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AN OUTLOOK ON NEW CONSTITUTION DEBATES IN TURKEY UNDER THE LIGHT OF EUROPEAN CHARTER OF LOCAL SELF GOVERNMENTS

Avrupa Yerel Yönetimler Özerklik Şartı Işığında Türkiye'de Yeni Anayasa Tartışmalarına Bir Bakış

Assoc. Dr. Erdal ABDULHAKİMOĞULLARI* – Prof. Dr. Fatih YÜKSEL**

ABSTRACT

Turkey signed European Charter of Local Self Government (E.C.L.G.) in 1988 by inscribing reservations on some of its articles. Not only do inscribing reservations on some articles prevent domination of local autonomy conditions in Turkey at its fullest but also some articles signed cannot be adopted due to effects of centralistic traditions for long years. In spite of constitutional amendments in 2004, 2005 and 2012 in Turkey, continuing problems are deficiencies in financial autonomy, problems occurring in methods implemented for accession and dismissal of local government organs and imbalances in delegations among central government and local government. The purpose of this study is to reveal implantation status of E.C.L.G., deficiencies in the Constitution pertaining to this issue and amendments required. To this end, concept of local autonomy will be dealt with and Turkish local government system will be evaluated and amendments required to be made in the Constitution will be tried to be defined.

Keywords: European Charter of Local Self Governments, the Constitution, Local Government, Local Government, Financial Autonomy.

ÖZET

Türkiye, Avrupa Yerel Yönetimler Özerklik Şartı'nı (A.Y.Ö.Ş.) bazı maddelerine çekince koyarak 1988 yılında imzalamıştır. Bazı maddelere çekince konarak, yerel özerklik koşullarının Türkiye'de tam anlamıyla hakim olması engellendiği gibi, imzalanan maddelerin bazıları da merkeziyetçilik geleneklerinin etkisiyle uzun yıllar hayata geçirilememiştir. Türkiye'de 2004, 2005 ve 2012 yılında gerçekleştirilen yasal değişikliklere rağmen devam eden sorunlar; katılım eksikliği, mali özerklik koşullarındaki eksiklikler, yerel yönetim organlarının göreve gelme ve görevden uzaklaşma yöntemlerindeki sorunlar, merkezi yönetim-yerel yönetim görev dağılımındaki dengesizliklerdir. Bu çerçevede ele alınan çalışmanın amacı, A.Y.Ö.Ş.'nın

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Türkiye'deki uygulama durumunu, konuya ilişkin anayasadaki eksiklikleri ve yapılması gerekli değişiklikleri ortaya koymaktır. Bu amaçla öncelikle yerel özerklik kavramı ele alınarak A.Y.Ö.Ş. açısından Türk yerel yönetim sistemi değerlendirilecek ve yeni anayasada yapılması gereken değişiklikler belirlenmeye çalışılacaktır.

Anahtar Kelimeler: Avrupa Yerel Yönetimler Özerklik Şartı, Anayasa, Yerel Yönetim, Yerel Özerklik, Mali Özerklik.

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1. Concept of Local Government

As per Article 3 of European Charter of Local Self Governments (E.C.L.G.), 'Concept of local government means that local organs are entrusted with the right and opportunity to arrange significant parts of public works and govern in line with the interests of local population and under their responsibilities within limitations stipulated by the laws."

Furthermore, in continuation of the same article, it is said that 'this right shall be exercised by councils or assembly meetings having enforcement organs answerable to themselves and consisting of members elected freely according to secret election based on direct, equal and universal suffrage. This provision may not prejudice any capacity to apply for other governments which give way to councils consisting of citizens, referendums or direct participation of citizens in cases where permitted by legislation'.

This definition made by European Charter of Local Self Governments takes the local governments' activity of meeting the needs of public within the borders defined by laws as basis. It is adopted that this power entrusted to local governments shall be exercised via local councils formed by elections.

In short, local government is that local governments may perform their duties and responsibilities and govern in itself (Wolman and Goldsmith, 1992:45) or local governments may form policy pertaining to local public services and have financial resources to execute them (Keleş, 2012:54). This may be defined that local government may make its own administrative and financial resolutions via its own selected organs and implement its own resolutions freely (Yüksel, 2005:275). As it is understood, an individual may make decision on how to be governed by revealing himself more realistically thanks to government (Roche, 1992:2). In this aspect, local government becomes a vehicle which increases productivity and manufacturing (Tortop, 1996:4).

Local government may be dealt with in two dimensions, namely administrative and financial. Conditions of administrative autonomy are 'local

government organs' holding office upon election' and these organs' capacity to make and implement decisions freely' and 'public participation'. It is possible to divide conditions of financial autonomy into four titles. These are "formation of majority of financial resources by equity'', provision of central government's assistance without any condition' and 'being free to spend the revenues' (Yüksel, 2005:281-285).

2. Evaluation of Turkish Local Government System in terms of European Charter of Local Self Governments

Turkey signed European Charter of Local Self Government (E.C.L.G.) in 1988 by inscribing reservations on some of its articles. Not only does the Republic of Turkey, by inscribing reservations on some articles, prevent domination of local autonomy conditions in Turkey at its fullest but also some articles signed cannot be adopted due to effects of centralistic traditions for long years.

No significant change has been made for the purposes of bettering charters of local self-governments from the year when charter is signed until 2004 and 2005. Bilagines passed in 1930, Special Provincial Administration formed in 1913, Village Law passed in 1924 and Metropolitan Bilagines passed in 1984 and therefore a local government system far away from autonomy maintained its existence until 2000s. In 2004 and 2005, Special Provincial Administration, Metropolitan Bilagines were amended and Metropolitan Bilagines were re-amended in 2012, and autonomies of local governments are strengthened. Main amendment made in these laws is to decrease guardianship. Approval authority of local authorities upon the local councils is abolished. However, requirements of E.C.L.G. in local government system couldn't be put into practice properly. Furthermore, no amendment is made in village Law. Existing Law passed in 1924 still maintains its enforcement under heavy guardianship.

According to Village Law, resolutions made by board of elder men are subject to the approval of local authority. Resolutions of village headman which are not for the benefits of village may be cancelled by local authority and may list village works by substituting board of elder men. All of these may make it impossible to say that villages in Turkey either are autonomous and or a unit of local government.

Deficiencies which are still available after the amendments in local government laws made between 2004 and 2005 are as the following:

1. Lack of Participation

It is said in Article 3 of E.C.L.G. that local governments shall have rights to make arrangements within their areas of responsibilities and borders and this right shall be exercised by councils or assembly meetings having enforcement

organs answerable to themselves and consisting of members elected freely according to secret election based on direct, equal and universal suffrage. In the continuation, it is expressed that this may not prejudice any capacity to apply for other governments which give way to direct participation of citizens by putting special emphasis on direct participation of the public.

Some arrangements have been made in Turkey in order to enable public to take part in local government policy and processes of making decisions. One of them is the formation of city councils of municipalities and thus foreseeing that several managers of the city and representatives of non-governmental organizations may take part in councils voluntarily and work again for voluntarily. However, no such an arrangement has been made for special provincial administrations.

Secondly, facilities through which public may be informed are attempted to be developed by enabling public to obtain access to information and documents of local governments about the decisions of local councils and commissions. Thus, the aim is to create increase in will and act of public informed to take part. While this arrangement is not direct, it becomes an arrangement which enables indirect participation. For example, obligation to announce commission reports of the council is introduced. Similarly, announcing council decisions to public via several vehicles becomes a requirement.

These arrangements about the public participation are quite insufficient. Absence of binding by these resolutions has caused particularly failure of city councils to enact and non-interest in their activities. Some of mayors' failure to believe necessity of councils and seeing them as opposing to council or thoughts that they may make their works difficult have become another reasons why they couldn't be activated.

There is need for more radical and binding arrangements in local government legislation which are not left to initiative of mayors and increase public participation. In some countries, there are positive examples about this issue. In England, all the records and information in relation to transactions carried out in local government units can be inspected by the electors and copies of documents may be obtained (Çoker, 1970:41-42). Furthermore, for the purposes of enabling public to take part in government and learning wills and desires of the public, one copy of resolution documents produced by public administration is delivered to citizens and press upon request in Sweden. In addition, important documents are collected in a special office in Stockholm and kept open to inspection (Eryılmaz, 2007:329).

For the public participation as an essential condition for local governments

in Germany, many ways are indicated. One of them is the public voting. Public voting is organized as *decree of citizens* in some states. This decree becomes valid not in all the municipal transactions but only for important works. *Decree of citizens* is organized upon the request of citizens or resolution made by the certain majority of municipal council. *Decree of citizen* produces the same legal outputs as the resolutions of municipal council; while there are differences among the states, this cannot be amended before two years and new decree of citizens is required for amendment. On the other hand, another way of participation is the right of petition entrusted to public. In this method, public can make application to municipal council in relation to a problem within the area of the municipality. State Constitution brings a requirement for support by certain number of citizens for exercising this right. For example this rate is 30% in Baden-Wurtemberg state. Another way of participation is to call public for meeting. By creating public councils, public fins opportunity to inspect important works of municipality. Public council may be called for meeting by municipal council or upon the request of certain number of citizens. In addition, local councils consult experts or participation is provided by appointing advisor for the committees within the municipality. Besides, public participation and control may be provided by arranging public meetings by announcing council resolutions to public (Ünüsan, 1996:147-148). For example, 'In Sweden, public opinion is benefitted as 'advisory' in making decisions pertaining to merging local government units' (Yalçındağ, 1974:198).

2. Deficiencies in financial autonomy

In Article 9 of E.C.L.G in relation to financial autonomy, it is adopted that sufficient financial resources shall be provided for the free usage of local authorities within their powers and financial resources and local authorities may be in ratio with the responsibilities specified in the Constitution and laws.

There is striking difference about this issue in Turkey when compared to E.C.G.L. It can be said that the most important deficiency in Turkish local governments is financial deficiency. However, it is very difficult to talk about administrative governments in local government system where there is financial deficiency. While some important arrangements were made in relation to local governments in 2004 and 2005 except for villages, no arrangement is made to enable local government to have revenue resource in ratio with their duties in financial terms. For example, act of municipal revenues was not amended. While it is stated in Article 127 of the Constitution that local authorities will be provided with income revenue in ratio with their duties, this issue couldn't be transferred to practice.

In the same article of the requirement, it is adopted that local government shall have local taxes and levies, the ratio of which shall be specified by local government at least partially. While some general local taxes and levies can be put within certain borders in Turkey, the authority to specify the ratio of relational taxes and levies is not entrusted to local governments in any way.

However, deficiencies in this issue make financial deficiencies an issue of agenda. It becomes difficult for local governments with financial deficiencies to perform expected functions and sustain their efficiency and their dependence upon central government increases (Ulusoy and Akdemir, 2009:264).

3. Deficiencies in methods of accession and dismissal of local government organs

In Article 3 of E.C.G.L, it is stated that right of local governments to govern is entrusted to councils holding office upon election. When we evaluate Turkey according to this sentence, it can be said that formation method of local councils is not a contrary practice. However, facility should be introduced to apply election method adopted for accession for a local government also for dismissal and not to appoint and dismiss local government heads upon resolutions made by central government.

Within this scope, in Article 38 of Villages Law, arrangement that village headman may be dismissed upon the resolution of authorized administrative board should be abolished immediately.

Insistent continuation of giving Governor the title as head of special provincial administration is one of the deviations which are unique for Turkey and should be dealt with. This deviation reveals itself clearly in this arrangement. According to Bigalines, a council which doesn't qualify activity report of head belonging to previous year may dismiss the head by making resolution about the head as disqualified. However, as per Law of Special Provincial Administration, although resolution of disqualification about the governor may be made upon not accepting annual activity report prepared by the Governor, general provincial council cannot dismiss the Governor. It is sufficient to inform Ministry of Internal Affairs about the issue. It is because governor is the representative of central government at the same time. The way to put an end to this deviation is to cancel special provincial administration as unit of local government or terminate the duty of governor who is also the representative of central government at the same time as the head of special provincial government. If the first way is adopted, all of the local services within the borders of municipality are provided by municipalities and those out of the borders of municipality only by villages.

According to Article 47 of Bigalines, municipal organs or members of these organs may be dismissed from their offices by Minister of Internal Affairs until the final resolution about whom or which investigation or proceedings are held due to any crime in relation to their offices. The resolution of temporary dismissal by guardian authority as stated in this article carries the risk of exercising this right in line with the political tendencies. Therefore, it is useful to have temporary dismissal resolution about the head made by an independent juridical organ and time limitation should be put for juridical organ in order to prevent delay.

4. Problems in delegations of central government – local governments

In Article 4 of E.C.G.L., it is expressed that local governments 'shall have the full discretion in terms of being active in all the issues which are not left out of their authorizations or for which another authority is not delegated within the borders as specified by the laws.'

In the continuation of the same article, stating that 'public responsibilities shall be exercised by authorities that are the closest to citizens generally and preferably', the principle of subsidiarity is adopted. Both of these articles are the arrangements which are not applied in Turkey. Article 123 of Constitution 1982 expresses that administration in Turkey is based upon principles of central government and local government. Although this arrangement gives impression at the first sight that it creates balance between two models of government, mentality, legislation and implementation reveals that administrative system in Turkey is extremely centralized. Similarly, in Article 127/5 of the Constitution, stating that central government is responsible for public services, it is indirectly expressed that local governments can only exercise their powers specified by the basic laws according to list principle. In other words, central government is authorized according to general power, whereas local governments are authorized according to list principle in terms of performing public services. In this case, while local governments are kept responsible for some local services listed in the law, central government is made responsible for performing all the public services apart from those left to local governments. Along with this arrangement in the Constitution, centralistic structure was strengthened and de-centralization structure or subsidiarity principle is rejected. This arrangement causes delays in public services, inefficiency and inactivity in services and also decreases satisfaction of citizens and increases bureaucracy and illness of public administration and also affects national development and economic improvement adversely.

In Article 14 of Bigalines No 5393, general power principle is adopted instead of list principle and the duty to perform local joint public services is

not left to another public institution but to municipalities. However, Supreme Court cancelled the rule entrusting duty and power to administration within an uncertain area without drawing a framework as per resolution dated 19.04.2007 and numbered 2007/39 and basis 2007/53 on the grounds that it is in violation of Articles 2 and 127 of the Constitution. Therefore, constitutional obstruction should be eliminated by authorizing central government according to list principle and local governments according to general authorization as a requirement of E.C.L.G.

3. Requirements in the New Constitution in Terms of European Charter of Local Self Governments and Unitary Structure Relation

Although there is a great deal of reasons why charter of local self-government cannot be actualized in Turkey, this basically results from the confrontation of local government – central government and perception of central – surrounding. In relation to local services which are executed by different institutions, persons and organization in the Ottoman Empire, the understanding of localization under the foreign pressure and western-type municipality services is tried to be adopted after Tanzimat (the political reforms made in the Ottoman State in 1839). However, they couldn't keep themselves far away from centralistic traditions in the process of western-type localization.

In short, two basic points become striking in the localization period emerging after Tanzimat. One of them is to experience localization forced without reaching the level of social maturity and without any demand from the ruled. Second of them is to produce view as if western-type localization model is adopted. In other words, this is to emergence of western-type local government model not as is but with the addition of centralization or limiting the local self-government charters.

Such a beginning has caused democratic and non-governmental characteristics, which are prerequisite for local governments, to be lost. In this period, the process beginning with administrative resolution has excluded democracy, which local government should have in Turkey and is the most important function. On the other hand, absence of this function has departed local governments from its aims for existence, in other words, their missions and limited their autonomies. As well, 'local self-government says it is what is democracy'' (Murie, 1989:194). However, local governments have occurred depending on actualization of democracy function in western countries and kept many characteristics of non-governmental organizations in its structure.

These deficiencies including local government fictionalized in that period reveal themselves in reforms for reinforcing local governments and local

government practices and central government – local government relations. Local governments could never have its essential qualifications and difficulties are encountered in actualization E.C.L.G. although signed; and even it couldn't be possible properly. Some motives for putting reservation on some essential articles through the process of signing the charter are commissioned and reveal their affects.

Well, it is useful to ask the question what these motives are and whether these motives exist or not in the current debates of the Constitution.

Similar matters become the issue of agenda in the debates of constitution, which is currently the agenda of Turkey. There is a great need for creating ideal localization substructure in new debated Constitution for presenting efficient and effective presentation of public services, actualizing democracy, actualizing state of law understanding and preventing resource waste, decreasing public bribe and clientelism, putting an end to bureaucracy, promoting development and increasing economic power.

Basic supposition which prevents the localization in Turkey for years is a set of fears dictated along with the localization. One of these fears is that unitary state structure will be destructed upon the reinforcement of local governments or implementation of E.C.G.L. and regional and local independency may emerge as the power of local councils to make resolutions increase and a flow towards federalism may occur. In this point, there is need for making explanation about the conditions in which unitary structure may be destructed.

Centrally government and locally governments are emerging structures depending on the share of two separate powers in political and administrative terms. Politically central and politically local government emerges politically, in other words, upon the share of legislation power and therefore, unitary state structure is created where there is only one legislation organ at the level of the country. However, on the contrary, politically local government occurs upon the expansion of political or legislation power to the level of country, in other words, its share among the structures at the the regional or local levels. In this structure which is also expressed as federalism, there is more than one legislation organ.

In administrative centrally and administrative locally governments, shared power is the power of enforcement. The issue in this structure is to perform duties, powers and responsibilities pertaining to enforcement defined by legislation organ within the legal borders specified by legislation organ. While administrative centrally governments means the allocation of enforcement power in one center, that is capital city and non-capital cities of the country,

whereas administrative locally government is to not to allocate power of enforcement in one center but to its share among the local governments.

While autonomy creates federal structures politically, administrative autonomy includes local government. This means to provide opportunity for powerful local governments and to deliver a large framework of duty, power and privileges reinforced with the administrative and financial autonomy in unitary structures (Parlak, hurfikirler.com).

A country which is centrally governed in terms of politics can be governed locally in terms of administration; in other words, political centralization doesn't require administrative centralization. In this point, in our days, the fear that local governments may be powerful upon the implementation of E.C.G.L and unitary state structure may be destructed is lacking in theoretic basis. The claim that legislation power will have been transferred along with the power of enforcement is not suitable in terms of scientific facts. However, if this fear is based on the supposition that legislation power will also be transferred following the transfer of enforcement power, this may be seen as a fair fear. However, upon a supposition, the idea that implementing E.C.L.G. and making constitutional amendments may destruct solely unitary state structure is an exaggerated approach.

If framework of strengthening local governments and councils is extended to the share of legislation power, this creates politically local government; in other words, federal structure is formed. These fears reveal themselves at that time.

Second fear is that Turkey has a unique structure and efficiency of ethnical structures may increase upon strengthening of the local governments and a dislocation may occur. Theoretical facts in relation to unitary state structure above produce replies to this issue. In reality, one of the basic functions of local governments is to make contribution to co-existence of different cultures, traditions and conventions and ethnical structures. In this aspect, in contrary to fears, local governments may strengthen the central government. Local governments re expected to make contribution to unity and solidarity of the country with the transfer of enforcement power to local institutions where public participation is provided. However, the very important point is the type of power transferred.

On the other hand, third fear is that strengthening of implementing conditions of E.C.G.L. and local governments is perceived as independency. Independency requires local councils to form their legal legislation coming out of the unitary state structure. However, we cannot talk of independency of any local government strengthened within the framework of sharing

enforcement power. Legislation organ continues to be the only speaker by making limitations upon the power, resources, duties and responsibilities of local governments.

Fourth fear is the lack of reliance on local governments. An anxiety is put forward that local governments may make wrong acts, their tendency for illegal things is higher, they should be absolutely guarded by central government, they can go out of control, their non-answerable acts may increase and they may abuse public power. Although there is share of rightness in some of these anxieties, how can it be claimed that the same anxieties may not occur in central government structure? Those governing institutions are people and it is possible to encounter with the same problems in both the structures. Then, there is need for creation of control system operating efficiently and impartially instead of choice whether to rely or not on institutions and their employees. Such an approach will be more democratic at the same time.

4. Conclusion

Under the light of fears expressed above, local governments have become not a local political area open to participation of citizens but an administrative unit trying to mitigating work load of central government and undertaking services at the amount required by central government. For eliminating this wrong perception, new Constitution remains an important opportunity in front of us. In the power and duty share among central governments and local governments, it should be emphasized that local governments 'are authorized to produce services along with their duties, powers and responsibilities pertaining to local joint needs which are not left to another public administration executively and as specified in the laws'. It should be highlighted that local governments shall execute all the services under their duty, authorization and responsibility in compliance with the principles and targets specified in development plans according to gestalt principle of administration. When the status is taken into account upon considering long past and development line of local governments in Turkey, arrangements should be made to strengthen the administrative and financial autonomy of local governments instead of creating a new local governmental unit at the regional level covering more than one province. Administrative guardianship authorization should be coped with in new Constitution with a new understanding (Ankara Strateji Ens., 2011).

In Article 123 of Constitution 1982, it is said that Turkish administration is based on central government and local government principles. Although this arrangement gives impression at the first sight that it creates balance between two models of government, mentality, legislation and implementation reveals

that administrative system in Turkey is extremely centralized. Within this framework, an arrangement pertaining to the fact that public administration system in Turkey shall be based upon localization principle may be incorporated into section titled general principles of the new constitution.

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SUPERVISION AND MEASURES IN CAPITAL MARKETS ACCORDING TO THE NEW TURKISH CAPITAL MARKET ACT

Yeni Türk Sermaye Piyasası Kanunu Uyarınca Sermaye Piyasalarında Denetleme ve Tedbirler

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ABSTRACT

Supervision is one of the most important duties of the "Capital Market Board ("Board")", after its duty on regulation. Supervision authority of the Board must be supported by disincentive measures for effective administration of the capital markets. The main purpose of this Paper is to review the provisions concerned with supervision and measures in the new "Turkish Capital Market Act ("Act")" numbered 6362, which was accepted on December 06, 2012 and published in the Official Journal numbered 28513 and dated December 30, 2012.

As an advanced example, the "European System of Financial Supervision ("European System")" is briefly discussed in this Paper. Moreover, Turkish Constitution's provision regarding the supervision of capital markets is mentioned since it constitutes the basis of the respective provision in the Act.

Alongside the Board, which is the supervision authority of capital markets in Turkey, other independent administrative authorities are briefly described in terms of their main functions of regulation and supervision.

Keywords: Capital Markets, Supervision, Measures, Independent Administrative Authorities

ÖZET

Denetleme fonksiyonu, Sermaye Piyasası Kurulu'nun düzenleme fonksiyonundan sonra en önemli fonksiyonlarından birisidir. Sermaye piyasalarının etkili bir biçimde çalışması için Kurul'un denetleme gücü caydırıcı tedbirler ve yaptırımlarla desteklenmelidir. Makalemizin ana konusu, 6362 sayılı ve 6 Aralık 2012 tarihinde kabul edilen ve 30 Aralık 2012 tarihinde 28513 sayılı Resmi Gazete'de yayımlanan Türk Sermaye Piyasası Kanunu'daki denetleme ve tedbirlere ilişkin hükümlerin incelenmesidir. Makalede bunun yanında Avrupa Finans Denetleme Sistemi'ne ve

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Sermaye Piyasası Kanunu'nun denetlemeye ilişkin hükümlerinin temelini oluşturan Türk Anayasası'nın ilgili maddesine de değinilmiştir.

Türk sermaye piyasalarının denetlenmesinden sorumlu olan Kurul'un yanında, makalede ayrıca bağımsız diğer kuruluşlar da düzenleme ve denetleme görevleri çerçevesinde kısaca incelenmiştir.

Anahtar Kelimeler: Sermaye Piyasaları, Denetleme, Tedbir, Bağımsız Denetleme Kuruluşları

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"Supervision" is one of the most important duties of the Turkish Capital Market Board ("Board") following its duty of "Regulation". Supervision authority of the Board should be supported by disincentive measures for effective administration of the capital markets. The main purpose of this paper is to examine the provisions on supervision and measures of the new "Turkish Capital Market Act numbered 6362 ("Act")".

The Act was accepted on December 06, 2012 and published in the Official Journal numbered 28513 and dated December 30, 2012. According to article 1, "The purpose of the Act is to regulate and supervise capital markets to ensure the functioning and development of capital markets in a secure, transparent, efficient, stable, fair and competitive environment and to protect the rights and interests of investors". This provision is mainly based on Art. 167 of the Turkish Constitution titled "Supervision of the Markets and regulation of Foreign Trade" which states that "The state shall take measures to ensure and promote the sound, orderly functioning of the money, credit, capital, goods and services markets; and shall prevent the formation, in practice or by agreement, of monopolies and cartels in the markets".

Since it influenced the Turkish capital market law system, the European System of Financial Supervision ("European System") is briefly examined in this paper.

I – EUROPEAN SYSTEM[1]

1- Description of the European System

Responding to the challenges of the financial crisis in 2007 and 2008, the European Union ("EU") adopted a new financial supervisory framework: the European System in 2010. Accordingly, new European Supervisory Authorities ("ESAs") were established in the beginning of 2011.

[1] EUROPEAN COMMİSSİON FİNAL REPORT; ÖZKORKUT, 396-399.

According to article 1 of the "EU Regulation numbered 1092/2010"; the European Securities and Market Authority ("ESMA"), the European Banking Authority ("EBA"), the European Insurance and Occupational Pensions Authority ("EIOPA") and the European Systemic Risk Board ("ESRB") form together with the Joint Committee of the ESAs and the competent or supervisory authorities in the Member States (as specified in the legislation establishing the three ESAs) the European System.

The three authorities have similar powers and competences in their respective fields. In particular, they contribute to the establishment of high-quality common regulatory and supervisory standards and practices, especially by providing opinions to the EU institutions and by developing guidelines, recommendations, and draft regulatory and implementing technical standards. Furthermore, they participate in the consistent application of the EU supervisory law and development of a common supervisory culture in the EU.

ESMA

ESMA is an independent authority that contributes to safeguarding the stability of the EU's financial system by ensuring the integrity, transparency, efficiency and orderly functioning of securities markets, as well as enhancing investor protection. In particular, ESMA fosters supervisory convergence both amongst securities regulators and across financial sectors by working closely with the other ESAs competent in the field of banking, insurance and occupational pensions. ESMA is also responsible for coordinating actions of securities supervisors or adopting emergency measures when a crisis situation arises. In particular, ESMA is also responsible for Credit Rating Agencies active in the EU.

EBA

EBA acts as a hub and spoke network of the EU and national bodies safeguarding public values such as the stability of the financial system, the transparency of markets and financial products and the protection of depositors and investors. EBA is an independent authority and has broad competences, including preventing regulatory arbitrage, guaranteeing a level playing field, strengthening international supervisory coordination, promoting supervisory convergence and providing advice to the EU institutions in the areas of banking, payments and e-money regulation as well as on issues related to corporate governance[2], auditing and financial reporting.

[2] KARASU, 35; PARKINSON, 159-200; PULAŞLI, 83-98.

EIOPA

EIOPA is an independent authority whose main goals are better protecting consumers, rebuilding trust in the financial system, as well as ensuring a high, effective and consistent level of regulation and supervision taking account of the varying interests of all member states and the different nature of financial institutions. It is also involved in harmonization and coherent application of rules for financial institutions and markets across the EU and strengthening oversight of cross-border groups.

2- EU Influence on the Turkish Capital Market Law:

As part of its commitment to become a full member of the EU, the Turkish Government has undertaken to harmonize the legislation on capital markets with the EU Acquis and tried to improve the institutional structure for effective implementation of this legislation[3]. Areas that need to be harmonized were identified in the "National Program for the Adoption of the Acquis" published in 2003. In the capital markets area, the main responsible Turkish body is determined as the Board.

Until now, the Board has involved in cross-border cooperation and exchange of information with foreign regulatory authorities based on its broad authority granted by the Act. Accordingly, the Board has also concluded several bilateral memorandums of understanding ("MoU") including the International Organization of Securities Commissions Multilateral MoU.

"Turkish Capital Market Act numbered 2499 ("Previous Act")" is replaced by the new Act numbered 6362 on 2012. The legal infrastructure of the Turkish capital markets has been comprehensively renewed with the enactment of the new Act and formation of the respective secondary legislation by the Board.

Both the Act and secondary legislation are prepared in compliance with the international norms especially, with the EU Directives such as the "EU Directive of the European Parliament and Council numbered *2003/6/EC* and dated January 28, 2003". This mainly regulates insider trading[4] and market manipulation, protection of investor rights, enables alternative financing sources to companies, strengthens the infrastructure of the Turkish capital market institutions and aims to turn Istanbul into an international financial center.

[3] VENZLAFF, 603-608.
[4] YASAMAN, 213-231.

II – SUPERVISION

1- Supervision Authority

a) The Turkish Capital Board

The Board[5] has two types of authorities: *Regulation* and *Supervision* of the capital markets to ensure the functioning and development of capital markets in a secure, transparent, efficient, stable, fair and competitive environment and to protect the rights and interests of investors[6]. The Board, carries out the tasks and exercises the authorities granted by the Act and related legislation (Art.117 (1)).

The Board licenses, regulates, monitors and supervises the conduct of business activities in the capital markets. Moreover, the Board determines the principles and procedures concerning the supervision of the capital market institutions, publicly-held corporations[7], exchanges and self-regulatory organizations within the framework of the Act (Art.128 (1), h).

The supervision authority is exercised by the professional staff ("Supervision Staff") assigned by the Chairman of the Board (Art.88 (1)). Supervision Staff is authorized for the application of the provisions of the Act and other legislation concerning the capital market and the supervision of all kinds of capital market activities and transactions.

b) Istanbul Stock Market

According to the "Regulation on the Membership and Membership Criteria of Istanbul Stock Exchange ("ISER")" dated December 8, 2012 and numbered 28491, İstanbul Stock Market has authority to take administrative measures.

In case wrongful orders and operations (ISER Art. 23) and forbidden situations are determined, the Head of the Stock Market could cancel such orders and operations.

In case the situations under ISER article 24 are determined, a disciplinary action could be taken against the respective members and they could be charged with compensation. The members concerned could object to the Board against the disciplinary decisions of the Stock Market.

According to ISER article 53, the members could be expelled from membership for a maximum of three months if they commit the acts stated under this provision.

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5 For the historical background of the Board, see TEKİNALP, 142-145; ULUSOY, 83-117.

6 TEKİNALP, 142-147; KUTLU GÜRSEL, 496.

7 ARKAN, 15-45.

There is no provision under the Act, the Board Communiqués and the "Turkish Commercial Code ("TCC") regarding the compensation of the third persons who are damaged by the above-mentioned acts of the members of the ISER. However, such compensation claims can be made on the grounds of the general provisions of the "Turkish Obligations Code".

2- Supervision Activity and Its Scope

Supervision of capital markets is based on "risk based supervision approach"[8]. The purpose of this approach is to provide that the Board implements its authority of supervision and control timely and effectively. The Board makes importance and priority rating by classifying persons and institutions operating in capital markets into different categories and considering their illegal actions.

Article 89 regulates the scope of supervision activity in more details than the repealed provision. The supervision comprises the activities and transactions of all institutions and organizations and other related real persons and legal entities[9] within the scope of this Act and related legislation on capital markets.

3- Execution of Supervision Authority

According to article 89, the Supervision Staff is authorized to request from the relevant real persons and legal entities information and documents regarding the Act and related legislation. They can examine all the books and documents, including the records kept for tax purposes, and all records, including the ones kept electronically, and miscellaneous means that contain information, and information systems; can request access to these systems and obtain the copies; can audit their accounts and transactions; can acquire written and verbal information from the relevant persons; can draw up the necessary minutes (Art. 89 (1)).

The relevant persons are obliged to fulfill the requests of the Supervision Staff and to sign the minutes. In cases where they refrain from signing, the reasons are clearly mentioned in the minute (Art. 89 (2)).

Upon the request of the Chairman of the Board and the decision of the the criminal court of peace, a search may be carried out with the help of police forces in required locations (Art. 89 (3)).

The books and documents found during the searches and required to be examined are identified with a detailed minute and in cases when on-site

[8] AKTUĞLU, 9-13; ÇETİN/TÖREMİŞ/CANTİMUR, 199-201; MUTLUER/USLU/BİLDİRİCİ, 153.
[9] ARKAN, 15-45.

examination is not possible, they are protected and sent to the work place of the person making the examination (Art. 89 (3)).

According to the Previous Act, the examination of the books and documents obtained as the result of a search should be concluded within a maximum of three months and should be returned to the owner with a report (Previous Act Art. 45 (4))[10]. In our opinion, a similar duration requirement for examination of books and documents should have been foreseen in the new Act in parallel with the previous regulation since the otherwise, puts the related persons under an unfavorable position.

According to article 94 of the "Regulation on the Organization, Duties and Operational Principles of the Capital Market Board numbered 8/4644 and dated April 26, 1982", officials cannot make any review, research, studies and investigations without the permission of the Chairman of the Board and cannot collect information from the interested individuals and organizations within this framework.

Supervision activity shall be conducted in accordance with the program to be prepared by the Chairman of the Board in the context of the principles of materiality and priority as well as risk evaluations. The Chairman of the Board may act without a program whenever he/she deems it necessary. For example, according to article 6 of the "Communiqué on Obligation of Notification regarding Insider Trading or Manipulation Crimes"[11], investment firms are obliged to notify the suspicious transactions to the Board in written form within five business days at the latest.

The Board can proceed upon application of the related persons or on its own (*ex officio*). The application can be made directly by e-mail and letter or through public prosecutor's office. In the event that a public prosecution has been filed upon the application, a copy of the bill of indictment shall be notified to the Board with its acceptance and at the same time the Board would gain the title of participating party (Art. 115).

4- Secrecy and Confidentiality

The Act provides an improvement in the provision regarding secrecy. According to the new Act, real persons and legal entities from whom information is requested, shall not refrain from giving information by claiming the confidentiality and secrecy provisions existing in this Act and in the special laws (Art. 90 (1)).

10 AKGÜL, 120.

11 MANAVGAT, 2; ŞENSOY, 378-380.

The Act foresees an obligation of confidentiality on the existence of supervision. Persons subject to examination as well as real persons and legal entities including public institutions that have been requested information and documents concerning the event and matter, are obliged to keep the presence and nature of the examination a secret (Art. 90 (2)). Those who make explanations to others concerning the information and documents requested in the framework of the examination or auditing activity carried out by the Board, shall be sentenced to prison from one year up to three years and be punished with a judicial fine up to five thousand days (Art. 113 (1))[12]. In our opinion, within the right of defense sharing information with the lawyers are exempt from this restriction and this should be expressly stated in this provision.

5- Gap of the Act with regard to Supervision

The Act does not contain any provision on determination, listening and recording of communication to detect the capital market crimes like insider trading (Art. 106)[13] and manipulation (Art.107). According to the "Turkish Criminal Procedure Act ("TCPA")", no one may listen and record the communication through telecommunication of another person except they are obtained in compliance with the principles and procedures determined in this Act (TCPA Art. 135 (8)). Since capital market crimes are not enumerated amongst the categorized crimes of the TCPA, it is not possible to apply this provision of the TCPA during supervisions.

III – THE MEASURES

The application of administrative measure[14] are counted as administrative acts[15]. Administrative acts are legal acts (*acte juridique*) different than the acts and decisions of the courts. They are one sided[16] and have individual characteristic[17].

The Banking Regulation and Supervision Agency shall be consulted before taking any measures about publicly held banks.

12 ÇETİN/TÖREMİŞ/CANTİMUR, 201.
13 YASAMAN, 229.
14 For the Previous Act, see ULUSOY, 176-182.
15 GÖZLER, 248-270.
16 GÖZLER, 261.
17 GÖZLER, 262.

1- Measures foreseen in the Capital Market Act

The Board can take administrative measures[18] considering the Capital Market Act, such as:

A- To Request Cautionary Injunctions and Attachments (Art. 91)

The Board is authorized to take all necessary measures, exempt from all kinds of charges and guarantees. The Board takes measures about those that have been identified to have issued or have made an attempt to issue a capital market instrument in violation of the Act. As an improvement, measures can also be taken about the person who attempts to issue a capital market instrument in violation of the Act. The Board may request cautionary injunctions and attachments exempt from all kinds of charges and guarantees for the equivalent of the amount sold and the capital market instrument to be sold.

One of the most important improvements in the Act is the identification of the procedure and the principles related to refund of cash and other assets to the right holders. In order to eliminate the consequences resulting from the illegal issue and to refund cash and other assets to the right holders, the Board makes a written notice to the issuer within thirty days starting from the date of determination. The addressee announces by means of instruments to be determined by the Board the detailed information concerning the real persons and legal entities from whom it has raised money as well as the raised amount and reports this information to the Board within at least thirty days from the notice. Within three months following this announcement, the real persons and legal entities from whom money has been raised may file an objection to the civil court of first instance of the place where the partnership is located. Upon finalization of the related list, the right holders are refunded by the person who made the related issue. The cautionary injunctions and attachments put according to the first paragraph of article 91 of the Act cannot be removed unless the restitution is fulfilled.

In case of collection of capital from the public without permission, the measures which can be taken by the Board, the authorities of the Board and the persons who will be held liable are regulated by TCC article 552. Professor Ünal Tekinalp, the Head of the Preparatory Commission of the new Act, has important contributions to the Turkish Commercial Law by adding this provision to the Act. Pursuant to this provision, approval of the Board shall be obtained prior to establishment of companies and capital increase through public offerings. TCC article 562 (11), which regulates the crimes and punishments, states that those who act in violation of article 552 shall be

[18] ÇETİN/TÖREMİŞ/CANTİMUR, 201-220.

punished with imprisonment from six months to two years. In case the Board permits collection of money from the public, the money collected should be utilized seriously according to the purpose within six months from the permission date. Otherwise, the Board foresees measures stated under TCC article 552 (1). The Court may extent this period.

The Board may apply to Ankara Commercial Court for suspension of the attempt or realization of collection of money, protection of the money collected and implementation of other measures deemed necessary. No guarantee payment is foreseen for such application.

The persons who collected money in contrary to this provision, the institutions and the board of directors' members, directors and entrepreneurs of the relevant companies who have knowledge of such act are jointly responsible for deposit of the respective amount to a bank or investment bank determined by the Board.

The aim of article 552 is to prevent establishment of a joint stock company especially abroad and collection of money for capital raise, to realize measures in such cases and to prevent deceit of the public through such means. Fault and realization of the collection are not foreseen as a condition for application of this provision. Therefore, attempt for collection of money is foreseen sufficient for application of this provision but, its meaning is not clarified.

In the event that the consequences resulting from the illegal issuance are not totally eliminated within one year starting from the date of the written notice has been made by the Board, the Board is authorized to file a suit for the refund of cash and other assets to the right holders or for the liquidation of the partnership (Art. 91 (3)).

The rights, arising from general provisions, of persons from whom money has been raised are reserved (Art. 91 (4)).

B- To File a Lawsuit of Nullity, Determination of Nullity and Validity, to File a Class Action (Art. 91, 92, 93, 94, 99)

There is an increase in the type of actions compared to the previous Capital Market Act. There is a possibility to file a lawsuit of nullity and a lawsuit for determination of nullity in addition to a lawsuit for annulment of the transaction in case of incompliance with law. In fact, any limitation is not foreseen on the type of "situation" or "act".

The Board is authorized to file a lawsuit of nullity at the commercial court of first instance against the board of directors' decisions of the respective company and to request to defer the execution of these decisions without guarantee.

The Board may file a lawsuit, which incurs losses, against the respective company for the return of the amount determined by the Board in case it discovers an income shifting.

Article 92 is applied in cases of existence of a capital or asset decrease or loss due to the situations and acts of issuers contrary to the law, the capital market legislation, the articles of association and the provisions of the fund rules or the purpose and field of enterprise.

There is an increase in the authorities of the Board. For example, the Board can remove the authority to sign of those who are responsible for these transactions if the presence of these situations and acts are determined by the decision of a court of first instance or if it is decided by a court upon the demand of the Board without waiting such decision.

The Board may bring a "class action" before the Ankara Commercial Court in order to ensure the implementation of measures. This category of action is recently accepted in Turkish Civil Procedural Law. Until date, the Turkish law has allowed only for multi-party litigation[19]. Legal associations, corporations and other legal entities may, within the framework of their statute and on their behalf, could file a lawsuit of group action in order to determine the rights of those concerned or to prevent abuse of future rights of those concerned, with the purpose of protecting members' benefits[20]. Unlike typical group actions, these lawsuits may not be filed for monetary damages.

C- To Request the Announcement of Lawsuit Decisions to Public / to Request the Announcement of Supervision Results from Publicly-held and Collective Investment Schemes (Art. 93, 94)

The Board is authorized to file a lawsuit of nullity against the board of directors decisions taken within the framework of the principles mentioned in article 18 at the commercial court of first instance where the headquarters of the partnership is located within three months starting from the date of the announcement of these decisions to public, and to request to defer the execution of these decisions without guarantee (Art. 93).

Furthermore, the Board is authorized to request the announcement of supervision results from publicly-held corporations, and collective investment schemes as well as their associates and subsidiaries which have been determined to be engaged in the transactions mentioned in article 21; to file

19 KURU/ARSLAN/YILMAZ, 274.

20 KURU/BUDAK, Hukuk Muhakemeleri Kanunu'nun Getirdiği Başlıca Yenilikler, İstanbul Barosu Dergisi, Cilt: 85, Sayı: 5, Yıl: 2011, 13.

a suit for the return of the amount determined by the Board within the period specified by the Board (Art. 94).

D- To Request Resolution of the Contradictions, to Restrict the Activities, to Cancel the Licenses and to Discharge the Members of Board of Directors (Art. 96)

The Board is authorized to request from the related parties to resolve the contradictions within the period determined by the Board and to provide compliance with the laws, the purpose and principles of the enterprise or;

- to restrict directly the scope of the activities of these institutions or to suspend their activities temporarily or;

- to cancel their licenses fully or as of certain capital market activities or;

- to take all kinds of other measures that the Board would envision.

The Banking Regulation and Supervision Agency shall be consulted before taking a measure in the direction of discharging the members of the Board of Directors of a bank.

E- To Decide on the Gradual Liquidation of Capital Market Institutions and to Request Their Bankruptcy After the End of the Gradual Liquidation or without Going Through any Gradual Liquidation (Art. 97, 98):

The Board is authorized to request the respective companies to strengthen their financial structures in a given pertinent period that shall not exceed three months or;

- to stop temporarily the operations of these institutions directly without giving any time or;

- to cancel their licenses fully or as of certain capital market activities or;

- to decide on the compensation of the investors or;

- to cancel temporarily or permanently the licenses of the managers and the employees who are responsible for these illegal activities or;

- to restrict or cancel their authorities to sign and to discharge members of the board of directors from office when necessary and assign new ones in place of them until the first general assembly meeting or;

- to decide on the gradual liquidation of these institutions or;

- to request their bankruptcy after the end of the gradual liquidation or without going through any gradual liquidation or;

- to take other measures it deems necessary.

The assets of the capital market institutions which are subject to withdrawal of authorities permanently shall not be transferred, pledged, collateralized, subject to cautionary injunction and attachment starting from the date of the Board's decision regarding the withdrawal of authority until it is announced that the gradual liquidation procedures have been completed; and until the request of bankruptcy has been concluded with prejudice by the court in case the bankruptcy has been requested directly or following the gradual liquidation.

The assets of the capital market institutions, activities of which have been suspended temporarily, shall also not be transferred, pledged, collateralized, subject to cautionary injunction or attachment starting from the date of temporary suspension decision until the date of reauthorization to launch their activities and all attachments and all cautionary injunctions on these institutions and all bankruptcy and execution proceedings automatically stop.

The temporary suspension period of the capital market institutions, the activities of which have been suspended temporarily by the Board according to the law or by their own will, shall not exceed two years.

The Board is authorized to request individual bankruptcy of their shareholders who directly or indirectly own more than ten percent of the shares, their board of directors' members who have resigned or are holding office, their managers having authority to sign, the managers of portfolio management companies and the members of the fund board of housing finance funds and of asset finance funds; provided that their responsibility has been determined in accordance with article 97.

The purpose of gradual liquidation[21] is to pay remaining receivables of investors which have not been compensated within the context of the investor compensation process established in article 85 as well as the receivables of the ICC arising from its position as successor to investors, through the allocation of assets of those who have been subject to a gradual liquidation decision or the allocation of the amount obtained by liquidating these assets into cash.

Provisions of the TCC, the Execution and Bankruptcy Law numbered 2004 and dated June 9, 1932 and provisions of other legislation related to liquidation shall not be applicable to gradual liquidation decisions and operations. The principles and procedures regarding gradual liquidation shall be determined with a by-law prepared by the Board.

[21] For the previous Act, see TEKİNALP, 160-162; ULUSOY, 177-180.

F- To Stop and Confiscate Unauthorized Entities' Notices and Advertisements Which are in Violation of the Law and to Request Temporary Closure of Workplaces (Art. 100):

Unconditional on an ongoing penal prosecution conducted on those liable companies, in circumstances where it is found to be detrimental to postpone action, their notices and advertisements may be stopped, and the notices and advertisements may be confiscated with the documents which are in violation of the law under the related legislation, and upon the request of the Board their workplaces may be closed temporarily by the relevant local highest officials of the civil service.

G- Other Measures:

The Board can take other measures, as follows;

- To take all necessary measures to stop the unauthorized capital market activities (Art. 99)

The Board is authorized to take all necessary measures to stop the unauthorized capital market activities inter alia to file a lawsuit within one year starting from the date when unauthorized capital market activities and transactions have been determined and in any case within five years starting from the date when they have occurred, to refund right holders their money or capital.

A new regulation has been introduced which authorizes the Board to prevent access to the web sites conducting unauthorized capital market activities via electronic means.

- To prohibit trading activities in the exchanges temporarily or permanently (Art. 101)

The Board is authorized to take all kinds of necessary measures to provide the effective and robust functioning of the market and to determine the principles and procedures regarding the implementation of these measures, including:

- To prohibit temporary or permanent trading activities in the exchanges,

- To change the methods of clearing,

- To put restrictions at the transactions of margin trading, short selling, borrowing and lending,

- To impose a guarantee obligation or change the obligation,

- To be traded in different market or markets or determination of different transaction principles,

- To restrict the extent of the distribution of the market data,

- To impose a transaction or position limit.

The measures that can be taken by the Board are not limited.

Reasonable doubt is the prerequisite for the application of the measures mentioned under article 101. In other words, such measures cannot be applied in case of simple doubt. In our opinion, since the definition of reasonable doubt in the Act is different than in criminal law, the definition and elements of reasonable doubt in the Act should be clarified in a way to suit capital markets. The determination of these parameters is necessary for the legal certainty. The situations which may be considered as reasonable doubt should be cited in the secondary legislation in order to inform the market participants.

- To send an observer to the general assembly meetings (Art. 95)

When it deemed necessary, the Board may send an observer, without having any voting rights, to the general assembly meetings of publicly-held corporations.

Although this is not a real measure, it provides the Board with the opportunity to gain knowledge on the issues discussed at the general assembly meetings and to take measures without any delay.

If the observer's attendance to the meeting is precluded, an administrative fine is provided.

According to the recent information provided by the Board, commonly used measures after the enactment of the new Act are "to change the methods of clearing (Art. 101-1-b)" and "to impose a guarantee obligation or to change the obligation (Art. 101-1-ç)". Furthermore, until date the number of persons temporarily or permanently prohibited from trading activities is 136 and the number of persons whose authority to sign is removed is 17.

In addition to administrative measures, there are also sanctions[22] that may be foreseen by the Board such as cancellation of the authorities to sign. For example, in case of a capital or asset decrease or loss due to the situations and acts of issuers contrary to the law, the Board can remove the authorities to sign of those who are responsible for these transactions if the presence of these situations and acts are determined by the decision of a court of first instance or if it is decided by a court upon the request of the Board without waiting such decision (Art. 92, 96, 97).

[22] AKGÜL, 121.

The Board is authorized to take all necessary measures to stop unauthorized capital market activities (Art. 99) and to prohibit the trading activities in the exchanges temporarily or permanently (Art. 101).

The Board, to be more effective, may impose administrative fines[23] from twenty thousand Turkish Liras up to two hundred fifty thousand Turkish Liras to those who perform the market abuse actions. Before the application of the administrative fine, the defense of the related person is taken and the appeal to the administrative justice process is possible.

The administrative measures are not limited and according to the Council of State (Decision of the 13th Chamber dated March 14, 2005, principle no. 2005/699, decision no. 2005/1453) the Board may take further measures not listed in the Act as long as they comply with article 1 of the Act[24].

2- Measures Foreseen in the Investigation Communiqué

The measures foreseen in the "Communiqué on the Measures to be applied in Investigations of Insider Trading and Manipulation numbered V-101.1 ("Investigation Communiqué")", are applied to the real persons or legal entities and the representatives of the legal persons about whom a reasonable doubt exists for executing transactions upon insider trading and manipulation according to article 106 and article 107 of the Act ("capital market crimes"). During the investigations carried out by the Board, these persons may be prohibited from capital market activities temporarily or permanently without waiting until the end of the respective investigation (Art. 5 of the Communiqué).

The Board may temporarily prohibit these persons from engaging in capital market activities with a duration of six months. This duration may be extended for another six months. The period of prohibition shall be two years, in case the Board decides to file a complaint to the Public Prosecution Office according to article 115 of the Act about these persons on suspicion of capital market crimes (Art. 6 of the Communiqué).

However, the Board may allow persons who are temporarily prohibited to continue conducting the following transactions: (a) Purchase of capital markets instruments, (b) Purchase and sale in wholesale markets upon notification to the Board by the person who is prohibited, (c) Sales executed within the scope of share capital increase transactions, in case a publicly-held joint-stock company is prohibited, (d) Purchases by means of exercising pre-emptive rights in the process of share capital increase and (e) Acquisition of share capital following a share capital increase.

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23 KUTLU GÜRSEL, 533.

24 AKGÜL, 133.

The Board may permanently prohibit the persons who are temporarily prohibited from engaging in capital market activities with a duration of five years in case they become subject to complaint before the Public Prosecution Office according to article 115 of the Act on the basis of alleged capital market crimes during the prohibition period (Art. 7 of the Communiqué).

Besides the prohibition of capital market activities, the Investigation Communiqué sets forth other measures to be applied in investigations of insider trading and manipulation such as;

- Application of gross barter,

- Putting restrictions at the transactions of margin trading, short selling, borrowing and lending,

- Imposing a transaction or position limit,

- Imposing a guarantee obligation or changing the obligation,

- Imposing an advance storage condition,

- Temporary suspension of the transaction line of the capital market instruments,

- Restricting the extent of the distribution of the market data.

IV- OBLIGATION OF NOTIFICATION

If there is a matter implying any information or doubt that a transaction constitutes the crimes enumerated under Articles 106 and 107, the investment firms and the capital market institutions to be determined by the Board are obliged to notify this situation to the Board or to other institutions and organizations to be determined by the Board.

Even though a provision exists in special laws, those who make a notification to the Board cannot provide information to the third parties, agencies and institutions including those who are engaged in the transactions, about the notification, except for the courts, the prosecutors' offices and the Presidency of the Financial Crimes Investigation Board.

CONCLUSION

In this paper, we aimed to provide information on supervision and measures applied in Turkish capital markets. We believe that efficient supervision should be realized and required measures should be applied timely in order to improve and deepen the capital markets in Turkey.

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ПОЛНОМОЧИЯ ПРОКУРАТУРЫ ВНЕ СФЕРЫ УГОЛОВНОЙ ЮСТИЦИИ, СВЯЗАННЫЕ С ПРЕДСТАВИТЕЛЬСТВОМ ИНТЕРЕСОВ ГРАЖДАНИНА ИЛИ ГОСУДАРСТВА В СУДЕ, ПО ЗАКОНАМ НЕКОТОРЫХ ГОСУДАРСТВ ЕВРОПЕЙСКОГО СОЮЗА

Authorities of the prosecutor's office outside the criminal justice system for representing the interests of the citizens or a state in the court under the laws of some states of the European Union.

Avrupa Birliğine Üye Bazı Ülkelerde Ceza Hukuku Dışında Devlet ve Vatandaşların Menfaatlerinin Korunması ve Temsili Açısından Savcılık Makamının Yetkileri

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Резюме

В статье освещены вопросы правовой регламентации полномочий прокуратуры вне сферы уголовной юстиции, связанные с представительством интересов гражданина или государства в суде, по законам некоторых стран Европейского Союза на предмет их соответствия европейским стандартам, в частности относительно законодательного установления и чёткого определения обязанностей и полномочий публичных обвинителей вне сферы уголовной юстиции, учитывая евроинтеграционные стремления Украины; определены особенности такой правовой регламентации, которые, в частности состоят в том, что эти полномочия, преимущественно, сводятся к так называемому государственному (публичному) представительству; установлено отсутствие правового однообразия в правовой регламентации этих полномочий с преобладающей тенденцией к избеганию чёткого определения полномочий прокуратуры вне сферы уголовной юстиции, связанных с представительством интересов в суде, в специальных законах о прокуратуре и определением этих полномочий в соответствующих процессуальных законах, что позволяет избегать коллизий между процессуальными нормами процессуального и материального законодательства, регулирующих отношения по представительству прокуратурой интересов гражданина или государства в суде; определены перспективные направления дальнейших научных исследований в этой сфере.

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Ключевые слова: прокуратура; полномочия прокуратуры вне сферы уголовной юстиции; представительство прокуратурой интересов гражданина или государства в суде; европейские стандарты.

ABSTRACT

The article highlights the issues of legal regulation of activities of the prosecutor's office outside the criminal justice system for representing the interests of the citizens or a state in the court under the laws of some states of the European Union; there was the analysis of their accordance with the requirenments of European standards, in particular with respect to a legislative setting, establishing a precise definition of the responsibilities and powers of prosecutors outside the criminal justice system considering the Euro-integration objectives; it was established the features of such a legal regulation, which are in fact those powers, which are largely confined to the so-called state (public) representative office; it was adjusted a lack of legal uniformity in the legal regulation of these authorities with a prevailing tendency to avoid the clearly defined powers of prosectutor's office outside the sphere of criminal justice on interest intermediation in court in special laws about the prosecutor's office and their authorization in the correspondent procedural law, which allows to avoid conflicts between the rules of proceedings of procedural and material legislation, regulating the relations concerning the representation of interests of the citizen or a state in the court; there was a determination of the prospects of further scientific researches in the studied issues.

Keywords: OfFice of Public Prosecutor; the Activity of Prosecutor's Office Outside a Criminal Justice System; Representation of Interests of the Citizen or the State in Court; European Standards.

ÖZET

Bu makale, Avrupa Birliğine bağlı bazı ülkelerin kanunlarında devlet ve vatandaşların menfaatlerinin mahkemelerde en doğru şekilde temsil edilebilmesi için savcılık makamının ceza hukuku haricindeki yetkilerinin yasal düzenlemelerle nasıl yapılandırıldığını incelemektedir. Ayrıca; bu yasal düzenlemelerin Avrupa Birliğine uyum süreci çerçevesinde, savcıların yetki ve sorumluluklarının net bir tanımının tesis edilmesi bakımından özellikle yasama hususunda Avrupa standartları doğrultusunda uyumlarının analizi yapılmıştır. Bu şekilde yapılan yasal düzenlemelerin nitelikleri esasen işlemekte olan sözde devlet (kamu) temsil makamının yetkileriyle sınırlıdır. Bu hususta savcıların ceza hukuku dışındaki yetkilerinin yaygın temayüller doğrultusunda yasal olarak düzenlenmesi, mahkemelerde menfaatlerin tavassutu bakımından özel kanunlarla belirlenmesi ve ilgili usul hukukuna göre yetkilendirilmesi bakımından düzenlemelerde yasal bir birlik tashih edilemediği gözlemlenmiştir. Bu alanda daha fazla bilimsel araştırma yapılması için umut verici alanlar belirlenmiştir.

Anahtar Kelimeler: Savcılık Makamı, Ceza Hukuku Haricinde Savcılık Makamının Yetkileri, Devlet ve Vatandaşların Menfaatlerinin Mahkemelerde Temsili, Avrupa Standartları.

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Введение. В настоящее время украинское государство находится в ожидании вступления в силу положений нового Закона Украины «О прокуратуре» (Закон Украины) [1], принятого Верховной Радой Украины 14 октября 2014 года. Основные задачи, которые стояли перед разработчиками нового Закона, сводились к созданию правовой основы для реформирования прокуратуры Украины в направлении построения оптимальной модели с учётом национальных правовых традиций функционирования указанного органа, а также требований и рекомендаций европейских институций. Что касается последних, необходимо отметить, що в европейской правовой практике органы прокуратуры традиционно рассматриваются как органы государственной власти, которые от имени общества и в его интересах обеспечивают применение права там, где нарушение закона влечёт уголовную санкцию, принимая во внимание как права человека, так и необходимость эффективного действия системы уголовного судопроизводства [2]. Однако, в последние годы международное сообщество постепенно пришло к признанию важности роли прокуратуры и вне сферы уголовной юстиции. В частности, среди государств-участников Совета Европы можно выделить две основные группы: государства, в которых прокуратуры не имеют полномочий вне сферы уголовной юстиции, и государства, в которых прокуратуры имеют определённые или широкие полномочия в этой сфере.

Так, в Эстонии, Финляндии, Грузии, Исландии, Норвегии, Швеции, Швейцарии, на Мальте и в судебных системах Великобритании соответствующие службы не имеют полномочий вне сферы уголовной юстиции. В то же время, прокурорские службы большинства государств – членов Совета Европы, среди которых Албания, Армения, Австрия, Азербайджан, Бельгия, Болгария, Хорватия, Чешская Республика, Кипр, Дания, Франция, БЮР Македония, Германия, Греция, Венгрия, Ирландия, Италия, Латвия, Лихтенштейн, Литва, Люксембург, Молдова, Монако, Черногория, Нидерланды, Польша, Португалия, Румыния, Российская Федерация, Сан-Марино, Словацкая Республика, Словения, Испания, Турция, Украина, имеют, по крайней мере, определённые задачи и функции за пределами сферы уголовного права. Сферы компетенции отличаются и включают, среди прочего, гражданское, семейное, трудовое, административное, избирательное право, а также защиту окружающей

среды, социальных прав и прав уязвимых групп населения, таких как несовершеннолетние, инвалиды и малообеспеченные лица. В некоторых государствах – участниках задачи и полномочия прокуроров в этой сфере могут даже преобладать над ролью прокуроров в системе уголовного судопроизводства.

В таких государствах как Албания, Австрия, Азербайджан, Дания, Германия, Греция, Ирландия, Италия, Лихтенштейн, Люксембург, Молдова, Сан-Марино, Словения, компетенция прокуратуры в этой сфере не очень важна или очень редко реализуется на практике [3].

Согласно положениям нового Закона Украины произошло значительное сокращение полномочий прокуратуры Украины за пределами уголовной юстиции, что обусловлено отменой полномочий прокуратуры по выполнению так называемой функции «общего надзора», в связи с выполнением Украиной своих обязательств перед Советом Европы. Правовой анализ этих положений, даёт все основания утверждать, что единственной конституционной функцией прокуратуры Украины, которая в перспективе будет определять полномочия прокуратуры Украины вне сферы уголовной юстиции, является функция представительства интересов гражданина или государства в суде в случаях, определённых законом. При этом, конституционное определение этой функции прокуратуры Украины уточняется законодателем в п. 2 ч. 1 ст. 2 нового Закона Украины как представительство интересов гражданина или государства в суде в случаях, определённых этим законом. Такая трансформация названия конституционной функции прокуратуры Украины в положениях Закона является результатом учёта законодателем рекомендаций европейских экспертов (п. 36 Заключения CDL-AD (2013) 025) [4] и одновременно «игнорированием» положений Основного закона Украины [5], что потенциально ставит соответствующие положения нового Закона Украины перед угрозой признания их неконституционными.

Продемонстрированная выше правовая несогласованность объясняется, в частности, тем, что Украина принадлежит к тем немногим государствам-участникам Совета Европы, в Основных законах которых в полном объёме, как и в Конституции Украины, определены функции прокуратуры, среди которых и основные направления деятельности за пределами уголовной юстиции.

Кроме того, новый Закон Украины вносит изменения в определении оснований и условий реализации этой функции прокуратуры Украины, которые, к сожалению, не в полной мере согласуются с положениями процессуального законодательства Украины. Причина такой правовой

коллизии, по нашему мнению, кроется в том, что законодатель сделал попытку ввести в положения нового Закона процессуальные нормы, которые по своей правовой природе должны содержаться в соответствующих процессуальных кодексах Украины.

В то же время, по мнению европейских экспертов, в законодательной формулировке полномочий прокуратуры Украины за пределами уголовной юстиции не удалось полностью избежать отсутствия ясности правовой регламентации сферы компетенции, которую предусматривает функция представительства прокуратурой интересов гражданина в суде (п. 79 Комментариев Генерального директората по правам человека и верховенства права Совета Европы [6]). Это предостережение обусловлено, в частности положениями Рекомендации CM / Rec (2012) 11 КМ СЕ государствам-участникам «О роли общественных обвинителей вне системы уголовной юстиции» (принята КМ СЕ 19 сентября 2012 на 1151 заседании на уровне заместителей министров) [7], согласно которым при наличии у службы публичного обвинения полномочий вне системы уголовной юстиции, государства-участники должны принять все необходимые и соответствующие меры для обеспечения того, чтобы эта роль выполнялась с особым вниманием к защите прав человека и основных свобод и в полном соответствии с принципом верховенства права, в частности, о праве на справедливое судебное разбирательство. С этой целью государства-участники должны в полной мере учитывать принципы, изложенные в приложении к настоящей Рекомендации. Одним из основополагающих принципов, среди общих принципов, можно считать ориентирование государств-участников на то, что обязанности и полномочия публичных обвинителей вне системы уголовной юстиции должны во всех случаях устанавливаться законом и чётко определяться во избежание многозначности.

Учитывая евроинтеграционные стремления Украины, чрезвычайно актуальным представляется исследование опыта правовой регламентации полномочий прокуратуры в специальных законах иностранных государств, в первую очередь, государств Европейского Союза, с целью его изучения, правового анализа и заимствования полезного опыта, что и определяет цель этой статьи.

Анализ последних исследований и публикаций. Вопросам правовой регламентации деятельности органов прокуратуры вне уголовной юстиции посвящены работы многих учёных, среди которых работы таких как О. Анпилогов, Е. Блаживский, Р. Бурлаков, Л. Грицаенко, В. Долежан, Т. Дунас, В. Карпунцов, И. Козьяков, М. Косюта, И. Корнаш, Т. Корнякова, О. Литвак, А. Матвиец, Н. Мычко, Н. Наулик, Н. Руденко, Г.

Середа, А. Тогобицкая, В. Чечерский, Р. Шестопалов и другие.

Изложение основного материала. Исследуя проблемные аспекты деятельности органов прокуратуры, учёные обращают внимание на особенности названия этого института, нечёткость которого, по их мнению, может порождать проблему нечёткости функций и компетенции соответствующего государственного органа. В частности, одним из типов названия этих органов, рядом с наименованием, которое ориентирует соответствующие службы исключительно на государственное (публичное) обвинение (Великобритания, Исландия, Норвегия, Швеция, Финляндия, Венгрия, Словения, Сербия, Черногория, Босния и Герцеговина, Македония), и постсоветским наименованием этих органов - «Прокуратура», которое сохраняется до сих пор в государствах - бывших советских республиках (Эстонии, Литве, Латвии, Украине, Молдове, России, Грузии, Армении, Азербайджане), а также государствах бывшего «социалистического лагеря» (Польши, Словакии, Болгарии), а также в Албании, выделяют наименование, которое ориентирует соответствующие службы на защиту публичных или государственных интересов.

Так, во Франции, Бельгии, Люксембурге, Монако - «Ministère public», которое переводится как Служба публичного представительства, в Италии - «Pubblico Ministero», в Португалии - «Ministério Público», в Румынии - «Ministerul Public», в Нидерландах - «Openbaar Ministerie», которое также означает Служба публичного представительства. В Испании, Андорре - «Ministerio Fiscal», что переводится как Служба государственного представительства. Латинский термин «fiscal» означает «казна». Так что этот орган призван защищать интересы казны, бюджета, государства. В Германии, Австрии, Швейцарии, Лихтенштейне - «Staatsanwaltschaften», которое переводится как Служба государственного представительства. В Чехии - «Státní zastupitelství», в Хорватии - «Državno odvjetništvo», которые также переводятся как Служба государственного представительства [8].

Компаративное исследование законодательной регламентации полномочий прокуратуры вне сферы уголовной юстиции, связанных с представительством интересов гражданина или государства в суде, по законам некоторых стран Европейского Союза, которые наделили прокуратуру полномочиями в этой сфере, даёт возможность выделить определённые особенности такой правовой регламентации, одной из которых, в частности, является то, что полномочия прокуратуры по представительству интересов в суде, в основном, сводятся к так называемому государственному (публичному) представительству.

Так, Федеральный Закон Австрийской Республики 1986 года № 338/1986 «О Службе государственного представительства» [9] определяет, что Службы государственного представительства при выполнении закреплённых за ними в законодательстве задач призваны к соблюдению интересов государства в сфере правосудия, прежде всего в сфере уголовного правосудия. Однако, этот закон допускает возложение на службы государственного представительства задач связанных с гражданскими делами, с оговоркой при этом о том, что в случае возложения таких задач на службы государственного представительства таких задач - соответственно применяются нормы этого Закона. Так, в гражданско-правовой сфере эта деятельность может заключаться в подаче судебных исков, а также в других направлениях деятельности, в частности, относительно признание брака недействительным, объявлении лица умершим и т.д. [10].

Согласно положениям Закона Королевства Испании № 50/1981, который регулирует Устав Службы государственного представительства [11], миссией Службы государственного представительства является содействие отправлению правосудия по защите законности, прав лиц и публичных интересов, определённых законом, по собственной инициативе или по обращениям заинтересованных сторон, а также обеспечение независимости судов и удовлетворение общественных интересов в этих судах.

Для выполнения этих задач Служба государственного представительства в целях защиты законности и публичных интересов общества участвует в процессах относительно гражданского состояния, а также в других производствах, определённых законом; выступает стороной в гражданских процессах, установленных законом, в случаях, когда затрагиваются интересы общества, или, когда производство может касаться несовершеннолетних, недееспособных лиц или инвалидов; Служба обеспечивает законные механизмы представительства их интересов; заботится об исполнении судебных решений, которые сказываются на публичных и общественных интересах.

Участие государственных представителей в не криминальных производствах может допускаться в крайних случаях, за исключением ситуаций, когда закон предусматривает иное, или же когда государственный представитель выступает в качестве истца. Кроме того, Правительство вправе требовать от Службы государственного представительства обращения в суды с исками о защите публичных интересов, которые Службе поручено отстаивать.

Согласно положениям Закона Португальской Республики № 47/86 от 15 октября 1986 года, который определяет Устав Службы публичного представительства [12], Служба публичного представительства представляет государство, защищает определённые законом интересы, участвует в реализации политики борьбы с преступностью, определённой верховными органами власти, осуществляет уголовное преследование на основе принципа законности, а также защищает демократическую законность в соответствии с положениями Конституции, настоящего Устава и законов.

Этот закон наделяет Службу публичного представительства, среди прочих, полномочиями по представительству государства, автономных регионов, местных органов управления, недееспособных, отсутствующих по неизвестным причинам и таких, которые пропали без вести, лиц; в случаях, предусмотренных законом - по защите коллективных интересов и интересов неопределённого круга лиц; по защите независимости трибуналов в области их полномочий, а также по обеспечению реализации судебных функций в соответствии с Конституцией и законами; по обеспечению выполнения решений трибуналов; по участию в процедурах банкротства и провозглашения неплатежеспособности, а также во всех процессах, затрагивающих публичные интересы. Кроме того, этот закон предусматривает, что Служба публичного представительства может выполнять другие функции, возлагаемые на неё законом. При этом условия деятельности Службы предусматриваются в процессуальном законе.

Служба публичного представительства выступает в главной роли в таких процессах: в случае, если она представляет государство, автономные округа и местные органы власти, недееспособных, отсутствующих по неизвестным причинам и тех, которые пропали без вести, лиц. Кроме этого, в случае, когда она осуществляет официальную опеку над работниками и членами их семей для защиты их социальных прав; если она представляет коллективные интересы или интересы неопределённого круга лиц; в инвентаризациях, которые требуются законом; во всех других случаях, когда закон наделяет Службу полномочиями выступать в указанной роли.

В случаях представительства автономного региона или местных органов власти деятельность в главной роли прекращается после того, как указанная единица создала собственный представительный орган. В случаях представительства недееспособных или пропавших без вести лиц деятельность в главной роли прекращается в случае, если юридические представители такого лица протестуют против такой роли Службы через

соответствующее официальное ходатайство.

В то же время привлекает внимание опыт Польши в вопросах правового регулирования отношений в сфере исследуемых вопросов. В отличие от специального Закона Украины, содержащего чёткое определение основных функций прокуратуры, в том числе за пределами уголовной юстиции, и полномочий прокуроров по выполнению этих функций, Закон Республики Польша «О прокуратуре» от 20 июня 1985 года [13] предусматривает возможность осуществления прокурорами и другой деятельности (кроме той, которая указана в этом законе – М. Стефанчук), определённой в законах (п. 10 ч. 1 ст. 3 этого закона).

Так, в соответствии со ст. 2 Закона Республики Польша «О прокуратуре» задачей прокуратуры является охрана законности и надзор за преследованием преступлений. Эти задачи Генеральный прокурор и подчинённые ему прокуроры выполняют, в том числе, путём предъявления исков в уголовных и гражданских делах, а также подачи заявлений и участия в судебных процессах по гражданским делам, делам, касающихся трудовых отношений и социального страхования, если этого требует защита законности, общественных интересов, собственности или прав граждан; обжалования в суде противоправных административных решений, а также участия в судебных процессах по делам соответствия таких решений закону; осуществления иной деятельности, определённой в законах. В соответствии с положениями ст. 42 этого закона участие прокурора в гражданском и административном производстве, в процессах по делам о правонарушениях, а также в других производствах определяют отдельные законы.

Так, согласно Кодексу административного производства Польши, прокурор может как возбуждать административное производство, так и участвовать в нём на любой стадии, а также обращаться с жалобой в Главный административный суд [14, 107].

По Закону Чехии «О государственном представительстве» оно вправе предъявить иск или вступить в гражданское дело только в случаях, предусмотренных законом. Процессуальный статус, полномочия и обязанности государственного представителя, который завил иск, или вступил в дело, определяется Гражданско-процессуальным кодексом, согласно положениям которого государственный представитель может вступить в гражданское дело, в частности относительно установления дееспособности; объявления умершим; записи в коммерческий реестр. Подобно чешскому законодательству регулируются полномочия прокурора по гражданскому представительству в Словацкой Республике. Согласно

положениям Закона Словакии «О прокуратуре» прокурор выполняет свои полномочия в гражданском судопроизводстве в объёмах, установленных специальным законом, согласно которому он уполномочен: заявлять иски; вступать в гражданское дело; представлять государство в суде; подавать жалобу (апелляцию или кассацию) на судебное решение [15, 149-150].

Согласно положениям Закона Республики Словения «О службе государственного обвинения» [16] от 12 июля 2011 года государственный обвинитель наделяется полномочиями вносить процессуальные акты, а также выполнять другие обязанности в гражданском и других судебных процессах, а также в административных процессах, если это предусмотрено законом. Так, в гражданско-правовой сфере эта деятельность может заключаться в подаче судебных исков, а также в других направлениях деятельности, в частности, относительно признание брака недействительным, аннулирования компаний, оспаривания отцовства или отмены усыновления [10].

Закон о прокуратуре Республики Хорватия [17] от 30 июня 2009 года уполномочивает компетентную прокуратура представлять Республику Хорватия во всех делах, возбуждённых в целях защиты имущественных прав и интересов перед судами и другими органами, если законом или постановлением, принятым на основании его компетентным государственным органом, не предусмотрено иначе.

При этом, с целью обеспечения эффективного представительства прокуратурой интересов государства Закон определяет процедуру, при которой компетентные государственные органы Республики Хорватия обязаны перед началом правовой деятельности по приобретению или отчуждению недвижимости получить от компетентной прокуратуры сообщение о правомерности данных правовых действий. Государственные органы, в структуре которых есть юридическая служба, должны вместе с запросом прислать и обоснованную позицию своей службы.

Законом о прокуратуре Венгрии 2011 года [18], одним из полномочий прокуратуры определено содействие тому, чтобы в судопроизводстве правильно применялись законы (участие прокуроров в судебных процессах по гражданским, трудовым, административно-управленческим и экономическим вопросам, а также в неправовых спорах).

Отдельный раздел закона определяет задачи и общие правила защиты прокуратурой общественных интересов. Так, прокурор, в пределах предоставленных ему полномочий, с целью предотвращения нарушений законодательства, в первую очередь пользуется своим правом возбуждения и участия в судебных и несудебных процессах, а также

инициирует проведение проверки законности действий официальных органов по отношению к обычным гражданам.

Отдельно законом регламентирован вопрос участия прокурора в судебных и несудебных процессах. Так, прокурор участвует в судебном процессе в качестве истца, а если иск подан против него, как ответчик; в судебных спорах между другими лицами может выступать на основании предоставленных ему законодательством полномочий, а также в предусмотренных законом случаях участвует в рассмотрении исков, поданных другими лицами. В тех судебных и иных делах, которые возбуждаются по требованиям закона или против него, прокурор пользуется одинаковыми правами с противной стороной. Во время участия в судебном процессе прокурор лично пользуется правом стороны процесса, но при этом он обязан также с уважением относиться к распорядительному праву сторон.

Прокурор пользуется правом на обжалование судебных решений, о которых, в соответствии с требованиями действующего законодательства прокурора в любой форме принадлежит ставить в известность. В предусмотренных согласно законодательству случаях прокурор пользуется правом на обжалование и тогда, когда не является стороной или ознакомление его с судебным решением не является обязательным.

Закон может обязать прокурора возбуждать иски, в частности, в случаях, связанных с распоряжением национальным имуществом, с незаконным использованием государственных средств и др.

Анализ норм законодательства зарубежных стран, определяющих правовой статус прокуратуры во Франции, ФРГ, Нидерландах, Италии, позволяет констатировать, что в этих государствах прокуратура наделена полномочиями вне уголовной юстиции, которые в основном сводятся к представительской деятельности [19, 43].

В этом аспекте, стоит отметить, что в Германии нет закона о прокуратуре. Основы организации и деятельности прокуратуры определяются главой 10 федерального Закона «О судоустройстве» и Уголовно-процессуальным кодексом ФРГ, а статус прокуроров, которые в целом признаются государственными служащими, - также законами о статусе чиновников, принятыми на федеральном уровне и в каждой из федеральных земель. Относительно вмешательства прокуроров в некриминальные сферы права, то оно ограничивается лишь представительством в суде интересов человека, признанного умершим. Это единственный случай, когда прокурор представляет интересы не государства, а человека. Это исключение обусловлено нестандартной ситуацией, при которой, с

одной стороны, есть определённый процент вероятности, что человек жив, но, с другой, есть необходимость решить вопрос о наследовании принадлежащего ему имущества и интересы каждого из наследников, как правило, не совпадают. Кроме того, прокуратура выступает в суде в качестве представителя государства в случаях, когда полиция или муниципальные службы привлекли нарушителя общественного порядка к ответственности в виде штрафа, а он с этим не согласен и оспаривает такое решение в суде [20].

Зато во Франции прокурор довольно активно участвует в гражданском процессе. Обычно прокурор не выступает на стороне тех или иных участников судебного процесса, а способствует поиску объективной истины как представитель в суде. В некоторых случаях участие прокурора является обязательным в гражданском судопроизводстве, учитывая то, что прокурор выступает как «законный представитель общества». Участие прокурора в гражданском судопроизводстве в соответствии с законодательством Франции обязательно при рассмотрении: всех дел по вопросам гражданства; дел по защите прав несовершеннолетних, когда возникает угроза их здоровью, образованию и безопасности; дел по защите прав и интересов инвалидов; дел по защите интересов лиц с психическими недостатками; дел по некоторым вопросам в сфере коммерческой деятельности (соблюдение законности при реализации имущества фирмы, признанной банкротом); дел, в которых решаются государственные вопросы [19, 44].

Таким образом, с учётом вышеизложенного, можно сделать вывод о том, что правовая регламентация полномочий прокуратуры вне сферы уголовной юстиции, связанных с представительством интересов гражданина или государства в суде, по законам отдельных государств Европейского Союза характеризуется отсутствием правового однообразия с преобладающей тенденцией к избеганию чёткого определения таких полномочий в специальных законах о прокуратуре (в случае их наличия в законодательном пространстве соответствующего государства), и определению этих полномочий в соответствующих процессуальных законах. Такая правовая регламентация, по нашему мнению, даёт возможность избегать коллизий между процессуальными нормами процессуального и материального законодательства, регулирующих отношения по представительству прокуратурой интересов гражданина или государства в суде, и в то же время соответствует Рекомендации CM / Rec (2012) 11 относительно того, что обязанности и полномочия публичных обвинителей вне системы уголовной юстиции должны во всех случаях устанавливаться законом и чётко определяться во избежание многозначности.

Кроме того, проведённое исследование, по нашему мнению, во многом объясняет позицию европейских экспертов, в частности относительно рекомендации по отмене функции надзора за соблюдением прав и свобод человека и гражданина, соблюдением законов по этим вопросам органами исполнительной власти, органами местного самоуправления, их должностными и служебными лицами, предусмотренной п. 5 ст. 121 Основного закона Украины, а также функции представительства интересов физических лиц. В то же время, следует согласиться с исследователями, которые справедливо отмечают, что ряд стран, которые являются членами Евросоюза, выполняют функцию защиты прав человека и гражданина, однако относительно них не высказывается никаких замечаний со стороны европейских структур [22, 21].

Учитывая результаты проведенного исследования, представляются перспективными дальнейшие научные исследования очерченных вопросов правовой регламентации полномочий прокуратуры, связанных с представительством интересов гражданина или государства в суде, с целью разработки его эффективного механизма, который будет отвечать европейским стандартам, не снижая при этом правозащитного потенциала прокуратуры вне сферы уголовной юстиции.

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DIE EINBEZIEHUNGSREGELUNGEN DES NEUEN TURKISCHEN AGB-RECHTS

Yeni Türk Genel İşlem Koşulları Hukukunun Yürürlük Denetimine İlişkin Düzenlemeleri

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ABSTRACT

Today it's a very common issue, that contracts have standard terms and conditions, setting out the rights and the obligations, which are not individually agreed und used for all customers. Many written contracts include standard terms, often in the small print and not easily readable. In accordance with the principle of protection of the economic interests of the customers, against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts, new regulations are made by the Parliament in Turkish Obligations Law, which came into force in 2012. These new Rules apply to trades, business or professions of a public nature and also consumer contracts, if there is no applicable rule in Consumer Protection Law.

Keywords: Terms and Conditions, Allgemeine Geschäftsbedingungen, Einbeziehungskontrolle, Nichteinbeziehung

ÖZET

Türk Borçlar Kanunu'nun yürürlüğe girmesiyle birlikte daha önce yalnızca tüketici sözleşmeleri ile sınırlı olarak mevcut olan genel işlem koşullarının yürürlük denetimi kanuni bir temele kavuşmuştur. Kanun koyucu her ne kadar gerekçesinde hükümlerin düzenlemesinde Alman Medeni Kanunu'nun ilgili hükümlerinin esas alındığını belirtse de, orada yer alan hükümlerden birçok açıdan ayrıldığını görmekteyiz. İşte bu makalenin temel amacı da Türk Borçlar Kanunu'nun genel işlem koşullarında yürürlük denetimine ilişkin hükümlerinin genel bir tanıtımının yapılmasının yanı sıra, mehaz Kanun ile olan benzerlik ve farklarının da ortaya konmasıdır.

Anahtar Kelimeler: Genel İşlem Koşulları, Yürürlük Denetimi, Yazılmamış Sayılma

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I. EINLEITUNG

Mit der Verabschiedung des neuen türkischen Obligationengesetzes[1] ist

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1 Im folgenden abgekürzt als tOR.

eine der wichtigsten Gesetzeslücke im Bereich der rechtlichen Behandlung von Allgemeinen Geschäftsbedingungen beseitigt worden. Da die Gerichte in den vergangenen Jahren verständlicherweise eine Kontrolle grundsätzlich im Rahmen des Konsumentenschutzgesetzes[2] übte, wurde schon früh erkannt und gefordert, dass Eingreifen des Gesetzgebers für eine allgemeine Regelung der AGB notwendig sei[3].

Eine der wichtigsten Neuigkeiten des Obligationengesetzes ist die Einführung der neuen Vorschriften Art. 20 bis 25, die für das neue AGB-Recht die künftige Rechtsgrundlage bilden werden. Ziel dieser gesetzlichen Regelungen ist es ferner, die Unsicherheit und Uneinheitlichkeit, die bei der Anwendung der Einbeziehungs- bzw. Inhaltskontrolle von AGB durch die Gerichte festzustellen war, in wesentlichen Punkten durch die gesetzlichen Regelungen zu beseitigen und zu verhindern.

Der persönliche Anwendungsbereich der Vorschriften Art. 20 bis 25 tOR sind jedoch nicht eingeschränkt. Das heisst, das Gesetz soll nicht nur gegenüber dem Endverbraucher, sondern auch auf Handelsgeschäften unter Kaufleuten Anwendung finden. Für die Verbraucher gelten jedoch die Sondervorschriften im Konsumentenschutzgesetz (KSG) weiterhin. Die allgemeinen Regelungen des tOR werden insoweit berücksichtigt werden, wenn eine Gesetzeslücke im Konsumentenschutzgesetz besteht. Im Rahmen dieses Aufsatzes wird daher jeweils darauf hingewiesen, inwieweit die jeweilige Klausel auf Geschäften mit Verbrauchern Anwendung finden wird oder nicht.

Gemäß § 310 BGB findet die Einbeziehungsregelung des § 305 keine Anwendung, wenn die AGB gegenüber einem Unternehmer verwendet werden, wenn der Vertrag zum Betriebe seines Handelsgewerbes gehört - und bei Verwendung gegenüber einer juristischen Person des öffentlichen Rechts (z.B. Gemeinde) oder einem öffentlich rechtlichen Sondervermögen. Eine derartige Einschränkung bezüglich des persönlichen Anwendungsbereichs der Einbeziehungsregelungen sieht das tOR nicht vor. Es ist insoweit zu begrüßen, als die Verwendung von AGB bei Geschäften unter Kaufleuten immer häufiger vorkommt und eine diesbezügliche Unterscheidung keinen triftigen Grund hat[4]. Ein Unternehmer wird dann bei einem Kreditgeschäft AGB-rechtlich

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2 "Tüketicinin Korunması Hakkında Kanun", Ges. Nr. 4077 vom 23.2.1995. Das Gesetz, wurde durch das Gesetz vom 28.11.2013 (RG) und Nr. 6502 ersetz worden.

3 Vor Inkrafttreten des tOR wurde eine AGB-rechtliche Kontrolle schon im Rahmen der Kompetenz zur Schließung von Gesetzeslücken (Art. 1/2 TZGB) anerkannt. S. Yargıtay 3. HD, 07.04.2008, 5324/5974; Yargıtay 3. HD, 02.06.1998, 4263/6098; Yargıtay HGK, 04.12.1996, 3–717/850; Yargıtay 13. HD, 18.03.1996, 1734/2495, (Kazancı).

4 Anderer Meinung **Baki İlkay Engin,** 6098 Sayılı Türk Borçlar Kanunu ve Yargıtay Kararları Işığında Faktoring Sempozyumu, 25-27 Kasım 2011 Antalya, s. 60.

genauso geschützt werden, wie ein Verbraucher gegenüber einer Bank.

Im Weiteren ist es darzustellen, inwieweit die neuen Sondervorschriften über AGB den Regelungsbedarf decken und den Endzweck als erforderliche Basis des Allgemeinen AGB-Rechts herbeiführen. Dazu werden die neue Regelungen des tOR mit den ansprechenden Regelungen des deutschen BGB (§§ 305-310) verglichen.

II. ALLGEMEINE GESCHÄFTSBEDINGUNGEN (Art.20 tOR)

Als allgemeine Geschäftsbedingungen werden für eine Vielzahl von Verträgen, die künftig abgeschlossen werden, vorformulierte Vertragsbedingungen bezeichnet, die der Verwender der anderen Vertragspartei bei Vertragsabschluss stellt (Art. 20/Abs.1). Verwendet z.B. ein Verkäufer wiederholt denselben Vertragstext bei seinen Geschäften, so liegen gemäss Art. 20/Abs. 1 "Allgemeine Geschäftsbedingungen (AGB)" vor. Auch die bloße Absicht des Verkäufers zur Mehrfachverwendung bei Vertragsschluss reicht für die Annahme von AGB aus. Bei Verträgen mit Verbrauchern reicht es dagegen schon aus, dass Vertragsbedingungen für einen einzigen geplanten Vertragsschluss vorformuliert worden sind (Art. 5/1 KSG).

Wenn auch Art. 20 tOR keine negativ formulierte Definition, wie bei § 305/I/3 BGB, enthält, stellt auch im türkischen Recht eine Selbstverständlichkeit dar, dass es sich dort nicht um Allgemeine Geschäftsbedingungen handelt, wo einer Regelung „individuelles Aushandeln" zugrunde liegt. Art. 20/Abs. 3 sieht dabei vor, dass eine Klausel, die darauf hinweist, dass die Vertragsbedingungen im Einzelnen ausgehandelt worden seien, allein den AGB-Charakter dieser Bedingungen nicht ausschließt. Mit dieser Regelung trägt der Gesetzgeber dem Umstand Rechnung, dass der Verwender an einer Stelle des Vertrages bestätigen lässt, dass die Vertragsbedingungen im Einzelnen ausgehandelt seien und damit sich von einer Einbeziehungs- und Inhaltskontrolle nach den Vorschriften des tOR befreien. Hier geht es daher um eine Beweislastregelung, wonach der Verwender dartun soll, dass die AGB-Klauseln nicht als AGB i.S.v. Art. 20/Abs. 1 tOR angenommen werden können, sondern zu Individualabreden gehören[5]. Als Indiz für das „Aushandeln" kann man etwa die nachträglichen Veränderungen im vorformulierten Text nennen.

Hat dagegen der Text AGB-Charakter, so ist eine Umkehr der Beweislast durch eine Klausel nach Art. 20/Abs. 3 unzulässig. So muss z.B. für den Mieter die tatsächliche Möglichkeit der Einflussnahme auf die Vertragsgestaltung

[5] Das Konsumentenschutzgesetz (Art. 5/Abs. 3) enthält dagegen eine ausdrückliche Beweislastregelung, wonach der Verwender darlegen muss, dass die fragliche Klausel individuell ausgehandelt worden ist.

bestehen. Das ist beispielsweise anzunehmen, wenn es zu individuellen Änderungen der Bedingungen kommt oder eine Einzelerörterung derselben samt denkbarer Alternativen vorkommt. Für die Annahme einer ausgehandelten Vereinbarung genügt auch die dem anderen Vertragspartei bekannte Bereitschaft des Verwenders, den Vertragstext zu ändern.

Gemäss Art. 20/Abs. 1 tOR kann sich nur dann um AGB handeln, wenn der Verwender das Vertragsangebot nicht für den konkreten Vertragsschluss sondern als Grundlage für gleichartige Rechtsverhältnisse formuliert und vorgelegt hat. Das Gesetz stellt weiter nicht fest, wieviel Verwendungsfälle für eine bestimmte „Vielzahl" erforderlich sind. Im deutschen Schrifttum geht die herrschende Meinung von einer Mindestzahl von 3 Fällen aus[6]. Das heisst, es kann bereits die dritte Verwendung von AGB in einem Vertragstext die Voraussetzung der „Vielzahl" erfüllen.

Art. 20/Abs.1/Satz.2 tOR sieht außerdem vor, dass es bei der Qualifizierung als „AGB" gleichgültig sei, ob die Bestimmungen in die Vertragsurkunde oder in ihren Anhang aufgenommen werden, welchen Umfang sie haben, in welcher Schriftart sie verfasst sind und welche Form der Vertrag hat. Zu beachten ist hier, dass auch die Absprachen und mündliche Vereinbarungen unter Abwesenden etwa über Telefon können AGB zum Inhalt haben. Genauso ist die Rechtslage, wenn die betroffene Klausel als Textbaustein eines Computer-Programmes oder sonstigen Datenträgers oder „im Kopf des Verwenders"[7] gespeichert ist[8]. Die meisten auf AGB des Verwenders basierenden Geschäfte werden jedoch durch schriftliche Verträge geschlossen[9].

Art. 20/Abs. 2 tOR stellt klar, dass die Vertragsbedingungen, die für eine Vielzahl von Verträgen vorformuliert sind, nicht unbedingt denselben Vertragstext bei jedem Vertrag beinhalten. Damit wird dann eine typische

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6 **MüKoBGB/Basedow** § 305 BGB Rn. 18; . **HK-BGB/Hans Schulte-Nölke** § 305 BGB Rn. 4. So auch BGH NJW 2002, 138; 2004, 1454.

7 BGH NJW 1988, 410; BGHZ 141, 108, 110 = NJW 1999, 2180, 2181; OLG Dresden BB 1999, 228.

8 **BeckOK BGB/Becker** § 305 BGB Rn. 16; **Yeşim Atamer**, "Yeni Türk Borçlar Kanunu Hükümleri Uyarınca Genel İşlem Koşullarının Denetlenmesi, TKHK m.6 ve TTK m.55, f.1 (f) İle Karşılaştırmalı Olarak", Türk Hukukunda Genel İşlem Şartları Sempozyumu, Bildiriler Tartışmalar, 8 Nisan 20112, BATİDER, Ankara 2011, s. 14 ve s. 19.

9 Nach meiner Meinung sind die AGB-Regelungen auch auf notariell beurkundete Verträge anzuwenden, weil auch notarielle Verträge Vertragsbedingungen enthalten können, die für eine Vielzahl von Verträgen vorformuliert und der einen Vertragspartei einseitig auferlegt sind. Ebenso **MüKoBGB/Basedow** § 305 BGB Rn. 33; **Murat Aydoğdu,** 6098 sayılı Türk Borçlar Kanununda Düzenlenen Genel İşlem Koşullarının Konu Bakımından Uygulama Alanı, Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi Cilt: 13, Sayı: 2, 2011, (Basım Yılı: 2013) s. 15; **Yeşim Atamer,** Genel İşlem Şartlarının Denetlenmesi, İstanbul 1999, s. 70-71.

Einwendung des Verwenders gehindert. Darauf, ob die Vertragstexte bei jeweiligem Vertrag identisch sind, kommt es nicht an. Entscheidend ist nur die Absicht des Verwenders zur späteren Verwendung also ob er eine Mehrfachverwendung in Aussicht genommen hat[10]. Nicht erforderlich ist es, dass der Verwender bei dem nächsten Vertragsabschluss tatsächlich denselben Text benutzt;

Entsprechend dem umfassenden Schutzcharakter des neuen Gesetzes und anders als in § 310 BGB, wo die Tarifverträge und die Verträge des Erbrechts, Familienrechts und Gesellschaftsrechts aus dem Anwendungsbereich des Gesetzes herausgenommen sind, finden Art 20-25 tOR auf alle Verträge ohne weitere Einschränkung[11]. Art 20/Abs. 4 tOR stellt dabei klar, dass die Vorschriften über AGB auch auf die Verträge anzuwenden sind, welche von den Personen oder Unternehmen vorformuliert worden sind, die ihre Dienste nach einer gesetzlichen Berechtigung oder einer amtlichen Bewilligung durchführen. Ausserdem finden im deutschen Recht die Einbeziehungsregelungen (§ 305Absatz 2 und 3 BGB) und bestimmte Vorschriften über Inhaltskontrolle (§ 308 Nummer 1, 2 bis 8 BGB und § 309 BGB) keine Anwendung auf Allgemeine Geschäftsbedingungen, die gegenüber einem Unternehmer, einer juristischen Person des öffentlichen Rechts oder einem öffentlich-rechtlichen Sondervermögen verwendet werden. Eine derartige Einschränkung sieht das tOR nicht vor. Dies wird jedoch im Schrifttum heftig kritisiert[12]. Meines Erachtens gibt es keinen triftigen Grund, einem Unternehmen gegenüber einer Bank, Versicherungs- oder Telekommunikationsfirma ein niedriges Schutzniveau hinsichtlich der AGB-rechtlichen Einbeziehungsregelungen zu gewährleisten. Bei der Anwendung des Art. 25, kann man jedoch strengere Anforderungen aufstellen, wenn es sich um eine Inhaltskontrolle der AGB, die gegenüber einem Unternehmer, einer juristischen Person des öffentlichen Rechts oder einem öffentlich-rechtlichen Sondervermögen verwendet werden.

In welchem Umfang das Gesetz Anwendung findet, richtet sich also weder danach, wer die AGB zum Vertragsinhalt machen will, noch danach, wem gegenüber sie vorgelegt werden. Es kommt also nur darauf an, ob die Bedingungen einseitig vorformuliert und der anderen Vertragspartei bei Vertragsabschluss gestellt worden sind.

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10 **Thomas Pfeiffer** in: Wolf/Lindacher/Pfeiffer, AGB-Recht, Kommentar, 6. Auflage 2013, Rn. 15; **Aydoğdu,** Konu Bakımından Uygulama Alanı, DEÜHFD Cilt: 13, Sayı: 2, 2011, s. 32.

11 Ömer Çınar, Tüketici Hukukunda Haksız Şartlar, İstanbul 2009, s. 33, 34, Fn. 63; **Aydoğdu,** Konu Bakımından Uygulama Alanı, DEÜHFD Cilt: 13, Sayı: 2, 2011, s. 8.

12 **Erden Kuntalp**, "Bankalar ve Genel İşlem Koşulları" Türk Hukukunda Genel İşlem Şartları Sempozyumu, Bildiriler Tartışmalar, 8 Nisan 20112, BATİDER, Ankara 2011, S. 92-93; **Engin,** Sempozyum, s. 60.

III. EINBEZIEHUNG von AGB IN DEN VERTRAG (Art. 21)

Neu ist auch die Regelung des Art. 21 tOR, in welcher bestimmte Anforderungen für die Einbeziehung von AGB konkretisiert und niedergelegt worden sind. Danach können die AGB, *die für den anderen Vertragsteil nachteilig sind*, nur dann Bestandteil eines Vertrags, wenn der Verwender bei Vertragsschluss die andere Vertragspartei auf sie ausdrücklich hinweist und der anderen Vertragspartei die Möglichkeit verschafft, von ihrem Inhalt Kenntnis zu nehmen und wenn die andere Vertragspartei mit der Geltung dieser Bedingungen einverstanden ist. Es ist kaum verständlich, warum der Gesetzgeber nur diejenige AGB der Regelung des Art. 21 tOR unterworfen hat, die für den anderen Vertragsteil nachteilig sind. Dies kann freilich dazu führen, dass das Gericht schon bei der Bestimmung, ob die AGB des Verwenders nachteilig sind oder nicht, eine Inhaltskontrolle machen muss[13].

Wegen seiner praktikablen Nutzung beim Vertragsabschluss machen die meisten Kaufleute von AGB Gebrauch, die etwa das anwendbare Recht, Gewährleistungs- und Haftungsfragen, Liefer- und Zahlungsmodalitäten usw. betreffen und für alle Verträge des Anbieters einheitlich gelten. Diese Situation verstärkt die rechtliche Position des Verwenders von AGB zuungunsten des Kunden, weil er in diesem Fall mit solchen Bedingungen unbedingt einverstanden sein soll, um den Vertrag zum Abschluss zu bringen. Deshalb stellt jede Rechtsordnung an die Einbeziehung von AGB in den Vertrag bestimmte Anforderungen zum Schutz der schwächeren Vertragspartei auf (in der Regel ist dies der Kunde). Dies gilt auch im türkischen Recht bzw. in der neuen Regelung des Art. 21 tOR.

Gemäß Art. 21/Abs. 1 tOR werden die AGB des Verwenders nur dann Vertragsbestandteil, wenn drei Voraussetzungen erfüllt sind: Der Verwender muss bei Vertragsschluss auf die AGB ausdrücklich hinweisen (a.), außerdem muss er dem Vertragspartner die Möglichkeit einer Kenntnisnahme verschaffen (b.) und schließlich muss der Vertragspartner mit der Geltung der AGB einverstanden sein (c.).

1. Ausdrücklicher Hinweis

Das Erfordernis der Ausdrücklichkeit des Hinweises ist nur dann erfüllt, wenn er so angeordnet und gestaltet ist, dass er von einem Durchschnittskunden auch bei flüchtiger Betrachtung nicht übersehen werden kann[14]. Dazu ist erforderlich, dass beim Vertragsschluss der Wille des Verwenders einen Vertrag abzuschließen, dem grundsätzlich seine AGB zugrunde liegen,

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13 **Atamer**, Sempozyum, S. 27-28.

14 **MüKoBGB/Basedow** § 305 BGB Rn. 58; **BeckOK BGB/Becker** § 305 BGB Rn. 45.

unmissverständlich und für den Kunden klar erkennbar erklärt worden ist.

Art. 21/Abs. 1 tOR schreibt ferner vor, dass der Verwender *nur* auf die AGB hinweisen soll, die für die andere Vertragspartei *nachteilig* sind bzw. dessen Interessen benachteiligen. Der ausdrückliche Hinweis muss sich also allein auf nachteilige Vertragsbedingungen beziehen. Die „Nachteiligkeit" der jeweiligen Klausel bestimmt sich ferner nicht nach den Umständen des Einzelfalles oder den Vorstellungen der Parteien. Dies bedeutet, dass vorformulierte Vertragsbedingungen unter Nichtberücksichtigung der Umstände des Einzelfalles auszulegen sind, also nach dem Willen verständiger und redlicher Vertragspartei unter Abwägung der Interessen der an Geschäften dieser Art normalerweise beteiligten Kreise. Hier geht es um dann eine *a priori* durchzuführende Inhaltskontrolle. Da die gesetzliche Einbeziehungskontrolle, der Kompensation der mangelnden privatautonomen Legitimation von AGB dient, stellt es eine Selbstverständlichkeit dar, dass die diese Kontrolle sich insbesondere auf die andere Vertragspartei benachteiligende AGB bezieht[15].

Die AGB-Verwender werden sich jedoch sicherlich in meisten Fällen zur Verteidigung ihrer AGB darauf berufen, dass die fragliche Klausel hinsichtlich der Interessen der anderen Vertragspartei nicht benachteiligend sei. Der Richter soll deshalb bei der Entscheidung, ob eine Klausel nachteilig und damit von der Hinweispflicht des Verwenders umfasst ist, das in der Klausel verankerte Interesse und der Regelungszweck genau festlegen. Dabei soll diese Ermittlung nicht auf die fragliche Bedingung beschränken; auch dessen Verhältnisse zu anderen Klauseln muss dabei berücksichtigt werden. Nicht selten ist der Fall, dass eine für die Vertragspartei des Verwenders nachteilig erscheinende Klausel, durch eine andere Klausel der AGB kompensiert und die Interessen ausgeglichen wird.

In diesem Zusammenhang ist ferner die Frage von Bedeutung, was die "Ausdrücklichkeit" des Hinweises bedeutet. Nach einer Ansicht im deutschen Schrifttum ist hierzu nicht ausreichend, dass die Bestellung des Kunden sich auf einen Katalog oder Prospekt bezieht, der die AGB des Verwenders vollständig enthält[16]. Dieser Auffassung ist zuzustimmen, weil weder im deutschen noch im türkischen Recht bei der Vorbereitung des Gesetzes keine "Wissen-müssen-Formel" berücksichtigt wurde, wonach die AGB des Verwenders auch dann Vertragsbestandteil werden konnten, wenn der Kunde gewusst habe oder habe wissen müssen, dass der Anbieter den Vertrag seinen AGB zugrunde zu legen will und dass sein Angebot als Einverständnis

15 Vgl. **Kuntalp**, Sempozyum, s. 95.

16 **MüKoBGB/Basedow** § 305 BGB Rn. 58; **BeckOK BGB/Becker** § 305 BGB Rn. 45; **Palandt/Grüneberg** § 305 BGB Rn 29.

mit der Geltung von AGB zu beurteilen ist. Die Einbeziehung der AGB erfolgt daher nur durch eine entsprechende Vereinbarung der Vertragsparteien, der sogenannte Einbeziehungsvertrag. Indessen fehlt ein solcher Vertragswille des Kunden, wenn man nur davon ausgeht, dass der Kunde allein schon aus dem Hinweis auf die AGB den Willen des Anbieters an einem Vertragsabschluss unter Einbeziehung der AGB erkennen muss. Der Kunde muss also seinem Angebot ausdrücklich unter Bezugnahme auf die AGB des Anbieters abgeben.

Die ausdrückliche Hinweispflicht des Verwenders wird in Art. 21 tOR ohne Ausnahme oder Einschränkung für alle Geschäfte konzipiert. § 305/Abs. 1/ Nr.1 BGB sieht dagegen eine Einschränkung für typische Massengeschäfte vor, sofern der Hinweis nur unter unverhältnismäßigen Schwierigkeiten möglich ist und durch einen deutlich sichtbaren Aushang am Ort des Vertragsschlusses ersetzt wird. Meines Erachtens ist eine derartige Einschränkung auch im türkischen Recht durch Berufung auf den Grundsatz von Treu und Glauben anzunehmen, sofern es dem Verwender wegen der Schwierigkeiten bei täglichem Massenverkehr ein ausdrücklicher Hinweis nicht zugemutet werden kann.

2. Möglichkeit der Kenntnisnahme

Gemäss Art 21/Abs. 1 tOR werden die vorformulierten Vertragsbedingungen nur dann Vertragsinhalt, wenn sie von dem Kunden bewusst und gewollt einbezogen werden. Dies setzt voraus, dass der Kunde Gelegenheit erhält, vom Inhalt des Formularvertrages eingehend Kenntnis zu nehmen, unabhängig davon, ob auch tatsächlich Kenntnis genommen wurde.

Der Vertragstext muss daher zunächst *lesbar* und *verständlich* sein[17]. Was dafür genau erforderlich ist, kann man nicht allgemein für alle Fälle geltend festlegen. Aber es ist klar, dass ein durchschnittlicher Kunde beim Lesen zumindest keine Lupe gebraucht, wie es bei Versicherungsverträgen häufig der Fall ist. Für die Lesbarkeit ist eine Mindestschriftgrösse im Obligationengesetz nicht vorausgesetzt. Das Konsumentenschutzgesetz sieht dagegen in Art. 4/ Abs. 1 vor, dass Verbraucherverträge mindestens eine Schriftgrösse von 12 Punkt haben sollen. Dieses Kriterium soll meines Erachtens durch eine analoge Anwendung des Art. 4/Abs. 1 auch für die Nicht-Verbraucherverträge gelten, weil unter normalen Umständen ein Vertragstext mit niedriger Schriftgrösse nur mit Mühe zu entziffern ist.

Darüber hinaus müssen die AGB angesichts des Verständnisses eines Durchschnittskunden klar und sinnvoll gegliedert und übersichtlich abgefasst

[17] **Pfeiffer** in: Wolf/Lindacher/Pfeiffer § 305 BGB Rn 69; **Atamer,** Genel İşlem Şartlarının Denetlenmesi, s. 97

sein[18]. Von Verständlichkeit der AGB nicht die Rede ist, wenn der Anbieter im AGB-Text bloß juristische oder technische Fachausdrücke verwendet oder er Verweisungen auf andere Klauseln oder Gesetzesbestimmungen ohne Angaben bezüglich ihres Inhalts macht. Im Art. 21 fehlt in diesem Zusammenhang eine § 305/Abs. 2/Ziff. 1 BGB ähnliche Regelung, wonach ein deutlich sichtbarer Aushang am Ort des Vertragsschlusses schon ausreichend ist, wenn ein ausdrücklicher Hinweis wegen der Art des Vertragsschlusses nur unter unverhältnismäßigen Schwierigkeiten möglich ist. Trotzdem kann man auch im türkischen Recht davon ausgehen, dass die *Aushändigung* der AGB die Voraussetzung der Möglichkeit der Kenntnisnahme erfüllt[19]. Hierzu reicht jedoch eine Angabe, wo der Vertrag erworben oder eingesehen werden kann, oder das Angebot, die Vertragsbedingungen auf Wunsch zu übersenden bzw. die bloße Bezugnahme auf ein Vertragsmuster nicht aus. Allerdings genügt die ausreichende Gelegenheit zur Kenntnisnahme; ob der Vertragspartner dann tatsächlich Kenntnis genommen hat, spielt dabei keine Rolle.

Die Möglichkeit der Kenntnisnahme setzt ferner voraus, dass der Kunde über die AGB des Verwenders beim Vertragsschluss verfügen kann. Bei den herkömmlichen schriftlichen Vertragsabschlüssen ist die Ausgabe oder Zusenden von Katalogen, Prospekten oder Preislisten erforderlich, in denen die AGB vollständig abgedruckt sind. Auf diese Weise erhält der Kunde die Möglichkeit von den AGB Kenntnis zu nehmen. Bei mündlichem oder telefonischem Vertragsschluss erscheint aber problematisch zu beurteilen, ob die Vertragspartei des Verwenders von AGB Kenntnis nehmen konnte. In solchen Fällen ist für die Möglichkeit der Kenntnisnahme ausreichend, dass die AGB nachträglich zugesendet oder im Geschäftslokal des Verwenders erhalten werden. Bei Internetgeschäften ist der Verwender verpflichtet, dem Kunden die Möglichkeit zu verschaffen, die AGB bei Vertragsabschluss abzurufen und in wiedergabefähiger Form zu speichern[20].

3. Das Einverständnis des Kunden

Für eine wirksame Einbeziehung ist ferner erforderlich, dass der Kunde bezüglich der Geltung der AGB sein Einverständnis erklärt. Ob ein Einverständnis des Kunden vorliegt, bestimmt sich nach den allgemeinen Bedingungen des Obligationengesetzes über die Willenserklärung (Art. 1 ff. tOR). Der Kunde soll das Angebot oder die Annahmeerklärung, in denen Einverständniserklärung vorhanden ist, dem Verwender übermitteln. Ist der Kunde gegen die Einbeziehung von AGB in den Vertrag, muss er dies dann

18 **BeckOK BGB/Becker** § 305 BGB Rn. 59; **MüKoBGB/Basedow** § 305 BGB Rn. 66, 71.
19 Vgl. **Atamer**, Sempozyum, s. 27.
20 **MüKoBGB/Basedow** § 305 BGB Rn. 69.

ausdrücklich in derselben Mitteilung zum Ausdruck bringen. In diesem Fall kommt in der Regel kein Vertrag zustande, weil man dann davon ausgehen, dass der Anbieter den Vertrag nur unter Einbeziehung seiner AGB abschließen wird. Ein sonstiges Verhalten des Kunden kann den Umständen nach als Einverständnis mit der Geltung der AGB angesehen werden[21].

III. ÜBERRASCHENDE KLAUSELN

Gemäss Art. 21/Abs. 2 beschränkt sich die mit dem Vertragspartner des Verwenders getroffene Einbeziehungsvereinbarung immer nur auf den *typischen Inhalt* eines Formularvertrages. Klauseln, die der Rechtsnatur des Vertrages und den Umständen des Geschäftes fremd sind, werden nicht Vertragsbestandteil. Solche Klauseln sind im Schrifttum als "überraschende Klauseln" genannt[22]. Der Sinn und Zweck der Regelung liegt darin, dass der Vertragspartner des Verwenders darauf vertrauen darf, dass sich die AGB im wesentlichen im Rahmen dessen halten, was er bei Vertragsabschluss erwarten konnte. Hinsichtlich der Erwartungen des Kunden ist nicht auf den jeweiligen Kunden sondern auf den *durchschnittlich einsichtsfähigen, aber rechtsunkundigen Kunden abzustellen*[23]*. Das heisst, der* konkrete Kenntnisstand der Parteien spielt grundsätzlich hierzu keine Rolle.

Art. 21/Abs. 2 tOR bestimmt, unter welchen Voraussetzungen eine Klausel als überraschend anzusehen ist. Die AGB des Verwenders dürfen danach keine Bestimmung enthalten, die „*der Natur des Vertrages fremd*" sind. Bei der Feststellung der Natur des Vertrages spielt schon die Vertragsüberschrift eine wichtige Rolle. Wenn also z.B. die AGB eines "Mietvertrages" eine Verpflichtung zum Abschluss eines Kaufvertrages bezüglich der Möbeln enthalten, so wird diese Klausel nach Art. 21/Abs. 2 nicht Vertragsbestandteil, weil man bei Abschluss eines "Mietvertrages" nicht damit rechnen muss, dass er eine der Natur des Vertrages fremde Verpflichtung eingegangen ist. Abzustellen ist in diesem Zusammenhang nicht nur auf die Vertragsüberschrift, sondern auch auf den gesamten äußeren Eindruck des Vertrags.

Überraschend sind auch Klauseln , die "*den Umst*änden des Geschäftes f*remd"* erscheinen. Hier werden solche Klauseln gemeint, mit denen ein durchschnittlicher Kunde bei einem solchen Geschäft nicht zu rechnen

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21 **MüKoBGB/Basedow** § 305 BGB Rn. 87.

22 Im türkischen Recht **Atamer,** Genel İşlem Şartlarının Denetlenmesi, S. 108; Ümit **Yeniocak,** Borçlar Kanunu Hükümlerine Göre Genel İşlem Koşullarının Yargısal Denetimi, TBB Dergisi 2013 (107), S. 86; **Ayşe Havutçu,** Türk Borçlar Kanunu Tasarısının Değerlendirilmesi Sempozyumu, Düzenleyenler: Legal Yayıncılık – Marmara Üniversitesi, Legal HD, C. 3, S. 34, 2005, S. 3619; **Atamer,** Sempozyum, S. 79.

23 **MüKoBGB/Basedow** § 305c BGB Rn. 6; **Yeniocak,** TBB Dergisi 2013 (107), S. 87.

braucht. Die AGB-Verwender berufen sich in meisten Fällen zur Verteidigung ihrer AGB darauf, dass diese Klauseln absolut brancheüblich seien. Zu beachten ist, dass der überraschende Charakter einer Klausel nicht dadurch ausgeschlossen, dass die Klausel in der Branche üblicherweise gebraucht wird. Es kann wohl sein, dass die Klausel tatsächlich eine übliche Verwendung erlangen hat; zugleich aber den Umständen des Geschäftes fremd ist. In vielen Bürgschaftsformularen der Banken findet sich eine derartige Klausel: "Der Sicherungszweck der Bürgschaft erstreckt sich auf alle gegenwärtigen und künftigen Forderungen der Bank gegen den Hauptschuldner". Nach einer Entscheidung des BGH[24] im Jahre 1995 seien solche Klauseln sowohl überraschend als auch unwirksam.

IV. RECHTSFOLGEN BEI NICHTEINBEZIEHUNG (Art. 22 tOR)

Im Art. 22 tOR besteht eine spezielle Regelung über Rechtsfolgen bei Nichteinbeziehung, die grundsätzlich dem Grundgedanke des Art. 27/Abs. 2 tOR (Art. 20/Abs. 2 in der geltenden Fassung) entspricht. Sowohl nach Art. 22 tOR als auch nach Art. 27/Abs. 2 tOR die Teilnichtigkeit eines Rechtsgeschäfts im Prinzip nicht Gesamtnichtigkeit zur Folge hat. Beide Regelungen sehen die grundsätzliche Wirksamkeit des restlichen Vertrags trotz Ausfalls der nicht einbezogenen oder unwirksamen Klauseln vor. Allerdings wird in Art. 27/ Abs. 2/S.2 tOR ausnahmsweise die Gesamtnichtigkeit angenommen, wenn ohne den nichtigen oder nicht einbezogenen Teil das Rechtsgeschäft nicht vorgenommen worden wäre.

Die Regelung des Art. 27/Abs. 2/S.2 tOR würde für AGB nicht passen, soweit der Vertragspartner des Verwenders eine berechtigte Interesse an der Aufrechterhaltung des Vertrages hat. Nach Art. 22/S.2 tOR, in Abweichung von Art. 27/Abs. 2/S. 2 tOR, wird der Verwender davon abgehalten, die Gesamtnichtigkeit des Vertrages mit der Begründung geltend zu machen, dass er ohne den nicht einbezogenen Teil den Vertrag nicht abgeschlossen habe. Die daraus entstandene Vertragslücke wird durch ergänzende gesetzliche Vorschriften oder ergänzende Vertragsauslegung geschlossen. Im deutschen Recht enthält § 306/Abs. 2 eine diesbezügliche Regelung: "*Soweit die Bestimmungen nicht Vertragsbestandteil geworden oder unwirksam sind, richtet sich der Inhalt des Vertrags nach den gesetzlichen Vorschriften*". Meines Erachtens ist diese Rechtsfolge eine Selbstverständlichkeit des allgemeinen Vertragsrechts und bedarf nicht unbedingt einer gesetzlichen Sonderregelung. Ist den Parteien keine ergänzende Vereinbarung gelungen und die Lücke nicht durch ergänzende Vertragsauslegung geschlossen werden

[24] BGHZ 130 19 23 ff.

kann, sind die notwendigen Inhalte nach den relevanten Gesetzesvorschriften oder durch ergänzende Vertragsauslegung zu bestimmen[25].

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[25] **Atamer,** Sempozyum, S. 32; **Yeniocak,** TBB Dergisi 2013 (107), S. 89.

SCHENKUNGSANFECHTUNG NACH TÜRKISCHER SCHULDBETREIBUNG UND KONKURSRECHT

Türk İcra ve İflas Hukukuna Göre İvazsız Tasarrufların İptali

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ZUSAMMENFASSUNG

Im türkischen und schweizerischen Schuldbetreibung und Konkursgesetz sind die durch den Schuldner vorgenommene Schenkungen und den Schenkungen gleichgestellte Rechtshandlungen anfechtbar. Es genügt, dass die Schenkungen unentgeltliche Verfügungen sind, um die Rechtshandlungen des Schuldners anzufechten. Eine Absicht oder Bösgläubigkeit des Schuldners oder der Dritten ist nicht erforderlich. Unter den nahen Verwandten vorgenommene Rechtshandlungen, gemischte Schenkungen und Leibrentenvertrag, Nutznießungsvertrag und Verpfründungsvertrag des Schuldners, die zugunsten eines Dritten vorgenommen werden, sind den Schenkungen gleichgestellt. Auf der anderen Seite wurde im Schuldbetreibung und Konkursgesetz anerkannt, dass übliche Gelegenheitsgeschenke nicht anfechtbar sind. Zum Beispiel gegen Geburtstagsgeschenke, Geschenke aufgrund Verlobung und Hochzeit können keine Anfechtungsklagen erhoben werden. Damit der Gläubiger eine Anfechtungsklage erheben kann, muss die Rechtshandlung innerhalb der letzten zwei Jahre vor der Pfändung oder Konkurseröffnung vorgenommen sein. Der Gläubiger muss dem Gericht gemeinsam mit der Klageschrift den Verlustschein einreichen. Das Landgericht ist für Anfechtungsklagen ohne Rücksicht auf den Wert des Streitgegenstandes sachlich zuständig. Die örtliche Zuständigkeit des Gerichts richtet sich nach Zivilprozessordnung. Für die Anfechtung der Rechtshandlung verpflichtet sich der Gläubiger innerhalb von fünf Jahren nach Ablauf der anfechtbaren Handlung Klage zu erheben. Das Urteil im Anfechtungsprozess hat betreibungs- und konkursrechtliche Wirkung. Durch diese Weise können die betreffenden Vermögenswerte in die Zwangsvollstreckung oder Konkursmasse gezogen werden.

Schlüsselwörter: Schuldbetreibungs- und Konkursrecht, Schuldbetreibung und Konkursgesetz, Anfechtungsklage, Schenkungsanfechtung, Schenkungen Gleichgestellte Rechtshandlungen, Gelegenheitsgeschenke, Gemischte Schenkungen.

ÖZET

Türk ve İsviçre İcra ve İflas Kanununda borçlunun yaptığı ivazsız tasarruflar ve bağışlama hükmündeki tasarruflar iptale tabidir. Borçlunun tasarrufunun iptal

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edilebilmesi için, bağışlamanın ivazsız olması yeterlidir. Borçlunun veya üçüncü kişilerin kasıtlı veya kötü niyetli olmaları gerekli değildir. Yakın hısımlar arasında yapılan tasarruflar, ivaz olarak malın gerçek değerine göre düşük bir fiyat kabul edilen tasarruflar, borçlunun üçüncü kişi yararına akdettiği ömür boyu gelir sözleşmesi, intifa sözleşmesi ve ölünceye kadar bakma akti bağışlama gibidir. Diğer yandan, İcra ve İflas Kanununda teamül gereği verilen hediyelerin iptalinin istenemeyeceği kabul edilmiştir. Örneğin doğum günü, nişanlanma ve evlenme nedeniyle verilen hediyelere karşı tasarrufun iptali davası açılamayacaktır. Alacaklının tasarrufun iptali davası açabilmesi için, tasarrufun hacizden veya iflasın açılmasından önceki son iki yıl içinde yapılması gerekir. Alacaklı aciz vesikasını dava dilekçesiyle birlikte mahkemeye vermek zorundadır. Tasarrufun iptali davalarını görmeye dava konusunun değerine bakılmaksızın asliye hukuk mahkemesi görevlidir. Davaya bakmaya yetkili mahkeme Hukuk Muhakemeleri Kanununa göre belirlenir. Alacaklı tasarrufun iptali davasını tasarrufun yapıldığı tarihten itibaren beş yıl içinde açmakla yükümlüdür. Tasarufun iptali davası sonunda verilen hüküm takip hukuku bakımından etki doğurur. Bu sayede, ilgili malvarlığı değerleri cüzi icraya veya iflas masasına dâhil edilir.

Anahtar Kelimeler: İcra ve İflas Hukuku, İcra ve İflas Kanunu, Tasarrufun İptali Davası, İvazsız Tasarrufların İptali, Bağışlama Hükmündeki Tasarruflar, Teamül Gereği Verilen Hediyer, İvaz Olarak Malın Gerçek Değerine Göre Aşağı Fiyat Kabul Edilen Tasarruflar.

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I- EINLEITUNG

Das türkische Schuldbetreibungs- und Konkursgesetz wurde im Jahr 1929 aus dem schweizerischen Schuldbetreibungs- und Konkursgesetz übernommen. Jedoch wurden zahlreiche Reformen durchgeführt, seitdem das die türkische Schuldbetreibungs- und Konkursgesetz in Kraft gesetzt wurde. In diesem Zusammenhang wurden die Bestimmungen hinsichtlich der Anfechtungsklage in den Jahren 1965, 1988 und 2003 geändert. In Bezug auf Anfechtungsklage hat das schweizerische Schuldbetreibungs- und Konkursgesetz dagegen in den Jahren 1994 und 2014 wichtige Änderungen durchgeführt. Zurzeit gibt es hinsichtlich der Bestimmungen der Anfechtungsklagen zwischen dem türkischen und schweizerischen Schuldbetreibungs- und Konkursgesetz wichtige Unterschiede. Jedoch sind in beiden Ländern insbesondere die Schenkungen und den Schenkungen gleichgestellte Rechtshandlungen des Schuldners besonders wichtig. Denn die Schenkungen des Schuldners zum Nachteil seiner Gläubiger sind anfechtbar. Darüber hinaus sind im türkischen und schweizerischen Schuldbetreibung und Konkursgesetz sind die den Schenkungen gleichgestellte Rechtshandlungen als anfechtbar anerkannt. Anfechtungsklage erhebende Gläubiger verpflichten sich nachzuweisen,

dass der Schuldner sein Vermögen geschenkt hat oder Schenkungen gleichgestellte Rechtshandlungen durchgeführt hat. Ansonsten braucht der Gläubiger keinen sonstigen Bösglauben des Schuldners nachzuweisen. Deshalb werden wichtige Erleichterungen gewährleistet, die Gläubiger ihre Forderungen kassieren können. Jedoch wurden Angesicht der Bestimmungen in Bezug auf Schenkungsanfechtung, sowohl im türkischen als auch im schweizerischen Recht wichtige Änderungen durchgeführt. Deshalb ist es vorteilhaft, im türkischen und schweizerischen Recht die Bestimmungen der Schenkungsanfechtung vergleichend zu betrachten. Nur so kann es möglich sein, für das türkische Recht Lösungsvorschläge zu machen.

II- Die Bedingungen der Schenkungsanfechtungen

A- Die Forderung des Gläubigers muss vor dem Rechtshandlungstag entstehen

Einige Autoren der Lehre vertreten den Standpunkt, dass eine Anfechtungsklage nur erheben werden kann, wenn die Forderung vor der anfechtbaren Rechtshandlung entstanden ist. Mit anderen Worten, die Rechtshandlung muss nach Entstehung der Forderung erfolgen, damit eine unentgeltliche Zuwendung angefochten werden kann[1]. Autoren, die den entgegengesetzten Standpunkt vertreten, sind der Meinung, dass keine ergänzenden Voraussetzungen erforderlich sind[2]. Das Revisionsgericht hat seine Meinung geändert, obwohl es in seinen früheren Entscheidungen die betreffende Voraussetzung nicht anerkannt hatte[3]. Gegenwärtig werden für alle in den Artikeln 278-280 des türkischen SchkG erwähnter Rechtshandlungen diese Voraussetzung gesucht[4]. In der schweizerischen Lehre dagegen wird der entgegengesetzte Standpunkt vertreten. Diesem Standpunkt nach ist es wichtig, dass die anfechtbare Rechtshandlung des Schuldners, den Gläubigern schädigen kann. Es ist gleichgültig, ob die Rechtshandlung vor oder nach Entstehung der Forderung vorgenommen wird[5]. Folgerichtig hat das schweizerische Bundesgericht in einem seiner Entscheidungen demnach Stellung genommen. Das schweizerische Bundesgericht hat mit dieser Entscheidung verkündet, dass die Personen, die nach Vornahme der anfechtbaren Rechtshandlung zu Gläubigern werden, auch beeinträchtigt

1 Baki Kuru, İcra ve İflas Hukuku El Kitabı, İstanbul 2013, s. 1406- 1407.

2 Necmeddin Berkin, İflas Hukuku, İstanbul 1972, s. 499; Saim Üstündağ, İflas Hukuku, İstanbul 2004, s. 285; Talih Uyar, İcra ve İflas Hukukunda Tasarrufun İptali Davaları, Ankara 2011, s. 316; Sümer Altay, İflas Hukuku, C.I, İstanbul 2004, s. 675.

3 13. HD 25.6.1979 3011/3730 (Uyar, s. 1815).

4 17. HD. E. 2013/3346 K. 2014/11706 T. 15.9.2014, Kazancı İçtihat Bankası.

5 Ulrich Haas, Kapitel Ausländisches Insolvenzanfechtungsrecht – Schweiz, Gläubigerkommentar Anfechtungsrecht, Heidelberg 2015, s. 1042.

werden kann[6]. Unserer Meinung nach wurde in dem türkischen und schweizerischen Schuldbetreibung und Konkursgesetz solch eine Ergänzung nicht vorausgesetzt. Ansonsten wenn der Schuldner seine Vermögenswerte an einen Dritten verkaufen und nachher von ihm Kredit nehmen sollte, würde der Gläubiger keine Anfechtungsklage erheben können. In diesem Falle würde der bösgläubige Dritte in Schutz genommen werden.

B- Der Angeklagte verpflichtet sich, dem Gericht ein Verlustschein einzureichen

Der Gläubiger verpflichtet sich den Verlustschein vorzulegen, wenn er eine Anfechtungsklage erheben möchte. Im türkischen Schuldbetreibung und Konkursgesetz werden zwei Arten von Verlustscheine anerkannt. Diese sind provisorische (tSchkG Art. 105) und definitive Verlustscheine (tSchkG Art. 105/1; 143). Es steht dem Gläubiger frei, einen dieser Verlustscheine dem Gericht einzureichen[7]. Im Prinzip verpflichtet sich der Gläubiger, den Verlustschein gemeinsam mit der Klageschrift einzureichen. Denn der Verlustschein ist eine Prozessvoraussetzung. Allerdings erlaubt das Revisionsgericht bis Ende des Verfahrens, den Verlustschein einzureichen[8]. Deshalb setzt das Gericht zum Einreichen des Verlustscheins eine Frist. Jedoch ist nach der Konkurseröffnung das Vorlegen des Verlustscheins nicht erforderlich.

C- Verdachtsperiode

Die Rechtshandlungen des Schuldners müssen innerhalb der im Artikel 278 des türkische SchKG erwähnten Frist vorgenommen werden. Während der Berechnung dieser First, ist es wichtig, ob die Rechtshandlung vor der Pfändung oder vor der Konkurseröffnung vorgenommen wurde. In der Regel sind alle Schenkungen und den Schenkungen gleichgestellte Rechtshandlungen innerhalb der letzten zwei Jahren anfechtbar. Demzufolge muss die Rechtshandlung innerhalb der letzten zwei Jahre vor der Pfändung (tSchKG Art. 79, 102), Konkurseröffnung (tSchKG Art. 165) oder Zahlungsunfähigkeit (tSchkG Art. 105) vorgenommen sein. Dieser Frist nicht entsprechende Rechtshandlungen sind gemäß Art. 278/2, Ziff.3 tSchKG nicht anfechtbar. Aber die Gläubiger können gemäß Art. 280 des türkischen SchKG eine Anfechtungsklage erheben. Sollte der Schuldner in Konkurs gehen, werden die Schenkungen vor der Konkurseröffnung anfechtbar sein. In diesem Falle wird die Anfechtungsfrist der Schenkungen, dem Tag der Konkurseröffnung

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6 BGer 5A-353/2011 vom 31. Oktober 2011 E. 5.4.3.

7 Hakan Pekcanıtez/Oğuz Atalay/Muhammet Özekes, İcra ve İflas Hukuku, Ankara 2015, s. 591; Kuru, s. 1418; Üstündağ, s. 285; Kuru/Arslan/Yılmaz, s. 620; İlhan Postacıoğlu, İcra Hukuku Esasları, İstanbul 1982, s. 540.

8 17. HD. E. 2012/9959 K. 2013/8839 T. 11.6.2013, Kazancı İçtihat Bankası.

entsprechend festgestellt. Die Rechtshandlung muss innerhalb der letzten zwei Jahre vor der Konkurseröffnung vorgenommen werden[9]. Falls die Entstehung der Forderung nicht so weit reichen sollte, werden die bis zur Entstehung der sogenannten Forderung erfolgenden Rechtshandlungen anfechtbar sein[10].

III- Anfechtbare Schenkungen und Schenkungen gleichgestellte Rechtshandlungen

A- Allgemein

Sowohl durch das türkische als auch durch das schweizerische Schuldbetreibung und Konkursgesetz wurde verhindert, dass der Schuldner vor Pfändung oder Konkurseröffnung durch unentgeltliche Zuwendungen die Gläubiger benachteiligt. Deshalb wurden die Schenkungen und die unentgeltlichen Verfügungen des Schuldners als Anfechtbar anerkannt. Diese Bestimmung ist Angesicht des Gläubigers besonders wichtig. Denn im türkischen Schuldbetreibung und Konkursgesetz wurde die Tatsache, dass die Schenkungen des Schuldners anfechtbar sind, als eine gesetzliche Vermutung anerkannt[11]. Auch im schweizerischen Schuldbetreibung und Konkursgesetz ist eine gleiche Bestimmung vorhanden (Art.286 sSchkG). Übrigens wird in der schweizerischen Lehre erwähnt, dass diese Bestimmung als eine gesetzliche Vermutung anerkannt wird[12].

Die anfechtbaren Rechtshandlungen im Schuldbetreibung und Konkursgesetz sind die Schenkungen des Schuldners (Art. 278 tSchKG). Die im Zivilrecht vollzogenen Schenkungen können gemäß Art. 278 tSchKG angefochten werden[13]. Sowohl in der türkischen als auch schweizerischen Lehre anerkennen die Autoren, dass es nicht erforderlich ist, für die Anfechtung des Schenkungsversprechens eine Anfechtungsklage zu erheben. Denn das Schenkungsversprechen wird durch Ausstellung eines Verlustscheins oder Eröffnung des Konkurses von selbst beendet (Art.296 tOG)[14]. Gemäß Art. 278 des türkischen SchkG genügt es um eine Anfechtungsklage zu erheben, wenn

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9 Pekcanıtez/Atalay/Özekes, s. 586; Kuru, s. 1406; Kuru/Arslan/Yılmaz, s.615; Uyar, s. 314.

10 Kamil Yıldırım, İcra ve İflas Hukukunda Tasarrufun İptali Davaları, İstanbul 1995, s. 181; Kuru, s. 1407.

11 Hakan Pekcanıtez/Oğuz Atalay/Muhammet Özekes, Medeni Usul Hukuku, Ankara 2015, s. 384.

12 Spühler, s. 102.

13 Adrian Stähelin/Thomas Bauer/Daniel Stähelin, Bundesgesetz über Schuldbetreibung und Konkurs II, Basel 2010, Art. 286, Rdnr.4.

14 Kuru, s. 1403; Yıldırım, s. 177; Stähelin/Bauer/Stähelin, (Stähelin A.), Art. 286, Rdnr. 8.; Jolanta Kren Kostkiewicz, Hans Ulrich Walder, SchKG Kommentar Schuldbetreibungs- und Konkursgesetz mit weiteren Erlassen und Bundesgerichtspraxis, Zürich 2012, Art. 186, Rdnr.5.

die Schenkungen des Schuldners eine unentgeltliche Verfügung sind. Es ist wichtig, dass obwohl der Schuldner rechtlich nicht verpflichtet ist, er eine unentgeltliche Verfügung vornimmt[15]. Die zugunsten des Gemeinschuldners eingegangene Bürgschaft ist ein Beispiel für dieses Thema[16].

Alle innerhalb der letzten zwei Jahre vor der Pfändung oder Konkurseröffnung vorgenommenen Schenkungen sind anfechtbar[17]. Im Zeitpunkt der Schenkung des Schuldners ist sowohl die Überschuldung des Schuldners nicht erforderlich auch braucht die dritte Person nicht zu wissen, dass der Schuldner überschuldet ist[18]. Um unentgeltliche Verfügungen anfechten zu können, werden keine subjektiven Tatbestände gesucht[19]. Deshalb ist weder der gute Glaube des Schuldners bedeutend, noch wird die Absicht oder Bösgläubigkeit des Dritten gesucht. In der Regel ist das Motiv des Schuldners für die Schenkungen nicht wichtig. Dementgegen wird erwähnt, dass die Schenkungen des Schuldners, die er aufgrund Erfüllung einer sittlichen Pflicht gemacht hat, nicht angefochten werden kann. Ein Beispiel für diesen Fall wäre, wenn ein Schuldner einem verwaisten Verwandten freiwillig hilft[20].

B- Nicht als Schenkung zu betrachtende Gelegenheitsgeschenke

Nicht alle Schenkungen des Schuldners im Zeitpunkt der Überschuldung sind als anfechtbar zu betrachten. Schenkungen, die aufgrund bestimmten Anlässen gemacht werden, sind nicht anfechtbar. Zum Beispiel in Bezug auf Weihnachtsgeschenke, Geburtstagsgeschenke, Spenden bei öffentlichen Sammlungen, übliche Gelegenheitsgeschenke aufgrund Verlobung und Hochzeit können die Gläubiger keine Anfechtungsklagen erheben dürfen[21]. Jedoch muss die Höhe dieser Zuwendungen üblich sein. Während Bewertung dieser Sache ist zu berücksichtigen, welche Geschenke als übliche Gelegenheitsgeschenke zu bewerten sind und wie die finanzielle

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15 Stähelin/Bauer/Stähelin, (**Stähelin A**.), Art. 286, Rdnr. 5; Kostkiewicz/Walder, Art. 286, Rdnr. 6.

16 BGE 31 II 350 E. 4.

17 Kuru, s. 1403.

18 Kuru, s. 1403; Yıldırım, s. 179; Kostkiewicz/Walder, Art. 286, Rdnr. 24; Stahelin, Art. 286, Rdnr. 3. In der Schweiz hat ein Autor behauptet, dass im Zeitpunkt der Rechtshandlung, der Schuldner überschuldet zu sein braucht (Diem, s. 70). Angesicht des türkischen Rechts kann dieser Standpunkt nicht vertreten werden. Denn durch eine Änderung im Jahr 2004, wurde die Überschuldung des Schuldners nur für Artikel 280 des türkischen SchkG als anerkannt. Für ähnliche Standpunkte siehe Bilge Umar, Türk İcra İflas Hukukunda İptal Davası, İstanbul 1963, s. 64; Yıldırım, s. 179.

19 Yıldırım, s. 179.

20 Stähelin/Bauer/Stähelin, (**Stähelin A**.), Art. 286, Rdnr. 3; Yıldırım, s. 178.

21 Pekcanıtez/Atalay/Özekes, s. 586; Kuru, s. 1404; Yıldırım, s. 177; Stähelin/Bauer/Stähelin, (**Stähelin A**.), Art. 286, Rdnr.11; Jäger/Walder/Kull/Kottmann, Art. 286, Rdnr. 21.

Lage des Schuldners und des Begünstigten ist. Darüber hinaus sind die persönlichen Verhältnisse miteinander und betreffende Gesellschaftskreise zu berücksichtigen[22]. Meiner Meinung nach, wenn der Schuldner auf einem Hochzeit einen bedeutenden Teil seinen Vermögens verschenken sollte, kann eine Anfechtungsklage erhoben werden. Im schweizerischen Recht dagegen wird ein Auto, dass dem Sohn aufgrund abschließen der Matur oder Absolvierung des Studiums verschenkt wurde, als kein übliches Gelegenheitsgeschenk betrachtet[23].

IV- Den Schenkungen gleichgestellte Rechtshandlungen

Die unentgeltlichen Verfügungen der Schuldner werden in der Regel unter sonstigen Rechtsgeschäften gedeckt. Um dies zu verhindern werden im Schuldbetreibung und Konkursgesetz einige Rechtshandlungen als Schenkungen bewertet und als anfechtbar anerkannt[24]. Den Schenkungen gleichgestellte Rechtshandlungen werden im Gesetz als Numerus Clausus festgelegt und können nicht durch Auslegung erweitert werden. Nachstehend werden diese Rechtshandlungen getrennt in Einzeln behandelt.

A- Die Rechtshandlungen zwischen dem Schuldner und dem Schuldner nahestehenden Personen

Im türkischen Schuldbetreibung und Konkursgesetz werden die Rechtshandlungen unter nahen Verwandten als Schenkungen anerkannt. Demzufolge werden zwischen Ehegatten, Aszendenten und Deszendenten, durch Abstammung oder Heiratsbund bis zum dritten Grades in Verbindung stehende Personen, Kind annehmende Person und angenommenes Kind gegen Entgelt gemachte Rechtshandlungen den Schenkungen gleichgestellt. Demzufolge können die zwischen den im Gesetz genannten Personen vorgenommenen Rechtshandlungen angefochten werden. Dementsprechend können die Rechtsandlungen zwischen dem Schuldner und seinem Sohn, seinem Onkel, seiner Tante, seiner Schweigertochter angefochten werden[25].

Zwischen den im Schuldbetreibung und Konkursgesetz erwähnten Personen durchgeführte Rechtshandlungen können auf jeden Fall angefochten werden (Art. 278/2, Ziff.1 tSchKG). Es ist nicht erforderlich zu beweisen, dass

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22 Kuru, s. 1404; Yıldırım, s. 177; Stähelin/Bauer/Stähelin, (**Stähelin A**.), Art. 286, Rdnr. 11; Kurt Amonn/Fridolin Walther, Grundriss des Schuldbetreibungs- und Konkursrecht, Bern 2008, s. 483.

23 Stähelin/Bauer/Stähelin, (**Stähelin A**.), Art. 286, Rdnr. 11

24 Kuru, s. 1404.

25 Kostkiewicz/Walder, Art. 286, Rdnr. 1; Kuru, s. 1404; Yıldırım, s. 179; Stähelin/Bauer/Stähelin, (**Stähelin A**.), Art. 286, Rdnr. 10; Timuçin Muşul, İcra ve İflas Hukuku, C.II, Ankara 2013, s. 1551.

der Schuldner diese Rechtshandlungen in der Absicht seinen Gläubiger zu benachteiligen, gemacht hat. Auch ist es nicht erforderlich, die Bösgläubigkeit des Schuldners und die im Gesetz genannten Personen zu beweisen[26]. Denn es besteht eine gesetzliche Fiktion, dass die Rechtshandlungen zwischen dem Schuldner und die im Gesetz genannten Personen gemacht werden, in Absicht den Gläubigern zu schädigen gemacht werden[27]. Es ist nicht möglich diese gesetzliche Fiktion zu widerlegen. Deshalb ist es nicht möglich, dass der Schuldner oder der Verwandte des Schuldners seine Gutgläubigkeit behauptet[28]. Das Revisionsgericht hat in dieser Richtung zahlreiche Entscheidungen getroffen. Falls die nahe Verwandtschaft zwischen dem Schuldner und der dritten Person nachgewiesen werden sollte, wird das Revisionsgericht die betreffende Rechtshandlung anfechten[29].

Im schweizerischen Schuldbetreibung und Konkursgesetz gab es früher keine Bestimmung hinsichtlich der nahen Verwandten des Schuldners. Jedoch wurde im schweizerischen Schuldbetreibung und Konkursgesetz im Jahr 2014 eine Änderung durchgesetzt. Mit dieser Gesetzesänderung wurde das Obliegen der Beweislast dem Schuldner gegeben. Demzufolge verpflichtet sich der Kläger nur nachzuweisen, dass der Schuldner mit den nahestehenden Personen des Schuldners ein Rechtsgeschäft abgeschlossen hat und dass die Vornahme des Leistungsaustausches miteinander gewechselt wurde. Nach Gesetzesänderung obliegt die Behauptungslast und Beweislast dem Beklagten, also den nahestehenden Personen des Schuldners, dass kein Missverhältnis zwischen Leistung und Gegenleistung besteht. In diesem Sinne wurde auch anerkannt, dass zwischen einer Gesellschaft des Konzerns auch eine nahestehende Personen ist (Art. 286 sSchKG). Wie festzustellen ist, unterscheiden sich die türkischen und schweizerischen Bestimmungen des Schuldbetreibung und Konkursgesetz hinsichtlich Schenkungsanfechtung gegenwärtig sehr enorm. Als erstes sind gemäß dem schweizerischen Schuldbetreibung und Konkursgesetz die zwischen dem Schuldner und einem ihm nahestehenden Personen vorgenommenen Rechtshandlungen nicht unbedingt anfechtbar. Wenn man es anders ausdrücken sollte, im schweizerischen Recht reicht es alleine nicht, dass der Schuldner mit seinem Verwandten oder einer ihm nahestehenden Personen eine Rechtshandlung abschließt, um ein Klage zu erheben. In diesem Sinne wurde anerkannt, dass die Beweislast der nahestehenden Person des Schuldners obliegt, wenn

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26 Kuru, s. 1404.

27 Pekcanıtez/Atalay/Özekes, Usul, s. 384.

28 Umar, s. 64; Kostkiewicz/Walder, Art. 286, Rdnr. 1; Kuru, s. 1404; Yıldırım, s. 177; Stähelin/Bauer/Stähelin, (**Stähelin A**.), Art. 286, Rdnr. 3.

29 17. HD 8.6.2010 2935/5293; 17 HD 29.12.2009 8454/9125 (Uyar, s. 393 ff.)

hinsichtlich einer Rechtshandlung zwischen dem Schuldner und einer ihm nahestehenden Person ein Missverhältnis zwischen den ausgetauschten Leistungen behauptet werden sollte. Mit anderen Worten ist der Gläubiger in solchen Fällen nicht verpflichtet, das Missverhältnis zwischen den ausgetauschten Leistungen nachzuweisen, sondern die Beweislast obliegt der nahestehenden Person des Schuldners[30]. Im türkischen Recht dagegen ist jedes mit einem im Gesetz definierten Verwandten des Schuldners abgeschlossenes Rechtsgeschäft auf jeden Fall als bösartig zu bewerten. Allerdings sind im Falle einer Zahlungsunfähigkeit oder Überschuldung des Schuldners, eben seine ihm nahestehenden Personen, denen er sein Vermögen am leichtesten verkaufen kann. So sind die Rechtshandlungen des Schuldners mit seinem Verwandten oder einer ihm nahestehenden Person, zum Beispiel mit seinem Freund oder einem Kollegen auf der Arbeitsstelle nicht auf jeden Fall als anfechtbar zu betrachten. So besteht für den Schuldner nicht mehr die Möglichkeit, durch Verkaufen seines Vermögens über objektivem Wert an ihm nahestehenden Personen, sich von seinen Schulden zu befreien. Aber auf der anderen Seite kann eine Rechtshandlung des Schuldners mit nahen Verwandten die Gläubigern benachteiligen. Deshalb ist es zwingend, dass das Interesse des Schuldners und seiner Gläubiger ins Gleichgewicht gebracht wird. In diesem Rahmen sind zwar die Rechtshandlungen zwischen dem Schuldner und den ihm nahestehenden Personen im Prinzip anfechtbar zu betrachten, jedoch sollte den nahestehenden Personen des Schuldners die Möglichkeit gegeben werden, das Gegenteil dieser gesetzlichen Vermutung zu widerlegen.

B- Gemischte Schenkungen

Auch die vom Schuldner empfangenen Gegenleistungen, die zu seiner eigenen Leistung in einem Missverständnis stehen, werden als Schenkung betrachtet (Art. 278/3, Ziff.2 tSchKG). Gemäß Art. 278/2, Ziff. 1 des türkischen SchKG ist es die Bösgläubigkeit des Schuldners nicht erforderlich, um das Rechtsgeschäft anfechten zu können. Wenn das Missverhältnis zwischen Leistung und Gegenleistung ein enormer Unterschied vorhanden sein sollte, so ist die Rechtshandlung des Schuldners anfechtbar, auch wenn der Dritte gutgläubig ist[31]. Um Leistung und Gegenleistung miteinander vergleichen zu können, ist der Marktpreis und Kaufpreis des Vermögensstücks (zum Beispiel einer Liegenschaft) im Zeitpunkt der Schenkung zu vergleichen. Das Missverhältnis zwischen Leistung und Gegenleistung muss erheblich sein.

30 Ausführlich hierzu Isaak Meier/David Siegwart, Anfechtungsklage nach revidiertem Recht – Unter besonderer Berücksichtigung von Konzernverhältnissen, Sanierung und Insolvenz von Unternehmen V, Zürich 2014, s. 61 ff.

31 Kuru, s. 1404; Kostkiewicz/Walder, Art. 286, Rdnr. 1; Yıldırım, s. 179; Stähelin/Bauer/Stähelin, (**Stähelin A**.), Art. 286, Rdnr. 3.

Insbesondere sollte betont werden, dass es nicht nötig ist, dass der Schuldner und die dritte Person das Erhebliche Missverhältnis zwischen Leistung und Gegenleistung erkannt haben. Ein objektives Missverhältnis zwischen Leistung und Gegenleistung ist ausreichend[32]. Jedoch ist es nicht immer einfach, das Missverhältnis zwischen Leistung und Gegenleistung zu festzustellen. In dieser Hinsicht sind im türkischen und schweizerischen Recht unterschiedliche Merkmale anerkannt. Im türkischen Recht hat das Revisionsgericht anerkannt, dass wenn zwischen Leistung und Gegenleistung ein- oder mehrfache Differenzen vorliegen, die Rechtshandlungen des Schuldners anfechtbar sind[33]. Dementsprechend wenn der Schuldner ein Vermögensstück mit einem Verkehrswert von 500.000 Türkisch Lira für 250.000 Türkisch Lira oder einem niedrigeren Preis verkauft haben sollte, besteht ein Missverhältnis zwischen dem vom Schuldner abgegebenen und empfangenen Gegenleistung. Darüber hinaus werden Pfändungen und Hypotheken von dem Vermögensstückwert abgezogen[34]. Im schweizerischen Recht dagegen anerkennt das schweizerische Bundesgericht in einer früheren Entscheidung, dass beim Kauf einer Liegenschaft für Fr. 5‘000.-, welche vorher für Fr. 6‘000.– gekauft und auf Fr. 7‘000.– geschätzt wurde, zwischen Leistung und Gegenleistung ein enormer Unterschied vorhanden ist[35]. In einer anderen früheren Entscheidung anerkennt das schweizerische Bundesgericht, dass bei einer Differenz von 10% zwischen den beiden Leistungen, ein erhebliches Missverhältnis vorhanden ist[36]. Dementgegen hat das schweizerische Bundesgericht in einer anderen Entscheidung die Rechtshandlung des Schuldners angefochten, da zwischen Leistung und Gegenleistung ein erheblicher Unterschied vorliegt. In dieser Sache hat der Schuldner, ausgehend von tatsächlichen Eigenmitteln einer Aktiengesellschaft in der Höhe von insgesamt Fr. 860‘000.-, für Fr. 240‘000.- verkauft[37]. In diesem Beispiel besteht zwischen Verkaufspreis und des tatsächlichen Wert einer Aktie fast ein dreifacher Unterschied. Dies zeigt, dass die verschiedenen Anwendungen des türkischen und schweizerischen Rechts, die Festlegung von einer Merkmal erschwert. In diesem Zusammenhang sollte dem Richter mehr Ermessensfreiheit gegeben werden. So wird der Richter in Fällen, wo zwischen Leistung und Gegenleistung ein einfacher Unterschied vorliegt, die Rechtshandlung nicht immer anfechten müssen. Der

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32 Carl Jäger,/Hans Ulrich Walder/Thomas M. Kull/Martin Kottmann, Bundesgesetz über Schuldbetreibung und Konkurs, Zürich 1997, Art. 286, Rdnr. 11; Stähelin/Bauer/Stähelin, (**Stähelin A**.), Art. 286, Rdnr. 15; Umar, s. 67.

33 17. HD 8.7.2010 4667/6627; 17. HD1.7.2010 3110/6224 (Ausführlich hierzu Uyar, s. 464 ff.).

34 17. HD 23.11.2009 6288/7786; 13.4.2009 5903/2309 (Uyar, s. 493 ff.).

35 BGE 26 II 204 E. 2 (Kostkiewicz/Walder, Art. 286, Rdnr.19).

36 BGE 45 III 151, 169 (Kostkiewicz/Walder, Art. 286, Rdnr.19).

37 BGer v. 28.01.2009, 5A_557/2008 E. 3.3.2.

Richter sollte die Rechtshandlung des Schuldners anfechten können, wenn zwischen den Leistungen keine erhebliche Differenz vorhanden ist aber der Wert des Vermögensstücks sehr hoch ist. Zum Beispiel sollte der Richter die Rechtshandlung des Schuldners anfechten können, wenn ein Vermögensstück in Wert von 10.000.000 Türkisch Lira für 6.000.000 Türkisch Lira verkauft sein sollte.

Auf der anderen Seite können im türkischen Recht alle Rechtsgeschäfte über einem bestimmten Geldwert nur mit einer Urkunde bewiesen werden. Wenn ein Rechtsgeschäft mittels Urkundenbeweis nachgewiesen sein sollte, so kann dieses Urkundenbeweis nur mittels eines anderen Urkundenbeweises widerlegt werden (Art. 201 tZPO). Angesicht gemischter Schenkungen ist diese Regel wichtig. Denn aufgrund dieser Regel ist das Widerlegen des erwähnten Betrages in der öffentlichen Urkunde nur mit einem Urkundenbeweis möglich. Aufgrund dieser Angelegenheit entstand im türkischen Recht ein wichtiges Problem. Denn in der Praxis wird der Verkaufswert im Grundbuch niedriger eingetragen, um weniger Steuern zahlen zu können. Aufgrund dieser Sache führt diese Lage Anlass zu Anfechtungsklagen. Demzufolge verpflichtet sich der Dritte mittels Urkunden nachzuweisen, dass er für den Kauf des Vermögensstücks einen höheren Betrag bezahlt hat, als es auf der öffentlichen Urkunde steht[38]. In dieser Sache ist die Entscheidung des Revisionsgerichts auch gleich[39]. Das Problem besteht darin, dass die öffentliche Urkunde, die durch die Grundbuchdirektion ausgestellt wurde, den wahren Verkaufspreis nicht zeigt. Wenn beim Verkauf des Vermögensstücks über die Bank gezahlt werden sollte, kann der wahre Preis des Vermögensstücks nicht angezweifelt werden. Wegen dem gleichen Grund soll beim Verkauf der beweglichen Sachen der wahre Preis auch über die Bank gezahlt werden. So wird es für das Gericht sehr leicht sein, ob zwischen Leistung und Gegenleistung wichtig Differenz vorliegt oder nicht.

C- Leibrentenvertrag, Nutznießungsvertrag und Verpfründungsvertrag

Das türkische Schuldbetreibung und Konkursgesetz erkannt auch die Anfechtung von manchen Rechtsgeschäften an, die er zugunsten von Dritter durchführt werden. Diese Bestimmung weist einen besonderen Anfechtungstatbestand. Der Gläubiger beantragt nach Art. 278/2, Ziff. 3 türkische SchKG die Anfechtung der Rechtsgeschäfte, die den Schenkungen gleichgestellt worden sind. Ansonsten wird der Gläubiger nicht die Anfechtung von unentgeltlichen Verfügungen oder den gemischten Schenkungen erwünschen. Aufgrund dieser Eventualität erwirbt der Schuldner ein

[38] Muşul, s. 1555.
[39] 17.HD 2167/1646 14.5.2007; 17. HD. 1713/1644 14.5.2007 (Uyar, s. 565 ff.)

unpfändbares oder beschränkt pfändbares Vermögensstück und aufgrund dieses Rechtsgeschäfts beschädigt er seinen Gläubiger. Deshalb hat der Gesetzgeber dem Gläubiger das Recht gegeben, eine Anfechtungsklage erheben zu können. Damit die im Gesetz genannten Rechtsgeschäfte anfechtet werden können, wird keine schädigende Absicht des Schuldners und die Erkennbarkeit der Vertragspartner gesucht. Darüber hinaus ist es Angesicht dieser Bestimmung unwichtig, ob ein Missverhältnis von Leistung und Gegenleistung vorhanden ist oder nicht[40]. Demzufolge wurde ein Leibrentenvertrag, Nutznießungsvertrag und Verpfründungsvertrag des Schuldners zugunsten eines Dritten den Schenkungen gleichgestellt. Gemäß Art. 278/2, Ziff.3 türkische SchKG ist kein Missverhältnis zwischen Leistung und Gegenleistung erforderlich, um eine Anfechtungsklage erheben zu können[41]. Dieser Sache betreffende Vorschrift des schweizerischen Schuldbetreibung und Konkursgesetzes steht dem türkischen Recht parallel. Im schweizerischen Schuldbetreibung und Konkursgesetz steht es geschrieben, dass die Verträge für Leibrente, eine Pfrund, eine Nutznießung oder ein Wohnrecht anfechtet werden kann. Im schweizerischen Schuldbetreibung und Konkursgesetz wurden unter anfechtbare Rechtsgeschäften, Verpfründungsverträge nicht geregelt. Deshalb sind im Vergleich zum türkischen Recht die, den Schenkungen gleichgestellte Rechtsgeschäfte begrenzter.

Diese Bestimmung wird auf die, das Vermögen des Schuldners schmälernde Rechtshandlungen angewendet. Der durch Dritte zugunsten des Schuldners abgeschlossener Leibrentenvertrag kann nicht anfechtet werden[42]. In einer Entscheidung des schweizerischen Bundesgerichts wurde anerkannt, dass wenn der Dritte dem Schuldner den Mietertrag geben sollte, der Schuldner nicht berechtigt ist, in Bezug auf diesen Mietertrag eine Anfechtungsklage zu erheben[43]. Das türkische Revisionsgericht dagegen erkennt an, dass durch die Verpfründungsverträge, den der Schuldner abgeschlossen hat, ohne sonstige Bedingungen anfechtbar sind[44]. Die Einräumung eines Wohnrechts hinsichtlich der Liegenschaft des Schuldners ist gemäß Art. 280 des türkischen SchKG anfechtbar[45]. Unwichtig ob an Grundstücken und beweglichen Sachen

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40 Umar, s. 64; Sümer Altay, Türk İflas Hukuku, C.I, İstanbul 2004, s. 677; Stähelin/Bauer/Stähelin, (**Stähelin A**.), Art. 286, Rdnr. 19; Abdurrahim Karslı, İcra Hukuku Ders Kitabı, İstanbul 2010, s.647.

41 Yıldırım, s. 185; Umar, s. 68.

42 Yıldırım, s. 186; Jäger/Walder/Kull/Kottmann, Art. 286 Rdnr. 9.

43 BGE 64 III 183 E. 3.

44 13. HD. 16.04.1974, 640-925 (Ali Güneren, İcra ve İflas Hukukunda Tasarrufun İptali Davaları, Ankara 2012, s. 785- 786).

45 Vgl. Kostkiewicz/Walder, Art. 286, Rdnr. 22.

eingeräumt, Nutznießung ist anfechtbar[46].

Im türkischen Schuldbetreibung und Konkursgesetz sind diese Rechtsgeschäfte Aufzählung abschließend. Die Bestimmungen in Bezug auf Anfechtungsklagen weisen einer außerordentlichen Ausnahme[47]. Deshalb ist es nicht möglich, dass andere Verträge durch Analogie in Rahmen dieses bewertet werden. Gemäß Art. 280 des türkischen SchKG haben die Gläubiger das Recht, gegen im Art. 278 des türkischen SchKG nicht aufgezählte Verträge Klage zu erheben. Jedoch verpflichtet sich der Gläubiger nachzuweisen, dass der Schuldner in der dem andern Teile erkennbare Absicht vorgenommen hat, seine Gläubiger zu benachteiligen oder einzelne Gläubiger zum Nachteil anderer zu begünstigen hat.

V- Prozessverfahren

Angesicht der Anfechtungsklagen für alle Anfechtungstatbestände ist das Prozessverfahren gemeinsam. Deshalb wird in Bezug auf die Anfechtungsklage angewendetes Prozessverfahren nur allgemeine Angaben gegeben. In diesem Zusammenhang sind insbesondere die sachlichen und örtlichen Zuständigkeiten zu behandeln. Vorerst sollte erwähnt werden, dass bei Feststellen der sachlich zuständigen Gerichte der Streitwert der Klage keine Rolle spielt. Demnach ist das Landgericht für Anfechtungsklagen ohne Rücksicht auf den Wert des Streitgegenstandes sachlich zuständig (Art 2 tZPO). Da es an dieser Stelle um keine Handelssache geht, wird das Handelsgericht sachlich nicht zuständig sein[48]. Die örtliche Zuständigkeit des Gerichts richtet sich nach Zivilprozessordnung. Falls der Wohnsitz des Schuldners und des Dritten gemeinsam sein sollte, richtet sich der örtlichen Zuständigkeit nach gemeinsamen Wohnsitz des Schuldners und des Dritten. Falls der Wohnsitz des Schuldners und des Dritten nicht gemeinsam sein sollte, wird für eine beklagte Partei zuständiges Gericht, für alle beklagten Parteien zuständig sein. Jedoch wird der Ort, wo sich die Liegenschaft befindet, nicht örtlich zuständig sein[49].

Das Anfechtungsrecht verwirkt, falls innerhalb von fünf Jahren nach Ablauf der anfechtbaren Handlung kein Antrag gestellt wird. Da Art. 284 tSchKG hinsichtlich ihrer Natur Verwirkungsfrist aufweist[50], soll der Richter von Amtswegen Achtung schenken. Jeder einzelne Gläubiger ist Klagelegitimiert. Jedoch braucht der Gläubiger ein Verlustschein, um

46 Kostkiewicz/Walder, Art. 286, Rdnr. 23; BGE 45 III 151, 169 ff.
47 Umar, s. 68.
48 Pekcanıtez/Atalay/Özekes, s. 590; Kuru, s. 1426; Kuru/Arslan/Yılmaz, s. 621.
49 Pekcanıtez/Atalay/Özekes, s. 590; Kuru, s. 1426; Kuru/Arslan/Yılmaz, s. 621.
50 Karslı, s. 658; Kuru, s. 1428.

eine Anfechtungsklage erheben zu können. Nach der Konkurseröffnung werden alle Konkursgläubiger Klagelegitimiert sein. Die Anfechtungsklage kann sowohl gegenüber dem Schuldner[51] als auch dem Vertragspartner des Schuldners gerichtet werden. Ferner werden auch bösgläubige Dritte Passivlegitimiert sein. Unter diesen Personen können Gesamtnachfolger des Schuldners und seine Singularsukzessoren aufgezählt werden. Der Gläubiger ist verpflichtet, nur objektive Tatbestände nachzuweisen. Mit anderen Worten, es genügt, wenn der Kläger nur im Art. 278 tSchKG aufgezählte Rechtsgeschäfte, die der Beklagte innerhalb der letzten zwei Jahre vor der Pfändung oder Konkurseröffnung vorgenommen hat, nachweist. Das gutheißende Anfechtungsurteil hat nur vollstreckungsrechtliche Wirkung. Durch die Anfechtung werden betreffende Vermögenswerte des Dritten verpfändet werden oder in die Konkursmasse gezogen werden.

ERGEBNIS

Einige Schuldner treten ihre Vermögenswerte kurz vor der Pfändung oder der Konkurseröffnung zum Nachteil der anderen Gläubiger an Dritte ab. In solchen Fällen besteht für die Gläubiger das Recht eine Anfechtungsklage zu erheben. Im Schuldbetreibung und Konkursgesetz werden den Gläubiger verschiedene Möglichkeiten gewährleistet. Eine Möglichkeit ist es, gegen den Schenkungen und den Schenkungen gleichgestellten Rechtshandlungen eine Anfechtungsklage zu erheben. Darüber hinaus wird im Gesetz erwähnt, dass die Möglichkeit besteht, Verträge für Leibrente, Nutznießung und Verpfründung anzufechten. Ferner ist es im Gesetz offen und kundig festgelegt, dass im Falle einer Gelegenheitsgeschenke des Schuldners, keine Anfechtungsklage erheben werden kann. Es sollte betont werden, wenn man die Schenkungen und den Schenkungen gleichgestellten Rechtshandlungen anfechten möchte, die Entstehungszeit der Forderung nicht wichtig ist. Egal ob die Forderung vor oder nach der Rechtshandlung entstanden ist, der Gläubiger wird berechtigt sein, eine Anfechtungsklage zu erheben. Umgekehrte Praxis wird zum Nutzen der bösgläubigen Schuldner sein.

Wenn zwischen Leistung und Gegenleistung ein enormer Unterschied vorhanden sein sollte, so ist die Rechtshandlung des Schuldners anfechtbar. Das Missverhältnis zwischen Leistung und Gegenleistung muss erheblich sein. Jedoch ist es nicht immer einfach, das Missverhältnis zwischen Leistung und Gegenleistung festzustellen. Aber der Richter sollte, wenn zwischen Leistung und Gegenleistung einfache Differenzen vorliegen, die Rechtshandlung des

[51] Im schweizerischen Recht dagegen ist der Schuldner nicht Anfechtungsbeklagter. Der Schuldner wird in der Anfechtungsklage als Zeuge oder Auskunftsperson einvernommen (Stähelin/Bauer/Stähelin, (**Stähelin A.**), Art. 290, Rdnr. 3).

Schuldners nicht immer anfechten. In diesem Zusammenhang sollte dem Richter mehr Ermessensfreiheit gegeben werden. Im türkischen Recht ist jedes mit einem im Gesetz definierten Verwandten des Schuldners abgeschlossenes Rechtsgeschäft auf jeden Fall als bösartig zu bewerten und als anfechtbar zu betrachten. So besteht für den Schuldner nicht mehr die Möglichkeit, sein Vermögen über objektivem Wert an ihm nahestehenden Personen zu verkaufen. In diesem Rahmen sind zwar die Rechtshandlungen zwischen dem Schuldner und seinen Verwandten im Prinzip anfechtbar zu betrachten, jedoch sollte den Verwandten des Schuldners die Möglichkeit gegeben werden, das Gegenteil dieser gesetzlichen Vermutung zu widerlegen.

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THE EFFECT OF THE DIVERSITY OF PUBLIC MORALS AMONG THE EUROPEAN UNION MEMBER STATES ON THE INTERNAL MARKET: ANALYSIS OF CROSS-BORDER INTERNET GAMBLING SERVICES AS AN INTERNAL MARKET PROBLEM

Avrupa Birliği Üye Ülkelerinin Toplumsal Ahlak Konusuna Giren Alanlardaki Farklılaşmalarının Ortak Pazar Üzerindeki Etkileri: Sınır Ötesi İnternet Kumarı Hizmetinin Bir İç Pazar Problemi Olarak Analizi

Asst. Prof. Dr. Berna AKÇALI GÜR*

ABSTRACT

This article analyses the responses of the European Union (EU) institutions and the EU member states to the cross-border provision of online gambling services via the Internet, from service providers established in one EU member state to the residents of others. The extensive case law and a variety of non-judicial actions and communications at the EU level provide a rich source of data for analysing whether the diversity of national trade regimes in public morals areas, such as gambling, is a major threat to the overall integration process. The article analyses these data in order to determine whether the diversity of national trade regulations in public morals areas is a threat to the integration goals of the desired EU legal order.

Keywords: Public Morals, European Union, Freedom to Provide Services, Online Gambling, Cross-border Provision of Services.

ÖZET

Bu makalede, AB kurumlarının ve AB üyesi ülkelerin, bir üye ülke sınırları içerisinde kurulmuş olan servis sağlayıcı tarafından diğer bir üye ülkede yerleşik kişilere İnternet üzerinden kumar hizmetlerinin sağlanmasına verdikleri tepkiler incelenmektedir. Kumar gibi toplumsal ahlaka ilişkin konularda ulusal ticari rejimlerin farklılaşmasının birliğin uyum sürecine ciddi bir tehlike oluşturup oluşturmadığı sorusuna ilişkin olarak konuya ilişkin yargı kararları, idari işlemler ve kurumlar arası iletişimler zengin veri kaynağı sunmaktadır. Bu veriler tarihsel gelişim süreçleri dikkate alınmak suretiyle değerlendirilerek, toplumsal ahlaka ilişkin alanlardaki ulusal ticari düzenlemelerin arasındaki farklılaşmanın Avrupa Birliği uyum süreci ile arzu edilen ortak hukuk düzenine bir tehdit oluşturup oluşturmadığı incelenmektedir.

Anahtar Kelimeler: Toplumsal Ahlak, Avrupa Birliği, Hizmetlerin Serbest Dolaşımı, İnternet Kumarı, Hizmetlerin Sınır Ötesi Sağlanması.

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1. Introduction

The analysis of the developments surrounding internet gambling services reflects one of the major tensions within the European Union (EU). As the EU evolved into an economic, monetary and political union from a customs union, the EU member states voluntarily limited their absolute autonomy in several areas that had previously been considered as falling within their ordinary capacities as sovereign powers. The extent of this otherwise voluntary transition has met with resistance, partly due to increased public attention and national political concerns related to controversial topics such as gambling. The EU legal principles adopted to achieve and protect the single market also impose general restrictions on the types and the extent of trade restrictions the EU member states can implement, even on matters left to their sovereign control. It is on this basis that the legitimacy of the EU member states' restrictions on the Internet gambling services provided by suppliers in other EU member states has been assessed by EU institutions, primarily the European Court of Justice (ECJ).

It is well-known that gambling has been a part of European leisure culture for centuries. At the time that Internet gambling services emerged, various types of gambling had been legally and widely available throughout Europe. Lotteries[1] and sports betting[2] have been commonly accepted forms of gambling, while casinos and casino-style gambling have been less popular and subject to tighter restrictions. Starting from 1993, the development of Information and Communication Technologies (ICT) had facilitated the formation of a liberated competitive gambling market from which national operators were mostly, if not completely, absent. The Internet operators benefited from the existing consumer base and merely offered the already existing services on a new platform, arguably a more accessible one. Being able to provide services without establishing their businesses on the receiving end provided them the opportunity to choose among the less restrictive of legal regimes. Their ease in taking advantage of the new media to evade local laws and its availability without constraints of travel, time and space caused public discomfort which led to governmental restrictions.

In response to negative reactions and in an attempt to establish their legitimacy and protect their businesses, Internet gambling companies

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1 Please see 'The History of Gaming' 2010 European Lotteries Available: https://www.european-lotteries.org/pdf/history_of_gaming.pdf [Accessed 27 October 2010].

2 It is allowed in all EU member states. Most states require license applicants to be local companies, while some EU member states have also allowed operators from other EU member states to apply for licenses.

challenged the limitations imposed on their activities by pursuing the legal paths available to them. They applied for local licences, engaged in lobbying efforts, filed complaints at the European Commission and filed lawsuits against the EU Member States with restrictive national legislations. Their primary position has been that their practice is legitimate and so they should be granted the privileges any other European service provider enjoys.

These legal proceedings have led to closer examination of the EU member states' gambling regimes, the regimes' suitability for the stated policy goals and their overall permissibility under Articles 56-57 and 49 of the Treaty on the Functioning of the European Union (TFEU),[3] which protect the freedom to provide services and freedom of establishment among the EU member states. This process and the extensive use of Internet in services sector in general led the EU member states to start making some revisions in their initial reluctance, in order to extend their legislative goals to the Internet platform without breaching EU Laws. Eventually a variety of reformed national gambling laws emerged, each with significant national differences.

These efforts toward reformation could be interpreted in part as an indication of the member state's respect for ECJ decisions and their commitment to EU membership requirements. On the other hand their resistance to the harmonization of gambling laws may be proof of the value placed on the remaining sovereign areas. This article seeks to analyse this tension with reference to the diversity of systems and values within the EU structure, which is shaped by its ambitions for a more uniform internal market structure.

For the purposes of this article, the Internet gambling services problem in the EU will be analysed as an internal market issue. Therefore, the focus is on the provision of Internet gambling services by an operator established in one EU member state to residents of another EU member state. The article will start with an introduction and analysis of the cases brought before the ECJ, in relation to national gambling regulations. Other developments, which are the adoption of a number of new directives and proceedings initiated by the European Commission and most notably the Green paper launched by the European Commission will be explored, thereafter. The conclusion of the article will consist of an evaluation of the data presented herein in relation to the changing limits of EU member states in regulating gambling, once an area presumed to remain in absolute state competence.

[3] Previously Article 49-50 and 43 of the EC Treaty.

2. JUdicial Processes in Relation to National Gambling Regulations

The obligation to acknowledge of ECJ decisions by national courts has been instrumental in integration of the EU (Tridimas 2002, Goldoni 2010, Halberstam 2010). In the gambling related cases the ECJ has managed to acknowledge that gambling regimes may remain particular to each nation while retaining the coherence of the overall EU trading system. In order to do so it has managed to employ effective review mechanisms to test legitimacy of national trade restrictions and their proportionality to decide whether they would be permissible as per exceptions and derogations provisions. The case law discussed below provides examples of ECJ's decisions and decision making processes in a variety of circumstances.

Early Case Law

There were six rulings from 1994 to 2006. Among these, the most significant are *Schindler*[4] and *Gambelli*[5]. This early case-law forms the basis for future cases regarding provision of Internet gambling services; although in none of the six cases did the customers directly reach to gambling service providers via the Internet. The issues at dispute were mostly the trade restrictions placed on gambling operations by the EU member states and their implications for other operators established in other EU member states. In each new case, the suitability of the national restrictions under the EU Laws was put to test and the limits of national autonomy in regulating their public morals areas were determined.

The *Schindler* case related to the importation of lottery tickets, application forms and advertising into the UK, by a German lottery operator. Two individuals (Gerhart and Schindler) who were independent agents of a licensed German lottery organizer dispatched envelopes from the Netherlands to United Kingdom nationals. Each envelope contained a letter invitation and application forms for participating in their lottery and a pre-printed reply envelope.

In *Schindler,* the first decision regarding cross-border provision of gambling services, the ECJ had to define gambling within the framework of EU legislations. The first query was whether it shall be classified as an economic activity, given that it is based on chance, it is in the nature of recreation and that profits are mostly allocated for public purposes by law[6]. In its analysis the

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4 Case C-275/92 *HM Customs and excise v Schindler* [1994] ECR I-01039.

5 Case C-243/01 *Criminal proceedings against Piergiorgio Gambelli and Others* [2003] ECR I-13031.

6 The ECJ added that, even if it was relevant to the national policies, the use of revenues

ECJ pointed out that none of these prevent the transaction having an economic nature. After this, the also ECJ pointed out that, even if material objects may be necessary for organization or operation of gambling activities, gambling is a service. Therefore, its cross-border provision from one EU Member State to another should be assessed within the framework of Article 56 of the TFEU[7].

The ECJ acknowledged that "gambling" in general is an activity of a peculiar nature with moral, religious and cultural aspects. Therefore; it is not for the ECJ to assess the legislation of an EU member state from a moral point of view. However, the national restrictions that prohibit the cross-border provision of gambling services constitute an obstacle to the freedom to provide services, whether or not they are indistinctly applicable. Such restrictions can be justified on grounds of social policy and of the prevention of fraud.

In *Läärä*[8]*,* the ECJ decision that followed *Schindler,* the ECJ added to its previous jurisprudence a discussion of the proportionality of the measures and ruled that the comparison of restrictions applied by the exporting EU member states to the importing ones was not appropriate and that EU member states may choose different systems and levels of protection, including monopolies. Therefore, proportionality test must be conducted between the objectives of the EU member state applying the measures and the level of protection they are intend to provide.[9]

The ECJ defined applicable provisions and principles to cross-border provision of gambling services in the EU Laws in its Schindler decision. However, it is the *Gambelli*[10] case that is considered a benchmark, the review standards of which had been followed in similar subsequent cases.

In the *Gambelli* case, the ECJ cleared the indeterminacies in its previous gambling decisions by adopting a proactive approach. The court conducted an

generated by the national lotteries for public projects or other good causes and other reasons of economic nature would not justify the breach of Article 56 TFEU. However, because the subject legislations are not discriminatory on the basis of nationality, the restrictions imposed by it could be justified via express derogations and/or overriding reasons in the public interest. Please see Paragraph 60, *Schindler.*

7 At the time of the case freedom to provide services was governed by Article 59 of the Treaty of Rome.

8 Case C-124/97 *Läärä* [1999] ECR I-6067

9 Paragraphs 35-9 of *Läärä*

10 The Italian judiciary established the existence of an organization of Italian agencies linked by the internet to an English bookmaker, established legally in the United Kingdom. Mr Gambelli and 137 other defendants were accused of collaborating with the English bookmaker by collecting bets and transmitting betting data in Italy. These activities were considered incompatible with the monopoly on sporting bets and constitutes an offence of fraud against the State.

assessment as to whether the restrictive measures are suitable to address the stated policy goals in a consistent and systematic manner or, instead, they are merely protecting domestic operators and tax revenues. This decision gives detailed instructions to the national courts and leaves very little discretion to them. By doing so, the ECJ set outer limits for the EU member states' margin of discretion (Littler 2007:35-6, Hörnle 2010). Accordingly, the national courts should decide whether the restrictions on freedom to provide services and freedom of establishment satisfy the following conditions:[11]

i. justified by imperative requirements in the general interest,

ii. suitable for achieving the objective which they pursue,

iii. not going beyond what is necessary in order to attain it, and

iv. applied without distinction

Ecj Case Law Regarding National Gambling Monopolies

Monopoly systems have been commonly employed among member states as a protectionist measure to control provision of gambling services. Austria, Portugal, the Netherlands, France and Germany have been among these states whose legislative systems have come under review of the ECJ. The ECJ having acknowledged the member states right to choose the level of protections it deems appropriate to achieve its legitimate objectives, did not dismiss monopolies. This became evident initially in *Läärä* and *Anomar* decisions. Following those the decisions in *Bwin*[12] (Portugal)*, Betfair*[13] *and Ladbrokes*[14](the Netherlands), *Carmen*[15]*, Stoß*[16] *and Winner Wetten*[17] (Germany), *Engelmann*[18] and *Dickinger*[19] *(Austria), Zeturf*[20]*(France), Garkalns SIA v Rīgas dome*[21]*(Latvia)* were issued. In each case the ECJ assessed the legitimacy of the goals intended to achieve via these restrictions and conducted a proportionality test to see if the legislation at issue contributes to these goals and whether it is applied in

11 Paragraph 65 of *Gambelli*.

12 Case C-42/07 *Liga Portuguesa de Futebol Profissional &Bwin International (Santa Casa)* [2009] ECR I-7633.

13 C-203/08 *Sporting Exchange & Others (Betfair)* [2010] ECR I-4695

14 Case C-258/08 *Ladbrokes Betting & Gaming and Ladbrokes International* [2010] ECR I-04757

15 Case C-46/08 *Carmen Media Group* [2010] ECR I-8149

16 Case C-316/07 etc. *Stoß & Others* [2010] ECR I-8069

17 Case C-409/06 *Winner Wetten* [2010] ECR I-8015

18 Case C-64/08 *Engelmann* [2010] ECR I-8219 Judgment of 09/09/2010

19 Case C-347/09 *Dickinger and Ömer* [2011] ECR I-0000 Judgment of 15/09/2011

20 Case C-212/08 *Zeturf* [2011] ECR I-0000 Judgment of 30/06/2011

21 Judgment of the Court (Fourth Chamber) of 19 July 2012. SIA Garkalns v Rīgas dome.

a consistent and systematic manner. If the proportionality test was satisfied the court found that the restrictions imposed by the subject legislation were justified, given the absence of harmonization in this area, it was for each state to determine the restriction in accordance with its values and to ensure their protection. In that respect in the *Bwin, Ladbrokes, Betfair*, Zeturf and *Rīgas dome* cases existence of monopolies in Portugal, the Netherlands, France and Latvia respectively were justified under Article 56 TFEU.

Despite ECJ's approval both France and the Netherlands have decided to change monopoly structures and proposed amendments. In fact, during the *Zeturf* case, the French authorities were already in process of amending their legislations to cover gambling services provided on the Internet and correct inconsistencies with EU Laws which had been pointed out by European Commission via infringement actions. Indeed, on 12 May 2010, the French Gambling Act[22] came into force.

The ECJ reached a different conclusion in the Austrian[23] and German[24] cases and found the then-current state monopolies incompatible with EU law and found that they were not contributing to limiting betting activities in a consistent and systematic manner. In *Carmen*, *Winner Wetten and Stoß* the ECJ's ruling confirmed that the EU member states may adopt a monopoly system whether or not it would be difficult to maintain its effectiveness due to the volume of Internet based transactions and to prohibit cross border gambling activities. However, the national courts may legitimately consider that the monopoly is not suitable for guaranteeing achievement of the objectives for which it was established if the advertising of the games operated by the monopoly and the other games operated by the authorized private operators exceed the level necessary to channel the potential players to legitimate venues, the authorized private operators exploit the types of games they offer, and if those games are potentially more addictive and their expansion is tolerated by authorities.[25] The German legislations are still in a transformation period and they are considered inconsistent (Günter Schmid, Thomas Talos et al. 2013:158). After *Engelmann* and *Dickinger and Ömer,* the Austrian authorities amended their laws to ensure compliance with EU Laws. However, a further review in the *Hit and Hit Larix* case revealed further inconsistencies. Austria, therefore, is expected to conduct further amendments in their laws.

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22 Law n° 2010-476

23 *Engelmann*, *Dickinger* & *Hit and Hit Larix* (Case C-176/11 Hit and Hit Larix [2012] ECR I-0000 Judgment of 12/07/2012)

24 *Carmen*, *Winner Wetten and Stoß*

25 Operative part of *Stoß & Others*

Case Law Regarding Other Trade Restrictions

The ECJ had the chance to rule on licensing regimes required in Italian Gambling Legislations in four different cases. The Italian gambling laws were amended to comply with EU Laws[26] after *Gambelli* and *Zennatti* decisions, followed by the *Commission v. Italy*[27] and the *Placanica*[28] decisions. However, the new legislations were also brought before the ECJ in *Costa and Cifone* case.[29] The application of the new legislation which also imposed restrictions on freedom to provide services, resulted in favouring previous license holders at the expense of new applicants, were not clear on reasons for withdrawal of licenses[30] and that withdrawal of licenses were not proportionate[31] for the stated objective which was preventing criminal activities.[32]

In the *Sjoberg and Gerdin*[33] case the ECJ ruled on the Swedish legislation that prohibits the promotion of Internet gambling services, the companies that are established in other EU member states and operate for profit. The ECJ found the said restriction in consistent with EU laws.[34] However, the ECJ also ruled that legislation that enforces stricter penalties for promotion of gambling activities authorized in the other member states when compared to promotion of gambling activities operated without a license within the national borders will not be compliant with TFEU Article 56.[35] This ruling revealed another aspect of gambling legislation that is promotion of gambling services, which needs to be re-considered under EU Laws.

Analysis of the ECJ Review Processes

The ECJ has produced twenty two rulings on gambling related disputes since 1994. Through these judgments, which became the primary source for mapping the legal framework for cross-border provision of Internet gambling services within the EU, the limits on the EU member states' autonomy in regulating gambling services within their borders became clearer. The ECJ's

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26 The decree regarding the amendments was called Decreto Bersani (Decree No. 223 of 4 July 2006).

27 Case C-260/04 *Commission v. Italy* [2007] ECR I-07083

28 Joined cases C-338/04, C-359/04, C-360/04, Criminal Proceedings against Massimiliano Placanica and Others [2007] ECR I-01891

29 Joined Cases C-72/10 & C-77/10 *Costa and Cifone* [2012] ECR I-0000 Judgment of 16/02/2012

30 Parapraph 90 *Costa and Cifone*

31 Paragraph 81 *Costa and Cifone*

32 Operative part of the Judement, *Costa and Cifone*

33 Joined Cases C-447 & C-448/08 *Sjöberg & Gerdin* [2010] ECR I-6921

34 Paragraph 46 of *Sjöberg & Gerdin*

35 Paragraph 57 of *Sjöberg & Gerdin*

role had been a challenging one, especially because gambling has always been a controversial topic, the trade of which had been governed by monopoly structures in the majority of the EU member states. The rulings were a display of the difficult task of balancing the treaty objectives that represent the interests of the EU and the single market against the legitimate interests of both the EU member states at the receiving end of the service, the EU member states in which the provider is established, and the recipients of the service.

Through an analysis of the decisions discussed above, it can be concluded that the ECJ recognized the EU member states' large margin of discretion in determining their own gambling policies, the objectives targeted by them and the level of protection necessary to achieve them.[36] However, the rulings also held that should these practices amount to restrictions of one or more of the fundamental freedoms of the TFEU, the restrictions should be based on legitimate reasons and should satisfy the proportionality assessment. Therefore, in the absence of EU-wide harmonization in the area, the EU member states are free to adopt gambling regimes ranging from prohibition to liberal licensing systems; however, these measures will still be subject to judicial review under the relevant provisions of the founding treaties. All the EU member states, whose legislation became the subject of the disputes, had placed some sort of restriction on the provision of the gambling services. Therefore, the defining section of the rulings became the ECJ's guidance to the national courts as to how the EU laws should apply to a variety of gambling policies and regimes.

In accordance with TFEU Article 52(1)[37], EU member states may take directly discriminatory measures only if they can be justified on grounds of public policy, public security or public health. This list is exhaustive and is referred to collectively as express derogations. The court has recognised additional bases for justification of measures that are indistinctly applicable or indirectly discriminatory. In the gambling-related case law some examples of these overriding reasons in the public interest are fighting crime and fraud linked to gambling and addiction to gambling, avoiding the incitement to squander money which may have damaging individual and social consequences and so on. As a matter of fact, by the time that gambling-related disputes started to appear, in its assessment of measures held to be not discriminatory on

[36] This margin of discretion had been justified with the moral, religious or cultural factors and the morally and financially harmful consequences for the individuals and for society associated with betting and gaming. Please see paragraph 76 of *Stoß,* paragraph 57 of *Bwin* and paragraph 47 of the *Placanica* decision and the case law cited.

[37] Also Article 62 which references it.

grounds of nationality, the ECJ had already started to base its assessments on whether these measures are otherwise likely to prohibit or otherwise impede freedom to provide services.

In gambling-related disputes, the ECJ has not required the EU member state to take into account the provisions of the EU member state in which the service provider is established. The reason provided for this flexibility was that, out of respect for the differences between the policy objectives and the levels of protection, the EU member states at the receiving end of the gambling services cannot be regarded as a sufficiently assured that their consumers will be protected against the risks and fraud and crime. What's more, given the margin of discretion granted to the EU member states and the lack of harmonization at EU level, the EU laws in their current state impose no duty of mutual recognition in the gambling area.[38] Therefore, the proportionality assessment is conducted independently of this requirement, solely with reference to the objectives pursued by the competent authorities of the EU member state concerned and the level of protection which it seeks to ensure.

Although proportionality is strictly required, the assessment is conducted with slight variations. In accordance with gambling-related case law, once it is established that the subject restrictions serve legitimate policy objectives, the first test is suitability, by which the national courts will have to assess whether the restrictions are also suitable to achieve the objective claimed as a ground for justification. This test is assessed in relation to each legitimate objective, and it may also be necessary to distinguish between various games.[39] The second step is an assessment of the necessity of the measures, by which the national courts will have to determine whether the measures go beyond what is necessary to achieve the aims in question and whether there are less restrictive measures that can reach the same objective. Given that most gambling related disputes concern monopolies, the case law regarding the proportionality assessment of monopolies has become quite comprehensive.

In a nutshell, in accordance with the proportionality assessment, the EU member states which have adopted monopolies must show that their aim is to ensure a particularly high level of protection. They also have to prove is that they can pursue their objectives effectively and deal with the risks connected with the gambling sector only by granting exclusive rights to a single entity which is subject to strict control by public authorities.[40]

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38 Paragraph 112 of *Stoß & Others*

39 *Ladbrokes v Norway*

40 The second part is a test of necessity. Please see paragraph 40-42 of *Läärä and Others*,

In doing so, the EU member states may legitimately claim that a monopoly structure enables its public authorities to implement their policies more effectively by allowing them additional means to supervise and influence the monopoly holder and the supply of games.[41]The claim is relevant to the necessity of the restrictive measures.

In terms of suitability, the national legislation is expected to reflect genuine concern in reaching the stated objective in a consistent and systematic manner.[42] What's more, it should also ensure that the monopoly holder will be able pursue these objectives in a consistent and systematic manner by means of a supply that is quantitatively measured and qualitatively planned.[43] Within this framework the commercial policies of the monopoly holders become relevant for the proportionality assessments. For example, despite the fact that monopoly structures aim to reduce opportunities for gambling and prevent incitement to squander money on gambling, they can also pursue expansionist commercial policies, which may include offer of an extensive range of games, advertising and utilization of the new distribution techniques.[44]

The expansionist policies of the monopoly holders have been found acceptable under a few conditions. The ECJ has ruled that controlled expansionist policies can be consistent with the stated objectives. These can be preventing the use of gambling activities for criminal or fraudulent purposes and preventing incitement to squander money on gambling and combating addiction to gambling by channelling consumers away from unauthorized suppliers into a regulated supply of gambling. This ruling is based on the assumption that the monopolies are free from criminal elements and that they will not try to expand the existing market but only try to capture or retain it.[45] In reflection of this assumption, the advertising campaigns of the monopolies must be limited to what is necessary to thus channel consumers. Under no condition are the public funds gained via gambling proceeds acceptable as the main goal of a restrictive policy, let alone an expansionist policy of a monopoly,

paragraph 66-67 of *Bwin*, paragraph 81-83 of *Stoß* and paragraph 41 and 47 of *Dickinger & Ömer*

41 In comparison to the situation they would have had should the same services have been provided by private operators in a competitive market, even if the latter were subjected to a system of authorization and a regime of supervision and penalties. Please see paragraph 82 of *Stoß & Others*

42 Paragraph 88-98 of *Stoß & Others*

43 Paragraphs 57 of *Dickinger & Ömer*, 37 of *Ladbrokes* and 83 of *Stoß*

44 Paragraphs 37 of *Ladbrokes*, 69 of *Dickinger & Ömer* and 67 of *Zeturf*

45 Paragraphs 101 and 102 of *Stoß and Other,* 63, 69 of *Dickinger & Ömer,* and 30 of *Ladbrokes.*

although they are acceptable as an incidental beneficial consequence.[46]

It is not only the activities of the monopolies that are the subject of the restrictive legislation but also their legal form.[47] Therefore these requirements also become a subject of the proportionality assessment and should thus be suitable for ensuring that the objectives pursued by setting up a monopoly system will be achieved and that any measures taken will not go beyond what is necessary for that purpose. For example, a requirement for minimum share capital may be justified under the claim that it is useful to ensure that the provider is capable of meeting its obligations, the claims of winning gamblers, unless there are no other less trade-restrictive measures.[48]

The ECJ has classified the requirement that the registered office of the holder of the monopoly be within the EU member state in which it will provide its services as a discriminatory measure that can be justified only by express derogations. The national courts will have to assess two issues. The first issue is whether there is a genuine and sufficiently serious threat to any fundamental interest of the society. The second issue is whether there are less restrictive ways of ensuring the level of monitoring attained by the public authorities over a provider established in their national territory on others established in other EU member states.[49]

The ECJ has not been as accommodating to the preservation of the monopoly structures in the alcohol trade. In a case concerning importation of spirits, wine and strong beer to Sweden from other EU member states[50], the established monopoly structure required all such sales to go through the national state monopoly provider. Therefore individual purchases through the Internet or other distance sale methods were prohibited. The justifications provided for the necessity of the monopoly were very similar to those provided in the gambling cases, the protection of health and life of humans by combating alcohol abuse and protection of minors. In this case the ECJ did not find the imposed trade restrictions justified, even though the grounds listed were not much different from those in the gambling cases (Hörnle and Zammit 2010: 162-3). Therefore, the ECJ has granted the EU member states greater autonomy in determining their gambling policies as compared to policies regarding alcohol consumption.

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46 Paragraphs 57-60 of *Schindler*, 32-37 of *Läärä*, 35-36 of *Zenatti* and 61-62 of *Gambelli.*

47 I.e., the amount of their share capital and the location of their registered offices.

48 Paragraphs 77 of *Dickinger & Ömer*

49 Paragraphs 84 of *Dickinger & Ömer*

50 Case C-170/4 *Klas Rosengren and others v Riså klagaren* [2007] ECR I-04071 Judgement of 5 June 2007.

3. Secondary EU Legislation

Gambling services had been specifically excluded from some widely anticipated directives, especially the E-Commerce Directive[51] and the Services Directive[52] at a critical time when ECJ was busy with high profile gambling disputes.[53] These exclusions revealed the view of the EP and the Council of the European Union, that gambling is a special sort of service that is best regulated at national level. Indeed, in paragraph 25 of the Services Directive, the reason provided for the exclusion was that the specific nature of the gambling activities necessitated implementation of nation-specific public policies and consumer protection by the EU member states themselves.

Indeed, if the country of origin principle introduced in the E-Commerce Directive that enabled the information society service providers to comply only with the law of the place of their establishment applied to gambling services the course of the future Internet gambling-services-related disputes and the sector itself would have changed dramatically by allowing service providers to establish themselves in the more liberal jurisdictions and provide their services freely to citizens of other EU member states (Hörnle and Zammit 2010: 143). At the time, given the highly political nature of these two institutions it was very unlikely for the EP and the Council of the European Union to take a step toward regulation of cross-border provision of gambling services at the risk of bad publicity.

The changing atmosphere surrounding Internet gambling and EU member state attitudes can be observed in later developments. Initially the emphasis had been on the diversity of national regimes and the right to remain so. Then, more and more, the expectation turned to cooperation among EU member states. For example in paragraph 30 of Report on Internet gambling in the Internal Market[54] cooperation among EU member states to agree on Europe-wide gambling-specific consumer protection measures is highly anticipated whereas gambling services had been left outside the scope of Consumer Rights Directive.[55] There are also other directives that regulate various aspects

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51 Directive 2000/31/EC OJ L178 pp. 1-16 of 17 July 2000.

52 Directive 2006/123/EC pp. 36–68 OJ L 376 27 December 2006.

53 In Article 1(5)(d) gambling activities are defined as "gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions.", whereas paragraph 16 of the preamble excludes "promotional competitions or games where purpose is to encourage the sale of goods or services and where payments, if they arise, serve only to acquire the promoted goods or services."

54 European Parliament resolution of 15 November 2011 on online gambling in the Internal Market (2011/2084(INI))

55 Directive 2011/83/EU OJ L 304 PP. 64-88 22 November 2011.

of services trade and are also applicable to Internet gambling services. Among them are Anti-Money Laundering Directive[56], Data Processing Directive[57], E-Privacy Directive[58], Unfair Commercial Practices Directive[59] and Audio-visual Services Directive[60].

4. Non-judicial Processes in Relation to National Gambling Regulations

In the path leading to harmonization of member states laws or ensuring coherence among national legislations not only administrative and judicial processes but also non-judicial processes are effective. On the issue of gambling, the EP and the European Council adopted a passive stance for a long time. Therefore, the ECJ had no choice but to assume the central role in interpreting the application of the relevant EU legislation, and its early case-law set the fundamental basis for the ECJ's subsequent rulings. It was only after 2004, along with further Internet gambling issues keeping the ECJ busy, other EU institutions have also become more decisive and acted on the acknowledgement that the changed market structure necessitated a more proactive performance. Eventually, all three primary institutions of the EU have assessed the cross-border provision of gambling services from their own perspectives, although there was an initial reluctance to take the initiative.

The Swiss Institute of Comparative Law Report

Prompted by complaints and changes in the gambling market, the European Commission re-entered the gambling services debate as well. As an initial step, in 2004, it requested new comprehensive research regarding the legal and economic aspects of gambling in Europe from the Swiss Institute of Comparative Law (SICL)[61]. One of the most significant findings of this study was that the coexisting national gambling laws differ significantly from one another, even though the public policy objectives that they intend to protect

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56 Article 2 of Directive 2005/60/EC OJ L309 pp. 15–36 of 25.November 2005 (as amended by Directive 2008/20/EC OJ L76 pp. 46-47 of 19 March 2008)

57 Directive 2002/58/EC OJ L 201 pp. 37–47 31 July 2002 (Amended by Directive 2006/24/EC OJ L 105, 13.4.2006, p. 54–63 and Directive 2009/136/EC OJ L 337 pp. 11–36 18 December 2009)

58 Directive 2002/58/EC OJ L 201 pp. 37–47 of 31 July 2002 (amended by Directive 2009/136/EC OJ L 337 pp. 11–36 of 18 December 2009)

59 Directive 2005/29/EC OJ L 149 pp. 22–39 of 11 June 2005.

60 Directive 2010/13/EU OJ L 95 pp. 1-24 of 15 April 2010. Article 22 this directive excludes all gambling services for which the audio-visual content is merely a supplementary feature of the main purpose. In this context games of chance and online games are excluded from the scope of this directive, whereas broadcasts devoted to games of chance are not.

61 Swiss Institute of Comparative Law 2006, Study of Gambling Services in the Internal Market of EU.

are mostly similar. It also confirmed that the gambling legislation of many EU member states often leads to barriers to the freedom to provide services and the freedom of establishment and is therefore not compatible with EU Laws.

Schaldemose Report

The official view of the European Parliament on the gambling services trade also came to light a few months later, in February 2009, when it approved the Schaldemose Report.[62] The report presented Internet gambling as a source of increased opportunities for fraud, corruption and other criminal behaviour and greater potential for gambling addiction and defended national legislation as a more appropriate form of governance in the Internet gambling area as opposed to a purely internal market approach. The report failed to recognize the legitimate, well-functioning and regulated Internet gambling markets that have been active in most EU member states which had not posed payment-related increased risks to consumers. What's more, the findings of an independent study[63] requested by the Committee on Internal Market and Consumer Protection were mostly ignored which found that there is no evidence as to: (1) the amount of money laundered through Internet gambling, (2) any increase in problem gambling due to the availability of Internet gambling, (3) a relationship between problem gambling and organizational structure and ownership of gambling, (4) and little hard evidence that EU consumers are defrauded on EU-licensed websites. The unfortunate shortcomings of the report overshadowed its calls for extensive research and cooperation at the member state and Union levels and for creation of a European Code of Conduct.

Report on the Integrity of Online Gambling

In the fall of 2008, the Council of the EU had also decided to participate actively in efforts to produce solutions to the problems that had arisen relevant to this fragmented industry and set up a Working Party for Gambling and Betting. The purpose of the Working Party was to bring the EU member states together to share their experiences and to work on mutual solutions to their problems. The Council of the EU adopted their progress report on

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62 'Report On the Integrity of Online Gambling' of 17 February 2009, European Parliament, Document no: A6-0064/2009. This report widely became known as "Schaldemose Report" because it was drafted by Christel Schadelmose, a socialist group member of the Parliament from Denmark, on behalf of the Committee on Internal Market and Consumer Protection at the end of 2008.

63 It was conducted by Europe Economics, an independent consulting company based in the UK. 'Online Gambling: Focusing on Integrity and A Code of Conduct for Gambling' YOUNG, R. & TODD, J. 2008. Document No: IP/A/IMCO/ST/2008-13.

10 December 2010[64] which will likely prove to be quite useful if a European Code of Conduct for the gambling industry comes to light. In their report, the Working Party has introduced the definition of illegal gambling: "gambling in which operators do not comply with the national law of the country where services are offered, provided those national laws are in compliance with TEU principles".[65] This definition emphasizes national values limited by the EU commitments. The report did not call for harmonisation but acknowledged the necessity of increased cooperation between regulatory public authorities in order to address the difficulties presented by remote gambling across the EU. This step showed that the EU member states have become aware that the established cooperation mechanisms of the EU could benefit them in tackling cross-border gambling related problems.

The Green Paper

These developments had an impact on gambling policy at the EU level which became apparent with the European Commission's Green Paper on Gambling in March 2011,[66] under which an extensive public consultation on on-line gambling was launched. A wide range of stakeholders subsequently provided information on relevant public policy challenges and possible Internal Market issues resulting from the consumption of Internet gambling services, upon which five different workshops consisting of specialists in the area, were formed to complement the consultation process. The European Commission pointed out that there were no predetermined steps to follow the consultation.[67]

The Green Paper is a further step in the EU member states' exploration of the possible advantages of the established structures of the EU in addressing their common problems related to Internet gambling. As of the publication time of Green Paper 23 member states and all three EFTA states had given notice of draft Acts and regulations regarding gambling. This reformation process, in fact, had started in January 2005.[68] The EU member states had

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64 'Conclusions on the framework for gambling and betting in the EU member states' adopted by the Council of the European Union at 3057th Competitiveness (Internal Market, Industry, Research and Space) Council meeting. Brussels, 10 December 2010. Council document 16884/10.

65 Please see VI. Conclusion, first paragraph the same document.

66 European Commission, 'Green Paper on Online Gambling in the Internal Market' SEC (2011) 321, 24 March 2011.

67 European Commission, 'Public Consultation on on-line gambling in the Single Market', 20 October 2011, MEMO/11/186.

68 'Commission Staff Working Document, Accompanying document to the Green Paper on Online Gambling in the Internal Market', European Commission, SWD (2012) 345, 23 October 2012, Brussels.

little or no choice but to reconsider their long-standing traditions of national control in the gambling services, the legislation of which had already been developed with noteworthy differences, and to adapt to the multi-level changes that had undermined their existing systems.

Creutzmann Report

The European Parliament adopted Creutzmann Report, a second report on online gambling after Schaldemose report, on 15 November 2011, which had been referred to with its rapporteur's name as well.[69] This report reflected the changing attitudes towards online gambling as its finding and recommendations were mostly in contradiction to the previous report. Creutzmann Report, very generally, calls for greater co-ordination among EU member states and a European Directive on consumer protection and betting fraud and requests common standards on licensing.[70] Even if it does not call for harmonization of regulations, due to unique nature of gambling, it also warns against the danger of lack of co-ordination between member states. [71]

Communication "Towards a comprehensive European framework on online gambling"

In October 2012, the European Commission proposed an EU-wide action plan and a set of initiatives, based on the public consultation that was launched by the Green Paper. The action plan and the initiatives were stipulated in the Communication "Towards a comprehensive European framework on online gambling" (Communication).[72] Therein, the EU Commission acknowledged that the type of challenges posed by the cross-border provision of online gambling services and their implications will be best tackled by cooperation among the EU member states and that it is no longer possible for them to reach effective results individually.

5. Conclusion: United in Diversity

This article has focused on the Internet gambling services trade as an internal market matter. The aforementioned judicial rulings and legislative and

69 'On online gambling in the Internal Market', Jürgen Creutzmann, European Parliament Register of documents, 14 October 2011, (2011/2084(INI))

70 For further details please see suggestions sections of the Creutzmann Report.

71 Some of the examples are: distortion of the competitive environment, allowing grey and black market gambling to thrive on the internet, and failure to protect potentially vulnerable consumers. Please see pp. 14 and 19 of the Creutzmann Report.

72 "Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the regions towards a comprehensive European framework on online gambling" European Commission, Strasbourg, COM(2012) 596 final.

administrative actions have all reflected an acknowledgment of the diversity of national regimes in the absence of harmonization in this area. Especially based on moral, religious and cultural considerations, a large margin of discretion has been granted to the EU member states notwithstanding the fact that their national regulations will still be subject to review by the ECJ should they restrict market access. In light of the information provided in this article, the gambling services trade experience of the EU seems to serve as a fitting example of its motto "united in diversity" and therefore constitutes no threat to the greater EU project, which aims for higher integration in economic and social areas.

It has even been suggested that the value-based approach to gambling-related cases may suggest a more holistic approach in the interpretation of primary treaty obligations regarding the internal market by giving consideration to values other than trade, which may in turn indicate a "move from market building into a market deepening project conditional on mutually agreed solutions, even if it is of a cooperative nature (Gerard 2012)". This thought also embraces the idea that uniformity of regulations is not a necessity for the success and/or coherence of an economic and political union such as the EU.

The overview of gambling-services-related developments in the EU, with particular attention on the ECJ's rulings, which assumed the central role in mapping the limits of EU member states' regulatory powers showed that the ECJ's view of the internal market, was defined by pluralism rather than uniformity. This had been the case even long before the cross-border gambling provision emerged as an issue (Bernard 1996, Littler 2007).[73]

The EP and the Council of the EU, though reluctant to take action in the beginning, also acknowledged and even supported the continuance of the diversity of national legal gambling regimes as long as legislation remained in compliance with relevant EU obligations. The European Commission, though more proactive compared to the other two administrative organs, allowed itself time to evaluate the market and developments after its initial intention to propose harmonization of the industry, before the Internet took centre stage as a means of facilitating cross-border trade. Their cumulative response was embodied in the Green Paper and the ensuing Communication that acknowledged the diversity of regulations in the gambling services

[73] A further long standing view of the ECJ that has had an influence on its ruling related to gambling-related services is that; in matters that are separable from production, the proper law is that of the country where the goods and services are marketed Bernard, N. (1996). "Discrimination and Free Movement in EC Law " International and Comparative Law Quarterly 45: 82-108.

area. However, both documents encouraged and facilitated administrative cooperation and coordination among the EU member states in order to address the challenges posed by the co-existence of their national regulatory systems, mostly for the purpose of protection of consumers, prevention of fraud and preservation of the integrity of sports and prevention of match fixing. This paper could be interpreted as a reminder to the EU member states that even in areas left to state competence; the member states are expected to comply with EU laws and that there are non-judicial methods available to them to cooperate in order to address common concerns, as members of an economic-political union. This message also signifies that the EU's overall integration process embraces national diversity, and with it diversity of cultural and regulatory traditions (Gerard 2012) while expecting the member states to address issues resulting from this diversity that concern the citizens of the EU as a whole.

Lastly, the EU member states, despite being assured of their sovereign competence to regulate, whether prompted by the ECJ rulings, the infringement proceedings or the need to adapt to the multi-level changes that have undermined their existing systems, have begun to reconsider their long-standing traditions and methods of national control in the regulation of gambling services. This reformation process was followed by the action plan proposed by the European Commission that explicitly rules out EU-wide legislation but sets out a plan that will require high level of cooperation from the member states.

Therefore, in the EU, the initial tension and adversity among the EU member states that arose from the cross border provision of Internet gambling services, embodied in the disputes brought before the ECJ, has been transformed into a reformation process on a state by state basis and an EU wide action plan that will be coordinated by the European Commission. The effects of the reformation process and the action plan on the pluralistic structure of regimes will depend on the results of operational and strategic cooperation between the national models that have emerged and between the actors, including popular, judicial, and institutional ones, who have played significant roles in their development (De Burca 2009).

The EU institutions have acknowledged that gambling is indeed a special item of trade that is best regulated at state level on the basis of their social policy objectives. On the other hand, the ECJ and the European Commission, each within their capacity, made sure that these regulations comply with the EU laws. The European Commission further initiated an action plan that requires participation and cooperation of the member states, in order to address problems that concerns EU citizens as a whole and would be

best tackled by adopting common principles at EU level and possibly at international level. This process indicates that in the EU context the diversity of national regulations in public morals areas had been acknowledged and not deemed a threat to the realization of the market integration goals or the desired EU legal order, per se. This in turn had the effect of giving space to member states to deliberate their priorities. Mostly because there are very strong incentives and adequate mechanisms in place to address shared concerns, accommodating these divergences have not undermined primary treaty objectives or the integration process.

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EVALUATIONS CONCERNING THE STATE OF NECESSITY IN ISLAMIC CRIMINAL LAW AND CONTEMPORARY TURKISH CRIMINAL LAW

İslâm Ceza Hukukunda ve Güncel Türk Ceza Hukukunda Zaruret Hali Kurumuna İlişkin Değerlendirmeler

Dr. Ali Rıza TÖNGÜR*

ABSTRACT

The state of necessity in criminal law means that even if an act of a person which was executed to protect himself from a definite danger or an assault against his or another person's rights constitutes a crime, he is not kept criminally liable for this act; i.e. it is to be excused.

The state of necessity is accepted among the excusatory and mitigating causes which affect or remove the culpability in legal systems of both Islamic criminal law and continental criminal law. It is mostly governed by general provisions sections of criminal codes.

This study aims to examine the concept of necessity in Turkish criminal law from a comparative perspective of both Islamic criminal law and contemporary continental law, and also to put forward similar and different aspects of the concept.

Keywords: State of Necessity, Danger, Islamic Law, Criminal Law, Excusatory and Mitigating Causes

ÖZET

Ceza Hukukunda zaruret veya ıztırar hali, kişinin kendisinin veya başkasının bir hakkına yönelen muhakkak bir tehlikeden kurtulmak amacıyla gerçekleştirdiği eylemler bir suça vücut verse dahi, bu eylemleri bakımından cezai sorumluluğunun olmadığını, diğer bir söylemle mazur görüldüğünü ifade eder.

Zaruret hali, hem İslam Ceza Hukukuna hem de Kıta Avrupası Ceza Hukukuna dâhil ülkelerde kusurluluğu etkileyen veya kaldıran hallerden kabul edilerek ağırlıkla ceza kanunlarının genel hükümler bölümünde düzenleme altına alınmıştır.

Çalışmamızda, zaruret hali kurumunu İslam ve Güncel Kıta Avrupası hukuku özelinde Türk Ceza hukuku kapsamında karşılaştırmalı olarak inceleyerek, benzer ve farklı yönlerini ortaya koymaya çalışacağız.

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Anahtar Kelimeler: Zaruret Hali, Tehlike, İslâm Hukuku, Ceza Hukuku, Cezayı Ortadan Kaldıran Hal.

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INTRODUCTION

The state of necessity that was introduced to continental criminal law in the XIII. Century is a concept mentioned in the Qur'an, the fundamental source of Islam. The essence of the state of necessity that has existed since the beginning of Islam is inherent in the sense of self-defence of humankind. A person, when faced with an instant danger, due to his nature, may have to harm, though involuntarily, innocent persons or persons causing danger but bearing no criminal liability, in order to survive or preserve his physical integrity or protect his property. Under usual terms, such acts are described as criminal offences by the legal order if the concept of state of necessity is not recognized. However, owing to this concept, such acts are accepted either a cause of legality or a cause of excuse.

In this study, the state of necessity will be examined in the basis of Turkish and Islamic criminal law. We first explain the concept of necessity, and then evaluate its conditions of application in detail.

I. THE CONCEPT OF THE STATE OF NECESSITY

The state of necessity is, in the lexical meaning, defined as being forced to do something or being in despair.[1] The situation leaving a man in despair is accepted as an important ground of excuse both by most legal orders and Islamic law.

The state of necessity that is rather broad in respect of its content is a structure of which existence has been acknowledged under criminal law discipline for a long time. The state of necessity is defined as a violation of a person's rights protected by law by acts of another person in order to protect the latter's life, physical integrity and rights when faced dangerous situation which emerged instantly in a manner that one's will and physical conditions fail to cope with.[2] It is widely accepted in different legal systems that a person

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1 http://www.tdk.gov.tr; http://www.osmanlicaturkce.com (Last access: 07.04.2015).

2 KAKHKI, M. Mohammad Hedeyati***, "Islamic Law",*** in "General Defence*s in Criminal Law, Domestic and Comparative Perspectives",* (Ed.) REED, Alan/BOHLANDER, Michael, Ashgate Publishing Company, Burlington 2014, USA, p.246; JESCHECK, H. Heinrich/SIEBER, Ulrich. ***"Alman Ceza Hukukuna Giriş"***, Trans. by. Feridun Yenisey, Beta, İstanbul 2007, p.36; BOHLANDER, Michael, ***"Principles of German Criminal Law",*** International Specialized Book Services, Portland 2009, p.106; NYAZEE, I.A.Khan, ***"General Principles of Criminal Law (Islamic and Western),*** 2010, p.151; HELLER, Kevin/DUBBER, Markus, ***"The Handbook***

who find himself in such a circumstance is not to be punished. [3]

The state of necessity which is governed by article 25 (titled "self-defence and necessity") paragraph 2 of Turkish Criminal Code (Law No: 5237) is stated as follows:

"... (2) No punishment is given to the offender for an act executed to protect himself from a severe and definite danger or an assault against his or another person's rights, where he has no other choice to eliminate this danger. However, there should be proportional relation between the imminent necessity to protect oneself and the seriousness of danger, and the means used to eliminate this danger." As it can be understood from the text of the provision, the state of necessity, with regard to Turkish Criminal Code, is a situation which expresses that a person cannot be held liable for an act that he committed to survive from a severe and definite danger against his or another person's rights.[4]

of Comparative Criminal Law", Stanford University Press, California 2010, p.331; KANGAL, Zeynel, ***"Ceza Hukukunda Zorunluluk Durumu"***, Seçkin Yayıncılık, Ankara 2010, p. 30.

[3] There are many theories that explain the legal character of the state of necessity. According to the ***Theory of Protective Instinct,*** the reason why the perpetrator is not sentenced in the state of necessity is the protective instinct of the people intrinsic to them and reflexes. Legal order excuses the protective instinct of the people. According to ***Theory of Psychological Compulsion,*** the person in the state of necessity gets into danger because of the situation he faces. In this case the person who does not sacrifice himself according to moral rules is under a moral responsibility. However it is not possible to turn this moral rule into a legal rule because a rule that is ineffective would lose its legitimacy. According to the ***Theory of Socializing of the Motives,*** the essence of the punishment is the social benefit it would provide. In case of necessity, the punishment would not provide any advantage since the objectives of fear, prevention and correction which the punishment uses in order to achieve its purposes would not be achieved. Therefore the offender should not be punished. According to the ***Theory of Purpose,*** pursuing an aim legally recognized through legal means cannot be contrary to law. When it is required to protect a legal value under danger and the violation of the legal values of a third person is the appropriate means for achieving this aim, it is considered that the perpetrator act in compliance with law. According to ***Theory of Conflict of Rights,*** in the event that two equal rights conflict, the public authority protects the preceding one. In this case, the right accepted as preceding is the victorious right in the conflict. Sacrificing the right that seems less important is compatible with law as it is considered that it is legally weak and less important. (For detailed information on the theories please see. ROXİN,Claus, ***"Strafrecht Allgemeiner Teil"***, Band 1, 3. Auflage, München 1997, p.724 ff.; DÖNMEZER, Sulhi/ERMAN, Sahir, ***"Nazari ve Tatbiki Ceza Hukuku"***, İstanbul 1997, V.I, p.126 ff.; ÖZBEK, V. Özer /KANBUR, Nihat/DOĞAN, Koray /BACAKSIZ, Pınar/TEPE, İlker, ***"Türk Ceza Hukuku Genel Hükümler"***, 2. Edt., Seçkin Yayıncılık, Ankara 2011, p.361 ff.)

[4] ÖZGENÇ, İzzet. ***" Türk Ceza Hukuku Genel Hükümler"***, Seçkin Yayınları, Ankara 2014, p.364; ÖZTÜRK, Bahri/ ERDEM, M. Ruhan, ***"Uygulamalı Ceza Hukuku ve Güvenlik Tedbirleri Hukuku",*** 11th Edt., Seçkin Yayınları, Ankara 2011, p.210; KOCA, Mahmut/ ÜZÜLMEZ, İlhan. ***"Türk Ceza Hukuku Genel Hükümler",*** Seçkin Yayınevi, 4th Edt., Ankara 2011, p.243; ARTUK,

In 2005, following entry into force of Turkish Criminal Code (No: 5237), a debate has emerged among Turkish legal scholars with regard to the legal qualification of the state of necessity. While some authors accept that the state of necessity is a cause of excuse that affects the culpability[5], some others[6] accept that it is a subject ground to law (grounds making a situation lawful) as governed by the abolished Turkish Criminal Code (No: 765).[7] There are also those[8] who accept that the state of necessity, according to the circumstances of the case, either is a cause affecting the culpability or is a subject ground to law. [9]

In the explanatory text of article 25 of Turkish Criminal Code, the legal qualification of the state of necessity is stated as "a cause removing the culpability".[10] Likewise, article 223 paragraph 3 sub-paragraph (b) of the Code of Criminal Procedure (No: 5271) states that courts should give judgments of "no legal ground to sentence" (punishment is not required) due to lack of culpability in a trial involving the state of necessity. Also article 64 paragraph 2 of Turkish Code of Obligations (No: 6098) provides for liability for compensation concerning a damage occurred as a result of the harm done to another person because of the state of necessity. Given the fact that different legal disciplines within the same system should be in a harmony, it should be accepted that, with respect to Turkish criminal law, the state of necessity is a reason affecting the culpability.[11] The General Board of the Criminal Panels of the Court of Appeals indicates, in its judgments delivered after the entry into

M.Emin / GÖKÇEN, Ahmet / YENİDÜNYA, A.Caner. ***"Ceza Hukuku Genel Hükümler"***, Turhan Kitabevi, 4.Edition, Ankara 2009, p.641; ZAFER, Hamide. ***"Ceza Hukuku Genel Hükümler",*** Beta, 2nd Edt., İstanbul 2011, p.275; MAHMUTOĞLU, F. Selami, ***"5237 S. Türk Ceza Kanununda Hukuka Uygunluk Nedenleri"***, Hukuk ve Adalet Dergisi, No:5, April 2005, p.51; HAKERİ, Hakan, ***"Ceza Hukuku"***, Adalet Yayınevi, Ankara 2012, p. 324.

5 ÖZGENÇ, ARTUK/GÖKCEN/YENİDÜNYA, KOCA/ÜZÜLMEZ, HAKERİ, MAHMUTOĞLU.

6 ZAFER, ÖZTÜRK/ERDEM.

7 The state of necessity was governed by article 49 paragraph three of Turkish Criminal Code (No: 765) as a subject ground to law: "*in necessity, if there was no other way of protection, so as to protect himself or another person against serious and definite danger not deliberately caused by himself".*

8 DEMİRBAŞ, Timur, ***"Ceza Hukuku Genel Hükümler"***, Ankara 2011, p. 269; KANGAL, p.47.

9 The state of necessity is governed by German Criminal Law both as a subject ground to law (article 34) and a cause of excuse (article 35). These provisions originated from doctrinal discussions are based on the criterion whether the legal value protected by the person in the state of necessity precedes the value he violates. If the protected value is considered as preceding, the concept is accepted as a subject ground to law''. If the protected value and the sacrificed value are equal to each other, the concept is accepted as "a cause of excuse". (see. JESCHECK/SIEBER, p.36; BOHLANDER, p.108; KANGAL, p.93).

10 ÖZGENÇ, p.398, note: 708; KOCA/ÜZÜLMEZ, p.225.

11 ÖZGENÇ, p.365 ; KOCA/ÜZÜLMEZ, p.254; ARTUK/GÖKCEN/YENİDÜNYA, p.643.

force of the new Turkish Criminal Code, that according to the provision laid down in article 223/3 of the Code of Criminal Procedure the state of necessity should be acknowledged as a cause removing the culpability.[12]

In Islamic criminal law, the act of a person who is in the state of necessity is excused, even though it is not justified by the legal order, because his free will is vitiated by a serious and definite danger.[13]

In Islamic criminal law, it is acknowledged that the concepts of the state of necessity, coercion and self-defence come from common basis and they are in close relationship with each other.[14] Therefore it is admitted that a person who is obliged to commit an offence under this imperatives cannot be held liable.[15] In Islamic criminal law, the state of necessity is sometimes governed as a subject ground to law or as a cause removing the sentence, and even sometimes considered a matter ineffective on the case.[16]

Qur'an, the fundamental source of Islam, provides for provisions concerning the state of necessity. Among these, in the verse 173 of Surah of Baqarah it is stated that *"He has only forbidden to you dead animals, blood, the flesh of swine, and that which has been dedicated to other than Allah. But whoever is forced [by necessity], neither desiring [it] nor transgressing [its limit], there is no sin upon him. Indeed, Allah is Forgiving and Merciful."* [17] And in the verse 195 of the same Surah, it is stated that *"Do not throw [yourselves] with your [own] hands into destruction [by refraining]"*. Also in the verse 29 of Surah of Nisa, it is stated that *"Do not kill yourselves [or one another]. Indeed, Allah is to you ever Merciful."* [18] Likewise Muhammad (PBUH) stated in one of his hadith that *"The liabilities caused by mistake and forgetting and acts which are committed without free will are exculpated from my Islam Ummah"* [19]

Likewise, article 21 of the *Mecelle* which is one of the important legal sources of Ottoman State reads that *"The necessities allows the forbidden permissible".*[20] Thus it is acknowledged that if a person under necessity is forced

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12 The judgment of General Board of the Criminal Sections of the Court of Appeals, K.2007/1-28 – E.2008/37, 26.02.2008. (see. Özbek et al., p. 368.)

13 OWAYDHAH, A.Khalid. ***"Justifications and Concept of Criminal Liability in Shari'ah",*** *Humanities and Social Sciences Review,* 2014, Vol. 3(2), p.61.

14 NYAZEE, p.152; KAKHKI, p.246.

15 OWAYDHAH, p.61.

16 UDEH, Abdulkadir, ***"Mukayeseli İslam Ceza Hukuku",*** Tran. Ali Şafak, Kayıhan Yayınları, 2nd Edt., İstanbul 2102, s.589 ff.

17 http://kuran.diyanet.gov.tr/tefsir.html (Last access: 10.04.2015)

18 Ibid.

19 ***"Sahih Bukhari"***, narrated by Abdullah Ibn Amr Ibn Al-As, Book 18, No: 1706.

20 Ali Haydar Efendi, ***"Dureru'l Hükkâm Şerhu Mecelleti'l Ahkâm",*** Transl. by Raşit Gündoğdu/

to do something and he is in the position to unavoidably act in that way, this act is excused. For example, one who is under a binding compulsion, in other words under a threat or coercion may waste another person's assets. Anyone who is being chased by an animal may break the window of someone else and get in.[21]

Today, the state of necessity is included in the criminal law legislations of many countries adopting Islamic law. In general, for the existence of the state of necessity, a serious and close threat of murder or damage is required. In addition, the will of the person should not involve in the perpetration of the act and he should be unable to prevent the incident otherwise. The acts breaching law are deemed as justified provided that persons are unable to otherwise protect their lives, religions, relatives or assets against a serious and absolute danger.[22] Article 299 of Pakistani Criminal Law, article 61 of Egyptian Criminal Law, article 95 of Afghani Criminal Law and article 55 of Islamic Penal Code of Iran govern the state of necessity.[23]

II. CONDITIONS OF THE STATE OF NECESSITY

A. Conditions Concerning the Danger

1. Existence of a Serious and Absolute Danger

According to Turkish Criminal Code, the first requirement for the existence of the state of necessity is the existence of a serious danger, which threatens with harming life, physical integrity or other valuable rights.[24] "Serious" threat means that the right is of vital importance that one cannot be expected to sacrifice when threatened. A danger against a trivial right cannot be assumed as serious.[25] The gravity of the danger is to be appreciated by the judge according to the circumstances of the case.[26] In addition to the seriousness of the danger, it should be also "absolute". The absoluteness of the danger means that there is a present, clear and real danger at the time of the incident. However, among the scholars of Turkish criminal law, a danger that is, with high probability, likely to create damage in the near future are accepted as an absolute danger even though it is not present at the time of the incident.[27]

Osman Erdem, Gül Neşriyat, 2012, Vol.II, p.645 ff.

21 Ibid, p.647.

22 JAVED, Azhar. ***"Intoxication & Self Defence A Comparative Study of Principles of English Law and Sharia'ah",*** Leeds Uni. 2004, p.92.; LAU, M. ***"The Role of Islam in the Legal System of Pakistan"***, Brill 2006, 26, s.3; HELLER/DUBBER, p.334.; NYAZEE, p.153.

23 JAVED, p.92; OWAYDHAH, p.62.

24 ARTUK/GÖKCEN/YENİDÜNYA, p.644-645; KOCA/ÜZÜLMEZ, p.256; ZAFER, p.279; ÖZBEK et al., 374-375.

25 ARTUK/GÖKCEN/YENİDÜNYA, p.644-645; ZAFER, p.279; KANGAL, p.448.

26 KOCA/ÜZÜLMEZ, p.256; ÖZBEK et al., 376.

27 ARTUK/GÖKCEN/YENİDÜNYA, p.644-645; KOCA/ÜZÜLMEZ, p.256; ZAFER, p.279; KANGAL,

Serious and absolute danger may arise from different sources. They may originate from natural disasters such as snow slide, flood, earthquake; and they may also arise from human-driven psychological individual needs such as hunger, thirst, illness and fear or attacks of wild animals and pets.[28]

In Islamic criminal law, the most important requirement for the existence of the state of necessity is a present and real danger against life or physical integrity (danger of injury).[29] The offender should not have any other option but to do in order to save himself from the adverse circumstance he faces.[30] Also the state of necessity should be present exactly at the time the act is committed. The acts perpetrated because of a prospective danger that did not occurred at that time are not considered within the scope of the state of necessity.[31] For example, a person who fears of dying from hunger cannot be assumed in the state of necessity if he eats the meat of a dead animal or another food which is forbidden by religion.[32]

Article 61 of Egyptian Criminal Code requires the existence of "a close and serious" danger; and article 95 of Afghani Criminal Code refers the existence of "a grave and sudden" danger. [33]

2. The Danger Must Be Aimed at a Right of the Perpetrator or of Another Person

For the existence of the state of necessity, the danger must be aimed at a right of the perpetrator or of another person.[34] This situation is explicitly stated by article 25/2 of Turkish Criminal Code. This provision refers a serious and absolute danger aimed at the ''right of the person committed the act and of other persons''. Furthermore no identification concerning the rights at which the danger must be aimed is envisaged. Therefore, the state of necessity may be considered to exist concerning the dangers aimed at life, physical integrity, freedom, sexual privilege, assets, reputation and the right to privacy.[35]

p.448.

28 KOCA/ÜZÜLMEZ, p. 257; ZAFER, p.279.

29 AKGÜNDÜZ, Ahmet, ***"İslam ve Osmanlı Hukuku Külliyatı, Kamu Hukuku"***,Osmanlı Araştırmaları Vakfı Yayınları, İstanbul 2011, Vol.I., p.520-521; JAVED, p.93; KAKHKI, p.247; OWAYDHAH, p.62.

30 UDEH, p.589; NYAZEE, p.154.

31 UDEH, p.589; KAKHKI, p. 247.

32 UDEH, p.589.

33 KAKHKI, .p.247; NYAZEE, p.154.

34 KOCA/ÜZÜLMEZ, p. 257; ZAFER, p.280; ÖZBEK et al., p.376, KANGAL, p. 452.

35 ARTUK/GÖKCEN/YENİDÜNYA, p.645; KOCA/ÜZÜLMEZ, p.257; ZAFER, p.280.

This situation was governed by the abolished Turkish Criminal Code (No: 765) in a different way. Article 49/3 thereof required the danger be directly against life and physical integrity by referring *"a necessity in that there was no other way of protection, so as to protect himself or another person against a grave and definite danger not deliberately caused by himself*. [36]

In accordance with the current Turkish Criminal Code, for the existence of the state of necessity, the danger is not required to be aimed at only to the rights and valuables of the perpetrator. The state of necessity in favour of third persons is also available. Accordingly, if a person commits an offence to eliminate danger aimed at right of a person who is not a relative of him, he still enjoys the state of necessity.[37] The consent of the person who is saved from the danger is not required. In this case, the legal responsibility of the perpetrator enjoying the subject ground to law because of the state of necessity is to be considered under the rules concerning *negotiorum gestio*.[38]

According to classical Islamic criminal law, the state of necessity is applicable only when the life of the perpetrator or of a third person is under threat or when it is feared that an organ will be wasted.[39] However the criminal codes of some countries in which Islamic law prevails acknowledge the state of necessity in cases of the protection of rights other than life and physical integrity.[40] Article 95 of Afghani Criminal Code, referring the danger against life and assets of both the perpetrator and of another person, establishes a wide framework of the circumstances in which the perpetrator may benefit from the state of necessity.[41] Likewise, the scope of the state of necessity is defined widely under article 55 of Islamic Penal Code of Iran. To this provision, anyone who needs to protect the life, assets or honour of himself or of another person may benefit from the state of necessity.[42]

3. The Danger Must Not Be Caused Deliberately

Another important requirement for the perpetrator to benefit from the state of necessity is that he should not involve in the emergence of the danger. This is referred in the relevant article of Turkish Criminal Code as *"...*

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36 ARTUK/GÖKCEN/YENİDÜNYA, p.645; KOCA/ÜZÜLMEZ, p.257; ÖZBEK et al., p.376.

37 Comp. German Criminal Code, § 35 (In German criminal law, concerning the state of necessity which is a cause of excuse, it is required that the relevant right should belong to the perpetrator or a relative of him.)

38 KOCA/ÜZÜLMEZ, p. 257; ÖZBEK et al., p. 376.

39 UDEH, p.589.

40 OWAYDHAH, p.62; NYAZEE, p.154; KAKHKI, p. 247; HELLER/DUBBER, p.332.

41 NYAZEE, 155; JAVED, p.94.

42 KAKHKI, p.248; HELLER, p.332.

which he has not deliberately caused". This condition refers prediction by the perpetrator of the danger that is likely to emerge because of his act. Therefore, in respect to the sorts of culpability except the unconscious negligence (direct intent, eventual intent and conscious negligence), the perpetrator may not benefit from the state of necessity. [43]

In Turkish law, it is controversial whether the provisions relating to self-defence or the state of necessity should be implemented with regard to persons who have to eliminate danger caused by persons without criminal capacity (minors and persons with mental disability).

Those who advocate that the perpetrator should get advantage of self-defence claim that the fact that the person does not have imputability (criminal capacity) does not constitute an obstacle for considering the assault wrong, and thus does not prevent us from considering the assault objectively wrong. Therefore they opine that in cases where it is not possible to punish the assailant, the rules for self-defence should apply.[44]

Others assert that since persons without imputability (criminal capacity) do not have the freedom to act with free will (to be faulty), it is not possible for them to deliberately cause the danger occurred; and thus the perpetrator who has to eliminate that danger should benefit from the rules of the state of necessity.[45]

With regard to Islamic law, similar discussion applies. Ebû Hanife and Ebû Yusuf who were among the classical Islamic legal scholars advocated that such assault executed by persons without imputability (criminal capacity) still bears the wrongfulness character; and thus the rules for self-defence should be implemented with regard to the perpetrator who has to eliminate that violating assault against himself. They also took the view that the perpetrator acted in state of necessity shall be liable in terms of neither criminal nor civil law (concerning the compensation aspect).[46]

On the other hand the majority (except the former two) acknowledged that the concept of self-defence is a structure established to prevent punishment. They claimed that since it would not be possible to qualify the acts of persons without imputability as a criminal offence, the perpetrator who has to eliminate the danger might benefit from the state of necessity rules. These scholars also admitted that the perpetrator acted in state of necessity would

43 ÖZTÜRK/ERDEM, p.212; KOCA/ÜZÜLMEZ, p. 257; ÖZBEK et al., s. 376; ZAFER, p.280; HAKERİ, p.334; KANGAL, p.458.

44 DÖNMEZER/ERMAN, Vol.II, n.799; ÖZBEK et al., p.377.

45 ARTUK/GÖKCEN/YENİDÜNYA, p.647; ÖZTÜRK/ERDEM, p.212.

46 UDEH, p.495.

bear the liability for compensation in terms of civil law for the harm he gave to the person without imputability.[47]

B. Conditions Concerning Protection From the Danger

1. Inability to Eliminate The Danger Otherwise

For the existence of the state of necessity the first requirement concerning the protection is that there should be no other choice, under the circumstances of the case, for the perpetrator acted in the state of necessity to eliminate danger without executing that offence. In other words, for the legal order to excuse the act executed for protection and normally constitutes a crime, there should not be any other choice but to commit. In cases where harm to the right of the others can be prevented by escaping from the danger, waiting or requesting for the intervention of the official authorities, state of necessity does not exist.[48] The judge of the case decides whether there was an opportunity to act otherwise to eliminate the danger or, in other words, adjudicates the urgency of the intervention having regard to the circumstances of the case and the psychological conditions of the perpetrator.[49]

Protection from the danger in state of necessity may appear as "the necessity of defence" or "the necessity of attack". Such a distinction is not provided for by Turkish Criminal Code. While in the necessity of defence, protection from the danger takes place by intervening to the source of the danger; in the necessity of attack, legal interests of an innocent third person involving in no way in the emergence of the danger may be violated.[50] Therefore, especially in the second case, the necessity and urgency of the attack should be interpreted in a narrower and much more sensitive way; and the criteria of proportionality should be paid attention.[51]

In Islamic criminal Law, for the existence of the state of necessity there should not be any other opportunity to eliminate the danger. Where it is possible to prevent the danger in different ways and methods and the defensive attack that is normally ''haram'' (forbidden by the religion) and constitutes an offence is directly executed without exercising such methods, the perpetrator would be deemed as an offender.[52] Therefore, to be able to

47 UDEH, p.495; KAKHKI, p.248.

48 ARTUK/GÖKCEN/YENİDÜNYA, p.647; KOCA/ÜZÜLMEZ, p.258; ÖZBEK et al., p.377; ZAFER, p.281.

49 ARTUK/GÖKCEN/YENİDÜNYA, p.647; KOCA/ÜZÜLMEZ, p.258; ÖZBEK et al., p.377; ZAFER, p. 281.

50 ZAFER, p. 281; KANGAL, p.348 ff.

51 KOCA/ÜZÜLMEZ, p.258; ZAFER, p.281.

52 UDEH, p.501–502; JAVED, p.95.

benefit from the rules of the state of necessity, it should be determined by the judge, according to the circumstances of the case, that there would not be any other choice but to take the defence to eliminate the danger.[53]

2. Not Having an Obligation of Resisting the Danger

Though not mentioned explicitly in the texts of both the abolished and current Turkish Criminal Code, another requirement commonly acknowledged for the existence of the state of necessity is that the perpetrator should not have an obligation to resist the danger.[54] In other words, the perpetrator exposed to the danger should not have the duty to eliminate the danger or to specially resist it. Therefore, it is admitted that persons carrying out police, gendarmerie, fireman, lifeguard profession cannot benefit from the state of necessity while on duty.[55] However it is acknowledged that these persons may get advantage of the state of necessity if they cannot carry out their responsibilities because the danger is too serious and great as to render them incapability to eliminate it.[56]

3. The Proportionality between the Act Committed in the State of Necessity and the Seriousness of the Danger

Article 25/2 of Turkish Criminal Code states that "... *however, there should be proportional relation between the imminent necessity to protect oneself and the seriousness of danger, and the means used to eliminate this danger."* Accordingly, it is emphasized that a choice should be made with regard to the contradiction appeared between the values which are protected and sacrificed in the state of necessity. For the perpetrator to take the advantage of the state of necessity, the value protected should precede the value sacrificed or at least should be equivalent to it when compared to each other.[57] Also there should be a reasonable proportion between the gravity of the danger and the subject and the means used.[58]

The act is not proportional when the perpetrator violates a superior right of an innocent third person to eliminate a danger against an ordinary right when compared to the former. Accordingly, proportionality does not exist where the perpetrator violates a superior right of a third person provided that he had the opportunity to eliminate that danger by violating an inferior

53 KAKHKI, p.249.
54 ARTUK/GÖKCEN/YENİDÜNYA, p.647; ÖZBEK et al., p.377; ZAFER, p. 281; HAKERİ, p.335.
55 ARTUK/GÖKCEN/YENİDÜNYA, p.647; ÖZBEK et al., p.377; ZAFER, p. 281.
56 ZAFER, p.281.
57 ÖZBEK et al., p.378; ZAFER, p.282.
58 KOCA/ÜZÜLMEZ, p.259.

right. The evaluation of the reasonable proportionality will be adjudicated by the judge according to the circumstances of the case.[59]

In Islamic criminal law, the principle of proportionality shall apply with reference to the fact that the danger should be eliminated by power that is not excessive.[60] The defensive attack must be in the amount equal to eliminate the threat and there must be a balance between the danger and the defensive attack. If the extent of the defensive attack excesses the extent of the existing danger, there is not a state of necessity but an offence.[61] The person in the state of necessity is always under a duty to eliminate the danger by the slightest ways and methods. If a person eliminates the danger in a way that is harder and more violating than necessary he may not benefit from the state of necessity rules.[62]

C. Legal Responsibility in State of Necessity

If there is state of necessity, the perpetrator will be free from punishment. However the losses of the person who suffers from damage because of the acts of the perpetrator needs to be compensated. This situation is explicitly laid down by article 64 of the Turkish Code of Obligations. In state of necessity, the damage does not aim at a person who caused the danger or who, in case of self-defence, caused the wrongful assault. As the state of necessity is considered as an excusatory cause (a cause removing the culpability) by Turkish Criminal Code, the damage occurred should be remedied. The assault cannot be deemed as lawful, thus the damages of people should be given a just satisfaction.[63]

In Islamic criminal law, it is acknowledged that the perpetrator is to be kept liable for damages emerged in the state of necessity. It is considered that legal excuses do not make it permissible to damage assets under legal protection such as life and property.[64] In other words, the causes of excuse provided by the legislator for the perpetrator do not make the religiously forbidden act permissible. Therefore the perpetrator should compensate the losses caused by him. Accordingly, article 61 of Egyptian Criminal Law, article 95 of Afghani Criminal Law and article 55 of Islamic Penal Code of Iran provide for rules in this way.[65]

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59 ARTUK/GÖKCEN/YENİDÜNYA, p.648; ZAFER, p.282.
60 UDEH, p.502; NYAZEE, p.156; KAKHKI, p. 248; HELLER, p.334.
61 UDEH, p.502.
62 UDEH, p.502; KAKHKI, p. 249; HELLER, p.335.
63 HAKERİ, p.339; KOCA/ÜZÜLMEZ, p.259.
64 UDEH, p.586.
65 KAKHKI, p. 249; HELLER, p.335.

III. THE EFFECT OF THE STATE OF NECESSITY ON THE RESULTS OF THE OFFENCES WITH REGARD TO ISLAMIC CRIMINAL LAW

A. Offences which cannot be Accepted as the State of Necessity

In Islamic law, the state of necessity does not find any application to serious crimes resulting in murder or serious injury causing waste of an organ. The state of necessity does not, in any case, give someone green light to end someone else's life or cut his organs off in order to protect his own life or physical integrity.[66] Because, to be able invoke the defence of state of necessity, the right violated in the state of necessity should be less valuable than the right who invokes the defence of state of necessity. According to Islamic law, if a boat is about to sink because of the excessive number of passengers on it, which is a classic example in the western criminal law books, no one on the boat will be considered in the state of necessity and throwing out any passengers in order to prevent the boat from sinking will still be considered nothing short of a murder.[67] However, here, there is a point on which Islamic lawyers agree that the sacrificed person must be a someone whose life and physical integrity are protected by religion (i.e. it is not allowed to kill him or cut off an organ of him according to the religion). However, there is an exception to this rule that it is permissible to kill or harm organs of persons that the rules of the religion allow to kill. Those fighting in a war, apostates and those ordered to be retaliated by judicial authorities can be sacrificed in case of necessity.[68]

The person in the state of necessity cannot take belongings of a third person who also is in the state of necessity and use those belongings to protect his life. Because what is at stake for both of them is not different from each other. Therefore, the person already possessing the belongings is considered as the one with superior rights. However the person in the state of necessity may, even by force, take the things which belongs to someone else, as long as they are not used by their owners to overcome a state of necessity of their own. Nevertheless taking by force in such way is only permissible if the person cannot afford to buy the thing in question.[69]

B. The Offences That the State of Necessity Makes Lawful to Commit

In Islamic law, state of necessity can be invoked with regard to some offences and in such cases state of necessity renders the crime into a lawful

66 UDEH, p.590.
67 Ibid, p.590.
68 AKGÜNDÜZ, p.520.
69 UDEH, p.591.

act. These offences are generally the ones concerning food and beverages.[70] Eating pork or carcass, drinking blood or other kind of forbidden beverages are this kind of offences.[71] However the most important element here is that the forbidden act remains permissible as long as it is limited with the amount sufficient for the survival of the person in the state of necessity.[72] However, there are the ones advocating that the person may eat until full because of the possibility of the state of necessity to repeat.[73]

C. The Offences for which the State of Necessity is Considered as a Ground of Lack of Sentence

Acts of a person that can be considered in the two preceding titles are not punished even though they are still considered to be forbidden.[74] For example, the person who steals food because of his hunger or the one who throws overboard freights from a sinking ship are not punished due to the state of necessity.[75]

In order to benefit from the immunity from the punishment, the person in the state of necessity should however commit such acts only to the extent allowing to him to survive from the existing situation. Also, the acts of the person must be necessary to eliminate the danger in question. For example, in the event that a person steals and sells a property belonging to someone else in order to eliminate his hunger, the state of necessity cannot be invoked.[76]

CONCLUSION

This study attempted to explain the state of necessity both according to Turkish Criminal Code and Islamic law. This defence entered into the continental criminal law systems relatively late compared to Islamic law. However, the elements of this defence, except several differences, in both legal systems are similar. In this regard, the first element of this defence in both legal systems is the existence of a serious threat to life or assets of a person. This danger may arise out of a natural incident such as fire and flood, or it may originate from the persons without imputability or from animals. While Turkish criminal law considers the danger about to occur sufficient for the state of necessity, Islamic law requires the danger to be present during the state of necessity.

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70 Mecelle, Vol.II, p.651.
71 KAKHKI, p. 251; AKGÜNDÜZ, p.520.
72 Mecelle, Vol. II, p.651.
73 UDEH, p.591.
74 Ibid, p.592.
75 NYAZEE, p.156.
76 UDEH, p.592.

The second requirement is that the acts in question should be inevitable in order to escape from this danger. If it is possible to get rid of the danger by running away or otherwise, it cannot be considered that the state of necessity is present. Otherwise, in both legal systems, such acts will be classified as offences, not as invoking state of necessity defence. .

The third requirement for the state of necessity is that the incident because of which the perpetrator is forced to act in a certain manner should not be caused by the very acts of the perpetrator.

The fourth requirement is that the acts conducted in order to eliminate the danger should be proportionate with the attacks suffered from. In other words, the protected interest should precede with the sacrificed interest or it should be equal to it.

In brief, the rights and interests protected in the state of necessity should be in a nature to worth or require the violation of the laws. Otherwise the act that becomes the demonstration of arbitrariness and a power play will reach a dimension requiring the punishment.

The state of necessity considered by Turkish Criminal Code as a reason removing the punishment in any way is governed by Islamic criminal law sometimes as "a subject ground to law", sometimes as "a cause removing the sentence" and sometimes as a structure which does not affect the culpability.

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EMBEDDING INTERPROFESSIONAL EDUCATION INTO THE CRIMINAL JUSTICE SYSTEM

Interprofesyonel Eğitim Sisteminin
Ceza Adelet Profesyonellerinin Eğitiminde Kullanılması

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ABSTRACT

Criminal justice professionals exist to maintain public's peace, security and safety. The most effective way of achieving this fundamental goal is through the cooperation and coordination of various agencies found within the criminal justice system. This 'cooperation' and 'coordination' is most likely to come about through training that emphasises the principles of Interprofessional Education, rather than the mono-education system that is currently in place. This paper firstly highlights the ineffectiveness of the criminal justice system, before considering the application of Interprofessional Educational. It recommends a step-by-step training model which shares the principles of this important phenomena which is widely deployed in the health and social care system.

Keywords: Interprofessional Education, Interprofessional Team Working, Criminal Justice System, Legal Education.

ÖZET

Ceza adalet sistemi profesyonellerinin görevi, toplumda barış, güvenlik ve huzuru sağlamaktır. Bu önemli hedefleri başarmak ancak, profesyonellerin ve ceza adalet sistemi birimlerinin birbirleri ile koordineli şekilde çalışması ile mümkündür. Koordinasyon ve birlikte çalışma kavramları mevcut geleneksel eğitim sisteminden farklı olarak İnterprofesyonel eğitimin üzerinde önemle durduğu kavramlardır. Bu çalışmada interprofesyonel eğitim sisteminin nasıl uygulanabileceği konusu ele alınmadan önce mevcut ceza adalet sisteminin yetersizliği üzerinde durulmaktadır. Daha sonra ceza adalet sistemi profesyonellerinin eğitiminde interprofesyonel eğitim sisteminden yararlanmak üzere çoğunlukla sağlık ve sosyal hizmet sektörlerinde kullanılan aşamalı eğitim modeli önerilmektedir.

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Anahtar Kelimeler: İnterprofesyonel Eğitim, İnterprofesyonel Takım Çalışması, Ceza Adalet Sistemi, Hukuk Eğitimi.

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Introduction

The 21st century criminal justice system is a complex, multi-dimensional, megalith that is subject to socio-political and organisational vagaries. Once, a number of independent component institutions, it has mutated into a phenomenon that depends upon multi-agency co-operation to address its myriad challenges – it has become rather more than the sum of its individual parts. However, there are evident ingrained stresses in the working relationships between the respective criminal justice agencies characterised primarily by myopic organisational ideologies, a lack of awareness regarding the distinguishing features of other criminal justice institutions and a failure to grasp the broader, now well-established, strategic principle that criminal justice is a holistic responsibility shared across several bodies. This paper puts forward the argument for the introduction of inter-professional education (IPE) as a means of mediating and ameliorating those strains so as to improve the efficacy of the system. Having advanced the awareness and transformational benefits of IPE for criminal justice practitioners it will propose a progressive 3 phase model for its delivery across the system before considering some of the challenges that need to be overcome to witness its introduction and establishment.

The Need for Inter-Professional Education in the Criminal Justice System

Similar to the health and social care which consists of a wide range of specialist professions (e.g. neurology, cardiology, maxillofacial, optometry, etc), the criminal justice system is comprised of a variety of agencies. Police, prosecution, courts, corrections, and victim and witness services are some of these agencies. All these agencies play a fundamental role in keeping public peace, maintaining order, preventing/detecting crime, delivering justice, incarcerating and rehabilitating offenders. They in return provide one of the biggest financial and social burdens on their governments. For example, the average total annual public budget allocated to all courts, prosecution and legal aid as a percentage of gross domestic product per capita across Europe was 0.33% on average: Finland, France and Ireland fell below this average (0.19%, 0.18% and 0.17% respectively) whilst the countries like Bosnia & Herzegovina, Montenegro, Serbia and Scotland remained significantly above (0.81%, 0.81%,0.65%,0.43% respectively) (NOA:2012:38-39). In the face of economic austerity, most governments throughout Europe and beyond are presently striving to reduce the financial cost of their criminal justice

departments. Scotland for example, is reducing its budget on justice by 5% in total between 2011/12 and 2014/15 whilst the Northern Ireland government is reducing it by 13% between 2010/11 and 2014/15 and Spain by 16% in alone 2011 (NOA, 2012:38-40). The Ministry of Justice in England and Wales, furthermore, will face a reduction in its budget from £8.3 billion in 2011 to £7 billion in 2015, a reduction of £1.3 billion (23%).

Indeed, whilst finance is an issue in these days of austerity, there are other costs that are equally important in the diverse arrangements embraced by the criminal justice system. The impact of a poorly managed sex offender, an offender with mental health problems, the failure to divert children and young people away from the system or the inadequate treatment of a victim or witness are some of the other factors which impact the image and credibility of the system. Indeed, despite spending large amounts of public money on the criminal justice system in England and Wales, Hough's *et al*., (2013: 30) study into public attitudes to sentencing and trust in justice has shown that only 43% of the public believe that the criminal justice system is effective. This is rarely surprising when one considers that in the year to December 2011, over 75% of proven offences were committed by offenders who had a previous reprimand, warning, caution or conviction for an offence; and45.5% of adult offenders, and 67.4% of juvenile offenders, reoffend within a year of leaving custody (Ministry of Justice, 2014: 14-15)

It was the Ministry of Justice's (2013a) contention that the success of the criminal justice system is dependent on the extent and the quality of collaboration between the agencies within the criminal justice system, emphasizing the need for Multi-Agency Working (MAW) or Inter-professional Collaborative Practice (IPCP) in the lexicon of health and social care. Both terms require practitioners from the different services within the Criminal Justice System/Health and Social Care to work together to provide services that meet the needs and expectations of its service-users whether they be victims, offenders, witnesses, patients or families. The Home Office's study into current multi-agency arrangements to safeguard children and young people found numerous positive outcomes for the agencies and their service users. Largely because collaboration is based on sufficient, accurate and timely intelligence that is shared across agencies, benefits include, but are not limited to, robust decision making; reduction in repeat referrals; improved case management; enhanced knowledge management and greater efficiencies (Home Office, 2013:4-5).

However, such collaboration between and beyond criminal justice system agencies is less likely to be effective and successful if criminal justice system professionals do not have sufficient knowledge, experience or interest in

the roles and responsibilities of their counterparts. Training and educating practitioners about the work of professionals from other agencies within the criminal justice system and how to practice together in partnership can have many advantages.

Inter-professional Education (IPE), a concept which has settled firmly in the literature, has become an important tool within the health and social care curriculum. Delaney et al. (2013) have advocated the need for team-based, collaborative care delivery as the hallmark for delivering high-quality patient-centered care. In line with this contention, the advantages of IPE in the health and social care range from sharing of ideas and knowledge with each other to enhanced communication skills and team working (Finch, 2000; Thistlethwaite et al., 2007). IPE, in short, aims to prepare all health, medical and social care students for the challenges of interprofessional working in practice. It requires members (or students) of two or more professions associated with health or social care to engaged learning with, from, and about each other (Barr et al, 2006). On the part of staff and students, for example, IPE provides the opportunity to broaden horizons as they learn from and about each other through networking. The creation of open and effective dialogue which enhances the level of understanding of other practitioner roles suppresses stereotypes (Allport, 1954, Zimbardo, 2007)whilst improving attitudes and communication will not only lead to organizational productivity but it will also contribute to enhanced staff confidence and patient care/safety (WHO, 2010).

IPE partly became a popular pedagogic concept due to a historic tendency on the part of health care professionals to examine the problems of patients in isolation, only from their area of expertise, as opposed to holistically. This led to a large number of cases where the treatment provided by a specialist was found to be limited or insufficient, causing not only serious health-related repercussions for the patient but also diminishing their confidence and trust in the health system. This malfunction is not restricted solely to the healthcare sector and similar comparison can be made to the criminal justice system. Confidence and trust goes to the heart of legitimacy in criminal justice systems (Hough and Roberts, 2004; Smith, 2007, Hough et al, 2013). All personnel who practice within the criminal justice system (whether a police officer, public prosecutor, magistrate, judge, prison officer, probation officer, youth worker or social worker) work towards the ultimate goal of reducing crime and increasing public safety whilst ensuring that all agencies are fair, reliable and efficient (shared goal). Educating practitioners about other criminal justice agencies and exploring how better to work together has the potential to nurture fuller understanding and so improve efficacy, quality of service and experience of the process for victims, witnesses and offenders.

For example, criminal proceedings, especially for relatively serious offences,are notoriously slow, cause frustrations and can completely disable other aspects of the system. Criminal prosecution is a multi-agency process with various challenges and pinch-pointsinvolved for each agency; insight and knowledge into these for all agencies would eradicate a lack of awareness, bring greater holisitic understanding and ameliorate some of the angst that can occur. Moreover, it would allow agencies to explain to their service users the issues involved from a shared perspective. Jointly educating agencies about the prosecutorial process, evidential procedures and standards and explaining judicial requirements and perspectives would not only bring clarity about criminal proceedings but could reduce the number of ineffective trials. To illustrate the necessity of this recommendation with examples from England and Wales, in 2012 alone, approximately 9,800 defendants were convicted by the magistrates' in England and Wales and then committed to the Crown Court for sentencing but a scrutiny into these referrals has shown that 40% were unnecessary and could have been handled in the magistrates' court (GOV.UK, 2014). Other than costing the government approximately £17 to £19 million (NAO, 2012: 5), ineffective trials lead to unnecessary delays and frustration to victims, witnesses, offenders and practitioners, undermining confidence in the criminal justice process.

When one considers that 10% (88,105) of cases that were submitted by the police were later dropped by the CPS in 2011/12 (Sosa, 2012:26), it is evident that officers require greater awareness of the decision-making process followed by crown prosecutors. Currently, all police officers in England and Wales undergo an 'extensive' and 'professional' training programme during their two year probationary period consisting training themes ranging from legislation to first aid training to officer safety and from community engagement strategies to law-enforcement tactics. It includes inputs on the Crown Prosecution Service. However, knowing that crown prosecutors have to apply evidential and public interest tests is one thing; the key issue is how those tests are interpreted and decisions are made. An insight into the working practices of crown prosecutors would inform officers as to when they should process cases onto the Crown Prosecution Service for perusal. This would be a positive step in alleviating the number of dropped cases which provide significant burden on both the police and the prosecution and again improve performance and confidence in the criminal justice system for all parties.

Likewise, the procedures and processes of the Prison Service are generally shrouded in mystery to other criminal justice system agencies. Yet, what occurs in prison has significant relevance and impact on the manner in which other agencies deal with an individual. Restrictive measures, which may be normative

within the Prison Service for security reasons, may appear disproportionate and unnecessary to other agencies. Similarly, what awareness do the other criminal justice agencies have of the working practices of and demands placed upon the Probation Service or Victim Support. These all contribute to the overall efficacy, perception and confidence of the criminal justice system and a greater shared knowledge would surely be beneficial.

The need for IPE in the criminal justice system can be further demonstrated by examining judges. Many skills and qualities are required of judges - they are required to complete a law degree, practice as a solicitor or barrister, serve as a judge for a period of time and must undertake training forcontinuing professional development.The punitive sentencing of judgeshas led to expansion of the prison population, harshening prison conditions and the imprisonment of the vulnerable, making it difficult for prison officers to deliver rehabilitative programmes. Educating judges about life behind bars, the effects of imprisonment on offendersand their familiesand the impact upon release into society would bring contextual insight that may reduce the number of offenders who are imprisoned in the first place. In England and Wales, there were 85,428 prisoners (of which 3,936 were female and 1,105 were children) in July 2014, and approximately 9,500 prisoners were held in Certified Normal Accommodation level (the prison service's own measure of how many prisoners can be held in good and decent standard of accommodation) (Howard League for Penal Reform, 2014). As high as 72% of male and 70% of female prisoners suffer two or more mental disorders, and prisoners are three times more likely than the general population to suffer neurotic disorder (40% of male and 63% of females prisoners suffers neurotic disorder) (Mental Health Foundation, 2007). Mental disorders were one of the main reasons behind the deaths in custody in 2014: between January and May 2014, there were 68 deaths in custody and 32 of deaths were self-inflicted (Howard League for Penal Reform, 2014). Prison is a harsh environment and judges need to understand the fallout from their sentencing practices, listening to the perspectives of other criminal justice agencies.

However, the virtue of IPE is not restricted purely to learning about the institutional goals, operational demands and organisational culture of other criminal justice agencies. It also allows practitioners from the various agencies the opportunity to explore and discuss ways of resolving criminal justice scenarios and policy challenges through partnership working in a safe-learning environment. Working through relevant 'real-world' problems as a multi-disciplinary team in an immersive learning environment leads to shared understanding and group learning – producing, rather than consuming, knowledge through a 'learning community' (Smith and McCann, 2001;

Angehrn and Gibbert, 2008). Peer learning is a collaborative and student-centered exercise that actively encourages students to take responsibility for their learning (Boud et al, 1999; Bloxham and West, 2004 and 2007; Liu and Carless, 2006).Learning communities represent an advanced pedagogic design which offers integrative, high-quality learning through curricular coherence and collaborative knowledge-production; nurturing skills and knowledge relevant to practice in a complex, diverse contemporary world. (Lardner and Malnarich, 20008). This inter-professional pedagogic approach has been found to be extremely beneficial for the healthcare sector and there is no reason to assume that it cannot be equally successful for criminal justice.Moreover, exposure to IPE can afford worthwhile networking events for criminal justice practitioners that can prove advantageous for their future practice.

The Development of an Inter-professional Education Model for the Criminal Justice System

As emphasized above, the maintenance of peace, security and crime prevention requires all criminal justice agencies to work harmoniously in cooperation and coordination at all times. A supplementary pedagogic package, embracing the principles of IPE, has the potential to help the criminal justice system achieve this in a more cohesive and effective fashion. This new model would be based on the 'work together and learn together' (Department of Health, 2001), preparing professionals for a career in which collaboration and partnership work is commonplace. It is argued that the benefits associated with IPE would help alleviate to a certain degree perceived problems around the failure to dispensing justice fairly, efficiently, effectively and promptly - in so doing, it would lead to greater public confidence and trust in the system. Having made the case for the introduction of IPE for criminal justice practitioners, the paper turns to what this should look like.

Currently, different criminal justice agencies have different educational requirements – some are graduate professions whilst others are not. Consequently, practitioners are educated in a variety of teaching centres – agency training establishments, Further Education or Higher Education institutions depending on the practice requirement with each agency having a specific educational requirement and different curriculum. Police officers, criminal prosecutors, judges, probation and prison officers, amongst others, typically receive training and education only on areas that fall within their remit; they are educated in practice silos.

Each profession teaches its practitioners sufficient pre-vocational legislation, policy and guidance to effectively undertake their responsibilities.

All professions currently have this in place to ensure that their practitioners can complete their role but it is argued that minimal attention is given to partnership working with other professionals within the criminal justice system. There is little common ground in pre-vocational education which limits the scope for effective collaboration when neophyte practitioners commence their careers. Insufficient insight and knowledge is provided to make effective partnership working a viable proposition when entering the workplace as a neophyte practitioner.

The diversity in pre-vocational teaching of criminal justice practitioners also makes the healthcare IPE model difficult to replicate and implement precisely. As stated, most healthcare professions recruit through pre-entry degrees many of which involve an undergraduate element of IPE in preparation for practice. This is clearly not the case with criminal justice practice where only a minority of the professions involve pre-entry programmes and, therefore, there is minimal exposure to undergraduate IPE. Consequently, a bespoke IPE model needs to be introduced for criminal justice practitioners – maybe one more akin to Continuing Professional Development rather than degree study and that provides structure and step-progression.

The model proposed falls out of the work by Anderson and Knight (2004), who developed a progressive, 3 strand model of IPE for the healthcare professions, termed the Leicester Model, which went beyond academic education and embraced those in professional practice. Notwithstanding the different entry criteria approaches of healthcare and criminal justice practice, the Anderson and Knight model is easily adaptable to facilitate IPE for criminal justice practitioners at all levels of development. Strand 1 of the Leicester Model is introductory and aims for students to have learnt about self and other professionals identified in promoting person-centred care. Strand 2 familiarises students with the theoretical basis of team working and effective collaborative team practice, considering their future roles within healthcare teams. Strand 3 further develops their knowledge and team working skills as applied to the modern health and social care services, identifying solutions to effective collaborative working.

The principles of IPE can be delivered to criminal justice students through strands 1 to 3 of the model to those who are in practice. The delivery of IPE is a conventional pedagogic exercise based on constructive alignment (Biggs, 1996) – hence, the teaching requirement is defined by the learning outcomes and, ultimately, there could be formal assessment of the teaching evaluated against the learning outcomes. However, IPE is slightly more nuanced and student centred; it focuses more on experiential, practice-based learning with the student as producer rather than consumer of knowledge (Dunne

and Zandstra, 2011). It is essential that the knowledge constructed and accumulated is relevant and transposable to the workplace so that it enhances partnership working in practice.

The underlying pedagogy of the Leicester Model bears a striking resemblance to Kolb's theory of learning (Kolb,1984) in that it is cyclical, analyses problems, explores solutions, transforms knowledge and immerses it into practice to achieve development. It is a classic example of experiential learning. Each stage has progressive learning aims and three sets of common learning outcomes relating to knowledge, skills and attitudes - theserelate to health and social care practice but are easily compatible and transposable to the criminal justice system.

Given the will, the Leicester Model can provide a template for the development of an IPE model for the criminal justice system that is easily achievable.It is proposed that the new education model for criminal justice practitioners, embracing IPE,would comprise three phases, irrespective of whether entry to the profession was via a pre-entry degree or not - post-induction, theoretical and operational experience, continued vocational training – in alignment with strands 1-3 of the Leicester Model;

First Phase - post induction

In this phase students would be introduced to their operational practice. As part of this post-induction, they would be required to work in a partnership team for a brief period of time. Moreover, within two years of commencing practice, it is important that practitioners come together to introduce their profession to their counterparts from other agencies in the criminal justice system, helping each other to obtain a comprehensive understanding of respective roles and responsibilities.This would require novice practitioners to attend IPE sessions, where they would receive short theoretical inputs in group working, participate in team-working activities and directly share in first-hand knowledge and experience ofother criminal justice professions. Central to this process, would be commencing an IPE portfolio that can demonstrate what has been achieved and learned to underpin partnership working.

Second Phase- theoretical and operational experience

The third phasewould seek to build upon and enhance the theoretical knowledge and practical experience of partnership working in the criminal justice system.Students would be equipped with theoretical knowledge through distance learning packages and improve understanding of partnership through problem solving activities at arranged sessions.

Furthermore, learning of partnership roles and responsibilities and co-

operating together as a team would be exploredthrough a series of reports based upon problem-solving scenarios. Such reports would be shared with student counterparts to provide a critical appraisal of the approach employed by that particular group to working in accordance to the principles of interprofessional education.

By critically reflecting on the detailed feedback from the other practitioners in their group and the facilitators, students will be to adopt and apply their inter-professional knowledge, skills and experience into contemporary criminal justice practice.

Third Phase- continued vocational training

In an attempt to develop the interprofessional skills of those who work in the criminal justice system, the final phase would require professionals to participate in IPE whilst in practice to preserve continual professional development. This would facilitate retaining currency, updating knowledge on multi-agency working and keeping abreast of changing practice conditions, whether structural, organisational, procedural or ideological.

This phase also has the potential of bringing IPE to bear on different hierarchical or specific perspectives of partnership working in the criminal justice sector. Events can be held in terms of different supervisory or management levels and on collaboration in areas of specialism where expert knowledge and experience can be shared.

In terms of IPE for the criminal justice system and higher education, there are two valid observations that are noteworthy. Firstly, there is nothing precluding the establishment and validation of IPE into the undergraduate curriculum of criminal justice related programmes. This depends on academics of all such disciplines recognising the value and relevance of IPE for the development and employability of their students. That is a debate that still needs to be raised. Secondly, a natural progression and further prospect to explore with regard to the model proposed is the attachment of academic credits to IPE events as part of postgraduate study for those in practice – thus making the notion more appealing to both agency and practitioner.

The Challenges

The IPE model which is widely used in the health and social care sector provides an important exemplar and opportunity for the criminal justice system in their efforts to improve co-operation, efficiency and effectiveness in this era of austerity. Alas, there are a number of barriers, largely implicit and shrouded in institutional mythology, in relation to the introduction and development of IPE across the criminal justice system - challenges similar

to those that threaten and undermine effective partnership working in any professional arena.However, most that is worthwhile needs to overcome threats and challenges to establish its credentials, validity and value.

One such hurdle is well-established ideologies, values and structural differences held by criminal justice agencies and their practitioners. These differences create, nurture and sustain organisational cultures and image that are deep-rooted, entrenched and inward-looking. Practitioners have a clear professional image and persona that influences, and maybe even dictates, the self-perpetuating fundamental goals, responsibilities and roles of a particular agency. Alongside, these intrinsic features are embeddedingrained and unstated philosophical conflicts and jealousies that further exacerbate the position. Such collective institutional mind-setslead to grass-roots resistance that is disadvantageous to partnership working and so IPE.

Institutional diversity with its specialisms, uber-specialisms, discrete practices and deployment of discretion is vital to its own identity and the contribution it can bring to multi-agency working. According to Hardy et al. (1992), there ought to be organizational and cultural differences between agencies; differences in their structures and working procedures; managerial and hierarchical differences; differences in the way funds are allocated by central government linked inevitably to the socio-political and financial climate at any given time. Similar arguments have been made by Marshall (et al 1979) and McGrath(1991). However, these unique qualities and strengths can also lead to professional haughtiness and isolationism, especially in instances where more general information, skills and team work are required in vocational problem-solving situations. Such self-regard for practice specialism can undermine IPE.

Flowing out of this, another challenge to partnership working is a fundamental belief in unilateral specialism – practicing in silos of expertise. This dogma results in lack of faith and enthusiasm in the notion and value of multi-agency working. Whilst outdated and unrealistic in the world of contemporary practice the perception continues to be held in certain influential quarters. If all criminal justice agencies believed in the concept of partnership co-operation there would have been no need to have legislated for it. It is anticipated that this could prove a real obstacle to IPE in criminal justice.

Multi-agency working can frequently be characterised, unnecessarily, by power differentials and controlling behaviour. Like healthcare, there can be stark, real and perceived, power distinctions and manoeuvres in the criminal justice system that can threaten harmonious partnership engagement; such

distortions need equalising and mediating so that balance is brought to arrangements. These inter-agency power dynamicsalso have the potential to impact on the introduction of IPE into the criminal justice system.

More prosaically, partnership work in the criminal justice system is distinguished by issues around resources, funding and management. Similar practical considerations would apply to the implementation of IPE. Extraction time would have to be released for practitioners to attend events, the costs of facilitating and hosting the education would have to be found and the whole process would require organising and managing. These issues represent real challenges. However, higher education institutions already have well-established expertise and experience in delivering IPE in an effective fashion. With its tradition of facilitation, support, criticality and constructive feedback and infrastructure, academia is clearly a natural choice to host, organise, manage and deliver IPE for the criminal justice sector.

In terms of the development of IPE for those in criminal justice practice, the difficulty though may ultimately be marketing the concept and achieving buy-in from the various agencies for a cross-section of the reasons mentioned. The significant difference between healthcare and criminal justice practice is that the former include practitioners who are required to be registered to practice whilst the latter does not. The impact of this is that healthcare professions, if they so wish, could make attendance at IPE events obligatory as part of preserving registration for practitioners as part of their continuing professional development. Whilst agencies in the criminal justice system may espouse partnership working, life-long learning and continual professional development, they have few mechanisms to ensure that this actually occurs.[1] The obvious audience to target with the notion of IPE is the local Criminal Justice Boards who have the mandate to persuade the various agencies to participate. This is a debate still to be had but provides an avenue for facilitating the introduction of IPE in the criminal justice sector.

Conclusion

This paper has examined the argument for the introduction of IPE for criminal justice practitioners, a straightforward progressive three phase model for its implementation, an avenue to facilitate its introduction and potential institutional barriers. The contemporary criminal justice system in 21st century post-modern society is a multi-agency partnership function – long

[1] The one exception to this at the moment are lawyers who are registered and regulated either as solicitors with the Law Society or as barristers with the Bar Council. Both of these professions have extensive continuing professional development opportunities but no specific IPE events.

gone are the sepia days of unilateral silo working. There has to be a cogent and cohesive approach, encapsulated in working together, to address the myriad of complex, ambiguous and vital challenges faced in administering criminal justice in a fashion that is fair and equitable to victims, witnesses and offenders. Many of the difficulties encountered these days are incapable of being resolved effectively by just one agency acting in isolation. Criminal justice agencies need, and are required by law in many instances, to co-operate, collaborate and combine to functionalise a system. There must be common understanding, responsibility and ownership of the criminal justice remit - without this multilateral perspective, the endeavour will not prosper. Disparities between the diverse agencies cannot be allowed to prevent partnership working from being conducted.

Education is known as a transformative facilitator (Sullivan, 1999, 2003) and, in terms of multi-agency working, IPE is a mechanism that can promote shared awareness and break down barriers between agencies. It has proven to be successful in the healthcare arena to improve the provision to service users and is a pedagogic medium that can facilitate harmonious partnership working in the criminal justice system for the benefit of all its actors. The challenges that undermine multi-agency working in the criminal justice system are precisely those that threaten the introduction and nurturing of IPE in the sector, yet the pedagogy and the proposed model has the potential to address those hurdles. Gaining support for IPE from every institution across the criminal justice system will be difficult to achieve but the local Criminal Justice Boards are bodies that can negotiate, mediate and even mandate its introduction. To date, the criminal justice system has not witnessed the potential fruits of IPE and there is a long way for the pedagogy to be established. This paper represents the start of the debate and the first steps on the journey.

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THE RIGHT OF WITHDRAWAL IN DISTANCE CONTRACTS UNDER LAW ON CONSUMER PROTECTION NUMBERED 6502*

6502 Sayılı Tüketicinin Korunması Hakkında Kanun Uyarınca Mesafeli Sözleşmelerde Geri Alma Hakkı

Research Fellow Başak BAK**

ABSTRACT

According to the Law on Consumer Protection, the consumer has the right to withdraw from distance contracts within 14 days without giving any reason even if the product is exactly what he ordered, perfectly working or suitable for normal use without any defect (Art. 48/4). Upon the exercise of the right of withdrawal, the consumer is obliged to send back the product and the seller/supplier is obliged to refund the total price including the original delivery price. To achieve the goal at which the consumer protection law aims, it is important for all consumers to know the legal aspects of the right of withdrawal and their rights in this regard. Therefore, this study aims at a global understanding of the nature of the right of withdrawal and the rights and obligations of both consumers and sellers/suppliers. For this purpose, the study focuses primarily on Turkish legislation and legal doctrine. Within the context of the study, the relevant EU texts and German legal doctrine are also taken into consideration as the occasion arises.

Keywords: Consumer Law, Distance Contracts, Consumer Protection, Right of Withdrawal

ÖZET

Tüketicinin Korunması Hakkında Kanun md. 48/4 uyarınca tüketiciler, ürün, sipariş ettikleri şekilde tamamen çalışır durumda veya ayıpsız bir biçimde kullanıma müsait halde olsa dahi 14 gün içinde hiçbir gerekçe göstermeksizin mesafeli sözleşmelerden cayma hakkına (geri alma) sahiptirler. Bu hakkın kullanılması üzerine tüketiciler, aldıkları ürünü geri göndermek ve satıcılar/sağlayıcılar da gönderim ücreti dâhil elde ettikleri tüm bedeli iade etmekle yükümlüdürler. Tüketicinin korunmasına

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ilişkin düzenlemelerin tüketicileri koruma amaçlarının daha etkin bir biçimde gerçekleştirilebilmesi için tüm tüketicilerin, sahip oldukları geri alma hakkının özelliği ve tüketici olarak haklarının neler olduğu konularında bilgi sahibi olmaları gerekmektedir. Çalışmamız, tüketicilerin sahip olduğu geri alma hakkının niteliği ve hem tüketicilerin hem de satıcıların/sağlayıcıların bu hususstaki haklarına ilişkin genel bir bakış açısı sunmayı hedeflemektedir. Bu amaçla çalışma, esas olarak konu ile ilgili Türk hukuk kaynakları ve doktrini üzerinde yoğunlaşmaktadır. Ayrıca yeri geldikçe AB hukukundan kimi kaynaklara ve Alman doktrinine de değinilmektedir.

Anahtar Kelimeler: Tüketici Hukuku, Mesafeli Sözleşmeler, Tüketicinin Korunması, Geri Alma Hakkı, Cayma Hakkı

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INTRODUCTION

All kinds of consumer transactions and implementations applied to consumers are regulated under Law on Consumer Protection[1] which is the main Law regarding consumer-related aspects in Turkish law. The objective of LCP is to protect the interests of consumers in relation to sanitary, security and economic issues. The Law helps consumers to indemnify their losses and aims to promote policies, raise awareness on the matter and thus achieve a high level of consumer protection (Art. 1). Consumer contracts are regulated in LCP in detail. Belonging to a specific group of consumer contracts, distance contracts are set forth in Art. 48 of LCP. Distance contracts are also regulated by the By-Law on Distance Contracts numbered 29188 and dated November 27th 2014 (The By-Law). The By-Law aims to determine the basic principles and the procedure of distance contracts. Hence, LCP and the By-Law are the main sources applied to consumer disputes in distance contracts.

There is also an international document called the EU Directive on Consumer Rights numbered 2011/83EU (EU Directive) which is taken into consideration in Turkish consumer law although the EU Directive is not directly applied to consumer conflicts rather draw guidelines for the contracting states, including Turkey. Yet the EU Directive is still worthy to be mentioned in this respect. Apart from that, German legal doctrine may set a precedent for Turkish law and is generally taken into account by the Turkish doctrine. Therefore, the EU Directive and the German doctrine need to be analyzed as the occasion arises.

By evaluating the above mentioned sources concerning the consumer issues in Turkish law, this study aims at a global understanding of the nature

[1] Tüketicinin Korunması Hakkında Kanun, Number: 6502, OJ 28.11.2013-28835. The Law is abbreviated and hereinafter referred as LCP.

of the right of withdrawal and the rights and obligations of both consumers and sellers/suppliers. Within this framework, the study has three main parts. The first part is the most extensive part and regarded as the core of the study due to the problematic aspects and multi-faced characteristic of the right of withdrawal. So, this part is pertaining to the legal framework the right of withdrawal which is an effective instrument in consumer law for the protection of consumers. In the first part, the definition and the purpose of this right are analyzed along with theoretical discussions concerning its legal aspects. The second part focuses on distance contracts and the third part aims to analyze the implementations and consequences of the right of withdrawal in distance contracts in particular.

I. LEGAL FRAMEWORK OF THE RIGHT OF WITHDRAWAL

The prerequisites, implementations and consequences of the right of withdrawal in consumer law are regulated both by LCP and the By-Law. However, the most important and controversial aspects of "right of withdrawal" in Turkish law is neither its implementation nor its consequences; but its legal aspects regarding the time of validity and its difference from another type of "right of withdrawal" regulated by the Turkish copyright law. Hence, apart from the problematic definition of "*right of withdrawal*" in general, the legal framework of this right in consumer law, i.e. its definition and legal aspect in consumer law and its differences from another right of withdrawal, should be analyzed before evaluating the distance contracts and the implementation and consequences of right of withdrawal in consumer distance contracts.

A. The Definition and The Legal Aspects of The Right of Withdrawal in Consumer Law

The right of withdrawal (*Widerrufsrecht*; *geri alma hakkı*) is an independent, multifunctional right that forms a new legal position by a unilateral will (*Gestaltungsrecht*). [2] Although these terms are indistinguishable in English, these rights aiming at forming a new legal position between the contracting parties by means of ending the contract by a unilateral will have completely different meanings and consequences in Continental European law system and thus in Swiss-based Turkish civil law. For instance, the right to cease/cancel a contract (*Rücktrittsrecht*) simply resolves a contract by means of creating an obligation to demand what has received before and from a classical perspective has an *ex tunc* effect.[3] On the other hand, the right to terminate a contract

[2] **Rona Serozan**, Sözleşmeden Dönme, 3rd Ed., İstanbul 2007, p.123-124; Çağlar Özel, Mukayeseli Hukuk Işığında Tüketiciyi Koruyan Geri Alma Hakkı, Ankara 1999, p. 74.

[3] Yet there is a tendency in civil law that *Rücktrittsrecht* has no *ex tunc* effect. This is generally

(*Kündigungsrecht)* just ends a contract towards the future without creating an obligation to demand what has received before and has an *ex nunc* effect. The term is applicable in permanent contracts (*Dauerndschuldverhältnisse*). Lastly, the right to revoke a contract (*Anfectungsrecht*) ends a contract which is void from the beginning (e.g. error, fraud or duress in contracts) with an *ex tunc* effect. Consequently, the right of withdrawal (*Widerrufsrecht*) is deemed as another and *sui generis* [4] type of *Gestaltungsrecht (group of rights aiming at forming, ending or altering a new relationship by unilateral will)*. As being a multifunctional right, the right of withdrawal has some consequences resembling either the right to *cease/cancel* or *terminate* or *revoke* a contract. However, since the right of withdrawal is an independent *sui generis* right, it is not possible to make a general definition comprising all types of withdrawal rights in Turkish law. Instead the term should be evaluated separately in every special case.

As being an independent right as belonging to a group of rights aiming at forming a new legal position by means of ending a contract by a unilateral will, the right of withdrawal is a "multifunctional", "supplementary" and an "alternative" right. [5] In Turkish law, the right of withdrawal aims to end either one-sided legal relationships [6] or reciprocal legal relationships e.g. agreements. [7] Withdrawal of "offer" (*Antrag*) and "acceptance" (*Annahme*) prescribed by Art. 10 of Turkish Code of Obligations [8] and the right of withdrawal of the "principal" who would like to withdraw the power of agency (*Vertretungsmacht*) as in Art. 42 of TCO are two examples of one-sided legal relationships in this regard. Upon withdrawal, these legal transactions would have no legal consequences any more.[9] According to Art. 555 of TCO, another

accepted in German law and by some scholars in Turkish law as well.

4 There is a controversy regarding the independent character of "right of withdrawal" and some believe that the term should be characterized under other types of *Gestaltungsrechts* aiming at ending a contract, e.g. *Rücktrittsrecht, Kündigungsrecht* or *Anfechtungsrecht* (**Felix R. Ehrat**, Der Rücktritt vom Vertrag nach Art. 107 Abs. 2 OR in Verbindung mit Art. 109 OR., Zurich 1990, p. 14).

5 **Serozan**, p.123-124; Özel, p. 74.

6 **Turgut** Öz, İş Sahibinin Eser Sözleşmesinden Dönmesi, İstanbul 1989, p. 25; **Vedat Buz**, Borçlunun Temerrüdünde Sözleşmeden Dönme, Ankara 2007, p. 91.

7 Özel, p. 89-90.

8 Türk Borçlar Kanunu, Number: 6098, OJ 04.02.2011-27836. The Code is abbreviated and hereinafter referred as TCO.

9 **Tekinay/Akman/Burcuoğlu/Altop**, Borçlar Hukuku Genel Hükümler, 6th Ed., İstanbul 1988, p. 121, 225; **Fikret Eren**, Borçlar Hukuku Genel Hükümler, 18th Ed., İstanbul 2015, p. 232, 449; Özel, p. 89, 94-95; **Kemal Oğuzman/Turgut** Öz, Borçlar Hukuku Genel Hükümler, 10th Ed., Vol. 1, İstanbul 2012, p. 183; **Necip Kocayusufpaşaoğlu**, Borçlar Hukuku Genel Hükümler, 5th Ed., Vol. 1, İstanbul.2010, p. 708.

one-sided relationship ended by enjoying the right of withdrawal is "order" (*Anweisung*). The withdrawal of an order has an *ex nunc* effect. [10] Not only one-sided legal relationships but also agreements are eligible to be withdrawn. e.g., donation agreements (*Schenkung*), by delivering a movable to the donee. The withdrawal of such donation agreements has *ex tunc* effect.[11]

As can be seen from the above-mentioned examples, it is not possible to make a uniform definition comprising all types of withdrawal rights or determine their legal aspects (*ex nunc* or *ex tunc* effect) in general under Turkish law. However, although a definite and uniform definition cannot be given, the need of prescribing withdrawal rights and the motive of the lawmaker can be explained as follows: The right of withdrawal serves the real freedom of contracts by serving the interests of contracting parties who would like to end the contract unilaterally due to characteristic of the relationship or the situation in question and are worth protecting in this regard.

The right of withdrawal set forth in LCP has the same purpose with other withdrawal rights regulated under Turkish law. Therefore, it aims at protecting the consumers who are considered as the vulnerable party of the consumer transactions. As a tool to protect the consumers, the right of withdrawal helps them to rethink the economical meaning and value of the contracts. By enjoying the mandatory right of withdrawal, consumers are unilaterally able to withdraw from the consumer contracts by sending the product to the seller and taking back the amount paid without giving any reason.[12]

The right of withdrawal (*Widerrufsrecht, geri alma hakkı*) in LCP is an independent right that forms a new legal position by unilateral wills (*Gestaltungsrecht*) of the consumers who are willing to end the contract. Yet there is a controversy in doctrine regarding the legal aspects of this right. In consumer law, it is debatable whether the right of withdrawal is a right that ends a valid contract (dissolving condition) or a condition precedent (*aufschiebende Bedingung*) that makes a void contract valid upon non-exercise.

According to Art. 355 of *Bürgerliches Gesetzbuch* (BGB) in German

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10 **Arif Kocaman**, Türk Borçlar Hukukunda Havale, Ankara 2001, p. 72; **Ahmet Türk**, Hukuki Yönden Banka Havalesi, Ankara 2007, p. 142.

11 **Özel,** p. 93; **Serozan**, p. 124; **Buz**, p. 90.

12 **Palandt**, Bürgerliches Gesetzbuch, 69th Ed., Munich 2010, p. 565; **Rebmann/Säcker/Rixecker**, Bürgerliches Gesetzbuch Schuldrecht Allgemeiner Teil, 4th Ed., Munich. 2003, p. 2259, 2268; **Nihat Yavuz**,*"*Yeni Türk Borçlar Kanunu Tasarısı ile Karşılaştırmalı Olarak İsviçre Borçlar Kanunu ve Tüketicinin Korunması Hakkındaki Geri Alma Hakkı Üzerine Genel Açıklamalar*"*, *Prof. Dr. Turgut Akıntürk'e Armağan*, İstanbul 2008, p. 758; **Leyla Müjde Kurt,** *"*TKHK Açısından Kapıdan Sözleşmelerde Tüketiciyi Koruyan Geri Alma Hakkı*"*, *Ankara Barosu Dergisi*, Vol. 2, 2011, p. 47, 53; **Özel**, p. 81-81.

consumer law, the right of withdrawal is considered as the right which ends (*rechtvernichtende Wirkung*) a valid contract in progress (*schwebend wirksam*) as of alleging the withdrawal right. [13] According to Turkish doctrine it is believed that the same rule should apply to distance contracts.[14] On the other hand, for installment payment agreements it is believed that the right of withdrawal is a condition precedent which makes a void (on hold) contract valid (*rechtsverschiebende Wirkung)* upon non-exercise of the right of withdrawal within the withdrawal period (*schwebend unwirksam*).[15] However by considering the Art. 255 of TCO some scholars are in the opposite opinion concerning the installment payment agreements.[16]

In our opinion it is safe to say that also in Turkish consumer law, the solution of being valid (in progress) accepted for distance contracts should be applied to all types of consumer contracts like in German law. Therefore, the consumer contract should be considered valid until the consumer exercises this right. If he decides to bring forward the right of withdrawal, the contract will be void from the beginning of the contract; yet if the consumer decides not to bring forward it, the contract will be valid from the beginning (*schwebend Wirksamkeit*).

B. The Differences Between the Right of Withdrawal in Consumer Law and The Right of Withdrawal in Copyright Law

In Turkish copyright law, there is another right of withdrawal set forth in Art. 58 of Law on Intellectual and Artistic Works.[17] However, although both rights (both in LCP and LIAW) are defined with the same term (*cayma hakkı*) according to Turkish law, these refer to two distinguished groups of rights. The right of withdrawal in consumer law is a typical *Widerrufsrecht (geri alma hakkı)*[18]; whereas the right of withdrawal in copyright law is a *Rückrufsrecht (cayma hakkı).* Again, the terms are vague and not different in English, yet there is a distinct difference between these two terms under German-based

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13 **Othmar Jauernig**, Bürgerliches Gesetzbuch Kommentar, 14th Ed., Munich 2011, p. 477-478; **Paland**t, p. 566.

14 **Necla Agdag** Güney, "Tüketicinin Cayma Hakkı Üzerine Bazı Düşünceler", Çetingil *ve Kender'e 50. Yıl Birlikte Çalışma Yılı Armağanı*, İstanbul 2007, p. 611.

15 **Aydın Zevkliler/Murat Aydoğdu**, Tüketicinin Korunması Hukuku, 3rd Ed, Ankara 2004, p. 250; Özel, p. 171; **Nihat Yavuz**, 6098 Sayılı Türk Borçlar Kanunu Şerhi, Vol 1., Ankara 2013, p. 1353.

16 **Mustafa Alper Gümüş**, 6098 Sayılı Türk Borçlar Kanunu'na Göre Borçlar Hukuku Özel Hükümler, Vol. 1., İstanbul 2012, p. 214.

17 Fikir ve Sanat Eserleri Kanunu, Number: 5846, OJ 13.12.1951-7981. The Code is abbreviated and hereinafter referred as LIAW.

18 **Yılmaz Aslan**, Tüketici Hukuku, 5th Ed., Bursa 2015, p. 545-546; **Yavuz**, Geri Alma Hakkı, p. 758; **Kurt**, p. 53.

Turkish copyright law. The differences between these rights are as follows:

First of all, the right of withdrawal in consumer law aims to protect the consumers who are worth protection as the vulnerable party of the consumer contracts and allows them to withdraw from the contracts unilaterally by sending the product to the seller and taking back the amount paid without giving any reason. By enjoying this right, consumers have a chance to rethink the economical meaning and the value of the contract and give their enlightened consents to the contract depending on their free wills. Therefore, the right of withdrawal is not contrary to the basic principle of *pacta sunt servanda* but soften its effectiveness. In Turkish law *pacta sunt servanda* is able to be softened with the consideration of public interest, public order and the principle of protecting the vulnerable. Thus, the right of withdrawal is in conformity with the principle of protecting the vulnerable and is a mandatory tool to protect the consumers in contracts by giving them a second change to maintain the real freedom of contracts. However, even though the right of withdrawal also aims to protect the copyright owner, the copyright owner cannot be categorically determined as the vulnerable party who needs protection in copyright contracts. On the contrary, according to Art. 58/IV of LIAW, the copyright owner is obliged to pay a proper compensation to the other party where the justice is required if he wishes to withdraw from the copyright contract. So unlike the right of withdrawal in consumer law, the withdrawal right in copyright law cannot be enjoyed without a suitable indemnification under the circumstances set forth in Art. 58.

Secondly, the right of withdrawal in copyright law cannot be brought forward without giving any reason. To enjoy this right the interests of the copyright owner should significantly be violated due to the non-performance of economic rights transferred to the other party by the copyright owner himself (Art. 58/I of LIAW). On the other hand, the consumer is able to enjoy this right without giving any reason. In fact grounding a reason is inconsistent with the logic of consumer's withdrawal right.

Thirdly, to enjoy the right of withdrawal, the copyright owner has to fulfill some formalities such as giving the other party a fixed period of time with a notification through the notary public (Art. 58/II-III of LIAW); whereas the right of withdrawal in consumer law is free from formalities.

Consequently, as a special remedy in copyright law, the right of withdrawal aims to protect the copyright owner by giving him the power to end the copyright contract unilaterally under some strict circumstances stipulated by Art. 58 of LIAW and is an independent right when compared with the right of withdrawal in consumer law even though the Turkish legislation prefers to

refer both rights by using the same term, "*cayma hakkı"*. Under Turkish law, the genuine "*cayma hakkı (Rückrufsrecht)*" is the right prescribed by LIAW and the right in consumer law exercised by the consumers is "*the right of withdrawal (geri alma hakkı)".*

II. DISTANCE CONTRACTS

With the digital era, most consumer contracts are concluded as the form of distance contracts. The sellers/suppliers do not reach the consumers only via conservative ways but also prefer novel ways by using electronic data interchange without being simultaneously present at the time when the contract is concluded, such as e-commerce. As the consumers have no chance to negotiate, the only option for them is to accept or decline the contract. However consumers have no chance to change the provisions of the contracts. These e-contracts are prepared by one side of the contract previously as the form of standard business terms.[19] Distance contracts are contracts concluded without the simultaneous presence of the seller/ supplier and the consumer by using the distance communication means such as mail order, internet, telephone, fax etc. until and at the time when the contract is concluded within the framework of a system where delivery and supply of the goods and the services are provided from a distance (Art. 48 of LCP). The contracts concerning financial services such as banking, credits, insurance, individual pension, investment and payment are also able to be formed as distance contracts.[20]

A distance contract is a reciprocal and consensual contract like a typical contract in the field of law of obligations and the general validity terms of contracts are also applicable to distance contracts. Yet these contracts are concluded by using distance communication tools. These communication tools can be written (catalog, letter magazine etc.), vocal (telephone), visual (e.g. teleshopping) or electronic (internet etc.).[21] Distance contracts are also obliged to be formed under an organized distance sales or service-provision scheme (Art. 4/e of the By-Law and Art. 2/7 of the EU Directive). Although there is not a specific form prescribed for the distance contracts in LCP, the provisions of the distance contracts should be informed to consumers with at least 12 point-font size in a clear, simple and understandable way. The font-size prerequisite is a validity form. (Art. 6/1 of the By-Law)

In distance contracts the sellers/suppliers are obliged to provide the

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19 **Mehmet Demir**, "Mesafeli Sözleşmelerle İlgili AB Yönergesine Göre Tüketicinin Geri Alma Hakkı", *Gazi* Üniversitesi *Hukuk Fakültesi Dergisi*, Vol. 7/1-2, 2003, p. 7.

20 **Erten**, p. 28-32.

21 **Oğuz Gökhan** Yılmaz, "Tüketici Hukukunda Mesafeli Sözleşmeler", *Türkiye Adalet Akademisi Dergisi*, Year: 4, Vol. 14, June 2013, p. 1020-1023.

consumers the following information clearly before consumers are bound by the distance contracts: the type of product, the title of the seller/supplier, the price of the product, contact information, the right of withdrawal, legal remedies etc. Consumers have to acknowledge that they are being informed by the seller/supplier. (Art. 5 and 7 of the By-Law).

In our opinion distance contracts should be subjected to a legal institution called "dissolving condition". This means the right of withdrawal is considered as the right which ends (*rechtvernichtende Wirkung*) a valid contract in progress (*schwebend wirksam*) as of alleging the withdrawal right within the withdrawal period. This opinion is also shared by some scholars in Turkish doctrine and accepted in German law, as well.[22] In German law scholars justify this view by alleging that Art. 355 of BGB gives consumers a dissolving condition. [23] According to Art. 355 if the consumer enjoys the right of withdrawal, the seller is no longer bound by the contract. [24]

The right of withdrawal plays an important role especially in distance contracts. However according to Art. 15 of the By-Law, unless agreed otherwise, the consumers are not entitled to use the right of withdrawal when

• the price is dependent on fluctuations in the financial market,

• the goods are prepared according to the consumer's requests or personal needs,

• the consumer contracts are concluded concerning the supply of goods which are liable to deteriorate or expire rapidly

• the sealed goods are unsealed after delivery and not suitable for return due to health protection or hygiene reasons

• the goods are inseparably mixed with other goods after the delivery,

• the sealed digital content or sealed computer software are unsealed after delivery,

• the consumer contracts are concluded concerning the supply of a newspaper, periodical or magazine with the exception of subscription contracts,

• the consumer contracts are concluded at a specific period of time and

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22 **Savaş Bozbel/Murat Atalı**, "Mesafeli Sözleşmelerde Cayma Hakkını Kullanılması ve Ortaya Çıkan Hukuki Sorunlar", *AÜHFD*, Vol. IX/1-2, 2005, s. 455.

23 **Jauernig**, p. 477-478; **Palandt**, p. 566.

24 *"…nicht mehr gebunden, wenn der Verbraucher seine Willenserklärung fristgerecht widerrufen hat…"* (Art. 355/I of BGB)

made for accommodation, transport of goods, car rental, catering or leisure activity purposes,

• the supply of service is performed in an electronic environment or when the consumer contracts are concluded concerning intangible goods delivered to the consumers immediately,

• the consumer contracts are concluded as service contracts which has begun to be performed with the consumer's consent before the expiration of the withdrawal period

The above mentioned circumstances set forth by the By-Law which the consumers cannot exercise their rights of withdrawal are also in conformity with Art. 16 of the EU Directive.[25]

III. IMPLEMENTATION AND CONSEQUENCES OF THE RIGHT OF WITHDRAWAL IN DISTANCE CONTRACTS

Right of withdrawal is exclusively important in distance contracts because distance contracts are prepared by one side of the contract previously as the form of standard business terms, so the right of withdrawal has appeared as an effective instrument to realize the real freedom of contracts.

The consumers have the right to withdraw from distance contracts without giving any reason even if the product is exactly what they ordered, perfectly working or suitable for use without any defect. The consumer is not obliged to pay any compensation to the seller/supplier or subject to any penal sanctions in this regard. The consumer has even the right to use or try the product within the withdrawal period because the consumer is not liable of any damages or deterioration of the product due to the ordinary use.[26]

The withdrawal period is 14 days. The consumer has to exercise the right of withdrawal within 14 days after he or the third party authorized by him physically receive the product or at the same day when the service contract is concluded. The former Law on Consumer Protection numbered 4077 and the former By-Law on Distance Contracts numbered 27866 stipulated some different provisions concerning distance contracts and the right of withdrawal in distance contracts. Among these provisions the most significant change is the withdrawal period. Under the former provisions, the withdrawal period was 7 days. The former Law and the former By-Law were abolished by LCP in

[25] For a detailed comparison of European Union Consumer Law and Turkish Consumer Law see **Bahar Yeşim Deniz,** "Avrupa Birliği Tüketici Hukuku İle Türk Tüketici Hukukunun Bazı Yönlerinin Karşılaştırmalı Değerlendirilmesi", *Türkiye Adalet Akademisi Dergisi*, Year: 4, Vol. 12, January 2013.

[26] **Ümit Gezder**, Mesafeli Sözleşmeler, Erzurumlu Şerhi, İstanbul 2006, p. 183-187.

2013 and the new By-Law numbered 29188 which lately came into force on 27th of February 2015.

What is important for the right of withdrawal in distance contracts is to fulfill the obligation to give information to the consumer by the seller/supplier. The seller/supplier is obliged to inform how, when and under which circumstances consumers are able to use the right of withdrawal and give them the contact information so that they can direct the withdrawal intention and send the product back. This information has to be given with at least 12 point-font size in a clear, simple and understandable way. If the consumer was not informed about the existence and the content of the right of withdrawal by the seller/supplier before bound by the contract or before accept the offer to make a contract or if there is a lack of information, the 14-day period does not even begin and the consumers will not be bound by the 14 day-period. It is the seller/supplier who is obliged to prove that the consumer was informed a priori. Yet, at all events the right of withdrawal is expired within a year after the end of the withdrawal period. The distance contract is deemed as not concluded unless the seller gets confirmation that the consumer has taken preliminary information properly. (Art. 48/IV of LCP, Art. 5, 6 and 10 of the By-Law and Art. 6 and 9/2 of the EU Directive)

According to Art. 48/IV of LCP if the consumer would like to withdraw from the contract, it is adequate to direct this intention to the seller/supplier. However, according to Art. 11 of the By-Law, it is necessary to direct the intention to the seller/supplier in a written form. Yet anyway the written form is not a prerequisite of validity but a means of proof under circumstances where the written form is required for the sake of enforceability. [27]

As there is no special provision in LCP or in the By-Law, distance contracts are concluded like any other consensual contracts. This means there is no need to deliver the product in order to conclude the contract; however the seller/supplier has an obligation to deliver the product and if he fails to perform his obligation, it will be a clear violation of the contract and leads to the default in delivery. If the seller sends a product which the consumer has not even ordered in the first place, then the consumer is not obliged to keep or send back the product (Art. 7 of TCO). The right of withdrawal can only be in question after the product is delivered to the consumer properly in accordance with the distance contract and when the product is exactly the one that the consumer has been ordered.

Upon the exercise of the right of withdrawal, the consumer is obliged to

[27] **Gezder**, p. 173.

send back the product and the seller/supplier is obliged to refund the total price including the original delivery price. The delivery price of the product paid before by the consumer should also be borne by the seller/supplier, unless agreed otherwise (Art. 12 and 13 of the By-Law and Art. 13 and 14 of the EU Directive). When the consumer brings forward the right of withdrawal, all ancillary contracts are automatically terminated as well (Art. 14 of the By-Law and Art. 15 of the EU Directive).

If the consumer brings forward the right of withdrawal, the valid (in progress) consumer contract between the parties will be deemed as void from the beginning by the unilateral declaration of intention of the consumer. Therefore the right of withdrawal should be deemed as a dissolving condition.

In our opinion the provisions regarding the right of withdrawal in Turkish consumer law are sufficient enough after the amendments such as extending the withdrawal period etc. and also are in conformity with the EU Directive. Yet in a theoretical perspective the terminology still remains problematic (*cayma hakkı*) in LCP and in the By-Law. Since 2003 there has been an effort to regulate distance contracts in a legal basis and in terms of consumer protection in distance contracts the efforts have been accelerated so far; however as an essential tool to maintain the consumer protection, the consumer's withdrawal right is obstructed by the sellers/suppliers with some formalities and not implemented in a desired level. For instance, even though it is obviously contrary to LCP, most sellers/suppliers ask for an acceptable withdrawal motive in printed distance contracts or they simply reject the withdrawal by implicitly forcing the consumer to another option like changing the product with another product rather than giving back the price. Although it is not contrary to LCP, demanding the delivery price of the returned product is also another obstacle. The sellers/suppliers demand the delivery price of the returned product via printed distance contracts without giving the consumers the chance to negotiate and consumers who have already paid the original delivery price also have to pay the delivery price of the returned product and paying the delivery price twice which in some cases extent the price of the product. In a situation like this, consumers cannot reject to pay the delivery price because it is stated as a clause in the distance contract and cannot make the clause unwritten alleging that it is a standard business term because according to Art. 21 of TCO only the terms which are unfamiliar to the nature of the agreement and the characteristic of the matter are considered as unwritten. Consequently, the obstacles before the right of withdrawal are not legal but discretionary and therefore the most important thing to overcome these obstacles is to create an awareness in the matter and guarantee its enforceability at the utmost level.

CONCLUSION

Nowadays with the digital era, most consumer contracts have been concluded via internet as the form of distance contracts and the behavioral habits of the consumers have been shifted correspondingly. Distance contracts are consumer contracts which are concluded without the simultaneous presence of the seller/ the supplier and the consumer within the framework of a system where delivery and supply of the goods and the services are provided from a distance by using the distance communication means such as mail order, internet, telephone, fax etc. until and at the time when the contract is concluded. Consumers who are considered as the vulnerable party of the contract are exclusively worth protecting against the sellers/suppliers because in distance contracts they have no chance to see the physical presence of the products or the contracts are simply about some financial services. In Turkish law, the amended Law on Consumer Protection governs some important provisions within the framework of the notion, "consumer protection", in accordance with the behavioral changes of the consumers. Thus, the mandatory right of withdrawal of the consumers has appeared as one of the strongest and most effective tools to protect consumers in distance contracts. The mandatory right of withdrawal allows consumers to withdraw from the consumer contracts unilaterally by sending the product to the seller and taking back the amount paid without giving any reason. The right of withdrawal aims at protecting the consumers who are considered as the vulnerable party of the consumer transactions. As a tool to protect the consumers, the right of withdrawal helps them to rethink the economical meaning and value of the contract concluded hastily and carelessly.

In Turkish consumer law, there has been an effort to regulate distance contracts in a legal basis since 2003 and in terms of consumer protection in distance contracts the efforts have been accelerated so far, such as adopting the new Law and extending the withdrawal period etc. In Tukey consumers are legally protected by codes, regulations and directives etc. Yet the real protection is provided only when such provisions are implemented properly. In reality the right to withdraw from distance consumer contracts is obstructed not by the lawmaker but by the sellers/suppliers with some formalities such as seeking an acceptable withdrawal motive even though it is obviously contrary to LCP or demanding the delivery price of the returned product via printed distance contracts without giving the consumer the chance to negotiate. Therefore, along with enacting rules relating to consumer protection, the awareness concerning implementations and consequences of the "right of withdrawal" in distance consumer contracts should be created and its enforceability should also be guaranteed.

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THE ANALYSIS OF THE ISRAELI POLICY ON AFRICAN ASYLUM SEEKERS

İsrail'in Afrikalı Sığınmacılar Politikasının Analizi

Emre YAVAŞ*

ABSTRACT

Because of the existing of refugees and asylum seekers in almost every time in the modern history, international society decided to protect these people and determined the principles. The expression refugee is defined in the Convention relating to the Status of Refugees of 1951. Although Israel ratified the U.N. Convention on the Status of Refugees in 1954, and acceded its protocols in 1968, Israel has not incorporated the convention into its domestic law. Israel governs asylum seekers regime through internal governmental regulations and avoids conducting refugee status determination procedures as regards Eritreans and Sudanese asylum seekers. Israel has chosen to give little more than a basic right to Eritreans and Sudanese asylum seekers not to be deported to their home countries. This policy contravenes the refugee convention, which stipulates that refugee status should be determined individually.

Keywords: Israel, Policy, Asylum Seeker, Refugee, Infiltrator

ÖZET

Uluslararası toplum modern tarihin neredeyse her zamanında sığınmacı ve mültecilerin bulunmasından dolayı bu insanları korumaya karar vermiş ve prensipleri belirlemiştir. 1951 tarihli Mültecilerin Statüsü ile ilgili Sözleşme mülteci kavramını tanımlamaktadır. İsrail'in Birleşmiş Milletler Mültecilerin Statüsüne İlişkin Sözleşme'yi 1954 ve sözleşmenin protokolünü 1968 yılında onaylamasına rağmen, sözleşmeyi ulusal yasalarına dahil etmediği görülür. İsrail sığınmacılar rejimini içsel idari kurallarla yönetmekte ve Eritreli ve Sudanlı sığınmacılarla ilgili mülteci statüsü belirleme prosedürünü uygulamaktan kaçınmaktadır. İsrail Eritreliler ve Sudanlılara temel haktan biraz fazla olan kendi ülkelerine sınır dışı edilmemelerini bir hak olarak vermiştir. Bu politika mülteci statüsünün bireysel olarak değerlendirilmesi gerektiğini şart koşan sözleşmeyi ihlal etmektedir.

Anahtar Kelimeler: İsrail, Politika, Sığınmacı, Mülteci, Casus

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Introduction

Leaving a home and having an obligation to live in different country is not easy for people who are seeking 'better life' because they probably face many difficulties in the new country or refugee camp. Refugees and asylum seekers is a unique sort of among a different classes of immigrants. Moreover, this kind of immigrants is obliged to migrate.[1] There are many human rights violations lead people to be refugees and asylum seekers. Because of the existing of refugees and asylum seekers in almost every time in the modern history, international society decided to protect these people and determined the principles. The expression refugee is defined in the Convention relating to the Status of Refugees of 1951. The Refugee Convention was signed by more than 140 countries because these countries had refugees of World War II.

The Refugee Convention was signed and approved earlier than other states by Israel which was one of the drafters of the Convention.[2] A substantial numbers of asylum seekers crossing significantly through its border with Egypt have given an experience to Israel especially since 2005. Whereas Israel has been a party to the Convention for several times, the new Israeli asylum mechanism became functional the first time in 2002. After this time, the numbers of asylum seekers have been increased rapidly. Most of the asylum seekers have come from especially, Sudan, Eritrea, and Ivory Coast.[3] This article, after presenting the historical background of the African asylum seekers, will be thoroughly referred to the international law, Israel's basic law and case law together with critically assessing the Israeli policy on African asylum seekers.

1. Why did they Leave Home and Come to Israel

Eritreans have been looking for asylum abroad since the middle of 2004. At least 200,000 Eritreans escaped and they registered in refugee camps in Ethiopia and eastern Sudan. Mass long-term or indefinite forced conscription and forced labor, extrajudicial killings, disappearances, torture and inhuman and degrading treatment, arbitrary arrest and detention, and restrictions on freedom of expression, conscience, and movement the main widespread human rights violations which are reasons for Eritreans being escaped.[4]

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1 Tally Kritzman-Amir, "Refugees and Asylum Seekers in the State of Israel", Israel Journal of Foreign Affairs Vo: 3 (2012), 98.

2 Ibid.

3 Tally Kritzman-Amir, " 'Otherness' as the Underlying Principle in Israel's Asylum Regime", (2009) 42(3) Israel Law Review, 603,604.

4 Human Rights Watch Report, September 2014, " 'Make Their Lives Miserable' Israel's Coercion of Eritrean and Sudanese Asylum Seekers to Leave Israel", 18.

Lots of Sudanese have left their country at the beginning of 2003 due to the big conflict broken out in Darfur. By the end of 2013, 636,405 Sudanese were registered as refugees and 28,705 registered Sudanese as asylum seekers in the whole world of whom 16,846 claimed asylum in 2013.[5] As a result of the situation which is that Egyptian riot police killed 28 Sudanese refugees and asylum seekers who had been stayed in camp outside of the United Nation Refugee Agency's (UNHCR) offices in Cairo in 2006, the relationship between Israel and African asylum seekers began. Following the massacre, almost 1,000 Sudanese crossed border and they came Israel.

By the end of 2013, there were 52,961 foreigners in Israel of whom about 49,000 were Eritreans and Sudanese. Most of the Eritreans and Sudanese especially live in the cities of Tel Aviv, Arad, Ashdod, Ashkelon, Eilat and Jerusalem. There were approximately 2,500 Eritreans and Sudanese detainees as of mid-June 2014. Eritreans and Sudanese constitute approximately one out of five of the whole number of foreign nationals in Israel.[6]

2. The International Context and Legal Framework

The term refugee is firstly defined in the Convention Relating to the Status of Refugees of 1951. The Convention defines a refugee as a person who:

"...owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it".[7]

United Nations High Commissioner for Refugees (UNHCR) 2011 Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Eritrea state: "in practice, the sentence for desertion or draft evasion is so severe and disproportionate that it makes up persecution."[8] According to the UNHCR 2013 report, about 83% of Eritrean asylum seekers were granted refugee status or some other protected status by Italy, Norway, Switzerland and the United Kingdom, where they have also sought asylum.[9]

5 Ibid, 19.
6 Ibid., 16.
7 Article A, Paragraph A (2) of the Convention on Refugees.
8 UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Eritrea," April 20, 2011, http://www.refworld.org/docid/4dafe0ec2.html (accessed March 9, 2015).
9 Human Rights Watch Report, 2014, 18,19.

On the other hand, Sudan's Criminal Act rules that Sudanese who visit the hostile countries, Israel is one, might be punished to years in prison. Human Rights Watch September 2014 Report claims that "Sudanese asylum seekers in Israel might have related to the reasons they fled Sudan, all Sudanese in Israel therefore have a sur place refugee claim in which the well-founded fear of being persecuted arises as a consequence of events that happened or activities the asylum seeker engaged in after they left their country of origin".[10]

3. Israel's Asylum Seekers Regime

The U.N. Convention on the Status of Refugees concretised Article 14 of the Universal Declaration of Human Rights, which enunciated that "every person has the right to seek and to enjoy in other countries asylum from persecution." Israel acceded the Refugee Convention and its consecutive protocol in 1954 and 1968, respectively. There is an obligation for Israel to fulfil all of its provisions and to enact essential laws to that effect.[11] Since the Convention was apprehended to be potentially beneficial to the Jewish refugees of the World War II, Israel had a serious concern that it designed. For this reason, Israel may be expected a great level of moral dedication toward asylum seekers, combined with an intensive empathy and an aptitude to identify with victims of persecution.[12]

Even though Israel has ratified the Convention, it has no own specific asylum law. In 2001, Israel accepted mechanisms to cope with asylum petitions under which UNHCR conducted the refugee-status-determination interview and the Interior Ministry had an authority to take the last decision on whether to grant or deny refugee status. Since July 2009, all stages of the asylum process have been handled by the Interior Ministry itself. In January 2011, Israel accepted new asylum mechanisms.[13]

3.1. The Legal Status of Asylum Seekers in Israel

Since 2001, Israel has offered little more than a basic right to Eritreans and Sudanese not to be deported to their home countries under its asylum policy. Between 2011 and 2013, officials' statements were made regarding Eritreans are not displaced because of interests about Eritrea's human rights record and Sudanese are not transported due to a lack of diplomatic relations with

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10 Ibid., 19, 20.

11 Reuven Ziegler, "A Matter of Definition: On 'Infiltrators' and Asylum Seekers in Israel", http://en.idi.org.il/analysis/articles/a-matter-of-definition-on-infiltrators-and-asylum-seekers-in-israel/ (accessed March 16, 2015).

12 Tally Kritzman-Amir, " 'Otherness' as the Underlying Principle in Israel's Asylum Regime", (2009) 42(3) Israel Law Review, 613.

13 Human Rights Watch Report, 2014, 6.

Khartoum.[14] According to a government decision, Israel gave a similar status to 500 asylum seekers from Darfur. Only these asylum seekers from Darfur have been granted the status of temporary residents and are entitled to get social benefits offered to citizens.[15]

Nowadays, whereas there are over 50,000 people who have been granted temporary protection, these people are not granted any rights, including the right to work or social benefits under the Israeli law. According to the Israeli law, these people have to get conditional release permit and this permit document has to be renewed every month. These people might be arrested and detained for illegal presence in the event that conditional release permit is not renewed on time. Moreover, they cannot work because employers are not able to hire them once their permit has expired. Until December 2013, these conditional release had been to renewed every one to four months by holders, on the basis of individual immigration officials' decision.

There was a big alteration in late December 2013 when the authorities decided to be opened just four permit renewal services and decreased the opening times to two days a week for two-and-half hours a day. As a result of this alteration, people must wait a lot of times to get paper ticket with a hand-written appointment date to renew their permits.[16] In the beginning of March 2014, the Ministry declared that 980 Eritrean asylum seekers had been interviewed, two were accepted as refugees. This makes up a recognition rate of 0.4 percent. According to the Ministry, at that time, Sudanese applicants had been interviewed. UNHCR said that as of mid-August 2014, the authorities had rejected all of them. These recognition rates contravened international ratio for Eritrean and Sudanese asylum seekers in 2013 which stood at 83% and 67% respectively.[17] On June 1, 2014, a new specialized "Appeals Tribunal" started dealing with immigration and citizenship decisions. There is a big critique regarding the lack of capacity, massive backlog, and the lack of legal aid that refrain most asylum seekers from appealing and many people cannot view the court as an effective legal remedy.[18]

3.2. The Detention of Asylum Seekers

It should be noted that, the great numbers of asylum seekers are detained due to their undocumented entering and often faces harsh situations. The

14 Ibid., 51, 52.
15 Tally Kritzman-Amir, "Refugees and Asylum Seekers in the State of Israel", Israel Journal of foreign Affairs VI: 3 (2012), 51.
16 Human Rights Watch Report, 2014, 55, 56.
17 Ibid., 72, 73.
18 Ibid., 74.

Knesset passed an amendment to the Prevention of Infiltration Act on 10 January 2012 **(Amendment no. 3)**. This amendment defines any person who is not a resident of Israel and who enters Israel without authorisation as an infiltrator. Moreover, in light of the new legislation, all people crossing Israel through Israel's southern border, many of whom are future asylum seekers, are accepted infiltrator and this authorises their detention for up to three years following the issuance of a deportation decision. This is in contravention of Article 5 of the Basic Law: Human Dignity and Liberty, which composes part of Israel's constitutional design. There is also a sharp contrary with arrangements under Israeli criminal law, even individuals indicted for an offence are generally not taken in custody during their trial, and even when they are, the periods of pre-conviction detention are significantly shorter than the periods under the amended act.[19] The authorisation of the lengthy detention period of up to three years shows that its main purpose is to prevent future asylum-seekers from entering Israel's border.

This amended act prima facie contravened the Article 31 of the 1951 Convention, which stipulates that asylum seekers crossing an asylum state without authorisation will not be punished, provided that they present themselves to state officials urgently and provide a reasonable explanation.[20] Under the amended Prevention of Infiltration Act, however, the situation of Eritrean and Sudanese nationals may be worse rather than better. As a conclusion of the lack of current detention facilities and the limited length of lawful detention under current law, most asylum seekers in Israel retain their liberty.[21] In September 2013, Israel's High Court ruled that the January 2012 amendments to the 1954 Anti-Infiltration Law breached the right to liberty under Israel's Basic Law because detention was only justifiable pending deportation and, according to Israeli officials' own statements, neither Eritreans nor Sudanese could be deported to their home countries. Furthermore, the Court ordered that anyone who had been held for more than 2 months should be released, unless their on-going detention could be justified in light of Israel's 1952 Law of Entry.

On the contrary, a new legislation **(Amendment no. 4)** ruled that these asylum seekers could be continued detaining before the 90-day period expires was passed urgently by the government. This limits detention of new

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19 Reuven Ziegler, 'The New Amendment to the Prevention of Infiltration Act – Defining Asylum Seekers as Criminals' http://en.idi.org.il/analysis/articles/the-new-amendment-to-theprevention-of-infiltration-act-defining-asylum-seekers-as-criminals (accessed March 22, 2015).

20 Ibid.

21 Ibid.

infiltrators entering Israel's southern border for *one*. It is worthy to notice that several of the justices explicitly stated in their separate opinions concerning the annulled legislation that any prolonged detention used by way of deterrence is inappropriate, and that locking up people who cannot be deported is unconstitutional; hence, the criticism of the quashed amendment applies *mutatis mutandis.*[22] **On 22 September 2014, the Israeli Supreme Court sitting as a High Court of Justice quashed in a 217-page judgment the Prevention of Infiltration Law.** After that amendment was struck down in September 2014, the third amendment was passed in December. This amendment shortens the period of incarceration in Saharonim even further, and limits detention in Holot to a period of 20 months. The new amendment also allows the asylum seekers to remain outside Holot the entire day.

3.3 The Politic Aspect towards Asylum Seekers

In August 2012, the Interior Minister Eli Yishai said: "infiltrators were an existential threat to the Jewish State and he would protect the Jewish majority of this country at any price."[23]In May 2012, Prime Minister Benjamin Netanyu referred to 'illegal infiltrators flooding the country' who were "threatening the social fabric of society, our national security, our national identity … and … our existence as a Jewish and democratic state."[24] The same month, Likud member of the Knesset (MK) Miri Regev said: "the Sudanese were a cancer in our body."[25]And in August 2012, Yishai claimed: "the infiltrator threat is just as severe as the Iranian threat."[26]

In June 2009, the head of the Population and Immigration Border Authority asserted: "99.9% of all foreign nationals who had claimed or might claim asylum in Israel were in Israel for work and they are not asylum seekers, they

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22 Reuven Ziegler, "The Prevention of Infiltration (Amendment no. 4) Bill: A malevolent response to the Israeli Supreme Court judgment" http://ohrh.law.ox.ac.uk/the-prevention-of-infiltration-amendment-no-4-bill-a-malevolent-response-to-the-israeli-supreme-court-judgment/ (accessed March 22, 2015).

23 "Eli Yishai asserts: We will return every infiltrator – until the last of them," Channel 2 News, August 8, 2012, http://www.mako.co.il/news-military/politics/Article-74bb292eddc1431017.htm (accessed March 25, 2015).

24 Harriet Sherwood, "Israel PM: Illegal African Immigrants Threaten Identity of Jewish State," Guardian, May 20, 2012, http://www.guardian.co.uk/world/2012/may/20/israel-netanyahu-african-immigrants-jewish (accessed March 25, 2015).

25 Ilan Lior and Tomer Zarchin, "Demonstrators Attack African Migrants in South Tel Aviv," Haaretz, May 24, 2012 http://bit.ly/1l69esx (accessed March 25, 2015).

26 Omri Efraim, "Yishai: Next phase – arresting Eritrean, Sudanese migrants," Ynetnews, August 16, 2012, http://www.ynetnews.com/articles/0,7340,L-4269540,00.html (accessed March 25, 2015).

are not at any risk."[27] In December 2012, Prime Minister Benjamin Netanyahu announced: "his party was moving on to the second stage, that of repatriating the infiltrators who are already here, infiltrator had been leaving Israel and would soon do so every month until the tens of thousands of people who are here illegally return to their countries of origin."[28]In early January 2014, Israel's Interior Minister Gideon Sa'ar said: "the purpose of our policies is to encourage the illegals to leave."[29] During a January 2014 discussion on how to respond to Eritrean and Sudanese demonstrations in Israel, Prime Minister Benjamin Netanyahu stated: "They are not refugees ... they are migrant workers who are here illegally."[30] It can be easily noted that these statements show us the reason for Israel's unwillingness about accepting African asylum seekers as a refugee.

Conclusion

Although Israel approved the U.N. Convention on the Status of Refugees in 1954, and acceded its protocols in 1968, Israel has not incorporated the convention into its domestic law. Israel governs asylum regime through internal governmental regulations. Because of absent primary legislation, lack of acknowledgement, and unwillingness, a very little amount of refugees has been recognized in Israel, in contrast, globally, 84% of Eritreans petitions are determined to be genuine, and the respective figure for Sudanese petitions is 64%. We can say that Israel avoids conducting refugee status determination procedures as regards Eritreans and Sudanese asylum seekers. Israel has chosen to give little more than a basic right to Eritreans and Sudanese asylum seekers not to be deported to their home countries. This policy contravenes the refugee convention, which stipulates that refugee status should be determined individually.

According to the non-removal policy, Israel restrains from granting refugee status, and the associated rights including freedom of movement, access

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27 Nurit Wurgaft, "Closing the holes and the loopholes," Haaretz, June 21, 2009, http://www.haaretz.com/print-edition/features/closing-the-holes-and-the-loopholes-1.278503 (accessed March 25, 2015).

28 "Summary of the Number of Infiltrators," Office of Prime Minister of Israel press release, December 31, 2012, http://www.pmo.gov.il/English/MediaCenter/Spokesman/Pages/spokesikum311212.aspx (accessed March 25, 2015).

29 David Lev, "Sa'ar: If Illegals Don't Want to Leave, We'll Make Them Leave," Israel National News, January 7, 2014, http://www.israelnationalnews.com/News/News.aspx/176000#.U3nRr_ldX9s (accessed March 25, 2015).

30 David Lev, "PM: Protests or Not, Illegals Will be Deported," Israel National News, January 6, 2014, http://www.israelnationalnews.com/News/News.aspx/175986#.UzqcMvldX9s (accessed March 25, 2015).

to work, healthcare, and social security to African asylum seekers who may deserve such status. Even though Israel Supreme Court struck down these amendments, Israel Parliament, insistently, has enacted some legislations which label border-crossers (asylum seekers) as infiltrators and authorise their precarious detention. This is in contravention of Article 5 of the Basic Law: Human Dignity and Liberty, which is a part of Israel's constitutional arrangement.

Israel is also bound by the International Covenant on Economic, Social and Cultural Rights (ICESCR) which guarantees non-discriminatory access to work and to health facilities. Israel has also ratified the Convention on the Elimination of Racial Discrimination (CERD). The CERD Committee has called on states to "respect the right of non-citizens to an adequate standard of physical and mental health by… refraining from denying or limiting their access to preventive, curative and palliative health services." As a result, Israel has to consider these convention rules as a customary law and offers African asylum seekers non-discriminatory refugee status determination procedures, access to work and to health facilities. Moreover, Israel has to refrain from conducting implementation to force African asylum seekers to leave Israel.

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ISTANBUL ARBITRATION CENTER: NEW INITIATIVE TO ARBITRATION

Tahkim Yargılamasına Yeni Bir Açılım Olarak İstanbul Tahkim Merkezi

Yusuf DEMİRCİ*

ABSTRACT

As a new efforts invested in settling legal disputes through alternative dispute resolution methods,(ADR),The Istanbul Arbitration Center(ISTAC) was established following the entry into force of the Istanbul Arbitration Center Law numbered 6570 on January 1 2015. ISTAC shall serve fort he settlement of the disputes, including foreign related issues, by arbitration or alternative dispute resolution. Being a uniqe hub of Turkey, ISTAC will also help Istanbul emerge as an peerless financial center with swift and effective procedures, having had General Assembly, Board of Directors, Auditor, Board of Consultants, National and International Courts of Arbitration and the secretary General. This article aims to describe the structure, duties, jurisdiction, and the rules of prosedure of the center.

Keywords: Istanbul Arbitration Center, Arbitration Proceeding, National Arbitration, International Arbitration.

ÖZET

Hukuki sorunların alternatif çözüm yöntemleriyle sonuçlandırılması hususlarındaki yeni çabalar devam ederken, 1 Ocak 2015 tarih ve 6570 sayılı İstanbul Tahkim Merkezi Kanunu yürürlüğe girerek İstanbul Tahkim Merkezini(İTM)kurmuştur. İTM tahkim veya alternatif çözüm yollarını kullanarak yabancı ve/veya yerli hukuki sorunların çözümü için uğraş verecektir. Genel Kurul, Yönetim Kurulu, Denetçi, Danışma Kurulu,Ulusal ve Uluslararası Tahkim Mahkemeleri ve Genel Sekreterden oluşan ITK, Türkiye'nin eşiz cazibe merkezi olarak, hızlı ve efektif yöntemleriyle, İstanbul'un rakipsiz bir finans merkezi olmasına da yardım edecektir.Bu makale Merkezin yapısı, görevleri, yargı alanı ve çalışma esaslarını anlatmayı hedeflemektedir.

Anahtar Kelimeler: İstanbul Tahkim Merkezi, Tahkim Yargılaması, Ulusal Tahkim, Uluslararası Tahkim.

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I. INTRODUCTION

1. The technological developments that came after the industrial revolution have contributed to the increase, proliferation and diversification

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of legal issues relating to the social and economic life. This momentum continues even today. As the traditional way of settling legal issues at courts turned into a lengthy process in parallel to the increasing workload of the courts, it became harder to reconcile this sluggishness with the dynamism of the economic life. This in turn led to search for alternative dispute resolution (ADR) methods which will allow legal disputes to be settled faster and more effectively. Arbitration is today one of the most frequently implemented ADR methods.

2. In this context, arbitration evolved as a faster and inexpensive alternative to civil procedure and in direct proportion to the dynamism of the commercial life and certain arbitration centers were established in developed, especially overseas countries. International arbitration is increasingly becoming the preferred method for dispute resolution in overseas transactions. The International Chamber of Commerce (ICC), the American Arbitration Association (AAA), the London Court of International Arbitration (LCIA) and other arbitration institutions are preferred. Taking into consideration a number of factors including costs, reliability, independence, selection of arbitrators, specialization, location, and arbitrability, contractual parties may decide to apply for institutional arbitration in case of disputes between them.[1]

3. In our country, the Law No. 3731 and dated 08.05.1991, the Law on the Ratification of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), and the Law on International Arbitration No. 4686 are the first legal arrangements on the matter. Since 2001, there have been regulatory initiatives concerning the establishment of an international arbitration center and the implementation of alternative methods such as conciliation and mediation. On 07.06.2012, the Law on Mediation in Civil Disputes No. 6325 was enacted. Our legal system has arrangements concerning arbitration in the Code of Civil Procedure (CCP) No. 6100 as well. As noted above, the main purpose of these institutions is to eliminate the problems experienced in national adjudication, to bypass lengthy proceedings and to ensure that disputes are resolved faster and with lower costs using the rules set by the parties, contributing to social peace.

4. Istanbul Arbitration Center has been established to this end, i.e., to facilitate the resolution of disputes between parties through arbitration or any other ADR method they choose instead of through litigation[2]. This article

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1 ÇELİKBOYA, Leyla Orak, http://www.erdem-erdem.com/articles/istanbul-tahkim-merkezi/, retrieved on 17.11.2015.

2 GÜL,Neytullah, "İstanbul Tahkim Merkezi Kanunu Tasarısı'nın Değerlendirilmesi" (Evaluation of Draft Law of Istanbul Arbitration Center ,Yalova Üniversitesi Hukuk Fakültesi

discusses the establishment purpose and remit of Istanbul Arbitration Center and its place in domestic law as well as the nature of its rules of procedure.

II. ESTABLISHMENT PURPOSE, ORGANIZATION AND JURISDICTION OF ISTANBUL ARBITRATION CENTER

A. ESTABLISHMENT PURPOSE

5. In Article 1 of the Istanbul Arbitration Center Law[3] numbered 6570, the purpose of the Law is stated as "to set forth the rules and principles for the establishment of Istanbul Arbitration Center as well as it organization and activities to ensure the resolution of disputes including the ones with foreign elements through arbitration and alternative dispute resolution methods." Accordingly, the Center's jurisdiction comprises the disputes related to private law, the administration's disputes related to private law and the disputes related to concession agreements and contracts, including the ones with foreign elements. In other words, all disputes subject to arbitration or other ADR methods fall within the ambit of the Center. The Center is defined as an institution where such disputes may be settled using arbitration or other ADR methods.[4]

6. The first reference to Istanbul Arbitration Center was made in Istanbul International Finance Center Strategy and Action Plan, promulgated in the Official Gazette dated 02.10.2009. In the section, "Reinforcing the Legal Infrastructure," of this Plan, its purpose was stated as: "establishing an independent and impartial institutional arbitration center which can compete globally and use arbitration method efficiently" in Istanbul.

7. In addition to the above-mentioned reasons, the main purpose of the establishment of the Center is to disseminate information about, and encourage arbitration and other ADR methods in Turkey. As noted in the reasoning of the Law, the Center will undertake coordination in the area of arbitration and play an active role in establishing relationships with foreign arbitration centers and undertaking promotional activities. The Center is designed to be independent and impartial and inclusive of all relevant entitled and organizations to ensure acceptance of the arbitration institution by concerned parties.[5]

8. As part of the vision to make Istanbul a regional and eventually a global finance center, the need for providing an effective legal protection to businessmen who plan to invest in Turkey entails the establishment of

Dergisi (Yalova University Journal of Law Faculty) (2012/1),p.189-214,p.190.

3 Official Gazette: 29.11.2014 Date and 29190 No.

4 From the Law's reasoning section.

5 From the Law's reasoning section.

an independent and autonomous institutional arbitration center which is capable of international competition[6].

B. JURISDICTION AND ORGANIZATIONAL STRUCTURE[7]

9. In Article 1 of the Law, the Center's jurisdiction is defined as the disputes related to private law, the administration's disputes related to private law and the disputes related to concession agreements and contracts, including the ones with foreign elements. In other words, all disputes subject to arbitration or other ADR methods fall within the ambit of the Center.

10. The duties of the Center are given in Article 4 of the Law as follows:

a) To determine the rules of arbitration and other ADR methods and ensure that the services are performed.

b) To promote arbitration and other ADR methods, encourage, support and conduct scientific research on arbitration and cooperate with domestic and foreign organizations and individuals.

11. The organizational structure of the Center is described in Article 5 as follows:

The Center consists of the General Assembly, the Board of Directors, the Auditor, the Advisory Board, National and International Arbitration Courts and the Secretary General.

12. The General Assembly consists of twenty five members in total with ten years or more experience in their fields, including six members selected by the Turkish Union of Chambers and Commodities Exchanges, namely two from chambers of commerce and industry, one from chambers of commerce, one from chambers of shipping one from chambers of industry and one from commodity exchanges, four members selected by the presidents of bar associations from among lawyers registered with bar associations, three members selected by the Higher Education Board from among the academic members experienced in arbitration, two members selected by the Turkish Exporters Assembly, one member selected by the Ministry of Justice from among the first-class judges who work at an administrative assignment, one member selected by the Turkish Banks Association, one member selected by the Turkish Participation Banks Association, one member selected by the

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6 EKMEN,Yasin, "Tahkim ve İstanbul:Geç Kalan Buluşma"(Arbitration and Istanbul:Late For Meeting) ,Türk Hukuk Dergisi(Turkısh Law Journal), September 2015,Issue:146,p.17.

7 AKINCI, Ziya , "Why Istanbul Arbitration Center?", Yaşar Üniversitesi Dergisi (Journal of Yaşar University) ,2013, Volume 8.,Özel Sayı Prof. Dr. Aydın Zevkliler'e Armağan (Special Issue dedicated to Prof. Dr. Aydın Zevkliler) , p.79-96,p.80.

Capital Markets Board, one member selected by Borsa Istanbul Joint Stock Company, one member selected by the Turkish Tradesmen's and Artisans' Confederation, one member selected by the Banking Regulation and Supervision Agency, one member selected by the Turkish Capital Markets Association, and one member selected by each Labor Union and Employer's Union with the most members (Article 6 of the Law).

13. The Constitutional Court has decided upon the request of annulling and granting a motion for stay of execution of the phrases- '' The President of Bar Association'' and '' his/her preference'' -as stated in the code mentioned, which asserts above-mentioned phrases are unconstitutional to article 2 of constitution; that these phrases said are not contrary to Article 2 of constitution, stating that these amendments are not made neither in favor of some privileged groups nor considering private interest but public interest; and also naming candidates among registered lawyers to the bar by the president of bar association in order to sustain pluralism is not againts public interest[8].

14. The Board of Directors is elected for four years and consists of five principal and four reserve members to be selected from the member of the General Assembly and at least three of principal members and two of reserve members shall have a law degree (Article 6 of the Law).

15. One or more auditors (three at most) are elected for four years by the General Assembly from its members or outside the General Assembly with the task of auditing annual activities of the Board of Directors and report them to the General Assembly[9]. The Advisory Board consists of fifteen members with at least five years of experience in arbitration or other ADR methods who provide the Center with consultancy regarding its goals (Article 11 of the Law).

16. The National Arbitration Court and the International Arbitration Court consist of the President of the Board of Directors and the Secretary General as ex officio members and three other members with at least ten years of experience in the field of law who are selected for tenure of five years.[10]

C. ITS PLACE IN DOMESTIC LAW

17. The only exception to Article 37 of the Constitution, which defines the courts established by law as the sole place of settlement for disputes among people, is the arbitration institution, introduced by Articles 407 to 444 of the Code of Civil Procedure (CCP) numbered 6100, which entered

8 The Constitutional Court decree No: 01.07.2015 Date and 2015/6 E.,2015/63 K.

9 GÜL,p.199.

10 Moreover, in Article 13 of the Law, the Office of the Secretary General is listed among the boards of the Arbitration Center.

into force on 01.10.2011. In Article 412 of the CCP, arbitration is defined as "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, which is contractual or not." In other words, the parties may conclude an agreement to transfer the decision power to arbitrators or arbitration institutions such as Istanbul Arbitration Center.[11]

18. Therefore, an arbitration agreement transfers the state's judicial authority to another person or institution or tribunal under a procedural law contract[12] signed between the parties. As such, arbitration is an institution which relies on laws and which does not run counter to the principles of legal judge and natural judge, referred to in Articles 36 and 37 of the Constitution.

19. As noted above, a major characteristic of arbitration as a dispute resolution mechanism that is alternative to the judicial justice is the autonomy of the willpower. Accordingly, the parties are free to decide how the dispute will be resolved and under which procedures without prejudice to the governing rule of the law.

D.OTHER SIMILAR ARBITRATION CENTERS

20. There are several Arbitration Centers such as Istanbul Arbitration Center across the world, where the international trade is a center of life. Nevertheless, some of Arbitration Centers could not take an attention at all and therefore were failed[13].

21. One of the most prominent arbitration centers is Paris Arbitration Center, where International Center of Commerce is located. This arbitration center is referred by lawyers, corporations, institutes, etc across the world due to positive point of view of the Courts of France[14].

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11 KARADAŞ, İzzet, Ulusal (İç) Tahkim (Domestic/Internal Arbitration), Ankara, 2013, p. 23; also for the legal nature of arbitration see ALANGOYA, Yavuz, Medeni Usul Hukukumuzda Tahkimin Niteliği ve Denetlenmesi (Nature and Review of Arbitration in our Civil Procedure Law), Istanbul, 1973, p. 41 ff.

12 For discussion on this topic, see KARADAŞ, İzzet, Ulusal (İç) Tahkim (Domestic/Internal Arbitration), pp. 23-24; KURU, Baki / ARSLAN, Ramazan/YILMAZ, Ejder, Medeni Usul Hukuku Ders Kitabı (Textbook of Civil Procedure Law), 25th Edition, 2014,Ankara, p. 779 ff.

13 AKINCI, Ziya , "Why Istanbul Arbitration Center?", p.80;also see SANLI, Cemal, Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları (Drawing up International Commercial Contract and Methods of Settling Disputes), Istanbul,2011, s.268 ff.; ; BİCAN,Buğrahan, "Milletlerarası Ticaret Odası Tahkimi, Görev Belgesi ve Usulü" (International Dispute Settlement of Chamber of Commerce, Incumbency Certificate and Methods , Kocaeli Üniversitesi Sosyal Bilimler Dergisi (Kocaeli University Journal of Social Science), KOSBED, 2015, Volume:29,p..2-21.

14 AKINCI, Ziya , "Why Istanbul Arbitration Center?",p.80-81.

22. Likewise, The London Arbitration Center is referred intensively due to its vast experience on Maritime Law. Moreover, Wien, Hamburg, Geneva, Zurich, Frankfurt and Stockholm are, also, most prominent arbitration centers in Europe. These arbitration centers are chosen frequently by Turkish Citizens considering business relationship between Turkey and European Countries[15].

23. Hong Kong, Beijing and Singapore are the most important arbitration centers in far east Asia. Among them, Singapore is unargued the best arbitration center due to its peerless lawyers, its objectivity and most importantly its exertion againts corruption[16].

24. In Arab Peninsula and Africa, Dubai and Cairo and in United States and Norh America, American Arbitration Association play very important role in solving all legal problems arising from international business relations.

III. RULES OF PROCEDURE OF ISTANBUL ARBITRATION CENTER

A. OVERVIEW

25. All sorts of disputes, whether they have a foreign element or not, may be resolved by Istanbul Arbitration Center, given its jurisdiction (Article 1 of the Code). Once the jurisdiction of the Center is defined, there is the question of which rules shall be applied in the disputes taken to arbitration at the Center and which rules of procedures shall be used if not specified by the parties.

26. Article 407 of the CCP makes it clear that the provisions of the CCP concerning arbitration shall apply if the arbitration does not constitute a foreign element as determined in the International Arbitration Law numbered 4686 and the place of arbitration is in Turkey. Therefore, if the disputes referred to the Center do not have a foreign element, the arbitration rules defined in the CCP and the rules of procedure set forth in the CCP, it none provided by the parties, shall be applied.

27. However, if the dispute has a foreign element and the place of arbitration is in Turkey, then the International Arbitration Law numbered 4686 shall apply.

28. The doctrine makes distinctions between types of arbitration such as domestic (internal) or international (external) arbitration, mandatory or voluntary arbitration, and ad hoc or institutional arbitration.[17]

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15 AKINCI, Ziya , "Why Istanbul Arbitration Center?",p.82-83.

16 AKINCI, Ziya , "Why Istanbul Arbitration Center?",p.82.

17 For this distinction, see KARADAŞ, İzzet, Ulusal (İç) Tahkim (Domestic/Internal Arbitration), p. 35 ff.; YEŞİLIRMAK,Ali,Doğrudan Görüşme,Arabuluculuk,Hakem-Bilirkişilik ve Tahkim,Sorunlar ve Çözüm Önerileri(Mediation,Arbitrator, Expertness and Arbitration:

29. In domestic (internal) arbitration, the legal system of the country in question is taken into consideration and arbitration is defined by that system and performed with reference to the national regulations involved.[18] International (external) arbitration contains foreign elements and affords more latitude to the parties and arbitrators.[19]

30. When an arbitration center is involved in the arbitration and disputes are resolved under the rules of that center, it is called institutional arbitration. In comparison, in ad hoc arbitration, no such institution is involved and arbitration is carried out under the arbitration legislation of the country in question.[20] Based on the foregoing definitions, it can be maintained that the arbitration rules regulated by the Law refer both to institutional and domestic (internal) arbitration and to international (external) arbitration.

B. RULES OF PROCEDURE

1. DISPUTES INVOLVING FOREIGN ELEMENTS

31. If the dispute referred to the Center for arbitration has a foreign element, this involves international arbitration and, as noted above, the relevant provisions of the International Arbitration Law numbered 4686 shall apply.

32. As set forth in Article 2 of the Law numbered 4868, the existence of certain circumstances demonstrates that the dispute has a foreign element[21].

Thus, if the parties to the arbitration agreement have their domiciles or habitual residences or places of business in different States, or if the place of arbitration or a place where a substantial part of the obligations arising from the underlying contract is performed or a place where the dispute has the closest connection is situated outside the State in which the parties have their domiciles or habitual residences or places of business or if a shareholder of the company which is a party to the underlying contract that constitutes the basis for the arbitration agreement has brought foreign capital in accordance with the laws concerning the encouragement of foreign capital or where a loan and/or guarantee agreement needs to be signed for the execution of the

Disputes and Resolutions.),İstanbul,2011,p.75 ff.

18 KARADAŞ, İzzet, Ulusal (İç) Tahkim (Domestic/Internal Arbitration), p. 35; KURU, Baki / ARSLAN, Ramazan / YILMAZ, Ejder, Medeni Usul Hukuku Ders Kitabı (Textbook of Civil Procedure Law), p. 778.

19 KARADAŞ, İzzet, Ulusal (İç) Tahkim (Domestic/Internal Arbitration), p. 36; KURU, Baki / ARSLAN, Ramazan / YILMAZ, Ejder, Medeni Usul Hukuku Ders Kitabı (Textbook of Civil Procedure Law), p. 778.

20 AKINCI, Ziya, Milletlerarası Tahkim (International Arbitration), 2nd Edition, Ankara, p. 27 ff.

21 For the notion of Suitability of Arbitration,seeYESILIRMAK p. 84.

underlying contract, of if in accordance with the underlying contract or with the underlying legal relationship, the movement of capital or of goods shall be made from one country to another, then the arbitration is deemed to have a foreign element (Article 1/1-4 of the Law numbered 4686).

33. A dispute can be taken to arbitration at the Center only if an arbitration agreement is made between the parties or if an arbitration objection is raised at the court and an agreement[22] is made (Articles 4-5 of the Law numbered 4686). The Center may be chosen as a place of arbitration (Article 9 of the Law numbered 4686).

34. As stated in Article 8 of the Law numbered 4686, the parties are free to agree on the procedure to be followed.

35. The arbitration shall be deemed to commence on the date on which a request for the appointment of arbitrators is made to the Center (Article 10/A of the Law numbered 4686).

36.The Center shall render an award within one year from the date of its first meeting (Article 10/B of the Law numbered 4686). This period may be extended upon agreement of the parties or, upon a party's request, by the civil court of first instance.[23]

37. The language of the arbitration shall be in Turkish or any other language which is the formal language of a state that is recognized by the Republic of Turkey (Article 10/C of the Law numbered 4686).

38. Unless otherwise agreed by the parties, either party may amend or supplement his claim or defense during the course of the arbitral proceedings. However, the arbitrator or the arbitral tribunal may consider it inappropriate to allow such amendment having regard to the delay in making it or to whether or not it creates an unjust difficulty for the other party or to other circumstances. The claim or defense will not be amended or supplemented so as to extend beyond the scope of the arbitration agreement (Article 10/D of the Law numbered 4686).

39. The Center shall be able to decide whether to hold oral hearings or whether the proceedings shall be conducted on the basis of the case file (Article 11/A of the Law numbered 4686).[24]

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22 YEŞİLIRMAK,s.78.

23 Here, the authorized civil court of first instance is the civil court of first instance located in the domicile or usual place of residence or place of business of the defendant; if the defendant does not have a domicile or usual place of residence or place of business in Turkey, it is the Istanbul Civil Court of First Instance (Article 3 of the Law numbered 4686).

24 However, as stated in Articles 11/A and 12 of the same Law, the Center may decide to

40. The Center may, at the request of a party, order an interim measure of protection or an interim attachment before or during arbitral proceedings (Article 6/1 of the Law numbered 4686). In this case arbitration will commence within thirty days from the date of the measure or attachment. Otherwise, the interim measure or attachment will automatically be lifted (Article 10/A-2 of the Law numbered 4686).

41. Any decision of the Center shall be made, unless otherwise agreed by the parties, by a majority of all its members (Article 13/A of the Law numbered 4686).[25] However, certain issues concerning procedure may be decided by the president the arbitral tribunal if so authorized by the parties or the members of the Center (Article 13/A-2 of the Law numbered 4686).

42. The Center's arbitral proceedings shall be terminated upon the realization of any of the circumstances listed in Article 13 of the Law numbered 4686.[26]

43. The arbitral awards given by the Center shall specify the legal grounds for the decision and note that the parties may bring a legal action for setting aside the award under the circumstances listed in Article 14 of the Law numbered 4686. Unless otherwise agreed by the parties, any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his domicile, habitual residence, place of business or mailing address (Article 14/C of the Law numbered 4686).

44. As set forth in Article 14/B of the Law numbered 4686, any part may request the Center to correct in the award any material errors or bring a legal action for laying aside the award. The application for the action laying aside the award may filed with the authorized civil court of first instance, described in Article 4, within thirty days (Article 15/A-4 of the Law numbered 4686).

45. A party whose domicile or habitual residence is not in Turkey may renounce that right completely in an express clause in the arbitration agreement or in writing, following the signature of the arbitration agreement. Alternatively, in the same manner, the parties may renounce the above right for one or more of the reasons as set forth above for setting aside the award. The application for setting aside the award shall be decided upon examination of the case file unless the court requires otherwise. The judgment on the application for setting aside the award may be appealed in accordance with the provisions of the Code of Civil Procedure; however, no request can be

conduct site-inspection or examination by an expert.

25 Article 12/3 of the Istanbul Arbitration Center Law numbered 6570 has similar provisions.

26 Most importantly, the party may agree to terminate the arbitral proceedings at any time.

made for reconsideration of the judgment. Any examination at the appeal level shall be limited to the grounds available for setting aside the award and it shall be prioritized and handled expeditiously (Articles 15/A-5, 6, 7 of the Law numbered 4686).

2. DISPUTES NOT INVOLVING FOREIGN ELEMENTS

46. If the dispute that is referred to the Center for arbitration does not have a foreign element, this involves domestic (internal) arbitration and, as noted above, the relevant provisions of the Code of Civil Procedure numbered 6100 shall apply.

47. As a rule, arbitration is not convenient for disputes arising from rights in rem over immovable goods or other transactions of which the parties cannot dispose of on their own will (Article 408 of the CCP).[27]

48. A dispute can be taken to arbitration at the Center only if an arbitration agreement is made between the parties or if an arbitration objection is raised at the court and an agreement is made (Articles 412-413 of the CCP). The Center may be chosen as the place of arbitration (Article 425 of the CCP).

49. The parties may freely determine the procedural rules to be applied by the arbitrators or the arbitral tribunal --without prejudice to the compulsory provisions-- or they may determine the rules of procedure with reference to the arbitration rules (Article 424 of the CCP).

50. The arbitration shall be deemed to commence on the date on which a request for the appointment of arbitrators is made to the Center (Article 426 the CCP). The Center shall render an award within one year from the date of its first meeting (Article 427 of the CCP). This period may be extended upon agreement of the parties or, upon a party's request, by the civil court of first instance.[28]

51. Unless otherwise agreed by the parties, either party may amend or supplement his claim or defense during the course of the arbitral proceedings. However, the arbitrator or the arbitral tribunal may consider it inappropriate to allow such amendment having regard to the delay in making it or to whether or not it creates an unjust difficulty for the other party or to other

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27 KARADAŞ, İzzet, Ulusal (İç) Tahkim (Domestic/Internal Arbitration), p. 82 ff; KURU, Baki / ARSLAN, Ramazan / YILMAZ, Ejder, Medeni Usul Hukuku Ders Kitabı (Textbook of Civil Procedure Law), p. 783. However, there is vagueness about whether these restrictions will apply also to the disputes brought to the Center.

28 Here, the authorized civil court of first instance is the civil court of first instance located in the domicile or usual place of residence or place of business of the defendant (Article 410 of the CCP).

circumstances. The claim or defense shall not be amended or supplemented so as to extend beyond the scope of the arbitration agreement (Article 428 of the CCP).

52. The Center shall be able to decide whether to hold oral hearings or whether the proceedings shall be conducted on the basis of the case file (Article 429 of the CCP).

53. The Center may, at the request of a party, order an interim measure of protection or an interim attachment before or during arbitral proceedings (Article 414 of the CCP). In this case arbitration shall commence within two weeks from the date of the measure or attachment.[29] Otherwise, the interim measure or attachment shall automatically be lifted (Article 426/2 of the CCP).

54. Any decision of the Center shall be made, unless otherwise agreed by the parties, by a majority of all its members (Article 433 of the CCP). However, certain issues concerning procedure may be decided by the president the arbitral tribunal if so authorized by the parties or the members of the Center (Article 433/2 of the CCP).

55. The Center's arbitral proceedings shall terminate upon settlement and the realization of any of the circumstances listed in Article 435 of the CCP.[30]

56. The arbitral awards given by the Center shall specify the legal grounds for the decision and note that the parties may bring a legal action for setting aside the award. As set forth in Article 437 of the CCP, any part may request the Center to correct in the award any material errors and interpret part of it or bring a legal action for laying aside the award. The application for the action laying aside the award may be filed with the authorized civil court of first instance within thirty days (Article 439/4 of the CCP). The judgment on the application for setting aside the award may be appealed (Article 439/6 of the CCP).

IV. CONCLUSION

57. Istanbul Arbitration Center is a significant step for making Istanbul a financial hub. The companies doing business in Istanbul will be able to apply to the Center for expedient proceedings with fewer costs.

58. That The Arbitration Center of Istanbul is referred by both entities and individuals not only for domestic issues but also for foreign-related issues, is an indication which states that Turkey is keen to be part of solution of

[29] For discussion about when this period will commence, see SALDIRIM, Mustafa, Hukuk Muhakemeleri Kanunu (Code of Civil Procedure), 2011, Ankara, p. 378.

[30] Most importantly, the party may agree to terminate the arbitral proceedings at any time.

commercial disputes arising[31].

59. However, the rules and procedures concerning the functioning of the Center haven't been introduced yet. There is still uncertainty about which disputes may be taken to the Center, i.e., whether the restrictions in Article 408 of the CCP will apply. And the remuneration of the arbitrators is still an uncharted territory. These shortcomings need to be addressed.

60. Still, expediency in proceedings particularly in commercial law will contribute to the emergence of our country and Istanbul as a financial center. As we mentioned above; there are some qualifications to be reached in order to compete and to have popularity as much as some Arbitration Centers such as London, Paris and Hamburg,- cities which are very popular and advanced at Arbitration-. These are the some qualifications to be reached;

- The procedure of Arbitration must be quicker and cost-efficiently

- A Comprehensive point of view to Arbitration by both Turkish Courts and Turkish Supreme Courts

- A positive approach and objectivity to Arbitration.

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THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND THE UNITED NATIONS SECURITY COUNCIL

Uluslararası Ceza Mahkemesi ve
Birleşmiş Milletler Güvenlik Konseyi Arasındaki İlişki

Yasin KOCAR*

ABSTRACT

National courts and tribunals try domestic and international crimes under their jurisdictions; however, the punishment of offenders committing international crimes at national level is not possible since the suspected persons are regarded as hero in their own countries. Ad hoc tribunals established after Second World War (The Nurenberg and the Tokyo Tribunals) were the initial phase to try war criminals. Then, the establishment of ad hoc tribunals for Rwanda and for the Former Yugoslavia was the main leading factor which made easier the establishment of an international criminal court in the last decade of the twentieth century.

The International Criminal Court (ICC) is the first permanent international institution having jurisdiction over individual and became operational on 1 July 2002. It has jurisdiction over the crime of genocide, crimes against humanity, war crimes and the crime of aggression. Unlike the ad hoc criminal tribunals for Rwanda and for the Former Yugoslavia were established as subsidiary organs of the United Nations, the ICC is created by the adoption of an international treaty known as the Rome Statute of the ICC as an independent court with specific relations with the Security Council. The Security Council has two roles, namely referral and deferral mechanisms under the Rome Statute. The relationship in question has been discussed on the basis of political role of the Security Council and the threat to the independence of the Court.

Keywords: The Crime of Genocide, Crimes Against Humanity, War Crimes, Deferral Mechanism, Referral Mechanism.

ÖZET

Ulusal mahkemeler, yerel ve uluslararası suçları kendi yargılama sistemine göre yargılamaktadır. Ancak, uluslararası suçluların bu mahkemeler tarafından cezalandırılması olanaklı değildir, çünkü bu suç şüphelileri kendi ülkelerinde kahraman olarak addedilmektedir. II. Dünya Savaşı'nda sonra kurulan ad hoc mahkemeler (Nüremberg ve Tokyo Mahkemeleri) savaş suçlularının yargılanması bakımından ilk aşama olarak görülmektedir. Daha sonra, Ruanda ve Yugoslavya Ad

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Hoc Mahkemeleri'nin kurulması ise, yirminci yüzyılın son on yılında uluslararası bir ceza mahkemesinin kurulmasını kolaylaştıran temel bir unsur olmuştur.

Uluslararası Ceza Mahkemesi(UCM), bireyler üzerinde yargılama yetkisine sahip ilk daimi uluslararası bir mahkeme olup, 1 Temmuz 2002 tarihinde faaliyetine başlamıştır. Mahkeme, soykırım suçları, insanlığa karşı suçlar, savaş suçları ve saldırı suçunu yargılama yetkisine haizdir. Birleşmiş Milletler'in bağımlı bir organı olan Ruanda ve Yugoslavya Ad Hoc Mahkemeleri'nden farklı olarak, Uluslararası Ceza Mahkemesi, Roma Statüsü olarak bilinen uluslararası anlaşma ile kurulan bağımsız bir mahkeme olup, Birleşmiş Milletler Güvenlik Konseyi ile özgün bir ilişkisi bulunmaktadır. Roma Statüsü yönünden Konsey'in 'başvuru' ve 'erteleme' mekanizması olarak adlandırılan iki rolü bulunmaktadır. Bu bağıntı, Konsey'in politik niteliği ve Mahkeme'nin bağımsızlığı yönünden bir tehdit oluşturması bakımından tartışılmaktadır.

Anahtar Kelimeler: Soykırım Suçu, Insanlığa Karşı Suçlar, Savaş Suçları, Başvuru Mekanizması, Erteleme Mekanizması.

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Introduction

The International Criminal Court (ICC) was established as a first standing international court for trying the crime of genocide, crimes against humanity, war crimes and the crime of aggression. Under Chapter VII of the United Nations (UN) Charter, the UN Security Council has responsibility to maintain or restore international peace and security. In light of its responsibility, the relationship between the Security Council and the International Criminal Court (ICC) was set up on the basis of the Rome Statute and it was discussed during the preparatory work of the Statute. Even though the Security Council created 'ad hoc criminal tribunals for Rwanda and for the Former Yugoslavia' as subsidiary organs to the UN, the ICC is an independent, permanent conventional international organisation, and it has specific relations with the Security Council. Since the ICC has jurisdiction only over individuals[1], it is different from the International Court of Justice, which has jurisdiction over states. The aim of the study is to analyse the two roles of the Security Council, namely referral and deferral mechanisms, and some controversial issues on this subject.

I. Establishment of the International Criminal Court

The international community had aspired to the establishment of a

[1] Benjamin N. Schiff, *Building the International Criminal Court* (first published 2008, Cambridge University Press) 9; Arash Abizadeh, 'Introduction to the Rome Statute of the International Criminal Court', (2003)

permanent international court for a long time. In 1993, the International Law Commission adopted by the UN General Assembly prepared a draft statute for an International Criminal Court and one year later, the Commission submitted the draft to the General Assembly as a part of the report of the Commission. The aspiration for a permanent international criminal court had ended by adopting of the Rome Statute by 120 States on 17 July 1998. When the necessary 60 states ratification reached, the Statute came into force on 1 July 2002.[2] As of January 2015, the number of states parties to the ICC Statute has reached the number of 123.

The ICC has jurisdiction over the crime of genocide, crimes against humanity, war crimes and the crime of aggression. These are depicted in both the Preamble and Article 5 of the Rome Statute as "the most serious crimes of concern to the international community as a whole". This feature of the crimes requires special judicial power as well as cooperation among States[3].

The ICC needs some preconditions in order to deal with a case: *i)* the alleged crime must have been committed after 1 July 2002[4]; *ii)* the suspect must be over 18 years of age[5]; *iii)* The home state of the suspect or the state on the territory of which the crime has been committed must accept the jurisdiction of the Court[6]. In addition to these requirements, the alleged crime must be brought before the Court by a state party or the UN Security Council. In addition, the prosecutor of the ICC may initiate an investigation with authorisation of the Court[7].

II. The Relationship between the International Criminal Court and the UN Security Council

The Security Council is the most leading and powerful body of the United Nations for implementation of the UN's main purpose of ensuring international peace and security[8]. Article 1 of the UN Charter specifies that *"The Purposes*

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2 Draft Statute for an ICC<http://legal.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1994.pdf>; Official website of the International Criminal Court <http://www.icc-cpi.int/en_menus/icc/about the court>

3 William A. Schabas, *An Introduction To The International Criminal Court* (4th edn, Cambridge University Press 2011) 89

4 Article 11, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Rome Statute of the International Criminal Court*, 17 July 1998, in force 1 July 2002

5 Ibid., Article 26

6 Ibid., Article 12 (2)

7 Ibid., Article 13-15; Jo Stigen, *The Relationship Between the International Criminal Court and National Jurisdictions* (1st edn, Martinus Nijhoff Publishers 2008) 3

8 Lawrance Moss, 'The UN Security Council and the International Criminal Court', (2012)

of the United Nations are; to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.." and Article 24 of the Charter depicts the role of the Security Council as "*In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf..".* In view of its function (maintenance of peace security in the world) and political body, the relationship between the Security Council and the ICC needs a balance in terms of the role of the Security Council and independence of the Court. This balance is specified in Article 2 of the Relationship Agreement between the United Nations and the International Criminal Court which entered into force on 4 October 2004 as *"(1) The United Nations recognizes the Court as an independent permanent judicial institution which, in accordance with articles 1 and 4 of the Statute, has international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes. (2) The Court recognizes the responsibilities of the United Nations under the Charter. (3) The United Nations and the Court respect each other's status and mandate."*

The Security Council is granted two roles named as "referral" and "deferral" by the Rome Statute of the ICC[9]. The Council can refer a "situation" in which one or more crimes (specified in Article 5 of the Statute) appears to have been committed in any state, irrespective of whether the state is the party of the Statute of the ICC. In accordance with the principle of "Presumption of innocence" expressed in Article 66 of the Statute, the Council can refer a "situation" rather than a specific crime or a criminal in any state. Regarding deferral power of the Council, it requests the ICC to defer an investigation or prosecution and it may be renewed a period of twelve months.

A. The Referral Mechanism

The first mode of the relationship between the UN Security Council and the ICC, specified in Article 13 (2) of the Rome Statute, is the referral of a situation which one or more crimes appears to have been committed in a

Friedrich Ebert Stiftung; Carsten Stahn and Göran Sluiter (editors), *The Emerging Practice of the International Criminal Court (*Martinus Nijhoff Publishers 2009) xiv

[9] Ibid., Article 13 (2) and Article 16

state (even if a state has not ratified the Rome Statute) by the Security Council under Chapter VII of the UN Charter. This part of the article will point out the concerns regarding the referral power of the Security Council after mentioning the process of the referral.

The Security Council determines international peace and security being threatened when it decides to refer a situation to the the ICC[10]. Article 39 of the Charter enunciates that '*The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security'*. Its decisions about referral are taken by a positive vote of nine members and the permanent members (China, France, Russian Federation, the United Kingdom, and the United States) which have veto power should have concurring votes[11]. In other words, if any permanent member of the Council votes against a referral, it cannot be brought to the Court by the Council. In addition, the Security Council even if decides to refer a situation to the Court, the Prosecutor of the ICC may not proceed an investigation related the situation because of lack of judicious basis to proceed[12]. The Prosecutor must notify the Pre-Trial Chamber of his or her own decision. If the Security Council requests the Chamber to reconsider the decision of the Prosecutor, it may review it[13]. When the Security Council decides to refer a situation to the Prosecutor, the decision together with other relevant documents is sent to the Prosecutor[14].

The Council, until now, referred the situations in Darfur in 2005 and in Libya in 2011 to the Court. The situations in Darfur and Libya were referred with the UN Security Council Resolution 1593(2005) and the Resolution 1970 (2011), respectively.

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10 The Resolution 1593 (2005) of the UN Security Council stated *"The Security Council, determining that the situation in Sudan continues to constitute a threat to international peace and security, decides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court."* and the Resolution 1973 (2011) of the UN Security Council stated *"The Security Council, determining that the situation in the Libyan Arab Jamahiriya continues to constitute a threat to international peace and security..."*

11 Article 27 (3) of the UN Charter states that *"Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members."*

12 Lawrance Moss, 'The UN Security Council and the International Criminal Court', (2012) Friedrich Ebert Stiftung; Article 53 of the Rome Statute

13 Karin N. Calvo-Goller, *The Trial Proceedings of the International Criminal Court, (*Martinus Nijhoff Publishers 2006) 159

14 Article 27 (1) of Relationship Agreement between the United Nations and the International Criminal Court (20 August 2004)

In general, the referral power of the Security Council undermines the legitimacy and independence of the International Criminal Court. The first concern is regarding the role of the permanent members of the Security Council which have the power of veto and its effects on the referral decisions. Three permanent members of the Security Council (China, Russian Federation and the United States) are not states parties to the Rome Statute, but these states are able to refer situations in states which are not parties to the Statute. In addition to it, the permanent members of the Council can tend to avoid the ICC's jurisdiction over themselves[15]. Similarly, Nuremberg and Tokyo Tribunals are criticized due to imposing "Allies' justice"; however similar crimes of Allies States had not been tried by these Courts[16].

Moreover, in consideration of the veto power of each permanent member of the Security Council, it is advised that each permanent member of the Council should not undermine a referral process regarding the most serious international crimes by using of its veto power[17].

The second concern is whether the Security Council should have stable criteria when it refers a situation to the ICC. In other words, in which circumstances the Council can refer a situation to the Court, even if it may be difficult to implement in practice. As a matter of fact, the situations in Darfur, Libya, Chechnya, Gaza or Syria are almost similar to each other. However, the question then arises as to why were only some situations referred by the Security Council?[18] In consideration of political body of the Security Council, referral mechanism without criteria may be concerned as politicising the mandate of the ICC. Moss noted that *"In using its power of referrals, the Council should apply criteria and processes that are as objective and consistent as possible' to minimize danger to the independence and legitimacy of the ICC,' so that Council decisions are not seen as politically motivated"*[19]. In contrast to "determining consistent standards", some suggested an alternative. Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland recommended a measure that the permanent members of the Security Council should avoid

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15 Chatham House, International Law Meeting Summary with Parliamentarians for Global Action, The UN Security Council and the International Criminal Court, (16 Mart 2012) 3

16 Kirsten Sellars, *"Imperfect Justice at Nuremberg and Tokyo"* (2011) 1090; Michael J. Struett, *The Politics of Constructing the International Criminal Court* (first published 2008, Palgrave) 158

17 Jennifer Trahan, "The Relationship between the International Criminal Court and the UN Security Council: Parameters and Best Practices" (Criminal Law Forum 2003) 428

18 Chatham House, International Law Meeting Summary with Parliamentarians for Global Action, The UN Security Council and the International Criminal Court, (16 Mart 2012) 4

19 Lawrance Moss, 'The UN Security Council and the International Criminal Court', (2012) Friedrich Ebert Stiftung

to use of the veto power to block the Council action aimed at preventing the most serious international crimes[20].

Nevertheless, the reports of the UN Office of the High Commissioner on Human Rights (OHCHR) have significant effects on decisions of the Security Council with respect to referral process. Libya resolution (2011) was adopted in parallel to the report of the OHCHR. Similarly, even though two permanents of the Council (Russia and China) vetoed the draft resolution regarding Syria conflict, thirteen members of the Council voted in favour of it. By November 2004, thousands of people had been killed in Darfur and 1.65 millions of people had been displaced[21]. Regarding the situation in Syria, by mid of 2014, more than 191,000 people killed and as of March, 2015, 7.6 millions of people had been internally displaced[22]. Unfortunately, the international crimes committed around the world have not been reviewed impartiality and fairly. Therefore, if the goal of the international community is to fight against impunity consistently, a set of objective criteria must be determined and adopted by the Security Council regarding when and in which circumstances a situation should been referred to the ICC. This ensures the legitimacy and independence of the ICC and the credibility of the Council.

Third controversial issue is immunity of some categorized groups from the ICC jurisdiction by the Security Council. In Resolution 1593(2005) with respect to Darfur, the Council decided that *"Nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union."* This decision specified that nationals and personnel (including US aid workers and peacekeepers) assigned by non states parties to the Rome Statute operating under an UN or African Union mandate in Sudan were exempted from the ICC jurisdiction [23]. The Resolution 1973 (2011), likewise the Darfur referral, exempted non-states parties of the ICC. Giving exclusion from ICC jurisdiction to a broad group of people exceeded

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[20] Revised Draft Resolution of Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland, A/66/L.42/Rev.1 (May 3, 2012), <http://responsibilitytoprotect.org/A%2066%20L%2042%20rev%201%20(2).pdf>

[21] Lawrance Moss, 'The UN Security Council and the International Criminal Court', (2012) Friedrich Ebert Stiftung

[22] The UN News Centre <http://www.un.org/apps/news/story.asp?NewsID=48535#.VQqj1Y7z3Qs>; The United Nations Office for the Coordination of Humanitarian Affairs (OCHA) http://www.unocha.org/syria

[23] Parliamentarians for Global Action (Regrets exemptions included in Resolution 1593 (2005), <http://www.iccnow.org/documents/PGA_DARref_01Apr05.pdf>

the power granted to the Council in Article 16 of the Rome Statute[24].

Another problematic issue is who has the financial responsibility when the Security Council refers a situation to the ICC[25]. Article 115 of the Rome Statute specifies that *"The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources: b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council."* However, the Security Council disallowed to allocate the UN funds to the ICC prosecution and jurisdiction in the Darfur Resolution[26]. Although the Rome Statute does not stipulate funding accompanying referral, insufficient funding can leave the Court not to maintain an investigation. Schabas, however, noted that "*In the case of tribunals formally created by the Council, it is normal that they be financed out of United Nations resources. The International Criminal Court is not a United Nations organ, and it seems unreasonable that its facilities be offered to the United Nations free of charge, so to speak."*[27] Under Article 115 of the Rome Statute, the UN General Assembly is authorized to decide about costs of referrals. That's why; the Security Council should refrain from financing decision on its referrals and leave the financial decision to the General Assembly.

B. The Deferral Mechanism

Article 16 of the Rome Statute gives power to the Security Council to defer investigations or prosecutions from the ICC, under Chapter VII of the UN Charter, for renewable twelve months period[28]. The referral power includes two significant aspects: *i)* the Security Council must decide under Chapter VII of the UN Charter[29], *ii)* After referral, no investigation or prosecution may be

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[24] Lawrance Moss, 'The UN Security Council and the International Criminal Court', (2012) Friedrich Ebert Stiftung

[25] Carsten Stahn and Göran Sluiter (editors), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers 2009) 193

[26] Resolution 1593, para. 7 ("*none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations")*

[27] William A. Schabas, *An Introduction To The International Criminal Court* (4th edn, Cambridge University Press 2011) 174

[28] Article 16 of the Rome Statute

[29] Igor Pavlovich Blishchenko (edited by José Doria Hans-Peter Gasser M. Cherif Bassiouni), *The Legal Regime of the International Criminal Court(*(1st edn, Martinus Nijhoff Publishers 2009) 438*;* Jo Stigen, *The Relationship Between the International Criminal Court and National Jurisdictions* (1st edn, Martinus Nijhoff Publishers 2008) 427

commenced or proceeded with. 'Acting under Chapter VII of the UN Charter' means that there must be a threat to the peace, breach of the peace, or act of aggression[30]. Secondly, the controversy is whether the Council can defer either an ongoing investigation (or a prosecution) or potential judicial proceeding. Article 16, however, does not clearly specify that in which circumstances the Council can defer an investigation or prosecution.

The Council has used the power of deferral once to date, in Resolution 1422 in 2002, by giving immunity from ICC jurisdiction to 'current or former officials or personnel from a contributing state not a party to the Rome Statute regarding UN-authorized operations'[31] and it was renewed by Resolution 1487 in 2003. Regarding this referral, a question that arises is whether there was an acceptable threat to the peace. Before the Resolution, the ICC jurisdiction over the armed forces deployed in UN Mission in Bosnia-Herzegovina was raised as a problem by the US. As a result of the US diplomatic efforts, this Resolution was adopted by the Council. Some authors, however, have argued that there was not a legitimate threat to justify the Resolution[32]. Moreover, the Government of Kenya with endorsement of the African Union requested the Security Council to defer the investigation about the situation in Kenya, however; the Council firmly declined this proposal[33].

Article 27 of the Rome Statute clearly expresses that *"This Statute shall apply equally to all persons without any distinction based on official capacity"* and *"Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."* In consideration of this Article, deferring a prosecution without determination of a threat to the peace or providing immunity from ICC jurisdiction to a certain person or group breaks this provision.

Conclusion

The International Criminal Court as a permanent international court has largely satisfied the international community and particularly the victims of the most serious international crimes all around the world. The ICC which

30 Jennifer Trahan, "The Relationship between the International Criminal Court and the UN Security Council: Parameters and Best Practices" (Criminal Law Forum 2003) 435

31 Resolution 1422 para. 1; Dominic Mcgoldrick Peter Rowe and Eric Donnelly (Editors), *The Permanent International Criminal Court(*Hart Publishing 2004) 116

32 Ibid., 438; Roberto Lavalle, "A Vicious Storm in a Teacup: The Action by the United Nations Security Council to Narrow the Jurisdiction of the International Criminal Court" Criminal Law Forum (2003) 14

33 Lawrance Moss, 'The UN Security Council and the International Criminal Court', (2012) Friedrich Ebert Stiftung

is an independent and impartial court can fight impunity more powerfully compared with 'ad hoc tribunals'. The Rome Statute created a relationship between the ICC and the Security Council that is the most primary organ of the UN and has responsibility to maintain international peace and security. However, this linkage between them should not undermine the judicial structure of the ICC, since the Security Council is a political body and contains permanent members which have political, economic and military power.

The deferral power of the Council has more negative effects on the mandate and independence of the ICC, compared with the referral mechanism, because after the Council makes a referral, the Prosecutor may not initiate an investigation about it. Moreover, the referral power as a triggering factor can provide more international support to the ICC. The deferral power which can suspend an ongoing investigation or prosecution should be removed from the Statute, because it explicitly interferes in judicial mandate and independence. In addition to that, the Security Council should refrain from referral resolutions which include similar decisions to deferral mechanism (immunity of some groups from ICC jurisdiction), such as Darfur and Libya Resolutions. As a consequence, the Council should always consider the judicial body of the ICC in order to fight against impunity efficiently and maintain international security and peace.

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TREND TOWARD THE RESTRICTIVE DOCTRINE OF STATE IMMUNITY: AN EVALUATION OF THIS TREND IN RESPECT OF EMPLOYMENT CONTRACTS

Devletlerin Sınırlı Yargı Bağışıklığına Yönelik Seyir: İş Uyuşmazlıkları Bağlamında Sözkonusu Seyre Dair Bir Değerlendirme

Yasir GÖKÇE*

ABSTRACT

State immunity, one of the most widely-recognized rules of international law, has been justified by independence, equality, dignity, or sovereignty of states. Stemming from sovereign and independent character of states, state immunity means that the legal personality of a state cannot be subjected to the judicial, legislative or executive proceedings of another state. The absolute doctrine of state immunity which was confirmed in *Casaux decision* of French Court de Cassation in 1849 and reaffirmed by British Supreme Court's *the Parlement Belge* ruling in 1879, was being challenged in late 19th century and early 20 century by some states which had been willing to adjudicate foreign states before their municipal courts due to economic or political concerns. Thereby, the trend towards the restrictive doctrine, gaining momentum with the incremental number of states which had adopted it, was fortified with some efforts to codify it in certain regional and international texts, though had a slow and cautious progress due to the disagreements among states in ascertaining the conducts of a state performed *jure impreii* and the ones performed *jure gestionis*. In this article focusing on the restrictive doctrine of state immunity, the legislation and court decisions of states insinuating the trend in state immunity as of 19th century till now are analyzed, so is Turkish legislation and Court de Cassation's rulings. Besides, the principles and methods that ought to be adopted and legal arguments that should be set forth in labour disputes by states are examined at the end of the article.

Keywords: Sovereign Immunity, Absolute State Immunity, Restrictive State Immunity, Casaux Decision, the Parlement Belge, Customary International Law.

ÖZET

Devletlerin sınırlı yargı bağışıklığı öğretisini konu edinen bu çalışmada, 19. yüzyıldan şimdiye dek gelişen yargı bağışıklığı seyri perspektifinden, yabancı devletlerin

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ve ülkemizin yasama faaliyetleri ile mahkeme kararları analiz edilmiştir. Ayrıca, makalenin sonunda devletlerce yabancı mahkemelerde açılan iş uyuşmazlıklarında benimsenebilecek ilke ve metodlar ile ileri sürülebilecek yasal argümanlar incelenmiştir.

Uluslararası hukukun en çok tanınan kurallarından biri olan devletlerin yargı bağışıklık, devletlerin bağımsızlığı, eşitliği, onuru, ve egemenliği ilkeriyle meşru bir zemine oturtulagelmiştir. Devletlerin egemen ve bağımsız doğasından kaynaklanan devlet bağışıklığı, bir devletin tüzel kişiliğinin başka bir devletin yasama, yürütme ve yargısal işlemlerine tabi tutulamaması anlamına gelmektedir. 1849 yılında Fransız Yargıtayı´nın *Casaux* kararıyla desteklenen, 1879 yılında ise İngiliz Yüksek Mahkemesi´nin *the Parlement Belge* hükmü ile teyid edilen mutlak yargı bağışıklığı kuralı, 19. yüzyılın başları ve 20. yüzyılın sonlarına doğru ekonomik ve siyasi kaygılardan ötürü yabancı devletleri kendi ulusal mahkemelerinde yargılama konusunda istekli olan devletlerce sorgulanmıştır. Böylece sınırlı yargı bağışıklığına doğru yöneliş, bu doktrini benimseyen ülkelerin giderek artan sayısıyla hız kazanmış, her ne kadar sözkonusu ülkelerin devletin *jure imperii* eylemleri ile *jure gestionis* eylemlerini belirleme konusundaki ihtilafları dolayısıyla yavaş ve ihtiyatlı bir seyir izlese de, sözkonusu ilkenin bölgesel ve uluslararası metinlerde kodifiye edilmesine yönelik çalışmalarla netlik kazanmıştır. Devletlerin sınırlı yargı bağışıklığı öğretisini konu edinen bu çalışmada, 19. yüzyıldan şimdiye dek gelişen yargı bağışıklığı seyri perspektifinden, yabancı devletlerin ve ülkemizin yasama faaliyetleri ile mahkeme kararları analiz edilmiştir. Ayrıca, makalenin sonunda devletlerce yabancı mahkemelerde açılan iş uyuşmazlıklarında benimsenebilecek ilke ve metodlar ile ileri sürülebilecek yasal argümanlar incelenmiştir.

Anahtar Kelimeler: Egemen Bağışıklık, Mutlak Yargı Bağışıklığı, Sınırlı Yargı Bağışıklığı, Casaux Kararı, The Parlemen Belge Kararı, Uluslararası Teamül Hukuk

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1. Introduction

Sovereign immunity means that legal personality of a state cannot be sued before the courts of another state, considering the presumption of sovereign equality of states.[1] Sovereign immunity among which is first commonly accepted rules of public international law and which is based upon the principles of that an equal cannot exercise sovereign powers on another equal and thereby cannot judge it, was confirmed in several cases including French Court de Cassation's notorious *Casaux decision*[2] in 1849 and British Supreme

[1] *See*, Rona Aybay, "Yargıtay İçtihatlarına Göre Devletin Yargı Bağışıklığı", *TBB Dergisi*, Sayı 72, 2007, at 109.

[2] *See*, *Gouvernement Espagnol v Casaux* Sirey 1849, Part I, 81 (France, Court de cassation, 1849).

Court's the *The Parlement Belge verdict*[3] in 1879. In these cases, the notion of state immunity from jurisdiction grounded on the fact that states exercised sovereign powers and acts or transactions of states were appearance of their authority and power; likewise the notion also based on the assumption that exercising judicial powers over the acts and transactions of a state could be regarded as exercising judicial powers over his sovereign nature.[4] Hence, British Supreme Court elaborated the sovereign immunity rule in its aforesaid decision as follows:

"Because of the absolute independence of every sovereign state, each other state must decline to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined for public use, or over the property of any ambassador, though such sovereign, ambassador or property may be on its territory."[5]

However, having considered the fact that there have been commercial-industrial and private law acts or transactions of which states did not exercise sovereign powers, it was foreseen that the notion of absolute state immunity adopted in the abovementioned cases was a strict interpretation on sovereign nature of states and their acts or transactions disposed as sovereign and the private law ones had to be differentiated; thereby the process for adopting the notion of "restrictive state immunity" against the absolute one was mounted.[6] According to that view, acts and dealings of which states do not exercise sovereign powers will enjoy sovereign immunity whereas acts and dealings governed by private law will not enjoy it.[7]

Parallel to coming into prominence of particularly the concepts of rule of law and individual rights in progressively democratizing countries, the sensitivity of these states on protecting their citizens damaged because of act or transaction of a foreign state and on subjecting the act or transaction to the judicial review has emerged and this sensitivity has become influential on their choice of immunity type which is the restrictive one.[8] On the contrary, those

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3 *See*, *The Parlement Belge*, 4 PD 129 (Probate, Divorce and Admiralty Division), Sir Robert Phillimore (1879).

4 *See*, Hazel Fox, QC Philippa Webb, *The Law of State Immunity*, Third Edition, Oxford University Press, 2013, at 25-26.

5 *The Parlement Belge*, *supra* note 3, para.155.

6 *See*, Ernest K. Bankas, *The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts*, Springer, Berlin-Heidelberg, 2005, at 71-73.

7 *See, e.g.,* Rona Aybay, Esra Dardağan, *Uluslararası Düzeyde Yasaların Çatışması,* İstanbul Bilgi Üniv. yayını, 2004. at 86.

8 *See, e.g.,* for the correlation between state approaches regarding individual rights or commercial concerns and restrictive state immunity; Pierre-Hugues Verdier, Erik Voeten,

which had intense commercial activities with third states were persistent on maintaining the notion of absolute immunity in order that states in which they had been carrying out commercial activities or their people would not sue them before foreign courts.[9]

Likewise, parallel to democratizing pace of states, improvement in labour rights has reflected to the labour laws, the subject matters regarding labour law have been regarded in the context of public order and states have been prone to implement their domestic labour law in favor of employees in the disputes stemming from employment contracts.[10] In the light of these occurrences, states in which these disputes are brought against a sovereign state before the courts, determine the type and scope of immunity by taking diplomatic or consular statue, citizenship, residential type of the employee or the subject matter of disputes into account.

In this article scrutinizing the restrictive sovereign immunity, the attitudes and trends as to sovereign immunity since 19th century until today are given a place, some foreign domestic and international courts' precedent decisions regarding sovereign immunity are analyzed and the actual and recent attitudinal approach of Turkey as to the subject matter is also examined. Besides, principles and methods that should be adopted and legal arguments that should be set forth in labour disputes by states which are adjudicated before foreign courts are treated at the end of the article.

2. State Immunity from 19th Century to Present

Based on the presumption of sovereign equality of states, state immunity means that the legal personality of a state cannot be exposed to the judicial, administrative or executive proceedings of another state.[11] The principle recognized as a fundamental international norm by French Court de Cassation in a case[12] brought against Spain in 1849 and reaffirmed by British Supreme Court's the *The Parlement Belge verdict*[13] in 1879, maintain its validity and existence as a rule of customary international law at the present time and is also codified in some international texts adopted in the last quarter century.

Strict and decisive approach adopted in the court decisions in the midst of 19th century holding that states had enjoyed absolute immunity from

"How Does Customary International Law Change? The Case of State Immunity"*, Social Science Research Network*, APSA 2012 Annual Meeting Paper, January 24, 2013.

9 *Id.,* at 3.

10 Bankas, *supra* note 6, at 353.

11 Aybay, *supra* note 1, at 109.

12 *See*, *Gouvernement Espagnol v Casaux, supra* note 2.

13 *The Parlement Belge*, *supra* note 3.

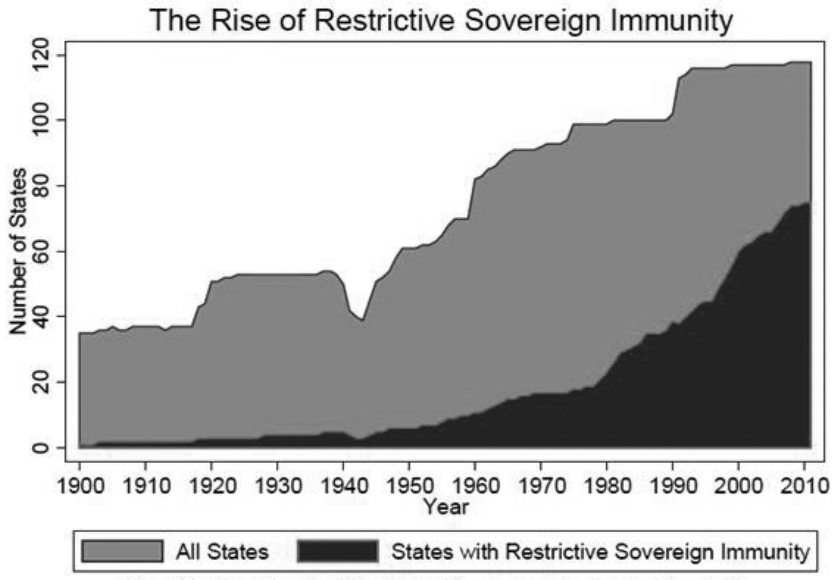
jurisdiction, was being left in the later 19th and early 20th century, thus states' actions or transactions disposed as sovereign and the private law ones had been differentiated; thereby the process for adopting the notion of "restrictive state immunity" against the absolute one was launched.[14] In this way, states and state corporations were being adjudicated due to the infringement of private law contracts which they were parties. Economic and political costs that states would confront when they deprive their citizens mounting judicial proceedings against foreign states of legal remedy has had an impact on that consequence.[15] Additionally, a state's export-import volumes, intensity of foreign economic activities within its territory and foreign states' attitudes concerning sovereign immunity have also been influential while ruling out absolute immunity and recognizing the principle of restrictive state immunity as the customary rule.[16]

States dispensed with the notion of absolute state immunity and adopted the principle of restrictive state immunity in national and international levels in different dates through various methods. States may adopt a rule as a customary norm through transmitting instructive circular, memorandum or notice to their national authorities in a consistent and constant manner, enacting a law on a subject matter or declaring that a rule is binding via an authorized spokesperson.[17] Besides, domestic courts may, regardless of guidance of the executive, also determine by their decisions that an international customary rule has changed and another rule has matured into international customary norm.[18] Hence, as will be seen in references and cases below, states have adopted the notion of restrictive state immunity through either issuing policy determining documents on the subject matter or instantiating the verdicts of its domestic courts determining that the notion of restrictive state immunity should be embraced and implemented.

Ends of 19th century were a period by which major powers such as the US, France, Germany, Japan, China and Austria regarded the principle of absolute state immunity as a binding international law rule for them.[19] However, in the same period, some states ruled out that principle and started to implement restrictive state immunity as a fundamental international customary law principle. First instance of transformation to that principle was that Belgium

14 *See, e.g.,* Bankas, *supra* note 6, at 72.
15 *See*, Verdier, Voeten, *supra* note 8, at 3.
16 *Id*., at 1.
17 London Conference 2000, Committee on Formation of Customary (General) International Law**,** International Law Association, at 20-28.
18 *See, id.,* at 6.
19 *See*, Fox, Webb, *supra* note 4, at 31-33.

Civil Court decided the admissibility of a case brought by a local company against the Netherlands in 1903 and Belgium has never left the rule thereafter. Apart from Belgium, Italy adopted the restrictive immunity in 1886, Switzerland in 1918, Egypt in 1920, Greece in 1928 and the Netherlands in 1947, respectively. Besides academic institutions like the Institut de Droit International founded Ghent Town Hall in Belgium in 1873 and Harvard Research on International Law were advocates of the principle of restrictive immunity in the same period.[20] The restrictive state immunity doctrine advocated by these states and institutions forming the minority before World War II was becoming acceptable and favorable in post-war period. Consequently, the Tate Letter[21] adopting the restrictive immunity doctrine issued by the US State Department in 1952 was a watershed for international community. In the following years, the US courts pursued the Letter issued by State Department. Finally, Foreign Sovereign Immunities Act[22] codifying the restrictive immunity doctrine in national level approved and ratified in 1976.



***See*, for the figure, Verdier, Voeten, *supra* note 8, at 11.**

[20] *See*, Verdier, Voeten, *supra* note 8, at 10-11.

[21] Fox, Webb, *supra* note 4, at 142; *See, e.g.,* Benedict Kingsbury, *Immunity and Act of State in National Courts: Development of Foreign Sovereign Immunity Law - Historical Intro*, Institute for International Law and Justice - New York University School of Law, International Law Cource, Unit 6, April 2009, at 4.

[22] *United States: Foreign Sovereign Immunities Act* of 1976 [October 21, 1976], 90 STAT. 2891 Public Law 94-583, 94th Congress, *available at* http://archive.usun.state.gov/hc_docs/hc_law_94_583.html.

In the period of post-world war II, as some states including the Netherlands, Austria, Germany and France considered the mentioned changes in state immunity doctrine, their courts held decisions observing the principle of restrictive state immunity. The UK and Commonwealth states had maintained absolute state immunity rule until British Supreme Court held[23] that Nigeria had restrictive immunity in 1977 and the UK ratified the State Immunity Act in 1978.[24] Transition trend from absolute state immuniy to restrictive immunity, as seen in the figure, has shown a dramatic rise between the years 1980-2000 and the figure concludes that today, 75 out of 118 states have adopted the restrictive state immunity rule.[25]

The aforesaid practices and approaches of states regarding state immunity indicate that the doctrine of restrictive immunity has matured into a rule of customary international law. Additionally, European Convention on State Immunity[26] dated 1972 and United Nations Convention on Jurisdictional Immunities of States and Their Property[27] (hereinafter, the UN Convention) dated 2004 also codifies that principle adopted as customary norm.

The European Council's Convention dated 1972 generally incorporates provisions constraining state immunity. According to the Convention, a state does not enjoy immunity from jurisdiction before the courts of host state as to the subject matters regarding employment contract signed between that state and the personnel who is a citizen of or resident in the latter. [28] Likewise, if the subject matter stemming from employment contract is within the context of public order or exclusive jurisdiction of the host state by virtue of domestic law, foreign state will not enjoy immunity according to the Convention.[29]

The UN Convention incorporates a legal system in which sovereign immunity is more preserved, even if the rule is restrictive state immunity. In the Convention, it is stipulated that a state cannot set forth a plea of state immunity before the courts of another state with related to the disputes

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23 *See*, *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] Q.B. 529 (Court of Appeal). Vgl. Einzelnachweise bei BAGv. 1.7.2010- 2 AZR 270/09, Rz. 13.

24 *See,* e.g., for a comparative analysis of British State Immunity Act 1978, Robert K. Reed, "A Comparative Analysis of the British State Immunity Act of 1978", *Boston College International and Comparative Law Review*, Volume 3, Issue 1 Article 8, 1979.

25 *See*, Verdier, Voeten, *supra* note 8, at 11.

26 European Convention on State Immunity, European Treaty Series - No. 74, Basle, 16.V.1972.

27 United Nations Convention on Jurisdictional Immunities of States and Their Property 2004, General Assembly resolution 59/38, annex, Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49 (A/59/49).

28 European Convention on State Immunities, art. 5/2(a) ve (b).

29 *Id*., art. 5/2(c).

stemming from employment contract signed and performed in the latter[30] though some below mentioned exceptions to that rule are also provided.

3. National and International Courts' Jurisprudence Regarding the Doctrine of Restrictive State Immunity

Examining the courts' jurisprudence of states adopted restrictive immunity would shed light on the matter in the sense of acquiring updated knowledge on how these states handle, interpret and implement that principle. Decisions of the Court of Justice of the European Union (CJEU) through which jurisprudence it scrutinizes the inclinations of the courts of member states and directs and guides them, demonstrates that states, in principle, cannot plea the argument of state immunity in the disputes deriving from private law transactions or employment contracts.

Berlin Labour Court (Arbeitsgericht) dismissed a case brought by an Algerian and German dual citizen named Mahamdia working in Algerian Embassy in Berlin as a driver asking for payment and then reemployment due to overtime and dismissal respectively and elaborated that the plaintiff's activities were functionally connected to the diplomatic activities of the Embassy. Thereon, Mahamdia appealed that verdict before Berlin-Brandenburg Higher Labour Court (Landesarbeitsgericht). Referring to the settled jurisprudence[31] of Federal Labour Court (Bundesarbeitsgericht), Higher Court ordered that German courts have jurisdiction in the dispute between the Embassy and its employee concerning Labour Law, provided that activities of the employee do not form sovereign acts of the foreign state. Berlin Higher Court referred the case through preliminary ruling to the CJEU, asking whether the Embassy is an establishment in terms of the EU Regulation no. 2011/44 determining the jurisdiction of EU Courts. After acknowledging that sovereign immunity is a rule of customary international law, the CJEU held that acts of states performed *iure gestionis* which did not fall within the exercise of public powers were exempt from state immunity, the embassy was an establishment in terms of the EU Regulation no. 2011/44 in the dispute brought by its employee who had not exercised public powers and it was for the national court to determine the precise nature of the functions carried out by the employee.[32]

Likewise, in the dispute brought by Hatice Demirer, a dismissed kavass

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30 United Nations Convention on Jurisdictional Immunities of States and Their Property, art. 11.

31 *See*, *e.g.,* Bundesarbeitsgericht (German Federal Labour Court), *BAG, Urteil vom 1. 7. 2010 - 2 AZR 270/09, available at* lexetius.com/2010,4693**;** vgl. Einzelnachweise bei BAGv. 1.7.2010- 2 AZR 270/09, Rz. 13.

32 *See*, *Ahmed Mahamdia v Algeria*, Judgment in Case C-154/11, Luxembourg, 19 July 2012, Court of Justice of the European Union.

in Köln Consulate General of Turkey, before Köln Labour Court, after acknowledging that sovereign acts and functions of states cannot be subjected to the jurisdiction of another states, otherwise any judicial review by a foreign court on sovereign acts of delegations or agents would vitiate the functions of embassies or consulates general, the Court held that the functions of the plaintiff in the consulate general felt within the exercise of public powers since she had access to the personal information of Turkish citizens, arranged the documents concerning them and signed these documents, had an institutional account of the Ministry, visited the citizens in the rest homes and prisons and listened to their complaints, therefore German courts did not have jurisdiction.[33]

Additionally, a former employee who had been working for 12 years in Toronto Consulate General of the US and dismissed due to his accounting errors and unexcused absence filed a case before Canadian Labour Court. The Court rejected the plea of state immunity since the US's act in question had not form a sovereign act falling within the exercise of the public powers, but a commercial activity which had private law nature.[34]

Parallelly, in the suit for compensation filed by a former employee who was dismissed from London Embassy of the US, the Britain Court substantially reviewed on the merits and adjudicated against the US. The request by former employee to be reemployed according to the court rule was rejected by the US authorities, thereon he sued against that act of rejection before Britain courts. After the court accepted the plea of state immunity by the US and ordered that it had no jurisdiction over that act, the former employee brought the case against the UK before the European Court of Human Rights, arguing that his right to due process was infringed. The European Court found the applicant unjust, so dismissed the case, contemplating that it "was not aware of any trend in international law towards relaxation of State immunity rules in the case of recruitment to foreign missions, which missions, by their very nature involve sensitive and confidential issues, related to the diplomatic and organization policy of the foreign state" [35]

The case filed by Ali Akbar against United Arab Emirates (UAE) stemming from a commercial contract between the two before Indian Supreme Court

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33 *See*, Arbeitsgericht Köln (Köln Labour Court), *Demirel v. Türkei*, BAG v. 01.02.2012- 2 AZR 270/09, Rz.11.

34 *See*, *Zakhary v United States of America*, 2012 CanLII 15690 (ON LA), *available at* http://canlii.ca/t/fqrt0.

35 *See*, *Fogarty v. United Kingdom*, European Court of Human Rights, Grand Chamber, November 21, 2001, App. No. 37112/97, *available at* http://www.echr.coe.int/Eng/Judgments/htm.

also exemplifies the matter in question. The court rejected the plea of state immunity of UAE and justified as stating that a person incurred a commercial loss had to be given a legal remedy as a resort by which s/he would claim his or her damage.[36]

Lastly, in the dispute brought by a former employee Leila Husein who dismissed from Zagreb Embassy of Turkey before Croatian Labour Courts for the claim of reemployment, either Zagreb Municipal Labour Court or the Supreme Court, considering the inconveniencies caused by a verdict ordering that an employee be reemployed in an embassy of a foreign state, required Turkey to merely pay compensation and other financial losses to the plaintiff.[37]

To conclude, it is understood from the court decisions that consistent and coherent jurisprudence on the matter in question in different states have been emerged, clarifying the fields of application of restrictive and absolute state immunity. It can also be observed that they have adopted restrictive immunity in some private law acts or transactions including commercial or labour relations, and similar criteria that they apply while assessing the precise nature of the functions carried out by state to determine whether it enjoy sovereign immunity.

4. Practice of Turkey Regarding State Immunity From Past to Today

Speaking of Turkey's approach regarding state immunity; Turkey had adopted absolute sovereign immunity until abrogated Act Concerning Private International Law and Procedural Law (MÖHUK) came into force in 1982. The Court de Cassation of Turkey confirmed the notion of absolute immunity in its verdict[38] dated in 1968:

"The suit is composed of a compensation claim deriving from a building contract signed between the plaintiff and the defendant, the US. A foreign state will be subject to the exercise of jurisdiction of Turkey's courts, if there is an agreement explicitly authorizing so or an acquiescence of the foreign state to the authorization or otherwise the subject matter will be dealt with in terms of public international law… Since the extension of territorial jurisdiction of a state to another state is not possible, the dismissal of case, thereof, will be appropriate according to the procedure, act and public international law principles."[39]

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36 *See*, *Mirza Ali Akbar Kashani v. United Arab Republic and Another* (AIR 1966 SC 230).

37 *See*, *Leyle Hüsein v. Republika Turska*, Republika Hırvatska Opscinski Gradanski Sud u Zagrebu, Poslovni borj: 3 Ovr-2629/13-2, 25.02.2013.

38 Yargıtay Ticaret Dairesi (Court de Cassation's Trade Chamber), Decision dated 16 February 1968 and numbered E.1966/630,K.1968/921.

39 *Id.*

Article 33[40] of abrogated MÖHUK which had came into force in 1982 envisaged that foreign states did not enjoy sovereign immunity in disputes stemming from private law relations and thus differentiated a foreign state's acts or transactions falling within the context of sovereign and public powers from private law ones. Thereby, restrictive state immunity adopted by several countries in that period was ratified by Turkey as well.

In that connection, after the entry into force of abovementioned Act in 1982, Court de Cassation of Turkey did not accept the US's plea of state immunity in a case[41] arising from rental contract, a private law agreement. Likewise, in its decision[42] dated 2006, Court de Cassation determined the revocation of visa granted to the plaintiff and the attitude conducted by the US state officials against him during his entry to the border as torts and held that the US did not enjoy immunity from jurisdiction. Besides in 2009, Court de Cassation acknowledged a lessor pleading debt claim and misuse compensation arising out of lease contract to be right and held that the US did not enjoy sovereign immunity in a dispute deriving from a lease contract governed by private law and a decision on the merits had to be rendered with regard to the misuse compensation claim.[43]

Moreover, İstanbul Seventh Labour Court dismissed the suit brought for the claim of termination compensation by a former driver whose contract with Croatian General Consulate in İstanbul was annulled, held that Croatia did not enjoy sovereign immunity since the case was litigated with related to a dispute regarding labour law and compensation claim, decided substantially on the merits of the case and adjudicated in favor of the driver.[44] Having considered the verdict given by İstanbul Seventh Labour Court, the Croatian Government directly defended itself upon the merits without claiming state immunity in another case brought by a former driver employed in Ankara Embassy for compensation arising out of infringement of employment contract.

Besides, in a case for fixing of period of service filed by an insured personnel of Ankara Embassy of the Kingdom of Denmark, the tenth Civil Chamber of

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40 MÖHUK no. 5719 in force, art. 49.

41 Yargıtay 13. Hukuk Dairesi (Court de Cassation's 13th Civil Chamber), Decision dated 16 November 1989 and numbered E.1989/3896,K.1989/6648.

42 Yargıtay 4. Hukuk Dairesi (Court de Cassation's 4th Civil Chamber), Decision no. E.2006/718,K.2006/1549. That decision of Court de Cassation was rendered upon the appeal of Ankara 22nd Civil Court's order no. E.2003/158,K.2004/382.

43 Yargıtay 6. Hukuk Dairesi (Court de Cassation's 6th Civil Chamber), Decision dated 1.12.2009 and numbered E. 2009/10643 K. 2009/10361.

44 İstanbul 7. İş Mahkemesi (İstanbul 7th Labour Court), Decision dated 11.2.2012 and numbered E. 2012/1453 K. 2012/5443.

Court de Cassation found the Embassy's plea of state immunity to be unjust and justified its decision arguing that exemption of jurisdiction should not be accorded to the private law disputes; otherwise, there would not be a legal remedy as a last resort for Turkish employees recruited in the embassies of foreign states.[45]

Last but not least, in cases filed by nineteen persons including driver, secretary, security guard, kavass, maid recruited in Ankara Embassy of Saudi Arabia for compensation claim for termination of their contracts, Ankara Seventh and Seventeenth Labour Court and Court de Cassation rejected Saudi Arabia's objection to the jurisdiction of Turkish courts and also its argument that exclusive jurisdiction of the subject matter belonged to the courts in Saudi Arabia.[46]

In sum, as seen in the aforesaid decisions of the first instance courts and Court de Cassation, the inclination of judicial authorities in Turkey is towards that the principle of restrictive sovereign immunity has matured into the rule.

5. Restrictive State Immunity as a Customary International Law

Two elements are observed in order a customary rule to become a binding norm for a state. First one is constant and uniform state practice in which a sufficiently extensive and representative number of states participate in a consistent manner.[47] A state practice may occur if a state invokes a certain course of action or refrain from such an action. That action may be composed of legislative, executive or judicial act, diplomatic stance and administrative decision such as military or other public institutions' orders.[48] The course of action or approach need to be constant and consistent and reflect general and extensive acceptance of states even if not necessarily be universal.[49]

The second element, even if controversial, is *opinio juris* which is a belief, on the part of the generality of States, that a practice corresponds to a legal obligation or a legal right.[50] A rule of customary international law may

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45 Yargıtay 10. Hukuk Dairesi (Court de Cassation's 10th Civil Chamber), Decision dated 14.10.1993 and numbered E. 1993/5620, K. 1993/10875.

46 Fevzi Kızılkoyun., "İşçilerin tazminat davası "Diplomatik" kriz yarattı", Hürriyet Gündem, 10 Mayıs 2013, Ankara, *available at* http://www.hurriyet.com.tr/gundem/23248115.asp.

47 London Conference 2000, Committe on Formation of Customary (General) International Law**,** *supra* note 17, at 8.

48 *Id*. at 20-28; Anthea Elizabeth Roberts, Traditional and Modern Approaches to Customary International Law: A Reconciliation, 95 AM. J. INT'L L. 757, 757 (2001), at 760.

49 London Conference 2000, Committe on Formation of Customary (General) International Law**,** *supra* note 17, at 29**;** Rome Statute of the International Criminal Court, art. 38(1)(b); *see, e.g*., *North Sea Continental Shelf* (FRG/Den.; FRG/Neth.), 1969 ICJ Rep. 3, 44 (Feb. 20).

50 London Conference 2000, Committe on Formation of Customary (General) International

be binding upon even a state which does not explicitly consent that rule.[51] Moreover, there are insights claiming that an article of an international agreement acquired the status of customary international law should be binding on states which have not signed or ratified that agreement.[52]

In consideration of the foregoing, whether the principle of restrictive state immunity matured into a binding customary international norm for states including Turkey can be examined as such: The restrictive immunity principle has been adopted by 75 out of 118 esteemed states of international community and the legal framework governing that principle has been shaped to a large extent.[53] As to Turkey, considering the codification of the restrictive immunity principle in 33rd article of abrogated MÖHUK, the inclinations of the first instance and supreme courts of Turkey hinting that the restrictive immunity principle should be implemented as a widely accepted rule by states and transmission of circular note[54] from the Ministry of Foreign Affairs of Turkey to the foreign missions in Ankara, articulating that they will be subjected to the jurisdiction of Turkey in disputes stemming from private law acts or transactions, including primarily labour contracts, it can aptly be purported that the aforementioned principle has matured into a binding customary rule in the sense of elements establishing customary international law.

To conclude, states which adopted the notion of restrictive state immunity and internalized it in their legal systems through legislative, executive or judicial means should also determine a coherent and principled legal strategy in conformity with national and international inclinations regarding the implementation of state immunity, taking into account the nature of the rule as a customary international norm, for the disputes brought against them before foreign or international courts. In this connection, acknowledging the probability that restrictive immunity might mature into a binding rule for them, states had better to produce and present substantial legal arguments in the disputes before foreign courts rather than merely objecting the jurisdiction of the court.

Law**,** *supra* note 17, at 32; *See, e.g.,* for *opinio juris* element in International Court of Justice decisions: *North Sea Continental Shelf supra* note 49; *Nicaragua v The United States of America Case,* Case Concerning the Military and Paramilitary Activities in and against Nicaragua, International Court of Justice Reports 1986. (27 June 1986); *The Legality of the Threat or Use of Force of Nuclear Weapons in Armed Conflict*, Advisory Opinion of International Court of Justice, (8 July 1996).

51 *See*, Verdier, Voeten, *supra* note 8, at 2.

52 *Id.*

53 *Id*., at 11 and 29.

54 Circular dated 05.09.2007 no. 379225 of the Ministry of Foreign Affairs of Turkey transmitted to the Diplomatic Missions.

6. GuIdelines to Be Followed in Cases Before Foreign Courts Arising Out of Labour Law

In their foreign missions, addition to employing diplomatic personnel who are subject to the appointment and rotation, states also locally recruits employees who belongs to either nationality of their own or of the host state. Given that the locally employed personnel cannot be appointed or rotated to another mission by the employer state, reside in the host state for a long time or obtain a permanent residential status, even gain the citizenship of the host state and keep restrictive diplomatic or consular status by virtue of Vienna Conventions[55], their employment relations with the mission are governed by the law of either the state to which the mission belongs or the host state. In this connection, the matters such as recruitment process of the aforesaid personnel, their rights stemming from their employment contracts, termination of their contracts, seniority indemnity and termination compensation they deserve are regulated in the framework of these two laws. In other words, missions have to observe these laws in their actions with related to the employee.

For the sake of example, Turkish or foreign national contractual personnel are recruited in foreign missions of Turkey by virtue of article 4(B) of State Officials Act[56] numbered 657, Principles Regarding the Recruitment of Contractual Personnel[57] numbered 7/15754 and 'standardized service contract' signed by employee and mission. In these legal texts, despite references[58] to the foreign law, there are provisions envisaging that Turkish law will prevail in cases of dispute. Nevertheless, in case of a dispute between the contractual personnel and the mission, the personnel are tendentious not to litigate the case before Turkish judicial authorities but the courts of the host state; thereby the dispute cannot be adjudicated within the framework of abovementioned national legal texts. In spite of the standardized service contract signed in terms of Turkish law and an article in the contract authorizing Turkish jurisdiction, it is observed that foreign courts deem themselves competent to adjudicate, decide on the merits and apply their own law. As they decide whether the subject matter of the case is within their jurisdiction, they take into account whether the contractual personnel is a citizen of the host state, obtain a permanent residential status or exercise public powers.

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55 Vienna Convention on Diplomatic Relations 18 April 1961 and Vienna Convention on Consular Relations 24 April 1963.

56 State Officials Act no. 657 issued in the Official Gazette dated 23.07.1965 and numbered 12056 and entered into force on that date.

57 Principles Regarding the Recruitment of Contractual Personnel entered into force via Cabinet Decree dated 06.06.1978 and numbered 7/15754.

58 *Id*., art.3 and 7.

That being said, in order to obtain court orders in favor of defendant states in cases arising out of private law transaction or labour contracts, to prevent any interference to exercising of their sovereign powers and to determine a principled, consistent and productive approach in conformity with international law, states should adopt certain guidelines taking into account their own and other states' approaches regarding the implementation of restrictive immunity principle and the pertaining provisions of United Nations Convention on Jurisdictional Immunities of States and Their Property which accords with these approaches.

In this context, states would obtain favorable orders if they plea the argument of sovereign immunity before the courts which belongs to the states still defending the doctrine of absolute immunity such as Iran, China, North Korea or Post-Soviet States including Ukraine, Estonia, Armenia and Turkic Republics.[59] It is highly likely that courts of these states would dismiss cases brought against foreign states, considering that examining judicial powers over another state is not appropriate according to their law, jurisprudence and state practice.

Likewise, the courts in Common-Law states such as the UK, Ireland, New Zealand, South Africa, Singapore, Canada and Pakistan are tendentious to widely interpret the sovereign immunity rule in favor of defendant states in cases filed by specifically employees of embassies or consulates without taking into account their hierarchical position, citizenship or status.[60] Therefore, considering this fact, insisting on the defense that the mission and state enjoy sovereign immunity will be favorable in the cases brought in these states.

Moreover, courts are usually inclined not to accept the plea of state immunity in the cases filed by employees who are citizens of the state whose court is adjudicating or who have permanent residential status in that state.[61] Hence, it is more likely that, because of not being competent, a court dismiss the case brought against embassy or its state by an employee who is a national of other than the state whose court is adjudicating or who is not resident in that state.

Furthermore, it will be productive to evaluate the nature and qualification of functions and duties of employee who sues the mission before foreign courts and accordingly to determine a legal strategy. In this context, states

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59 *See*, Verdier, Voeten, *supra* note 8, at 12 and 29.

60 *See, e.g.,* R. Rajesh Babu, "Foreign State Immunity in Contracts of Employment with Particular Reference to Indian State Practice"*, Journal of Indian Law Institute*, 49 (4) 2007, at 9.

61 *Id*., at 11.

have to set forth the argument of state immunity in cases brought by their employee whose functions fall within the context of public powers.[62] As examples for the employees whose functions and duties form a part of exercise of sovereign powers mentioned in the preamble of United Nations Convention, International Law Commission counts "private secretary, crypto agent, translator, interpreter" and the similar employees whose functions pertain with national security and fundamental state interests.[63] The personnel who can access classified documents and correspondences for the sake of duty may be added to the aforementioned list. The defense that the jurisdiction is exclusively belongs to the state that employs the personnel, so it enjoys sovereign immunity with related to the subject matter, can be set forth in the cases brought by the aforesaid employees regardless of the type of subject matter, claim for compensation or reemployment whatsoever. Nevertheless, it is possible to plead substantial arguments upon the merits rather than the plea of state immunity in the suits arising from labour disputes filed by the personnel not categorized above such as cook, driver, repairman or maintenance staff.

Last but not least, as to the disputes concerning recruitment, renewal of employment or reinstatement of an individual, regardless of the employee's function of duty, states should insist on that they obtain exclusive territorial jurisdiction and enjoy sovereign immunity from jurisdiction of foreign courts on the subject matter.[64] This is because the mere discretion on whether a former employee is to be reinstated or an individual is to be recruited belongs exclusively to states, which is also an appearance of unilateral and sovereign nature of public powers.[65] But, given that immunity in the subject matter does not encompass compensation claims arising out of aforementioned disposals, it will be appropriate to not insist on the plea of immunity and to set forth substantial arguments upon the merits in such cases filed for merely compensation claims. Hence, in a case brought by an employee named Zakhary of the US's embassy in London for compensation claim deriving from dismissal before Britain courts, the US defended itself upon merits without

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62 United Nations Convention on Jurisdictional Immunities of States and Their Property, art. 11/2(a)-(b).

63 *See, e.g.,* ILC Commentaries on Draft articles on Jurisdictional Immunities of States and Their Property, (A/46/10), *Yearbook of the International Law Commission*, 1991, vol. II, Part Two, at 42.

64 United Nations Convention on Jurisdictional Immunities of States and Their Property, art. 11/2(c).

65 *Bkz*. ILC Commentaries on Draft articles on Jurisdictional Immunities of States and Their Property, *supra* note 63, at 43.

claiming immunity from jurisdiction of the court.[66]

7. Conclusion

Sovereign immunity among which is first commonly accepted rules of public international law and which is based upon the principles of that an equal cannot exercise sovereign powers on another equal and thereby cannot judge it, was at first absolutely interpreted in the strict sense by French Court de Cassation's notorious Casaux decision in 1849; however, having considered the issues such as rule of law, individual rights, labour rights, commercial concerns, export-import volume etc., that rule had not been extended to the commercial-industrial and private law acts or transactions of which states did not exercise sovereign powers and thereby the process for adopting the notion of restrictive state immunity was mounted. In this regard, states have adopted the notion of restrictive state immunity through either issuing policy determining documents on the subject matter or instantiating the verdicts of its domestic courts determining that the notion of restrictive state immunity should be embraced and implemented. Thereby, today, the restrictive immunity principle has been adopted by 75 out of 118 esteemed states of international community.

As to Turkey, given that the codification of the restrictive immunity principle in 33rd article of abrogated Act Concerning Private International Law and Procedural Law, the inclinations of the first instance and supreme courts of Turkey hinting that the restrictive immunity principle should be implemented as a widely accepted rule by states and transmission of circular note from the Ministry of Foreign Affairs of Turkey to the foreign missions in Ankara, articulating that they will be subjected to the jurisdiction of Turkey in disputes stemming from private law acts or transactions, including primarily labour contracts, it can aptly be asserted that the aforementioned principle has matured into a binding customary rule in the sense of elements establishing customary international law.

In consideration of the foregoing, in order to obtain court orders in favor of defendant states in cases arising out of private law transaction or labour contracts, to prevent any interference to exercising of their sovereign powers and to determine a principled, consistent and productive approach in conformity with international law, states should adopt certain guidelines taking into account their own and other states' approaches regarding the implementation of restrictive immunity principle and the pertaining provisions of international legal texts which accords with these approaches

66 *See*, *Zakhary v United States of America*, *supra* note 34.

such as United Nations Convention on Jurisdictional Immunities of States and Their Property and European Convention on State Immunity.

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PROBLEMATIQUE WHEN A CONTRACT INCLUDES OFFER TO A SPECIFIC JURISDICTION AND ALSO MAKES A REFERENCE TO ARBITRATION

Bir Sözleşmenin Aynı Zamanda Tahkim ve Mahmeke Şartı İçermesi Sorunu

Mehmet ÇOĞALAN*

ABSTRACT

There is a problematique when a contract includes both specific jurisdiction and arbitration clauses for judges and lawyers. In this situation, one of the dispute resolution system should be picked on by judges because both systems cannot be implemented to dispute. Validity of arbitration agreement or arbitration clause are arbitrability crucial issue for this problematique. Deep analysing and to settle up of this issue will also help international trade and development because faster solution will lead better trade.

Keywords: Problematique, Arbitration, Jurisdiction, Contracts, World Trade, Jugdes.

ÖZET

Bir sözleşmenin aynı anda mahkeme ve tahkim şartı içermesi hakim ve avukatlar için soruna yol açmaktadır. Bu durumda, uyuşmazlığa her iki çözüm sistemi uygulanamayacağından bir sistemin seçilmesi gerekmektedir. Tahkim sözleşmesinin veya şartının ve tahkime gidilebilirliğin durumu bu sorunun çözümünde hayati bir yerde durmaktadır. Bu sorunun derin bir analiz ve çözümü aynı zamanda hızlı bir çözüme sebebiyet vereceğinden uluslararası ticeret ve gelişime katkıda bulunacaktır.

Anahtar Kelimeler: Sorunsal, Tahkim, Yargı Yetkisi, Sözleşmeler, Dünya Ticareti, Hakimler

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1. INTRODUCTION

The relationships have increased all over the world between traders with development of communication and technology during the twentieth century and beginning of the twenty-first century. This situation leads to more commercial transactions and more international contracts between businesses in all kind of fields. National courts and arbitration tribunals are getting involve during this process which is crucial part of trade life. Parties

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and their advisers struggle to make the procedures of dispute resolution straightforward and clear when they refer to arbitration or submit to a specific jurisdiction in their contract. If parties prefer these two options together, problems can arise as to interpretation and enforceability. This study will focus on the issue when parties choose a specific jurisdiction and make a reference to arbitration in the same contract. This study will firstly deal with different approaches to contradiction of arbitration and litigation clauses by scholars and courts generally, and then consequences of different kinds of expression on arbitration or jurisdiction clause by the parties. After examining and discussing contradiction issue between clauses, validity of international arbitration agreements will be dealt with in the aspect of formal validity and substantive validity which is crucial for arbitration. After that, arbitrability issues will be viewed from different aspects such as public policy, economic value of subject matter, anti-trust and competition claim.

2. DIFFERENT APPROACHES TO CONTRADICTION OF ARBITRATION AND LITIGATION CLAUSES

There are different opinions and examinations among the scholars and judicial authorities as to contradictions between specific jurisdictions and arbitration clauses when both of them are stated in the same contract. According to Joseph the arbitration clause should prevail over the specific jurisdiction clause.[1] Ostrove, Salomon, Shifman also states that "… courts in Hong Kong, London, Paris, Singapore, Stockholm, Switzerland, and the United States tend to exhibit a markedly pro-arbitration attitude."[2] Tang also claims that "most countries are willing to limit the reach of state power and public policy, and allow party autonomy in wider areas."[3] However, this method is not always correct, judicial authorities should give effect to the parties' intention. According to Garnett, "While at times courts and writers have emphasised the need to give effect to the intentions of the parties, on occasions an implicit or explicit policy in favour of arbitration appears to have been adopted.[4] It is possible to say that to give arbitration clauses more value than specific jurisdiction clauses without examining other factors such as wording or the intention of parties might cause injustice. Joseph also claims that simply considering unclear notion of superiority of arbitral procedure and give effect to arbitration clause is not acceptable.[5] Garnett states, "The process for determining which of the clauses is to be given priority must be neutral and

1 Joseph, 2005
2 Ostrove, Salomon, Shifman, 2014, p.3
3 Tang, 2014, p. 108
4 Garnett, 2013
5 Joseph, 2005

even handed, relying on parties' wording as far as possible."[6] Therefore, it is possible to claim that judicial authorities should consider a variety of factors before giving effect to arbitration or specific jurisdiction clauses.

Regarding international arbitration regulations, such as UNCITRAL and New York Convention, there are no articles which regulate the situation where parties prefer both arbitration and specific jurisdiction in the same contract. Hence, it can be said that contractual interpretation has a crucial effect to resolve such contradictions instead of simply upholding the arbitration clause.

The arbitration clause and exclusive jurisdiction clause should be examined and placed in the same level. This idea is improved by Hague Convention on Choice of Court Agreements, as there are narrower grounds for non-recognition of specific jurisdiction provisions.[7] Also in the *Donohue v Armco Inc*[8] case, the specific jurisdiction clause was given more value than it used to be given.

2.1. Expressed Priority of Arbitration over Specific Jurisdiction

This situation occurs where parties have preferred specific jurisdiction and arbitration provisions in the same contract, but they explicitly expressed the priority of arbitration. In the *Naveria Amazonica Peruanna SA v Compania internocional de Seguros del Peru*[9] case the contract contained both the specific jurisdiction in Lima, Peru and the arbitration clause in London. The court held that parties gave priority to arbitration clause because Article 1 of contract including the arbitration clause was a typed endorsement, whereas the other one including specific arbitration was printed. In another case *Law Debenture Trust Corb Plc v Elektrim Finance BV*[10], the parties gave predominance to specific jurisdiction other than arbitration in the contract; therefore, the court resolved this situation in favour of specific jurisdiction. A similar Approach was employed in *Oppenheim v Midnight Marine*[11] where the contract contained respectively London arbitration and service of suit. But, the arbitration clause included a statement which stated in case of conflict this clause should prevail. Hence, the conflict was easily resolved in favour of the arbitration clause. It is possible to claim that giving more importance to one clause is a crucial clue for determining parties' intentions when the contract includes both arbitration and litigation clauses.

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6 Garnett, 2013, p.362
7 Hague Convention on Choice of Court Agreements, 2005, Article 5, Article 6
8 [2002] 1 Lloyd's Rep 425
9 [1988] 1 Lloyd's Rep
10 [2005] EWCH 1412 (Ch)
11 [2010] NLCA 64

It is possible that in the same contract parties may chose an optional arbitration clause and a mandatory specific jurisdiction provision or it can be reversed. According to Garnett, "There is Commonwealth authority to the effect that where such clauses are included in the same contract, priority should normally be given to the mandatory provision, on the basis that the obligatory overrides the optional."[12] Judicial Authorities may use this principle 'obligatory overrides the optional' because parties' intention can be seen more effectively in this way. In the *Ace Capital Ltd v CMS Energy Corp*[13] case the contract concluded between the parties which included US service of suit clause and mandatory arbitration clause. An anti-suit injunction application was made by a party to the court to set barrier against proceedings in the US court. The court accepted the injunction demand because the jurisdiction clause as to the US court was optional.

2.2. Expressed Priority of Specific Jurisdiction over Arbitration

This situation occurs where parties have preferred specific jurisdiction and arbitration provisions in the same contract, but they explicitly expressed priority of specific jurisdiction. *In Momentous.ca Corporation v Canadian American Association of Professional Baseball Ltd.*[14] case*, in Nicola v Ideal Image Developmet Corp*[15] case *and* in *The Law Debenture Trust Corp PLC v Elektrim Finance BV*[16] case, parties gave priority to specific jurisdiction in their agreement. According to and implementing intention of parties, the specific jurisdiction clause was properly entrusted by the judgements to constrain a contracting party's chase of arbitration.

2.3. Dividing Subject Matter between Arbitration and Specific Jurisdiction

When a contract consists of arbitration and litigation clauses, it can be possible that the parties particularly define matters which might be referred to specific jurisdiction or arbitration. For instance, some contracts include an arbitration clause in a particularised place, but it allows contracting parties to go to court for urgent situations. Even though there is an arbitration clause in a contract, these situations such as temporary measures of protection or freezing orders, do not derogate the arbitration law or arbitration agreement.[17] In the *Seeley International Pty Ltd v Electra Air Conditioning BV*[18] case there

12 Garnett, 2013, p.364
13 [2008] 2 CLC 318
14 [2010] ONCA 722
15 [2009] FCA 1177
16 [2005] EWCH 1412
17 Arbitration Act 1996 c.23, Section 44
18 [2008] NSWSC 644 [45]

was a distribution agreement between parties, provision 20.1 states that "any question or difference of opinion shall be referred to arbitration in Melbourne Australia" whereas provision 20.3 stated that "nothing in this clause 20 prevents a party from seeking injunctive or declaratory relief in the case of material breach or threatened breach of this agreement". The claimant applied to the court and asserted that there was a breach of agreement in connection with consumer protection, and the respondent claimed a stay of litigation process because of the arbitration clause. The court held that the court proceeding should progress because clause 20.3 is enough for to complete court process. At this point it might be claimed that such court decisions can effect arbitration in a negative way; however, parties' intentions and freedom of contract should be considered by adjudicators.

2.4. Optional Specific Jurisdiction and Arbitration Clauses

When there is a mandatory arbitration clause and optional specific jurisdiction or the reversed situation, it might be easy to resolve such a contradiction. However, if both clauses are optional, this situation might cause complexity during the litigation process, because, one of the parties might try litigation process but another party asks for stay of the litigation process in favour of arbitration. In this situation, Joseph claims that ordinary principles of contractual construction will be applied[19], which means even though there is a more general clause, the specific clause governs the conditions to that it is directed. Joseph also states that "the English courts will be reluctant to hold that the dispute resolution choice fails for uncertainty or ambiguity but will strive instead to uphold the bargain by enforcing the arbitration provision as to substantive disputes."[20] In the *Paul Smith Ltd v H&S international Holding Inc*[21] case, in the contract parties referred arbitration and International Commercial Chambers (ICC) rules as to appointment of arbitrators. Parties also have chosen English law and the English courts as an exclusive jurisdiction. In this case, Mr Justice Steyn held that applicable law and the jurisdiction clause was ineptly expressed but on its factual construction purely mentioned the law applicable to the arbitration. Hence, the arbitration agreement was upheld by the English court. In another similar case, *The Nerarno*[22], a bill of landing contained an arbitration clause and also a statement "if there is a conflict, English law and jurisdiction applies." Mr Justice Clarke held that there is no inconsistency between submission of an arbitration clause and English

19 Joseph, 2010
20 Joseph, 2010, para. 4.73
21 [1991] Lloyd's Rep. 127
22 [1994] 2 Lloyd's Rep. 50

jurisdiction, because when there is submission of arbitration in the contract, the courts had residual supervisory jurisdiction in England. In another case, the parties' intention was expressed. In *Shell international v Coral Oil Co. Limited*[23] there were two provisions in the contract, one of them provided arbitration in London, and another one provided English courts for jurisdiction. Mr Justice Moore Bick held that the jurisdiction of the courts in England was narrowed to cases with regard to the proper law. It was considered that clauses in the contract both conferring arbitration and jurisdiction are an untidy situation. However, this effect should be given to intention of parties which substantive conflict be determined by arbitration

According to Garnett, "English courts here seem to have applied the same principles from the situation where a "stand-alone" optional arbitration agreement exist and have routinely ordered arbitration in this context, paying little if any regard to jurisdiction clause." Some cases can be given at this point as an example. In *NB Three Shipping Lth v Harebell Shipping Ltd*[24]*,* the charter contract included both a special jurisdiction and an arbitration clause in which only the owner can arbitrate. Even though the claimant sued in England and argued that there is no breach of the arbitration agreement by starting of the court, the court decided to stay of proceedings in favour of arbitration. The reason for this decision was that the owner can use the arbitration option to defeat the court proceeding. In another case, *Lobb Partnership v Aintree Racecourse Company Ltd*[25]*,* the court decided again on stay of proceedings in favour of arbitration because the arbitration clause can be triggered during the court process when a party wants to prefer arbitration. The idea that a jurisdiction clause can only be applied when both parties do not prefer arbitration might cause derogation of the jurisdiction clause. In the *Westfal-Larsen & Co A/s v Ikerigi Compania Vaviers SA (The Messiniaki Bergen)*[26] case, the contract between the parties contained English jurisdiction and London arbitration clauses. The claimant preferred a court in the US, but proceedings were stayed in favour of arbitration by the court. The defendant started the action in England as to appointment of arbitrator. Then the court held that the optional arbitration clause generated a binding duty upon the party who invoked the arbitration right.

2.5. Alternative Approaches to Contradictions

The cases and situations mentioned above were mostly about expressed

[23] [1999] 2 Lloyd's Rep. 606
[24] [2004] EWCH 2001 (Comm)
[25] [2000] 1 Building LR 65
[26] [1983] 1 Lloyd's Rep 424

priority of arbitration over specific jurisdiction or reverse situation, division of subject matter between arbitration and specific jurisdiction, the courts generally giving importance to parties' intention and wording, and in some situations courts stay of proceedings in favour of arbitration based on different reasons.

When parties treat arbitration and litigation equally, one alternative is to allow parties to choose their own dispute resolution in tandem. This alternative might cause a lot of complexity and responsibility. Parties might pay additional price, parallel proceedings might give a different decision, and complexity can occur during the enforcement of the awards. According to Garnett "Common law courts today strongly emphasise the need for "one-stop shop" adjudication in order to reduce fragmentation and duplication of dispute resolution."[27]

Which forum is more appropriate to settle dispute, is another alternative for resolve the contradiction clauses between arbitration and jurisdiction. When a party sues in a court firstly which is proper for contract conditions, this selection should usually be given deference. This situation might be the reverse, arbitration also can be given deference, if first attempt to dispute resolution is towards to arbitration. According to Garnett "In common law countries, the well-established test for resolving conflicts of jurisdiction between courts in different countries is to apply the discretionary principles of appropriate forum with weight given to the tribunal which is seised first time."[28] For example, in the *Henry v Henry*[29] case it was stated that if there is a court proceedings in a foreign country, it is oppressive and vexatious to start the same proceedings in an Australian court. Of course such an approach does not give exact priority to the court first seised, for example, the court might decline jurisdiction or court might consider the all circumstances in the case, and also the claimant's objective as to commencing the proceedings.

Another alternative is to render void or inoperative the arbitration clause when both dispute resolution clauses as to jurisdiction and arbitration is mandatory. However, this kind of approach is against the equal treatment to dispute resolution.

27 Garnett, 2013, p.369
28 Garnett, 2013, p.370
29 [1996] 185 CLR 571

2.6. Discussing Arbitration Agreement Issue under the Brussels I Regulation[30] (Brussels I)

Arbitration agreements start to take more places in commercial life all around the Europe. However, Brussels I contains noting about arbitration agreements, in fact arbitration agreements totally excluded from Brussels I's scope. At that situation, what is the consequences, even though there is an arbitration agreement, a party sues in a court of member state.

According to Article 71(1) of Brussels I "shall not affect any convention to which the member states are parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgements."[31] All member states of European Union (EU) are party of New York Convention, and courts of member states need to refer the parties to arbitration when courts seise a dispute which contracting parties made an arbitration agreement under New York Convention. According to Hartley "this requires the court to decline jurisdiction, or to stay the proceedings before it, so that the arbitration can proceed."[32]

3. VALIDITY OF INTERNATIONAL ARBITRATION AGREEMENT

3.1. Formal Validity of International Arbitration Agreement

It would be worth to mention about validity of international arbitration agreements because when contradiction clauses discussed above, it was presumed that parties have concluded valid arbitration agreement. If they did not conclude a valid arbitration agreement, court would probably ignore this agreement. According to Gusy, Hosking, Schwarz "The tribunal's jurisdiction depend on whether a valid arbitration agreement exists, and if so, on whether the dispute falls within its scope."[33]

Arbitration agreements are subject to some formal requirements such as signature requirements or written form. These kind of requirements can possibly be stated in international regulations such as New York Convention on the Recognition and Enforcement of Foreign Awards (New York Convention)[34] and UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL)[35] or in domestic regulations. Born states that "…some national laws purport to impose other form requirements, including requirements

30 Council Regulation EC 44/2001
31 Council Regulation EC 44/2001, Article 71
32 Hartley, 2009, p.180
33 Gusy, Hosking, Schwarz, 2011, p.151
34 New York Convention on the Recognition and Enforcement of Foreign Awards, 1958
35 UNCITRAL Model Law on International Commercial Arbitration, 1985

concerning the size and location of type in which the arbitration clause is printed…"[36]

3.2. New York Convention

New York Convention is one of the most important regulation as to arbitration, so the validity conditions that it states are crucial. According to Article 2(1) New York Convention only applies to "agreements in writing"[37] and according to Article 2(2) "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."[38] When both Articles are considered together, an arbitration agreement should be in written form and should be signed by the parties or should be included in an exchange of letters or telegrams. It can also be stated that "Article 2(2) has generally been held to exclude not just orally agreements, but also arbitration agreements involving oral or tacit acceptance of written instruments and unsigned, but orally agreed written contracts."[39]

3.3. UNCITRAL Model Law

This regulation originally included requirements which were parallel to Article 2(2) of New York Convention. According to Article 7(2) an arbitration agreement should be in writing, it requires written agreement or an exchange of written communications.[40] However, there are two options that are adopted in the 2006 Revisions to the UNCITRAL Model law that diminish or remove any writing requirement. The second option provides that "an agreement to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not." It is possible to claim that with this revision oral and tacit consent will both be enough for validity of agreement. The first option provides that "an arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means." Requirements for signature or exchange of writings were eliminated by this agreement.

3.4. Substantive Validity of International Arbitration Agreements

Like formal validity requirements, there are also substantive requirements

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36 Born, 2012, p.74

37 New York Convention on the Recognition and Enforcement of Foreign Awards, 1958, Article 2(1)

38 New York Convention on the Recognition and Enforcement of Foreign Awards, 1958, Article 2(2)

39 Born, 2012, p.74

40 UNCITRAL Model Law on International Commercial Arbitration, 1985, Article 7(2)

for international arbitration agreements. Important factors of substantive validity are impossibility and frustration, fraudulent inducement, illegality, waiver of right to arbitrate, inconvenient arbitral seat, lack of capacity, termination and repudiation, unconscionability and duress, inoperable, incapable of being performed, null and void, and more important factor will be dealt under this section.

Article 2(3) of New York Convention and Article 8(2) UNCITRAL provide the same things as to null and void, inoperative or incapable of being performed, and it exactly states that "…unless it finds that the said agreement is null and void, inoperative or incapable of being performed."[41] According to Born ""null and void" permits defences based on unconscionability, fraud, mistake, lack of capacity and illegality, "inoperative" permits defences based on termination, waiver, changed circumstances, and repudiation, "incapable of being performed" refers to impossibility and similar defences."[42]

Regarding the fraudulent inducement, it can be said that there is no convention or domestic regulation as to arbitration that specifically deal with this problem. However, arbitral tribunals and courts consider that an arbitration contract is null and void or invalid if fraudulent inducement is based for holding the arbitration contract. However, fraudulent inducement does not influence the validity of an arbitration clause comprised in the agreement subject the separability presumption. Dispute resolution clauses cannot be denounced because of fraudulent misrepresentation of the services or goods.[43]

Concerning illegal aspects, many jurisdictions do not enforce and recognise illegality of contract, but some courts consider the seperabilty presumption and suggest that the illegality of underlying contract does not affect the arbitration clause.[44] Unusually, courts state that some kind of illegality of the underlying agreement can also render the related arbitration contract inacceptable.[45]

Regarding to inconvenient arbitral seat, when contracting parties made an agreement as to arbitral seat, this choice can become highly inconvenient for one party. Born claims that "It is occasionally suggested that this inconvenience provide sufficient grounds for challenging the validity of the arbitration

41 New York Convention on the Recognition and Enforcement of Foreign Awards, 1958, Article 2(3)

42 Born, 2012, p.77

43 *Fiona Trust & Holding Corp. v Privalov* [2007] UKHL 40

44 *Buckeye Check Cashing, Inc. v Cardenga* [2006] 546 U.S. 440

45 *Soleimany v Soleimany* [1998] Q.B. 785

agreement, including on the basis of unconscionability or mistake."[46] It can be said that this kind claims should be effective only in consumer contracts not another kind of agreements such as agreement between two massive companies.

Lack of capacity is also very crucial for arbitration agreements, and New York Convention gives authorisation to a state court to reject recognition of an decision if the contracting parties to the arbitration agreement were under some incapacity Article 5(1)(a) of New York Convention states that "… were, under the law applicable to them, under some incapacity…"[47] UNCITRAL model law also has parallel regulations in Articles 8, 34(2)(a)(i) and 36(1)(a)(i), but both of these regulations do not have regulation as to choice of law or substantive rules in connection with capacity. However, other contract requirements as to legal capacity can be copied such as mental incompetence.

4. ARBITRABILITY

Another crucial subject in connection with contradiction between arbitration clause and specific jurisdiction is arbitrability which means "whether a subject matter can be submitted to arbitration."[48] Tang states that "Restrictions to arbitrability and the subject matter scope of jurisdiction clauses include public policy, protection for third parties and involvement of state sovereign interest and administrative power."[49] When a judgement decide arbitrability, he intends to use the *lex fori* because arbitrability related to public interest that classified mandatory rules. New York Convention also provides that, national courts should consider lox fori, at the enforcement and recognition stage of arbitral awards, and if subject matter of arbitration is not arbitrable, enforcement and recognition can be refused.[50] Tang states that "Although arbitral tribunals are not obliged to consider the law of the enforcement jurisdiction, from a pragmatic perspective, arbitral tribunals would consider the risk of refusal to recognise and enforce arbitral awards."[51] Parties cannot submit all disputes to the arbitral tribunals, this procedural autonomy is limited by states' law as to subject matter. Born says that "Virtually all states have provided that, by legislation or judicial decisions,

46 Born, 2012, p.81
47 New York Convention on the Recognition and Enforcement of Foreign Awards, 1958, Article 5(1)(a)
48 Tang, 2014, p.93
49 Tang 2014, p.108
50 New York Convention on the Recognition and Enforcement of Foreign Awards, 1958, Article 5(2)(a)
51 Tang 2014, p.96

that certain categories of disputes are non-arbitrable."[52] UNCITRAL model law states that specified kind of claims can be treated as non-arbitrable.[53] However, jurisdiction agreements scope is broader because conflicts are determined by courts, and these courts have power of state, but arbitrators power comes from parties' agreement.

One of the most important factor that limits arbitrable matters is public policy, some countries' law adopt public policy to set barrier arbitration whereas other states do not strictly exclude all arbitration disputes by using public policy. It can be claimed that the reason for these differences might be ambiguity of public policy concept.

Economic value of subject matter is also important criteria for arbitrability. For example, under German law any dispute in connection with economic interest can be subject matter of arbitration, under Swiss law, any claim in connection with property is arbitrable. Regarding the English law this distinction is not clear enough, and case-by-case approach has been employed by court system.

Anti-trust and competition disputes were held by a lot of courts as a non-arbitrable.[54] However, this kind of attitudes have been left by the courts recently, and many kind of civil anti-trust disputes are not non-arbitrable. Supereme Court Held in *Mitsubishi motors Corp. v. Soler Chrysler-Plymouth, Inc.* that federal antitrust disputes were arbitrable, given that they rose from a transnational operation and they stated that "the utility of the New York Convention in promoting the process of international commercial arbitration depends upon the willingness of national courts to let go of matters they normally would think of as their own."

Some kind of subject matters are excluded by states commonly such as validity of marriage, citizenship, child custody, criminal cases. It depends on states law policy whether a subject matter should get involved in arbitration or not, and decision maker have to take into account their codes before determination. Tang claims that arbitrability is determined by arbitral tribunals in most situations, but also in recognition and enforcement stage courts may decide arbitrability.[55]

Nowadays, even though public interest cannot be subject matter of arbitration, arbitration scope is getting wider all around the world, most

[52] Born, 2012, p.82
[53] UNCITRAL Model Law on International Commercial Arbitration, 1985, Article 1(5)
[54] Born, 2012
[55] Tang, 2014

countries allow some matters which were not arbitrable in the past. States' courts determined that different kind of claims had no arbitrability because of public policy. However, recently in developed states courts narrowed down the no arbitrability approach.

5. CONCLUSION

Arbitration tribunals are becoming more important to dispute resolution all around the world day by day. This increase is being encouraged by generally developed states' courts and government policy. Even though judgements generally support arbitration agreements, sometimes there can be some conflict such as discrepancy clauses. In case of discrepancy between arbitration and jurisdiction clauses there are different approaches as we mentioned above. Determination of jurisdiction or arbitration clauses by courts should depend upon variety of reasons such as, parties' intention, wording, expressed priority of specific jurisdiction over arbitration or expressed priority of arbitration over specific jurisdiction. It can also be possible that different states' courts may give different decision about similar cases as to conflict between jurisdiction and arbitration clauses. Validity of arbitration clauses is also important because when an arbitration agreement is not valid, it is possible that this agreement can be ignored from the beginning of process. The party who wants to court process for determination of dispute may also claim validity problem of arbitration agreement. Arbitrability is crucial for arbitration agreement because it indicates whether subject matter is proper for arbitration process. There are different factor that affect arbitrability of subject matter such as public policy or economic value of subject matter, however, nowadays these kind of restrictions are being narrowed down by developed countries, and arbitration as a dispute resolution system is getting more essential for businesses in commercial life.

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