constitution: the Fourth Amendment, the Fifth Amendment, the Sixth Amendment, the Eighth Amendment and the Fourteenth Amendment.[7] The Fourth Amendment is concerned with search and seizure. On the other hand, although there is not a rule about search and seizure which binds all states, there is a rule which binds the United States Federal District Court, named Federal Rules of Criminal Procedure for the United States District Courts.

Search was not defined in the U.S. statutes and regulations; but Article 5of the Turkish Regulation about Judicial and Administrative Search (TRJAS)[8] was defined search incident as "Search is an incident to explore a person's homes, offices, surfaces of body, goods, vehicles, another place which belongs to him, and private documents, by limiting that person's secrecy of family and private life, in order to seize evidences, marks and indications of a crime, or to seize a suspect, convicted, defendant, or a person who is under reasonable suspicion of committing a crime or participating in a crime or else abetting a crime in accordance with the Turkish Criminal Procedure Code (5271) and other related codes." The Turkish Regulation clearly defined what is search and differentiates search incident from wiretapping, eavesdropping and electronic surveillance. Whereas, all eavesdropping, electronic surveillance and monitoring are evaluated in the Fourth Amendment in the U.S. This can be seen in the *Katz v. United States* case.[9] In that case, the Court held that government's electronic eavesdropping and recording defendant's words spoken in public telephone booth violated the privacy and thus constituted a 'search and seizure' within the Fourth Amendment, and the search and seizure, without prior judicial sanction and attendant safeguards, did not comply with constitutional standards, and further, magistrate has authorized with appropriate safeguards the very limited search.

The rules that a search incident can be conducted based only upon probable cause originates from the Fourth Amendment; however, courts sometimes rule

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7 The Fifth and the Fourteenth Amendment, governs rights to due process, the sixth Amendment, related to right to counsel and a speedy and public trail, the eighth Amendment, concerned with prohibition on excessive bail and double jeopardy.

8 Article 5 of TRJAS "Adlî arama, bir suç işlemek veya buna iştirak veyahut yataklık etmek makul şüphesi altında bulunan kimsenin, saklananın, şüphelinin, sanığın veya hükümlünün yakalanması ve suçun iz, eser, emare veya delillerinin elde edilmesi için bir kimsenin özel hayatının ve aile hayatının gizliliğinin sınırlandırılarak konutunda, işyerinde, kendisine ait diğer yerlerde, üzerinde, özel kâğıtlarında, eşyasında, aracında 5271 sayılı Ceza Muhakemesi Kanunu ile diğer kanunlara göre yapılan araştırma işlemidir." (Translated by author)

9 The official United States Reports, Katz v. United States, 389 U.S. 352 (U.S. 1967).

that, in such cases, the police do not need to obtain search warrant and this type of search is constitutional. Through some decisions, the U.S. Supreme Court held that open field search, search of trash, observing and monitoring public behavior, usage of dogs to sniff for contraband, using a beeper, and aerial search are not unconstitutional. Furthermore, there are some exceptions which were formed by the Supreme Court: Search incident to arrest, search incident to hot pursuit, plain view, automobile exceptions, inventory search, border crossing and check point search, consent search, search of probation and parole, administrative search, drug testing, and exigent circumstances.

Indeed, search is the most important tool to elicit evidence physically. Therefore, a search incident should clearly be identified and its border should be drawn.

I) Search Incident in the U.S.

Generally, search incidents are defined by case law. The federal legal system has only one regulation in the Constitution which binds all states. Some of the states have promulgated their own criminal procedure rules; however, most of them do not have a code about criminal procedure.

I. a) Legislative Regulations

The Fourth Amendment of the U.S. Constitution includes the provision which is "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized"

In addition, the Rule 41of Federal Rules of Criminal Procedure for the United States District Courts[10] has settled some rules relevant to search warrants which might issue by district court. According to this Rule, a magistrate judge has authority to issue a warrant to search and seize a person or property located within the district. If no federal district court judge is available, a judge of a state court of record in the district can issue the search warrant about federal issue. A magistrate judge has authority to issue a search warrant outside of his district if the crime is about domestic terrorism or international terrorism, and if activities related to the crime committed in his jurisdiction may have occurred in any other states or districts.[11]

[10] The rules have been promulgated and amended by the United States Supreme Court pursuant to U.S.C. § 2072 (Rules of procedure and evidence; power to prescribe), and further amended in 2010 by Acts of Congress.

[11] Fed. Rules Cr. Proc., Rule 41 (b)

A search warrant may be issued for (1) evidence of a crime; (2) contraband, fruits of crime, or other items illegally possessed; (3) property which is designed for use, intended for use, or used in committing a crime; or (4) a person to be arrested or a person who is unlawfully restrained.[12]

If there is probable cause to search for and seize a person or property or to install and use a tracking device, the magistrate judge must issue a warrant.[13] When an affidavit is presented, the judge may require the affiant to appear personally and may examine under oath the affiant and any witness the affiant produces.[14]

I. b) Who Can Apply For Search Warrant?

There is no specific rule about this issue which is binding all states. Every state can make their own ruling. In some jurisdictions which have provisions regarding this issue, any law enforcement or prosecuting officer can apply for a warrant; however in a few jurisdictions "any person'' or "any credible person'' are permitted to ask for a search warrant.[15] On the other hand, Rule 41 of Federal Rules of Criminal Procedure for the United States District Courts authorizes "a federal law enforcement officer or an attorney for the government" to ask for a federal search warrant.[16] The regulation about search warrants which was promulgated in accordance with this rule gave the authority for asking the issuance of a search warrant to some persons: Any person authorized to execute search warrants by statute, the head of a department, bureau, or agency; any civilian agent of the Department of Defense who is authorized to enforce the criminal laws of the United States, and the Uniform Code of Military Justice; special agents in Department of Transportation, Small Business Administration, Department of Labor, General Services Administration, Department of Interior, Department of Housing and Urban Development, Social Security Administration, Veterans Administration;[17] Department of Health and Human Services Investigators of Alcohol and Tobacco Division of Internal Revenue Service[18]; some peace officer or customs officer of the Virgin Islands, Guam, or the Canal Zone; and any officers from District of Columbia.[19]

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12 Fed. Rules Cr. Proc., Rule 41 (c)

13 Fed. Rules Cr. Proc., Rule 41 (d)(1)

14 Fed. Rules Cr. Proc., Rule 41 (d)(2)(A)

15 Burkoff, J. M. (updated 2013); *Search Warrant Law Deskbook* § 6:2, Westlawnext, Retrieved: https://1.next.westlaw.com/Document/I87cd82181a2711da9fcdad2a775355a5/View/FullText.html?originationContext=documenttoc&transitionType=CategoryPageItem&contextData=%28sc.Default%29, 11/6/2013

16 Fed. Rules Cr. Proc., Rule 41 (d)(2)(A)

17 The Code of Federal Regulation, § 60.2 (28 C.F.R. § 60.2, U.S.A.)

18 The official United States Reports, *United States v. Ventresca*, 380 U.S. 102; The official Supreme Court Reports, 85 S.Ct. 741 (1965),

19 The Code of Federal Regulation § 60.2 (28 C.F.R. § 60.2, U.S.A.)

When another person who is not authorized asks for a search warrant, it makes defective the application in terms of constitutionality; and, the exclusionary rule[20] was not applied by some courts in such situations even if the applicants acted in good faith.[21]

I. c) Affidavit

According to the Fourth Amendment requirement, no warrants shall issue, but upon probable cause, supported by oath or affirmation. The Oath's role in affidavit was explained in *State v. Turner,* that "An Oath or affirmation is a formal assertion of, or attestation to, the truth of what has been, or is to be, said. It is designed to ensure that the truth will be told by insuring that the witness or affiant will be impressed with the solemnity and importance of his words. The theory is that those who have been impressed with the moral, religious or legal significance of formally undertaking to tell the truth are more likely to do so than those who have not made such an undertaking or been so impressed."[22] Furthermore, the purpose of an oath was explained in *Smith v. State,* as "to call upon the affiant's sense of moral duty to tell the truth and to instill in him a sense of seriousness and responsibility. When an individual swears under oath, society's expectation of truthfulness increases and the legal consequences for untruthfulness-prosecution for perjury, for example-may be severe."[23]

Affidavit is a kind of sworn testimony which is submitted by an officer. If there is not an oath in the affidavit, it cannot be a basis of warrant. For example, in *Levine v. City of Bothell*, the Court held that the officer who failed to support his affidavit by oath affirmation was not entitled to qualify for immunity.[24] As well as in *State v. Dunbar*, the Court decided that the person who signed the affidavit had no knowledge of the facts alleged in the affidavit and the officer did not provide an information under oath, and therefore, the evi-

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20 "The exclusionary rule is designed to exclude evidence obtained in violation of a criminal defendant's Fourth Amendment rights. The Fourth Amendment protects against unreasonable searches and seizures by law enforcement personnel. If the search of a criminal suspect is unreasonable, the evidence obtained in the search will be excluded from trial", http://legal-dictionary.thefreedictionary.com/Exclusionary+Rule, retrieved:04/03/2014

21 Burkoff, J. M. (updated 2013), *Search Warrant Law Deskbook* § 6:4, https://1.next.westlaw.com/Document/I87cd821e1a2711da9fcdad2a775355a5/View/FullText.html?originationContext=document&contextData=%28sc.Folder*cid.322c77365db74a-27902212d433ad6325*oc.Category%29&transitionType=StatuteNavigator, Retrieved: 11/6/2013

22 Federal Reporter Second Series, State v. Turner, 558 F.2d 46, 50 (2nd Cir. 1977)

23 South Western Reporter Second Series, Smith v. State, 207 S.W.3d 787, 790 (Tex. Crim. App. 2006)

24 Federal Supplement Second Series, Levine v. City of Bothell, 904 F.Supp.2d 1124, 1133 (W.D. Wash. 2012)

dence obtained due to this warrant had to be suppressed.[25]

The oath which the police officers have to swear does not have a formal form. Any officer can swear in any form. The oath can be oral, written, on phone, and completed before a notary, or sworn in the company of a witness.[26]

An affidavit has to include evidence which can be found in the place, like contraband, fruits of crime, or other illegal items possessed from this crime, and the property which was used for crime or intended to be used for crime.[27] Immediately, it should be indicated that identifying the person who will be searched or whose premises will be searched is not mandatory subject when issuing a search warrant and so as in affidavit.

A written affidavit shall not be required yet a magistrate judge may issue a warrant according to the information which was communicated by telephone or other electronic device.[28] Nevertheless, most of time, the affidavit is submitted in written and in person.

I. d) Level of Suspicion for Search

A search warrant requires facts and circumstances within the officer's knowledge who is applying for, or about which the officer has reasonably trustworthy information sufficient to issue a search warrant about a person or place in the belief that contraband or evidence of a crime will be found. Thus, as a reasonable and independent person, the judge can consider the likelihood of existence of evidence in the place.[29]

Probable cause can be based on the information observed directly by a police officer, or on information received indirectly (hearsay) from third parties, such as informants, citizens, or victims. The most prominent Supreme Court cases addressing the issue of probable cause involve information received indirectly.

So as to determine whether probable cause existed, the Supreme Court used to applied the two-prong test, *Aguilar-Spinelli*. The first prong of the *Aguilar-Spinelli* test--the "veracity" prong--examines whether there is a basis for concluding that the person providing the information is an honest, credible individual, or is providing reliable information in this particular instance.[30] The second prong--the

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25 South Eastern Reporter Second Series, *State v. Dunbar,*603 S.E.2d 615, 621 (S.C. App. 2004),

26 Burkoff, J. M.

27 Chemerinsky, E.& Levenson, L.L.; p.96

28 Fed.Rules Cr.Proc., Rule 41(e)(3)

29 Jenkins, J.A.(2011); *The American Court: A procedural Approach,* Jones and Bartlett Publishers, Sudbury, p.277

30 The official United States Reports, *Aguilar v. Texas,* 378 U.S. 108 (1964); The official United

"basis of knowledge" prong--examines how the informant observed the evidence or crime and how the tip was detailed.[31] Later, totality of circumstances has, however, become the main evaluation measurement. In *Illinois v. Gates,* the Court stated, "the task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, there is a fair probability that contraband or evidence of a crime will be found in a particular place."[32] The court stated totality of circumstances which includes the *Aguilar-Spinelli* test and all circumstances, like police conduct.[33]

In the *Maryland v. Pringle* case in which this question is based, the Court found that probable cause existed for arresting the front-seat passenger.[34] Although the Court had held in a previous case that a search warrant for a tavern did not permit searches of the patrons absent individualized suspicion because "[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person, "[35] the Court found that this situation is different.

The Court explained that the presence of three individuals in the small confines of the automobile permitted the inference that the individuals were engaged in a "common enterprise." The Court stated, "The quantity of drugs and cash in the car indicated the likelihood of drug dealing, an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him."[36]

In *Whren v. United States,* the Court held that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[37] The Court explained that its previous cases foreclosed any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved.[38]. The Court agreed that the Constitution prohibits selective enforcement of the law based on race, but explained that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."[39]

States Reports, *Spinelli v. United States*, 393 U.S. 410 (1969).

31 Ibid

32 The official United States Reports, *Illinois v. Gates,* 462 U.S. 213 (1983).

33 Ibid

34 The official United States Reports, *Maryland v. Pringle,* 540 U.S. 366 (2003).

35 The official United States Reports, *Ybarra v. Illinois,* 444 U.S. 85, 91 (1979).

36 Maryland v. Pringle at 373.

37 The official United States Reports, *Whren v. United States,* **517 U.S. 806, 813 (1996),**

38 Ibid.

39 Ibid.

I.e) Search Warrant

A search warrant can only be issued upon probable cause which was explained, ditto. If there is not probable cause then the warrant will be unconstitutional and the obtained items may not be used in trial.

The element that search warrants shall include is specified in the Federal Rules of Criminal Procedure.[40] The warrant shall identify property to be searched, any person or property to be seized, and the magistrate judge to whom it must be returned.[41]Execution time limit no longer than fourteen days and whether execution will be processed in daytime or nighttime must be specified in this warrant.[42]

The search warrant must and can only be issued by a neutral and detached magistrate. Allowing a state attorney general to issue a warrant violates the Fourth Amendment.[43] What the meaning of neutral is may be explained explicitly in *Connally v. Georgia*.[44]The Court explained in his rationale what is defective for impartiality:

"The justice is not salaried. He is paid, so far as search warrants are concerned, by receipt of the fee prescribed by statute for his issuance of the warrant, and he receives nothing for his denial of the warrant. His financial welfare, therefore is enhanced by positive action and is not enhanced by negative action. The situation, again, is one which offers 'a possible temptation to the average man as a judge . . . or which might lead him not to hold the balance nice, clear and true between the State and the accused.'"

In the *State v. Guhl* decision, the Court held that the judge who has been issuing the warrant met with members of the grand jury, discussed testimony and other matters with them, including the fact that he was conferring with the district attorney, gave the assistant district attorney and staff investigators suggestions and directives, discussed with the district attorney and staff investigators in regard to grand jury testimony; therefore, the magistrate was disqualified from issuing the search warrant, and evidence obtained thereby must be suppressed.[45]

If the judge travelled to the scene, he became a part of the investigation and therefore, his impartiality ceased, and the evidence from that search must be suppressed. [46]

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40 Fed.Rules Cr.Proc., Rule 41(e)(2)(A)

41 Ibid

42 Ibid

43 The official United States Reports, *Coolidge v. New Hampshire,* 403 U.S. 443 (1971)

44 The Supreme Court Reporter, *Connally v. Georgia,* 97 S.Ct 546,547 (1977).

45 The South Eastern Reporter Second Series*, State v. Guhl,* 230 S.E.2d 22, 24, 26 (Ga. App 1977)

46 The Pacific Reporter Second Series, *State v. Wilson,* 879 P.2d 683 (Mont.1994).

In general, who has the authority to issue a search warrant has been decided in some case law. For example; a state judge may issue federal warrant for execution anywhere in the state, a justice of peace held authorized to issue warrant in her county and anywhere within state, Circuit judges are not authorized to issue warrants beyond their county, district judges may issue warrants for any county in state, Municipal judge held authorized to issue warrants outside of county; Superior court justices, Circuit Court Commissioners, District Court Commissioners, Criminal law hearing officers authorized to issue search warrant; on the other hand Superior court judges do not have authority to issue inspection warrants etc.[47] While municipal court judges do not have authority to issue administrative warrants, district court judges do.[48] Furthermore, under Texas Law, a non-lawyer magistrate may issue warrant if no lawyer magistrate is available.[49]Particularly, in Kentucky Law, in the event of an absence of all judges, the clerk of courts has authorized to issue warrant."[50]

In *U.S. v. Peltier*, the Court decided that in tribal land which belongs to American Indians, contrary to the other practices, state magistrates cannot lawfully issue warrant under federal—not state—jurisdiction.[51]Once more, in *State v. Mello*, the court held that the district court did not have authority to issue a search warrant for out of State Corporation.[52]

I.f) Exigent Circumstances and Exceptions

There is not a statute regarding what the exigent circumstances and exceptions are. The USA courts have decided by case law that what circumstances can be considered exigent and exception, and search can be conducted without warrant.

• **Search incident to arrest**: This kind of search shall be limited to the arrestee's body or his immediate control area, it does not extend to beyond that area, like other rooms.[53]The police can search an arrestee to disarm the suspect in order to protect himself and to seize of fruits of the crime, instrumentalities and other evidence of the crime to prevent its destruction or concealment.[54]Search incident to arrest does not justify a full-field search.[55]

47 Burkoff, J. M., § 7:2
48 Ibid
49 The South Western Reporter Third Series, *Proactor v. State,* 356 S.W.3d 681, 686 (Tex.App. Eastland 2011)
50 Kentucky Revised statutes, KRS § 15.725(5).
51 The Federal Supplement Second Series, 344 F.Supp.2d 539, 547 (E.D.Mich. 2004).
52 New Hampshire Reporter, *State v. Mello,* 162 N.H. 115 (N.H. 2011).
53 The Official Supreme Court Reports, *Chimel v. California,* 395 U.S. 752 (1969).
54 The Federal Reporter Second Series, *U.S. v Robinson,* 42 F.2d 1082, 1093 (D.C. Cir. 1973).
55 The Official Supreme Court Reports, *Knowles v. Iowa*, 525 U.S. 113 (1998).

• **Stop and Frisk:** The main difference between stop and arrest is level of suspicion. The police can stop if he has reasonable suspicion; however, he has to have probable cause to arrest. The level of suspicion is not the issue that we look through. Therefore the issue is, assuming there is reasonable suspicion, what the scope of authority of the police is. If there is reasonable suspicion that a person is carrying a weapon, he/she can stop, and frisk only the outer clothing of the person.[56]When the police is suspicious of the person who is driving the car or accompanying him, he can search the areas that suspect can obtain a weapon from.[57]

• **Consent for search:** Consent for search has to be freely and voluntarily given, and totality of circumstances will be the test for evaluation of voluntariness.[58] The consent will be subject to the knowledge to refuse it.[59] This knowledge is to be taken into account by the court, prosecutor, however, does not need to prove it.[60]The Consent might be given by an occupant who shares, or is reasonably believed to share the object to be searched, but the consent given by defendant's wife, while the suspect was present and expressly refused to consent, is invalid as to the defendant.[61]

• **Exigent Circumstances (Hot Pursuit and red-handed):** For warrantless search, there must be probable cause in addition to exigent circumstances. Which circumstances are exigent is decided by court under case law. For example: imminent destruction of evidence,[62] a threat to the safety of law enforcement officers or the general public,[63] likelihood that a suspect will flee before the officer can obtain a warrant,[64] reasonable belief that the evidences are in imminent danger of being removed or destroyed, unless the police immediately conduct a warrantless search.[65]

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56 The Official Supreme Court Reports, *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

57 The Official Supreme Court Reports, *Michigan v. Long,*463 U.S. 1032, 1050 (1983).

58 The Official Supreme Court Reports, *Schneckloth v. Bustamone*, 412 U.S. 218, 223 (1973).

59 Ibid

60 ibid

61 The Official Supreme Court Reports, *Georgia v. Randolph*, 547 U.S. 103 (2006)

62 The Official Supreme Court Reports, *Ker v. Cal.,* 374 U.S. 23, 41-42 (1963); The Official Supreme Court Reports, *Cupp v. Murphy,* 412 U.S. 291, 294-96 (1973); The Federal Reporter Third Series, *U.S. v. Moses*, 540 F.3d 263, 269-70 (4th Cir. 2008).

63 The Official Supreme Court Reports, *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967); The Supreme Court Reporter, *Michigan v. Fisher*, 130 S. Ct. 546, 548-50 (2009); The Federal Reporter Third Series,*Estate of Bennett v. Wainwright,* 548 F.3d 155, 169-70 (1st Cir. 2008).

64 The Official Supreme Court Reports, *Minn. v. Olson,* 495 U.S. 91, 100 (1990).

65 The Federal Reporter Third Series, *U.S. v. St. Pierre*, 488 F.3d 76, 79 (1st Cir. 2007); The Federal Reporter Third Series, *U.S. v. Hearn*, 563 F.3d 95, 105 (5th Cir. 2009).

Moreover, conducting search five minutes after the suspected person entered the house is lawful.[66]On the other hand, after two days from committing a crime, even if there is probable cause for the person who lives in the house and there is reason to believe the suspect is within, this house cannot be searched without warrant.[67]If a suspect is chased from the doorway of the home into the vestibule, it is lawful to search the home.[68]

Red-handed has to be evaluated with search incident to arrest because while the police have seized a person, he can be searched under search incident to arrest rules. If, under the totality of the circumstances, a reasonable person would not feel free to end the encounter and leave,[69] although the person was not seized with handcuffed, he is under custody and he can be searched under custodial arrest.

• **Plain view:** If officer is present in a building or on an area, he can use all his senses.[70] Plain view is the situation that the police have inadvertently come across evidence which incriminates the suspect, and it cannot extend to exploratory search.[71] Seizing evidence which was not encountered inadvertently is unlawful.[72] The item's incriminating character must be immediately apparent and not only must the officer lawfully present the searching area but also he has the right of access to the object itself.[73]"If the scope of the search exceeds that permitted by the terms of a validly issued warrant or the character of the relevant exception from the warrant requirement, the subsequent seizure is unconstitutional without more."[74] For example, if the police enter a house because of shooting under exigent circumstances, the aim is to find the weapon or evidence, they cannot turn down the stereo equipment to check if it is stolen except they have probable cause to support this.[75]

I.g) Limitation to Search

• **The President:** According to Article II Section 4th of the Constitution, "The President, Vice President and all civil Officers of the United States, shall be re-

66 The Official Supreme Court Reports, Warden, *MD. Penitentiary v. Hayden*, 387 U.S. 294, 298 (1967).
67 The Official Supreme Court Reports, *Payton v. New York,* 445 U.S. 573 (1980).
68 The Official Supreme Court Reports, *U.S. v. Santana*, 427 U.S. 38, 42-43 (1976).
69 Georgetown Law Journal Annual Review of Criminal Procedure, 40 Geo. L.J. Ann. Rev. Crim. Proc. 1, p.183.
70 Chemerinsky, E.&Levenson, L.L.; p.131.
71 Ibid, p. 132-133.
72 The Official Supreme Court Reports, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).
73 The Official Supreme Court Reports, *Horton v. California*, 496 U.S. 128, 129 (1990).
74 Id at 140
75 The Official Supreme Court Reports, *Arizona v. Hicks,* 480 U.S. 321 (1987).

moved from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." The Attorney General has the right to preliminary investigation whenever he/she receives information sufficient to investigate whether the president and vice president may have violated any federal criminal law more severe than violation classified as a Class B or C misdemeanor or an infraction.[76]

• **Members of House of Representatives and Congress:** Article 1 Section 6 of U.S. Constitution has a rule that "They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place." The Attorney General has the right to preliminary investigation if he/she receives information sufficient to investigate about a Member of Congress who may have violated any Federal criminal law more severe than violation classified as a Class B or C misdemeanor or an infraction.[77] The Attorney General, if he/she had evidence about a crime, shall apply to the division of the court for the appointment of an independent counsel.[78] The independent council has the authority to apply for warrant and subpoenas.[79] In the *Eastland v. U.S. Servicemen's Fund* case,[80] the U.S. Supreme Court held that 'the central role of the clause is to prevent intimidation of legislators by the executive, and accountability before a possibly hostile judiciary" and in the *United States v. Brewster* case,[81]the Court emphasized that "the speech or debate clause does not confer immunity from prosecution for criminal activities upon Members of Congress, because such activities are not legitimate legislative acts." The Justice Department have used grand jury subpoenas to obtain documents relative to a criminal investigation of members of the Senate or House of Representatives and the Justice Department can obtain search warrants for representative office from a Federal judge.[82]

• **Diplomats and diplomatic premises:** Article 22(3) of Vienna Convention on Diplomatic Relations, signed by the USA on June 29th of 1961, has included the rule that diplomatic premises and vehicles shall not be searched. Therefore, diplomatic missions and diplomats cannot be subject a search incident in the USA.

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76 The U.S. Code Annotated, 28 U.S.C.A. § 591 (a),(b)

77 The U.S. Code Annotated, 28 U.S.C.A. § 591 (c.2)

78 The U.S. Code Annotated, 28 U.S.C.A. § 592 (c.1)

79 The U.S. Code Annotated, 28 U.S.C.A. § 594 (a.7)

80 The Supreme Court Reporter, *Eastland v. U.S. Servicemen's Fund*, 95 S.Ct. 1813, 1820 (1975)

81 The Supreme Court Reporter, *United States v. Brewster,*92 S.Ct. 2531, 2535 (1972),

82 Committee on The Judiciary House of Representatives One Hundred Ninth Congress Second Session, May 30, 2006, Serial No. 109-122, p.2

• **Prosecutors and judges and their belongings:** Judges and prosecutors have no privileges for criminal investigation, prosecution or conviction action related to their functions and otherwise.[83]

On the other hand, there are some other rules which regulate disciplinary inquiry. In disciplinary inquiry, the chief judge who is responsible to review the complaint has limited inquiry[84] to determine whether the complaint requires further formal investigation or not. The chief judge may take the complaint's statement, and as well he may examine any relevant documents.[85] This rule does not include search, and limits action in this stage. If the chief judge decides special committee to investigate the complaint, the committee can conduct an extensive investigation as necessary as it considers.[86] The special committee and judicial council have full power of subpoenas and subpoenas *duces tecum*.[87] No other rule in the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, or the Federal Rules of Evidence might apply except expressly provided U.S.C.A chapter 16.[88] This chapter is about disciplinary actions and there isn't any authority to issue a search warrant regarding a judge.

• **Attorneys:** Same as Judges, attorneys have no privilege in criminal investigation about crimes they may have committed. But, attorney-client privilege has designed in several case law.[89] These types of privileged communications apply only past illegal acts, not future or ongoing acts.[90]Search incidents are used to find and seize evidence related to white collar crime in which the attorney is a subject.[91]The district attorney should show probable cause that the evidence is not in attorney-client privilege.[92]The U.S. Supreme Court decided that seizure of

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83 Burnham, W. (2011); *Introduction to the American Law and Legal System of the United States*, West Thomson Reuters, St. Paul, p.185

84 The U.S. Code Annotated, 28 U.S.C.A. § 352 (a)

85 Ibid

86 The U.S. Code Annotated, 28 U.S.C.A. § 353 (c)

87 The U.S. Code Annotated, 28 U.S.C.A. § 356 (a) and 28 U.S.C.A. § 332 (d). Subpoenas *duces tecum* is used to compel parties and others to bring documents to the court. It cannot be used for oral testimony and ordinarily cannot be used to compel a witness to reiterate, paraphrase, or affirm the truth of the documents produced. http://legal-dictionary.thefreedictionary.com/subpoena+duces+tecum, Retrieved:04/04/2014

88 The U.S. Code Annotated, 28 U.S.C.A. § 362

89 The Official Supreme Court Reports, *Vogel v. Grauz,* 110 U.S. 311 (1884); The Federal Supplement Reporter, *United States v. United Shoe Mach. Corp.,* 89 F. Supp. 357 (D. Mass. 1950)

90 The Federal Supplement Reporter, *Hercules Inc. v. Exxon Corp.,* 434 F. Supp. 136 (D. Del. 1977).

91 Enwright, S J.(1997): *Note: The Department of Justice Guidelines to Law Office Searches: The Need to Replace The "Trojan Horse" Privilege Team With Neutral Judicial Review ,* 43 Wayne L. Rev. 1855, p.1865

92 Ibid, p.1879

private papers did not constitute self-incrimination.[93] After this decision, Congress accepted the Privacy Protection Act. But, this act includes only "recognition of special concern for privacy interests in cases in which a search … for such documents would intrude upon a known confidential relationship such as that which may exist between … lawyer and client…."[94] The signal by this Act to prosecutors regarding physical searches of law offices and similar repositories of confidential information as a most compelling case was not adopted by prosecutors because the language of the Act is not deterrent, so that the act cannot apply to criminal cases and does not require proof greater suspicion then probable cause.[95]

I.h) Officers Who Can Conduct Search

Search, as criminal tool, has to conduct by official servants. Anyone cannot conduct search in the meaning of the Fourth Amendment except authorities. If a person who is not officer conduct search incident by himself, this search, therefore, will not be evaluated as the search of criminal tool and will not be subject to the Fourth Amendment. Indeed, it is not a search, it is unlawful intrusion to a house.

Coast Guard has right to searches upon the high seas and the waters which belong to United States.[96]Custom officers have the right to search the vessel or vehicle and every part and any person.[97] Customs officer term means any officer of the United States Customs Service of the Treasury Department or any commissioned, warrant, or petty officer of the Coast Guard, or any agent or other person.[98] The police, a fortiori, have the authority for search as seen all case.

In the *United States v. Ventres ca*case,[99] the Court made a decision that affidavit for warrant which alleged that Investigators of Alcohol and Tobacco Division of Internal Revenue Service smelled odor of fermenting mash on two occasions when they walked in front of house shows probable cause for search warrant. The Court accepted the affidavit submitted by this service.

II) CONCLUSION

As the conclusion, I will attempt to compare the U.S. law to Turkish Law on Search and give opinion on which is better.

One variation between Turkey and the U.S. is who can apply for a search war-

93 The Sureme Court Reporter, *Zurcher v. Stanford Daily,* 98 S.Ct. 1970 (1978)
94 The U.S. Code Annotated, 42 U.S.C.A. § 2000aa-11 (a.3)
95 Ibid
96 The U.S. Code Annotated, 14 U.S.C.A. § 89 (a).
97 The U.S. Code Annotated, 19 U.S.C.A. § 1581 (a).
98 The U.S. Code Annotated, 19 U.S.C.A. § 1401(i).
99 The Official Supreme Court Reports, *United States v. Ventresca,* 380 U.S. 102 (1965).

rant. While the police are able to apply for a warrant in the USA, only a public prosecutor can apply for a search warrant in Turkey. These procedures will allow prosecutors to control affidavits. On paper, it protects suspects from unlawful search. But, in reality, it seems it is not like that. In spite of these regulations, abuse of this power is very widespread because prosecutors have not been fully examined the affidavits and conducts which were executed by the police have been argued in time of course.

The other distinction is what an affidavit shall include. While affidavits shall include an oath of consonant in the U.S., an affidavit with oath affirmation is not mandatory in Turkey. In my opinion, this rule has to be adapted in the Turkish Criminal System so that the police might be impressed ethically and do their job well and in a professional sense. And moreover, perjury should be adapted for affidavits with under oath. Thus, in addition to moral pressure, a criminal sanction will apply if the police abuse this power. This kind of regulation will eliminate the officers who are wrongdoing.

The other distinction related to an affidavit is what an affidavit and a warrant shall include. While expected evidence or contraband and the probable cause that these will be found there has to be shown in the U.S., there is not an obligation regarding expected property in Turkish criminal procedure. Therefore, not only should probable doubt with evidence be demonstrated in an affidavit, but also the evidence for the contraband which is expected to be found should be shown.

Level of suspicion is another variation. The important difference between the levels of suspicion is questionability of it by trial courts or higher courts. Probable cause for crime and expected evidence or contraband is to be questioned in the U.S. by trial court, or higher courts while reviewing appellation. However, Turkish trial courts and the Supreme Court have not questioned yet any warrant in this way whether there is reasonable suspicion whilst issuing a search warrant. In my opinion, the Turkish Supreme Court, as well as trial courts, should question if there is enough evidence for probable doubt while issuing search warrants regardless of seized evidence or contraband. This questioning will help the police not to behave arbitrarily and help their professionalism. Otherwise, the police may take their chance to find evidence or contraband. The questioning method, motion to suppress evidence, must immediately adapt in order to examine whether there was solid evidence for issuing the search warrant. The trial court examines this motion in the U.S. In my opinion, however, the trial court's review, which the court is the same as the court that will hear the case, is incompatible to fair trial. The judge will encounter the evidence which can show the defendant guilty. Due to the fact that the judge could not be impartial, my advice is that the review should be fulfilled by another judge or court. A special judge or court

might be commissioned.

Length of effectiveness of search warrant is different as well. Length of effectiveness is maximum fourteen days in the U.S. However, the code does not include any limitation for effectiveness, except its time, day or night in Turkey. I think a warrant cannot be issued for unreasonable length in Turkey. The definition of reasonable length is to be determined by the court in accordance with the characteristics of the crime. A maximum fifteen days is reasonable for conducting a search.

The type of search without warrant varies. Except frisking in hot-pursuit, red-handed, and preventing a crime from being conducted, the chiefs of police officers (very few) and the public prosecutors can issue a written warrant in exigent circumstances in Turkey. On the other hand, the police need not obtain a written warrant in exigent circumstances in the U.S. In my opinion, the police should obtain a written warrant from her headquarter at least to prevent misconduct.

Stop and frisk and automobile exceptions are similar. But, in Turkey, the police officer cannot search an automobile to find evidence or contraband even if she has probable doubt unless the officer obtains a written warrant. The exception for this is administrative searches.

The plain view exception is similar, too. Plain view is not evaluated as search in both countries. In reality, it is not a search because the officer does not make any effort to find an evidence or contraband, it is just in the officer's view.

The other difference is about privileges of some officials. Except the president, members of congress, and diplomats, the U.S. has not ensured privileges for officials. The president has special privilege in Turkey. Prime minister, ministers, members of parliament, judges, public prosecutors, and attorneys have different levels of privilege. That many privileged officials be can be criticized. The special conditions of Turkey, however, I think, require privileges. Politicized police officers and partial judicial officers can easily misuse their power upon some official like parliament members or ministers. There are some examples which we have widely experienced. For example: Article 135 of TCPC has contained the rule that the communication between a suspect or a defendant and his/her relations who can refuse to testify shall not be recorded, even if this circumstance was realized after recording, the record shall be deleted in advance.[100] Despite this rule we saw and heard many conversations between father-son and husband-wife. These shows that the police who

[100] Article 135 of TCPC, "Şüpheli veya sanığın tanıklıktan çekinebilecek kişilerle arasındaki iletişimi kayda alınamaz. Kayda alma gerçekleştikten sonra bu durumun anlaşılması hâlinde, alınan kayıtlar derhâl yok edilir."

record the communication even in sufficient to court order did not delete it. Where investigation officials are not professional, privileges are mandatory. Otherwise, administrative officials, or members of parliaments, or judges and prosecutors can be fragile in the hand of investigation authorities.

A recently abolished rule which bans bringing action against judges and prosecutors for their wrongdoings in the case or investigation is a good conversion to professionalism because the officials will one more time think if their decision is lawful. In fact, the ability of suing these officials is a general rule; however, legislative power banned suing judges and public prosecutors by persons so as to protect them in the course of investigation and trial against alleged attempts to overthrow government. Defendants and convicted can sue the person who conducted unlawful search in the U.S. In the case of *Jones v. Kirchner*, the Court decided dismissal about civil action in which the plaintiff claimed damage for unlawful search for the conviction to be invalidated.[101] The civil action against decision makers should depend on invalidation of conviction and be strongly banned while at hearing. On the other hand, as punitive damage for the plaintiff in fault, there should be at least a minimum amount of compensation in favor of the defendant judge and prosecutor. This will prevent abusing the right to sue judges and prosecutors. Otherwise, criminal people in Turkey will sue judges and prosecutors even if they will not win the case.

Eventually, even though the Turkish criminal procedure rules are new and detailed, partial and unprofessional officials might misuse these rules or they may not obey the rules explicitly. There should be an effective punishment system for abusing rules and power. Not only should Turkish rulers consider that changing the rules can regulate the understanding of humankind, but also they must dramatically convert the education system from teaching practical/positive knowledge to ethical training together with the teaching system. Experiences show that children don't learn ethics in school and respect to them in their life. Changing educational system might affect the society in long time frame. Therefore, effective punishment system to prevent abusing rules and power should be formed in advance. The High Council of Judges and Prosecutors should take quick action against abuses and must not give mercy for these kinds of actions. Another solution can be impeachment with qualified majority voting. Parliament may have to impeach the judges and prosecutors who wantonly abuse their power, or commit some more severe crime. This kind of decision can be submitted to public voting if the defendant appeals for it. Thus, parliament can check judiciary, and their decision can be reviewed by public. This kind of instrument might give judges and prosecutors a higher position like that of the president or minister.

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[101] The U.S. District Court Decision in LEXIS, *Jones v. Kirchner*, 2008 U.S. Dist. LEXIS 41586 (D.D.C. May 26, 2008)

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ACRONYMS

C.:	Case
D:	Decision
C.F.R.:	The Code of Federal Regulation
U.S.C.A:	United States Code Annotated
TRC:	Turkish Criminal Code
Fed. Rules Cr. Proc.:	Federal Rules of Criminal Procedure for the United States District Courts
S.Ct:	The United States Supreme Court Reporter
US.:	The official Supreme Court Reports
U.S. Dist.:	The United States District Court
F. Supp.:	Federal Supplement
D. Del.:	District of Delaware
D. Mass.:	District of Massachusetts
F. 3d.:	Federal Reporter Third Series
Cir.:	Circuit
F. Supp. 2d.:	Federal Supplement Second Series
F. 2d:	Federal Reporter Second Series
D.C.Cir.:	District of Colombia Circuit
N.H.:	New Hampshire
E. D. Mich.:	Easter District of Michigan
S. E. 2d:	South Eastern Reporter Second Series
S. W. 3d:	South Western Reporter Second Series
P. 2d:	Pacific Reporter Second Series
Tex. App. Eastland:	Texas Court of Appeals Eastland
Tex. Crim. App.:	Texas Court of Criminal Appeals
W. D. Wash.:	Western District of Washington
S. C. App.:	South California Court of Appeals