



**JUSTICE ACADEMY OF TURKEY**

**LAW** Year: 10 • Issue: 19 • December 2019  
**& JUSTICE**  
**REVIEW**



**JUSTICE ACADEMY  
OF TURKEY**

**LAW** & **JUSTICE**  
REVIEW

Year: 10 • Issue: 19 • December 2019

[yayin.taa.gov.tr](http://yayin.taa.gov.tr)

ISSN 1309-9485

19



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Ankara Açık Ceza İnfaz Kurumu İş Yurdu Müdürlüğü Matbaası

İstanbul Yolu 13. Km. Ergazi-Şaşmaz/ANKARA

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# THE MAIN DETERMINANTS OF SENTENCING DECISIONS IN GERMANY\*

*Almanya'da Cezanın Belirlenmesi Kararının Ana Etkenleri*

**By Dr. Mehmet Arslan. LL.M (Freiburg)\***

## **Abstract**

In Germany, as elsewhere, the sentencing decisions of judges are determined by a number of factors. Although they are bound by the provisions of the Penal Code, further factors influence their decisions, while stipulating the type and degree of sentence in any specific case. Accordingly, the sentencing law in Germany must be explored not only under the substantive aspects; but also sentencing-related consideration of criminal proceedings are to be mentioned. Given the fact that the German Penal Code contains only few sentencing guidelines, the jurisprudence of the Appellate Courts plays a crucial role in legal practice. In last regard, the review procedure of the sentencing decisions by Appellate Courts also needs to be taken into consideration. Finally, the sentencing practice also in Germany must be seen against the sub-cultural backgrounds of its decision-makers. Thus, this contribution aims to give an overview of relevant statutory frameworks of sentencing and a review of empirical research on sentencing practice in Germany.

**Keywords:** retribution, prevention, determining sentence, conflict between objectives of punishment, alternatives of punishment, trial and sentencing, review of sentencing decision.

## **Özet**

Diğer ülkelerde olduğu gibi, Almanya'da da hakimin cezanın tayinine ilişkin kararını belirleyen bir çok etken bulunmaktadır. Her ne kadar Ceza Kanunu'na tabi olsalar da; hakimlerin somut bir olayda cezanın çeşidi veya haddi konusundaki belirlemeleri hakkındaki kararlarını başka bazı hususlar da etkilemektedir. Bu bağlamda, Almanya'da cezanın belirlenmesi sadece maddi hukuk anlamında değil; aynı zamanda cezanın tayinine ilişkin usul hukuku kurumları çerçevesinde irdelenmelidir. Alman Ceza Kanunu'nun cezanın belirlenmesi bakımından sadece bazı genel ilkeler içermesi karşısında; temyiz mahkemelerinin oluşturdukları içtihat hukuku uygulamada önemli bir rol oynamaktadır. Keza temyiz mahkemelerinin temyiz usulünün de ayrıca göz önüne alınması gerekmektedir. Son olarak Almanya'da cezanın belirlenmesi uygulamasının karar vericilerin alt kültürleri bağlamında değerlendirilmesi gerekmektedir. Böylece bu çalışma Almanya'da cezanın belirlenmesi bakımından geçerli olan mevzuat hakkında genel bir bakış ve mevcut cezanın tayini uygulaması hakkında yapılmış ampirik çalışmaların özetini sunmaktadır.

**Anahtar Kelimeler:** oç alma, önleme, cezanın belirlenmesi, cezanın amaçları arasındaki çatışma, cezaya alternatifler, kovuşturma ve cezanın tayini, hükmün cezaya ilişkin kısmının temyizi.

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\* This contribution is a revised version of the text that I used for my lecture of 12 April 2017 at the Institute of Criminal Law and Criminology at the University of Tehran and at the Faculty of Law and Political Sciences at University of Kharazmi in Iran.

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## INTRODUCTION

The penalizing of certain behaviors and the inflicting of sanctions are severe public interventions into basic rights. As such they require justification by statutory law.<sup>1</sup> And the German constitution supplements this requirement with the principle of legality, according to which an act may be punished only if it was defined by law as a criminal offence before the act was committed. The definition must cover not only the description of the criminalized behavior (*nullum crimen sine lege*) but also the legal consequences that will be imposed on the offender (*nulla poena sine lege*).<sup>2</sup>

With regard to the legal consequences – which are the subject of this contribution – German criminal law makes an important differentiation: first, provided that the perpetrator of a crime has acted in a blameworthy way, the legal consequence of his criminal act is a punishment that is to be inflicted on him. According to the Federal Constitutional Court, the delimitation of the criminal sanction by guilt or blameworthiness is anchored in the Constitution, specifically by the notion of human dignity stipulated explicitly in Article 1 para (1) of the Constitution. Thus, punishment in a specific case can only be justified by the guilt of the offender (*nulla poena sine culpa*). Any infliction of

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<sup>1</sup> Bundesverfassungsgericht [BVerfG] [FEDERAL CONSTITUTIONAL COURT], Case No. 2 BvR 1275/16 (Oct. 13, 2016), BeckRS 2016, 53503, Rn. 40; Bock, Dennis, *Strafrecht Allgemeiner Teil*. Berlin 2018, at 77 f.; Wilfert, Marie Verena, *Strafe und Strafgesetzgebung im demokratischen Verfassungsstaat*. Tübingen 2017, at 18 ff.; Nettesheim, Martin, *Verfassungsrecht und Unternehmenshaftung. Verfassungsrechtliches Freiheitskonzept und präventionsgetragene Verschärfung des Wettbewerbsanktionsrechts*. Tübingen 2018, at 11; Sternberg-Lieben, Detlev, *Die objektiven Schranken der Einwilligung im Strafrecht*. Tübingen 1997, at 24 ff.; Kampmann, Tobias, *Die Pönalisierung der geschäftsmäßigen Förderung der Selbsttötung–Eine kritische Analyse. Zugleich ein Reformvorschlag zur Normierung ärztlicher Suizidassistentz*. Baden-Baden 2017, at 61; Kaspar, Johannes, *Sentencing Guidelines versus freies richterliches Ermessen – Empfiehlt sich eine Reform des Strafzumessungsrechts?*, NEUE JURISTISCHE WOCHENSCHRIFT – BEILAGEHEFT [NJW-Beil] 37, at 37 (2018).

<sup>2</sup> Bundesverfassungsgericht [BVerfG] [FEDERAL CONSTITUTIONAL COURT], Nov. 11, 1986, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 43, 44 (1987); Bundesverfassungsgericht [BVerfG] [FEDERAL CONSTITUTIONAL COURT], Feb. 2, 1991, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 223, 223 (1992); Bundesgerichtshof [BGH] [Federal Court of Justice], Sep., 15, 1995, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3324, 3327 f. (1995); see also Vogel, Benjamin, *The Core Legal Concepts and Principles Defining Criminal Law in Germany in: The Limits of Criminal Law. Anglo-German Concepts and Principles*, ed. by Matthew Dyson and Benjamin Vogel. Cambridge 2018, 44 f.; Brodowski, Dominik, *Alternative Enforcement Mechanism in Germany in: The Limits of Criminal Law. Anglo-German Concepts and Principles*, ed. by Matthew Dyson and Benjamin Vogel. Cambridge 2018, at 371; Foster, Nigel and Sule, Satish, *German Legal System and Laws*. 4th ed. Oxford 2010, at 339.

punishment beyond the guilt of offender is unconstitutional.<sup>3</sup> Hence, punishment requires the guilt of the offender and vice versa. That is the basic notion of punishment, and makes up the so-called first track of sanctions that German criminal law provides as a reaction to criminal behavior. However, besides the guilt of the offender, his degree of dangerousness as displayed through his criminal act could also justify the imposition of certain measures. Accordingly, without or beyond the guilt of the perpetrator, sanctions of rehabilitation and security can be ordered in accordance with the degree of his dangerousness and the principle of proportionality.<sup>4</sup> In sum, criminal law in Germany, as a core legal tool to deal with crime, is founded on the differentiation between the guilt-based punishment of an offender, and measures of rehabilitation and security which refer to the dangerousness of the offender.<sup>5</sup> Measures of rehabilitation and security generally concern three groups of offenders who are considered as serious recidivists because they are at particular risk: the mentally ill, the addicted, and habitual offenders.<sup>6</sup> The measures are mental hospital orders, custodial addiction treatment orders, preventive detention, supervision orders,

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<sup>3</sup> Bundesverfassungsgericht [BVerfG] [FEDERAL CONSTITUTIONAL COURT], Mar. 19, 2013, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1058, 1059, paras. 1-2, 20 (2013); Weigend, Thomas and Turner Iontcheva, Jenia, The Constitutionality of Negotiated Criminal Judgements in Germany. 15 GERMAN LAW JOURNAL [GLJ] 81, 85 (2014); see generally and compare, Streng, Franz, Strafrechtliche Sanktionen. Die Strafzumessung und ihre Grundlagen, 3d ed. Stuttgart 2012, at 164; Frisch, Wolfgang, Zur Bedeutung von Schuld, Gefährlichkeit und Prävention im Rahmen der Strafzumessung, in: Grundfragen des Strafzumessungsrechts aus deutscher und japanischer Sicht, ed. by Wolfgang Frisch. Tübingen 2011, 3–26, at 23; Wilfert, *supra* note 1, at 145 f.; Köhler, Michael, Über den Zusammenhang von Strafbegründung und Strafzumessung. Heidelberg 1983, at 47 ff.; for principle of guilt in German Criminal Law in general see Foster and Sule, *supra* note 2, at 340; Vogel, *supra* note 2, at 43 f.

<sup>4</sup> Section 62 StGB; see also Bundesverfassungsgericht [BVerfG] [FEDERAL CONSTITUTIONAL COURT], Nov. 16, 2004, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 739, 739 (2004); instructive on that Bohlander, Michael, Principles of German Criminal Procedure. London 2012, at 221 ff.; see also Frisch, *supra* note 3, at 23; Jung, Heike, Some Reflection on the German System of Sanctions, 30 ISRAEL LAW REVIEW [IsLR] 223, 229 (1996); Foster and Sule, *supra* note 2, at 77.

<sup>5</sup> See generally Kett-Straub, Gabriele and Kudlich, Hans, Sanktionenrecht. 1st ed. München 2017, at 5; see generally also Schäfer, Gerhard and Sander, Günther M. and Gerhard, van Gemmeren, Praxis der Strafzumessung, 6th ed. München 2017, at 9 and 113; Tatjana, Hörnle, Moderate and Non-Arbitrary Sentencing without Guidelines – the German Experience, 76 LAW & CONTEMPORARY PROBLEMS [Law & Contemp. Probs.] 191, 210 (2013); Albrecht, H.-J., Sentencing in Germany: Explaining Long-Term Stability in the Structure of Criminal Sanctions and Sentencing. 2, 21 (2013) available at <http://weblaw.haifa.ac.il/he/Events/Punishment/Documents/Hans-Joerg%20Albrecht.pdf>; Thomas Weigend, Sentencing in West Germany, 42 MARYLAND LAW REVIEW [Md. L. Rev.] 37, 44 (1983).

<sup>6</sup> See also Albrecht, *supra* note 5, at 2.

and disqualification from driving or from exercising a profession.<sup>7</sup> As a result of several statutory amendments since 1998, preventive detention can be imposed not only on sexual offenders for an indeterminate term, namely after serving a prison sentence.<sup>8</sup> However, the proportionality of this preventive detention was questioned by the European Court of Human Rights in Strasbourg<sup>9</sup> and also by the Federal Constitutional Court.<sup>10</sup> The jurisprudence of both courts has set new limits on preventive detention.<sup>11</sup>

## I. STATUTORY FRAMEWORK OF SENTENCING

As to the criminal sanctions, for each crime that is regulated by its special part the German Penal Code provides a provision concerning punishment. The provision standardly contains initial indications regarding the kind and severity of punishment that can be imposed on the perpetrator of a specific crime. In the general part of the Penal Code's criminal sanctions, the conditions and methods of imposition are described in a more detailed way. So sentencing takes place in Germany by application of both parts of the Penal Code.<sup>12</sup>

<sup>7</sup> Section 61 StGB; see for more Bohlander, *supra* note 4, at 178 f.; Kett-Straub and Kudlich, *supra* note 5, at 7; Jung, *supra* note 4, at 230.

<sup>8</sup> See also Albrecht, *supra* note 5, at 3; see for more Michael, Schäfersküpper and Jens, Grote, Neues aus der Sicherungsverwahrung – Eine aktuelle Bestandsaufnahme, *NEUE ZEITSCHRIFT FUER STRAFRECHT [NSTZ]* 197 – 203 (2016).

<sup>9</sup> European Court of Human Rights [ECtHR] *M. v. Germany*, App. No. 19359/04, at para. 86 (Dec. 17, 2009), <http://hudoc.echr.coe.int/>. [= HRRS 2010 Nr. 1]; *Berland v. France*, App. No. 42875/10, at para. 36, see also Bergmann v. Germany, App. No. 23279/14, at para. 77 (Jan. 7, 2016); *Ilseher v. Germany*, App. No. 10211/12 and 27505/14, at para. 59 (Feb. 02, 2017); instructive in this regard Bohlander, *supra* note 4, at 226 ff.

<sup>10</sup> Bundesverfassungsgericht [FEDERAL CONSTITUTIONAL COURT], Case No. 2 BvR 2365/09 (July. 19, 2011); Case No. 2 BvR 740/10 (Sept. 20, 2011); Case No. 2 BvR 2333/08 (Nov. 21, 2012); Case No. 2 BvR 1152/10 (July. 19, 2011); Case No. 2 BvR 571/10 (June. 30, 2010), <https://www.hrr-strafrecht.de/hrr/archiv/11-06/index.php?sz=6>.

<sup>11</sup> Renzikowski, Joachim, Abstand halten! – Die neue Regelung der Sicherungsverwahrung, *NEUE JURISTISCHE WOCHENSCHRIFT [NJW]* 1638–1644 (2013); Pösl, Michael, Die Sicherungsverwahrung im Fokus von BVerfG, EGMR und BGH, *ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTDOGMATIK [ZIS]* 132–146 (2/2011); Dessecker, Axel, Die Sicherungsverwahrung in der Rechtsprechung des Bundesverfassungsgerichts, *ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTDOGMATIK [ZIS]* 706–713 (8-9/2011); see also Streng, Strafrechtliche Sanktionen, *supra* note 3, at 216 ff.

<sup>12</sup> See generally Vogel, *supra* note 2, at 40 ff.; Streng, Franz, Sentencing in Germany: Basic Questions and New Developments, 8 *GERMAN LAW JOURNAL [GLJ]* 153, 153 (2007); Hörnel, *supra* note 5, at 190; Cornelius, Nestler, Sentencing in Germany, 7 *BUFFALO CRIMINAL LAW REVIEW [Buff. Crim. L. Rev.]* 111, 138 (April 2003); Götting, Bert, Gesetzliche Strafrahmen und Strafzumessungspraxis. Eine empirische Untersuchung anhand der Strafverfolgungstatistik für die Jahre 1987 bis 1991. Frankfurt am Main 1997, at 227; Dölling, Dieter, Die rechtliche Struktur der Strafzumessungsentscheidung im deutschen Strafrecht, in: *Grundfragen des Strafzumessungsrechts aus deutscher und japanischer Sicht*, ed. by Wolfgang Frisch. Tübingen 2011, 85–93, at 86.

The main criminal sanctions of the German Penal Code are fines and imprisonment.<sup>13</sup> Fines are imposed in daily units. The minimum fine sanction is five days and the maximum three hundred and sixty days.<sup>14</sup> The courts decide on the number of day fines in accordance with the (degree of) guilt of the offender. The offender has to serve the same number of days in prison should he fail to make the payment;<sup>15</sup> however, individual federal states (so-called *Länder*) are allowed to replace this by community service.<sup>16</sup> The amount of day fines is calculated in line with the income of the offender. Thereby, the courts are able to impose fines of equivalent effects on offenders of different financial means whose criminal acts are comparable with regard to the seriousness of the wrongfulness and the degree of their guilt, and equally to take the victimization of the victims into account.<sup>17</sup>

A prison sentence is only in exceptional cases for life – for murder, for instance (an aggravated form of manslaughter),<sup>18</sup> otherwise, imprisonment is for a fixed term.<sup>19</sup> The Penal Code provides a general minimum and maximum imprisonment term, namely from one month up to fifteen years.<sup>20</sup> However, the special provisions of the Penal Code in most cases contain as a penalty a lesser and more enumerable range of punishment (Strafrahmen).<sup>21</sup> They provide a scale of sentences that binds the judges in their sentencing decision. They must fix the sentence from within this scale. For instance:

Section 242 par. 1 (Theft) Whosoever takes chattels belonging to another away from another with the intention of unlawfully appropriating them for himself or a third person shall be liable to imprisonment not exceeding five years or a fine.<sup>22</sup>

<sup>13</sup> Section 38 – 43 StGB; see also Kett-Straub and Kudlich, *supra* note 5, at 6; Streng, *Strafrechtliche Sanktionen*, *supra* note 3, at 170; Harrendorf Stefan, *Sentencing Thresholds in German Criminal Law and Practice: Legal and Empirical Aspects*, 28 *Criminal Law Forum*, 501, at 503 (2017).

<sup>14</sup> Section 40 StGB; see also Kett-Straub and Kudlich, *supra* note 5, at 61; Nestler, *supra* note 12, at 112.

<sup>15</sup> Section 43 StGB; see also Harrendorf, *supra* note 13, at 507.

<sup>16</sup> Section 293 EGStGB; see also Schäfer/Sander/van Gemmeren, *supra* note 5, at 35.

<sup>17</sup> Bundesverfassungsgericht [BVerfG] [FEDERAL CONSTITUTIONAL COURT], Jun. 1, 2015, NEUE ZEITSCHRIFT FUER STRAFRECHT RECHTSSPRECHUNGSREPORT, [NStZ-RR] 335, 335 (2015); Bundesgerichtshof [BGH] [Federal Court of Justice], Apr. 28, 1976, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1510, 1510 f. (1976); Oberlandesgericht Jena [OLG] [Higher Regional Court], Case No. 1 OLG 161 Ss 53/1 (Oct. 27, 2017), BeckRS 2017, 135278, Rn. 12; see also Weigend, *supra* note 5, at 42.

<sup>18</sup> Section 212 StGB; see also Kett-Straub and Kudlich, *supra* note 5, at 34; Jung, *supra* note 4, at 229 f.

<sup>19</sup> Section 38 par. 1. StGB; see also Bohlander, *supra* note 4, at 171.

<sup>20</sup> Section 38 par. 2. StGB.

<sup>21</sup> See also Albrecht, *supra* note 5, at 4; Nestler, *supra* note 12, at 113; Weigend, *supra* note 5, at 41.

<sup>22</sup> Translation of German Penal Code by Bohlander, Michael, available at <https://www.>

The sentencing range in that case is from one month (as general minimum imprisonment term) to five years. Another example:

Section 223 par. 1 (Causing bodily harm) Whosoever physically assaults or damages the health of another person, shall be liable to imprisonment *not exceeding five years or a fine*.<sup>23</sup>

In this regard, criticisms have been raised that the principle of legality is undermined by such broad statutory sentencing ranges, because the lawmaker thereby leaves considerable discretion to the judge to specify the particular sentence in each case.<sup>24</sup> In addition, the Penal Code sometimes limits the discretion of the judge by providing *a mandatory minimum sentence range*. The punishment that the judge must impose in a specific case must exceed a certain amount which is already prescribed by law. There is no possibility for a judge to fix a sentence below this threshold.<sup>25</sup> For instance:

Section 249 par. 1 (Robbery) Whosoever, by force against a person or threats of imminent danger to life or limb, takes chattels belonging to another from another with the intent of appropriating the property for himself or a third person, shall be liable to imprisonment of not less than one year.<sup>26</sup>

Apart from robbery, in serious offences the German Penal Code provides a minimum statutory penalty of one year's imprisonment (perjury or counterfeiting of money),<sup>27</sup> or three years' (aggravated robbery),<sup>28</sup> or five years' (manslaughter),<sup>29</sup> and in some cases ten years' imprisonment (preparation of a war of aggression or high treason against the federal state, and other examples).<sup>30</sup>

Another example of limited discretion in sentence fixing can be seen in cases of so-called aggravated forms of certain crimes, and in cases of "Regelbeispiele" (regular examples).<sup>31</sup> The former are distinct crimes characterized by the existence of some additional element beside the regular form of the crime: burglary of private homes, for example, is classed as an aggravated form of theft (section 244 par. 1 Nr. 3; compare with 243 par. 1 Nr. 1 StGB). The

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[gesetze-im-internet.de/englisch\\_stgb/](https://www.gesetze-im-internet.de/englisch_stgb/).

<sup>23</sup> *Id.*

<sup>24</sup> Weigend, *supra* note 5, at 51; Nestler, *supra* note 12, at 111; Kaspar, *supra* note 1, at 37.

<sup>25</sup> See in general Meier, Bernd-Dieter, *Strafrechtliche Sanktionen*. 3d ed. Heidelberg 2015, at 174; Nestler, *supra* note 12, at 113.

<sup>26</sup> Translation by Bohlander, Michael, available at [https://www.gesetze-im-internet.de/englisch\\_stgb/](https://www.gesetze-im-internet.de/englisch_stgb/).

<sup>27</sup> Section 154 par. 1. 146 par. 1. StGB.

<sup>28</sup> Section 250 par. 1. StGB.

<sup>29</sup> Section 212 par. 1. StGB.

<sup>30</sup> Section 80, 81 StGB.

<sup>31</sup> Albrecht, *supra* note 5, at 4; Dölling, *supra* note 12, at 86 f.

category of “Regelbeispiele”, meanwhile, is not that clear, even though it is of some significance with regard to judges’ sentencing decisions, since an aggravated sentencing range is stipulated in the case of a regular example. The formal classification of such crimes is a matter of controversy among German legal scholars, with opinions ranging from their being an aggravated form of a regular crime, just like in the case of burglary mentioned above, to a mixed sort of criminal provision or a *sui generis sentencing norm*.<sup>32</sup> The jurisprudence considers them to be a special sentencing norm: as the law indicates by its wording, so the argument goes, the commission of a typified example will regularly require the use of the increased sentencing range, although the examples are neither enumeratively defined by the Penal Code, nor the court obliged to make use of the aggravated sentencing range even in the case of a regular example.<sup>33</sup> Admittedly, the Penal Code does not always describe the “Regelbeispiele” in the form of a specific typified example. In so-called cases of particular seriousness, it gives the judge the power to determine whether the specific crime committed has reached the required level of seriousness. The following provision illustrates both types of “Regelbeispiele”:

Section 243 par. 1 (Aggravated Theft) In especially serious cases of theft the penalty shall be imprisonment from three months to ten years. An especially serious case typically occurs if the offender

1. for the purpose of the commission of the offence breaks into or enters a building, official or business premises or another enclosed space or intrudes by using a false key or other tool not typically used for gaining access or hides in the room; ....<sup>34</sup>

<sup>32</sup> For this dispute see Eisele, Jörg, Die Regelbeispielmethode im Strafrecht. Tübingen 2004, at 143 ff.; Kastenbauer, Andreas, Die Regelbeispiele im Strafzumessungsvorgang. Dargestellt am Beispiel des Diebstahls in einem besonders schweren Fall. München 1986, at 125 ff.

<sup>33</sup> See for more Bundesgerichtshof [Federal Court of Justice], Jun. 17, 1997, NEUE ZEITSCHRIFT FUER STRAFRECHT-RECHTSSPRECHUNGSREPORT, [NStZ-RR] 293, 293 (1997); Oberlandesgericht Düsseldorf [OLG] [Higher Regional Court], Jul. 7, 1983, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2712, 2713 (1983); Eisele, Jörg, Die Regelbeispiele: Tatbestands- oder Strafzumessungslösung?, JURISTISCHE ARBEITSBLEATTERA [JA], 309, 310 (2016); Vormbaum, Thomas and Bohlander, Michael, A Modern History of German Criminal Law, translated by Margaret Hiley, 1st ed. Berlin Heidelberg 2014, at 256; Calliess, Rolf-Peter, Der Rechtscharakter der Regelbeispiele im Strafrecht. Zum Problem von Tatbestand und Rechtsfolge im 6. Strafrechtsreformgesetz, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 929–935 (1998); Eser, Albin, A century of penal legislation in Germany. Developments and trends in: Old ways and new needs in criminal legislation. Documentation of a German-Icelandic colloquium on the development of penal law in general and economic crime in particular, ed. by Albin Eser and Jonatan Thormundsson, Freiburg 1989, 1–26, at 10; see for instance section 243, 224 StGB.

<sup>34</sup> Translation by Bohlander, Michael, available at [https://www.gesetze-im-internet.de/englisch\\_stgb/](https://www.gesetze-im-internet.de/englisch_stgb/).



In particular, by introducing the category of regular examples, the legislature created a third kind of component of a criminal norm alongside the elements of the crime (description of criminalized behavior) and the legal consequences; this contradicts the conventional two-part structure of criminal norms in German law.<sup>35</sup> As the “examples” do not belong to the description of the crime, so the argument continues, the principle of certainty applies less strictly. Thus, ambiguous terms – like “causing a major financial loss” in case of fraud (Section 263 par. 3 Nr. 2) – are deemed compatible with the principle of certainty. However, the use of this legislative technique brought with it not only uncertainties as regards sentencing decisions by the judge, but also considerable problems for the German theory of crime, since the application of requirements or legal figures such as intention, attempt, and participation in a regular example, have not yet been clearly conceptualized in the jurisprudence and doctrine.<sup>36</sup>

The willingness of lawmakers to equip the judge with broad discretion in questions of sentencing can also be seen from so-called less serious cases, where the German Penal Code enables judges to choose more moderate sentence ranges. By using this tool, the judge can avoid the minimum mandatory sentences in the above-mentioned cases of violent crimes and, most importantly, suspend imposed prison sentences of less than two years.<sup>37</sup> For instance:

Section 250 par. 3 (Aggravated robbery) In less serious cases under subsections (1) and (2) above the penalty shall be imprisonment *from one to ten years*.

## II. DEVELOPMENT OF SENTENCING LAW

This brief survey of the statutory framework for sentencing shows that judges have broad leeway in deciding on sentences in particular cases, despite

<sup>35</sup> Calliess, *supra* note 33, at 933; Eisele, *supra* note 33, at 312; for the structure of a criminal norm in general see Wilfert, *supra* note 1, at 17.

<sup>36</sup> For the discussions in general see Eisele, *supra* note 32, at 143 ff. and 406; Hochmayr, Gudrun, Wert- und Schadensqualifikationen versus Regelbeispiele. Eine vergleichende Untersuchung des polnischen, deutschen und österreichischen StGB in: Vergleichende Strafrechtswissenschaft. Frankfurter Festschrift für Andrzej J. Szwarc zum 70. Geburtstag, ed. by Jan C Joerden, Uwe Scheffler and Arndt Sinn. Berlin 2011, 250 ff.; see also Andrissek, Tobia R., Vergeltung als Strafzweck. Tübingen 2017, at 186 ff.; Franzke, Kevin, Der „privilegierte Vollendungsstäter“? – Ein Beitrag zur Harmonisierung der Rechtsprechung bei „versuchten Regelbeispielen“ NEUE ZEITSCHRIFT FUER STRAFRECHT [NSfZ], 566 – 572 (2018).

<sup>37</sup> Bundesgerichtshof [Federal Court of Justice], Case No. 2 StR 355/80, paras. 56-243, (Sept. 17, 1980), [https://www.jurion.de/urteile/bgh/1980-09-17/2-str-355\\_80/](https://www.jurion.de/urteile/bgh/1980-09-17/2-str-355_80/).

the mandatory minimum sentences.<sup>38</sup> Nevertheless, the Penal Code contains a second set of boundaries and preferences that judges have to comply with in their sentencing decisions.<sup>39</sup> In this regard, one must mention the reform of 1969, which shaped current German sentencing law.<sup>40</sup> The reform introduced at least two important patterns: a preference for fines over imprisonment regarding offences of lesser or medium seriousness, i.e. those requiring an imprisonment sentence up to 6 months such as bodily harm, theft or fraud; and an avoidance of short-term imprisonment.<sup>41</sup> The court is allowed to impose a prison sentence below 6 months only if this is strictly required due to reasons of rehabilitation of the offender or general deterrence, which it has to explain in writing.<sup>42</sup> According to the jurisprudence of the Appellate Courts, general deterrence requires the imposition of an imprisonment sentence below 6 months if the public would perceive a fine as incommensurate with the general sense of justice, and the confidence of the population in the inviolability of their rights could thereby be damaged.<sup>43</sup> In fact, the practice of the courts is consistent with this legislative preference, especially in cases of less serious offences.<sup>44</sup> Apart from exceptional cases, in such cases the courts impose fines on first-time offenders. For the first reoffence there is a suspended sentence, and finally for the second reoffence an enforceable prison sentence.<sup>45</sup>

Regarding the judges' margins in making decisions, which remain broad, section 46 was reformulated in the course of the 1969 reform.<sup>46</sup> It now provides

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<sup>38</sup> See also Albrecht, *supra* note 5, at 4.

<sup>39</sup> Weigend, *supra* note 5, at 51; Hörnle, *supra* note 5, at 192.

<sup>40</sup> Eser, *supra* note 33, at 10; Vormbaum and Bohlander, *supra* note 33, at 226; Weigend, *supra* note 5, at 50.

<sup>41</sup> Section 41 und 47 StGB; see also Schäfer/Sander/van Gemmeren, *supra* note 5, at 26 and 38; Streng, *Strafrechtliche Sanktionen*, *supra* note 3, at 81; Harrendorf, *supra* note 13, at 510; Bohlander, *supra* note 4, at 178.

<sup>42</sup> Albrecht, *supra* note 5, at 4; see also Weigend, *supra* note 5, at 61, 65; Hörnle, *supra* note 5, at 191.

<sup>43</sup> Bundesgerichtshof [Federal Court of Justice], Jul. 7, 2017, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3011, 3013 (2017); Bundesgerichtshof [Federal Court of Justice], Dec. 8, 1970, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 439, 440 (1971); Oberlandesgericht Köln [OLG] [Higher Regional Court], May. 18, 2001, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3491, 3492 (2001); see also Beckmann, Heinrich, *Die Aussetzung des Strafrestes bei lebenslanger Freiheitsstrafe*, NEUE JURISTISCHE WOCHENSCHRIFT [NJW], 537, 538 (1983); for a critical perspective see Köhler, *supra* note 3 at 21.

<sup>44</sup> Section 47 par. 1 StGB; see also Albrecht, *supra* note 5, at 4; and see generally Frase, Richard S., *Sentencing in Germany and the United States: Comparing Äpfel with Apples*, MAX PLANCK INSTITUTE FOR FOREIGN AND INTERNATIONAL CRIMINAL LAW, <https://www.mpicc.de/shared/data/pdf/frase-endausdruck.pdf>.

<sup>45</sup> Weigend, *supra* note 5, at 66.

<sup>46</sup> Eser, *supra* note 33, at 10; Vormbaum and Bohlander, *supra* note 33, at 226; Weigend, *supra* note 5, at 66.

judges with certain principles which they have to consider in their sentencing decisions. As will be shown in more detail below, a closer consideration reveals that section 46 is far from guiding the judge in terms of fixing a particular sentence within the statutory sentencing ranges.

Still in terms of historical developments, the subsequent amendments (1986) abolished a general statutory minimum sentence for recidivists and extended the scope of suspension from six months to two years.<sup>47</sup> In case of recidivism, the multipliable offences of the recidivist are sanctioned by one cumulative sentence that must be reduced in accordance with certain specific rules.<sup>48</sup> Serious recidivism that entails a considerable degree of dangerousness is addressed – as emphasized above – by measures of rehabilitation and security, and especially preventive detention.<sup>49</sup>

Finally, sentence bargaining in court trials was introduced by a 2009 amendment to the German Code of Criminal Procedure, although in fact it had already been informally developed and practiced by the criminal courts.<sup>50</sup> Section 257c StPO [German Code of Criminal Procedure] mainly empowers the trial court to offer a reduced upper and lower limit of a sentence to the defence in return for a confession by the defendant. The agreement comes into existence if the defendant and public prosecutor consent to the court's proposal.<sup>51</sup> The law does not allow bargaining between the participants of the

<sup>47</sup> See also Albrecht, *supra* note 5, at 3; Streng, *supra* note 12, at 168.

<sup>48</sup> Section 54, 55 StGB; see for more Schäfer/Sander/van Gemmeren, *supra* note 5, at 441 ff; Streng, *Strafrechtliche Sanktionen*, *supra* note 3, at 330 ff.

<sup>49</sup> For that see also Albrecht, *supra* note 5, at 3.

<sup>50</sup> Bundesgesetzblatt, [BGBl], no.49 3.8.2009, 2353 ff, <https://dejure.org/2009,51880>; see for instance Bundesgerichtshof [BGH] [Federal Court of Justice], Jun. 9, 2004, NEUE ZEITSCHRIFT FUER STRAFRECHT, [NStZ] 115, 115 ff. (2005); Bundesgerichtshof [BGH] [Federal Court of Justice], Feb. 20, 1996, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1763, 1763 ff. (1996); Bundesverfassungsgericht [BVerfG] [FEDERAL CONSTITUTIONAL COURT], Jan. 27, 1987, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2662, 2663 (1987); see also Weigend and Turner Iontcheva, *supra* note 3, at 83; Müller, Martin, Probleme um gesetzliche Regelung der Absprachen im Strafverfahren. Köln 2008, at 35 f.; Hauer, Judith, Geständnis und Absprache. Berlin 2007, at 57 ff.; Huttenlocher, Peter, Dealen wird Gesetz – die Urteilsabsprache im Strafprozess und ihre Kodifizierung. Zugleich eine kritische Untersuchung der aktuellen Gesetzesvorschläge des BMJ, der BRAK, des Bundesrates, des DAV, der Generalstaatsanwälte u.a. Hamburg 2007, at 10 ff.; Rönnau, Thomas, Das deutsche Absprachemodell auf dem Prüfstand – zwischen Pest und Cholera, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTDOGMATIK [ZIS], 167, 168 (5/2018).

<sup>51</sup> Section 257c par. 1 and 2 StPO; see also Vogel, *supra* note 2, at 55; Meyer, Frank, Praxis und Reform der Absprache im Strafverfahren, STRAFVERTEIDIGER [StV], 790, 790 (2015); critical Schünemann, Bernd, Faires Verfahren und Urteilsabsprachen im Strafverfahren. GOLT DAMMER'S ARCHIV FÜR STRAFRECHT [GA], 181, 193 (2018); Safferling, Christoph and Hoven Elisa, Plea Bargaining in Germany after the Decision of the Federal Constitutional Court, 15 GERMAN LAW JOURNAL [GLJ], 1, 3 (2014).

trial on the question of guilt, and it recognizes negotiations only within the statutory sentencing range.<sup>52</sup> The introduction of sentence bargaining must be assessed in the broad context in Germany of legal policies that demand economy within criminal proceedings. However, factors other than the drive for economy also paved the way for the incorporation of sentence bargaining into criminal proceedings, notably, as regards sentencing law, doubts about the possibility of accurately reconstructing the circumstances of a crime as indispensable foundations of a verdict on guilt and sentencing, as well as the shift within the objectives of punishment from guilt-based retribution to prevention, and especially general deterrence.<sup>53</sup> According to the conventional conceptualization of German criminal law, the court hearing shall be conducted in order to find the so-called material truth about guilt and the sentencing-relevant facts. First, the determination of material truth will enable the trial court to apply the core principle of criminal liability and sentencing, namely the principle of guilt: without material truth a trial court will not be able to establish guilt or to issue a sentence accordingly.<sup>54</sup> Advocates of the principles of material truth and of guilt are concerned about the fact that a sentencing agreement will in most cases lead to a shortcutting of the efforts by the trial court to seek material truth through evidence-taking, not least due to a confession being given by the defendant.<sup>55</sup> Despite this justified concern, the German Federal Constitutional Court permits applications of sentence

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<sup>52</sup> Weigend and Turner Iontcheva, *supra* note 3, at 91; for the extent of sentence bargaining see Schemmel, Alexander and Corell, Christian and Richter, Natalie, Plea Bargaining in Criminal Proceedings: Changes to Criminal Defense Counsel Practice as a Result of the German Constitutional Court Verdict of 19 March 2018? 15 GERMAN LAW JOURNAL [GLJ], 43, 56 (2014).

<sup>53</sup> Rönnau, *supra* note 50, at 168; see also Landau, Hebert, Das Urteil des Zweiten Senats des BVerfG zu den Absprachen im Strafprozess vom 19. März 2013. NEUE ZEITSCHRIFT FUER STRAFRECHT, [NStZ], 425, 425 ff. (2014); Bittmann, Folker, Consensual Elements in German Criminal Procedural Law, 15 GERMAN LAW JOURNAL [GLJ], 15, 15 (2014); Weichbrodt, Korinna, Das Konsensprinzip strafprozessualer Absprachen. Zugleich ein Beitrag zur Reformdiskussion unter besonderer Berücksichtigung der italienischen Regelung einvernehmlicher Verfahrensbeendigung, Berlin 2006, at 40 ff.; for other reasons for acceptance of sentence bargaining in practice see Müller, *supra* note 50, at 48 ff.; Hauer, *supra* note 50, at 49 ff.; Weigend and Turner Iontcheva, *supra* note 3, at 86; Safferling and Hoven, *supra* note 51, at 2.

<sup>54</sup> For more see Börner, René, „Fair Trial“ aus der Perspektive der Verteidigung unter besonderer Berücksichtigung der Verfahrensabsprache, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTDOGMATIK [ZIS], 178, at 178 (5/2018); Vogel, *supra* note 2, at 54; Weßlau, Edda, Wahrheit und Legenden: die Debatte über den adversatorischen Strafprozess, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTDOGMATIK [ZIS], 558, (1/2014); Schünemann, *supra* note 51, at 182 ff.; Müller, *supra* note 50, at 97 ff.; Weigend and Turner Iontcheva, *supra* note 3, at 84 f.

<sup>55</sup> Rönnau, *supra* note 50, at 169; Börner, *supra* note 54, at 182; Schünemann, *supra* note 51, at 186; Landau, *supra* note 53, at 426 ff.; compare however with Meyer, *supra* note 51, at 791.

bargaining in accordance with section 257c StPO, which should still enable a guilt-commensurate sentencing decision (see in particular par. 3 second sentence), and for this reason among others it upheld the constitutionality of sentence bargaining.<sup>56</sup> In the final analysis, although the Court explicitly rejects the constitutionality of a model of criminal proceedings which would be based on the principle of consensus between the participants of trial, it nevertheless accepts the pursuit of the so-called procedural truth within the framework of sentencing bargaining in accordance with section 257c StPO.<sup>57</sup>

In the following, I first deal with the substantive law that regulates the sentencing decisions of courts, and then move to the procedural elements of sentencing law, which play a rather important role in Germany.

## A. Substantive framework of sentencing

### *I. The principle of sentencing in accordance with section 46 of German Penal Code*

It is assumed that for each offense the Penal Code provides a range of punishments according to its seriousness in terms of harming or possessing danger to a legally protected good. The severity accommodated within the

<sup>56</sup> Bundesverfassungsgericht [BVerfG] [FEDERAL CONSTITUTIONAL COURT], Apr. 21, 2016, NEUE ZEITSCHRIFT FUER STRAFRECHT, [NStZ] 422, 423 ff. (2016); see also Huttenlocher, *supra* note 50, at 76 ff.; Weichbrodt, *supra* note 53, at 74; Rönnau, *supra* note 50, at 168; Landau, *supra* note 53, at 428 ff.; opposing Börner, *supra* note 54, at 184; for a critical perspective on sentence bargaining see also Andrissek, *supra* note 36, at 156; Hassemer, Winfried, Human Dignity in the Criminal Process: The Example of Truth-Finding, Vol. 44 ISRAEL LAW REVIEW [IsLR], 185, 197 f. (2011).

<sup>57</sup> Bundesverfassungsgericht [BVerfG] [FEDERAL CONSTITUTIONAL COURT], Apr. 21, 2016, NEUE ZEITSCHRIFT FUER STRAFRECHT, [NStZ], 422, 425 (2016); for the limits of the principle of consensual truth in criminal proceedings see Weichbrodt, *supra* note 53, at 113 ff.; for the notion of the so-called procedural truth see Weigend, Thomas, Should We Search for the Truth, and Who Should Do It, 36 NORTH CAROLINA OF INTERNATIONAL LAW AND COMMERCIAL REGULATION [N.C. J. Int'l L. & Com. Reg.], 389 – 415, 394 ff. (2010); Link, Jochen, Wahrheit und Gerechtigkeit als Axiome des Strafverfahrensrechts? in: Oglakcioglu, Mustafa Temmuz/Schuh, Jan/Rückert, Christian, Axiome des nationalen und internationalen Strafverfahrensrechts. Baden-Baden 2016, 97–120, 103 f.; for the tension between material truth versus procedural truth within the single provisions of StPO, notably sections 244 par. 2 (duty of establishing the truth) and 260 (principle of free evaluation of evidence) see Kotsoglou, Kyriakos N., Über die „Verständigung“ im Strafverfahren als Aussageerpressung. Eine materiell-rechtliche Studie zu § 257c StPO, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTDOGMIK [ZIS], 175, at 184 (3/2015); for a critical perspective on the notion of material truth see Schünemann, Bernd, Reflexionen über die Zukunft des deutschen Strafverfahrens in: Strafrecht, Unternehmensrecht, Anwaltsrecht, Festschrift für Gerd Pfeiffer, ed. by Otto Friedrich Freiherr von Gamm, Peter Raisch, Klaus Tiedemann. Berlin 1988, 461–484, at 474 ff.; skeptical about a simple juxtaposition of the notions of material truth and consensual truth as mutual alternatives see Weßlau, *supra* note 54, at 561 ff.

sentencing range is expected to be in accordance with the significance of the legal good that the Penal Code aims to protect by means of criminal law. However, within any given category of offense, it is impossible even for the most informed lawmaker to foresee all the variations in the way a specific crime might be committed, in order to assign them a certain flat penalty. Indeed, the Penal Code not only gives the judge broad discretion to determine the basic penalty from the statutory range, but also broad discretion in making decisions in other sentencing contexts, for instance when determining lesser or particularly serious cases or deciding on short-term imprisonment or suspension.<sup>58</sup>

With regard to the exercising of this discretion, the Penal Code paradoxically offers rather little guidance.<sup>59</sup> Section 46 postulates the principle that “the guilt of offender is the basis for sentencing”. It supplements this by a second requirement, namely that “the effects which the sentence can be expected to have on the offender’s future life in society shall be taken into account”. It is obvious that section 46 aims at sentencing that is supposed to meet some specific purposes or at least be in line with them.<sup>60</sup> In other words, it raises the question of the objectives of punishment, to which section 46 itself does not provide a final answer. In fact, sentencing decisions are considered as opportunities to realize the purposes of punishment in a particular case. According to this approach, the judge is asked to tailor the sentence to the anticipated aims and effects of the punishment that the law pursues.<sup>61</sup>

Taking guilt as the basis for sentencing is based on the idea of retribution, whereas considering the effects of the sentence on offenders implies the rehabilitative function of punishment.<sup>62</sup> However, section 46 does not define any sequence of preference between retribution and so-called positive special prevention, namely rehabilitation. Moreover, it thereby leaves general prevention totally out of the picture.<sup>63</sup> Furthermore, it contains no guidelines

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<sup>58</sup> Weigend, *supra* note 5, at 49-50; see also Nestler, *supra* note 12, at 113; Albrecht, *supra* note 5, at 20.

<sup>59</sup> Weigend, *supra* note 5, at 51; Kaspar, *supra* note 1, at 37.

<sup>60</sup> Weigend, *supra* note 5, at 76.

<sup>61</sup> Von Heintschel-Heinegg, Bernd, BeckOK StGB Kommentar, 38. Edition, para. 46 StGB, Rn. 51, 2018; Bundesgerichtshof [BGH] [Federal Court of Justice], Case No. 2 StR 355/80, paras. 56,243, (Sept. 17, 1980), [https://www.jurion.de/urteile/bgh/1980-09-17/2-str-355\\_80/](https://www.jurion.de/urteile/bgh/1980-09-17/2-str-355_80/); Oberlandesgericht Hamm [OLG Hamm], Case No. - 4 RVs 80/17, paras. 38, 47, 243, (July. 11, 2017).

<sup>62</sup> Bundesverfassungsgericht [BVerfG] [FEDERAL CONSTITUTIONAL COURT], Jan. 14, 2014, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2073, 2073 (2004); see also Albrecht, *supra* note 5, at 20.

<sup>63</sup> Weigend, *supra* note 5, at 76; Schöch, Heinz, Maßstäbe für Strafart und Strafhöhe in der Bundesrepublik Deutschland, in: Grundfragen des Strafzumessungsrechts aus deutscher und japanischer Sicht, ed. by Wolfgang Frisch. Tübingen 2011, 163–173, at 169; Köhler,

for how to resolve the well-known conflict between guilt-oriented and prevention-oriented sentencing (for further explanations on that see below II.). Finally, and most importantly, it says nothing about how the judge should fix the specific sentence within the statutory range of punishments, namely how to pick a number from the statutory range (for instance eight months in a case of theft).<sup>64</sup>

These questions are widely discussed in the jurisprudence of the high courts and in the literature.<sup>65</sup> As this contribution aims at giving an overview of the main determinates of sentencing decisions in Germany, I focus on explaining the position of the jurisprudence in general terms, and only occasionally refer to the scholarly critiques.<sup>66</sup>

## *II. Sentencing in accordance with objectives of punishment?*

It is probably the predominant opinion in the jurisprudence and amongst German scholars that punishment is, at least when fixing its amount in a specific case, retributive and as such aims to compensate the guilt of the offender, although it is also true to say that the idea of retribution is sometimes contested in the literature.<sup>67</sup> One of the ways to understand retribution by punishment is that the perpetrator of a crime deserves the punishment as a reaction to his blameworthy action, and sentencing must therefore be commensurate with his guilt, understood in terms of the extent of his “deviation from ethical standards”

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*supra* note 3, at 20; more specific on the objectives of sentencing in the legal practice of criminal courts, Müller, Susanne, *Rechtliche und tatsächliche Kriterien der Strafzumessung im Deutsch-Französischen Vergleich*, 16 ff. A contribution to sanction research under the Laboratoire Européen Associé, <https://www.mpicc.de/shared/data/pdf/fa-mueller.pdf>

<sup>64</sup> Weigend, *supra* note 5, at 78; for the antinomy of the conflicting objectives of punishment see Kett-Straub and Kudlich, *supra* note 5, at 79; Schäfer/Sander/van Gemmeren, *supra* note 5, at 293; Meier, *supra* note 25, at 166; Horn, Eckhard, *Tatschuld-Interlokut und Strafzumessung*, 85 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT [ZStW], 7, 18 (1/1973).

<sup>65</sup> Among many see Streng, *supra* note 12, at 154; Hörnle, *supra* note 5, at 193; Müller, *supra* note 63, 18 ff.

<sup>66</sup> See for more Streng, *supra* note 12, at 157 ff; Schäfer/Sander/van Gemmeren, *supra* note 5, at 294 ff.

<sup>67</sup> Bundesverfassungsgericht [BVerfG] [FEDERAL CONSTITUTIONAL COURT], Mar. 19, 2013, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1058, 1059 f. (2013); Bundesgerichtshof [BGH] [Federal Court of Justice], Case No: 1 StR 144/18, para. 349, (May. 16, 2018), <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=6f94859dc9e0f4493f4bebc78fd8b558&nr=84589&pos=0&anz=1>; Oberlandesgericht Hamm [OLG Hamm] [Higher Regional Court], Case No. - 4 RVs 80/17, paras. 38, 47, 243, (July. 11, 2017); Eser, *supra* note 33, at 4; Beckmann, *supra* note 43, at 541; critical on retribution as an objective of punishment Kaspar, *supra* note 1, at 38; Wilfert, *supra* note 1, at 87 ff.; Stahl, Dominik, *Strafzumessungstatsachen zwischen Verbrechenlehre und Strafrecht*. Zugleich ein Beitrag zur Strafzumessungsrelevanz des Vor- und Nachverhaltens. Berlin 2015, at 57; an overview of scholars opposed to retribution Andrissek, *supra* note 36, at 45 f.

(the so-called desert principle).<sup>68</sup> A lesser punishment than that commensurate with the culpability of the offender is not permissible, even when the deserved punishment would have detrimental effects on the offender.<sup>69</sup> In this regard, the desert principle marks out the core ethical meaning of punishment, which shall not be undermined by its preventive purpose, no matter whether this works in favor of the offender.<sup>70</sup>

According to the predominant opinion in Germany, a purely secondary importance is assigned to the preventive objective of punishment.<sup>71</sup> *Special prevention*, namely the rehabilitation of the offender during imprisonment, or his incapacitation, is deemed only a by-product of guilt-commensurate punishment and not its genuine objective. This position is also supported by the widespread suspicion of the view that regular prison sentences can have substantial positive rehabilitative effects on offenders. Additionally, nobody is in a position to reliably predict how long a prison sentence should last in order to generate a rehabilitative effect, and when the offender must be released.<sup>72</sup> The incapacitation of an offender cannot be pursued by a sentence that goes beyond guilt-oriented punishment because this would violate the constitution. Such an incapacitation is only possible if the offender shows a certain degree of dangerousness. In that case, it is not punishment but only measures of rehabilitation that can be ordered.<sup>73</sup>

Similar limitations are set on *general prevention*, which is supposed to be achieved, on the one hand, through deterring potential offenders from committing future crimes and, on the other, through demonstrating the enforcement of law and strengthening the trust of the people in the inviolability of the legal order.<sup>74</sup> However, one can doubt whether or to what extent the mere

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<sup>68</sup> Weigend, *supra* note 5, at 70; Nestler, *supra* note 12, at 126; Jung, *supra* note 4, at 227; Beckmann, *supra* note 43, at 538; see also Streng, *supra* note 12, at 153; for another interpretation of the retributive objective of punishment, namely the expression of disapproval and reprimand see Frisch, *supra* note 3, at 23; critical Kaspar, *supra* note 1, at 38; see also Andrissek, *supra* note 36, at 237, who regards retribution as founded in “a deeply rooted human intuition.”

<sup>69</sup> Weigend, *supra* note 5, at 50; see also Albrecht, *supra* note 5, at 18.

<sup>70</sup> Bundesgerichtshof [BGH] [Federal Court of Justice], Case No: 2 StR 355/80, paras. 56, 243, (Sept. 17, 1980); expressing criticism on this jurisprudence Frisch, *supra* note 3, at 23 ff.; Kaspar, *supra* note 1, at 38.

<sup>71</sup> Frisch, *supra* note 3, at 8; Jung, *supra* note 4, at 226.

<sup>72</sup> Weigend, *supra* note 5, at 73; Wilfert, *supra* note 1, at 105; Andrissek, *supra* note 36, at 50 f.; for some empirical findings in this regard see Streng, Franz, *Forschung zu Grundlagen und Determinanten der Strafzumessung in: Grundfragen des Strafzumessungsrechts aus deutscher und japanischer Sicht*, ed. by Wolfgang Frisch. Tübingen 2011, 39–64, at 40 ff.

<sup>73</sup> Weigend, *supra* note 5, at 73; see also Streng, *Strafrechtliche Sanktionen*, *supra* note 3, at 309; Frisch, *supra* note 3, at 6 and 8.

<sup>74</sup> Frisch, *supra* note 3, at 5; Wilfert, *supra* note 1, at 108; Späth, Patrick and Tybus, Jakob, *Vom*



inflicting of punishment on an offender in a single case is able to generate such effects. Moreover, the objective of general prevention provides hardly any specific criteria for how to determine the sentence in a given case: it is rather based on the straightforward dictum that high sentences will have such preventive effects.<sup>75</sup> A narrower approach advocates that positive general prevention, namely promoting confidence in the legal order, can be achieved by guilt-commensurate sanctions. According to this approach, punishment can generate confidence only if the amount of punishment is considered by all concerned as acceptable and suitable in order to restore the social peace that has been disturbed by the offense in question. A harsh punishment, the advocates of this approach argue, will cause dissatisfaction on the part of the offender and his sympathizers, and a light or lenient one will do the same for the victims and their friends.<sup>76</sup> As long as punishment is guilt-commensurate, it will promote confidence in law, and as such deterrence would also be considered a by-product of it.<sup>77</sup> Such an understanding does not countenance achieving general prevention by deterring people through imposing exorbitant penalties. To the contrary, it assumes that obedience to the law can be achieved by constructive communication with the people. By imposing guilt-commensurate and moderate penalties, the courts will treat people with a strong sense of fairness and justice. Only by reference to this policy can a moderate and guilt-commensurate practice of sentencing be defended in the public eye. With each guilt-commensurate sentencing decision, the court strengthens the public discourse around a form of criminal justice that is based on a standard of proportionality, not severity.<sup>78</sup>

However, besides this particular interpretation of general prevention there is also a broader one that tends, where necessary, to impose harsher sentences in order to generate effective deterrence among some groups of offenders. In fact, it is not rare for the courts to raise the degree of a sentence by invoking a special need that a deterrent signal must be sent to a particular group of potential offenders.<sup>79</sup>

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Zweck der Bestrafung von Unternehmen: Die neue Sentencing Guideline for Fraud, Bribery and Money Laundering Offences in England and Wales, CORPORATE COMPLIANCE ZEITSCHRIFT [CCZ], 35, 35 (2016); Köhler, *supra* note 3 at 17.

<sup>75</sup> Frisch, *supra* note 3, at 5; Wilfert, *supra* note 1, at 107; Andrissek, *supra* note 36, at 48 f.

<sup>76</sup> Weigend, *supra* note 5, at 74; see also Andrissek, *supra* note 36, at 148; Frisch, *supra* note 3, at 5; Kaspar, *supra* note 1, at 38.

<sup>77</sup> Bundesverfassungsgericht [BVerfG] [FEDERAL CONSTITUTIONAL COURT], Jan. 14, 2004, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2073, 2073 (2004); Weigend, *supra* note 5, at 71.

<sup>78</sup> See also Streng, *supra* note 12, at 154; Weigend, *supra* note 5, at 75-76; Frisch, *supra* note 3, at 13 ff.; for corresponding empirical findings see Streng, *supra* note 74, at 44.

<sup>79</sup> Weigend, *supra* note 5, at 76; Harrendorf, *supra* note 13, at 512; expressing criticism of

In view of all this, one can conclude that, when fixing its amount in a specific case, punishment in Germany primarily has the objective of retribution and therefore of guilt-commensurate sentencing, and secondarily allows special and general prevention to be taken into account as long as this does not undermine the main objective. This is the so-called combined theory (*Vereinigungstheorie*).<sup>80</sup> The main problem of this theory is that it is not only unable to deliver a uniform and consistent foundation for punishment, but also fails to provide practicable yardsticks for sentencing. As I have already mentioned with regard to section 46 of the Penal Code, the objective of retribution faces a considerable difficulty: it fails to explain how to calculate the guilt of the offender and to translate the degree of guilt into numbers. One indication that the guilt-commensurate sentencing approach does not work, and is not taken seriously in practice, is that sentencing decisions are consistently given in round numbers, e.g. one year, eight months etc.<sup>81</sup> It is perhaps surprising that in no case does the guilt of the offender require an unrounded amount of punishment, for instance 8 months and 16 days.<sup>82</sup> Secondly, as I implied above, there is an inherent conflict between retribution and prevention (the so-called antinomy of objectives): a guilt-commensurate imprisonment sentence might not be necessary for the rehabilitation of the offender, or its length might lack the harshness needed to generate the desired deterrence. Thus, the combination of all the objectives fails to generate any preference rule because the individual objectives contradict each other, requiring both a less and a more severe sentence.<sup>83</sup>

### III. “*Spielraumtheorie*”: a theory of sentencing?

The solution to which the jurisprudence and the majority of scholars turn is the so-called *Spielraumtheorie*, which can be translated as “theory of margin or leeway”.<sup>84</sup> According to this theory, there is a narrower scope of punishment within the broad range of statutory sentences that must first be

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such an understanding and application of general prevention Frisch, *supra* note 3, at 5; Köhler, *supra* note 3 at 47 ff.

<sup>80</sup> Bundesverfassungsgericht [BVerfG] [FEDERAL CONSTITUTIONAL COURT], Feb. 2, 2004, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 739, 745 ff. (2004); Bundesverfassungsgericht [BVerfG] [FEDERAL CONSTITUTIONAL COURT], Jun. 21, 1977, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1525, 1531 (1977); Frisch, *supra* note 3, at 21; Späth and Tybus, *supra* note 74, at 35; Beckmann, *supra* note 43, at 538.

<sup>81</sup> Weigend, *supra* note 5, at 72-74; Beckmann, *supra* note 43, at 539.

<sup>82</sup> See also Weigend, *supra* note 5, at 65.

<sup>83</sup> Frisch, *supra* note 3, at 21; Stahl, *supra* note 67, at 68; Hörnle, Tatjana, Tatproportionale Strafzumessung. Berlin 1999, at 27.

<sup>84</sup> For an overview with regard to the theories see Schäfer/Sander/van Gemmeren, *supra* note 5, at 294 ff; Hauer, *supra* note 50, at 102 ff.; for the so-called theory of proportionate sentencing see Hörnle, *supra* note 83, at 108 ff.

found in accordance with the degree of the offender's guilt.<sup>85</sup> Once this scope of punishment is established, with its maximum and minimum bounds, the preventive objectives of punishment can be taken into account within this "second" scope.<sup>86</sup> As any sentence that could be fixed from the "second" scope is commensurate with guilt, mitigating or aggravating punishment within this scope based on preventive considerations would not violate the principle of guilt-commensurate punishment.<sup>87</sup> With these guidelines, the theory seems to be operable in a rather satisfactory and simple way.

A closer consideration reveals that the Spielraumtheorie is shaped by two main considerations. Firstly, albeit dogmatically, it offers an apparently convincing proposal to combine the contradictory objectives of punishment by giving preference to retribution and at the same time allowing preventive considerations to a certain extent (the so-called combined theory).<sup>88</sup> Secondly, it retains the existing practice of courts. This is particularly evident by the fact that the theory, as it is argued and applied by Appellate Courts, does not oblige the courts to explain in writing the way in which they came to the specific amount of punishment, especially in terms of the calculation of guilt-commensurate sentencing and the consideration of preventive objectives within this margin.<sup>89</sup> As this fact also shows, the Spielraumtheorie does not definitively guide the courts during sentencing, and it still leaves open how to "cross the gap" between the minimum and maximum margin of punishment and to fix a specific sentence from this range.<sup>90</sup> Indeed, the courts routinely decide on sentencing, and indeed impose a specified amount of punishment. But how? Clearly they are doing this without reference to any fully theorized principle.<sup>91</sup>

<sup>85</sup> Weigend, *supra* note 5, at 74; see also Kett-Straub and Kudlich, *supra* note 5, at 80; Streng, *supra* note 12, at 155; Horn, *supra* note 64, at 19.

<sup>86</sup> Bundesgerichtshof [BGH] [Federal Court of Justice], Case No: 2 StR 355/80, paras. 56, 243, (Sept. 17, 1980); Oberlandesgericht Frankfurt [OLG Frankfurt] [Higher Regional Court], Case No: 1 Ss 174/17, Dec. 20, 2017, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 715, 715, (2018); Schäfer/Sander/van Gemmeren, *supra* note 5, at 296.

<sup>87</sup> Bundesgerichtshof [BGH] [Federal Court of Justice], Case No: 2 StR 355/80, paras. 56, 243, (Sept. 17, 1980); see also Harrendorf, *supra* note 13, at 506; Bohlander, *supra* note 4, at 191; Frisch, *supra* note 3, at 21 f.; Dölling, *supra* note 12, at 89; Späth and Tybus, *supra* note 74, at 42.

<sup>88</sup> Streng, *supra* note 12, at 158; Frisch, *supra* note 3, at 21; critical on that Hörnle, *supra* note 83, at 23; Köhler, *supra* note, 3 at 24.

<sup>89</sup> Bundesgerichtshof [BGH] [Federal Court of Justice], Case No: 2 StR 338/16, paras. 46, 49, (Dec. 14, 2016), Oberlandesgericht Frankfurt [OLG Frankfurt] [Higher Regional Court], Case No: 1 Ss 174/17, Dec. 20, 2017, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 715, 715 (2018); see also Streng, *supra* note 12, at 156; Schöch, *supra* note 63, at 165; Kaspar, *supra* note 1, at 38.

<sup>90</sup> See also Hörnle, *supra* note 5, at 193; Albrecht, *supra* note 5, at 18-19; Nestler, *supra* note 12, at 126; Weigend, *supra* note 5, at 73-74.

<sup>91</sup> Hörnle, *supra* note 5, at 193; Weigend, *supra* note 5, at 81; Streng, *supra* note 12, at 156; Kaspar, *supra* note 1, at 37 f.; Köhler, *supra* note 3 at 22; Götting, *supra* note 12, at 228.

#### *IV. Sentencing categories in practice*

Sentencing researchers point out that the courts have a certain routine<sup>92</sup> when it comes to fixing punishment, and that in practice there are certain factors which help them to locate a specific case within certain categories. The most important sentencing factors are the prior record of the offenders, the damage caused by them, their behavior in the trial, and other relevant circumstances of the offence.<sup>93</sup> In particular, the amount of the monetary losses in the case of crimes against property or the seriousness of the injuries in the case of crimes against the integrity of body are important determinants of sentencing in practice.<sup>94</sup> In fact, this pragmatic approach shows how far the sentencing practice departs from those dogmatic sentencing theories that are based on an abstract and normative concept of guilt, but miss the most visible circumstances of a particular case, such as the consequences of the crime, which clearly play a significant role as sentencing factors.

In the light of these factors, the courts assess to which categories the particular case belongs: whether it is a “normal”, “average” or “severe” case. These categorizations are made by reference to the prior appearances of a given crime in court practice, and in comparison with the experience that the courts have had as regards the frequency and seriousness of other cases.<sup>95</sup> Other categorizations of cases dealt with in court practice can also be made, as some scholars have observed.<sup>96</sup> The most important point here is that the

<sup>92</sup> Weigend, *supra* note 5, at 64-65, 80; Nestler, *supra* note 12, at 126; Albrecht, *supra* note 5, at 21; Frisch, *supra* note 3, at 19; compare however with Götting, *supra* note 12, at 213 ff.

<sup>93</sup> Kammergericht Berlin [KG] [Court of Appeal], Case No. (5) 161 Ss 94/17 (54/17), para. 46, (July. 19, 2017), <http://www.gerichtsentscheidungen.berlin-brandenburg.de/jportal/portal/t/i9w/bs/10/page/sammlung.psm1?doc.hl=1&doc.id=KORE247572017&documentnumber=1&numberofresults=1&doctype=juris-r&showdoccase=1&doc.part=K&paramfromHL=true#focuspoint>; Weigend, *supra* note 5, at 81; Hörnle, *supra* note 5, at 191; Bartel, Louise, Die Strafzumessungsentscheidung in der Tatsacheninstanz, in: Grundfragen des Strafzumessungsrechts aus deutscher und japanischer Sicht, ed. by Wolfgang Frisch. Tübingen 2011, 187–200, at 198; for the prior record and behavior of offender during the trial see Kunz, Karl-Ludwig, Vorleben und Nachtatverhalten als Strafzumessungstatsachen, in: Grundfragen des Strafzumessungsrechts aus deutscher und japanischer Sicht, ed. by Wolfgang Frisch. Tübingen 2011, 135–150, 140 ff.; Stahl, *supra* note 67, at 188 ff.; for corresponding empirical findings see Götting, *supra* note 12, at 230 ff.

<sup>94</sup> Nestler, *supra* note 12, at 127; see also Weigend, *supra* note 5, at 80; Bundesgerichtshof [BGH] [Federal Court of Justice], Case No: 2 StR 338/16, paras. 46, 49, (Dec. 14, 2016); Oberlandesgericht Frankfurt [OLG Frankfurt] [Higher Regional Court], Case No: 1 Ss 174/17, Dec. 20, 2017, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 715, 715 (2018); Oberlandesgericht Hamm [OLG Hamm], Case No. - 4 RVs 80/17, (July. 11, 2017), BeckRS 2017, 120053.

<sup>95</sup> Albrecht, *supra* note 5, at 21; Frisch, *supra* note 3, at 18; Dölling, *supra* note 12, at 89.

<sup>96</sup> For an overview see Schäfer/Sander/van Gemmeren, *supra* note 5, at 422; see also Frisch, *supra* note 3, at 18; Bittmann, *supra* note 53, 17 f. who, as a Chief Prosecutor, presents the following categorization: absolute and relative petty crimes, small-scale crime and crimes of lower medium gravity, and crimes of higher-medium gravity and serious crimes; critical

range of the minimum and maximum penalty is not mathematically divided into a “number” of categories: to the contrary, the “normal” and “average” cases which make up the majority of cases in practice, are deemed by courts to be of a low degree of seriousness with no substantial significance and are located in the first third of the sentencing range.<sup>97</sup>

The fact that the courts assign the case to one of the categories does not mean that the courts apply strict sentencing tariffs according to this categorization.<sup>98</sup> Indeed, section 46 par. 2 StGB provides the courts only with a catalog of circumstances that they shall weigh in favor of or against the offender. Thereby, this provision on the one hand opens a discussion about the mitigating and aggravating circumstances of a specific case, and on the other it enables the courts to locate the case within the categories with a fine degree of differentiation. Here, the courts are in a position to “individualize” the sentencing within certain limits.<sup>99</sup> There is an extensive jurisprudence and literature on the appropriateness, character and reach of frequent mitigating or aggravating sentencing circumstances that I must leave out here.<sup>100</sup>

Looking at the results of the sentencing practice of criminal courts, which above I have tried to explain, one sees that the most commonly imposed sanctions are fines. In 2016, in total 655,379 adults were sentenced by a court decision according to general criminal law. The sentence imposed in 548,482 cases was a fine: thus they make up about 83% of the sentencing decisions of the criminal courts in 2016.<sup>101</sup>

A fine is considered as having greater social efficiency than imprisonment, given the fact that the alternative of prison may result in the “moral and social

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of categories such as the “average” case Götting, *supra* note 12, at 213 ff.

<sup>97</sup> For more see Schäfer/Sander/van Gemmeren, *supra* note 5, at 420; see also Frisch, *supra* note 3, at 19; Schöch, *supra* note 63, at 166.

<sup>98</sup> Frisch, *supra* note 3, at 18; more specific on the “tariffs” in the legal practice of the criminal courts Müller, *supra* note 63, 20 ff.

<sup>99</sup> See also Albrecht, *supra* note 5, at 20; Hörnle, *supra* note 5, at 193, 195, 199; Weigend, *supra* note 5, at 48; Bundesgerichtshof [BGH] [Federal Court of Justice], Case No: 2 StR 355/80, paras. 56, 243, (Sept. 17, 1980).

<sup>100</sup> Bundesgerichtshof [BGH] [Federal Court of Justice], Case No: 4 StR 598/17, (May. 22, 2018); Schäfer/Sander/van Gemmeren, *supra* note 5, at 210 ff; Streng, *Strafrechtliche Sanktionen*, *supra* note at 3, at 268; see also Weigend, *supra* note 5, at 52; Albrecht, *supra* note 5, at 19; von Heintschel-Heinegg, *supra* note 61, para. 46 StGB, Rn. 32; Kunz, *supra* note 93, at 135–150.

<sup>101</sup> Statistisches Bundesamt (Destatis). Justice. Criminal Prosecution. Defendants convicted by final judgment. 2018, available at [https://www.destatis.de/EN/FactsFigures/SocietyState/Justice/Tables/\\_DefendantsConvictedByFinalJudgment.html](https://www.destatis.de/EN/FactsFigures/SocietyState/Justice/Tables/_DefendantsConvictedByFinalJudgment.html); see generally for other related figures Subramanian, Ram and Shames, Alison, *Sentencing and Prison Practice in Germany and the Netherlands: Implications for the United States*. New York, NY: Vera Institute of Justice, 2013, at 9 ff. [<https://www.prisonpolicy.org/scans/vera/european-american-prison-report-v3%20.pdf>].

disintegration” of the convicted person. Moreover, imprisonment may have the detrimental effect that the offender comes to “think of himself as a criminal”. Imposing a fine instead of a prison sentence avoids these drawbacks. The imposition of a prison sentence is considered a last resort to be employed in the case that the culpability of an offender requires it under the specific circumstances of the case, and where another sentence would be considered by the public as insufficient.<sup>102</sup>

These considerations are also reflected in the number of cases where a prison sentence is imposed that is also executed. In 2016, in roughly 107,000 cases the courts imposed a prison sentence, but in two-thirds of these cases the prison sentences were suspended.<sup>103</sup> The court can suspend the execution of sentences of up to two years if it is convinced that the offender will not reoffend and there are no other reasons against the suspension. The preconditions of suspension become stricter, the longer the imposed prison sentence is.<sup>104</sup> In the end, only 5% of convicted offenders had to go to prison.<sup>105</sup> Even in cases of an enforceable prison sentence, the length of sentences is generally quite moderate, mostly from one to five years.<sup>106</sup>

This, then, exhausts my discussion of the sentencing factors that the substantive law provides. Yet, as highlighted above, German sentencing law would be not completely covered if one failed to consider certain institutions of procedural law that also have substantial effects on sentencing.

## **B. Sentencing-related consideration of procedural law**

### *I. Investigation phase*

At the investigation stage, the German Code of Criminal Procedure provides for some effective diversion mechanisms that allow the prosecutor to divert a considerable amount of cases out of the court-based adjustment system entirely, and so to bring only selected cases before the courts.<sup>107</sup> The suspect

<sup>102</sup> Weigend, *supra* note 5, at 48; see also Kett-Straub and Kudlich, *supra* note 5, at 57; Nestler, *supra* note 12, at 127.

<sup>103</sup> Statistisches Bundesamt (Destatis). Justice. Criminal Prosecution. Defendants convicted by final judgment. 2018, available at [https://www.destatis.de/EN/FactsFigures/SocietyState/Justice/Tables\\_/DefendantsConvictedByFinalJudgment.html](https://www.destatis.de/EN/FactsFigures/SocietyState/Justice/Tables_/DefendantsConvictedByFinalJudgment.html).

<sup>104</sup> Section 56 StGB: see also Schäfer/Sander/van Gemmeren, *supra* note 5, at 45; Kett-Straub and Kudlich, *supra* note 5, at 43 ff; Harrendorf, *supra* note 13, at 503 ff.

<sup>105</sup> Statistisches Bundesamt (Destatis). Justice. Criminal Prosecution. Defendants convicted by final judgment. 2018, available at [https://www.destatis.de/EN/FactsFigures/SocietyState/Justice/Tables\\_/DefendantsConvictedByFinalJudgment.html](https://www.destatis.de/EN/FactsFigures/SocietyState/Justice/Tables_/DefendantsConvictedByFinalJudgment.html).

<sup>106</sup> See for the figures Weigend, *supra* note 5, at 39; Harrendorf, *supra* note 13, at 530 ff; Subramanian and Shames, *supra* note 103, at 10.

<sup>107</sup> For an overview see Brodowski, *supra* note 1, at 367 ff.; Schäfer/Sander/van Gemmeren, *supra* note 5, at 9; Weigend, *supra* note 5, at 48; Weigend and Turner Iontcheva, *supra* note 3, at 83 f.

under investigation is faced with a criminal sanction or the imposition of an obligation when the prosecutor decides to submit a bill of indictment before the competent court,<sup>108</sup> to apply for a penal order by the court<sup>109</sup> or to dismiss the prosecution,<sup>110</sup> but only under certain conditions.

The prosecutor is empowered to draft a penal order if the investigated offence does not require a minimum mandatory punishment of one year. By a penal order, the prosecutor can impose a fine or a suspended prison sentence of up to one year if the offender has a lawyer. However, in practice, it is mostly fines that are imposed by a penal order. The release of a penal order enables the prosecutor not only to conclude a case quickly and without a court trial, but also empowers the prosecutor to fix the sentence. In fact, in practice the courts that review penal orders only rarely turn them down due to defects in the prosecutor's sentencing decisions.<sup>111</sup> If the defendant does not object within two weeks, the penal order becomes final and has the effect of a conviction.<sup>112</sup>

If the investigated offence does not require a minimum mandatory punishment of one year, the prosecutor also has the power, with the consent of the accused and of the competent court, to dismiss the prosecution and impose conditions and sanctions upon the suspect. The preconditions for conditional dismissal are that the degree of guilt of the suspect does not present an obstacle and that the imposed conditions are sufficient to satisfy the public interest in criminal prosecution. The conditions are:

1. ... to make reparations for damage caused by the offence;
2. to pay a sum of money to a non-profit-making institution or to the state;
3. to perform community service;
4. to comply with duties to pay a specified amount in maintenance;
5. to make a serious attempt at perpetrator–victim mediation
6. to participate in a course.<sup>113</sup>

In 2016, in about 22% of investigations conducted the suspects received a

<sup>108</sup> Section 170 par. 1 StPO; for more see Bohlander, *supra* note 4, at 103 f.; Krey, Volker F., Speech: Characteristic Features of German Criminal Proceedings – An Alternative to the Criminal Procedure Law of the United States? 21 LOYOLA LAW REVIEW [LoyLR], 591, at 598 ff. (1999); Weigend and Turner Iontcheva, *supra* note 3, at 84.

<sup>109</sup> Section 407 – 412 StPO; on that Brodowski, *supra* note 1, at 378 f.; Frase, *supra* note 44, at 6; Bohlander, *supra* note 4, at 135 f.

<sup>110</sup> Section 153 – 154 StPO; see for more on that Frase, *supra* note 44, at 5 ff.; Bohlander, *supra* note 4, at 108 ff.; Bittmann, *supra* note 53, at 1327.

<sup>111</sup> Albrecht, *supra* note 5, at 4; for a critical perspective on the role of the public prosecutor in sentencing decisions Vormbaum and Bohlander, *supra* note 33, at 239.

<sup>112</sup> See also Weigend, *supra* note 5, at 54.

<sup>113</sup> Section 153 a StPO; see for more Schäfer/Sander/van Gemmeren, *supra* note 5, at 10 ff.; Streng, Strafrechtliche Sanktionen, *supra* note at 3, at 44 ff.; translation of German Code of Criminal Procedure by Duffett, Brian and Ebinger, Monika, available at [https://www.gesetze-im-internet.de/englisch\\_stpo/](https://www.gesetze-im-internet.de/englisch_stpo/).

criminal obligation or sanction by a formal charge, penal order or conditional dismissal.<sup>114</sup> In exercising this power to dismiss the prosecution under some conditions, the prosecutor also considers the sentencing-related circumstances of the cases, namely the degree of guilt and the public interest in prosecution, and has quite an important influence on the conditions imposed, even when he shares this power with the court.

Beside penal orders and conditional dismissals, one of the diversion mechanisms most commonly used in practice is the unconditional dismissal, applicable where the investigated offence does not require a minimum mandatory punishment of one year.<sup>115</sup> In more than one-fourth of proceedings in 2016, the prosecutors dismissed the case without imposing a condition.<sup>116</sup> One of the most frequent and also sentencing-related reasons for unconditional dismissal in practice is the minor nature of the guilt of the offender.<sup>117</sup>

## II. Trial phase

Sentencing practice in Germany should also be considered from the perspective of how court proceedings deal with sentencing as a procedural issue. The German Code of Criminal Procedure does not make a formal distinction between guilt-finding and sentencing. In regard to both questions the courts proceed through one single trial, although a respective distinction has been proposed by scholars, expert commissions and Bar Associations for rather a long time.<sup>118</sup> One of the

<sup>114</sup> The Federal Statistical Office of Germany. Justice. Prosecutor Offices. [Statistisches Bundesamt. Rechtspflege. Staatsanwaltschaften.] 2016, at 26, [https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/GerichtePersonal/Staatsanwaltschaften2100260167004.pdf?\\_\\_blob=publicationFile](https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/GerichtePersonal/Staatsanwaltschaften2100260167004.pdf?__blob=publicationFile).

<sup>115</sup> See also Weigend, *supra* note 5, at 54.

<sup>116</sup> The Federal Statistical Office of Germany. Justice. Prosecutor Offices, *supra* note 95, at 26.

<sup>117</sup> *Id.* at 26.

<sup>118</sup> Advocating for a division Ostendorf, Heribert, *Der Wandel vom klassischen zum ökonomischen Strafprozess*, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTDOGMATIK [ZIS], 172, 177 (4/2013); Blau, Günter, *Die Teilung des Strafverfahrens in zwei Abschnitte. Schuldpruch und Strafausspruch*, 81 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT [ZSTW], 31, 47 f. (1/1969); Fischinger, Helmut, *Die Teilung des Strafverfahrens in zwei Abschnitte. Schuldpruch und Strafausspruch*, 81 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT [ZStW], 49, 59 (1/1969); Jescheck, Hans-Heinrich, *Der Strafprozess – Aktuelles und Zeitloses*, JURISTENZEITUNG [JZ], 201, 206 (7/1970); for the proposal of the German Bar Association see *Stellungnahme des Deutschen Anwaltvereins durch den Strafrechtsausschuss zum Referentenentwurf eines Gesetzes zur Regelung der Verständigung im Strafverfahren und ein eigener Vorschlag für eine gesetzliche Regelung*, 1–15, at 9 [[http://www.gesmat.bundesgerichtshof.de/gesetzesmaterialien/16\\_wp/reg\\_verst\\_strafv/stellung\\_dav\\_vorschlag.pdf](http://www.gesmat.bundesgerichtshof.de/gesetzesmaterialien/16_wp/reg_verst_strafv/stellung_dav_vorschlag.pdf)]; rather reluctant Schöch, Heinz and Schreiber, Hans-Ludwig, *Ist die Zweiteilung der Hauptverhandlung praktikabel? Erfahrungen mit der Erprobung eines informellen Tatinterlokuts*, ZEITSCHRIFT FÜR RECHTSPOLITIK [ZRP], 63–67 (1978); Horn, *supra* note 64, at 26; highlighting the advantages of a division of the main hearing into two parts, albeit with reservations, the Expert Committee of the Federal Ministry of Justice and Consumer Protection of 2015, see *Bericht der Expertenkommission zur*



important consequences of this approach is that the courts conduct evidence-gathering in order to clarify both questions simultaneously.<sup>119</sup> However, research shows that the courts are primarily concerned with the proof of guilt, and that sentencing-related questions are only a subsidiary consideration.<sup>120</sup> This fact is revealed especially by the relatively short amount of time that on average the courts spend on sentencing. In an average trial which takes less than one hour, the courts deal with sentencing-related issues only for five minutes.<sup>121</sup>

Beside the proof of guilt, the other important issue for the court is to complete the trial within a reasonable time.<sup>122</sup> The completion of criminal proceedings within a reasonable time is also a legal requirement that emerges from the German Constitution and European Convention on Human Rights.<sup>123</sup> To promote a speedy conclusion of the trial, since 2009 the German Code of Criminal Procedure has also provided for sentence bargaining between trial court, prosecutor and defendant.<sup>124</sup> This presents another procedural element that influences sentencing in Germany, namely the trial's agreements on the size of sentencing between court, prosecutor and defense council (see for more above Introduction II.). However, in practice sentence bargaining is not broadly applied,<sup>125</sup> especially since the jurisprudence has put stricter conditions on it.<sup>126</sup>

### *III. Review of sentencing decisions*

Finally, the sentencing practice of courts of the first instance is reviewed by the Appellate Courts. Thus, in reality German sentencing law is supplemented by certain principles that the Appellate Courts have developed regarding the

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effektiveren und praxistauglicheren Ausgestaltung des allgemeinen Strafverfahrens und des jugendgerichtlichen Verfahrens, at 9 ff. [[https://www.bmjv.de/SharedDocs/Downloads/DE/PDF/Abschlussbericht\\_Reform\\_StPO\\_Kommission.pdf?\\_\\_blob=publicationFile&v=2](https://www.bmjv.de/SharedDocs/Downloads/DE/PDF/Abschlussbericht_Reform_StPO_Kommission.pdf?__blob=publicationFile&v=2)]; for discussions at the 36th Conference on German Lawyers in Bamberg in Nürnberg see Berichte, JURISTENZEITUNG [JZ], 468, 469 (14/1971).

<sup>119</sup> See for more Schäfer/Sander/van Gemmeren, *supra* note 5, at 463 ff.; Bartel, *supra* note 93, at 188.

<sup>120</sup> See for instance Schöch and Schreiber, *supra* note 118, at 66.

<sup>121</sup> Weigend, *supra* note 5, at 61.

<sup>122</sup> Weigend, *supra* note 5, at 63.

<sup>123</sup> Bundesverfassungsgericht [BVerfG] [FEDERAL CONSTITUTIONAL COURT], Case No. 2 BvR 1275/16 (Oct. 13, 2016); see also; Schäfer/Sander/van Gemmeren, *supra* note 5, at 270; Streng, Strafrechtliche Sanktionen, *supra* note at 3, at 303.

<sup>124</sup> Section 273c StPO; Vormbaum and Bohlander, *supra* note 33, at 257.

<sup>125</sup> Albrecht, *supra* note 5, at 18; Weigend and Turner Iontcheva, *supra* note 3, at 92; for the figures see Schemmel and Corell and Richter *supra* note 52, at 46.

<sup>126</sup> Bundesverfassungsgericht [BVerfG] [FEDERAL CONSTITUTIONAL COURT], Case No. 2 BvR 1422/15 (Apr. 21, 2016); see also Bundesgerichtshof [Federal Court of Justice], Apr. 21, 2016, STRAFVERTEIDIGER [StV] 409, 409 ff. (2016); Bundesgerichtshof [Federal Court of Justice], Jul. 25, 2017, STRAFVERTEIDIGER [StV] 9, 9 f. (2017); see for more Brodowski, *supra* note 1, at 379; Meyer, *supra* note 51, at 791 ff.; Fischer, Thomas, Ein Jahr Absprache-Regelung. Praktische Erfahrungen und gesetzlicher Ergänzungsbedarf. ZEITSCHRIFT FÜR RECHTSPOLITIK [ZRP], 249–251 (2010).

legality of sentencing decisions.<sup>127</sup>

Recent decades have seen increasing involvement by Appellate Courts in reviewing sentencing decisions.<sup>128</sup> Sentencing decisions are no longer an issue of the mere exercising of discretion by the trial court, which Appellate Courts may not subject to review: rather, they are questions of the application of substantive law to the sentencing-related circumstances of cases, even if the courts rely to a considerable extent on their direct impression of the offender.<sup>129</sup> The courts of first instance have to present in their written verdict the reasons for their sentencing decisions, although their capacity to draft such reasons remains limited in terms of the reproduction and transmission of personal impressions. On the ground of these written reasons, and in accordance with the Spielraumtheorie, the Appellate Courts review the assessments of sentencing facts (mitigating or aggravating) by the courts of first instance and reverse the sentencing decisions if the assessments are considered wrong.<sup>130</sup> Another subject of review is consistency in the assessment of the sentencing-related circumstances of cases. Both inconsistency, and also deviation from the “usual” amount of the length of punishment without a specified and acceptable reason, leads to the quashing of the sentencing decision.<sup>131</sup> Finally, the review of sentencing occurs by proving whether the amount of the imposed sentence is “completely unjustifiable” in comparison with the practice of courts of first instance in similar cases.<sup>132</sup> As this jurisprudence clearly shows, the real determinants of the amount of the sentence – the so-called sentencing tariffs – are not derived from the Penal Code: the actually existing “tariffs” are, rather, judge-made law.<sup>133</sup>

<sup>127</sup> Instructive in this regard Frisch, Wolfgang, Die revisionsgerichtliche Überprüfung der Strafzumessung, in: Grundfragen des Strafzumessungsrechts aus deutscher und japanischer Sicht, ed. by Wolfgang Frisch. Tübingen 2011, 215–235; more general on the review by Appellate Courts see Jung, Heike, Appellate Review of Judicial Fact-Finding. Processes and Decisions, 31 ISRAEL LAW REVIEW [IsLR], 690, 694 ff. (1997); Bohlander, *supra* note 4, at 260 ff.

<sup>128</sup> See also Hörnle, *supra* note 5, at 193; Weigend, *supra* note 5, at 41.

<sup>129</sup> Bundesgerichtshof [BGH] [Federal Court of Justice], Case No: 2 StR 338/16, paras. 46, 49, (Dec. 14, 2016); Oberlandesgericht Frankfurt [OLG Frankfurt] [Higher Regional Court], Case No: 1 Ss 174/17, Dec. 20, 2017, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 715, 715 (2018); Frisch, *supra* note 127, at 219 ff.

<sup>130</sup> Bundesgerichtshof [BGH] [Federal Court of Justice], Case No: 2 StR 338/16, paras. 46, 49, (Dec. 14, 2016); Oberlandesgericht Frankfurt [OLG Frankfurt] [Higher Regional Court], Case No: 1 Ss 174/17, Dec. 20, 2017, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 715, 715 (2018) also available at, [https://www.burhoff.de/asp\\_weitere\\_beschluesse/inhalte/4439.htm](https://www.burhoff.de/asp_weitere_beschluesse/inhalte/4439.htm).; see also Albrecht, *supra* note 5, at 3; Weigend, *supra* note 5, at 69, 82; Frisch, *supra* note 127, at 220; Jung, *supra* note 127, at 695.

<sup>131</sup> Oberlandesgericht Hamm [OLG Hamm] [Higher Regional Court], Case No. - 4 RVs 80/17, Rn.7, paras. 38, 47, 243, (July. 11, 2017); see also Kett-Straub and Kudlich, *supra* note 5, at 124; Frisch, *supra* note 127, at 221.

<sup>132</sup> For examples from the jurisprudence of the Federal Supreme Court see Schäfer/Sander/van Gemmeren, *supra* note 5, at 298 ff; see also Meier, *supra* note 25, at 238.

<sup>133</sup> Albrecht, *supra* note 5, at 1; see also Kett-Straub and Kudlich, *supra* note 5, at 125; Weigend, *supra* note 5, at 70, 83.

It has been doubted that the requirement for reasoning about sentencing decisions is of significance in establishing the real determinants of a sentencing decision. *Albrecht* points out that there is a difference between the presentation of a decision and the making of it, and that this goes for sentencing decisions as well.<sup>134</sup> Indeed, as *Weigend* mentions, there is even a saying among German lawyers: every verdict has three reasonings – the oral, the written and the real one. Furthermore, in practice the reasoning itself is written with a calculated aim, namely to make the verdict “appeal-secure” (revisions-sicher), i.e. to ensure the verdict, as it is written down, corresponds to the requirements of the Appellate Court regarding the sentencing law, at least *prima facie*. In order to achieve this goal, in practice the courts make use of common formulae that are far from representing the real deliberations of the courts, such as “with respect to the nature of the offense and to the personality of the offender, the sentence imposed was necessary and sufficient”.<sup>135</sup> The effectiveness of the review by the Appellate Courts must also be assessed against the fact that the written reasons behind a sentencing decision are of relative importance, as the verdict might not reflect the actual motives of the court while sentencing. *Weigend* even argues that the Appellate Courts are to be blamed for the fact that the “true reasons” remain hidden, as they require the reasoning to be presented in a certain way.<sup>136</sup> In this regard, *Albrecht* points out that in practice “most reasoning” has nothing to do with the particular outcome of sentencing decisions.<sup>137</sup>

Finally, *Hörnle* considers the very core of the sentencing theory of Appellate Courts, namely the so-called Spielraumtheorie, to be “an approach that was developed in the interest of the Appellate Courts”. In fact, the Federal Court of Justice does not demand that the courts express the “second” narrow scope numerically and thereby avoids a considerable amount of work.<sup>138</sup>

As this analysis reveals, the Federal Courts’ review is also limited to regulating the sentencing practice of courts of first instance.<sup>139</sup> All this indicates that the sentencing practice as it currently takes place in the jurisprudence of German courts is influenced by more than simply the normative framework, doctrinal theories and jurisprudence.<sup>140</sup>

### C. Empirical and sub-cultural factors of sentencing

Indeed, a closer consideration reveals that sentencing practice in Germany must be regarded from a broad perspective which encompasses the analysis of

<sup>134</sup> See also *Weigend*, *supra* note 5, at 70.

<sup>135</sup> *Albrecht*, *supra* note 5, at 19.

<sup>136</sup> *Weigend*, *supra* note 5, at 68-67 and 81.

<sup>137</sup> *Weigend*, *supra* note 5, at 67; see also *Calliess*, *supra* note 33, at 930.

<sup>138</sup> *Albrecht*, *supra* note 5, at 1.

<sup>139</sup> *Hörnle*, *supra* note 5, at 194; see also *Nestler*, *supra* note 12, at 127.

<sup>140</sup> *Hörnle*, *supra* note 5, at 196; see also *Streng*, *supra* note 72, at 47 ff.; *Götting*, *supra* note 12, at 213; *Jung, Heike, Sanktionssysteme und Menschenrechte*. Bern 1992, at 183; see also in general *Dreier, Ralf, Recht – Moral – Ideologie. Studien zur Rechtstheorie*, 2th ed. Frankfurt am Main 2015, at 52 ff.

types of crime committed, punishment imposed by the courts and the judicial culture of the country, in particular amongst judges. This contribution cannot offer a comprehensive analysis of these issues: it limits itself to highlighting only a few relevant factors.

First of all, crime statistics in Germany reveal instructive characteristics that also have an influence on the sentencing practice of courts. Police crime statistics of 2015 show that the crimes committed are primarily non-violent and non-severe in nature.<sup>141</sup> Not only are the most frequently committed crimes against property (roughly two-thirds of registered cases) but also, apart from traffic crimes, most of the courts' workload comprises crimes against property.<sup>142</sup> And even these crimes against property are mostly of lesser gravity. In conclusion, the low gravity of crimes committed in Germany results in low sentences.<sup>143</sup> This sentencing factor underlines once again that current sentencing practice in Germany is not determined only by a normative framework or doctrinal considerations.

Secondly, sentencing seems to be a judicial issue that is influenced considerably by certain subcultures within the criminal courts.<sup>144</sup> In fact, this perspective is an inherent part of the three-stage-based sentencing factors analysis that is present, albeit in fragments, within the literature: namely the macro-, mid- and micro-levels. Although a strict definition of these levels has apparently not yet been made, political, social and economic circumstances are deemed macro-level factors, whereas the subculture of courts and the personal persuasions of judges – their “biases and personal vision of criminal policy” – can be considered as mid- and micro-level factors.<sup>145</sup> Indeed a dozen analyses have been conducted and a considerable quantity of sentencing indicators have been shown to relate to one of these elements.<sup>146</sup> The main criticism of this

<sup>141</sup> Crime Report of the Federal Criminal Police Office [Bericht zur polizeilichen Kriminalstatistik] 2017, at 43 [file:///Y:/Eigene%20Dateien/Rechtsgebiete/Cezan%C4%B1n%20tayini/Sentencing%20desicion%20by%20judge/pks2017ImkBericht.pdf]; see also Nestler, *supra* note 12, at 126.

<sup>142</sup> Overview on Justice by the Federal Statistical Office [Justiz auf einen Blick] 2015, at 20 [https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/Querschnitt/BroschuereJustizBlick0100001159004.pdf?\_\_blob=publicationFile].

<sup>143</sup> Weigend, *supra* note 5, at 48 and 49.

<sup>144</sup> Weigend, *supra* note 5, at 49; Jung, *supra* note 140, at 184.

<sup>145</sup> Hörnle, *supra* note 5, at 193, 203.

<sup>146</sup> See for instance Lappi-Seppälä, Tapio, Vertrauen, Wohlfahrt und politikwissenschaftliche Aspekte – International vergleichende Perspektiven zur Punitivität, in: Kriminalität, Kriminalpolitik, strafrechtliche Sanktionspraxis und Gefangenenraten im europäischen Vergleich. Band 2, ed. by Dünkler, Frieder, Lappi-Seppälä, Tapio, Morgenstern, Christine, van Zyl Smit, Dirk. Mönchengladbach 2010, 963–1022; Müller, *supra* note 63, at 16 ff.; Grundies, Volker and Light, Michael, Die Sanktionierung der „Anderen“ in der Bundesrepublik. In: Risiken der Sicherheitsgesellschaft. Sicherheit, Risiko & Kriminalpolitik, ed. by Niggli, M. A. and Marty, L., Kriminologische Schriftenreihe der Neuen Kriminologischen Gesellschaft

approach and the associated explanations that have evolved from these analyses refers to the point that the analyses mostly focus only on single sentencing factors as the overriding variable, like the migrant background or gender of the offenders, and thereby neglect other decisive factors of sentencing decisions of the courts. In particular, they are broadly engaged with presenting the role of a certain variable within the whole system of criminal justice in detail.<sup>147</sup>

Indeed, there are indications that in Germany these factors also play a crucial role in sentencing decisions.<sup>148</sup> For now, however, I confine myself to referencing certain remarks about micro-level sentencing factors and one mid-level explanation that *Hörnle* put forward in order to illuminate the non-normative and non-dogmatic factors affecting sentencing practice in Germany. Personal persuasions that go beyond the normative program of sentencing, but which nevertheless influence the sentencing decisions of judges, can be related for instance to the immigration background or social-economic status of the offender. As *Hörnle* points out, current sentencing practice in Germany does not exclude undesirable sentencing determinants. However, she also reminds us that the few existing studies have not revealed systematic determination by these mentioned factors.<sup>149</sup>

However, sentencing research has clearly revealed some local differences in the sentencing practice of courts in similar cases, as well as uniformities within a single jurisdiction.<sup>150</sup> This fact correlates with the common manner in which new judges adopt local sentencing tariffs: as the Penal Code is not very helpful in fixing a certain amount of a sentence in a particular case, the experienced judges transfer their knowledge to new colleagues quite informally, by a simple conversation.<sup>151</sup>

As a result, the courts seem to have a quite effective subculture. In this regard, *Hörnle* argues that three main features might explain sentencing patterns

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e.V. Bd. 115. Mönchengladbach 2014, 225-239; for further studies see Dünkel, Frieder and Geng, Bernd, Die Entwicklung von Gefangenenraten im nationalen und internationalen Vergleich – Indikator für Punitivität? SOZIALE PROBLEME 24/2013,42– 55, 65 ff.; Dünkel, Frieder and Morgenstern, Christine, Landesbericht Deutschland, in: Kriminalität, Kriminalpolitik, strafrechtliche Sanktionspraxis und Gefangenenraten im europäischen Vergleich. Band 1, ed. by Dünkel, Frieder, Lappi-Seppälä, Tapio, Morgenstern, Christine, van Zyl Smit, Dirk, Mönchengladbach 2010, 97, 230, at 158 ff.

<sup>147</sup> Hörnle, *supra* note 5, at 193, 203; see also Jung, *supra* note 140, at 193 ff.; for an empirical study focused on sentencing law see Streng, *supra* note 72, at 39.

<sup>148</sup> See also Hörnle, *supra* note 5, at 204.

<sup>149</sup> Hörnle, *supra* note 5, at 201; for similar conclusions on an empirical basis see also Grundies and Light, *supra* note 146, at 225-239; Streng, *supra* note 74, at 51 f.

<sup>150</sup> Hörnle, *supra* note 5, at 201; see also Götting, *supra* note 12, at 213; Streng, Strafrechtliche Sanktionen, *supra* note at 3, at 234; Streng, *supra* note 74, at 48 f.

<sup>151</sup> Weigend, *supra* note 5, at 82.

in Germany at mid-level: “the impact of preventive detention on sentencing practices, the recruitment and self-concept of judges and the impact of legal education”.<sup>152</sup> According to her, the mere existence of preventive detention takes the pressure off judges to consider dangerousness and recidivism as sentencing factor, and thereby to preserve the principle of guilt-commensurate and moderate sentencing.<sup>153</sup>

With regard to the recruitment and self-concept of judges, Hörnle adds that sentencing practice in Germany is influenced “by the way the profession operates, [and that] career paths and modes of recruitment matter; and the degree of professionalization is important”.<sup>154</sup> In all these regards, Hörnle describes positive aspects of the German judiciary. Finally, she points out that during their education at law schools, German judges acquire a strong commitment to the principle of proportionality and justice. In particular, she adds, judges are also skeptical about the success of deterrence by harsh sentences.<sup>155</sup>

### CONCLUSIONS AND FINAL REMARKS

In conclusion, then, sentencing in Germany is a multifactorial issue that is influenced not only by statutory law, jurisprudence, and dogmatic debates, but also by non-normative and non-dogmatic factors. Here I have only been able to survey the issues in a fragmentary way. It is indeed difficult to isolate which factors are decisive for sentencing practice in Germany. Yet, this complex landscape can also be considered as an opportunity for progressive policy making in the area of sentencing, as there are many avenues for fine-tuning. In particular, the detrimental effects of sentencing factors can be counterbalanced. For instance, a punitive attitude among judges and their preference for prison sentences can be addressed by respective amendments in law. But such adjustments will seem promising only if at the same time they take the particular circumstances of the subculture of courts in a given region into account. In Germany, the courts have adopted law reforms that aimed at a less punitive approach in sentencing practice. In fact, the practice of courts has mostly been accepted and incorporated into the jurisprudence of Appellate Courts, and there seems to be no particular inconsistencies between dogmatic theories and sentencing practice. As a whole, as Hörnle has pointed out,

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<sup>152</sup> Hörnle, *supra* note 5, at 201; see also Albrecht, *supra* note 5, at 18; Weigend, *supra* note 5, at 82.

<sup>153</sup> Hörnle, *supra* note 5, at 204; see also Streng, *supra* note 12, at 166.

<sup>154</sup> Hörnle, *supra* note 5, at 205-206; see also Albrecht, *supra* note 5, at 2; for more empirical findings with regard to the role of the judge in the sentencing decision see Streng, *supra* note 72, at 49 ff.

<sup>155</sup> Hörnle, *supra* note 5, at 206; for the education and recruitment of judges in Germany see also Bittmann, *supra* note 53, at 1320 ff.

sentencing practice in Germany is consistent, fair, moderate and not punitive.<sup>156</sup> This state of affairs raises the question of whether there is any need to continue to discuss sentencing in Germany? Yet I think there is. The current output of sentencing practice should not seduce us into overlooking certain weaknesses of the sentencing framework overall. From our review, the framework emerges as in a state of constant challenge, induced by shifts of perspective and the emergence of new types of crimes. To close our discussion, I mention only one group of cases that has this character, namely deaths resulting from car race accidents. Such deaths were and still are the subject of talk shows on TV. And recently a court in Berlin addressed this controversial phenomenon, the subject of extensive public debate, by an unusually harsh sentencing decision, namely life imprisonment. The verdict has again raised questions about the legitimate objectives of punishment, especially deterrence, and the limitations imposed by the guilt of the offenders.<sup>157</sup> As already shown above, traditionally the jurisprudence in Germany answers these questions by application of the so-called “Spielraumtheorie”, however, apparently with some exceptions.

Indeed, not only the judiciary, but also lawmakers seem to feel public pressure with regard to the moderate sentencing policy in Germany. Former German Federal Minister of Justice and Consumer Protection, Heiko Mass, wrote in 2015 the preface to a handbook on Criminal Justice in Germany: in the very first paragraph, he emphasizes that “Public perception of crime and law enforcement is dominated by headline news. Sensational cases attract media coverage; they are the topic of discussion on social networks. But the real picture is different: The day-to-day fight against crime is largely a story of minor and moderate serious property offences”.<sup>158</sup>

But would that convince the public? Should criminal courts tune out public perceptions of “just sentencing” entirely?

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<sup>156</sup> Hörnle, *supra* note 5, at 209; compare with Schäfer/Sander/van Gemmeren, *supra* note 5, at 5.

<sup>157</sup> Das Landgericht Berlin [LG Berlin] [Higher Regional Court], Feb. 27, 2017, 7–8 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK [ZIS] 439, 439 ff. (2017), para. 211; Bundesgerichtshof [BGH] [Federal Court of Justice], Case No. 4 StR 399/17, para 212, (Mar. 01, 2018); for the aggravating the sentence in connection with the migrant background of the offenders see Hörnle, *supra* note 83, at 32.

<sup>158</sup> Criminal Justice in Germany, by Jörg-Martin Jehle, 6th ed. 2015 [[https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Justizstatistik/Criminal\\_Justice\\_Germany\\_en.pdf?\\_\\_blob=publicationFile](https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Justizstatistik/Criminal_Justice_Germany_en.pdf?__blob=publicationFile)].

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# SUCCESSION RIGHTS OF SURVIVOR SPOUSE DURING DIVORCE SUIT BY DECISIONS OF THE TURKISH COURT OF APPEALS

*‘Türk Yargıtay Kararları Çerçevesinde Boşanma Davası Sırasında Sağ Kalan Eşin Mirasçılığı’*

**By Asst. Prof. Çiğdem Mine YILMAZ\***

## Abstract

Legal heirs are specified in the first chapter of 3rd Book of Turkish Civil Code (TCC) No. 4721. The surviving spouse is defined as one of the legal heirs. If one of the spouses has died during a divorce suit that has been filed because of the negativities in a marriage, then the divorce suit becomes devoid of essence and the lawsuit ends because it is not possible to make a decision based on the lack of essence. In the same context, until the Civil Code No. 4721 entered into force, the Court of Appeal remained consistent in its decisions that the heirship rights of the surviving spouse continue in case of the death of complainant or defendant spouse. On the other hand, the heirship of surviving spouse in case of the death of the other spouse during a divorce suit, especially one filed with the imputation of gross fault has been considered to be irritating. For this reason, Article 181 of Turkish Civil Code No. 4721 regulating the consequences of divorce has been amended. After the amendment, the article in force is to the effect that: The divorced spouses cannot fall heir to each other and, unless indicated otherwise, the testamentary dispositions become void (181/I). Article 181/II goes ahead to state that, in case of death of one of the spouses during a divorce lawsuit, and if one of the heirs of the deceased complainant continues the lawsuit and evidences the fault of defendant spouse, the same provisions mentioned above shall be applied; i.e., they cannot inherit from the deceased spouse.

However, examining some legal systems under comparative law, it is evident that (in some systems) the heirship of spouse does not continue upon filing the lawsuit or rather the law has imposed certain conditions for such situations. In this paper, the provisions entered into force will be analyzed and discussed.

**Keywords:** Heirship of Spouse, Divorce Suit, Legal Heirs

## Özet

Yasal mirasçılar 4721 sayılı Türk Medeni Kanunu'nun Üçüncü Kitabının Birinci kısmında düzenlenmiştir. Sağ kalan eş, yasal mirasçılardan biridir. Boşanma davası devam ederken, eşlerden birinin ölmesi halinde, dava konusuz kalacağı için, boşanma davası sona erecektir. Oysa, ölüm evliliği sona erdirmekte olup, mirasa ilişkin sorunlar doğacaktır. 4721 sayılı Medeni Kanun yürürlüğe girenedek, Yüksek Mahkeme'nin, dava devam ederken, eşlerden birinin ölümü halinde, sağ kalan eşin mirasçı olacağına ilişkin içtihadı yerleşikti. Ne varki, bu rahatsız edici durum, kanun koyucu tarafından dikkate alınarak, madde yeniden düzenlendi. 181. Maddeye göre, boşanan eşler birbirlerinin mirasçısı olamayacağı gibi, tasarruftan aksi anlaşılmadıkça, ölüme bağlı tasarrufla sağlanan hakları da kaybederler. Nitekim, maddenin II. Fıkrasında, ölen eşin mirasçılarının davaya devam etmesi ve diğer eşin kusurunun ispatlanması halinde de aynı hükmün uygulanacağı kabul edilmiştir. Oysa, mukayeseli hukukta, boşanma davasının açılmasıyla, eşlerin mirasçılık sıfatının ortadan kalkacağı ya da başka şartların arandığı görülmektedir. Çalışmada, bu hükümler ele alınıp, öneri sunulmaya çalışılacaktır.

**Anahtar Kelimeler:** Yasal mirasçılar, Eşin mirasçılığı, Boşanma Davası

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## INTRODUCTION

Under the Turkish Law of Inheritance, which is based on the parental system, the “spouse” is not a parental heir. Principally, the spouse is an heir together with relatives at any degree, and the presence of a spouse is a restraint for escheat.

The share of a spouse, when he/she is heir with other degrees of relatives, is regulated in Article 499 of TCC. Accordingly, the share of a spouse, when together with first degree relatives, is  $\frac{1}{4}$  of the heritage. In Turkish law, the first degree relatives are the descendants of the deceased, and downwardly limitless. Second degree of relatives is the deceased’s parents and their descendants. It continues downwards to the deceased’s brothers and sisters, nephews and nieces, and second cousins.

Third degree of relatives consists of the deceased’s grandparents and their descendants such as deceased’s uncles, aunts, and their descendants. However, when the surviving spouse becomes heir together with third degree relatives, his/her succession is limited. If the spouse is an heir together with the heads of third degree relatives and their children, the spouse shall have  $\frac{3}{4}$  of the heritage (TCC Article 499/III). According to TCC 497/V, if there is one surviving spouse and in the event both of the grandmother and grandfather have died before the deceased, then each of their individual share shall be passed to his/her own child(ren)”. In other words, the spouse of deceased shall fall heir together only with the grandparents and their children. However, if cousins are alive, the spouse shall be the only heir.

With the finalization of an annulment of marriage, according to TCC 181/I, spouses shall not fall heir to each other. Besides that, the testamentary dispositions that they have made for each other automatically become annulled. The invalidity of testamentary disposal upon the death of one of the spouses had been discussed by some lecturers at doctrine<sup>1</sup>. An author has stated that, if a husband makes a will in favor of his wife and dies 10 years after the divorce, then the fact that he had no amendment in testament during the 10 years clearly evidences that he wanted to keep the testament. The testamentary disposition, which has not been altered after the divorce, should have been considered void only when the duration was short.” But, if it has been stated in testamentary disposition that the testament shall be valid even in case of a divorce, the spouse, in favor of whom the testament is, shall request the fulfillment of the testament.

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<sup>1</sup> Tekinay, 1990, p. 294.

## **I. HEIRSHIP OF SURVIVING SPOUSE IN TURKISH LAW OF INHERITANCE IF ONE OF THE SPOUSES DIES DURING THE DIVORCE SUIT**

TCC 181/II has different provisions on the situations, in which one of the spouses dies during a divorce suit. 181/II (Amendment to Article 19 of the Law No. 6217 in 03.31.2011) refers to 181/I by stating that “the provisions of first paragraph are applied if one of the heirs of the spouse that died during the divorce suit continues the lawsuit and the fault(s) of the other spouse is evidenced”.

From the Article 181/I being referred, it states that only the parties that have officially divorced cannot fall heir to each other and, as such, it can be seen that the legislative authority imposed that, in the event a party dies during the divorce proceedings, the testate and intestate succession principally remain in force because the marriage ended with a death rather than a divorce; TCC 181/II, however, specifies an exceptional situation<sup>2</sup>. According to this paragraph, if a spouse, who was the complainant in a suit, dies during the divorce proceedings and one of the heirs continues the suit and the faults of other defendant spouse are evidenced, the surviving spouse shall lose his/her heirship.

The contradiction of the provision of Article 181/II with the right of succession granted to everyone by Article 35 of Constitution has been discussed. However, an author has rightfully concluded that, since the heritage remains in the hands of family other than the spouse, the right of succession is protected as a constitutional right<sup>3</sup>.

There are some other consequences arising from Article 181/II. For instance, the deceased spouse may be defendant or complainant. But yet, the heirs of deceased spouse have been granted this right (of continuing the divorce suit) only when the deceased spouse is complainant<sup>4</sup>.

Based on the Court of Appeal’s Decision No. 102/14 (docket Nr.2008/102, date: 01.21.2010-Official Gazette Nr. 27737 dated 10.22.2010, the provision has been amended<sup>5</sup>. Hence, from the aspect of the technique of civil law, the Lower Court ruling the case should have made a decision within the frame of TCC Article 1 when it concluded that this was an unconscious gap<sup>6</sup>.

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<sup>2</sup> Dural&Öz, 2013, p. 43; Serozan&Engin, 2014, p. 199

<sup>3</sup> Topuz, 2012, p. 221-256

<sup>4</sup> Thus, this provision has been criticized by Hatemi since it doesn’t fit to the principle of “fairness of the contract”. Hatemi, 2013, p.109.

<sup>5</sup> According to İnan&Ertaş&Albaş, such a decision of Court of Appeal doesn’t fit to the system of Civil Law.

<sup>6</sup> İnan&Ertaş&Albaş, 2015, p. 125.

In this amendment, it has been accepted that the deceased spouse may be “complainant” or “defendant”. Hence, in the decision of Court of Appeal, the granting of the right of continuance of the suit only to the heirs of complainant spouse has been found to be contrary to the principle of equality in 10th article of Constitution and to the right to a fair trial in 36th article of the Constitution.

Again, in the grammatical interpreting of this provision, it can be concluded that one of the heirs of deceased may continue the lawsuit, and the participation of all the heirs is not required. It can also be concluded that anyone that does not have an heirship shall not participate into the lawsuit but the heir that has the right to continue the lawsuit may be the legal or assigned heir. For instance, if the deceased spouse has descendant(s), his/her parents shall not continue the lawsuit. Hence, only the rightful heirs of the deceased person shall have the benefit of continuing the lawsuit. On the other hand, according to the clear provision of code, obligor of the deceased shall not continue the lawsuit.

As stated in the justification of Article 181/II, in case of the death of one of the spouses during the lawsuit, the meaning of continuance of the divorce suit is not to simply continue it, but to determine “which spouse is faulty in divorce”<sup>7</sup>. In other words, according to Article 181/II, the purpose of “continued lawsuit” is to determine which spouse is at fault in the events causing the divorce suit<sup>8</sup> because the marriage has automatically ended with the death<sup>9</sup>.

If the fault of the surviving spouse is evidenced during the continuing lawsuit, then the spouse at fault shall not fall heir to the unfaulty spouse. According to Dural&Öz, if based only on a declaratory judgment, the determination of the faultiness of defendant shall not prevent his/her heirship. Another lawsuit requiring the determination of qualification should be filed. On the other hand, if the court decides to end the heirship of the surviving spouse, then it would not be judgement declaring fault. But, it would be a decision eliminating the heirship of a surviving spouse and hence, with this decision, the heirship of the surviving spouse is ended<sup>10</sup>. Moreover, in its judgment on 04.11.2006, the Court of Appeal has considered a lawsuit, where the heirs have continued, to be a lawsuit for ascertainment of fault<sup>11</sup>.

Again in Article 181/II, by stating the “participation of heirs in the actual lawsuit”, it can be concluded that the heirs have no right to file a new lawsuit and that, if the actual lawsuit is not followed by the heirs, it is not possible to achieve this result in a new lawsuit<sup>12</sup>.

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<sup>7</sup> Justification of Decision, p. 377.

<sup>8</sup> Yıldırım, 2014 p. 86.

<sup>9</sup> Court of Appeal, 2nd Civil Chamber. 12.12.2005 d. 14672 Docket No., 47405 Decree No.; Court of Appeal, 2nd Civil Chamber. 16.09.2003 d. Merits No.7241, Decree No.11357

<sup>10</sup> Dural&Öz, p. 44.

<sup>11</sup> Court of Appeal, 2nd Civil Chamber. 11.04.2006 t. 2005/17867 Docket No., 2006/5233 Decree No., Yargıtay Kararları Dergisi, Vol. 32, Issue.9 September 2006 p.1397.

<sup>12</sup> Kılıçoğlu, 2015, p. 186.

According to the previous law, Article 146/II of Turkish Civil Code No. 743, if there is a will made by the deceased in favor of a divorced spouse, then such an inheritance depending on such testamentary disposition becomes invalid. According to Feyzioğlu, Article 146/II of Turkish Civil Code No. 743 is of compulsory character and any contrary regulation regarding the validity of testamentary disposition, which has been prepared before the death, is void<sup>13</sup>.

In this provision of the previous law, the legislative authority assumed that the marriage has ended because of the death. For this reason, in Article 181/II, it is concluded that filing a divorce suit does not solely alter the legal heirship of spouses until the finalization of a decision. Therefore, in case of the foreclosure of the lawsuit due to death, the surviving spouse remains a legal and appointed legatee<sup>14</sup>. In Turkish law, in case of the death of the complainant spouse, the only way of preventing the rights of surviving spouse is to continue the suit by one of the heirs and to evidence the surviving spouse's fault in the divorce. In this case, according to some authors in doctrine, TCC 181/II has brought the provision of disinheritance, which has not been regulated in TCC Article 578<sup>15</sup>.

In doctrine, there are different opinions regarding whether the provisions of TCC. 181/II shall be applied to all of the reasons/grounds of divorce. Some of the authors<sup>16</sup> have expressed that they should be applied to all of the reasons, whereas the others<sup>17</sup> have sought for the presence of grounds for divorce requiring gross fault. According to Kılıçoğlu, in high-conflict divorce suits, this provision shall not be applied if it has been understood that the complainant spouse has shared fault<sup>18</sup>.

This provision is also criticized from the aspect of the rules of procedure. That is to say; Article 181/II required an amendment in terms of the configuration. The amendment sought is mainly to deal with the problems about the relationships between the heirs continuing the lawsuit and the commitment of heirs to the proceeding lawsuit's consequences<sup>19</sup>.

Moreover, another criticism is made from the aspect of character of the right. In other words, the ability of heirs to continue the lawsuit after the death is considered "strange" even if the point was to ascertain the pure fault of the person in a divorce lawsuit<sup>20</sup>.

Considering the effects of the rules of procedure in terms of substantive law, one notes that there also is an uncertainty. For instance, it is not clear how one

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<sup>13</sup> Feyzioğlu, 1986, p. 377.

<sup>14</sup> Akkanat, 2004, p. 48.

<sup>15</sup> Dural&Öz, p. 43; İnan&Ertaş&Albaş, p. 123.

<sup>16</sup> İnan&Ertaş&Albaş, p. 125

<sup>17</sup> Kılıçoğlu, 2004, p. 23.

<sup>18</sup> Kılıçoğlu, 2004, p. 23.

<sup>19</sup> Taş Korkmaz, <http://hukuk.deu.edu.tr/wpcontent/uploads/2015/09/H%C3%9CLYA-TA%C5%9E-KORKMAZ.pdf>; Akkanat, p. 47.

<sup>20</sup> Serozan&Engin, p. 61.

of the heirs would continue the lawsuit. Moreover, there is no problem if the heir is aware of the procedure and willing to continue the lawsuit. However, if the heirs do not know about the lawsuit, it is not clear what will happen. According to Kılıçoğlu<sup>21</sup>, in such a case where a spouse dies during the divorce proceedings, the court should summon the extracts of the deceased from the civil registry, the addresses of heirs should be investigated from the aspect of delivery, the statements of heirs with regards to whether they will continue the lawsuit, and the action should proceed in this parallel. In this case, even if one of the heirs have reported to the court that he/she would continue the lawsuit, the other heirs should also be ascertained and then invited to the lawsuit. This solution would protect other heirs from the risk of one heir's discontinuance or disclaimer. For this purpose, it is recommended to ascertain all of the heirs of deceased spouse, invite them to the lawsuit, and give them time for making statement about if they are willing to continue the lawsuit<sup>22</sup>.

## II. HEIRSHIP OF SPOUSE IN COMPARATIVE LAW

In the Swiss law, the share of a spouse is  $\frac{1}{2}$  when together with 1<sup>st</sup> degree relatives (ZGB Art. 462- Amended by Annex No. 8 of the Same Sex-Partnership Act of 18 June 2004, in force since 1st January 2007) and  $\frac{3}{4}$  when together with 2nd degree relatives. The presence of a spouse, contrary to the Turkish law, hinders the heirship of 3rd degree relatives. TCC Article 181/I has been quoted from ZGB 154 and this provision has been amended by Article 120/II having the same content. Article 181/II is not present in Swiss Civil Code. According to certain authors<sup>23</sup>, who characterized this situation as the conscious silence of law, ZGB Article 109 and mainly the Article 120 regulate the provisions of the consequences that follow when one of the spouses dies after the annulment or termination of a marriage, but not the implications when one of the spouses dies during and/or before the annulment or termination of a marriage is concluded; it means that the legislative authority consciously remained silent<sup>24</sup>. For this reason, according to Dural/Öz, the death of one of the spouses during the divorce suit doesn't influence the heirship of the surviving spouse. In other words, the surviving spouse remains the legal heir of the deceased and he/she can request the fulfillment of his/her rights arising from the testamentary dispositions<sup>25</sup>.

According to Hegneuer, to a certain extent, this is a consequence of the fact that the end of the marriage was because of a death rather than a divorce, and

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<sup>21</sup> Kılıçoğlu, 2015, p. 186.

<sup>22</sup> Antalya, 2009, p. 96.

<sup>23</sup> Dural/Öz, p. 44.

<sup>24</sup> <https://www.admin.ch/opc/en/classified-compilation/19070042/index.html>

<sup>25</sup> Dural&Öz, p. 44.

that the capacity of accession to divorce suit belongs only to the spouses and, accordingly, the heirs cannot participate in the lawsuit<sup>26</sup>. Hence, in Switzerland Bundesgericht's BGE 76 II 252, BGE 51 II 539, BGE 76 II 129, and JdT 1951 I 130 decisions, the opinion that the heirs of deceased shall not continue the lawsuit is dominant<sup>27</sup>.

Under German Law, the first article of German Civil Code (BGB) dated 1st of January 1900, BGB § 1933, mentions that "The deceased spouse, until his death, has the right to file a divorce suit because of the fault of the surviving spouse and, if the spouse has filed a divorce suit or claimed the annulment of marriage, the heirship of surviving spouse ends." According to this provision, if the legator spouse is the complainant, then the surviving spouse shall lose his/her rights originating from the legal heirship.

In the German law, surviving spouse's loss of heirship arising from the testamentary disposition is regulated in BGB § 2077. Amended form of BGB § 2077, amended in year 1938, is as follows: "If the marriage is void or the marriage ends before the legator died, the testamentary dispositions of legator in favor of surviving spouse become invalid. A legator has right to file a suit for annulment of marriage until his/her death; if the legator has filed a claim and if the surviving spouse is considered at fault in the course of divorce or in annulment of marriage, then the same consequences similar to the official annulment of a marriage and the end of a marriage, specifically in relation with the law of inheritance, shall apply."

In the 2<sup>nd</sup> paragraph, it is specified that, if an engagement ends before the death of legator, the testamentary dispositions of legator in favor of his/her fiancé(e) shall become null. However, the 3<sup>rd</sup> paragraph states that, if the dispositions of a legator would have been made valid by the deceased, even in such cases where the marriage and/or engagement has been dissolved, then these dispositions shall not become invalid.

German Civil Code Article 2077 has been amended by the Marriage Law (EheSchIRG) in 1998. Current form of provision is as follows: According to 2077/1; if the marriage is void or has ended with death, then the testamentary dispositions of deceased in favor of surviving spouse shall become invalid. If the conditions of divorcement have been met before the legator has died or if the legator has claimed or approved the petition for divorce, the consequences regarding the law of inheritance shall be the same with the end of a marriage. In 2<sup>nd</sup> paragraph, again, it has been emphasized that, if the engagement ends before the death of legator, the testamentary dispositions in favor of fiancé(e) shall become null. In 3<sup>rd</sup> paragraph, it has been remarked that "if the legator

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<sup>26</sup> Dural&Öz p. 45.

<sup>27</sup> Topuz, p. 244.

has approved the validity of dispositions even under such conditions, then the dispositions will not become null”.

In this case, in actual form of German Civil Code BGB § 1933 and 2077, the statement of “materialization of the divorce conditions” has been emphasized. With the current amendment, the condition of “fault” has been removed from the German law for the loss of heirship, specifically the Marriage Law dated 1998 has been amended by 1st Reform Regulation on Family and Marriage Law, and the principle of “fault” has been changed to principle of “breakdown of marriage”<sup>28</sup>. The mentioned regulation has remarked that, in case of the materialization of conditions of breakdown of marriage, the complainant spouse or the spouse accepting to divorce loses his/her heirship. According to Serozan&Engin<sup>29</sup>, the petition of divorce means almost the same as in disinheritance of spouse in German law. German doctrine accepts that this regulation is in compliance with the will of legator and prevents the negative effects of any delay in trial from the aspect of law of inheritance<sup>30</sup>. In both of German Civil Code § 1933 and § 2077, the surviving spouse’s loss of heirship is regulated. According to these provisions, for the loss of legal and testamentary heirship, legator spouse must have claimed a divorce suit (BGB 1564/satz 1) or accepted the petition of divorce against him/her (1566/ Abs1), so the conditions of divorce must be met. In other words, the divorce suit filed based on a valid reason has been considered equal to the annulment of marriage. In this article, it is emphasized that the decision of judge brings a legal consequence same as in the annulment of marriage. The faulty spouse, to whom the divorce suit has been filed based on this provision, shall not profit from the “coincidence” of the early death of complainant<sup>31</sup>. According to BGB §2077, in order for a surviving spouse to lose his/her testamentary heirship, in addition to mentioned conditions, the legator spouse must have not approved the validity of testamentary dispositions in case of divorcement or the claim filed for annulment of the marriage.

However, in the Turkish doctrine, these provisions are criticized since the divorce suit doesn’t annul the heirship of both of the parties. Hence, it is considered quite unfair that the complainant spouse may fall heir to the defendant spouse if the defendant spouse dies during the proceedings<sup>32</sup>.

### III. PROPOSAL FOR TURKISH LAW

An amendment in TCC Article 181/II would protect the benefits of spouses

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<sup>28</sup> Topuz, p. 228.

<sup>29</sup> Serozan&Engin, p. 61

<sup>30</sup> Topuz, p. 229 .

<sup>31</sup> Serozan&Engin, p. 61/ Aksu, 2009, p. 76.

<sup>32</sup> Serozan&Engin, p. 61.

and other heirs. Since it is not thought that the death may coincidentally occurring the course of a divorce, the possibility of spouses' heirship to each other does not even come to the mind. Despite this possibility, it is clear that any of the spouses, at least the complainant spouse, does not want the other spouse to be his/her heir heirship when a divorce suit is filed. Considering the provisions of TCC regarding the law of inheritance, the heirship of a spouse, who is one of the legal heirs, is coherent with the reputed will of legator spouse. In other words; as long as the person's marriage continues, it can be naturally accepted that the person wants his/her spouse to fall heir to him/her. But, when he/she wants to annul the marriage, it is hypothetically clear that the complainant spouse does not want the heirship to remain anymore. However, despite all these realities, the provisions of Turkish Civil Code provide that loss of heirship is available only through denial of inheritance, renunciation of the inheritance, annulment, or disqualification.

In testamentary heirship, the legator may remove any person from the testamentary disposition. In the legal heirship, however, the heirship might be eliminated from heirship or disqualification only via disappropriation. For instance, assuming that the husband has beaten his wife and then thrown her out of the house, and his wife filed a divorce suit, if the complainant woman dies as a result of traffic accident during the procedure and if the heirs do not continue the lawsuit, the defendant husband can fall heir to the descendant wife because the grounds of disinheritance are limited in the code. This is because, according to TCC Article 578, beating the legator and throwing him/her out of the house are not reason for disinheritance.

It should be noted that, since disinheritance is regulated in Turkish Civil Code, it may be thought that a new regulation is unnecessary and the complainant may disinherit his/her spouse when alive. But, disinheritance has some strict conditions regulating it. For instance; in disinheritance, the legator might disinherit the heir based on one of 2 grounds: 1. Committing a serious crime against the legator and/or his/her relatives and 2. Severe violation of the familial responsibilities towards the legator. In both clauses, there is "serious crime or severe violation". On the hand, in a divorce suit, the surviving spouse may be found "faulty" but might have not committed such violations. For this reason, there is a handicap in disinheritance. Also, disinheritance requires a testament, which has been prepared by legator when he/she was healthy and sane. However, in some populations, especially those having low educational level, spouses may not even know what a testamentary disposition is or, even if he/she knows that, one may die before disposing or he/she might have not done because of the threats of their spouse.

The legal ground, on which more than half of divorce cases in Turkish law are based, is TCC Article 166/V. In this clause, no fault is sought. According



to the clause, “..... if common/normal life couldn’t be established again, then the marriage is considered principally broken down, and divorce is decided upon the claim of one of the spouses.” To my opinion, even during such a lawsuit, the heirs of deceased may continue the lawsuit for ascertaining the faulty party. Hence, considering the letter of the law (TCC 181/II), there is no handicap for fault examination. In the TCC 166/IV, it is stated that, in case that the lawsuit claimed for one of the reasons for divorce, if the common life could not be established again within 3 years of the rejection of that lawsuit, then it is considered to be the breakdown of marriage and the divorce decision is made upon the application of one of the spouses. Based on this provision, if one of the spouses dies within 3-year period after the rejection of lawsuit, the surviving spouse would fall heir to his/her deceased spouse although the continuance of marriage is not clear. This may seem like winning a lottery, especially for the surviving spouse. Accordingly, there is no doubt that such an event may cause social unrest.

According to TCC 166, in the case of the continuance of divorce suits that have been filed, there is another question, the answer of which is sought in doctrine. The question is as follows; when a lawsuit continues according to Article 181, shall the full fault of the surviving spouse be sought or can he/she be less faulty than deceased spouse was? In such a case, even if the surviving spouse is found to be slightly faulty, the surviving spouse cannot have any right on the inheritance.

Since the provisions of TCC Article 181 are applied to all of grounds for divorce, as much as it is aimed to prevent undesired consequences, it is also thought in some cases that it may cause legal disadvantages<sup>33</sup>.

Another remarkable suggestion In Turkish Law, regarding our topic, is that “attempted murder” which might be considered as an absolute ground for divorce may also be considered a ground for disinheritance. However, the rights of spouses, who have learnt about the grounds for divorce such as adultery, indignity, committing a crime or living a dishonorable life and clearly declared that he/she will file a divorce suit but died before filing that suit, have not been regulated!<sup>34</sup> This approach has been significantly criticized, and it has been stated in doctrine that, where there is the aspect of anticipating a divorce suit (and in this case it would be enough to be alleged by the legator that he intends to file a suit), then in the interest of transparency and in order to clear doubts, it has been thought that it would be better to grant the heirs the right of filing a divorce suit in cases, where the will of legator leaves no room for

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<sup>33</sup> İnan&Ertas&Albaş, p. 124,125

<sup>34</sup> İnan&Ertas&Albaş, 2015, p. 124; Akkanat, p. 48.

doubt<sup>35</sup>. But, since the marriage ends with death, the suit that the heirs will file could be “a declaratory action” rather than the “divorce suit”. To my opinion, the “hypothetical will” of the deceased spouse also requires this.

Some of the authors assert that, in case of the death of one of the spouses before the finalized decision on the divorce suit, the defendant party shall be disinherited if the deceased spouse is the complainant or the complainant shall be considered to have renounced the other spouse’s inheritance rights if the deceased spouse is the defendant party<sup>36</sup>. To my opinion, in cases where the divorce claim is built on a solid ground, it should be carefully considered by the Turkish law, and for it to prepare a legal solution removing the heirship of both spouses<sup>37</sup>. In this way, the benefit of both spouses will be paid through a claim of participation, which shall be paid from inheritance according to the regime of participation/contribution in the acquired property<sup>38</sup>. The ground of spouse’s heirship is constituted by the marriage. Regardless of fault, the marriage has entered into the process of annulment/termination. For this reason, the heirship of surviving spouse to the deceased spouse is not fair anymore.

Moreover, the divorce is not solely based on the principle of “fault” in Turkish law. For this reason, there are many divorce decisions, where no fault has been sought. Moreover, the presence of “fault” principle in the actual regulation and the evidential tools are rarely known by ones other than the spouses. There may be many events disrupting the marriage and known only by spouses. Therefore, it has been concluded in decisions of the Court of Appeal that the heirs of deceased spouse can continue the lawsuit in a “divorce suit filed based on a ground for divorce, where the factor of fault is not regulated as a concrete event”<sup>39</sup>. In these decisions, it has been emphasized that the Article 181/II grants the heirs of the deceased spouse with a direct special right and the mentioned provision/remarks that no discrimination shall be implemented to the grounds of divorce. In a mentioned decision; CoA. 2<sup>nd</sup> CC. E.2008/3668, K.2009/6307, the statement of opposition lodged by member Ömer Uğur Gençcan is as follows: “Marriage is to maintain coupledness in good and bad times. Is it fair to grant the person, who attempted to divorce from the spouse because the spouse got mentally ill (due to a divine disaster), with the right of continuance of the lawsuit upon his/her death? Is it possible for the heirs of complainant to evidence any fault of defendant, who was already mentally ill? Because the behaviors of a mentally ill person cannot be conscious, is it possible for the heirs of complainant to

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<sup>35</sup> İnan&Ertaş&Albaş, p. 124.

<sup>36</sup> Hatemi&KalkanOğuztürk, 2013, p. 109.

<sup>37</sup> In same opinion Serozan&Engin, p.62.

<sup>38</sup> For detailed information, please see Acar, 2014.

<sup>39</sup> CoA 2<sup>nd</sup> CC. 20.02.200617321 E. 1794 K.; CoA 2<sup>nd</sup> CC. dated 06.04.2009 No. 3668 E. 6307.

continue the divorce suit upon the mental illness? According to the author, not every divorce lawsuit shall be continued by the complainant's heirs according to the provisions of TCC § 181/II<sup>40</sup>. Therefore, according to the author, in actions based on Article 166/III regulating the consensual divorce and TCC 166/IV regulating the contested divorce, the lawsuit shall not be continued by the heirs of complainants based on the same grounds. Author member has opposed the majority by stating/questioning that how the heirs of complainant may assert the fault of defendant, if the complainant spouse would never be capable of evidencing that fault even if he/she would be alive.

### CONCLUSION

As known, if an ordinary marriage life ends with death, surviving spouse is considered as one of the legal heirs. Again, according to TCC Article 505, within the scope of freedom of testamentary disposition, the spouses may make a disposition in favor of each other. But, if a divorce suit has been filed because of the negativities in marriage and if one of the spouses has died during the procedure, then the divorce suit becomes devoid of essence, and the lawsuit ends. In this case, the surviving spouse shall fall heir to the deceased spouse because the marriage has ended with a death.

During the period when the old Turkish Civil Code No. 743 was in force, there was a debate in doctrine regarding the unfair consequences such as the above-mentioned one. In this mentioned period, there was not an exact parallelism between the decisions of Court of Appeal; while it has been concluded in a decision that the complainant spouse shall not fall heir to the defendant spouse. In another decision, it has been concluded that the defendant spouse shall fall heir to complainant spouse, who has died. Following these contradictory decisions, Civil Code No. 4721 came into force and, after its entering into force, the Court of Appeal remained consistent with its decisions on the heirship of surviving spouse in case of the death of complainant or defendant spouse.

On the other hand, the heirship of surviving spouse in case of the death of other spouse during and when a divorce suit has been filed, especially with the imputation of gross fault has been considered irritating. For this reason, Article 181 regulating the consequences of divorcement in 2<sup>nd</sup> Book regarding the family law of Turkish Civil Code No. 4721 has been amended. After this amendment, the article in force is as follows: The divorced spouses shall not fall heir to each other and, unless indicated otherwise, the testamentary dispositions become void (181/I). In case of the death of one of the spouses during the divorce lawsuit, if one of the heirs of the deceased spouses

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<sup>40</sup> Gençcan, 2008, p.868.

continues the lawsuit and evidences the fault of other surviving spouse, the abovementioned provisions of 181/I shall be applied (181/II).

TCC. 181/II grants the heirs with the right to continue the suit. However, in case of a divorce lawsuit filed because of mental illness, the heirs of complainant cannot evidence any fault if the complainant has died during the proceedings. Moreover, in case of a consensual divorce or active separation, the heirs of complainant cannot evidence any fault<sup>41</sup>. TCC. 181 / II granted the heirs with the right to pursue the case. However, when the complainant dies in divorce due to mental illness, the complainant's heirs will not be able to prove any defects. Likewise, in the event of a consensual divorce or an act of separation, the complainant's heirs will not be able to prove any defects.

In my opinion, in Turkey's realities, where the spouses avoid from revealing the real reasons of the divorce because of various factors, the TCC181 cannot be applied to consensual divorce suits because of the literal interpretation of provision. Even the ability of heirs to assert the evidence of fault where no fault has been asserted is more suitable for the objective of the provision. For this reason, in Turkish law, it would be appropriate to make a regulation similar to and even beyond the German law. Discontinuance of heirship upon the filing a lawsuit overlaps more with the reality of the absence of willingness to continue the marriage.

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<sup>41</sup> In the decision of the Second Civil Chamber of the Court of Appeal with Decision No.1794 and Merits No.17321 on 02.20.2006, this opinion was specified as counter vote.

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# DOES GDPR COVER THE EXPECTATIONS AFTER DPD ?\*

*GDPR, DPD sonrası beklentileri karşılar mı ?*

**By Judge Serdar ATALAR\***

## **Abstract**

Due to technological developments and globalization personal data protection has become a severe problem in the last two decades. Mankind is a social alien because of that people's information spread whole area of the world such as banks, schools and NHS. Due to this deployment community needs to protective rights about their personal data. The EC Data Protection Directive (DPD) has been acknowledged as an international standard for data protection law. Digital data help data controllers to create better products and services, but all this development may not be done at the expense of the consumer privacy. The common approach that the Directive 95/46 is no longer able to meet the requirements of rapid technological developments and globalization the European Union adopted a new regulation called General Data Protection Regulation (GDPR), which replaced the DPD on May 2018. Data protection regulations are undergoing a global reform. There have been both positive and negative reactions to that novel regulation; on the one hand, it is argued that the GDPR will reinforce the right to data protection, on the other hand, it is widely criticized on the ground that it does not cater for a stronger and more comprehensive regulation expectations.

**Key words:** GDPR, DPD, data protection, novelties, personal data, privacy

## **Özet**

Teknolojik gelişmeler ve küreselleşme nedeniyle kişisel verilerin korunması son yirmi yılda ciddi bir problem haline gelmiştir. İnsanın sosyal bir birey olmasından dolayı insana ait tüm bilgiler bankalar, okullar ve ulusal sağlık servisleri gibi tüm dünyaya yayılmıştır. Bu yayılmanın sonucu olarak toplum kişisel verileri hakkında koruyucu haklara ihtiyaç duymaktadır. Avrupa Birliği Veri Koruma Direktifi (DPD) veri koruma düzenlemesi için uluslararası bir standart olarak kabul edilmiştir. Dijital veriler, veri denetleyicilerinin daha iyi ürün ve hizmetler sunmalarına yardımcı olmaktadır. Ancak tüm bu gelişmeler tüketici mahremiyetini ihlal etmemelidir. 95/46 sayılı DPD'nin hızlı teknolojik gelişmelerin ve küreselleşmenin gerekliliklerini yerine getiremediği yönündeki ortak yaklaşımın sonucu olarak Mayıs 2018'de DPD'nin yerini alan Genel Veri Koruma Yönetmeliği (GDPR) adında yeni bir düzenleme Avrupa Birliği tarafından kabul edilmiştir. Veri koruma düzenlemeleri küresel bir reform geçirmektedir. Bu yeni düzenlemeye hem olumlu hem de olumsuz tepkiler oldu; Bir yandan, GDPR'ın veri koruma hakkını güçlendireceği, diğer taraftan daha güçlü ve daha kapsamlı bir düzenleme beklentisini karşılamadığı gerekçesiyle eleştirilere maruz kalmaktadır.

**Anahtar Kelimeler:** GDPR, DPD, veri koruma, yenilikler, kişisel veri, gizlilik

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- \* This Article has been prepared by making some changes from the work used in the LLM program at the University of Hertfordshire.
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## I. INTRODUCTION

Due to technological developments and globalization personal data protection has become a severe problem in the last two decades. Mankind is a social alien because of that people's information spread whole area of the world such as banks, schools and NHS. Due to this deployment community needs to protective rights about their personal data. The EC Data Protection Directive (DPD)<sup>1</sup> has been acknowledged as an international standard for data protection law.<sup>2</sup> Due to the emergence of social media, cloud computing, big data and smart phones have added pressure to update this regulation.<sup>3</sup> Thus, more personal data is collected which creates risks of discrimination, unfair treatment, hurdles for freedom of expression and so on for individuals and society in general.<sup>4</sup> Digital data help data controllers to create better products and services, but all this development may not be done at the expense of the consumer privacy.<sup>5</sup> The harmonization obtained by the Directive 95/46 has seemed insufficient.<sup>6</sup> The common approach that the DPD is no longer able to meet the requirements of rapid technological developments and globalization<sup>7</sup> gave rise to concerns about the adequacy of it, and as a result of a revision need, following long-running discussions, the European Union adopted a new regulation called General Data Protection Regulation<sup>8</sup> (GDPR), which replaced the DPD on May 2018.

Taking into account the many specific obstacles and furthermore the complex nature of data protection<sup>9</sup>, the European Commission, on 25 January 2012 presented the proposal for a Regulation on the protection of individuals with regards to the processing of personal data and on the free movement of such data; the so-called "General Data Protection Regulation".<sup>10</sup> This proposal is not just warranted by the rapid changes in technology but also by the changes in

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<sup>1</sup> 95/46/EC.

<sup>2</sup> Colette Cuijpers, Nadezhda Purtova, Eleni Kosta, 'Data Protection Reform and the Internet: The Draft Data Protection Regulation' (2014) Tilburg Law School Legal Studies Research Paper Series No. 03/2014 <http://ssrn.com/abstract=2373683> accessed 18 April 2017.

<sup>3</sup> Tomi Mikkonen, 'Perceptions of controllers on EU data protection reform: A Finnish perspective' (2014).

<sup>4</sup> Collette Cuijpers, (n.2).

<sup>5</sup> Tomi Mikkonen, (n.3).

<sup>6</sup> Luiz Costa, Yves Poullet, " Privacy and the regulation of 2012" (Universty of Namur, Belgium).

<sup>7</sup> Christopher Kuner, The European Commission's Proposed Data Protection Regulation: A Copernican Revolution in European Data Protection Law [2012], Privacy & Security Law Report, ISSN 1538-3423, 2.

<sup>8</sup> Hereinafter: GDPR.

<sup>9</sup> Peter Blume, " Will it be a better world? The proposed EU Data Protection Regulation." (International Data Privacy Law, 2012 VOL.2 No.3).

<sup>10</sup> Luiz Costa, Yves Poullet, (n.6).

the basic EU treaties since 1995.<sup>11</sup> Data protection regulations are undergoing a global reform.<sup>12</sup> By aiming at giving citizens and residents back control of their personal data and to simplifying the regulatory environment for international business, the GDPR, intend to strengthen and unify data protection for all individuals within the EU and addresses the export of personal data outside the EU. There have been both positive and negative reactions to that novel regulation; on the one hand, it is argued that the GDPR will reinforce the right to data protection, on the other hand, it is widely criticized on the ground that it does not cater for a stronger and more comprehensive regulation expectations. This article focuses on the proposed Regulation. After the historical and legal background necessary to understand the genesis and nature of the proposed Regulation is provided, its provisions are critically analyzed and discussed.<sup>13</sup>

## II. WHY A NEW DATA PROTECTION REGULATION IS NEEDED

The existing data-protection rules, which is based on a series of directives in particular, Directive 95/46/EC, Directive 2002/58/EC, and Directive 2006/24/E has proved to be very impractical as a result of the significant discrepancies between the interpretations or implementations of each directive that were made in the various Member States. This divergence has created a substantial burden on businesses. The choice of a regulation for the new general rules for personal data protection should provide greater legal certainty by introducing a harmonized set of core rules that will be the same in each Member State.<sup>14</sup> It should be noted that future data protection is to be governed by a regulation and not by a directive. This means that data protection is placed at a higher legal level as a regulation is directly a part of the national law and must not be transposed into national statutory law. All the European national data protection acts will disappear when the Regulation becomes effective.<sup>15</sup> The proposed regulation has been surrounded by fierce controversy and has been the subject of frenzied lobbying by global corporations, industry groups, research centres and privacy campaigners on both sides of the Atlantic.<sup>16</sup> A single set of rules on data protection, valid across the European Union, would make it easier for companies to know the rules. Unnecessary administrative burdens, such as notification requirements for companies, would be abolished. Instead, the

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<sup>11</sup> Peter Blume, (n.9).

<sup>12</sup> Tomi Mikkonen, (n.3).

<sup>13</sup> Gilbert Francoise, 'Proposed EU Data Protection Regulation: The Good. The Bad. and The Unknown (2012) Vol.15, No.10.

<sup>14</sup> Gilbert Francoise, (n.13).

<sup>15</sup> Peter Blume, (n.9).

<sup>16</sup> Alexander Dix, 'EU Data Protection Reform: Opportunities and Concerns, The Commissions' Data Protection Reform After Snowden's Summer' archive.intereconomics.eu/downloads/getfile.php?id=871 accessed 23 April 2017.

proposed Regulation provides for increased responsibility and accountability for those who process personal data. In the new rules, an organization would only have to deal with a single national data-protection authority in the European Union Member State where it has its main establishment. Likewise, an individual would be able to refer to the data-protection authority in his or her Member State, even when his or her data are processed by a company based outside the European Union.<sup>17</sup> The Commission's proposal includes many positive recommendations that should be embraced.<sup>18</sup> There are lots of novel approaches in terms of Data Protection in the GDPR.

The scope and the definition of the personal data is expanded in the GDPR. The definition of "personal data", it is more detailed in the GDPR than it is in the DPD,<sup>19</sup> and defined as "'any' information relating to an identified or identifiable natural person (data subject)"; and an identifiable natural person is one who can be identified directly or indirectly by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.<sup>20</sup> Online identifier or internet-related data include IP addresses or cookies, and in this way, the clarity is provided as regards how personal data may relate to an individual in the contemporary processing environment.<sup>21</sup> In this regard, an IP address can be a personal data, so, the scope of "personal data" has been enlarged and a wider range of information has been put into the scope of the data protection. On the other hand, 'anonymous' data which does not identify the data subject are not personal data and such data may be processed regardless of such laws.<sup>22</sup>

Numerous additional requirements would come instead. While the new data-protection rules would reduce red tape, it would require companies to be more accountable, to have in place written procedures and processes that they actually use, and to be able to show that they do comply with the applicable legal requirements.<sup>23</sup>

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<sup>17</sup> Gilbert Francoise, (n.13).

<sup>18</sup> Peter Cullen and Jean Gonie, 'Tomorrow's Privacy, 1995–2012: from a directive to a regulation, the Microsoft perspective' *International Data Privacy Law*, 2012, Vol. 2, No. 3. 117-118.

<sup>19</sup> Overview of the General Data Protection Regulation, <https://ico.org.uk/for-organisations/data-protection-reform/overview-of-the-gdpr/introduction/> accessed 21 April 2017.

<sup>20</sup> Gauthier Chassang, The impact of the EU general data protection regulation on scientific research [2017], *ecancer* 2017, 11:709 DOI: 10.3332/ecancer.2017.709, 2.

<sup>21</sup> Paul De Hert, Vagelis Papakonstantinou, The proposed data protection Regulation replacing Directive 95/46/EC: A sound system for the protection of individuals [2012] *Computer law & Security review* 28, 130-142, 133.

<sup>22</sup> W.Kuan Hon, Eleni Kosta, Christopher Millard, Dimitra Stefanatou, Cloud Accountability: The Likely Impact of the Proposed EU Data Protection Regulation [2014] *Tilburg Law School Legal Studies Research Paper Series*, 9.

<sup>23</sup> Gilbert Francoise, (n.13).

When processing data, the mechanism of the consent requirement is a significant guarantee of individual control over personal data as a most common data processing tool. It is apparent that technological developments require a careful consideration of consent thanks to the easiness and prevalence of data processing<sup>24</sup>. Therefore, strict consent requirements are described as the last defence for individuals against the loss of control of the processing taking place with their personal information, due to the being the most practical way<sup>25</sup>. The conditions for consent are quite similar to the conditions in the EC Data Protection Directive<sup>26</sup>. The GDPR has references to both ‘consent’ and ‘explicit consent’. However, the difference is not clear because both forms should be freely given, specific, informed and an unambiguous indication of the individual’s wishes<sup>27</sup>. In the initial proposal of Commission, consent must be explicit in all types of personal data which can be described as a brave standpoint.<sup>28</sup> Nevertheless, this requirement has been removed from the final text of Article 7 and remains for only processing of sensitive personal data under the article 9.<sup>29</sup> In addition to this, some form of clear positive action is required, thus, inactivity, silence or pre-ticked boxes do not constitute consent<sup>30</sup>. Furthermore, some form of record must be kept of how and when consent was given to make consent verifiable. Individuals have a right to withdraw consent at any time<sup>31</sup>. Briefly, the detailed provision of consent illustrates that lessons from the past have been learned and incorporated into the text of the GDPR.

The GDPR introduces some novel rights for individuals and reinforces some of the rights that already exist under the DPA, which provides relatively stronger control for data subjects over their personal data. The right to data portability, to erasure or to be forgotten, to restrict processing, to rectification and to object are some of them, and data controllers are obliged to implement detailed procedures and the EC is empowered to adopt acts and procedures so that individuals can exercise their rights.<sup>32</sup>

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<sup>24</sup> Seyed Ebrahim Dorraji, Mantas Barcys, ‘Privacy in Digital Age: Dead or Alive?! Regarding the New EU Data Protection Regulations’ (2014) 4(2) S.T. 306–317.

<sup>25</sup> Paul De Hert, Vagelis Papakonstantinou, ‘The New General Data Protection Regulation: Still a Sound System for The Protection of Individuals?’ (2016) 32 C.L.S.R. 187.

<sup>26</sup> GDPR Article 7.

<sup>27</sup> Information Commissioner’s Office, Overview of The General Data Protection Regulation, 03 March 2017 <<https://www.google.co.uk/url?sa=t&rc=t=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEWirgoebnq3TAhVNZ1AKHX6CCZsQFggoMAA&url=https%3A%2F%2Fico.org.uk%2Ffor-organisations%2Fdata-protection-reform%2Foverview-of-the-gdpr%2F&usq=AFQjCNFZe6yYN4bEZcBOisY62i5gLhVrYA&sig2=gpubaQ0gN6my2g2Nf-X4Qw>> accessed 13 April 2017

<sup>28</sup> Hert, Papakonstantinou, (n.25) 187.

<sup>29</sup> GDPR, Article 9(2)a.

<sup>30</sup> Hert, Papakonstantinou, (n.25) 187.

<sup>31</sup> GDPR, Article 7(3).

<sup>32</sup> Christopher Kuner, (n.7) 6.

When it comes to ‘The right to object’ it is based on personal data and protection of both individuals and companies. It means people have an opportunity to object the procession or usage of their data under legitimate interests. This right includes the performance of an assignment in the public interest of official authorities and direct marketing. Scientific or historical researches and statistics that are being processed are also the subject matter of this right.<sup>33</sup> This right ensures people about having proper safeguards of individual personal aspects such as their work performance, situation in economy, reliability, personal preferences and health.<sup>34</sup>

One of the most controversial and significant issues of the GDPR would be the right to be erasure (right to be forgotten)<sup>35</sup> European Commission described this as the right of an individual to make her/his data no longer processed. With this right there will be no grounds for retaining the data, it will be erased.<sup>36</sup> In fact, right to be forgotten is originated from French and Italian concept of right to oblivion.<sup>37</sup> The right to be forgotten brought too much criticism. According to some scholars the reason why there occurred a need about creating a new rule under the name of “right to be forgotten” is not as clear as it had to be.<sup>38</sup> One of the decisions of Court of Justice of European Union about this context would be a good example which is related to Google: Court of Justice of European Union required Google to move away the results saved in their indexes when somebody searches an individual’s name.<sup>39</sup> But besides such factors, the GDPR made it possible to apply the rule to be forgotten at a wider range by applying it to all data controllers and all people who operate and process the data.<sup>40</sup> In addition to all these, with this right, the negative data that is out of date became harder to be used against people, and if the data are no longer needed for legitimate

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<sup>33</sup> Overview of the General Data Protection Regulation, <https://ico.org.uk/for-organisations/data-protection-reform/overview-of-the-gdpr/introduction/> accessed 21 April 2017.

<sup>34</sup> Ibid.

<sup>35</sup> Hereinafter; RtbF.

<sup>36</sup> W. Gregory Voss, ‘Looking at European Union Data Protection Law Reform through a Different Prism: The Proposed EU General Data Protection Regulation Two Years Later’ (2014) 17/9 J.I.L. 11-24.

<sup>37</sup> Paul A. Bernal, ‘A Right to Delete?’ [2011] European Journal of Law and Technology, Vol. 2, No.2, 2.

<sup>38</sup> Christopher Kuner, (n.7) 2.

<sup>39</sup> Case C-131/12 Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González (2014) ECLI:317.

<sup>40</sup> Rosemary Jay, James Henderson, ‘The Right to Be Forgotten - Under Spotlight’ (2016) 16(3) P. & D.P. 6-8.

purposes they had to be deleted.<sup>41</sup> Some scholars criticise some aspects of this novelty. There is a concern that it is uncertain whether data controllers can balance the right to be forgotten against rights like free expression.<sup>42</sup> However, regardless of the outcome, the introduction of the ‘right to be forgotten’ on the internet is very important for individuals,<sup>43</sup> and despite the need for some clarifications, the mere introduction of the right to be forgotten demonstrates that huge steps are taken to give the control of the internet to the individuals and to allow people to live without their past interfering with their future.<sup>44</sup>

Another important right is about the personal data breach which is called “the right to know when your data has been hacked”. The European Commission states that the organizations or companies are expected to report or give information to the national supervisory authority of serious data breaches as soon as possible in order to make it possible to take action.<sup>45</sup> “Personal data breach” is described as a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed.<sup>46</sup> Within this context, data processors shall notify the controller immediately after detecting that a breach has occurred, and the controller shall notify the competent DPA without undue delay and where feasible, not later than 24 hours after learning the breach.<sup>47</sup> This novelty is fitting to touch upon punishment regime of the GDPR which has also significantly revised the regime of sanctions and penalties currently provided by the Directive<sup>48</sup> and increased enormously<sup>49</sup>

Finally, another novel right introduced under Article 18 is “right to data portability”, which allows individuals to change online services more easily by giving them the right to obtain a copy of processed data from their service provider.<sup>50</sup> The right to data portability only applies to

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<sup>41</sup> Paul A. Bernal, (n.37) 2.

<sup>42</sup> Ibid.

<sup>43</sup> Hert, Papakonstantinou, (n.21) 137.

<sup>44</sup> Emily Adams Shoor, *Narrowing The Right To Be Forgotten: Why The European Union Needs To Amend The Proposed Data Protection Regulation* [2014] Vol.39 No. 1, 519.

<sup>45</sup> Agreement of European Commission, ( n 1 ).

<sup>46</sup> Hert, Papakonstantinou, (n.21) 140.

<sup>47</sup> Christopher Kuner, (n.7) 8.

<sup>48</sup> Stefano Varotto, Colin James, ‘The European General Data Protection Regulation and Its Potential Impact on Businesses: Some Critical Notes On The Strengthened Regime Of Accountability And The New Sanctions’ (2015) 20(3), *Comms. L.* 78-85

<sup>49</sup> Christopher Kuner, (n.7) 12.

<sup>50</sup> Christopher Kuner, (n.7) 6.

personal data an individual has provided to a controller; where the processing is based on the individual's consent or for the performance of a contract; and when processing is carried out by automated processing systems.<sup>51</sup> In these circumstances, data subjects have the right to transmit their data in an electronic format. However, that is criticized by the view that the scope of control that right offers is limited since if processing is not based on consent or contract, that right cannot be used.<sup>52</sup> Additionally, it is argued that the general right to data portability is not more than an allowance to get a copy of the data and does not enable the data subjects to take their data and leave.<sup>53</sup>

While effective enforcement of data protection rules is important to ensure that companies take their responsibilities seriously, the proposal's 'one-size-fits-all' approach, which applies the same sanctions to all violations regardless of their severity, intent or impact, is a potentially huge burden and risk even for the most responsible organizations. Under the GDPR, for example, if a company that accidentally fails to use an electronic format when giving a customer access to his or her information could face the same penalty as a company that repeatedly and intentionally collects and processes data about individuals without their knowledge or consent.<sup>54</sup> This approach can create unfair situations among the companies comparing with the severity of their data protection breaches.

The aim of the GDPR is to give people back the control of their own data. The GDPR not only protects the personal data within the European Union but also the personal data outside the European Union.<sup>55</sup> The proposal fails to deliver what the Commission aimed for. It is neither modern nor does it reduce bureaucracy. Thus, the question has come up as to whether the approach taken in the Commission's proposal is appropriate for a modern information society. In addition, the proposal is criticized severely for being outside of the scope of European legislative powers and for proposing to allocate to the European Commission regulatory powers to decide on fundamental aspects of the future data protection law.<sup>56</sup>

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<sup>51</sup> Overview of the General Data Protection Regulation <https://ico.org.uk/for-organisations/data-protection-reform/overview-of-the-gdpr/introduction/> accessed 21 April 2017.

<sup>52</sup> Collette Cuijpers, (n.2) 12.

<sup>53</sup> Ibid.

<sup>54</sup> Peter Cullen, Jean Gonie, (n.19) 118.

<sup>55</sup> REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (2016) OJ L 119/1 Article 4(1).

<sup>56</sup> Ulrich Wuermeling, 'Modernization of European data protection law at a turning point.' (Latham & Watkins LLP, Frankfurt, Germany).

### III. CONCLUSION

If all these points are taken into consideration, the new GDPR will increase the rights of the individuals and the powers of the data protection authorities. While the Regulation would create additional obligations and accountability requirements for organizations, the adoption of a single rule throughout the European Union would help simplify the information governance, procedures, recordkeeping, and other requirements for companies unless the Member States take advantage of the numerous loopholes in the proposed Regulation to reinstate the provisions of their own laws that have been suggested by the Regulation.<sup>57</sup> The GDPR demonstrates some similarities with the old Directive and aims to take data protection compliance to a new level despite some problems. In the context of technological developments and increased globalisation, it constitutes a bold attempt to make the legal framework more efficient and effective; increase protection of fundamental rights; putting individuals in control of their data and provide more legal certainty. On the other hand, it can be said that the reform package not only presents an outdated approach, but also fails to fulfil its legal mission.<sup>58</sup> The different points are welcomed by the scholars, but the similarities caused lots of criticism about why such a new regulation is needed because there already was DPD in action and it was possible to update it instead of generating a new system of rules and regulations.<sup>59</sup> Some aspects in the GDPR that are represented as new were so much similar with the ones in DPD that people questioned why they were served under new names.<sup>60</sup> But, it is believed that the benefits of novel Regulation eventually outweigh any negatives.

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<sup>57</sup> Gilbert Francoise, (n13).

<sup>58</sup> Ulrich Wuermeling, (n.54).

<sup>59</sup> W. Gregory Voss, (n.36).

<sup>60</sup> Andrew Murray, *Information Technology Law* (3 rd edition OPU 2016) 582.



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# USING AI IN JUDICIAL PRACTICE – CAN AI SIT ON THE BENCH IN THE NEAR FUTURE?

*Mahkeme Uygulamasında Yapay Zeka Kullanımı – Yapay Zeka Yakın Gelecekte Kürsüde Yer Alabilir Mi?*

**By Judge Oğuz Gökhan YILMAZ\***

## **Abstract**

AI is one of the most popular topics in particular in the last decade even if it has an older history. This paper tries to address AI from the law perspective to discover to what extent AI can be used in judicial practice from an assistant to a judge. This paper anticipates that AI can be used in judicial practice by three options as AI assistant to judge, AI drafting decisions and AI deciding cases. Moreover, if AI is used in judicial practice, firstly it should have an ethical frame, as the ordinary legal actors have. Indeed, there are certain attempts for both to regulate AI, in general, and to create an ethical framework for the AI being used in legal practice even if they still remain at the initial stage. All in all, AI boom will continue to affect legal practice as it does in other professions even if the law will be one of those sectors which will be affected less and later.

**Keywords:** AI and the law, AI judge, legal personhood of AI, legal ethics for AI.

## **Özet**

Yapay zekâ, daha eski bir geçmişe sahip olsa da özellikle son on yıldaki en popüler konulardan biridir. Bu çalışma, yapay zekânın, bir yardımcıdan müstakil bir hakime varana kadar yargı pratiğinde ne kadar kullanılabileceğini keşfetmek adına yapay zeka kavramını hukuk perspektifinden ele almaya çalışmaktadır. Bu makale yapay zekanın yargı uygulamasında, hakime yardımcı yapay zeka, karar taslaklarını hazırlayan yapay zeka ve karar veren yapay zeka olarak üç şekilde kullanılabileceğini öngörmektedir. Yargı uygulamasında kullanılacak yapay zeka ilk olarak bir etik çerçeveye sahip olmalıdır. Zira adil olma, ayrımcılık yasağı gibi hukuk sisteminin kurucu değerlerine uygun hareket edilmesi mevcut aktörler için de bir yükümlülüktür. Aslında, henüz başlangıç aşamasında olsalar da hukuki uygulamada kullanılacak yapay zeka için hem düzenleme hem de etik bir çerçeve oluşturmaya dair çeşitli girişimler bulunmaktadır. Sonuç olarak, yapay zekâ patlaması, her ne kadar hukuk olabildiğince geç ve sonradan etkilenecek sektörlerden biri olsa bile, diğer alanlarda olduğu gibi yargısal uygulamaları da etkilemeye devam edecektir.

**Anahtar Kelimeler:** Yapay zeka ve hukuk, yapay zeka hâkim, yapay zeka ve kişilik hakkı, yapay zeka ve hukuki etik.

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## INTRODUCTION

Artificial intelligence (AI) is one of the most recent hot topics over the world and which was firstly used by a professor of Dartmouth College at a research project in 1956.<sup>1</sup> Despite the old history of AI, it became much more popular after the millennium in particular in the last decade by the effect of the huge development of computer and internet technologies. Likewise, the proliferation of the internet, AI-based things such as autonomous cars are becoming much more visible in our daily lives.

AI is mainly defined as it is a machine has the ability to solve problems like a human having this ability naturally. Besides, the early version of AI application was the industrial robots used in factories. Moreover, recent versions of the AI or robots are much more beyond than predecessors. AI's rapid and enormous development will continue to affect society particularly work life. It is estimated that roughly 30-40% of the jobs will be replaced by AI and related technologies by 2040.<sup>2</sup>

It is clear that AI has a changing effect on many sectors in professional life. Besides the law has also been affected that AI boom although the law is one of those sectors which will be affected by AI less and latest. AI will affect the law on different levels since legal practice is conducted by several actors as lawyers and judges. To illustrate there is an AI for lawyers recently, which is Ross invented by the IBM and assisting the lawyers in certain legal tasks<sup>3</sup>, whereas there is not an exact AI for judges so far. However, it is clear that courts will also undertake AI in their operations due to the AI's huge further potential even if it is difficult to predict to what extent it will be undertaken by the courts.

This paper tries to address AI's prospective use in judicial practice by the courts since there are plenty of studies on the lawyers' side regarding the AI. Besides, as being a judge, using AI in judicial practice is more motivative for the writer since AI will inevitably affect judicial practice as it happened in the internet case.

It should be noted that blockchain technology is another one of the recent hot topics and usually closely used by AI. Blockchain technology is generally known as the structural network of cryptocurrencies like bitcoin etc. but it is not limited with cryptocurrency system and has much wider potential. This paper generally excludes the focusing on blockchain technology since the concept

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<sup>1</sup> STUART RUSSEL and PETER NORWIG, *ARTIFICIAL INTELLIGENCE A MODERN APPROACH*, 17, (3rd ed. 2010).

<sup>2</sup> Vishal Marria, *The Future of Artificial Intelligence In The Workplace* ( 11 Jan 2019), available at: <https://www.forbes.com/sites/vishalmarria/2019/01/11/the-future-of-artificial-intelligence-in-the-workplace/#7851418773d4> (visited June 25, 2019)

<sup>3</sup> See at <http://www.rossintelligence.com>

needs comprehensive statements due to its complexity. Blockchain technology might be used for storing the judicial data on the electronic environment which will be dwelled upon briefly in the last chapter.

Chapter I as a descriptive part of the paper focuses on the AI itself. In this chapter first step is searching the definition of AI since there is not a correct and clear definition of AI among the scholars. After demonstrating certain definitions of AI, the writer tries to define AI by his words. AI needs a set of terms for better understanding because of its technical aspects. In this regard, certain core terms, which are most closely connected to the paper's mainframe, are also addressed.

Chapter II focuses on AI from the law perspective. The law should also cover the new concepts as AI since they are becoming a vital part of the social or commercial life. AI's current position and its further potential constitute a need for AI to be regulated by the law. Law regulations have several levels from general rules as principles to specific rules as statutes. To this end, how to regulate AI is the following sub-chapter where international and domestic regulation attempts are addressed. AI is relatively new for the law so it has not a comprehensive legal frame among the states or international organizations. Not having a clear legal position constitutes certain legal debates particularly for the situations where liability might occur. In this regard, legal personhood of AI as a legal identification of AI and the legal liability rules for AI is considered.

Chapter III is the core of this paper where possible use of AI by the courts considered. Yet, the ethical frame of legal actors and AI is addressed first as ethical rules are constructive and essential in legal practice. The paper proposes 3 types of use of AI by the courts. First one is the 'AI as an assistant to judge' which covers an AI to assist the judge in the course of ordinary conduct as summarizing the legal documents. The second one is 'AI drafting decisions' which includes an AI prepares draft decisions regarding the present case for the judge. Thus, the judge becomes an appeal judge here by having the discretion to whether or not to use AI's draft. The ultimate stage is that 'AI deciding cases' which refers to that AI decides for the cases like a human judge in the current system. Abovementioned three options are considered with pros and cons including the risks in particular for the current legal values as the fair trial. This chapter is finally focusing on the data protection issue of using AI in judicial practice.

Final chapter is the conclusion part which indicates the overall remarks of the paper. AI will continue to proliferate and judicial practice will inevitably be affected by this. The point is that to what extent AI will take part in courts that is the grey area.

## 1. AI AND CORE TERMS

Artificial intelligence has been becoming more popular across the world in particular recent years. Likewise, the proliferation of internet, AI-based things such as autonomous cars, software, electronic tools are becoming much more visible in our daily lives. Artificial intelligence as a concept firstly used by John McCarthy in 1956<sup>4</sup> and which was defined as it is a machine has the ability to solve problems like a human having this ability naturally. Besides, the early version of AI application was the industrial robots used in factories. Moreover, recent versions of the AI or robots are much more beyond than predecessors. To illustrate, a robot was appointed as a board member of a firm which is Vital developed in the UK, in 2014 and this is the first one sharing an equal position with humans.<sup>5</sup> In 2016, Sophia, most famous robot around the world and which is the first robot granted with citizenship, existed. AI's rapid and enormous developments bring about certain law debates such as the legal situation of AI, in other words, legal personhood of AI, legal liability of AI and intellectual property rights of AI inter alia.

### 1.1. Definition and History of AI

AI was used firstly by John McCarthy in a workshop at the Dartmouth College in 1956, The Dartmouth Summer Research Project on Artificial Intelligence, including several scholars from the field and this was the official birthplace of AI.<sup>6</sup> The idea about thinking machines or machines' can do some task was older than this time, besides, there were some other scholars studying in this field.<sup>7</sup> From its birth, AI has been studied many times by the different fields' scholars since it is related to several fields such as math, computer engineering, neuroscience, linguistics and so on, which makes it difficult to define AI.

John McCarthy stated the idea before the workshop as; “[t]he study is to proceed on the basis of the conjecture that every aspect of learning or any other feature of intelligence can in principle be so precisely described that a machine can be made to simulate it.”<sup>8</sup>

It is defined in Oxford Dictionary as; “the theory and development of computer systems able to perform tasks normally requiring human intelligence,

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<sup>4</sup> See at: [https://en.wikipedia.org/wiki/History\\_of\\_artificial\\_intelligence](https://en.wikipedia.org/wiki/History_of_artificial_intelligence)

<sup>5</sup> Ugo Pagallo, *Vital, Sophia, and Co.—The Quest for the Legal Personhood of Robots*, 9, INFORMATION, 230, 233, (2018), available at: <https://www.mdpi.com/2078-2489/9/9/230> (visited April 22, 2019)

<sup>6</sup> Supra note 1.

<sup>7</sup> Id. at 16.

<sup>8</sup> John McCarthy, Marvin L. Minsky, Nathaniel Rochester and Claude E. Shannon, *A proposal for the dartmouth summer research project on artificial intelligence, August 31, 1955*, AI MAGAZINE, 12, 14, (2006) available at: <https://www.aaai.org/ojs/index.php/aimagazine/issue/view/165> (visited April 22, 2019)

such as visual perception, speech recognition, decision-making, and translation between languages.”<sup>9</sup>

Another definition is as; [AI] is the study of how to make computers do things at which, at the moment, people are better.<sup>10</sup> Definition of AI is also classified into four categories as thinking humanly, acting humanly, thinking rationally, acting rationally<sup>11</sup>.

In the light of above definitions, we can define AI as; it is a kind of technology teaching a machine, which may be in various forms from a humanoid robot to an autonomous car, etc., how to do a task generally thought to be performed by humans.

AI and working structure of AI are more complicated than ordinary computer software. Namely, to have a better understanding of AI we should also know certain terms and concepts. In this chapter, I will try to address briefly certain important terms related to AI, inter alia, such as machine learning, algorithm, natural language processing, and robot.

## 1.2. Algorithm

Algorithm is a term for math but nowadays it is more used for computer science. The general definition of an algorithm is; “[a] process or set of rules to be followed in calculations or other problem-solving operations, especially by a computer”<sup>12</sup>. In other words, an algorithm is a set of steps<sup>13</sup> to accomplish a task<sup>14</sup> (any task such as commuting between home and work, finding the distance between two points) either for math or computer science. Basically, we can define this process as a three-step process as input-calculation/processing-output. It is clear that algorithm takes part in the calculation/processing phase. To illustrate, navigation apps, which is one of the fundamentals of our current life, is a typical example of an algorithm which is called a route finding algorithm<sup>15</sup>. A navigation algorithm calculates the shortest distance between the two points in the city as it calculates the shortest path between two points on

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<sup>9</sup> See at: [https://en.oxforddictionaries.com/definition/artificial\\_intelligence](https://en.oxforddictionaries.com/definition/artificial_intelligence) (visited April 22, 2019)

<sup>10</sup> ELAINE RICH, KEVIN KNIGHT AND SHIVASHANKAR B. NAIR *ARTIFICIAL INTELLIGENCE*, 3, (2<sup>ND</sup> ed. 2009)

<sup>11</sup> *Supra* note 1, at 2.

<sup>12</sup> See at: <https://en.oxforddictionaries.com/definition/algorithm> (visited April 22, 2019)

<sup>13</sup> David Schatsky, Craig Muraskin, and Ragu Gurumurthy, *Demystifying Artificial Intelligence*, A Deloitte series on cognitive technologies (Nov. 04 2014), <https://dupress.deloitte.com/dup-us-en/focus/cognitive-technologies/what-is-cognitive-technology.html#endnote-sup-11> (visited April 22, 2019)

<sup>14</sup> *What is an algorithm and why should you care?*, KHANACADEMY, <https://www.khanacademy.org/computing/computer-science/algorithms/intro-to-algorithms/v/what-are-algorithms> (visited April 22, 2019)

<sup>15</sup> *Id.*



the chessboard. Algorithm finds the designated/requested option, the shortest distance in navigation example, among the finite options, namely there are various but limited paths between two points on the chessboard.

Above example is solely one from our daily life including the usage of numerous apps, software, and technological devices. Besides, there are various algorithms in computer science and also in our life such as face identification algorithms which is also used in certain smart phones as a privacy security tool.

### **1.3. Machine Learning**

Machine learning is the term referring to the computer programs that can be learned from user-fed data to reach entirely new data. In traditional methods, machines' knowledge is directly based on what the developer programmed it, namely, the software developer solely develops a specific group of instructions for every possible data point.<sup>16</sup> In other words, in traditional methods, a machine or software is loaded by the answers of finite questions even if the number of these questions may be enormous. Therefore, in machine learning the machine may learn more than what it is loaded at first as well as it can reach the data. The more data will lead to better learning. “[M]achine learning is the process of automatically exploring patterns in data.<sup>17</sup> Once discovered, the pattern can be used to make predictions.”<sup>18</sup> Machine learning is so significant since programs using this process learn to give proper outcomes with few or without instruction as to how they complete the relevant task.<sup>19</sup>

### **1.4. Natural Language Processing (NLP)**

Human and machines communicate by using a programming language including codes and numbers and which is a precise, unambiguous and stable method. NLP is changing this ordinary method and providing a machine to understand humans' natural language while it is spoken.<sup>20</sup> In contrary to a programming language, natural languages are mostly not precise and plain not only for the meaning of words but also the sentence structure. Meaning of the same word may totally be different by the certain conditions such as who says it, to whom it is said, in which social context it is said, for what it is said (joking, slang, etc.). NLP allows computers to understand and to interpret the meaning of human language.

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<sup>16</sup> Sean Semmler and Zeeve Rose, *Artificial Intelligence: Application Today and Implications Tomorrow*, 16 DUKE L. & TECH. REV. 85, 86, (2017)

<sup>17</sup> Supra note 13.

<sup>18</sup> Id.

<sup>19</sup> Supra note 16 at 87.

<sup>20</sup> Sergio David Becerra, *The Rise of Artificial Intelligence in the Legal Field: Where We Are and Where We Are Going*, 11 J. BUS. ENTREPRENEURSHIP & L. 27, 37, (2018)

This process enables recent applications such as automatic text summary, text mining, machine translation, automated question answering and so on.<sup>21</sup> Machine translation, the automatic translation of the text,<sup>22</sup> is a typical and one of the most used examples of the NLP applications as google translate. NLP is using algorithms for the interpretation of the human language which is based on machine learning algorithms. Otherwise, it would be almost impossible to program all the variations of words and structures of the language apart from the huge burden and time of work. Instead of hand-coding huge sets of words and rules, NLP can use machine learning to learn all those set automatically by analyzing examples.<sup>23</sup>

Using AI in the judicial proceedings, this papers' main subject, is directly related to NLP. The better NLP capabilities will make more usage AI in the judicial proceeding due to the fact that judicial proceedings are totally based on human statements either written or oral. NLP development relatively high but NLP is still lack of clear understanding of human language because of the flexibility and ambiguity of the language as mentioned above. Forthcoming developments potential is encouraging as it is in the entire AI field.

### 1.5. Robots

Various robots have been in workplaces over the world from more than 50 years in particular massive manufacturing industries such as car manufacturing. What is more, they have started to exist in our daily life by doing certain home services or so on, in parallel to the development of technology and computers. A robot is defined in the dictionary as; “a machine capable of carrying out a complex series of actions automatically, especially one programmable by a computer.”<sup>24</sup> There is not a common definition on what a robot is and which machines are to be defined as a robot among the scholars<sup>25</sup> despite the above-mentioned dictionary definition.

Therefore, robots can be classified under three primary categories<sup>26</sup> which are manipulators, mobile robots and mobile manipulators.<sup>27</sup> A manipulator is the ordinary and oldest form of robots, which is also called a robot-arm, mostly

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<sup>21</sup> Matt Kiser, *Introduction to Natural Language Processing*, ALGORITHMIA (Aug. 11, 2016), <http://blog.algorithmia.com/introduction-natural-languageprocessing-nip/> (visited April 28, 2019)

<sup>22</sup> Supra note 1 at 907.

<sup>23</sup> Supra note 21.

<sup>24</sup> <https://en.oxforddictionaries.com/definition/robot> (visited April 25, 2019)

<sup>25</sup> Isabelle Wildhaber, *Artificial Intelligence and Robotics, the Workplace and Workplace-related Law*, in W. Barfield, U. Pagallo (eds) RESEARCH HAND BOOK ON THE LAW OF ARTIFICIAL INTELLIGENCE, 577, 579 (2018).

<sup>26</sup> Supra note 1 at 971.

<sup>27</sup> Id.

used in manufacturing industries to perform specific motions.<sup>28</sup> The second, mobile robots, takes its name from its feature as being mobile, namely, it can move by its wheels, legs or similar tools.<sup>29</sup> Currently, unmanned air vehicle is a significant and one of the most developed examples of mobile robots. The last category is a synthesis of manipulation and mobility<sup>30</sup> which is the most developed version of robots particularly those in this category which are integrated with AI.

Some of AI robots are also defined as humanoid robots which resemble human-body by having a torso, arms, and legs. To illustrate, in 2016 there is Sophia, first citizen robot ever, which has a worldwide reputation as a humanoid.<sup>31</sup>

There are also other classifications as not being a clear and common definition of the robots.<sup>32</sup> Additionally, all robots need a physical existence, those not having a physical existence but also having certain functions likewise the robots are called ‘ bot ’ from the point of robotics. Robotics, an interdisciplinary field of such disciplines as engineering, computer science and so on, is dealing with the entire process of robots including design, operation, control and the others.<sup>33</sup> Last but not least, aforementioned brief characteristic of robots and AI became a hot topic for the law in particular after the humanoid robots since they have potential to be part of social life by having interactions with people.

## 2. AI AND THE LAW

Law rules always come after the developments affecting social life since the rules are mainly inspired by the tangible cases. In other words, law rules are adjusted upon the needs of the society that is the adaptation of the law for the new circumstances which makes the law dynamic and adaptive. Otherwise, static law rules would clearly be insufficient to deal with disputes in society. To illustrate, in 1990s vast majority of the states or law systems had not comprehensive provisions on the internet apart from certain fundamental provisions in limited states. Though, today, the vast majority of the states have elaborate provisions and regulations on the internet. Namely, the proliferation of the internet gradually brings about those elaborate legal rules, since there is an enormous need for it.

Artificial intelligence (AI) is not new in our life but it refers to totally different meaning compared to the 20 years ago or much older. AI, AI robots,

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<sup>28</sup> Id.

<sup>29</sup> Id.

<sup>30</sup> Id. at 972.

<sup>31</sup> Supra note 5, at 235.

<sup>32</sup> Supra note 25.

<sup>33</sup> See at: <https://en.wikipedia.org/wiki/Robotics> (visited April 25, 2019)

AI entities, autonomous cars, autonomous intelligent devices are some among the other applications of AI in various fields.<sup>34</sup> AI has been becoming much more ubiquitous not only for the high tech companies or states but also for the general use of the society. That is highly analogous with the proliferation of the internet along with the regulation of the internet by legal rules. Therefore, here is the point where questions arise as do we need to regulate AI and if so how to regulate AI?

## 2.1 Regulation Need for AI

AI provides great benefits for people such as to deal with highly complicated issues, what is more, its further potential is beyond than the current situation. On the other hand, AI technologies have the ability to be used maliciously even if that depends on the users at least so far, since it is not certain if the robots take the control autonomously and damage to people. In any case, we do need more than Asimov's three laws of robots<sup>35</sup>.

First and foremost AI needs a clear definition before to be regulated but it is quite difficult to define AI with a single accurate definition even if amongst the expert in the field.<sup>36</sup> In the first chapter, we also mentioned a definition of AI by inspiring from the John McCarthy and several other scholars<sup>37</sup> and it also challenges with this difficulty. From the law perspective, the first step is the definition of the relevant concept to be regulated. However, AI has also certain ambiguities regarding its background operating system, codes, and algorithms, because of its opaque structure<sup>38</sup> which is relatively different from the ordinary

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<sup>34</sup> AI and robots can be used interchangeably in this chapter.

<sup>35</sup> Isaac Asimov, a science fiction author, created those rules for the robots in his books. After a while he needs to create one more rule and he defined new rule as zeroth rule. The rules are as follow; "First Law, A robot may not injure a human being or, through inaction, allow a human being to come to harm. Second Law, A robot must obey the orders given it by human beings except where such orders would conflict with the First Law. Third Law, A robot must protect its own existence as long as such protection does not conflict with the First or Second Laws. Zeroth Law, A robot may not harm humanity, or, by inaction, allow humanity to come to harm." See at: [https://en.wikipedia.org/wiki/Three\\_Laws\\_of\\_Robotics](https://en.wikipedia.org/wiki/Three_Laws_of_Robotics) (visited May 28, 2019).

<sup>36</sup> Valerie Thomas, *Report on Artificial Intelligence: Part I-the existing regulatory landscape*, (May 14, 2018) available at <https://www.howtoregulate.org/artificial-intelligence/#sdendnote1sym> (visited May 28, 2019); Matthew U. Scherer, *Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, and Strategies*, 29, HARVARD JOURNAL OF LAW & TECHNOLOGY, 354, 359, (2016) available at: <http://jolt.law.harvard.edu/articles/pdf/v29/29HarvJLTech353.pdf> (visited May 28, 2019)

<sup>37</sup> Supra note 8, 9 and 10.

<sup>38</sup> Amitai Etzioni and Oren Etzioni, *Should Artificial Intelligence be Regulated*, 33/4, ISSUES IN SCIENCE AND TECHNOLOGY, 32, 34, (2017), available at: <https://issues.org/perspective-should-artificial-intelligence-be-regulated/> (visited May 28, 2019)

computer software system<sup>39</sup>. Another point is that AI is subjected various different fields such as medical, military, numerous industries, computer science, internet tools, and network, etc. which makes it difficult to create uniform rules applying all of those fields.

## 2.2 How to Regulate AI

The next point for the regulation of AI is that on which level it should be regulated? Namely, soft law rules as guidelines or ethical rules, or ordinary legal rules either domestic or international. AI should be regulated by a two-tiered system as general rules/guidelines, which applies to all field, and secondary/specific rules to apply different fields. There are certain attempts and opinions on them. Indeed, regulators, scholars or others, who are studying on AI, are emphasizing the possibility of malicious use of AI in particular for the lethal automated weapons<sup>40</sup>. In this regard, to cope with this potential hazard, Oren Etzioni proposes as the first principle in his 5 guidelines for regulating AI “ [t]o set up regulations against AI-enabled weaponry and cyberweapons”<sup>41</sup> In other words, Etzioni proposes that first regulation should be that not to weaponize AI. Although it sounds great to cope with the biggest risk of AI, it remains far from the historical realities of international relations since AI is the power of the future, particularly for military use.<sup>42</sup>

The United Nations is also aware of the AI’s significance and prospective future role of it so the UN launched a program on AI and robotics. It established a Centre on Artificial Intelligence and Robotics in Hague, under the Interregional Crime and Justice Research Institute (UNICRI) to monitor developments on AI to focus AI by a single UN agency<sup>43</sup>. The UN’s AI and Robotics program remains still far from a regulation for AI even though there have been certain activities within the UNICRI.<sup>44</sup>

The European Union has relatively elaborate regulations and activities on

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<sup>39</sup> Jenna Burrell, *How the Machine ‘Thinks’: Understanding Opacity in Machine Learning Algorithms*, 3/1, BIG DATA & SOCIETY, (6 June, 2016), available at: <https://journals.sagepub.com/doi/full/10.1177/2053951715622512> (visited May 28, 2019)

<sup>40</sup> Nicolas Petit, *Law and Regulation of Artificial Intelligence and Robots - Conceptual Framework and Normative Implications*, (9 March, 2017) available at: <https://ssrn.com/abstract=2931339> (visited May 28, 2019)

<sup>41</sup> Oren Etzioni, *Should AI Technology Be Regulated?: Yes, and Here’s How*, 61/12, COMMUNICATIONS of the ACM, 32, 33, (2018) Available at: <https://cacm.acm.org/magazines/2018/12/232893-point-should-ai-technology-be-regulated/fulltext> (visited May 28, 2019)

<sup>42</sup> Vladimir Putin stated that “whoever leads in artificial intelligence will rule the world.” at 4 September 2017, see at <http://fortune.com/2017/09/04/ai-artificial-intelligence-putin-rule-world/> (visited May 28, 2019)

<sup>43</sup> See at [http://www.unicri.it/in\\_focus/on/UNICRI\\_Centre\\_Artificial\\_Robotics](http://www.unicri.it/in_focus/on/UNICRI_Centre_Artificial_Robotics) (visited May 28, 2019)

<sup>44</sup> Id.

AI for several grounds as innovation, economy, data privacy, ethical framework and so on. 25 members of the EU signed a declaration to cooperate on AI to deal with social, economic, legal issues regarding AI on 10 April 2018<sup>45</sup>. To this end, the High-Level Expert Group on AI (AI HLEG)<sup>46</sup> is created in order to support the implementation of the European strategy on artificial intelligence. Besides, AI HLEG prepared the “Guidelines for Trustworthy AI” in April 2019 which is ethical guidelines for the AI consisting of seven key requirements. EU has an elaborate strategy for AI to deal with its benefits and risks such as economic development/innovation or data privacy.<sup>47</sup>

States have also certain strategies to designate their further operations in the field. Some states declared their own strategy regarding AI particularly those which are willing to lead the field such as China, USA, Canada, India, UK, EU<sup>48</sup> and so on. Development of AI and regulation of AI is a double-edged sword for the states. On the one hand, states are willing to support this innovative technology to reach forward to get more benefit compared to other states, on the other hand, comprehensive regulation on AI in particular in the early phase, as in today, may constitute an obstacle to developments. By and large, states are in a position to support AI innovations at first by having regulation strategies in place of comprehensive regulations at least before the proliferation of AI applications.<sup>49</sup>

### **2.3 Legal Debates on AI**

AI brings about various debates on law apart from the differences among the states which is also another point making it more complicated to regulate. From the legal perspective, the first need is legal positioning of AI where the granting personhood to some AI is proposed as a solution. Besides, legal liability of AI in case there is wrongdoing in its operations, damage to humans is another crucial legal issue among the others.

#### **2.3.1 Legal Personhood of AI**

AI and robots are becoming more visible and bringing up certain debates in particular in the legal field as mentioned above. Legal positioning of AI is an essential one of them. To this end, legal personhood<sup>50</sup> is proposed to given

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<sup>45</sup> See at <https://ec.europa.eu/digital-single-market/en/artificial-intelligence> (visited May 28, 2019)

<sup>46</sup> See at <https://ec.europa.eu/digital-single-market/en/high-level-expert-group-artificial-intelligence> (visited May 28, 2019)

<sup>47</sup> See at <https://ec.europa.eu/digital-single-market/en/news/member-states-and-commission-work-together-boost-artificial-intelligence-made-europe> (visited May 28, 2019)

<sup>48</sup> Tim Dutton, An Overview of National AI Strategies, 28 June, 2018 available at: <https://medium.com/politics-ai/an-overview-of-national-ai-strategies-2a70ec6edfd> (visited June 14, 2019)

<sup>49</sup> Id.

<sup>50</sup> Various scholars and laws use different terms as legal personality, personhood, capacity etc. all of which states the same concept.

AI under certain conditions and in analogy with corporations to deal with the need of legal positioning.<sup>51</sup> Before addressing the AI from the point of legal personhood it is better to dwell upon person and personhood briefly.

A person is known as a human being and also used to define the single human in general but its frame is wider in particular for the law. Black's Law Dictionary defines a person as "a person is a human being or natural person and an entity that is recognized by law as having the rights and duties of a human being"<sup>52</sup>. A person is a being that has certain capabilities, rights, and responsibilities. According to common legal practice, there is a distinction on the person as natural person and legal person. It is clear that natural persons are only humans and legal persons which may be named also juridical person, artificial person, juristic person, etc., are non-human persons such as corporations and foundations.

Personhood is the legal status of being a person either natural or legal. The defining features of personhood vary among the law systems from past to present. Conferring the status of personhood on any entity depends upon the legal systems. To illustrate, some idols or rivers are a legal person in some countries such as the Whanganui River in New Zealand and the Ganga in India<sup>53</sup>. On the contrary, in the past, in Roman law slaves didn't have personhood but they had certain limited rights as peculium, having a property with the consent of the owner, or in many countries, women had personhood but had very limited rights.

Legal personhood allows the natural persons to act as a single entity apart from their individual personhoods for legal purposes. Legal personality confers the relevant entity certain rights and liabilities if it fulfills the necessary procedures according to the relevant law system. There are several legal personalities such as a corporation, foundation, association, etc. Although legal persons have separate and independent personality, they consist of the common will of persons. In other words, legal persons need a natural person to be established and to conduct operations. Besides, there is a mechanism called piercing the corporate veil, making the natural persons liable behind the company, can be applied in case of wrongdoings in the operations of the company.

The early version of AI application was the industrial robots used in factories which clearly do not need elaborate legal definition whereas recently

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<sup>51</sup> Lawrence B. Solum, *Legal Personhood for Artificial Intelligences*, 70 N.C. L. Rev. 1231, 1256, (1992) available at: <http://scholarship.law.unc.edu/nclr/vol70/iss4/4> (visited May 29, 2019)

<sup>52</sup> See at: Black's Law Dictionary, 10th ed. (2014)

<sup>53</sup> Solaiman S. M., *Legal Personality Of Robots, Corporations, Idols and Chimpanzees: A Quest For Legitimacy*, 25/2 ARTIFICIAL INTELLIGENCE AND LAW 155, 177, (2017), available at: <http://ro.uow.edu.au/lhapapers/3076> (visited May 29, 2019)

we have robots sharing an equal position with humans. To illustrate, a robot was appointed as a board member of a firm which is Vital developed in the UK, in 2014 and this is the first one sharing an equal position with humans.<sup>54</sup> In 2016 we have the Sophia case which has a well-known reputation over the world by not only being the first AI application having the citizenship of a country, Saudi Arabia, but also being the first non-human to be given a UN title that she was named the first Innovation Champion of the United Nations Development Program. To sum up, Sophia case is adequate to explain why there is a debate among law scholars regarding the legal personhood of robots.

Law scholars mainly divided into two groups concerning the legal personhood of robots. The first group claims that robots should have legal personhood likewise the companies have<sup>55</sup>, the latter claims that robots cannot have legal personhood because of lack of necessary conditions of being a legal person<sup>56</sup>. Besides, a comparison has been made between robots and slaves by certain scholars.<sup>57</sup> Indeed, the slave option is not noteworthy in particular for the negative connotation of the term itself. Moreover, there is also certain institutional attempt to regulate this issue as the European Parliament's motion<sup>58</sup> which stipulates electronic personality for the robots.

AI entities are taking larger parts in humans' activities as do companies, which is the main ground for the proponents of legal personhood for the robots.<sup>59</sup> Companies are responsible in most of the law systems even if they are not criminally liable because of the principle of natural persons' criminal liability in certain countries<sup>60</sup>. Another point is that lawmakers have the discretion to grant legal personhood to any entity depending on the necessary condition of that law system as seen in the personhood of idols or rivers. Being autonomous and self-learning, creativity, cognitive abilities are some of the features which

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<sup>54</sup> Supra note 5, at 235.

<sup>55</sup> Gabriel Hallevy, (2010) *The Criminal Liability of Artificial Intelligence Entities -from Science Fiction to Legal Social Control*, 4/2, AKRON INTELLECTUAL PROPERTY JOURNAL, 171, 200 (2010) available at: <https://ideaexchange.uakron.edu/akronintellectualproperty/vol4/iss2/1> (visited May 29, 2019)

<sup>56</sup> Robert van den Hoven van Genderen, *Legal Personhood in the Age of Artificially Intelligent Robots*, in W. Barfield, U. Pagallo (eds) RESEARCH HANDBOOK ON THE LAW OF ARTIFICIAL INTELLIGENCE, 213, 247 (2018).

<sup>57</sup> Robert van den Hoven van Genderen, *Do We Need New Legal Personhood in the Age of Robots and AI?* in M. Corrales, M. Fenwick, N. Forgó (eds) ROBOTICS, AI AND THE FUTURE OF LAW, 15, 44 (2018)

<sup>58</sup> See at: [http://www.europarl.europa.eu/doceo/document/A-8-2017-0005\\_EN.html#title1](http://www.europarl.europa.eu/doceo/document/A-8-2017-0005_EN.html#title1) (visited May 29, 2019).

<sup>59</sup> Supra note 57.

<sup>60</sup> According to the Turkish Penal Code, article 20, legal persons do not have criminal liability as perpetrators. Legal persons might be subjected to certain security measures for the crimes stated in the Code.



illustrate the further possibility of the robots in analogy with the current well-known developed models.

In this respect, European Parliament adopted a proposal in 2017 which suggests that “[s]elf-learning robot can be granted “electronic personalities” such a status allows robots to be insured individually and be held liable for damages if they hurt people or damage property”.<sup>61</sup> European Parliament’s proposal explicitly shows that there will be a need to regulate robots, particularly in the future due to the possibility of their unlimited development. Also, EP’s proposal can be defined as to find a happy medium between both opinions, granting or not granting personhood to robots, in particular, to determine the liability in case of wrongdoings of robots.

On the other hand, abovementioned both opinions, the personhood of robots and EP’s electronic personalities of robots, are criticized by certain scholars. For EP’s proposal there is an open letter, agreed on it by 156 AI and robotics experts<sup>62</sup> from 14 EU countries, essentially claims that creating a legal personality for robots is inappropriate from an ethical and legal perspective. Furthermore, law scholars also claim that legal personhood is directly related to humans. To illustrate, in companies case there are always humans behind the companies and they are created by the common will of the humans. Another point is that companies have only rights which are relevant to their fields such as to sue/to be sued, having property or operate commercial activities and all these rights are conducted by the human representatives.

It is clear that robots need a legal position either legal personhood or another concept. Legal personhood is a concept which confers legal identity to an entity to operate certain activities related to its legal definition and purpose on behalf of the humans behind it. To illustrate, companies operate commercial activities to gain profit while foundations conduct social activities. Similarities between companies and robots are not sufficient to grant legal personhood to the robots. Current most developed robots, Sophia and Vital or so forth, still do not have consciousness or moral values and that is not certain whether they can acquire those abilities in the future.

In current modern law system if there is damage to a person either natural or legal there must be a liability to recover that damage. Robots or AI application can cause damages even today as it was occurred in the US by an autonomous car accident.<sup>63</sup> It will be more often to have those kinds of accidents and

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<sup>61</sup> Janosch Delcker, *Europe Divided over Robot Personhood*, (4 Nov, 2018) <https://www.politico.eu/article/europe-divided-over-robot-ai-artificial-intelligence-personhood/> (visited May 30, 2019)

<sup>62</sup> See at <http://www.robotics-openletter.eu/> (visited May 30, 2019)

<sup>63</sup> See at <https://www.theguardian.com/technology/2018/mar/19/uber-self-driving-car-kills-woman-arizona-tempe> (visited May 30, 2019)

damages because of the potential of the proliferation of AI or robots. That is the basic and a concrete example showing the need for a legal position of robots. There are also other opinions that the robots may become very hazardous in the future for humanity as Stephen Hawking and Elon Musk stated, *inter alia*.<sup>64</sup>

Consequently, AI and robots need a legal regulation to identify their legal position in particular for the disputes or damages that they cause. However, granting legal personhood to the robots is not a convenient step to solve the problem due to the lack of conformity of the conditions to have legal personhood such as direct relation with natural persons. Therefore, creating legal liability rules for legal problems, that robots bring about, may constitute a solution. Indeed, legal liability is also one of the reasoning of the proponents of AI personhood.

### 2.3.2. Legal Liability of AI

One of the essential parts of law order is the legal liability of persons from their actions throughout history. There are two kinds of liability from the point of law as criminal liability and civil liability. Criminal liability arises where the actions are considered as a crime under the relevant law system. Criminal liability aims to punish the offender due to his act (crime) by violating the legal order. As regards civil liability which might mainly be classified under two forms as tort liability and product liability. A tort is civil wrongdoings which stay lower than a crime. Tort liability gives chance to the claimant to recover his damages stemming from the offender's wrongful act. Product liability is basically to give rights to the buyer to recover his damages from that product due to the fault of the manufacturer.

Classical legal liability models will challenge to deal with the AI's (or AI-based robots, systems, entities)<sup>65</sup> wrongdoings either in civil or criminal since traditional legal liability model needs legally attributable offender.<sup>66</sup> It will be much more complicated if the fully autonomous AI is developed. It would be better to address this issue separately from the criminal law and civil law.

Criminal law requires two conditions, which are *actus reus* (action, physical existence) and *mens rea* (intention, inner motivation), at the same time to consider liability. *Actus reus* may consist of an action or a failure to act<sup>67</sup> while

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<sup>64</sup> Supra note 57 at 16.

<sup>65</sup> AI and the related terminology differ upon the writers. The writer prefers to use AI including the various AI applications as robots etc.

<sup>66</sup> Supra note 57.

<sup>67</sup> John Kingston, *Artificial Intelligence and Legal Liability* in Max Bramer and Miltos Petridis (eds) RESEARCH AND DEVELOPMENT IN INTELLIGENT SYSTEMS XXXIII INCORPORATING APPLICATIONS AND INNOVATIONS IN INTELLIGENT SYSTEMS XXIV, 269, 271 (2016)

*mens rea* needs knowledge or negligence.<sup>68</sup> To decide criminal liability in cases where there is a crime committed by an AI, the current rules need legally attributable person<sup>69</sup> since AI applications are still not fully autonomous.

As for fully autonomous AI here is the point where an essential and philosophical question arises which is “is it possible to punish an AI” due to its wrongdoings. Hallevy proposes that robots’ criminal liability is possible but it is needed to develop a wider criminal law context since the current version is not sufficient for that.<sup>70</sup> From my point of view, it is almost impossible to be convinced that punishing the robots is logical or effective for the community.

Another point is that AI applications are very closely related to computer-software technologies which put AI under a huge risk which is to be hacked by other users.<sup>71</sup> Besides, hackers cannot be followed/found most of those cases which brings about a huge dilemma/problem for the proofs and the offender.

As regards civil law, liability stems from tort and product liability. In other words, there should be actions resulted by damage to a person or products causes damage to a person in order to apply the civil liability. There should be a distinction between the fully autonomous AI and the other AI to consider the liability.

For the fully autonomous AI, civil liability is more plausible in comparison to the criminal liability of AI since civil liability mainly based on monetary sanctions as compensation. It is possible to create several systems, which is adequate to compensate damages for the AI, such as compulsory insurance, AI fund (victim compensation fund) or AI registration systems.<sup>72</sup> It is noteworthy to dwell upon the personhood issue again. If it is admitted to grant personhood or another form such as electronic personality in EU’s proposal<sup>73</sup> all of which are principally sufficient to undertake civil liability in case of damages to persons. To this end, other AI, semi-autonomous or non-autonomous, will be subjected to traditional tort rules.

Product liability provides consumers to apply to the manufacturer to recover his damages due to a fault of the product, which is one of the essential principles in consumer or commercial law. As the AI applications being a prominent product of recent times they can also be subjected to product

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<sup>68</sup> Id.

<sup>69</sup> Real persons -without mental disabilities- and legal persons for certain jurisdictions. Personhood of the AI is also integral part of this issue, theoretically if the AI has personhood it will be legally attributable.

<sup>70</sup> See at: [https://www.washingtonpost.com/news/wonk/wp/2013/03/05/how-to-punish-robots-when-they-inevitably-turn-against-us/?noredirect=on&utm\\_term=.93ffb763ecc4](https://www.washingtonpost.com/news/wonk/wp/2013/03/05/how-to-punish-robots-when-they-inevitably-turn-against-us/?noredirect=on&utm_term=.93ffb763ecc4) (visited May 30, 2019)

<sup>71</sup> Supra note 67 at 274.

<sup>72</sup> Supra note 56 at 249.

<sup>73</sup> See at: [http://www.europarl.europa.eu/doceo/document/A-8-2017-0005\\_EN.html](http://www.europarl.europa.eu/doceo/document/A-8-2017-0005_EN.html) (visited 30 May, 2019)

liability rules.<sup>74</sup> Since AI and the relevant technologies are developed by the companies to sell them in order to gain profit as usual in all commercial operations. Product liability is designed for the foreseeable situations, namely, the reason for the harm occurred is predictable at the stage of production or it should be.<sup>75</sup> The manufacturer is liable for its products' performance as designated and anticipating the prospective problems or damages it brings about. Therefore, predictability is significant for product liability, however, AI may be unpredictable<sup>76</sup> certain cases particularly for those which use machine learning techniques. That is beyond the manufacturer predictability which directly affects liability. The unpredictability of AI is another dilemma for the liability from the point of product liability.

Tort liability consists of three elements which are action, damage and causality. Negligence is the main grounds for tort liability and which requires the duty of care, breaching this duty and this breach causes damage. It is not clear who has the duty of care on AI applications among manufacturer, operator or end-user. As mentioned above unpredictability of AI makes ineffective to determine the duty of care. Is the negligence attributable to any of relevant bodies, if not, there will not be culpability. Moreover, if there is no culpability who undertakes the liability according to which grounds. Here is the point strict liability may be thought. Strict liability does not need a negligent party or culpability and determines a party strictly liable for the damages occurred.<sup>77</sup>

Strict liability, as in the form of an AI fund, might constitute an adequate ground to deal with to compensate the damage conducted by AI entities. AI fund, which may also be named victim compensation fund, is proposed by scholars in particular for the autonomous car cases<sup>78</sup>. Therefore AI fund can be a sufficient resort for not only autonomous cars but also other AI applications. AI fund is also beneficial and less costly for all parties in comparison to the litigation process.<sup>79</sup> The creation of an AI fund could also offer significant protection to the manufacturers and developers of AI and promote innovation.

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<sup>74</sup> Omri Rachum Twaig, *Whose Robot Is It Anyway? Liability for Artificial Intelligence Based Robots*, 2020 U. ILL. L. REV. 1, 17 (Forthcoming, 2020) available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=333230](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=333230) (visited May 28, 2019)

<sup>75</sup> Peter M. Asaro, *The Liability Problem for Autonomous Artificial Agents* (5 March, 2016) available at: <https://www.aaai.org/ocs/index.php/SSS/SSS16/paper/view/12699/11949> (visited May 30, 2019)

<sup>76</sup> Supra note 74.

<sup>77</sup> Supra note 75.

<sup>78</sup> Paul Heaton, Ivan Waggoner and Jamie Morikawa, *Victim Compensation Funds and Tort Litigation Following Incidents of Mass Violence*, 63 BUFF. L. REV. 1265, 1266 (2015) available at: <https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?article=4558&context=buffalolawreview> (visited June 15, 2019)

<sup>79</sup> Tracy Hresko Pearl, *Compensation at the Crossroads: Autonomous Vehicles and Alternative Victim Compensation Schemes*, 60 WILLIAM & MARY LAW REVIEW, 1827, 1853 (2018) available at: <https://ssrn.com/abstract=3148162> (visited June 15, 2019)

By offering people, damaged from an AI, “a quick and reliable way of obtaining compensation in exchange for waiving their right to sue, a fund could reduce the number of lawsuits filed in the tort system and thus drive down the liability exposure of manufacturers and developers and lower insurance costs.”<sup>80</sup>

### 3. USING AI IN JUDICIAL PRACTICE

As mentioned in previous chapters AI is becoming much smarter and ubiquitous in various fields. It is noteworthy that, AI has already beaten the champions of such mind games as go and the champion of the jeopardy.<sup>81</sup> AI’s continuous development brings about the question for the legal field as ‘to what extent AI can be used in judicial proceedings?’ which is the focusing point of this chapter.

Trials and other court proceedings are mainly conducted a kind of triangle structure consisting of a judge, a plaintiff, and a respondent. Both parties claim their arguments in line with their positions according to the current legal rules and court precedents and the judge decides on the dispute in the light of the existing legal rules and precedents. That is an extremely long legal custom, lasting from prehistoric civilizations to recent times, for almost all legal systems despite the differences of the legal systems. What is more, the essence of the legal practice is always stable as conducted by humans.

It is estimated that roughly 30-40% of the jobs will be replaced by AI and related technologies by 2040<sup>82</sup>. Even if the legal practice is not one of those fields which are mostly based on technology, it is clear that legal practice also incorporates certain technologies or tools. To this end, will AI take part in this triangle legal practice as replacing actor(s) where there have already been certain preliminary-experimental steps<sup>83</sup> and various anticipations<sup>84</sup>.

Legal practice is conducted within the scope of several ethical rules for the different actors. First and foremost AI should be addressed from the ethical perspective as a constructive step before its using in legal practice. Following the ethical assessment of AI, AI will be addressed by using in courts.

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<sup>80</sup> Supra note 78.

<sup>81</sup> Woodrow Barfield, *Towards a Law of Artificial Intelligence*, in W. Barfield, U. Pagallo (eds) RESEARCH HAND BOOK ON THE LAW OF ARTIFICIAL INTELLIGENCE, 2, 9 (2018).

<sup>82</sup> Supra Note 2.

<sup>83</sup> Drew Simshaw, *Ethical Issues in Robo-Lawying: The Need for Guidance on Developing and Using Artificial Intelligence in the Practice of Law*, 70 HASTINGS LAW JOURNAL, 173, 176 (2018) available at: <https://ssrn.com/abstract=3308168> ; See also <http://www.rossintelligence.com/> ((visited June 15, 2019)

<sup>84</sup> Law firm leaders increasingly believes that AI will replace their employees. See at: Catherine Nunez, *Artificial Intelligence and Legal Ethics: Whether AI Lawyers Can Make Ethical Decisions*, 20 TUL. J. TECH. & INTELL. PROP. 189, 204 (2017) available at [https://heinonline.org/HOL/Page?collection=intprop&handle=hein.journals/tuljtip20&id=198&men\\_tab=srchresults](https://heinonline.org/HOL/Page?collection=intprop&handle=hein.journals/tuljtip20&id=198&men_tab=srchresults) ((visited June 15, 2019)

### 3.1. Ethical Issues in Legal Practice

Ethics, or morality, is a philosophical concept and mainly being used to define concepts of right and wrong conducts apart from the several meaning of ethics. Oxford dictionary defines ethics as “[t]he rules of conduct and moral principles in a specific profession, field, relationship or other contexts of human life.”<sup>85</sup> From the legal perspective we might define ethics; core values of the certain legal rules particularly for those which have a general and constructive context rather than specific and technical rules.

Legal practice is mainly performed by three actors as judges, prosecutors, and lawyers all of which have certain specific codes of conduct regarding their profession and ethical rules. Code of conducts or ethic rules of the professions may differ among the countries, legal systems, even if fundamentally they have a common basis. It should be noted that ethic rules are soft law, namely, they do not incorporate direct sanctions in contrary to law rules.

#### 3.1.1. Ethical Frame for Legal Actors

There are various ethic rules for legal actors due to the existence of different legal cultures and practice. In this chapter, I will briefly address the Bangalore Principles of Judicial Conduct for judges; European Guidelines on Ethics and Conduct for Public Prosecutors for prosecutors and International Bar Association and American Bar Association rules for lawyers as examples of ethical rules for the legal actors before addressing the AI from the legal ethics.

The Bangalore Principles of Judicial Conduct (the Bangalore Principles) was adopted by the Judicial Group on Strengthening Judicial Integrity (the Judicial Integrity Group)<sup>86</sup>, an informal group at the beginning, consisting certain chief justices and superior court judges around the world by the support of the UN. They aimed to establish ethical principles for judges and propose a framework to the judiciary and/or legislatures to regulate judicial conduct. They also inspired precedent regulations either internal or international as the United Nation’s Basic Principles on Independence of the Judiciary (1986).<sup>87</sup> The Judicial Integrity Group declared six core values like independence, impartiality, integrity, propriety, equality and lastly competence and diligence. These six core values also include a set of rules and principles regarding their specific frame. The Bangalore Principles not only adopted by the countries but also by the international organizations as the UN (Social and Economic Council), the European Council and so on<sup>88</sup>. That makes the Bangalore Principles one of the most worldwide adopted judicial ethical principles.

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<sup>85</sup> See at: <https://www.oed.com/view/Entry/355823?rskey=86biC3&result=2#eid> (visited June 25, 2019)

<sup>86</sup> See at: <https://www.judicialintegritygroup.org/> (visited June 25, 2019)

<sup>87</sup> See at: [https://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf) (visited June 25, 2019)

<sup>88</sup> See at: [https://www.unodc.org/res/ji/import/international\\_standards/commentary\\_on\\_the\\_bangalore\\_principles\\_of\\_judicial\\_conduct/bangalore\\_principles\\_english.pdf](https://www.unodc.org/res/ji/import/international_standards/commentary_on_the_bangalore_principles_of_judicial_conduct/bangalore_principles_english.pdf) (visited June 25, 2019)

European Guidelines on Ethics and Conduct for Public Prosecutors (known also the Budapest Guidelines)<sup>89</sup> was adopted by the Council of Europe<sup>90</sup> to create a frame for its member states to establish ethical principles for the prosecutors. The Budapest Guidelines is also a soft law instrument as ethical regulations do since it is not binding. The Budapest Guidelines incorporates five sub-headings as “introduction, basic duties, professional conducts in general, professional conduct in the framework of criminal proceedings and private conduct” respectively. It has various rules and principles under those sub-headings some of which very similar to the Bangalore Principles since both aims to provide a fair, impartial and independent legal system and practice.

As regards the third actor in legal practice, lawyers, there are also ethical rules for the lawyers either in domestic level or international level. Lawyers have almost the same duty in any legal system throughout the legal history. International Bar Association’s (IBA) International Principles on Conduct for the Legal Profession<sup>91</sup>, American Bar Association’s Model Law on Model Rules on Professional Conduct<sup>92</sup> and UN’s Basic Principles of Role of Lawyers<sup>93</sup> are some of the regulations for the lawyers’ code of conduct. Lawyers profession is more flexible and depending on the lawyers’ own discretion in comparison to judge and prosecutors. To this end, lawyers’ code of conduct incorporates more provisions, rather than an ethical framework since lawyers are the legal body which bridges the gap between society and the judiciary. Confidentiality, competency, zealous representation, professional judgment (prohibition of conflict of interest) are some prominent of those ethical rules for lawyers among the others.

### **3.1.2. Ethical Frame for AI in Legal Practice**

As regards AI from the ethical perspective as a whole there are various states and international organizations adopted certain principles for AI due to the increasing use of AI in different fields which make it difficult to regulate by statutes entirely covering. The European Union<sup>94</sup>, the Organization of

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<sup>89</sup> See at: <https://rm.coe.int/conference-of-prosecutors-general-of-europe-6th-session-organised-by-t/16807204b5> ((visited June 15, 2019))

<sup>90</sup> The Council of Europe is an international organization which was established in 1949 and has 47 members. See at: <https://www.coe.int/en/web/about-us/our-member-states> ((visited June 25, 2019))

<sup>91</sup> See at: [https://www.icj.org/wp-content/uploads/2014/10/IBA\\_International\\_Principles\\_on\\_Conduct\\_for\\_the\\_legal\\_prof.pdf](https://www.icj.org/wp-content/uploads/2014/10/IBA_International_Principles_on_Conduct_for_the_legal_prof.pdf) (visited June 25, 2019)

<sup>92</sup> See at: [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/) (visited June 25, 2019)

<sup>93</sup> See at: <https://www.ohchr.org/en/professionalinterest/pages/roleoflawyers.aspx> (visited June 25, 2019)

<sup>94</sup> See at: <https://ec.europa.eu/digital-single-market/en/news/ethics-guidelines-trustworthy-ai> (visited June 25, 2019)

Economic Cooperation and Development (the OECD)<sup>95</sup> and the G20<sup>96</sup> are some of those international organizations which have adopted ethical principles for AI. To illustrate the OECD adopted five principles on 22 May 2019 which are as follow;

- “AI should benefit people and the planet by driving inclusive growth, sustainable development, and well-being.”<sup>97</sup>
- “AI systems should be designed in a way that respects the rule of law, human rights, democratic values and diversity, and they should include appropriate safeguards – for example, enabling human intervention where necessary – to ensure a fair and just society.”<sup>98</sup>
- “There should be transparency and responsible disclosure around AI systems to ensure that people understand AI-based outcomes and can challenge them.”<sup>99</sup>
- “AI systems must function in a robust, secure and safe way throughout their life cycles and potential risks should be continually assessed and managed.”<sup>100</sup>
- “Organizations and individuals developing, deploying or operating AI systems should be held accountable for their proper functioning in line with the above principles.”<sup>101</sup>

Ethical principles regarding the AI not only the OECD’s but also the others’ aim to draw a frame for AI as it has merits and risks. On the one hand, ethical principles incorporate provisions to support AI’s development, on the other hand, to prevent its malicious use by underlining certain core legal values like human rights, rule of law, democratic values, etc.

Using AI in courts is relatively new for the customary legal practice and which is at the very early stage currently. Ethical rules issue is one of the hot topics regarding AI in particular for legal practice. Should AI be considered upon the current ethic rules for the different legal actors as mentioned above or is it needed to designate a new ethical framework for the AI in legal practice? AI’s border regarding to be used in legal practice is not clear, what

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<sup>95</sup> See at: <http://www.oecd.org/going-digital/ai/principles/> (visited June 25, 2019)

<sup>96</sup> See at: [https://g20trade-digital.go.jp/dl/Ministerial\\_Statement\\_on\\_Trade\\_and\\_Digital\\_Economy.pdf](https://g20trade-digital.go.jp/dl/Ministerial_Statement_on_Trade_and_Digital_Economy.pdf) (visited June 25, 2019)

<sup>97</sup> Supra note 95.

<sup>98</sup> Id.

<sup>99</sup> Id.

<sup>100</sup> Id.

<sup>101</sup> Id.



is more, we only have certain predictions supported with limited experimental implementation by now. Current ethical rules are created for the humans to cope with certain human-based challenges as to be biased or not to be impartial etc. Is it possible for an AI to have biases on something (this question excludes the intentional bias programming for AI)? Surprisingly, it was noticed that AI might have biases against certain people within its operating context. To illustrate, risk assessment software (COMPAS) in the USA which is used for anticipating the recidivism of criminals was biased against African-American people.<sup>102</sup> This example explicitly shows that there is a need for an ethical framework for AI in legal practice.

European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe adopted the European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment (European Ethical Charter or EEC)<sup>103</sup> on December 2018. European Ethical Charter incorporates five principles as constructive values of AI in judicial systems. These principles are as follows; principle of respect for fundamental rights<sup>104</sup>; principle of non-discrimination<sup>105</sup>; principle of quality and security<sup>106</sup>; principle of transparency, impartiality and fairness<sup>107</sup>, and principle under user control<sup>108</sup>. It should be noted that these principles are strongly in parallel with general ethical principles of AI as OECD's principles as mentioned above. In other words, these principles are the legally designed version of those principles focusing the legal content.

### 3.1.2.1 Principle of respect for fundamental rights

The first principle is underlining the point of fundamental rights which are essential for developed legal systems. For the Council of Europe, the European Convention on Human Rights (the ECHR) is the document regulating fundamental rights within the Council of Europe by also a specific court, the

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<sup>102</sup> Thomas Julius Buocz, *Artificial Intelligence in Court : Legitimacy Problems of AI Assistance in the Judiciary*, 2/1 COPENHAGEN JOURNAL OF LEGAL STUDIES, 41, 44 (2018) available at: <https://static1.squarespace.com/static/59db92336f4ca35190c650a5/t/5ad9da5f70a6adf9d3ee842c/1524226655876/Artificial+Intelligence+in+Court.pdf> visited June 25, 2019; See also: Max Ehrenfreund, *The machines that could rid courtrooms of racism* (Aug 18, 2016), available at: [https://www.washingtonpost.com/news/wonk/wp/2016/08/18/why-a-computer-program-that-judges-rely-on-around-the-country-was-accused-of-racism/?utm\\_term=.419946f91004](https://www.washingtonpost.com/news/wonk/wp/2016/08/18/why-a-computer-program-that-judges-rely-on-around-the-country-was-accused-of-racism/?utm_term=.419946f91004) (visited June 25, 2019)

<sup>103</sup> See at: <https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c> (visited June 25, 2019)

<sup>104</sup> Id.

<sup>105</sup> Id.

<sup>106</sup> Id.

<sup>107</sup> Id.

<sup>108</sup> Id.

European Court of Human Right. This principle indicates that using AI in judicial systems should be in conformity with the ECHR and naturally with the case-law of the European Court of Human Rights. The charter explains this as “principle of respect for fundamental rights ensure that the design and implementation of artificial intelligence tools and services are compatible with fundamental rights”<sup>109</sup>

### **3.1.2.2. Principle of Non-Discrimination**

It is crystal clear that non-discrimination in any part of legal practice is one of the essential values. As it is a pre-condition for the all legal actors it should clearly be same for the AI systems to be used in judicial proceedings. It was experienced that AI can also create some biases<sup>110</sup> by itself which might cause discriminatory proceedings. The charter explains this as “principle of non-discrimination specifically preventing the development or intensification of any discrimination between individuals or groups of individuals.”<sup>111</sup> The charter aims to prevent any kind of discrimination stem from the using AI before AI takes part in judicial practice prevalently.

### **3.1.2.3. Principle of Quality and Security**

Using AI in judicial practice will be based on mainly machine learning systems and algorithms both of which process personal and judicial data. Current computer system is almost always under the risk of to be hacked and which is also valid for AI and relevant technologies. To this end, providing the security of personal data and correct processing (without altering, etc.) of those data is one of the crucial steps. The charter aims to cover this significant risk with this principle which is defined as “with regard to the processing of judicial decisions and data, using certified sources and intangible data with models conceived in a multi-disciplinary manner, in a secure technological environment.”<sup>112</sup>

### **3.1.2.4. Principle of Transparency, Impartiality and Fairness**

Machine learning process is called black box<sup>113</sup> of AI technologies because of its unknown working structure. From the legal perspective, unknown structure of a technology which is processing huge amount of data might have certain risks. Data processing systems need to have transparency in order to be audited due to the fact that personal or judicial data are sensitive for legal perspective. The charter aims to deal with this with the transparency

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<sup>109</sup> Id.

<sup>110</sup> Supra note 103.

<sup>111</sup> Supra note 104.

<sup>112</sup> Id.

<sup>113</sup> Supra note 38.

principle. Impartiality and fairness are fundamental legal values and surely AI technologies should be in conformity with both if it is used in judicial practice. The charter explains this principle as “transparency, impartiality and fairness making data processing methods accessible and understandable, authorizing external audits.”<sup>114</sup>

### **3.1.2.5. Principle of Under User Control**

The Charter explains this principle as “under user control is precluding a prescriptive approach and ensuring that users are informed actors and in control of their choices.”<sup>115</sup> This principle requires that parties should comprehensively be informed on the level of AI usage whether AI’s solution binding, different options available and s/he still reach to a court or so on. As it is seen under user control principle is a kind of right to be informed for the parties which have a direct relation with the fair trial stated in article 6 of the ECHR. It is clear that the right to be informed about the legal procedure is one of the essential legal values. Besides under user control is also defined that AI should be under the human control for the predictions that AI robots might start to be autonomous and taking the world control as it has been in some science fiction movies.

All in all, it seems that AI will increasingly be used in judicial practice which makes the ethical rules for AI as a primary need. Judicial practice is conducted within strict rules including the ethical rules for the legal actors. Although it is not certain currently to what extent AI will be used in judicial practice, AI’s potential and its unique position need to be regulated by ethical rules in particular for the legal practice. Besides AI also need to be regulated generally where there are several attempts either in domestic or internationally as mentioned above. Consequently, the European Ethical Charter draws a balanced frame between the promotion of AI innovation and prevention of AI’s risks or malicious use. That is what we need about AI recently, a balanced approach, since AI has merits and hazards simultaneously like double-edged sword particularly for the unpredictable boundaries of the AI.

## **3.2. How Can AI Be Used in Judicial Practice?**

AI in legal practice is just in its infancy and maybe there will not be an AI can alternate the judges.<sup>116</sup> It is crystal clear that AI and relevant technologies continue to be developed and subsequently will take part in judicial practice. However, it is not clear that to what extent, from assistant tools to judging AI, it will take part in judicial practice. The profession of judge consists of a set

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<sup>114</sup> Id.

<sup>115</sup> Id.

<sup>116</sup> Eugene Volokh, *Chief Justice Robots*, 68 DUKE LAW JOURNAL, 1135, 1137 (2019) Available at: <https://scholarship.law.duke.edu/dlj/vol68/iss6/2> (visited June 25, 2019)

of skills as research, logic, creative solutions, intellectual and social skills, strong capacity in comparative analysis and interpretation, etc. The point is that whether or not AI can undertake all these skills at the same time.

We can divide judge's skills mainly in two groups as paper works and the others including the hearing management. It is clear that computers and also AI have superior capacity than humans to compute huge data sets (written documents). To illustrate IBM Watson can read and analyze one million pages in a minute which is extremely beyond than human capacity.<sup>117</sup> However judicial practice requires more as analyzing and interpretation of legal texts which generally include indirect context. Natural language processing (NLP) is the sub-field of AI to cope with text computing challenges and currently it is still far from to understand legal texts even if it is developing day by day.<sup>118</sup> Another point is that inter-communicational processes such as hearing witnesses and its evaluation is also challenging for AI since this kind of processes are considered by the judge with some intangible criteria as reasonableness, fairness, consistency, etc.<sup>119</sup> The judge uses those criteria with his human sense which he had naturally and improved by his experience.

AI can be used in various ways from a basic assistant to a robot judge. AI-based information and document computing systems clearly contribute to court practice. Particularly for the legal research stage, not only for facts but also for superior and equivalent court precedents, can be conducted relatively better with AI. There are various predictions and proposals among scholars regarding the use of AI in court practice<sup>120</sup>. In this paper, using AI in judicial proceedings will be addressed upon three categories. These are 1.AI as an assistant to judge, 2.AI drafting decision, 3.AI deciding cases.

### 3.2.1. AI as an Assistant to Judge

Courts have a clerk office to conduct ordinary duties as collecting and storing files and so on to support the judge. Besides in certain legal systems, there is also assessor to assist the judge in his judicial duties as collecting or sorting the legal material or case law. In the past, collecting and sorting legal

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<sup>117</sup> Margaret Rouse, *IBM Watson Supercomputer* (16 June, 2018) available at: <https://searchenterpriseai.techtarget.com/definition/IBM-Watson-supercomputer> (visited 30 June, 2019)

<sup>118</sup> *Supra* note 13 and 16.

<sup>119</sup> *Supra* note 116 at 1145.

<sup>120</sup> *Id.*; Tiia-Helinä Heikkinen, *How Does the Use of Artificial Intelligence Affect the Concept of Fair Trial?* (12 June 2019) available at: <https://lup.lub.lu.se/student-papers/search/publication/8980709> (Visited June 25, 2019); Thomas Julius Buocz, *Artificial Intelligence in Court : Legitimacy Problems of AI Assistance in the Judiciary*, 2/1 COPENHAGEN JOURNAL OF LEGAL STUDIES, 41, 47, available at: <https://static1.squarespace.com/static/59db92336f4ca35190c650a5/t/5ad9da5f70a6adf9d3ee842c/1524226655876/Artificial+Intelligence+in+Court.pdf> (visited June 25, 2019)

information is difficult and limited duty, which is also called as librarian job,<sup>121</sup> in comparison to recent times.

The job of assessors is to find required precedents or legal information related to specific case. It is clear that currently this kind of legal research is conducted through several legal databases by the effect of the internet which is easier compared to past. What will AI do differently from assessor's search through the internet? AI will do legal research more accurately and in a much shorter time because of its computing capability. To illustrate, AI will directly find the most relevant part from the huge database, but an assessor still needs to read and sort the documents, which takes plenty of time, found on the database. It is noteworthy that AI as an assistant to judge is relatively different from the current legal research tools<sup>122</sup>.

In this model, AI not only does legal research but also supports the judge by indicating the essential elements of the case according to the parties' claims such as applicable laws and provisions. In this model, it can be possible to communicate AI orally likewise to communicate a human and it should also be noted that this assistant AI can exist physically as a robot.

It is noteworthy that assistant AI can also be used in courts for secondary elements rather than the legal ones. AI provides efficiency to judge in court management if it is used in secondary elements as voice-to-text conversion for records or distant accession to the court for filing or delivery of decisions through the internet. To illustrate, face recognition system can be used for the parties for an identity check in order to file a new case through the internet as it is used in Chinese Internet Courts recently.<sup>123</sup>

All in all, this model is the model which we reach first because of the current existence of certain legal assistant AI as the Ross<sup>124</sup> even if they are mainly used by lawyers so far. This model is the relatively less controversial one among the others since it is not very far from our current technological tools either legal or general. Besides, the case is still conducted by a real judge by the support of his assistant either real-assessor- or AI. Although transparency of AI or its working structure is generally criticized<sup>125</sup>, entire proceeding is conducted by the judge and ordinary appeal procedures are still applicable so AI's critical points will not bring significant drawbacks for this model. Assistant AI will contribute judicial proceedings positively and it will become prevalent since it has merits in particular for time and efficiency.

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<sup>121</sup> Id.; Buocz at 50; Heikkinen at 25.

<sup>122</sup> As Westlaw, Nexis-Lexis and Heinonline.

<sup>123</sup> Frank Zhuang and Tony Tang, *How Do China's Internet Courts Work*, 22 Jan 2019, <https://www.chinalawandpractice.com/2019/01/22/will-chinas-internet-courts-lead-the-future-of-litigation/> (visited June 25, 2019)

<sup>124</sup> See also <http://www.rossintelligence.com/> (visited June 25, 2019)

<sup>125</sup> Supra note 7, 38 and 121 Buocz at 50.

### 3.2.2 AI Anticipating/Drafting Decisions

AI can be used before the decision stage in two ways. The first is to anticipate the decision before going to court and the second is offering a draft decision to judges at the court stage. The former, predictive AI applications, is mainly designed for lawyers or the other actors similar to lawyers as insurance companies<sup>126</sup> and so on. Since the prediction of the decision is an essential part of their further job position. On the other hand, AI applications which can draft decisions are mainly for the judges and maybe alternative actors who resolve the dispute as a mediator, arbitrator, etc.

Predictive AI applications try to anticipate the decision upon possibilities might be taken into account by the judge. AI performs this duty by using machine learning and natural language processing.<sup>127</sup> Besides, as a principal for machine learning systems the more data enables better prediction, namely, predictive AI tools will have better performance by the increasing use of them. Predictive AI not only indicates the possibility of the court's decision but also it shows the legal grounds and reasoning for each possibility. Therefore lawyers using the predictive AI have indicative grounds for appeal process even if the court's decision is different from the AI's anticipation. In other words, predictive AI will have already written a sample appeal petition in case the judge decides different than the prediction of AI.

The second option refers to the situation that the case has already been brought to the court and AI is used to draft/offer a decision.<sup>128</sup> After applied to AI regarding the case, AI will provide a draft decision about the case by using its skills. Afterward, the judge has options either using the AI's draft as his decision or ignoring it or revising it. Indeed, in this option, the judge, even if he is a first instance judge, likely become an appeal judge by having options on AI's draft as confirmation, revision or re-decide. Besides, parties' procedural rights are by no means affected because ordinary resorts as appeal are still available.

AI's this usage has better consequences on civil, commercial or administrative matters rather than criminal matters. The judge should decide on criminal matters entirely by its own discretion upon the evidence. As mentioned in the European Charter of Ethics<sup>129</sup> and other constructive documents as ECHR, drafting a decision for judge even if by AI might affect judge's approach indirectly which might constitute a violation of core procedural values. In other words, at least from my point of view, using AI to draft decision in criminal matters for the judge is not reasonable due to the fact that defendant's position might be affected adversely.

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<sup>126</sup> Supra note 120 Heikkinen at 27.

<sup>127</sup> Id., at 28

<sup>128</sup> Id., at 29

<sup>129</sup> Supra note 103.

### 3.2.3 AI Deciding Cases

The third option refers that AI decides on the cases autonomously like a human judge. That might not happen in the near future since we are still far from assistant AI to the judge and maybe the concept of AI judge will stay a theoretical prediction.<sup>130</sup> In this option, AI judge resides as a first instance judge and its decisions subject to appeal. In other words, parties bring their case before the AI judge at first<sup>131</sup> and then they can appeal to its decision before the human judges. It should be noted that there are certain attempts to solve certain disputes by AI-based online dispute resolution methods.

AI generally has a superior capability than humans to compute data as mentioned above. However, AI has limited capacity in particular for the interpretation of legal text due to the implicit context. In this regard, an AI judge can solve certain cases which are not very complex and multifaceted. Therefore, for AI judge first step might be specific cases stemming from internet disputes as consumer disputes or technical disputes. On the other hand, certain cases requiring human interpretation as contested divorce should be decided by human judges. Since sometimes it might not be clear which one has a major fault on divorce so the judge should have knowledge about family and marriage as being a human since marriage or emotional situations are not possible for AI or robots. It should be noted that criminal cases should also be excluded from the AI judge at least until there is a consistent and successful practice in civil cases. Last but not least, AI judge's opaque operation structure and the risk to be hacked must be taken into account.

As a judicial proceeding either by AI or human judge it is possible that both may come up with incorrect decisions. However, it is an ordinary risk and appeal mechanism is designed to deal with it for both. Another point is that parties in particular at the beginning stage of AI judge, must clearly and comprehensively be informed about the AI judge procedure not to violate his/her legal rights as regulated in the constitution or international conventions. Indeed, European Ethical Charter regulates this issue adequately as "The user must be informed in clear and understandable language whether or not the solutions offered by the artificial intelligence tools are binding, of the different options available, and that s/he has the right to legal advice and the right to access a court. S/he must also be clearly informed of any prior processing of a case by artificial intelligence before or during a judicial process and have the right to object so that his/her case can be heard directly by a court within the meaning of Article 6 of the ECHR."<sup>132</sup>

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<sup>130</sup> Supra note 116 at 1138.

<sup>131</sup> Supra note 126 at 30.

<sup>132</sup> Article 5 of EEC see at: <https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c> (visited June 25, 2019)

Consequently, if the strong AI, which has equal intellectual abilities as humans or even surpasses him in it, might be developed AI judge will become a concrete alternative for the judges. AI judge, as competent as a human judge in whole legal fields including criminal law seems to remain anticipatory. If it is accepted that AI will reach that stage, replacing the judges, it will have already replaced the people in the vast majority of labors, so, many questions arise as what will humans do in that stage?

### **3.3 Data Protection Issue for the AI Used in Judicial Practice**

It is clear that AI and relevant technologies will be increasingly used in judicial practice. On the one hand, it will contribute judicial practice positively, on the other hand, it has certain risks. It will provide judicial practice efficiency and practicality in particular for the time as mentioned in the above sections. We should focus on to that what kind of risk might arise and what might be the solutions for those risks?

First and foremost data protection issue can constitute a major risk for AI in judicial practice since court documents include relatively private personal data. On the other hand, data is essential for AI systems since it is a kind of fuel of AI, in other words, the more data provides the better results even in recent AI applications in various fields. Therefore, limitation of AI concerning the accession of data is not a solution since AI's development or better performance is directly based on that practice which requires data processing highly. Another point is that as mentioned above<sup>133</sup>AI may have biases against certain groups of people and limitless data processing may also increase this risk.

There are different approaches regarding the disclosure of judicial documents hearings, decisions and so on either in the first level or appeal level among the different legal system. Nevertheless, as a principle, a judge can reach the former decisions of equivalent or superior court without limitations. So, AI used in judicial practice by courts should have the same principle to get better consequences. On the other hand, AI used by lawyers should reach the same level of data with the lawyers can do within the relevant legal system.

Ethical principles of AI in judicial practice and the data protection regulations should include sufficient provisions to cope with this data risk with regard to AI. Ethical principles of AI in judicial practice are core regulation of AI even if recently there are no binding regulations for AI. Besides data protection regulations are the framing legal documents to provide adequate data protection within the relevant legal system. From the legal perspective, AI regulations and data protection regulations should draw a common frame for AI in judicial practice.

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<sup>133</sup> Supra note 102.



As regards three models proposed to use AI in judicial practice, the first and the second model do not have major risks since judge conducts most of the process and the final step. However, as all computer systems including AI systems are under the risk to be hacked or external intervention if they are operated online, data security issue may still constitute a risk. Blockchain technology or intranet systems might have an adequate level to overcome this situation. The third model, autonomous AI judge, is beyond the formers since it is the sole actor to conduct the entire process. It is difficult to anticipate that stage from the data protection perspective. If an AI is created to be used as a judge at that stage we should already solve the issue of data protection. It should be much simpler to protect data than creating an AI mentally equal or superior to a human.

### CONCLUSION

The relation between AI and the law will continue to be a hot topic since AI has several ambiguities from the law perspective. Therefore, AI needs to cover a long distance in order to answer positively for this paper's question which is 'can AI sit on the bench in the near future'. In this regard, this paper's concluding remarks can be stated under three sections as regulation need and legal positioning of AI, the ethical frame of AI in legal practice and using AI in judicial practice.

First and foremost AI needs to be addressed by the law rules however AI is subjected various different fields such as medical, military, computer science, internet tools, network, etc. which makes it difficult to create uniform rules applying all of those fields. Therefore, to cope with this difficulty AI should be regulated by two-tiered system as general rules/guidelines, which applies to all fields, and secondary/specific rules to apply relevant sector with its characteristic requirements.

Besides, the legal positioning of AI and legal liability of AI in case there is wrongdoing in its operations, damage to humans, is another crucial legal issue. AI and robots need a legal regulation to identify their legal position in particular for the disputes or damages that they cause. However, granting legal personhood to the robots is not the convenient step to solve the problem due to the lack of conformity of the conditions to have legal personhood such as direct relation with natural persons. Therefore, creating legal liability rules for legal problems, that robots bring about, may constitute a solution. To illustrate, strict liability, as in the form of an AI fund, might constitute an adequate ground to deal with to compensate for the damage conducted by AI entities. AI fund can be a sufficient resort for not only autonomous cars but also other AI applications. AI fund is also beneficial and less costly for all parties in comparison to the litigation process.

The next point is the ethical frame of AI in legal practice before addressing the use of AI in judicial practice since legal actors have ethical rules to conduct their duties. Legal practice, including all actors, is conducted within different ethic rules for different actors all of which aim to reach a fair trial. Namely, legal proceedings are not technical tasks which computers and AI perform better. Thus, the legal practice is conducted under certain principles as non-discrimination, transparency, fairness, impartiality and so on which are the core values of legal practice. So, if an AI takes part in legal practice it should perform in conformity with those core values as an initial and constructive step since AI might also breach those principles as mentioned above chapters.

AI in legal practice is just in its infancy and maybe there will not be an AI can alternate the judges however there are some levels before altering the real judge with an AI. It is crystal clear that AI and relevant technologies continue to be developed and subsequently will take part in judicial practice. However, it is not clear that to what extent, from assistant tools to judging AI, it will take part in judicial practice. This paper claimed that AI can be used in three gradual options in judicial practice. These are AI as an assistant to judge, AI drafting decisions and AI deciding cases.

AI assistant to judge is the initial stage and we are not very far from that stage currently since similar tasks have already achieved in different fields as smartphones' personal assistants etc. In this model, AI not only does legal research but also supports the judge by indicating the essential elements of the case according to the parties' claims such as applicable laws and provisions. This model is relatively less controversial one among the others since the entire proceeding is conducted by the judge and ordinary appeal procedures are applicable so AI's critical points will not bring significant drawbacks for this model. Assistant AI will contribute judicial proceedings positively in particular for time and efficiency.

AI can be used before the decision stage in two ways. The first is to anticipate the decision before going to court and the second is offering a draft decision to judges at the court stage. Predictive AI applications try to anticipate the decision upon possibilities might be taken into account by the judge. Predictive AI not only indicates the possibility of the court's decision but also it shows the legal grounds and reasoning for each possibility. In second options AI will provide a draft decision about the case. Afterward, the judge has options either using the AI's draft as his decision or ignoring it or revising it so the judge likely becomes an appeal judge. Besides, parties' procedural rights are by no means affected because ordinary resorts as appeal are still available. Last but not least this option has better consequences on civil, commercial or administrative matters rather than criminal matters. The judge should decide on criminal matters entirely by its own discretion upon the evidence.

AI deciding cases is the ultimate stage and the most controversial option. In this option, AI decides on the case like a real ordinary judge. AI judge resides as the first instance judge and its certain decisions subject to appeal. The appeal process should be conducted by the human judges even if it is possible to design another AI for the appeal stage. Firstly, people's perception on a fair trial is an issue here since being judged by an AI is a revolutionary step for long-lasting legal custom. AI judge seems extra-ordinary for the generations who experienced the non-digital world, however, newer generations who were born in a digital age might perceive AI judge not extra-ordinary. Another point is that AI has limited capacity in particular for the interpretation of legal text due to the implicit context. Moreover, certain cases require human interpretation as contested divorce since they have emotional or intangible backgrounds.

All in all, it is very difficult to predict whether we reach AI judge or not. Theoretically, if the strong AI, which has equal intellectual abilities as humans or even surpasses him in it, might be developed AI judge will become a concrete alternative for the judges. AI judge, as competent as a human judge in whole legal fields including criminal law seems to remain anticipatory. The realistic prediction might be that certain cases as internet disputes, technical disputes can be decided by AI by the condition to be appealed before a human judge. If it is accepted that AI will reach that stage, replacing the judges, it will have already replaced the people in the vast majority of labors, so, many questions arise as what will humans do in that stage?

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# THE PROTECTION OF UNION OF MARRIAGE IN TURKISH LAW

*Türk Hukukunda Evlilik Birliğinin Korunması*

**By Prof. Dr. Mehmet ERDEM\***

## **Abstract**

After the marital union established, spouses are obliged to fulfill the duties imposed on them by the union. In this respect, spouses should act following good faith and avoid behaviors that prevent them from living together. However, occasionally there may be disagreements between spouses that endanger the unity of the family. Therefore, the legislator, besides regulating the obligations of spouses, has also issued special provisions regarding violation of spouses' duties in order to protect the unity of the family. Some of these provisions can be regarded as follows, the suspension of joint household in Turkish Civil Code\* (TCC) 197; restriction of power to dispose of assets in TCC 199; besides these, when the spouses are subjected to violence, Law No. 6284 on the Protection of the Family and the Prevention of Violence Against Women.\* In this regard, firstly the provisions of TCC 195, which is the basic norm for the protection of marital unity, and then the relevant provisions of Law No. 6284 and TCC 197, 199 will be examined below.

**Key Words:** Protection of Marital Union, Unity of Family, Domestic Violence, The Suspension of Joint Household, Cautionary Decision.

## **Özet**

Evlilik birliği kurulduktan sonra eşler, evlilik birliğinin kendilerine yüklediği görevleri yerine getirmekle yükümlüdür. Bu doğrultuda eşler dürüstlük kuralına uygun hareket etmeli ve birlikte yaşamayı engelleyecek davranışlardan kaçınmalıdır. Buna rağmen, zaman zaman eşler arasında evlilik birliğini tehlikeye düşürecek anlaşmazlıklar söz konusu olabilir. Bu sebeple kanun koyucu evlilik birliğinin korunmasına yönelik, eşlerin yükümlülüklerini düzenlemenin yanında onların görevlerini ihlâl etmelerine karşı da özel hükümler düzenlemiştir. Bunlardan bir kısmı, MK 197'de düzenlenen birlikte yaşamaya ara verilmesi; MK 199'da öngörülen belirli malvarlığı değerleri üzerinde eşlerin tasarruf yetkilerinin sınırlanması; bunların yanında, eşlerin şiddete maruz kalması durumunda, hâkimin müdahalesine imkân veren, 6284 sayılı 'Ailenin Korunması ve Kadına Karşı Şiddetin Önlenmesine Dair Kanun' hükümleridir. Bu doğrultuda aşağıda ilk olarak evlilik birliğinin korunmasına yönelik temel norm olan MK 195 hükmü, daha sonra ise sırasıyla MK 197 ve 199 ile 6284 sayılı 'Ailenin Korunması ve Kadına Karşı Şiddetin Önlenmesine Dair Kanun' un ilgili hükümleri incelenecektir.

**Anahtar Kelimeler:** Evlilik Birliğinin Korunması, Aile Birliği, Aile İçi Şiddet, Birlikte Yaşamaya Ara Verilmesi, Tedbir Kararı.

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\* Law No. 4721, O.J. 08.12.2001, Issue: 24607.

\* Law No. 6284, O.J. 08.03.2012, Issue: 28239.



## I. THE PROTECTION OF UNION OF MARRIAGE

### A. The Ground Norm

The general regulations regarding the protection of marital union are within the scope of provisions 195 ff. of the TCC. However, the ground norm concerning the protection of marital union is TCC 195. TCC 195 is as follows: “*In case of none fulfillment of obligations arising from marital union or disagreement on an important subject concerning marital union, they may request jointly or separately to the judge’s intervention.*”

*The judge reminds the spouses of their duties; attempts to settle their differences and if the spouses’ consent, experts may be consulted.*

*If necessary, at the request of one spouse the judge will take the steps envisaged by law”.*

In case of disagreement in marriage, to seek a judge’s intervention is perhaps one of the last remedies. Spouses who have come to this stage may request the judge’s intervention if they cannot resolve the disagreement among them. In this matter, it is not possible to a person other than spouses to request the judge’s intervention, nor judge to act ex-officio<sup>1</sup>.

When spouses conflict on obligations arising from the marital union or disagree on an important issue related to the marital union, the judge should be guiding on the settlement of dispute among spouses as acting arbitrator/conciliator. The judge may warn the spouses about these obligations. However, it should not be possible to make a decision that constitutes a sanction by a judge. To resolve the conflict, the judge tries to reconcile the spouses about what obligations they have and how they must act to solve problems among them. At this point, the judge, unlike any other case, should seek measures and solutions aimed at ensuring the peace and happiness of the marital union. In these reconciliation and settlement processes, the judge may seek the support of experts, such as marriage counselors or family psychologists, if the spouses’ consent (TCC 195/I). It can be ensured that these experts could help spouses to resolve the dispute within the framework of the target shown them.

Besides this general protection norm of law, there are also protection provisions that are specifically provided for certain situations. For instance, TCC 196 and 198 allow the judge to make decisions and intervene in the spouses’ participation in the expenses of the union of marriage. Also, TCC 190 allows the judge to cancel or limit the authority to represent of spouse if the spouse exceeds or is incapable of exercising this authority.

Apart from these situations, some special cases regarding the protection of the union of marriage have been regulated in TCC. Some of these

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<sup>1</sup> Deschenaux/Steinauer/Baddeley, p. 267. *Court of Cassations For The Second Circuit 1.12.2003, M. 2003/15232, D. 2003/16106 (Kazancı).*

provisions can be regarded as follows, the suspension of joint household in TCC 197; restriction of power to dispose of assets in TCC 199; besides these, when the spouses are subjected to violence, Law No. 6284 on the Protection of the Family and the Prevention of Violence Against Women which enable the judge to intervene.

The court in charge of the measures to protect the marital union is the family courts following article 4/I of Law No. 4787 on the Establishment, Duties, and Procedures of Family Courts. However, TCC 201 regulating the competent court is as follows:

*“The competent court on measures to protect the marital union is the settlement court of any of the spouses.*

*If the spouses’ settlements are different and both have requested precaution to be taken, the competent court is the settlement court of the first applicant.*

*The competent court to be taken the amendment, completion or termination of precaution is the court that issued the precaution. However, if the settlements of both spouses have changed, the competent court is the new settlement court of any of the spouses<sup>2</sup>”.*

## **B. The Suspension of Joint Household**

TCC 197 entitled as the suspension of the joint household is as follows:

*“A spouse is entitled to suspend the joint household for as long as his or her personality rights or financial security or the welfare of the family are seriously endangered by living together.*

*If the suspension of the joint household is justified, at the request of one spouse the judge will determine the maintenance paid to the other spouse, issue directions on the use of the home and the household effects.*

*A spouse may also make such a request if living together is impossible, in particular, because the other spouse refuses to do so without good cause.*

*If the spouses have minor children, the judge takes the necessary steps following the provisions governing the legal effects of the parent-child relationship”.*

The suspension of a joint household arises as a matter of course if the conditions occur, and it is not required to be decided on this matter by the court<sup>3</sup>. To be decided on the suspension of a joint household, one of the spouses (1) personality rights, (2) financial security or (3) the welfare of the family must be endangered by living together. This situation does not have to be due to a misdemeanor of one of the spouses. In cases where spouses do not have any misdemeanor, the right to living separately may arise as well.

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<sup>2</sup> Court of Cassations For The Third Circuit 10.2.2014, M. 2013/17531, D. 2014/1871 (Kazanci).

<sup>3</sup> Werro N 951. Court of Cassations For The Second Circuit 24.9.2007, M. 2006/17324, D. 2007/12577 (Kazanci).

Impairment of personality rights due to living together may particularly arise from the violence of one of the spouses against another<sup>4</sup>. This violence can be physical, both as oppression, housebound or defamation and as psychological and verbal. Endangering financial security may also be caused by either one of the spouses not being allowed to work or another spouse does not work although it is necessary<sup>5</sup>. The serious endangering of the welfare of the family may be caused, for example, by the moving of a close relative of a spouse to matrimonial home due to severe illness and the consequences of this illness.

The right to legal separation continues until the disappearance of the phenomena that cause it. Within this period, the spouse who lives separately is not considered to have abandoned communal residence<sup>6</sup>.

According to TCC 197/II, “*If the suspension of the joint household is justified, at the request of one spouse the judge will determine the maintenance paid to the other spouse, issue directions on the use of the home and the household effects.* Likewise, “*If the spouses have minor children, the judge takes the necessary steps following the provisions governing the legal effects of the parent-child relationship*” (TCC 197/IV). Although the right of suspending the joint household originates automatically when the conditions are met, the judge’s decision is essential to arrange some of its consequences. It can be requested from the judge to decide that the maintenance payment which one of the spouses living separately makes to the other spouse, how the spouses’ properties will be administrated, who benefits the home and household, who will have parental power and determination of the child maintenance that the other spouse will pay<sup>7</sup>. The judge having power of discretion on this issue should decide the most suitable solution considering the spouses’ benefits. While the judge is making a decision, s/he shall take into consideration the facts that causes the spouses to live separately and whether the spouses are in default and the defective fraction.

Another caution mentioned in TCC 197/II that the judge can take is to decide the conversion of the legal or contractual matrimonial property among the spouses into the separation of estates (TCC 206)<sup>8</sup>.

Although the right of living separately has not occurred, if a spouse abstains from living together without good cause or the joint-life becomes impossible

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<sup>4</sup> Öztan, *Aile*, p. 352; Gümüş, *Evlilik*, p. 153 ff.; Yılmaz, p. 29 ff.; Dural/Öğüz/Gümüş, p. 182. Court of Cassations For The Third Circuit 13.4.2004, M. 2004/3682, D. 2004/3631 (Kazancı).

<sup>5</sup> Yılmaz, p. 40-43.

<sup>6</sup> Akıntürk/Ateş, p. 138.

<sup>7</sup> Werro N 961 ff. Supreme Court Assembly of Civil Chambers 16.3.2016, M. 2014/81021, D. 2016/328 (Kazancı); Court of Cassations For The Second Circuit 24.7.2008, M. 2008/11603, D. 2008/11279 (Kazancı); Court of Cassations For The Second Circuit 24.7.2008, M. 2008/11603, D. 2008/11279 (Kazancı).

<sup>8</sup> Court of Cassations For The Second Circuit 24.5.2011, M. 2010/8448, D. 2011/8998 (Kazancı). Gümüş, *Evlilik*, p. 172-173; Dural/Öğüz/Gümüş, p. 184. See also, Yılmaz, p. 153 ff.

to the spouses, each of the spouses may request that the measures provided for in article 197/II to be taken (TCC 197/III).

According to TCC 200, “*When there is a change in circumstances, at the request of either spouse the judge shall modify the measures or revoke the same if they are no longer justified*”. For instance, if the spouse who has the right of living separately does not return to communal residence, although the situation caused the suspension of the joint household has discontinued, the judge may decide to revoke the financial contribution. In addition to this, if the spouse who has the right of living separately begins to work, the financial contribution can be readjusted<sup>9</sup>. In cases where children’s interests need to be considered, the judge may make necessary changes at any time.

### **C. Restriction of Power to Dispose of Certain Assets**

Each spouse may enter into transactions with the other or with third parties unless Law provides otherwise (TCC 193). However, if the transactions regarding the assets are meaningless, this may result in a decrease in the assets. Decrease of the assets of the spouse may endanger the financial future of the family and the contribution of the spouse whose assets decrease to expenses required by the marital union. Therefore, the legislator acknowledges that in such cases, the power to dispose of certain assets of the spouses may be subject to a restriction. TCC 199 is as follows:

*“To the extent required to ensure the family’s financial security or fulfillment of a financial obligation arising from the marital union, at the request of one spouse the judge may make the power to dispose of certain assets conditional on its consent.*

*The judge orders the appropriate protective measures.*

*If it prohibits a spouse from disposing of land it must have a note to this effect recorded in the land register”.*

To apply to these measures, the financial existence of the family and the contribution to the expenses required by a marital union must be dramatically endangered due to the transactions of one of the spouses<sup>10</sup>. However, even if the transactions made by one of the spouses is meaningless or are related to only a part of its assets and remaining assets are sufficient, such measures cannot be applied.

Likewise, it is not possible to apply to these measures if the transactions of the spouse are based on reasonable grounds. For instance, if the spouse sells its assets to discharge his/her debts in the presence of deterioration of the business life or operation’s loss, such transaction of the spouse cannot be prevented.

If the conditions are fulfilled, the judge may take the necessary action at the

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<sup>9</sup> Court of Cassations For The Third Circuit 19.1.2004, M. 2004/194, D. 2004/99 (Kazancı).

<sup>10</sup> Barlas, İşlem Özgürlüğü, p. 134; Gümüş, Evlilik, p. 189; Öktem, p. 323-325; Şahinci, p. 316-317; Dural/Öğüz/Gümüş, p. 187. Court of Cassations For The Second Circuit 16.11.2009, M. 2008/16201, D. 2009/19869 (Kazancı).

request of the other spouse. However, the measures to be taken should be both as proportionate and as necessary<sup>11</sup>. The measure may refer to a single item, for instance, a real estate, as well as specific assets. Yet, the measure should be a concrete transaction, in other words, it should declare which assets are entreated<sup>12</sup>.

The measure to be taken is the restriction of power to dispose of certain assets of the spouses<sup>13</sup>. The spouse whose power to dispose of assets is restricted should gain other spouse's consent to make transactions regarding this issue. The spouse's consent is not subjected to any form, it can be explicit or implicit. The consent can also be given before or after the transaction<sup>14</sup>. The judge orders the appropriate protective measures after the restriction of the spouse's power to dispose of assets (TCC 199/II). These measures may be the cash deposit into an account which is disposed only with the consent of the spouse or storing the commercial paper, jewelry and similar movable values at a certain location<sup>15</sup>.

If the restriction of spouse's power to dispose of assets is related to real estate, in other words, it prohibits a spouse from disposing of land, the judge must have a note to this effect recorded in the land register. This does not require a different request (TCC 199/III)<sup>16</sup>. Although it has suggested that the note recorded in the land register will close/lock the land registry to the transactions<sup>17</sup>, the adoption of this suggestion which is not explicitly stated by Law has not any benefit to our land registry system<sup>18</sup>.

The restriction of power to dispose of assets endure at the same time as the verdict. Even if there is not any note recorded in the land register after the verdict, the *bonafide* person transacting with the authorized spouse is not preserved. TCC 199 is the provision eliminating the good faith of third parties in the acquisitions of right in rem, that is, the provision that precedes provisions protecting good faith such as TCC 1023<sup>19</sup>. In other words, the acquisitions of right in rem of third parties who do not know the decision of the restriction of power to dispose of certain assets or unable to know it are not valid. The

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<sup>11</sup> **Gümüş, Evlilik**, p. 192. **Court of Cassations For The Second Circuit 5.5.2016, M. 2016/6148, D. 2016/9173 (Kazancı); Court of Cassations For The Second Circuit 12.4.2012, M. 2011/2293, D. 2012/9437 (Kazancı).**

<sup>12</sup> **Barlas, İşlem Özgürlüğü**, p. 134; **Öktem**, p. 325. **Court of Cassations For The Second Circuit 6.5.2014, M. 2014/2235, D. 2014/10433 (Kazancı).**

<sup>13</sup> **Barlas, İşlem Özgürlüğü**, p. 133; **Gümüş, Evlilik**, p. 193. See the discussion on the legal nature of the restriction, **Öktem**, p. 325-327.

<sup>14</sup> **Barlas, İşlem Özgürlüğü**, p. 134; **Öktem**, p. 328; **Gümüş, Evlilik**, p. 195.

<sup>15</sup> **Şahinci**, p. 322.

<sup>16</sup> **Dural/Öğüz/Gümüş**, p. 189.

<sup>17</sup> **Örneğin Gümüş, Şerhler**, p. 79 ff.; **Doğan**, p. 196. For discussions see, **Öktem**, p. 331 ff.; **Gümüş, Şerhler**, p. 77 ff.

<sup>18</sup> See, **Barlas, İşlem Özgürlüğü**, p. 136-137; **Öktem**, p. 330 andp. 333.

<sup>19</sup> **Gümüş, Şerhler**, p. 87; **Ayan**, p. 268; **Öktem**, p. 335; **Barlas, İşlem Özgürlüğü**, p. 137.

registration made on behalf of these persons, the spouse whose consent has not been received has the right to sue to be adjusted the land registry. However, before the note recorded in the land registry, the acquisitions of the right of rem of the person who transacting with the spouse is valid. The note takes the good faith of these persons off.

The precaution should only be at the level required by the protection<sup>20</sup>. Otherwise, the judge cannot, for instance, decide to use the money in a certain investment, to sell the jewelry and to buy a real estate. In addition to these, the injunction is not announced.

According to TCC 200, if there is a change in circumstances, at the request of either spouse the court shall modify the measures or revoke the same if they are no longer justified. If the conditions required the restriction are removed, the judge can completely abolish the measure. However, if they are not completely removed but partly changed, the judge can make the changes as the situation requires. For instance, some of the measures imposed on properties can be abolished, as the obligations required by the marital union will be reduced since the children are mature and their education is not continued anymore.

#### **D. The Protection Against The Domestic Violence**

Violence against women, regardless of economic and social status, is a phenomenon encountered in every society. Although women are undoubtedly and predominantly aimed, it is known that violence is directed towards children and other family members<sup>21</sup>. It is a fact that if one of the spouses (especially the woman) is subjected to violence, it can be seen as bad and dishonorable behavior, in some cases constitute an intent to life and often cause the marital union to be broken down. In such cases, there should be no doubt that the spouse who is subjected to violence may petition for divorce. Likewise, violence brings about a penal act, as well as assaulting (invasion) against the immunity of the body and on honor (insult).

Even if the spouse who is subjected to violence has the right to petition for divorce, the first thing to be done is to save and protect him/her from violence as soon as possible. In some cases, the pressure on the shoulders of the spouse who is subjected to violence makes him/her unable to avoid being subjected to violence. In addition to this, the economic factors and social structure (especially the family) do not allow the spouse to petition for divorce even if he/she is subjected to violence.

The spouse subjected to violence is not either able to protect him/herself from this violence, or operate the necessary complaints and protection

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<sup>20</sup> Dural/Öğüz/Gümüş, p. 188.

<sup>21</sup> To see Law No. 4320, the first regulation to be tackled domestic violence, Erdem, Şiddet, p. 50 ff.

mechanisms. Therefore, to get rid of the violence, the protection mechanisms should be developed without the spouse's consent. Law No. 6284 on Law To Protect Family And Prevent Violence Against Women aims at this protection. In fact, the first law in this respect is Law on the Protection of the Family dated 14/01/1998 and numbered 4320. The scope of the protection and the measures envisaged in Law numbered 4320 are extended with Law To Protect Family And Prevent Violence Against Women (Law No. 6284).

The aim of Law No. 6284 is explained in the first article as follows: *“The aim of this law is to protect the women, the children, the family members and the victims of stalking, who have been subject to the violence or at the risk of violence, and to regulate procedures and principles with regard to the measures of preventing the violence against those people”*. In the same article is expressed that The Constitution of The Republic of Turkey, the agreements to which Turkey is a party, especially the Council of Europe Convention on Prevention and Combating Violence against Domestic Violence and Women are set to be taken into account in the implementation of this Law.

The second article of Law No. 6284 gives some definitions. According to this:

**Violence:** The acts which results or will probably result in person's having physical, sexual, psychological and financial sufferings or pain and any physical, sexual, psychological, verbal or economical attitude and behavior which include the treat, pressure and arbitrary violation of person's freedom as well and conducted in social, public and private space.

**Domestic violence:** Any physical, sexual, psychological and economic violence between the victim of violence and the perpetrator of violence and between the family members and the people who are considered as a family member whether they live or do not live in the same house.

**Violence against women:** The gender-based discrimination directed against a woman just because she is a woman or that affects women disproportionately and any attitude and behavior violating the human rights of women and defined as violence in this Law.

**Victim of violence:** The person who is directly or indirectly subject to or at the risk of the attitudes and behaviors which are defined as violence in this Law and the people who are affected by violence or at the risk of being affected by violence.

**Violence Prevention and Monitoring Centers:** The centers which operate on a 7/24 basis and provide support and monitoring services to prevent the violence and to carry out the protective and preventive measures efficiently.

As can be seen, although the main purpose of Law is to protect women in domestic violence, the field of its application is wider than this. It should be noted that Law also concerns the prevention of violence in the family or other household or member of the family, even if they do not share the same household.

In accordance with Law No. 6284, the injunction (measure) is decided by two authorities. They are the superiors and judges. **The protective and preventive measures** to be decided by the local authority are stated in the third article of Law as follows:

*“(1) One of the following measures, several of them or similar measures deemed appropriate shall be decided by the civilian authority concerning the persons who are protected within the scope of this Law.*

*a) To provide an appropriate shelter to the person and if necessary to the person’s children in the vicinity or in some other location.*

*b) To provide financial aid to the person, without prejudice to other assistance provided within the scope of other laws.*

*c) To provide psychological, professional, legal and social guidance and counseling services.*

*ç) To provide temporary protection upon a request of the relevant person or ex officio if there is a life-threatening danger for the person.*

*d) If deemed necessary; four months of daycare, maximum two months for those who have a job, is provided to children of the protected persons to support the person’s integration into work-life; the amount which cannot exceed the half of the net minimum wage paid to those older than 16 years of age with the condition of documenting is covered from the Ministry’s related budget.*

*(2) In cases where a delay is considered to be risky, the measures as contained in paragraph 1, clauses A and Ç shall be taken by related law enforcement chiefs as well.*

*Law enforcement chief shall present the report to the administrative chief for approval not later than the first workday after the decision is taken. The measures which are not approved by the administrative chief within forty-eight hours shall be per se abolished”.*

The decisions on **protective measures** to be taken by the judge are given in the fourth article as follows:

*“(1) One of the following protective measures, several of them or similar measures deemed appropriate shall be decided by the judge regarding the persons who are protected within the scope of this Law:*

*a) To change the workplace.*

*b) To decide a house settlement different from the shared one if the person is married.*

*c) To put an annotation to the title deed as a family house if the conditions are applicable as contained within the Turkish Civil Code no.4721 dated 22/11/2001 and upon the request of the protected person.*

*ç) To change the identification and other related information and documents based on the informed consent of the relevant person as per the provisions of the Witness Protection Law No. 5726 dated 27/12/2007 if it is determined that there is a life-threatening danger for the protected person and the measures to prevent this danger are inadequate”.*



**The preventive cautionary decisions** to be taken by the judge is expressed in the fifth article as follows,

*“(1) One of the following preventive measures, several of them or similar measures deemed appropriate shall be decided by the judge concerning the perpetrators of violence:*

*a) Not to exhibit an attitude and behaviors including the threats of violence, insult, and humiliation against the victim of violence.*

*b) To move from the shared dwelling or the vicinity immediately and to allocate the shared dwelling to the protected person.*

*c) Not to approach the protected persons and their residences, schools, and workplaces.*

*ç) If there is a previous decision to allow having a personal connection, to have a personal connection with the children together with a company and to restrict the personal connection or to revoke it completely.*

*d) Not to approach the friends or relatives and children of the protected person even though they haven't been subject to the violence, without prejudice to the decisions that allow personal connection with children*

*e) Not to damage the personal belongings and household goods of the protected person.*

*f) Not to cause distress to the protected person through communication instruments or alternative channels*

*g) To hand over the officially permitted and authorized weapons to Law enforcement officials.*

*ğ) To hand over the weapon to the employing institution, even if the person is in a profession of public service that requires carrying a weapon.*

*h) Not to use alcohol, drugs or stimulants in places where the protected people are present or not to approach the protected people and whereabouts while under the influence of these substances and to ensure to have a medical examination and treatment including in-patient treatment in case of the addiction.*

*ı) To apply to the health center for examination or treatment and to ensure having a treatment.*

*(2) In cases where a delay is considered to be risky, the measures as contained in the clauses of (a), (b), (c) and (d) of the first paragraph shall be taken by the relevant law enforcement chiefs as well. The law enforcement chief shall present the report to the judge for approval no later than the first workday after the decision is taken. The measures which are not approved within the twenty- four hours by the judge shall be perse abolished*

*(3) With the measures identified within this Law, the judge is authorized to make a decision on protective and preventive measures as contained within the Child Protection Law no. 5395 dated 3/7/2005 and on the issues of guardianship, custody, alimony and personal connection as per the provisions of Law no.4721.*

*(4) If the perpetrator of violence is the person who at the same time is the provider of or contributor to the family's livelihood, the judge may decide on a temporary alimony by taking into consideration of the living standards of the victim even without request provided that no decision on maintenance had been rendered priorly as per the provisions of Law no. 4721".*

Complaints of the victim is not needed to take a decision of protective or preventive measures to be taken by the civil authority or the judge within the scope of Law no. 6284.

According to the seventh article of Law, *"If there has been violence or there is a risk of it, everybody can report this situation to the official authorities and organs. The public officials who receive the report are obliged to fulfill their duties without any delay and inform the authorities for the other measures needed to be taken".* Even if the victim of violence is not a complainant, or states that he/she has not been subjected to violence, the situation should be investigated ex officio and the necessary measures should be taken if the presence of violence is detected.

The eighth article regarding **the cautionary decision** is as follows:

*"(1) The cautionary decision is taken either upon a request of the relevant person or law enforcement officers or public prosecutor. The cautionary decisions may be requested from the judge, administrative chief or law enforcement unit, whichever is in the nearest and easiest location.*

*(2) The cautionary decision is taken for six months at most initially. However, if it is determined that there is a continued risk of violence, the measures shall be extended, modified, abolished or kept ex officio or upon a request of the protected person or the officials of Ministry or law enforcement agencies,*

*(3) No evidence or report proving the violence is required to take the cautionary decision. The preventive cautionary decision is taken without delay. This decision cannot be delayed as to endanger the realization of the aim of this Law.*

*(4) The cautionary decision is pronounced or notified to the protected person and perpetrator of violence. Regarding the refusal of the request for a cautionary decision, only the protected person is notified. In cases where the delay is considered to be risky, the perpetrator of violence is immediately notified with an official report on the cautionary decision taken by the related law enforcement unit.*

*(5), The legal warning stating that the person is subject to the preventive imprisonment in the case of acting contrary to the cautionary decision is issued when the cautionary decision is pronounced and notified.*

*(6), If deemed necessary, in addition to the cautionary decision, the identification information of the protected person or other family members or the information to reveal their identification, their addresses and the other information important for the efficiency of protection shall be kept confidential within records upon a request or ex officio. A different address is identified*

*for the notifications to be sent. The person who illegally gives, reveals and discloses the information to somebody else is subject to the related provisions of the Turkish Penal Code no. 5237 dated 26/9/2004*

*(7) If requested, the delivery of personal belongings and documents to the relevant persons is ensured through law enforcement”.*

The appealing to the cautionary decision is regulated in the ninth article of Law as follows:

*“(1) The decisions taken as per the provision of this Law may be appealed to the family court by the relevant persons within two weeks after the notification is received.*

*(2) Upon a complaint about the cautionary decisions taken by the judge, if there is more than one family court, the file is transferred to the numerically succeeding family court; if the court taking the decision is numerically the last court, it is transferred to the numerically first court; if there is one family court in that area, it is transferred to the court of the first instance; if the judge of family court and judge of the court of the first instance are the same person, it is transferred to the nearest court of the first instance without delay.*

*(3) The authority for complaints shall decide within a week. The decisions taken by the authority for complaints are the final”.*

The implementation of the cautionary decision is regulated in the ninth article of Law and contradiction with the decision in article 13. There are also some regulations such as the establishment of violence prevention and monitoring centers (art. 14), support services (art. 15), interinstitutional coordination and training (art. 16), temporary financial assistance (art. 17), alimony (art. 18) and health expenses (art. 19).

## CONCLUSION

The general regulations regarding the protection of marital union are within the scope of provisions 195 ff. of the Turkish Civil Code (TCC). However, the ground norm concerning the protection of marital union is TCC 195. In case of disagreement in marriage, to seek a judge's intervention is perhaps one of the last remedies. However, the spouses who come to this stage may request the judge's intervene if they cannot otherwise resolve the disagreement between them. When spouses conflict on obligations arising from the marital union or disagree on an important issue related to the marital union, the judge should be guiding on the settlement of dispute among spouses as acting arbitrator/conciliator. At this point, the judge, unlike any other case, should seek measures and solutions aimed at ensuring the peace and happiness of the marital union.

Spouses are obliged to live together as long as the unity of family continues. However, while the unity of marriage continues, one of the spouses may have the right to live separately if the conditions have been met despite the other

spouse's unwillingness. To be decided on the suspension of a joint household, one of the spouses (1) personality rights, (2) financial security or (3) the welfare of the family must be endangered by living together. This situation does not have to be due to a misdemeanor of one of the spouses. The right to legal separation continues until the disappearance of the phenomena that cause it. Within this period, the spouse who lives separately is not considered to have abandoned communal residence.

Decrease of the assets of the spouse may endanger the financial future of the family and the contribution of the spouse whose assets decrease to expenses required by the marital union. Therefore, the legislator acknowledges that in such cases, the power to dispose of certain assets of the spouses may be subject to a restriction. To apply to these measures, the financial existence of the family and the contribution to the expenses required by a marital union must be dramatically endangered due to the transactions of one of the spouses.

The measure to be taken is the restriction of power to dispose of certain assets of the spouses. The restriction of power to dispose of assets endures at the same time as the verdict. Even if there is not any note recorded in the land register after the verdict, the *bonafide* person transacting with the authorized spouse is not preserved. TCC 199 is the provision eliminating the good faith of third parties in the acquisitions of right in rem, that is, the provision that precedes provisions protecting good faith such as TCC 1023.

The spouse subjected to violence is not either able to protect him/herself from this violence, or operate the necessary complaints and protection mechanisms. To keep the spouse out from violence, the protection mechanisms that do not require complaint of the victim must be developed. Law No. 6284 on Law To Protect Family And Prevent Violence Against Women aims at this protection. In this context, Article 1 (1), 3 (2), 4 (decisions of protective measures to be taken by the judge); 5. (preventive measures); 8. (injunction); 9 and 13 (violation of the injunction) of Law No. 6284 address the prevention of violence in the family.

### ABBREVIATION LIST

(Kazancı)	: www.kazanci.com
art.	: Article
D.	: Decree no
M.	: Merits no
O.J.	: Official Journal
p.	: Page
TCC	: Turkish Civil Code

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# EVALUATION OF THE TURKISH COMMERCIAL CODE ART. 5/A RELATED TO MEDIATION AS A PROCEDURAL REQUIREMENT IN COMMERCIAL ACTIONS

*Ticari Uyuşmazlıklarda Dava Şartı Olarak Arabuluculuğa İlişkin Türk  
Ticaret Kanunu 5/A Hükümünün Değerlendirilmesi*

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## **Abstract**

After the so-called success that is achieved in labor actions, mediation is accepted as a procedural requirement in commercial actions. According to Turkish Commercial Code (TCC) Art. 5/A,

*“Application to mediation before commencing a commercial action regulated by the Turkish Commercial Code Article 4 or other codes, in which the matter of dispute is the payment of a pecuniary claim arising from an action of debt or action for damages, is a procedural requirement”.*

However, this regulation consists of several problems. The codification process of the regulation is highly unusual, the actions that are subject to mediation as a procedural requirement are not clearly stated and there is no monetary limit that is brought to the pecuniary claims that are subject to mediation. All those factors may cause several unwanted and unpredicted outcomes in practice.

In this article, the problems that may emerge because of the regulation that is accepting mediation as a procedural requirement in commercial actions will be evaluated and determined. In addition, solutions to those possible unwanted and unpredicted outcomes will be discussed.

**Keywords:** Mediation, commercial actions, procedural requirement.

## **Özet**

İş uyuşmazlıkları bakımından öngörülen dava şartı olarak arabuluculuk sisteminin başarıya ulaşmasından sonra; arabuluculuk, ticari uyuşmazlıklar bakımından da dava şartı haline getirilmiştir. Türk Ticaret Kanunu (TTK) m. 5/A'nın ilk fıkrasına göre,

*“(1) Bu Kanunun 4 üncü maddesinde ve diğer kanunlarda belirtilen ticari davalardan, konusu bir miktar paranın ödenmesi olan alacak ve tazminat talepleri hakkında dava açılmadan önce arabulucuya başvurulmuş olması dava şartıdır.”*

Söz konusu hüküm, bazı sorunları beraberinde getirmektedir. Şöyle ki, bu hükümde hangi uyuşmazlıklar bakımından arabuluculuğun dava şartı olduğu tam olarak belirtilmediği gibi, arabuluculuğa elverişli uyuşmazlıklar bakımından parasal bir sınır da getirilmiş değildir. Bu belirtilenler başta olmak üzere, hükmün mevcut haliyle uygulanmasının bazı sorunlara ve beklenmeyen sonuçlara yol açacağını söylemek mümkündür.

Çalışmamızda, ticari uyuşmazlıklarda dava şartı olarak öngörülen arabuluculuğun ortaya çıkarması muhtemel sorunlar ile bu sorunlara ilişkin çözüm önerileri üzerinde durulacak, söz konusu hükme ilişkin bazı değerlendirmelerde bulunulacaktır.

**Anahtar Kelimeler:** Arabuluculuk, Ticari Uyuşmazlıklar, Dava Şartı.

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## INTRODUCTION

Art. 20 of the “Code on Initiating a Dept Enforcement Proceeding Related to the Pecuniary Claims Arising from Subscription Agreements” (Code no 7155)<sup>1</sup> introduced Art. 5/A to the Turkish Commercial Code (TCC). The article is as follows:

### Article 5/A

*“(1) Application to mediation before commencing a commercial action regulated by the Turkish Commercial Code Article 4 or other codes, in which the matter of dispute is the payment of a pecuniary claim arising from an action of debt or action for damages, is a procedural requirement.*

*Mediator shall conclude the mediation process in six weeks after assignment. This period can be extended two more weeks when compulsory circumstances occur”.*

This regulation is a product of the ongoing studies that aim to extend the success of the mediation as a procedural requirement in labor actions<sup>2</sup>. With the introduction of new Code on Labor Courts (Code no 7036), application to mediation before commencing a labor actions became a procedural requirement. Between 1.1.2018-31.10.2019, nearly %64 of the actions are concluded with an agreement after the mediation process<sup>3</sup>.

## I. EVALUATION AND CRITICISM OF THE CODIFICATION CHOICES AND PROCESS

Art. 5/A of the TCC can be subject to criticism due to the articles codification process. When the scope is considered, it is possible to say that Art. 5/A of TCC is a fundamental amendment to the code. An amendment to TCC with this scope and importance should not be a part of a “Code on Initiating a Dept Enforcement Proceeding Related to the Pecuniary Claims Arising from Subscription Agreements”. There is no correlation and legal relation between the title of the Code 7155 and Art. 5/A of TCC. This codification practice is not in accordance with the principle of legal predictability<sup>4</sup>. Codification through omnibus bills with an inclusive title is a common codification practice in Turkish law<sup>5</sup>. Leastwise, an amendment with this scope and importance could have been made a part of an omnibus bill, instead of a code that is unrelated to it.

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<sup>1</sup> Published in Official Gazette, No: 30630, Date: 19.12.2018.

<sup>2</sup> General preamble of the code, <https://www.tbmm.gov.tr/sirasayi/donem27/yil01/ss16.pdf>, 18.3.2019.

<sup>3</sup> <http://www.basin.adalet.gov.tr/Etkinlik/arabuluculukta-dosya-sayisi-bir-milyonu-asti>, 24.12.2019.

<sup>4</sup> In this context, see: <http://www.ankarabarusu.org.tr/Siteler/2012yayin/2011sonrasikitap/kanun-yapim-tek-torba-kanun-calistay-ic-web.pdf>, 25.10.2019.

<sup>5</sup> e. g. “The Code on Amending Certain Codes with the Aim of Improving the Investment Environment” (Published in Official Gazette, No: 30356, Date: 10.3.2018).

Second criticism that can be brought to the article is the usage of the phrase “[...] *commercial action regulated by ... other codes*”. This phrase exists neither in the proposed bill nor the bill that is accepted by the Justice Commission<sup>6</sup>. Thus, no explanation about this phrase can be found in the general preamble of the code or the preamble of the related article. The phrase is added to the bill by the general assembly, during the hearing session of the code in Turkish Grand National Assembly (TBMM)<sup>7</sup>.

However, the phrase limited effect<sup>8</sup> on the scope of the Art. 5/A of the TCC. As far as it is determined, the commercial actions regulated by other codes are the actions regulated by the Art. 99 of the Code on Cooperatives (CC)<sup>9</sup> and bankruptcy action that is regulated by the Art. 14 of Debt Enforcement and Bankruptcy Code<sup>10</sup>. It should be stated that cooperatives are already accepted as commercial companies by the Art. 124 of the TCC and the actions related to them are commercial actions. In addition to that, because of its nature related to public interest, bankruptcy actions also cannot be brought before a mediator according to the Art. 2 of the Code on the Mediation in Civil Disputes. Final criticism that can be brought is the usage of the phrase “*a commercial action [...] in which the matter of dispute is the payment of a pecuniary claim arising from an action of debt or action for damages*”.

It should be stated that although the term “action of debt” *may generally* be used to refer to actions that arise from contractual disputes and “action for damages” to the non-contractual ones; this is not absolute. An “action for damages” may easily arise from a contractual dispute, when non-compliance to the terms and conditions of a contract causes damage to the other party of the contract and these damages will be the subject of an action for damages. On the other hand the phrase “*commercial cases in which the matter of dispute is the payment of a pecuniary claim*”, which is the main phrase in the regulation that sets the scope of it already includes both actions of debt and actions for damages. Thus, it can be said that usage of those phrases in the regulation is not necessary *from a technical standpoint* and shows carelessness of the lawmaker in the lawmaking process.

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<sup>6</sup> Report of the Justice Commission, p. 32, <https://www.tbmm.gov.tr/sirasayi/donem27/yil01/ss16.pdf>, 18.3.2019.

<sup>7</sup> [https://www.tbmm.gov.tr/develop/owa/tutanak\\_g\\_sd.birlesim\\_baslangic?P4=23200&P5=H&PAGE1=15&PAGE2=86](https://www.tbmm.gov.tr/develop/owa/tutanak_g_sd.birlesim_baslangic?P4=23200&P5=H&PAGE1=15&PAGE2=86), 24.12.2019, p. 72.

<sup>8</sup> For these effects see Code Nr. 5957 and 5362.

<sup>9</sup> Published in Official Gazette, No: 13195, Date: 10.5.1969.

<sup>10</sup> Published in Official Gazette, No: 2128, Date: 19.6.1932.

## II. EVALUATION OF THE ARTICLE AS A PART OF THE MANDATORY MEDIATION SYSTEM

### A. Mediation as a Procedural Requirement

According to Art. 5/A of TCC, application to mediation before commencing a commercial action regulated by the TCC Art. 4 or other codes, in which the matter of dispute is the payment of a pecuniary claim arising from an action of debt or action for damages, is a procedural requirement.

Procedural requirements are the procedural conditions that should exist in order to evaluate an action on its merits<sup>11</sup>. Non-existence of a procedural requirement prevents a competent court to rule on an action. An action without procedural requirements should be concluded by a dismissive judgement. The same action can be brought in front of the court, only when the procedural requirements are met<sup>12</sup>.

The procedural requirements and general principles governing them are regulated by the Civil Procedure Code (CPC) Art. 114 and 115. According to these principles, if a commercial action that is subject to mediation as a procedural requirement is commenced without commencing the mediation process, it should be dismissed by the court. The dismissal judgement is not decisive on the merits of the action; thus, the same action can be brought before the court when the mediation as a procedural requirement is met.

This procedural requirement is also not completable. According to the second paragraph of the Art. 115 of CPC, when it is possible to complete the procedural requirements during an action, the court gives the relevant party a decisive amount of time for completion<sup>13</sup>. However, mediation is not a procedural requirement that can be completed during an action.

According to the second paragraph of article 18/A of the Code on Mediation

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<sup>11</sup> Alangoya, Y.: Medeni Usul Hukuku Esasları, 3. B., İstanbul 2003, p. 208; Ansay, S. Ş.: Hukuk Yargılama Usulleri, Ankara 1960, p. 203; Arslan, R./Yılmaz, E./Taşpınar Ayvaz, S./Hanağası, E.: Medeni Usul Hukuku, 5. B., Ankara 2019, p. 285; Atalı, M./Ermenek, İ./Erdoğan, E.: Medeni Usul Hukuku, Ankara 2018, p. 324; Bilge, N./Önen, E.: Medeni Yargılama Hukuku, 3. B., Ankara 1978, p. 402; Göksu, M.: Civil Litigation and Dispute Resolution in Turkey, Ankara 2016, p. 115; Karşlı, A.: Medeni Muhakeme Hukuku, 3. B., İstanbul 2012, p. 454-455; Pekcanitez, H.: Medeni Usul Hukuku, 15. B., İstanbul 2017, p. 950 (Usul); Tanrıver, S.: Medeni Usul Hukuku, C. I., 2. B., Ankara 2018, p. 636; Ulukapı, Ö.: Medeni Usul Hukuku, Konya 2014, p. 222; Üstündağ, S.: Medeni Yargılama Hukuku, 7. B., İstanbul 2000, p. 280-281.

<sup>12</sup> Ansay, p. 203; Arslan/Yılmaz/Taşpınar Ayvaz/Hanağası, p. 297; Atalı/Ermenek/Erdoğan, p. 336; Bilge/Önen, p. 402-403; Göksu, p. 115; Pekcanitez, Usul, p. 954; Tanrıver, p. 638; Ulukapı, p. 230; Üstündağ, p. 281.

<sup>13</sup> E.g. obtaining the consent of the legal guardian when an underage child commences an action by himself/herself (Alangoya, p. 218; Arslan/Yılmaz/Taşpınar Ayvaz/Hanağası, p. 297; Atalı/Ermenek/Erdoğan, p. 336; Göksu, p. 115; Karşlı, p. 466-467; Pekcanitez, Usul, p. 952; Tanrıver, p. 638; Ulukapı, p. 230).

in Civil Disputes (CMCD) which regulates the mediation as a procedural requirement, “*The Plaintiff should attach the original or the copy of the final protocol that is certified by the mediator to the complaint, which states that no agreement is reached at the end of the mediation process between the parties of the dispute. When this requirement is not met, the court sends an invitation to the plaintiff including the warning that the final protocol shall be submitted to the court in the peremptory term of one week, otherwise the action will be dismissed by the court. When the requirement is not met, the action will be dismissed without serving the complaint on the defendant. When it is found out by the court that the action is commenced without applying to a mediator, the action will be dismissed without further procedure*”.

It can be easily seen in the paragraph that the completion of the mediation as a procedural requirement during the action is not the aim of the lawmaker. It is specifically emphasized in the second paragraph of Article 18 of the CMCD that the plaintiff shall apply to a mediator before commencing the action. The plaintiff can have one week of extended time only in the event that the mediation process is commenced and finished, but the final protocol that is signed at the end of the mediation process is not attached to the complaint. It is also clearly stated that no extended time can be given when it is understood that the plaintiff did not commence the mediation process before commencing the action. Thus, the article 115 of CPC cannot be applied in this situation<sup>14</sup>.

## **B. The Evaluation Of The Limitation That Is Brought By Mediation As A Procedural Requirement In The Context Of Right To Legal Remedies**

### **1. Right to Legal Remedies as a Fundamental Right**

*According to Article 36 of Turkish Constitution, “Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures. No court shall refuse to hear an action within its jurisdiction”.*

Right to legal remedies is regulated in the constitution as a jurisdictional fundamental right and a requirement of rule of law. It is not only an individual fundamental right, but also a security measure that enables the utilization and protection of other fundamental rights for the individuals<sup>15</sup>.

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<sup>14</sup> Atalı/ErmeneK/Erdoğan, p. 765.

<sup>15</sup> Akkan, M.: Medeni Usul Hukukunda Etkin Hukuki Koruma (MİHDER, Issue 6, 2007, p. 29-68), p. 48; Aydın, M.: Anayasa Mahkemesi Kararlarında Hak Arama Özgürlüğü (AÜSBFD, 2006, Vol. 61, Issue. 3, p. 1-37), p. 4; Evren, T.: Hak Arama Özgürlüğü ve Savunma (TBBD 1988/1, p. 5-15), p. 5; Köküsarı, İ.: Hak Arama Özgürlüğü ve 2010 Anayasa Değişiklikleri (GÜHFD, Vol. 15, 2011, Issue 1, p. 163-208), p. 167, 179; Özeker, M.: İcra Hukukunda Temel Haklar ve İlkeler, Ankara 2009, p. 122 (İcra); Yılmaz, E.: Medeni Yargıda İnsan Hakları [Makaleler (1973-2013), p. 877-892], p. 881.

Modern states eliminate individuals from executing their rights on their own. In return, they are obliged by the constitutions to provide the individuals a system that enables effective legal protection for their rights<sup>16</sup>. In order to do so, providing individuals some abstract opportunities in the context of executing the rights is not enough. States are obliged to provide a system that enables effective accession to rights designed with concrete measures<sup>17</sup>.

According to Constitutional Court, one of the main elements of right to legal remedies is right/access to a court. This right also includes being able to bring a legal dispute before a competent court and execution of its judgement<sup>18</sup>.

European Court of Human Rights also has a similar approach<sup>19</sup>. The court evaluates the right to legal remedies within the scope of right to a court. In the context of European Convention on Human Rights Article 6, The Court believes that being able to apply to a court about the claims concerning the civil rights and obligations is just one aspect of right to a court. In addition to that, States are obliged to take sufficient, effective and protective measures that enable the execution of the judgements. The execution of judgements shall not be hindered, annulled or adjourned in a way that restricts the essence of the right to a court.

## 2. Restriction of Right to Legal Remedies

Right to legal remedies is not boundless and absolute. Although Constitution Article 36 does not bring out any special limitations to the right, it has its own boundaries arising from its legal nature<sup>20</sup>. In addition to that, right to legal remedies can be limited according to rule of law and fundamental principles of law<sup>21</sup>. Right to legal remedies, because of its nature, requires regulations that can differ from time to time and place to place in order to meet the needs and sources of the individuals and the society<sup>22</sup>. On the other hand, the limitation

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<sup>16</sup> Akkan, p. 48; Ekmekçi, Ö./Özekes, M./Atalı, M./Seven, V.: Hukuk Uyuşmazlıklarında Arabuluculuk, 2. B., İstanbul 2019, p. 148; Köküarı, p. 165, 167; Ovey, C./White, R.: The European Convention on Human Rights, New York 2006, p. 171; Özekes, İcra, p. 122-123, 127; Pekcanitez, Usul, p. 13, 15; Yılmaz, p. 881.

<sup>17</sup> Akkan, p. 48; Ekmekçi/Özekes/Atalı/Seven, p. 148; Özekes, İcra, p. 123-124, 127; Yılmaz, p. 882.

<sup>18</sup> Constitutional Court, 25.12.2014, E. 2014/112, K. 2014/203, O.G. 21.5.2015, Issue 29362.

<sup>19</sup> Pini and Others/Romania Judgement of ECHR, 22.6.2004, application no: 78028-78030/1, para. 176 (<http://hudoc.echr.coe.int/eng?i=001-61837>, 29.11.2019); Saffi/Italia Judgement of ECHR, 28.07.1999, application no: 22774/93, para. 63, 66, 74 (<http://hudoc.echr.coe.int/eng?i=001-58292>, 29.11.2019). Also see: Harris/O'Boyle/Warbrick, p. 234.

<sup>20</sup> Köküarı, p. 171. Also see: Constitutional Court, 28.01.2016, E. 2014/92, K. 2016/6, O.G. 28.1.2016; 25.12.2014, E. 2014/112, K. 2014/203, O.G. 21.5.2015.

<sup>21</sup> Akkan, p. 50; Pekcanitez, Usul, p. 16. Also see: Constitutional Court, 28.01.2016, E. 2014/92, K. 2016/6, O.G. 28.1.2016, para. 13.

<sup>22</sup> Grote, R./Maruhn, T. (Hrsg.): Konkordanzkommentar zum europäischen und deutschen

that is brought upon the right to legal remedies should be according to the guarantees that are accepted by the Article 13 of the Constitution<sup>23</sup>.

In this context, right to legal remedies can only be limited by law and should not violate the essence of the right. The limitation that is brought by the law shall not complicate the usage of the right in a serious manner, shall not hinder it from reaching its aim and shall not dispose its effectiveness<sup>24</sup>. In addition, these limitations shall be proportionate, in accordance with the letter and the spirit of the Constitution, necessities of democratic society and secular republic. Especially in the context of the principle of proportionality, the means that are used to limit the right to legal remedies shall be adequate and necessary to the aim of the limitation. There must be a proportionality between the means that are used and the aims that are targeted with the limitations<sup>25</sup>.

European Court of Human Rights also states in its decisions that, States have discretionary power in the matter of limiting the right to legal remedies. However, these limitations shall not damage the essence of the right itself<sup>26</sup>. In addition to that, the limitation shall have a legitimate purpose, it shall be foreseeable enough<sup>27</sup>.

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- Grundrechtsschutz, Tübingen 2006, p. 675; Harris/O'Boyle/Warbrick, p. 239. Also see: Ashingdane/United Kingdom Judgement of ECHR, 28.05.1985, application no: 8225/78, para. 57 (<http://hudoc.echr.coe.int/eng?i=001-57425>, 29.11.2019).
- <sup>23</sup> Constitutional Court, 28.01.2016, E. 2014/92, K. 2016/6, RG. 28.1.2016; 25.12.2014, E. 2014/112, K. 2014/203, O.G. 21.5.2015, Issue 29362.
- <sup>24</sup> Köküşarı, p. 173. Also see: Constitutional Court, 15.03.2017, E. 2016/165, K. 2017/76, OG. 13.04.2017, Issue 30037.
- <sup>25</sup> Köküşarı, p. 178. For further explanations on the principle of proportionality, see: Erdoğan, M.: Anayasa Hukuku, 7. B., İstanbul 2012, p. 209; Gören, Z.: Anayasa Hukuku, Ankara 2011, p. 398-400; Gözler, K.: Anayasa Hukukunun Genel Teorisi, C. II, Bursa 2011, p. 550-551; Metin, Y.: Ölçülülük İlkesi, Ankara 2002, p. 187 vd; Özbudun, E.: Türk Anayasa Hukuku, 13. B., Ankara 2012, p. 114; Sağlam, F.: Temel Hakların Sınırlanması ve Özü, Ankara 1982, p. 110 ff; Tanör, B./Yüzbaşıoğlu, N.: 1982 Anayasasına Göre Türk Anayasa Hukuku, 12. B., İstanbul 2012, p. 154-155.
- <sup>26</sup> Akkan, p. 50; Dijk, P./Hoof, G. J. H.: Theory and Practice of the European Convention on Human Rights, Hague 1998, p. 427-428; Grabenwarter, p. 127; Grote/Marauhn, p. 675; Harris/O'Boyle/Warbrick, p. 239; Leach, P.: Taking a Case to the European court of Human Rights, 3. Ed. New York 2011, p. 272; Ovey/White, p. 170. Also see: Lithgow and Others/United Kingdom Judgement of ECHR, 08.07.1986, application no: 9405/81, para. 194/b (<http://hudoc.echr.coe.int/eng?i=001-57526>; 29.11.2019).
- <sup>27</sup> Akkan, p. 50; Dijk/Hoof, p. 428; Grabenwarter, p. 127; Grote/Marauhn, p. 675; Harris/O'Boyle/Warbrick, p. 239; Leach, p. 272; Ovey/White, p. 170. Also see: Ashingdane/United Kingdom Judgement of ECHR, 28.05.1985, application no: 8225/78, para. 57 (<http://hudoc.echr.coe.int/eng?i=001-57425>, 29.11.2019); Lithgow and Others/United Kingdom Judgement of ECHR, 08.07.1986, application no: 9405/81, para. 194/b (<http://hudoc.echr.coe.int/eng?i=001-57526>, 29.11.2019).

### **3. Mediation as a Procedural Requirement and the Right to Legal Remedies**

There is no discussion that mediation as a procedural requirement limits the right to legal remedies. It is clearly stated by the Article 18/A of CMCD that no action can be brought before the court if the matter of dispute is subject to mediation as a procedural requirement. And this procedural requirement is not a requirement that can be completed during the litigation, it should be completed before commencing the action. This limitation is brought by CMCD, so the first requirement of the limitation is met. However, the problem here is whether this limitation is legitimate and proportional.

#### **a. Opinions that are Adopted in the Doctrine**

Two main opinions arise about the subject of constitutionality of mediation as a procedural requirement. According to the first one, mediation as a procedural requirement does violate the essence of the right to legal remedies and is not constitutional. Especially with the regulations that are governing mediation as a procedural requirement in Turkey, disputes that needs special procedures because of their legal nature and disputes which needs to be brought before a court that consists of three judges in order to ensure the assurance to the jurisdiction are removed from the courts and plaintiffs are forced to bring their dispute before a mediator. By doing so, usage of right to legal remedies by the individuals is very complicated. Some of the procedures that require jurisdictional power is executed by mediators and mediation bureaus, which are simply administrative bodies. The whole dispute resolution system is in the control of executive. In addition, the party which loses the litigation after the mediation process is obliged by the court to pay the mediation expenses, which also affects the will of the plaintiff and forces it to settle for an amount that is not desired by the plaintiff in the first place. Thus, mediation as a procedural requirement violates the essence of the right to legal remedies and is not constitutional<sup>28</sup>.

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<sup>28</sup> Ekmekçi/Özekes/Atalı/Seven, p. 148 ff; Güzel, A.: İş Mahkemeleri Kanunu Tasarısı Taslağı Hakkında Bazı Aykırı Düşünceler (Çalışma ve Toplum, 2016/3, p. 1131-1146), p. 1135; Namlı, M.: İş Mahkemeleri Kanunu Tasarısı Taslağı İle Getirilen Zorunlu Arabuluculuk Kurumunun Medeni Usul Hukuku Bakımından Değerlendirilmesi (İş Hukuku Ve Sosyal Güvenlik Hukuku Derneği 40. Yıl Uluslararası Toplantısı İş Mahkemeleri Kanunu Tasarısı Taslağının Değerlendirilmesi, İstanbul 2016, p. 151-165), p. 158; Özekes, M.: Zorunlu Arabuluculuğun Hak Arama Özgürlüğü ve Arabuluculuk İlkeleri Bakımından Değerlendirilmesi – Zorunlu Arabuluculuğa Eleştirel Bir Yaklaşım [Arabuluculuğun Geliştirilmesi Uluslararası Sempozyumu AYBU Hukuk Fakültesi, Ankara 2018 (Ed. Erdoğan, E., Ankara 2019, p. 111-136)], p. 113; Yenisey, K. D.: İş Yargısında Zorunlu Arabuluculuk (İş Hukuku Ve Sosyal Güvenlik Hukuku Derneği 40. Yıl Uluslararası Toplantısı İş Mahkemeleri Kanunu Tasarısı Taslağının Değerlendirilmesi, İstanbul 2016, p. 167-193), p. 182 ff. Tanrıver, S.: Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu Tasarısı'nın Getirdikleri ve Değerlendirilmesi (Makalelerim II, Ankara 2011, p. 183-211), p. 186-187.

According to the second opinion that is adopted in the doctrine, mediation as a procedural requirement does not violate the essence of the right to legal remedies since it does not force the parties to a settlement. It only forces the parties to apply to a mediator before commencing the action. The parties can end the negotiations whenever they want and bring their action before the state courts<sup>29</sup>.

The article governing mediation as a procedural requirement in labor actions is brought before the Constitutional Court. Constitutional Court adopted the second view and stated that mediation as a procedural requirement does not violate the essence of the right to legal remedies<sup>30</sup>.

### **b. Our Opinion**

At a first glance, it can be said that mediation as a procedural requirement does not violate the essence of the right to legal remedies since it does not force the parties to a settlement. They can halt the negotiations whenever they want and commence their actions before the state courts. In addition to that, mediation as a procedural requirement, does not prevent parties to commence a debt enforcement proceeding, which can be commenced without a judgment of a court according to rules governing Turkish debt enforcement law.

However, the question that should be answered here is whether mediation as a procedural requirement complicates the usage of the right to legal remedy and whether it is proportional or not. Commencing an action before the state courts after the mediation process or commencing a debt enforcement proceeding before it is possible. On the other hand, as stated in the first opinion, this process surely complicates the usage of right to legal remedies.

When we have a look at the labor disputes, it can easily be seen that a high number of plaintiffs in these disputes are employees, which are financially weaker than the defendants of the same disputes (employers). In the process of the mediation as a procedural requirement, employee faces many threats that eliminates him from commencing an action and fully enjoying his/her right to legal remedies.

First one is the position of the employer as a party in the mediation process, possibly with the assistance of a lawyer. This is a legitimate threat, since in many cases, employees who work for minimum wage and recently terminated from his/her job cannot afford the assistance of a lawyer. Although CMCD

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<sup>29</sup> Özbek, M. S.: Anayasal Hak ve Hürriyetler İle Yargılamaya Hakim Olan İlkeler Işığında Arabuluculuk (Medenî Usûl ve İcra - İflâs Hukukçuları Toplantısı - IX Hukuk Uyuşmazlıklarında Arabuluculuk, Ankara 2010, p. 107-154), p. 137; Özdemir, E. M.: İş Mahkemelerinin İşleyişi ve Bireysel İş Uyuşmazlıklarının Alternatif Çözüm Yöntemleri (Çalışma ve Toplum, 2015/4, p. 185-221), p. 207; Raftesath, G. I.: Solutions-Not Rights: The Objective Of Alternative Dispute Resolution (The Arbitration and Dispute Resolution Law Journal 1996/June, p. 91-99), p. 93.

<sup>30</sup> Constitutional Court Judgement, Date: 11.7.2018, 2017/178, 2018/82; OG: 11.12.2018.



states that a party with financial difficulties can apply for legal aid, this means plaintiff should also commence another process before the competent peace court and it complicates the process even more. Most of the individuals are not aware of the possibility that they can be granted legal aid before commencing the mediation process. In addition, acquiring legal aid for the payment of the fees of a lawyer is very rare. The judge of the competent peace court can rule not granting legal aid, which is “*a general rule*” when the statistics about legal aid is observed<sup>31</sup>.

Secondly, although the main aim of the lawmaker is to reduce the work load of the courts, which can be classified as a legitimate aim, the regulations that are governing mediation as a procedural requirement are not suitable and effective for obtaining this aim and thus, unproportionate. There is no monetary limit to the disputes that are subject to mediation as a procedural requirement. Both a dispute over 100 TL and a dispute over 1.000.000.000 TL is subjected to mediation.

In addition to this, the regulations state that the party which loses the litigation after the mediation process is obliged by the court to pay the mediation expenses. This may constitute an obstacle for the plaintiffs especially when the subject of the dispute is relatively low. This situation creates two main problems. Firstly, mediation as a procedural requirement is *not free* and eventually creates an extra expense if the parties does not reach an agreement in the process. Secondly and because of the first problem, plaintiff may be afraid of the outcome of a possible litigation because of the increasing expenses, even though his/her demand is valid and may be accepted by the court. However, regulations governing legal costs shall be prepared proportionally and shall not hinder the individual’s right to legal remedies in any way<sup>32</sup>.

Lastly, the wordings of the regulation is so bad that today still there is no common opinion about the scope of the regulations and this situations create potential problems that will arise about the disputes that are subject to mediation as a procedural requirement<sup>33</sup>.

As a result, in our opinion, the regulations that are governing mediation as a procedural requirement effectively complicates the usage of right to legal remedies, is not suitable and proportionate for the aims that are targeted and thus, unconstitutional.

### **C. The Scope of Mediation as a Procedural Requirement**

According to the first paragraph of Art. 5/A TCC, “*Application to mediation before commencing a commercial action regulated by the Turkish Commercial Code Article 4 or other codes, in which the matter of dispute is the payment of*

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<sup>31</sup> [https://www.adrcenter.com/international/Legal\\_Aid\\_Committee\\_Report.pdf](https://www.adrcenter.com/international/Legal_Aid_Committee_Report.pdf), 29.11.2019.

<sup>32</sup> Yılmaz, p. 881; Yılmaz, E.: Yargılama Giderlerinin İşlevi ve sosyal Hukuk Devleti [Makaleler (1973-2013), p. 383-403], p. 383-384.

<sup>33</sup> Also see below: II. D. 1. b.; II. D. 5.

*a pecuniary claim arising from an action of debt or action for damages, is a procedural requirement”.*

This article determines the scope of the mediation as a procedural requirement in commercial actions. First of all, there has to be a commercial action. Commercial actions are divided into two categories. First category is “absolute commercial actions”, in which the matter of dispute is regulated by the Art. 4 of TCC, whether the parties of the dispute are merchants or not. Second category is “relative commercial actions”, in which the matter of dispute is related to the commercial enterprise of the both parties<sup>34</sup>. In both absolute or relative commercial actions, mediation is a procedural requirement. There is no distinction between those two types of commercial actions in the Article 5/A of TCC.

Secondly, the matter of dispute in these commercial actions must be “*the payment of a pecuniary claim*”. However, the types of actions that are subject to mediation as a procedural requirement are not explicitly set forth by Art. 5/A of TCC.

#### **D. Types of Actions in Turkish Law and Mediation as a Procedural Requirement**

##### **1. Actions for Performance**

###### **a. In General**

The types of actions in Turkish law are regulated by the Art. 105 ff of the CPC. Payment of a pecuniary claim, according to the legal protection that is requested from the court, in principle, is possible only with an action for performance (Art 105 CPC). Through an action for performance, the court is requested to sentence the defendant to give or to perform something or to avoid from doing something<sup>35</sup>. In the commercial actions that are subject to mediation as a procedural requirement, it is requested from the court to sentence the defendant to pay a sum of money.

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<sup>34</sup> Tanrıver, p. 153. According to Kırca, the term “*matters concerning the undertakings of the both parties*” should be interpreted as the “*actions arising from the matters which can be counted as commercial for both parties*” (Kırca, İ. Nispi Ticari Davaya Dair, Batider 2017/I, Ankara, p. 61). Author also incisively states that in order to determine whether a dispute is commercial or not, not the titles of the parties or the relevance of the dispute to an undertaking, but the nature of the dispute should be taken into consideration (Kırca, p. 57). According to Karayalçın, the regulation should also contain a statement which requires both parties to be merchants (Karayalçın, Y.: Ticaret Hukuku, I. Giriş-Ticari İşletme, Ankara 1968, p. 255, fn. 35. Similarly, see: Ülgen, H./Helvacı, M./Kaya, A./Nomer Ertan, F. N.: Ticari İşletme Hukuku, İstanbul 2019, p. 136; Bozer, A./Göle, C.: Ticari İşletme Hukuku, Ankara 2018, p. 164.

<sup>35</sup> Alangoya, p. 219; Ansay, p. 223; Arslan/Yılmaz/Taşpınar Ayvaz/Hanağası, p. 298; Atalı/Ermeneke/Erdoğan, p. 340; Göksu, p. 109; Karlı, p. 378; Pekcanitez, Usul, p. 960; Tanrıver, p. 582; Ulukapı, p. 208; Üstündağ, p. 314.

The actions for indefinite debts (Art. 107 CPC) and actions for the partial performance (Art. 109 CPC) are also types of actions for performances<sup>36</sup>. When these actions are commercial actions, they are also subject to mediation as a procedural requirement. Only commencing the mediation procedure before commencing the action is accepted as the procedural requirement. Thus, after the mediation process is finished for the whole claim, the plaintiff can either commence a partial performance action or commence an action for the full extent of his/her claim<sup>37</sup>.

### **b. Counter Actions**

Commencing a counter-action in this system will inevitably cause some problems. Counter action is an action that is commenced by the defendant of the main (first) action in order to acquire his/her counter claim in the span of the same jurisdiction<sup>38</sup>. Counter actions are commenced by the defendant with the answer petition within the time period that is granted to submit it, which is two weeks from the date of service of the complaint the defendant (CCP Art 127).

Counter action is a proper action. Thus, if the counter action is also a commercial action that is subject to mediation, it cannot be commenced with the answer petition due to the non-existence of a procedural requirement. In this case the court would separate the principle action and the counter action from each other and end the litigation of the counter action with a dismissive judgement.

It is also physically not possible to overcome the mediation process within the time period of two weeks, considering the time period accepted for the mediation process in commercial actions, which is 6 weeks (and can be extended two more weeks) according to article 5/A of TCC.

The first possible solution for the defendant in this situation is dividing his/her claim into two parts, submitting the first part in and with the answer petition as an exchange defense and commence the mediation process for the remaining part of the claim. After the mediation process is ended, an action can be commenced and the consolidation of this action with the principle action

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<sup>36</sup> Akil, C.: *Kısmi Dava*, Ankara 2013, p. 105; Arslan/Yılmaz/Taşpınar *Ayvaz/Hanağası*, p. 299 ff; Çil, Ş. / Kar, B.: 6100 Sayılı HMK'ya Göre İş Yargısında Belirsiz Alacak Davası ve Kısmi Dava, 2. B., Ankara 2012, p. 21, 28; Göksu, p. 111, 112; Loosli, P.: *Die unbezifferte Forderungsklage unter besonderer Berücksichtigung des Kantons Zürich*, Zürich 1978, p. 10; Pekcanitez, H.: *Belirsiz Alacak Davası*, Ankara 2011, p. 31; Pekcanitez, *Usul*, p. 989, 1025; Simil, C.: *Belirsiz Alacak Davası*, İstanbul 2013, p. 94-95; Tanrıver, p. 591, 597; Ulukapı, p. 210.

<sup>37</sup> Ekmekçi/Özekes/Atalı/Seven, p. 187.

<sup>38</sup> Arslan/Yılmaz/Taşpınar *Ayvaz/Hanağası*, p. 519; Arslanpınar, T.: *Medeni Yargılama Hukukunda Karşı Dava*, Ankara 2017, p. 18; Ansay, p. 244; Göksu, p. 122; Postacıoğlu, İ.: *Medeni Usul Hukuku*, İstanbul 1975, p. 280 ff; Üstündağ, p. 513.

can be requested from the court. Second possible solution for the defendant is commencing the mediation process and requesting the court of the principle action for the stay of the proceedings according to Article 165 of CPC, which may also create other procedural problems<sup>39</sup>.

As a result, mediation as a procedural requirement highly complicates the right to legal remedies of a main actions' defendant and a clear example that it consequently violates the essence of the right to legal remedies<sup>40</sup>.

### **c. Commercial Actions for Performances that are Subject to Mediation as a Procedural Requirement**

According to these explanations, commercial actions, in which the matter of dispute is the payment of a sum of money, that are regulated by the TCC or other codes can be listed as follows<sup>41</sup>:

- Claims of merchants and craftsman for the payment of a fee (Art. 20 TCC),
- Claims for damages arising from the violation of trade names (Art. 52.1 TCC),
- Claims for damages arising from unfair competition (Art. 56.1 TCC),
- Claims arising from a running account contract (Art. 89 ff. TCC),
- Claims of a commercial agent for fees<sup>42</sup>, interests or extraordinary expenses (Art. 113 ff. TCC), claims arising from unlawful termination of an agency contract (Art. 121.4 TCC) or claims for the equalization (Art. 122 TCC) with the claims for damages arising from a non-competition contract (Art. 123.1 TCC).
- Claims arising from the obligation of capital investment (Art. 127 ff. TCC),
- Claims for damages arising from the structural change of the corporation (Art. 193 TCC),
- Claims for damages arising from the abuse of dominant position in an enterprise (Art. 202 TCC) and claims for damages of the creditors of the dominant corporation in the enterprise (Art. 206 TCC),
- Claims regarding dividends or exclusions,
- Claims arising from the liabilities of the organs of the corporations,

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<sup>39</sup> Ekmekçi/Özekes/Atalı/Seven, p. 191.

<sup>40</sup> Ekmekçi/Özekes/Atalı/Seven, p. 191.

<sup>41</sup> Koçyiğit, İ./Bulur, A.: Ticari Uyuşmazlıklarda Dava Şartı Arabuluculuk, Ankara 2019, p. 129 ff.

<sup>42</sup> Claims of a commercial agent for fees includes the fees that commercial agent is entitled to as a result of successful agency activities or collection of the claims that belong to the client from the customers. However, mediation is a procedural requirement when only the fee is accepted as a sum of money instead of a value in kind (see: Tekin, U.: Acentenin Ücret Hakkı, Ankara 2018, p. 13, fn. 39; Tekin, U.: Acentenin Tahsil Komisyonu Talep Hakkı, İnönü Üniversitesi Hukuk Fakültesi Dergisi, 10/2, 2019, p. 368).

- Claims arising from share transfers,
- Claims arising from non-payment of the negotiable instruments,
- Claims arising from cargo or insurance contracts,
- Claims arising from intellectual property regulations<sup>43</sup>,
- Claims arising from movable pledge in commercial actions,
- Claims arising from banking and the other credit institutions regulations.

On the other hand, the subject that whether mediation is a procedural requirement or not in commercial declaratory actions is highly controversial<sup>44</sup>.

## 2. Declaratory Actions

According to the Article 106 of CPC, declaratory actions are actions in which, the court is requested to determine the existence or nonexistence of a right or a legal relationship, or whether a document is forged or not<sup>45</sup>.

In the handbook that is published by the Ministry of Justice on the mediation as a procedural requirement in commercial disputes<sup>46</sup>, it is stated that not only commercial actions for performances, but also commercial declaratory actions should be subject to mediation as a procedural requirement. According to the writers, *“there is no clear statement in the preamble of the Article 5/A of TCC saying that only actions for performances are subject to mediation as a procedural requirement. The aim of the law-maker is to broaden the success of the application of mediation as a procedural requirement in labor actions to all commercial actions. It is undisputed that in labor actions, both actions for performances and declaratory actions are subject to mediation as a procedural requirement. In addition, declaratory actions are predecessor of the actions for performances. Thus, mediation should be accepted as a procedural requirement not only in commercial acts for performances, but also in commercial declaratory actions”*<sup>47</sup>.

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<sup>43</sup> For more information on disputes arising from intellectual property regulations that are subject to mediation as a procedural requirement, see: Karaca, O. U.: Dava Şartı Olan Arabuluculuk Kapsamındaki Sınai Mülkiyet Uyuşmazlıkları, Ankara Barosu Fikri Mülkiyet ve Rekabet Hukuku Dergisi, p. 53-54. For more information on disputes arising from intellectual property regulations that are not subject to mediation as a procedural requirement, see: Yılmaztekin, H. K./İnce, Z.: Dava Şartı Arabuluculuk Ekseninde Bazı Fikri Mülkiyet Hukuku Uyuşmazlıkları, Terazi Hukuk Dergisi, 14/159, November 2019, p. 2177-2179.

<sup>44</sup> See below, II, D, 2.

<sup>45</sup> Alangoya, p. 220; Ansay, p. 224; Arslan/Yılmaz/Taşpınar Ayvaz/Hanağası, p. 303; Atalı/Ermenek/Erdoğan, p. 342; Göksu, p. 109; Karılı, p. 378; Kuru, B. / Budak, A. C.: Tespit Davaları, İstanbul 2010, p. 68; Pekcanitez, Usul, p. 972; Tanrıver, p. 583; Ulukapı, p. 209; Üstündağ, p. 324.

<sup>46</sup> <http://www.adb.adalet.gov.tr/link/ticariuyusmazliklardadavasartiarabuluculuk.pdf>, 17.6.2019

<sup>47</sup> Koçyiğit/Bulur, p. 141-142.

There is also no consistent view that is adopted by the courts. Erzurum District Court of Justice 3<sup>rd</sup> Civil Court Office stated in a decision that a commercial negative declaratory action is in the scope of the Article 5/A of TCC and thus, should be subject to mediation as a procedural requirement<sup>48</sup>.

On the other hand, Istanbul District Court of Justice 14<sup>th</sup> Civil Court Office stated otherwise. According to court, commercial actions that are subject to mediation as a procedural requirement are the actions in which the subject matter is the payment of a pecuniary claim. However, neither in positive nor negative declaratory actions there is a pecuniary claim. The subject of a negative declaratory action can only be the determination of the nonexistence of the defendants right to a pecuniary claim. Thus, a negative declaratory action is not subject to mediation as a procedural judgement<sup>49</sup>.

First of all, this controversy is caused by the poor wording of Article 5/A of TCC. However, this is not the case in labor actions. According to first paragraph of Article 3 labor actions with a pecuniary claim and reemployment actions are subject to mediation as a procedural requirement. There is no controversy about declaratory labor actions being subject to mediation as a procedural requirement, because it is clearly stated by the related article that the most important and commonly commenced declaratory action in labor disputes, which is reemployment action is subject to mediation as a procedural requirement. However, it is not the case in commercial actions. Article 5/A of TCC only states that Application to mediation before commencing a commercial action regulated by the Turkish Commercial Code Article 4 or other codes, in which the matter of dispute is the payment of a pecuniary claim arising from an action of debt or action for damages, is a procedural requirement. There is a great variety of commercial actions and the Article 5/A of TCC is not suitable for the nature of all commercial actions.

Secondly, as stated in the handbook published by Ministry of Justice, Article 5/A of TCC is a procedural norm. Although there is no special interpretation method for procedural norms<sup>50</sup>; it is accepted that main method used for the interpretation of procedural norms is literal interpretation method<sup>51</sup>. Article 5/A

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<sup>48</sup> Erzurum District Court of Justice 3<sup>rd</sup> Civil Court Office, Date: 27.03.2019, Decision no: 531/549.

<sup>49</sup> Istanbul District Court of Justice 14<sup>th</sup> Civil Court Office, Date: 22.03.2019, Decision no: 521/423 (www.kazanci.com).

<sup>50</sup> Ansay, p. 10; Arslan/Yılmaz/Taşpınar Ayvaz/Hanağası, p. 66; Atalı/Ermenek/Erdoğan, p. 42; Karşlı, p. 118; Pekcanitez, Usul, p. 72; Rosenberg, L. / Schwab, K. H. / Gottwald, P.: Zivilprozessrecht, 17. Auflage, München 2010, § 7, rn. 8; Ulukapı, p. 13 ff.

<sup>51</sup> Atalı/Ermenek/Erdoğan, p. 42-43; Karşlı, p. 118; Pekcanitez, Usul, p. 72; Ulukapı, p. 14. However, literal interpretation should also be in accordance with the aim of the lawmaker and nature of the subject matter (Atalı/Ermenek/Erdoğan, p. 43-44; Pekcanitez, Usul, p. 72; Ulukapı, p. 14).

of TCC only subjects commercial actions with a pecuniary claim to mediation as a procedural requirement. The article does not include other types of commercial actions such as declaratory actions or actions for the modification of rights. If the aim of the law maker is to broaden the application of mediation as a procedural requirement, only referencing the commercial actions that are regulated by the Article 4 of TCC would be enough.

As a result, in our opinion, a commercial declaratory action in which it is not requested from the court to give a decision that sentences the defendant to pay a sum of money; but only determination and declaration of the existence of a right to claim the payment of a sum of money should not be subject to mediation as a procedural requirement.

However, in legal practice, because of the inconsistency between court decisions, lawyers are applying to the mediation even before commencing a declaratory action. The threat of a dismissal judgement is a legitimate threat, while in practice, an action that is dismissed because of a procedural requirement can be brought before the same court nearly after a year. Thus, lawyers do not take the risk of a dismissal judgement even before a declaratory action and apply to mediation, which only extends to two months, at most.

### **3. Actions for the Modification of Rights**

Actions for the modification of rights is the type of actions in which the formative rights (rights that create, modify or abolish a right) can only be used by commencing an action. Thus, these types of actions can only be commenced when it is permitted by law<sup>52</sup>. These actions are by their legal nature, are not subject to mediation.

### **4. Joint Actions**

In the joint actions (Art. 110 CPC), in which two or more independent claim against the same defendant is brought by the plaintiff before the court, because of the fact that both claims are independent from each other<sup>53</sup>, every independent claim can be subject to mediation if it is about payment of a sum of money<sup>54</sup>.

If some of the claims are subject to mediation as a procedural requirement and some are not in a joint action, the court shall sever the actions from each

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<sup>52</sup> E.g. divorce actions, actions commenced to annul a marriage or establish paternity etc (Alangoya, p. 225; Ansay, p. 232; Arslan/Yılmaz/Taşpınar Ayvaz/Hanağası, p. 308; Atalı/Ermenek/Erdoğan, p. 348; Göksu, p. 110; Karlı, p. 381; Önen, E.: İnşai Dava, Ankara 1981, p. 50 ff; Pekcanitez, Usul, p. 984; Tanrıver, p. 586; Ulukapı, p. 212 ff; Üstündağ, p. 336).

<sup>53</sup> Arslan/Yılmaz/Taşpınar Ayvaz/Hanağası, p. 314; Atalı/Ermenek/Erdoğan, p. 354; Göksu, p. 113; Karlı, p. 383; Muşul, T.: Medeni Usul Hukukunda Terdit İlişkileri, İstanbul 1984, p. 102; Pekcanitez, Usul, p. 1092; Tanrıver, p. 628; Ulukapı, p. 217.

<sup>54</sup> Ekmekçi/Özekes/Atalı/Seven, p. 192 ff.

other, continue the litigation for the claims that are not subject to mediation and dismiss the ones that are subject to mediation.

### **5. Actions with Gradual Demands**

In the actions with gradual demands (Art. 111 CPC), the plaintiff asserts multiple demands against the defendant in the same complaint, with identifying the demands as primary and secondary. Secondary claims in these actions cannot be examined and resolved before evaluation and denial of the primary claim on the merits<sup>55</sup>.

In these types of actions, whether mediation is a procedural requirement or not is also controversial. According to the handbook that is published by Ministry of Justice, if one of the demands are subject to mediation whether it is primary or not, the whole action should be subject to mediation as a procedural requirement<sup>56</sup>.

However, in our opinion, these actions should be subject to mediation only when the primary claim is the payment of a sum of money since the evaluation and resolution of the secondary claim is related and bound to the refusal of primary claim. Otherwise, commencing the mediation process would be compulsory even in cases that only secondary claim is subject to mediation and the primary claim of the plaintiff is accepted by the court, which is not only unacceptable but also would be against the benefits of the plaintiff.

On the other hand, when this opinion is adopted, mediation as a procedural requirement causes another problem for the actions with gradual demands in which the primary claim is not subject to mediation when the secondary claim is. Because in this situation, the plaintiff can commence a case without applying to mediation. However, when the primary claim is rejected by the court, the litigation on the secondary claim cannot continue due to the lack of a procedural requirement. In addition, mediation is not a procedural requirement that can be completed during litigation. Thus, after rejecting the primary claim of the plaintiff, the court shall also dismiss the secondary claim of the plaintiff because of the absence of the mediation process. The plaintiff commences the mediation process for the secondary claim and after the mediation process, commences the action before the court.

As a result, it does not matter which opinion is adopted. Mediation as a procedural requirement extensively complicates the usage of the right to legal remedies in actions with gradual demands and consists another example for the violation of the essence of the right.

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<sup>55</sup> Alangoya, p. 229; Arslan/Yılmaz/Taşpınar Ayvaz/Hanağası, p. 312; Atalı/Ermenek/Erdoğan, p. 356; Göksu, p. 113; Karşlı, p. 383; Muşul, p. 105 ff; Pekcanitez, Usul, p. 1083, 1085; Tanrıver, p. 629, 630; Ulukapı, p. 218; Üstündağ, p. 337 ff.

<sup>56</sup> Koçyiğit/Bulur, p. 69.



## 6. Actions with Alternative Demands

In the actions with alternative demands (Art. 112 CPC), the debtor or a third party has the right to choose regarding an alternative obligation. When the debtor or the third-party refrains from exercising this right, the creditor files an action with alternative demands<sup>57</sup>. In these types of actions, when one of the alternative demands is the payment of a sum of money and subject to mediation, the whole action should be subject to mediation. Because in these actions, the matter of dispute is the sum of all alternative demands<sup>58</sup>.

## 7. Group Actions

The group actions (Art. 113 CPC), in which associations or other legal entities commence an action in accordance with the framework of their statutes with the purpose of protecting the interests of the people they represent<sup>59</sup>, are also not subject to mediation. Because the matter of dispute in these actions can only be the determination of rights of the concerned parties, suspension or prevention of unlawful activities<sup>60</sup>, which are not suitable demands for mediation.

## 8. Non-contentious Matters

Lastly, non-contentious matters (Art 382 ff CPC), which cannot be classified as a civil action<sup>61</sup>, are not subject to mediation and can be brought before the competent court without applying to mediation.

According to Art. 382 of CPC, the commercial non-contentious matters are as follows:

- 1) Issuance of document in the event of loss of commercial books (Art. 82.7 TCC).
- 2) Liquidation of the goods that are received by the commercial agent on

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<sup>57</sup> Arslan/Yılmaz/Taşpınar Ayvaz/Hanağası, p. 313 ff; Atalı/Ermenek/Erdoğan, p. 358; Göksu, p. 114; Karlı, p. 386; Muşul, p. 105; Pekcanitez, Usul, p. 1090; Tanrıver, p. 631; Ulukapı, p. 219.

<sup>58</sup> Atalı/Ermenek/Erdoğan, p. 358; Muşul, p. 105; Pekcanitez, Usul, p. 1091; Ulukapı, p. 220.

<sup>59</sup> Arslan/Yılmaz/Taşpınar Ayvaz/Hanağası, p. 316; Atalı/Ermenek/Erdoğan, p. 360; Gasser, D. / Rickli, B.: Schweizerische Zivilprozessordnung, 2. Auflage, Zürich 2014, Art 89, rn. 6; Göksu, p. 114; Karlı, p. 386; Pekcanitez, Usul, p. 1099; Tanrıver, p. 632; Ulukapı, p. 213 ff.

<sup>60</sup> Arslan/Yılmaz/Taşpınar Ayvaz/Hanağası, p. 316; Atalı/Ermenek/Erdoğan, p. 361; Brunner, A./Gasser, D./Schwander, I.: Schweizerische Zivilprozessordnung, 2. Auflage, Zürich 2019, Art 89, rn. 12 ff; Gasser/Rickli, Art 89, rn. 8 ff; Göksu, p. 114; Karlı, p. 387; Pekcanitez, Usul, p. 1103; Tanrıver, p. 633; Taşpolat Tuğsavul, M.: Kolektif Hukuki Yarar Çerçevesinde Topluluk Davaları, İstanbul 2016, p. 229 ff; Ulukapı, p. 214.

<sup>61</sup> Arslan/Yılmaz/Taşpınar Ayvaz/Hanağası, p. 80; Kuru, B.: Nizasız Kaza, Ankara 1961, p. 24; Pekcanitez, Usul, p. 104; Tanrıver, p. 113.

behalf of the client, according to Code of Obligations (Art. 111.1 TCC).

3) Appointment of a liquidator in liquidation of a general partnership (Art. 273 TCC).

4) Appointment of an expert for inspection of accounting records of the company upon the request of a partner with limited liability (Art. 310.2 TCC).

5) Commissioning an expert report and granting permission by the court regarding contribution to the real capital of a corporation, acquiring business with a value of one tenth of the capital within two years from the date of registration and capital reduction (Art. 343 TCC).

6) Annulment of negotiable instruments (Art. 651.1; 657; 661 ff. TCC).

7) Determination of defect or deficiency of goods regarding moving of goods (Art.856 ff TCC); deciding for liquidation of goods according to the Code of Obligations in the event of undeliverability; inspection of sent goods through the court.

8) Appointing a trustee in case the owner could not be found regarding ship mortgages (Art. 1034 TCC).

9) Preparation of sea protests (Art. 1098 TCC).

10) Determination of the departure date of the ship by the court regarding mixed cargo contracts.

11) Determination of the state, size, number and weight of the goods in the port of discharge by an expert regarding contracts of affreightment (Art. m. 1184 TCC).

12) Appointment of an adjuster regarding general average (Art. 1280 TCC) and approval of the adjustment by the court.

13) Appointment of an expert for determination of the damage and its scope regarding insurances against maritime risks.

14) Appointment of an expert for appraisal of real capital in cooperation (Art. 21 CC).

## CONCLUSION

The choice of the lawmaker to apply the regulations on the mediation as a procedural requirement to the commercial actions after the success that is achieved in the labor actions, may easily cause some unwanted and unpredicted outcomes.

First of all, legal nature of labor actions and commercial actions are vastly different. In labor actions, the parties are not economically equal and success rates of mediation as a procedural requirement in labor actions actually depends on the immediate financial needs of the employees. An employee with immediate financial need may easily accept the offer of the employer in the mediation process, whether the offer is fair or not, instead of waiting the result of a jurisdiction that can last four or five years. On the other hand, in principle, both parties of a commercial dispute are economically equal and both parties of these disputes will not be as eager as an employee to a settlement, which makes mediation as a procedural requirement in civil disputes less useful when compared to labor disputes.

Secondly, claims arising from labor disputes are mainly claims of the employees and those claims consist of severance and notice payments, which are usually equal to the total of one-year wage of the employee. Thus, there is a natural limit of the pecuniary claims arising from labor disputes. However, there is no such natural or legal limit to the pecuniary claims arising from commercial disputes. Whether the dispute is about the payment of 1000 TL or 1.000.000 TL, it will be subject to mediation. In its nature, settlement of a dispute about the payment of a bigger sum of money is vastly different and difficult from the settlement of a dispute about the payment of a smaller sum of money. Because of this reason, in commercial courts, disputes less than 300.000 TL is assessed by a single judge, but disputes more than this limit are assessed by a board of judges<sup>62</sup>.

Lastly, there are various types of commercial disputes. Thus, determining the types of commercial actions that are subject to mediation should be clear and non-negotiable, as in the labor actions.

As a result, rules regulating the mediation as a procedural requirement in commercial disputes are not sufficient for the vast scope and variation of commercial disputes. In order to eliminate this insufficiency, the commercial actions that are subject to mediation should be listed in a clear and non-negotiable manner and a limit to the pecuniary claims that is adequate to the nature of the commercial disputes should be implemented.

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<sup>62</sup> Code Nr. 5235, Art 5.3.

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# PRAETER DELICTUM PREVENTIVE MEASURES AGAINST INDIVIDUALS AND THE SLOW PROCESS TOWARDS GREATER PRECISION

*Kişisel Önleyici Tedbirler ve Daha Açık Hale Getirme Sürecinin Yavaşlığı*

By Assoc. Dr. Francesca CONSORTE

## Abstract

Praeter delictum preventive measures against individuals represent a legal arrangement of ancient origins which characterizes the Italian legal system. Despite being subjected to a series of amendments over time, this type of measures has endured to the present day. The reference text is currently represented by the Legislative Decree no. 159/2011 (s.c. Antimafia Code), which envisages two types of measures discerned by the different individual interests involved. First of all, there are the personal preventive measures (which in some cases can have impact on personal freedom and freedom of movement), that are imposed by the General Director for Public Security ('questore'), in certain instances, and by the judicial authority, in others. The 'mandatory expulsion' order ('Foglio di via obbligatorio') ex Article 2 and the 'oral warning' ('avviso orale') ex Article 3 fall in the former category and they concern the so called 'ordinary dangerous' individuals ('pericolosi generici') described by Article no. 1, letters a, b, c. The various form of special surveillance (Article 6) are instead applied by the judicial authority and concern the qualified dangerous individuals ('pericolosi qualificati') i.e. subjects described by Article 4, who in turn also include those considered by the abovementioned Article 1.

The second type of measures consists of patrimonial preventive measures affecting the patrimony of the recipient or, under given circumstances, of her/his heirs/successors in title. The latter will not be discussed in the paper.

The recent February judgment of the Constitutional Court (j. no. 24/2019) declared unlawful the inclusion among the recipients of these measures "individuals who, on the basis of factual evidence, may be regarded as habitual offenders" ("abituamente dediti a traffici delittuosi") covered by art. 1, letter a). This paper retraces the critical aspects which - in spite of the aforementioned ruling - continue to affect the preventive personal measures with reference to the compliance of the principle of legality and precision and not only.

**Keywords:** Praeter delictum preventive measures against individuals, suspect, sufficient precision, special police supervision, criminal law, principle of legality

## Özet

Önleyici tedbirler, İtalyan hukukunu karakterize eden ve antik dönemlere kadar uzanan bir hukuki kumdur. Zaman içerisinde pek çok değişikliğe konu olmasına rağmen, bu kurum, bugüne kadar varlığını sürdürmüştür. Farklı bireysel menfaatlere göre farklılaşan iki tür tedbir öngören referans metin 159/2011 sayılı kanun hükmünde kararname ile yürürlüğe girmiştir (Antimafya Kanunu). Öncelikle, bireysel özgürlüklere ve hareket serbestisine etki eden ve belirli durumlarda 'questore' (il güvenlik yöneticisi) tarafından diğer hallerde ise yargı mercileri tarafından öngörülen kişisel önleyici tedbirler söz konusudur. 2. maddede öngörülen 'uzaklaştırma emri' ('foglio di via obbligatorio') ve 3. maddede öngörülen 'sözlü uyarı' ('avviso orale') birinci gruba dahil olup bunlar 1. Maddenin a,b ve c bentlerinde tanımlanan 'genel tehlikeli kimseler'e ('pericolosi generici') ilişkindir. Yargısal merciler tarafından uygulanan çeşitli biçimlerdeki özel denetim (Madde 6) ise, 4. Maddede tanımlanan ve daha önce anılan 1. Maddede düzenlenenleri de kapsayabilen 'özel tehlikeli kimseler'e ('pericolosi qualificati') yöneliktir.

İkinci kategori ise, hakkında tedbir uygulanan kimse ile belirli hallerde bu kimsenin mirisleri ve varislerinin malvarlığına etki eden malvarlığına yönelik önleyici tedbirlerdir. Bu ikinci tür tedbirler, bu makalenin kapsamı dışında bırakılmıştır.

İtalyan Anayasa Mahkemesi, şubat tarihli son kararında "şuçtan geçinmeyi alışkanlık haline getirdiği olgusal verilerden anlaşılın kimseler" in de bu tedbirlerin muhatabı haline getirilmesini hukuka aykırı bulmuştur (Madde 1, bent a). Bu makale, İtalyan Anayasa Mahkemesinin anılan kararına rağmen, kişisel önleyici tedbirleri etkilemeye devam eden temel hususları kanunilik ve açıklık gibi ilkeler bakımından ele almaktadır.

**Anahtar Kelimeler:** Kişisel önleyici tedbirler, şüphe, yeterli açıklık, özel polis denetimi, ceza hukuku, kanunilik ilkesi



## INTRODUCTION

The *Praeter delictum* preventive measures against individuals represent a traditional legal arrangement<sup>1</sup> which dates back to the nineteenth century and since then has always been part of the Italian legislation. Currently, they are governed by the Legislative Decree no. 159/2001<sup>2</sup>, known as the “Antimafia Code”. This Code envisages two categories of measures which are discerned according to the individual interests involved. First of all, there are the ‘personal preventive measures’ which, in some cases, can have impact on personal freedom and freedom of movement. These measures are imposed by the General Director for Public Security (‘questore’), in certain instances, and by the judicial authority, in others. The ‘mandatory expulsion’ order (‘Foglio di via obbligatorio’) ex art. 2 and the ‘oral warning’ (‘avviso orale’) ex art. 3 fall in this former category. The measures envisaged by art. 2 and by art. 3 concern the so called ‘ordinary dangerous’ individuals (‘pericolosi generici’) described by art. 1, letters a, b, c. They are individuals who, “on the basis of factual evidence, may be regarded as habitual offenders” (‘abituamente dediti a traffici delittuosi’; letter a); those who, on account of their behaviour and standard of living, and on the basis of factual evidence, may be regarded as individuals who habitually live, even in part, with the proceeds of crime (letter b) and those who, again on the basis of factual evidence, may be regarded as having committed offences endangering the physical or mental integrity of minors or posing a threat to health, security or public order (letter c). The third personal prevention measure is the ‘special police supervision’ with or without compulsory residence order or prohibition (sorveglianza speciale di pubblica sicurezza con o senza divieto o obbligo di soggiorno). It is governed by art. 6 and it is applied by the judicial authority. It concerns the ‘qualified dangerous’ individuals (‘pericolosi qualificati’) described by art. 4. These individuals are subjects suspected of very serious crimes listed, such as being part of a mafia-type organisations (...) or being involved in subversive activities (...) etc.... Art. 4, letter d also includes the individuals described by the abovementioned Article 1.

The second category consists of measures affecting the property of the individual or, under given circumstances, of her/his heirs/successors in title. This second category is not considered in this essay.

In general, the ‘preventive measures system’ has systematically raised old and new questions referable to a common issue i.e. the difficulty of finding an

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<sup>1</sup> The original regulatory reference is Law no. 2248 of 20<sup>th</sup> March 1865.

<sup>2</sup> Legislative Decree no. 159 of 6<sup>th</sup> September 2001. It should be considered that this Code does not govern every preventive measures included in the Italian legal system. In fact, it must be integrated with the various special laws which cover *ad hoc* measures concerning specific fields, such as for instance the Decree Law no. 11/2009 converted with amendments by Law no. 38/2009 with regard to stalking.

appropriate balance between two requirements: the security of citizens and the freedom of the individual<sup>3</sup>. Specifically, these old and new questions are nourished by the constant topical collective need of security that somehow, in some respects, clashes with the tendency, also extremely topical, to transcend the labels in identifying the criminal law and in submitting its application to the corresponding guarantees, first of all the guarantees provided by the Constitution. In solving these questions (security v. guarantees), the legislator of prevention has always privileged security, to the point that the measures which are today governed by the Antimafia Code can be considered real precursors of that “punitive law of suspicion” that, especially in the last decade, has found multiple expressions from both the regulatory<sup>4</sup> and the jurisdictional<sup>5</sup> point of view, drawing the attention of much literature<sup>6</sup>. The point is that these legal arrangements under examination have ancient origins<sup>7</sup> and contain measures based on a “risk coming from the person who has to be submitted to restrictive measures<sup>8</sup>”. The assessment of the risk is in turn delegated to a judgment oriented to a possible future,<sup>9</sup> without the guidance of scientific-probabilistic laws<sup>10</sup>. This last aspect, in particular, projects the measures in question into a dimension which has nothing to do with “the responsibility connected to a material fact”<sup>11</sup>, a dimension which is light years away from the concrete

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<sup>3</sup> See Pulitanò D., *Relazione di sintesi “Misure di prevenzione e problema della prevenzione”*, Riv. It. Dir. Proc. Pen., 2017, dossier 2, p. 639.

In terms of the prevention-system constitutionality the fundamental benchmark is article 2 of Constitution. See NUVOLONE P., *Relazione introduttiva*, in AA.VV., *Le misure di prevenzione, Atti del Convegno* held in Alghero, 26th-28th of April 1974, Milan, 1975, 15 et seq. Moreover, in literature it was argued that the preventive measures which restrict the personal freedom would be in accordance with the provisions of article 25, paragraph 3 and article 13 of Constitution (reserve of jurisdiction and rule of law), while those which affect the freedom of movement would be in accordance with article 16 of Constitution (being adopted for “safety reasons”). For these aspects, see MENDITTO F., *Le misure di prevenzione personali e patrimoniali*, Milan, 2012, 25.

<sup>4</sup> For instance the Legislative Decree no. 231/2001 on corporates liability.

<sup>5</sup> It is enough to mention the interpretation of negligence to the light of the precautionary principle (paradigmatic is the Court of Appeal Venice, section II, 15<sup>th</sup> December 2004).

<sup>6</sup> See Consorte F., *Tutela penale e principio di precauzione. Profili attuali, problematicità, possibili sviluppi*, Turin, 2013 and the literature cited therein.

<sup>7</sup> For a very detailed historical analysis see Cairo A., Forte C., *Codice delle misure di prevenzione*, Nel Diritto, Roma, 2014.

<sup>8</sup> Pulitanò D., *Relazione di sintesi “Misure di prevenzione e problema della prevenzione”*, quoted, p. 642 et seq.

<sup>9</sup> Pulitanò D., *Relazione di sintesi “Misure di prevenzione e problema della prevenzione”*, quoted, p. 642 et seq.

<sup>10</sup> Basile F., *Tassatività delle norme ricognitive della pericolosità nelle misure di prevenzione: Strasburgo chiama, Roma risponde*, in [www.penalecontemporaneo.it](http://www.penalecontemporaneo.it), 20.07.2018, p. 15.

<sup>11</sup> MANNA A., *Il diritto delle misure di prevenzione*, in AA.VV., *Misure di prevenzione*, edited by Furfaro S., Turin, 2013, p. 21.

danger. In other terms, preventive measures operate in the shadow of a mere risk. Not being supported by an underlying scientific evaluation demonstrating its existence<sup>12</sup>, however, such a risk turns into a mere suspect. As we shall see, however, all of this is not enough.

### **1. “Prevention system and suspect”: the characteristics of the application process**

Preventive measures are defined as “measures of suspect” also by virtue of the developments of their application process and in particular as a result of the *central position* and of the *physiognomy* assumed by the “diagnostic-ascertative phase”. With regard to this, the approach shared by the jurisprudence is that the implementation of the measures under examination should be divided in two phases<sup>13</sup>. The first phase – the “diagnostic-ascertative one” – is destined to ascertain, on the basis of a retrospective judgment concerning previous facts, the constituent elements of the subjective types considered by art 1 (the already mentioned “ordinary dangerous individuals”) or by art. 4 (the already mentioned “qualified” dangerous individuals) of the Antimafia Code. The second phase – the “prognostic” one – concerns the possibility that the person (judged to belong to the categories described in articles 1 and 4 following the “diagnostic-ascertative phase”) would commit a crime in future. From the theoretical point of view, the “prognostic” phase is the one which characterizes the “prevention system”, placing the system just mentioned outside the penal-punitive law<sup>14</sup> and consequently subtracting it from the constitutional<sup>15</sup> and conventional<sup>16</sup> guarantees dominating the criminal law. The approach under examination has been recently confirmed by the Constitutional Court, which defined the “undoubted punitive dimension” of the preventive measures as a mere “collateral consequence” of the preventive aims pursued by the measures

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<sup>12</sup> The benchmark on the concept of risk is the note Commission Statement, 2<sup>nd</sup> February 2000 about precautionary principle, COM(2000), 1 definition in *eur-lex.europa.eu*, p. 31.

<sup>13</sup> It is about a recent approach endorsed by the Constitutional Court in its judgment of 27<sup>th</sup> February 2019 (ud. 24/01/19) no. 24.

<sup>14</sup> This position is based on the idea that preventive measures are measures “with no crime” that do not comply with a function of justice but of “security”. See Pulitanò D., *Relazione di sintesi “Misure di prevenzione e problema della prevenzione”*, quoted, 639 et seq. In a critical sense, see FIANDACA G., MUSCO E., *Diritto penale, parte generale*, Bologna, 2014, 913 ss.; CANESTRARI S., CORNACCHIA L., DE SIMONE G., *Manuale di diritto penale, parte generale*, Bologna, 2007, 881 et seq.

<sup>15</sup> See Constitutional Court no. 24/2019.

<sup>16</sup> See European Court of Human Rights, Grand Chamber, case De Tommaso c. Italy, 23<sup>rd</sup> February 2017, ric. no. 43395/09.

See MENDITTO F., *La sentenza De Tommaso c. Italia: verso la piena modernizzazione e la compatibilità convenzionale del sistema della prevenzione*, in *Dir. Pen. Cont.*, 2017, 139 et seq.

themselves. The Constitutional Court consequently excluded, in the same judgment, that the punitive dimension might constrain and modify the non-criminal nature of preventive measures<sup>17</sup>.

Despite representing the most qualifying one, the “prognostic phase” also represents the “weaker component” of the prevention procedure. It is true that, on the one hand, the jurisprudence recognizes the need to ascertain the existing and concrete individual dangerousness of the person<sup>18</sup>. Not by chance, the Court of Cassation abandoned the presumption of dangerousness even with regard to people suspected of mafia<sup>19</sup>. In addition, the Constitutional Court declared the constitutional illegitimacy of article 15 of the Antimafia Code in consideration of the fact that it does not impose the renewal of the dangerousness evaluation after a period of detention<sup>20</sup>. But it is also true, on the other hand, that the prognostic judgment - given its generic<sup>21</sup>, vague, questionable<sup>22</sup> and intuitive<sup>23</sup> content - tends to be “crushed” on the ‘diagnostic-accertative one. This is the reason why this last phase has become central in the preventive procedure.

As anticipated, the “diagnostic-accertative judgment” is actually based on the assignment to the person of the “facts” considered by art. 1 and art. 4 of the Antimafia Code: the two articles specify the previous behaviors on the basis of which individuals can be judged, respectively, as generically or qualified dangerous.

For present purposes, the problem is the physiognomy assumed by this diagnostic-accertative phase of the prevention procedure. The point is that over time the facts specified in articles 1 and 4 of the Antimafia Code have been progressively anchored to some criminal offences or categories of offences. Despite having been hoped by the Constitutional Court<sup>24</sup> since last century

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<sup>17</sup> Constitutional Court no. 24/2019, quoted, par. 9.7.1.

<sup>18</sup> Constitutional Court 17th March 1969, no. 32; see also Court of Naples, section of preventive measures, 9th December 2010, [www.penalecontemporaneo.it](http://www.penalecontemporaneo.it). On this issue see MENDITTO F., *Le misure*, quoted, 23; see also T.A.R. Turin, (Piedmont), I, 15/05/2015, no. 796.

However, the aforementioned reflections cannot be extended to patrimonial measures. Article 18 allows indeed that these last measures are required and implemented “*independently from the social danger of the person proposed for their application at the time of preventive measure request*”.

<sup>19</sup> Joined Chambers of Court of Penal Cassation 30<sup>th</sup> November 2017, no. 111. See QUATTROCCHI A., *Lo statuto della pericolosità qualificata sotto la lente delle Sezioni Unite (nota a Cass., SSUU, sent. 30 novembre 2017 (dep. 4 gennaio 2018), no. 111, Pres. Canzio, Rel. Petruzzelis, Ric. Gattuso, Dir. Pen. Cont., 2018, no. 1, 51 et seq.*

<sup>20</sup> Constitutional Court, 6<sup>th</sup> December 2013, no. 291.

<sup>21</sup> Mazzacuva F., *La prevenzione sostenibile*, *Cass. pen.*, 2018, issue 3, 1017 et seq.

<sup>22</sup> Pulitanò D., *Relazione di sintesi “Misure di prevenzione e problema della prevenzione”*, quoted, 637 et seq.

<sup>23</sup> Manna A., *Il diritto delle misure di prevenzione*, quoted, 17.

<sup>24</sup> Constitutional Court no. 177/1980, quoted; F. MAZZACUVA, *Le persone*, quoted, 116.

because oriented to a major specificity, the aforementioned evolution exposes the preventive measures to the criticism of functioning as a real “substitute” of penalty. The point is that - in the face of conducts described as criminal offences (art. 4) or referable to categories of criminal offences (art. 1) - the legislator allowed the application of preventive measures which have unquestionable punitive effects but do not require the full evidence of criminal liability<sup>25</sup>. We come to explain why they have punitive effects and why their application does not require full evidence of the commission of the offences listed in articles 1 and 4.

We talk about punitive effects because the measures under examination limit individual rights not only on account of the direct effects caused, in particular, by ‘special police supervision’ on the personal freedom and movement, but also because they produce indirect punitive effects “similar to the so called criminal effects of conviction<sup>26</sup>”. Therefore, in this way, such preventive measures involve a serious legal degradation of the person and have a serious impact on rights which are constitutionally<sup>27</sup> and conventionally<sup>28</sup> protected. An example is represented by the prohibitions automatically introduced by the Antimafia Code in the case of the application of personal preventive measures by the judicial authority<sup>29</sup>. Such prohibitions deny the person, his life partners and the company he “manages”<sup>30</sup> to access to a considerable range of administrative authorizations as well as to the analogous measures required by law to carry out economic and entrepreneurial activities<sup>31</sup>. Another example is represented by the indirect effects envisaged by the code of criminal procedure in the case of individual subjected to preventive measures. Let us think, for instance, of the impossibility to assume the role of expert, interpreter, witness *ad actum*<sup>32</sup>. In addition there are the indirect effects envisaged by some special laws as the impossibility to assume the top role in the supervised sectors (for instance,

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<sup>25</sup> See MAIELLO V., in AA.VA., *La legislazione*, quoted, 327; E. GALLO, *Misure*, quoted, 7; FIANDACA G., *Misure*, quoted, 116.

<sup>26</sup> Marini M., *Gli effetti ‘punitivi’ delle misure di prevenzione personali*, *Cass. pen.*, 2018, no. 2, 692 et seq.

<sup>27</sup> See, for instance, the abovementioned judgment of the Constitutional Court no. 24/2019.

<sup>28</sup> See, for instance, the abovementioned judgment of the ECHR “De Tommaso” of 23<sup>th</sup> February 2017.

<sup>29</sup> Article 66 et seq. of the Legislative Decree no. 159/2011.

<sup>30</sup> In these cases the prohibitions shall be effective for five years and, therefore, even beyond the duration of the implemented preventive measure (paragraph 4).

<sup>31</sup> Article 67 of the Legislative Decree no. 159/2011. Except in the event that the livelihood lack to the person concerned and his family (paragraph 5).

<sup>32</sup> Article 144, letter c) and article 225, paragraph 3 of Code of Criminal Procedure; article 120, letter b), of the same Code.

the banking sector<sup>33</sup>), the inability to vote<sup>34</sup> and so on<sup>35</sup>. All these preclusions (indirect effects deriving from the application of personal preventive measures by the judicial authority) go far beyond the control and preventive needs that legitimize the prevention system itself.

As seen before, despite these invasive effects, the preventive measures can be enforced in the absence of a full evidence concerning the previous commission of the criminal offences described in articles 1 and 4 of the Antimafia Code. Except in certain cases<sup>36</sup>, in the application of the categories of danger described by the two Articles, the ‘judge of prevention’ can resort to not better specified factual elements<sup>37</sup> (in accordance with article 1) or to simple clues<sup>38</sup> (in accordance with article 4). In addition, the ‘judge of prevention’ is not subject to rules of evidence<sup>39</sup> and to judgment rules of criminal trial and is also not bound to the results of the latter even if it concerns the same facts<sup>40</sup>.

The underlying jurisprudential approach is well summarized by the Court of Cassation, according to which “the prevention procedure does not require an evidence equipped with the features required by article 192 of the Code of Criminal Procedure”, i.e. that article which regulates criminal proceedings by establishing that in such proceedings the existence of a fact cannot be inferred from clues if they are not serious, precise and concordant. The Court of Cassation also adds that “during the prevention procedure, the merit judge is entitled to use evidence elements or clues taken from ongoing criminal proceedings..... even if they are not yet terminated with a definitive judgment and, in this last case, even independently of the nature of the verdict about the

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<sup>33</sup> For instance, for the banking sector see the Ministerial Decree no. 161/1998, art. 5.

<sup>34</sup> In accordance to article 2, paragraph 1 of the Decree of the President of the Republic no. 223/1967 people under special supervision for the entire duration of the effects of the provision cannot vote.

<sup>35</sup> For a detailed list see Marini M., *Glieffetti ‘punitivi’*, quoted, 692 et seq.

<sup>36</sup> See, for instance, article 4, letter g which specifically requires a previous conviction.

<sup>37</sup> According to GUERRINI R., MAZZA L., RIONDATO S., *Le misure di prevenzione: profilisostanziali e processuali*, Padova, 2004, the level of evidence required by article 1 would operate in a grey area composed of objective factual circumstances that, despite not being adequate to be used as evidence of a crime, might be a “reasonably base” to support the opinion of subsistence of circumstances described in article 1 (with reference to article 1, Law no. 1423/1956, amended in 1988, cfr. Gallo E., *Misure*, quoted, 7.). However, other authors raise the question that this article legitimates in practice forms of repression which operate in presence of mere suspicion. See MANNA A., *Il diritto delle misure di prevenzione*, quoted, 8.

<sup>38</sup> See, for instance, Court of Cassation, section II, 28<sup>th</sup> May 2013, no. 35714.

<sup>39</sup> See, for instance, Court of Cassation, section V, 22<sup>nd</sup> July 2014, no. 2002, <https://www.gazzettaufficiale.it/eli/id/2014/11/12>.

<sup>40</sup> See, for instance, Joined Chambers of Court of Penal Cassation 9<sup>th</sup> April 2010, no. 13426 and Supreme Criminal Court, section II, no. 35714/2013, quoted. The preventive measures can be imposed on the basis of evidence obtained both independently and during the criminal proceeding, even when the judge believes they are irrelevant in this forum (see Joined Chambers of Court of Penal Cassation no. 13426/2010, quoted).

assessment of liability”. The result is that the acquittal - even when irrevocable - does not entail the automatic exclusion of the social dangerousness. In other words, the acquittal does not prevent the judge of prevention from believing that the individual has committed the facts described in articles 1 and 4 and therefore to consider him a dangerous subject; the ‘prevention judge’ is free to base his decision on the same historical facts for which the crime was excluded in the criminal proceedings, as well as on other facts independently deduced in the prevention judgement<sup>41</sup>.

Returning to the initial topic, namely the relationship between preventive measures and risk, in the light of what clarified above the reasons why the literature considers preventive measures as “cases of suspected crimes”<sup>42</sup> are evident.

## 2. The metamorphosis of the prevention system

In the light of what has been said so far, the bewilderment of literature concerning the extension of the system of prevention to the so called “white-collar crimes” becomes understandable. In the case of “white-collar crimes”, in fact, the simplification of the proof risks to increase exponentially in consideration of the transition not only from criminal law to the preventive system, but also from the cases of ordinary (article 1) to the cases of qualified (article 4) dangerousness.

Let focus on the latter transition based on the Law no. 161/2017<sup>43</sup>. We shall focus on two aspects of this law.

First of all, this law included the suspects of several mono-subjective offences in the list provided for in article 4 (subsequently integrated by the so called “Red Code”<sup>44</sup>, entered into force in August 2019). To start with, some of these new offences do not have the aptitude to raise the social alarm which preventive measures traditionally cope with. From this point of view, the striking example is that of the “suspects of aggravated fraud in obtaining public funds”<sup>45</sup> ex art. 640-bis Criminal Code.

Secondly, always in reference to the cases envisaged by article 4, the 2017 law also included the “suspects of criminal association aimed at committing a series of crimes against the Public Administration”<sup>46</sup> in the list provided for in article 4 thereof (new letter *i-bis* of art. 4).

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<sup>41</sup> See, for instance, Supreme Criminal Court, section V, 22<sup>th</sup> July 2014, no. 202, <https://www.gazzettaufficiale.it/eli/id/2014/11/12>.

<sup>42</sup> FIANDACA G., *Misure*, quoted, 115; Maiello V., *La corruzione nel prisma*, 2; MAIELLO V., in AA.VA., *La legislazione*, quoted, 325.

<sup>43</sup> Law no. 161 of 17<sup>th</sup> October 2017 (in Official Journal 4<sup>th</sup> November 2017, no. 258)

<sup>44</sup> In particular, the Law no. 69/2019 included the suspects of crime provided for in article 572 of Criminal Code. See letter *i-ter*.

<sup>45</sup> See letter *i-bis*) article 4 of the Legislative Decree no. 159/201.

<sup>46</sup> Articles 314, paragraph 1, 316, 316-*bis*, 316-*ter*, 317, 318, 319, 319-*ter*, 319-*quater*, 320, 321, 322 and 322-*bis* of Criminal Code.

The interesting aspect of the two aforementioned cases, is that the explicit inclusion of the offences under examination in the list of article 4 extends the suspicion regime based on clues ex art. 4 to cases that may concern white collars, previously regulated by article 1 of the Antimafia Code. The point is that the latter allows to apply the preventive measures only in the case of proved habitualness in the conducts described by article 1 itself (i.e. habit to commit offences or live, even partially, with the proceeds of crime)<sup>47</sup>. Before 2017, article 1 having to be applied, the mere clue did not allow to apply personal preventive measures to white collars. Now instead, in some cases, namely those covered by the 2017 law, it's possible or might be. This conclusion is indisputably true with regard to those who are suspected of aggravated fraud for obtaining public funds (art. 640-bis Penal Code), a mono-subjective offense inhomogeneous with respect to those traditionally envisaged by art. 4 of Antimafia Code.

By contrast, it requires a more detailed explanation in the case of offences against the Public Administration. Article 4, in fact, includes such offences only when they represent the purpose-crimes of a criminal association, crime provided for in article 416 of the Criminal Code, serious crime in line with those envisaged by art. 4 of Antimafia Code. In case of mono-subjective commission of offences against Public Administration should therefore come back into play article 1 and the subsequent demonstration of habitual requirement. In the past, this last article was in fact applied by the jurisprudence in cases of corruption and not only.<sup>48</sup> The problem is that the criminal association envisaged and punished by article 416 of Italian Criminal Code has fuzzy borders<sup>49</sup>, so much that there are cases in which the existence of criminal association is inferred from the commission of single purpose-offence.<sup>50</sup>

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<sup>47</sup> See for instance Court of Chieti, 12<sup>th</sup> July 2012, Pres. Spiniello, Est. Allieri, [www.penalecontemporaneo.it](http://www.penalecontemporaneo.it), 3<sup>rd</sup> September 2012; Court of Cremona (decr.), 23<sup>rd</sup> January 2013, [www.penalecontemporaneo.it](http://www.penalecontemporaneo.it); Supreme Criminal Court, section I, 24<sup>th</sup> March 2015, no. 31209; Court of Milan, Section of preventive measures, 16<sup>th</sup> February 2016, [www.penalecontemporaneo.it](http://www.penalecontemporaneo.it). In literature, see MAIELLO V., in AA.VV., *La legislazione*, quoted, 336-337; Maugeri A.M., *La confisca allargata: dalla lotta alla mafia alla lotta all'evasione fiscale?*, *Diritto penale contemporaneo, Riv. Trim.*, 2014, no. 2, 214; Rapino F., *La modernizzazione*, quoted, 8; see also Brizzi F., *Misure di prevenzione e pericolosità dei "colletti bianchi" nella elaborazione giurisprudenziale della giurisprudenza di merito*, [www.archiviopenale.it](http://www.archiviopenale.it), 7 et seq.; Zuffada E., *Il Tribunale di Milano individua una nuova figura di "colletto bianco pericoloso": il falso professionista (nella specie il falso avvocato). Un ulteriore passo delle misure di prevenzione nel contrasto alla criminalità da profitto*, [www.penalecontemporaneo.it](http://www.penalecontemporaneo.it).

<sup>48</sup> See for instance Supreme Criminal Court, section I, 24<sup>th</sup> March 2015, no. 31209, quoted.

<sup>49</sup> For this issue see Insolera G., Guerini T., *Diritto penale e criminalità organizzata*, Turin, 2018; Consorte F., *Sezione II – Il Modello di organizzazione, gestione e controllo e la prevenzione dei reati associativi*, in CONSORTE F., GUERINI T., *Reati associativi e responsabilità degli enti: profili dogmatici e questioni applicative*, in *La responsabilità amministrativa delle società e degli enti*, 2013, no. 2, 283-301.

<sup>50</sup> See for example, Court of Cassation, section I, 20<sup>th</sup> January 2010, no. 6308.



To sum up, the inclusion of crimes against the Public Administration (even if they are purpose-crimes of criminal association) in art. 4 of Antimafia Code gives rise to fears that the circumstantial regime provided by the same art. 4 may replace the assessment of the more stringent requirements required by the category of ordinary dangerousness (by art. 1). What is feared in particular is that the reference to the crime of criminal association is sterilized at an interpretative level and that the judge is thus able to apply the crimes against the public administration listed in art. 4 ignoring the requirement of “persistently antisocial lifestyles”<sup>51</sup> and the stricter<sup>52</sup> evidentiary regime provided for in art. 1. The ultimate concern is that all this leads to consider crimes against public administration themselves as serious as those traditionally envisaged by art. 4.

Not by chance, the literature claims that the purpose of the Law no. 161/2017 is to inform the public opinion<sup>53</sup> about the beginning of the process of unreasonable<sup>54</sup> assimilation between mafia and corruption that reached its peak with the recent anticorruption law entitled “Measures contrasting crimes against Public Administration, as well as in the field of time-barred of the crime and in the field of transparency of political parties and movements” (s.c. “*Spazzacorrotti*” law)<sup>55</sup>. Such an assimilation displays all its inconsistency when applied to the prevention system. This is particularly true if the letter *i-bis* of art. 4 should represent a way to assimilate the social dangerousness of the person who commits, for instance, one or more corruption offences, together with other people, to the social dangerousness of the persons traditionally considered by Article 4<sup>56</sup>. In short words, the concern is that the 2017 Law might allow a genetic mutation of preventive measures.

### **3. The long process towards a greater precision in the definition of ‘socially dangerous individuals’. The merits of the recent judgment no. 24/2019 of Constitutional Court**

In the face of a system based on suspicion, widely applied, afflictive and devoid of adequate guarantees, the importance of the process in reducing the imprecision of norms that define ‘socially dangerous individuals’, triggered by

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<sup>51</sup> Maiello V., *La corruzione*, quoted, 1.

<sup>52</sup> Constitutional Court no. 24/2019, quoted.

<sup>53</sup> Maiello V., *La corruzione*, quoted, 4, before the so called “*Spazzacorrotti*” Law entered into force.

<sup>54</sup> The corruption as operational tool of Mafia is to be distinguished from the corruption of the citizen: cfr. Padovani T., *Riforma delle illusioni e illusioni della riforma*, *Arch. Pen.*, 2018, dossier 3, online.

<sup>55</sup> That is to say Law no. 3/2019.

<sup>56</sup> See Maiello V., *La corruzione*, quoted, 2 et seq, for a critic point of view on the draft law which envisaged to integrate article 4 with suspects of some offences against the Public Administration which were considered at that period from a monosubjective point of view.

the Constitutional Court since the last century, becomes evident. This process towards a greater precision is crucial not only in order to orientate *ex ante* individual behaviors<sup>57</sup> but also in order to ensure the effective knowability of the content of the norm at the time of its application, in compliance with the “Rule of Law”<sup>58</sup> and with the effectiveness of the right of defense.

It is not a coincidence that the current text of articles 1 and 4 is the result of a long lasting legislative evolution aimed at conciliating preventive measures with constitutional guarantees. As we have already seen, the two articles just mentioned specify the previous behaviors which a person must have held in order to be qualified as ‘socially dangerous’: ‘ordinary socially dangerous’ in the event that previous behavior falls under art. 1; ‘qualified socially dangerous’ in the event that previous behavior falls under art. 4.

From the point of view of compliance with the principle of legality, art. 4 connects the behaviors (to be considered dangerousness indexes) to precisely listed criminal offences. By contrast, art. 1 refers to an ‘antisocial lifestyle’ related to generic categories of criminal offences and so it retains a significant deficit of speciesism.

The Constitutional Court has tried to rectify at least *partially* this indeterminacy with one of the two 2019 February judgments concerning the relationship between the principle of legality and the preventive measures.<sup>59</sup> For our purposes, judgment no. 24<sup>60</sup> is especially significant<sup>61</sup>. The reason is that the latter judgment recalls and applies both national and supranational jurisprudence that – while denying the criminal nature of preventive measures – submits these measures to the principle of legality and sufficient precision. From the point of view of domestic jurisprudence, the just mentioned judgment no. 24 refers to the famous judgment no. 177/1980<sup>62</sup> of the Constitutional Court itself which declared the unconstitutionality of the norm allowing the application of preventive measures to individuals “whose outward conduct gives good reason to believe that they have *criminal tendencies*”. Moving to the international jurisprudence, judgment no. 24 reminds the judgment of the European Court of Human Rights concerning the case *De Tommaso c.*

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<sup>57</sup> The issue of *ex ante* knowability of the dangerousness case in point is linked to the problem of the relationship between the preventive measures and the principle of guilty and more in general to the relationship between these measures and the principles which govern the criminal matter. It is about a subject that was mentioned but it is not investigated here.

<sup>58</sup> Mazzacuva F., *La prevenzione sostenibile*, quoted, 1017 et seq.

<sup>59</sup> It is about judgments of the Constitutional Court, 27<sup>th</sup> February, no. 24, and Constitutional Court, 27<sup>th</sup> February, no. 25, both published on [www.consultaonline.it](http://www.consultaonline.it).

<sup>60</sup> The present paper will not deal with the judgment of Constitutional Court no. 25/2019 on article 75, paragraph 2 of the Legislative Decree no. 159 of 6<sup>th</sup> September 2011.

<sup>61</sup> Constitutional Court, judgment of 27<sup>th</sup> February 2019 (ud. 24/01/19) no. 24

<sup>62</sup> Constitutional Court, 22<sup>nd</sup> December 1980, no. 177, [www.consultaonline.it](http://www.consultaonline.it).

Italy<sup>63</sup>. The latter is a recent case in which the European Court traces back the preventive measure of ‘special police supervision’ (sorveglianza speciale di pubblica sicurezza) to the restrictive measures of the freedom of movement governed by art. 2 of Protocol no. 4 of European Convention of Human Rights. In addition, the European Court claims that “There has therefore been a violation of Article 2 of Protocol No. 4 on account of the lack of foreseeability of the Act in question”. The motivation is that individuals described by article 1, no. 1 and no. 2, of the law no.1423/1956<sup>64</sup> (corresponding in turn to the individuals currently described by art. 1, letters a and b, of the Antimafia Code to which special supervision may be applied) are not defined with sufficient precision. As it is known, letter a) concerns those who, on the basis of factual elements, may be regarded as “habitual offenders”, whilst letter b) concerns those who, again on the basis of factual elements, “habitually live, even in part, with the proceeds of crime”. According the European Court, in the De Tommaso judgment the problem of the Italian legal system is that neither the Constitutional Court nor the law have defined in sufficient detail the “*factual evidence*” and the *specific types of conducts* that should be taken into account in order to assess the danger for society of the person to which to apply the preventive measure of ‘special police supervision’.

In conclusion, the European Court of Human Rights has stated that the aforementioned norms are extremely vague and indeterminate<sup>65</sup> and consequently do not provide the legal base required by the European Convention in order to adopt the preventive measure of special police supervision. Specifically, according to the jurisprudence of the European Court, a measure has a legal basis not only when it is envisaged by domestic law but also when it satisfies certain standards of quality represented by “accessibility” to the person concerned and by the “predictability” of its effects.

Going back to the recent judgment no. 24/2019, in line with the two aforementioned judgments (judgment no. 177/1980 of Italian Constitutional Court and judgment De Tommaso of the European Court), the Italian Constitutional Court first of all declared the constitutional illegitimacy of article 1, no. 1, of the Law no. 1423/1956 and of the corresponding article 4 letter c of the Legislative Decree no. 159/2011 in the part in which they allowed the application of the personal preventive measure represented by special police supervision<sup>66</sup> to person who need to be considered, on the basis of factual elements, “habitual offenders” (article 1, letter a).

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<sup>63</sup> European Court of Human Rights, Grand Chamber, case De Tommaso c. Italia, quoted

<sup>64</sup> Current norm at the time of facts.

<sup>65</sup> According to the European Court, the “types of conducts” to be considered a “danger to society” were not typified in an appropriate manner to protect the individual from the arbitrary interferences of domestic Courts, to guide the conducts of individuals and put them in a situation able to predict “with a sufficient level of certainty” the implementation of the preventive measures. See paragraph 118 of the De Tommaso judgment.

<sup>66</sup> Both in the presence and in the absence of a compulsory residence order or prohibition (ordine o divieto di soggiorno).

The ruling of the Constitutional Court also concerns measures affecting the patrimony<sup>67</sup>, but we will not talk about this.

There are two elements that led the Constitutional Court to consider article 1, letter a, as “vitiated by radical inaccuracy” and, consequently, unable to meet the specific requirements required by Article 13<sup>68</sup> of Constitution and by Article 117, paragraph 1<sup>69</sup> of the Constitution (in connection with Article 2 of Protocol no. 4 of the European Convention). The first motivation is the generic nature of the content of the norm and, specifically, of the concept of “habitual offenders”<sup>70</sup> (*abitualmente dedito a traffici delittuosi*). The second motivation is the impossibility to find in the jurisprudence of the Court of Cassation an interpretative activity suitable to “refill” the concept of “habitual offenders” with a sufficiently detailed content, foreseeable *ex ante* by the person concerned.

It is different the fate reserved by the Constitutional Court to the standard concerning individuals “who, on the basis of factual elements, may be regarded as habitually living, even in part, with the proceeds of crime” (Article 1, letter b).<sup>71</sup> According to the Constitutional Court, the interpretative contribution of the Court of Cassation currently allows to predetermine the “specific criminal offences” to which letter b refers. This allows people to predict reasonably in advance the cases – and “ways” – in which they could be subject to the preventive measure of special police supervision in these case (as well as to patrimonial preventive measures).<sup>72</sup> Specifically, the Constitutional Court recalls the judgments of the Court of Cassation according to which the just mentioned letter b of Article 1 exclusively refers to offences qualified as crimes (and therefore not to any criminal offences) that are habitually committed (that is to say “over a significant time period” and consequently not sporadically and not *una tantum*) and that generate profits which for a period of time represent the whole income of the individual concerned, or at least a significant part of it.

The disrupting effects of judgment no. 24 of the Constitutional Court have manifested themselves early. Shortly after that judgment, in fact, the Court of Cassation<sup>73</sup> has decreed “the immediate inapplicability” of special police supervision (as well as of patrimonial measures) to the individuals mentioned

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<sup>67</sup> Article 19 of Law no. 152/1975 and article 16 of the Legislative Decree no. 159/2001 have been censured in parallel in so far as they establish the enforceability of seizure and confiscation to the individuals described by article 1, letter a).

<sup>68</sup> This constitutional article protects personal freedom.

<sup>69</sup> This constitutional article obliges the legislator to respect international obligations.

<sup>70</sup> See paragraph 12.3. of judgment no. 24/2019, quoted, of Constitutional Court.

<sup>71</sup> Article 1, no. 2 Law no. 1423/1956, included in article 1, letter b) of the Legislative Decree no. 159/2011.

<sup>72</sup> Constitutional Court, no. 24/2019, quoted, paragraph 12.2. With regard to letter b), the Constitutional Court is in line with what was said by the Court of Cassation in some judgments post-De Tommaso. For instance, Supreme Criminal Court, section I, no. 349/2017 and Supreme Criminal Court, section VI, no. 2385/2017.

<sup>73</sup> Court of Cassation no. 27263/2019, quoted.

by Article 1, letter a) of the Antimafia Code. With this, the Court of Cassation annulled the decision under its scrutiny thus avoiding the consolidation of a judgment that had become incompatible with the Constitution”.<sup>74</sup> In addition, the recent judgment of the Court of Cassation has blindly adhered to the interpretation of letter b) provided by the Constitutional Court in the aforementioned judgment No 24, that in turn has re-proposed the three requirements elaborated by the Court of Cassation in the past and particularly after the De Tommaso judgment.

### **3.1 The limits of the recent judgment no. 24/2019 of Constitutional Court**

Thanks to the recent judgment of the Constitutional Court described before, the step forward of the principle of precision in the ‘prevention system’ is unquestionable. Nevertheless, the persistence of several doubts concerning the other parts of Article 1 of the Antimafia Code (specifically, letters b and c) is also undeniable. In addition, it is also necessary to consider both the perplexities raised by some of the arguments put forward by the Constitutional Court in judgment no. 24 and the critic aspects that are still connoting Article 4 (Antimafia Code) and the prevention system as a whole.

Let us start with some of the criticisms concerning the argumentations put forward by judgment no. 24/2019. Specifically, we are referring to the part of it where the Constitutional Court rescues letter b of Art. 1, judging the category of those “who, on account of their behaviour and standard of living, and on the basis of factual evidence, may be regarded as individuals habitually living, even in part, with the proceeds of crime” sufficiently determined. The core of our criticism to the approach of the Court is that – on the presumption of the non-criminal nature of preventive measures – the Court itself comes to consider their level of precision taking into account not only the letter of the law but also the constant and uniform interpretation of the law itself provided by the Court of Cassation<sup>75</sup>. Let us now see in detail the reasons for our perplexities. Going to the core of the judgment, the constitutional legitimacy parameters used by the Constitutional Court in evaluating the constitutional legitimacy of art. 1, lett. b (and a), are represented by Article 117, Paragraph 1 (in connection with Article 2, Protocol 4, of ECHR), by Article 25<sup>76</sup>, Paragraph 3 and lastly by Article 13 of Constitution. In a nutshell, the core of the legitimacy judgment is thus represented by the compliance with the principle of legality in terms both of the necessary precision and of the predictability of conducts prescribed by letters b (and a) of Article 1 of the Antimafia Code.

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<sup>74</sup> Court of Cassation no. 27263/2019, quoted.

<sup>75</sup> In particular, see paragraph 12 where the Court excludes that the same reasoning could be extended to criminal matter.

<sup>76</sup> This constitutional rule codifies the principle of legality in criminal matter.

In the reasoning of the Court, however, Article 25 of Constitution “immediately leaves the scene”. The reason is that the Court actually recognizes not to have carried out in the past a “constant reference” to this Article with regard to the prevention system. Article 13 of Constitution, by contrast, is placed by the Court at the center of the scene. In this regard, the Court itself confirms its own long-standing approach according to which – given the inclusion of the special police supervision among the restrictive measures of personal freedom – the legitimacy of related norms must be examined in the light of guarantees provided for in Article 13 of the Constitution. Such guarantees in turn include the rule of law that, according to the Court, should be *strengthened in view of the legal predetermination requirement of ‘cases and manners’ of restriction*.”<sup>77</sup>

At the origin of the doubts anticipated at the beginning of paragraph, there is thus the logic-argumentative step which allows the Constitutional Court to rescue the aforementioned letter b by concluding that it prefigures a precise and predictable norm in its application. As we have seen, this conclusion is drawn not so much in virtue of the letter of the law (questionable, according to the Court), but mainly on the basis of the interpretative/integrative action carried out by the Court of Cassation. The point is that the approach adopted by the Constitutional Court seems to betray the essence of the principle of precision. A few years ago, the Court itself stated that Article 13 of Constitution concerns “the supreme guarantees of *habeas corpus* which are one of the cornerstones of civil society in a democracy”<sup>78</sup> and that, according to the same article, *only the law* can legitimately define the ‘cases and manners’ in which physical freedom of the person can be limited. The implication is that determinacy and precision require a punctual drafting of the law itself and consequently that it is necessary to evaluate the written text in order to verify the compliance of the norm to the precision principle. We may consequently imagine that (even according to the De Tommaso judgment), if the Court had adopted this criterion in evaluating the constitutional legitimacy of letter b, the fate of such a letter would have been quite different.<sup>79</sup>

However, there is more.

The Constitutional Court not only did not ban the jurisprudential formant<sup>780</sup>, but it also legitimated a jurisprudential interpretation that some authors consider “creative” and “source of a new right”<sup>781</sup>. An example is represented by the “conduct” and by the “standard of living”, two elements that are expressively

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<sup>77</sup> See par. 9.7.3.

<sup>78</sup> Constitutional Court 15<sup>th</sup> July 1959, no. 49.

<sup>79</sup> Constitutional Court 10<sup>th</sup> March 1966, no.19.

<sup>80</sup> Maiello V., *La prevenzione ante delictum da pericolosità generica al bivio tra legalità costituzionale e interpretazione tassativizzante*, *Giur. Cost.*, 2019, dossier 1,337 et seq.

<sup>81</sup> Maiello V., *La prevenzione ante delictum*, quoted, 338.

mentioned by law<sup>82</sup> under letter b of Article 1, but neglected by jurisprudence of the Court of Cassation in the application of this article.

In addition, also the assessment of the effective predictability of cases and manners in which letter b is implemented seems to be questionable. This predictability is imposed both by Article 13 of Constitution and the Article 117, Paragraph 1, Constitution (in connection with Article 2 of Protocol no. 4 of the European Convention of Human Rights according to the interpretation of the European Court). To start with, the interpretative clarifications of the Court of Cassation about those “who... may be regarded as individuals who habitually live, even in part, with the proceeds of crime” are still characterized by an intrinsic precariousness that survives despite the legitimation of the abovementioned clarifications by the Constitutional Court. It is actually known that the Italian legal system does not envisage the “*stare decisis*”: the judgement, in fact, is binding only in the specific case<sup>83</sup> it deals with. This occurs even when the interpretation is legitimated by a rejection interpretative judgment (*sentenza interpretativa di rigetto*) of the Constitutional Court how it is considered the judgment no. 24/2019<sup>84</sup>. Even assuming that the jurisprudential interpretation has effectively corrected the legislative imprecision of the norm under assessment, it keeps representing a remedy on whose stability the citizen cannot rely on.

If that was not enough, it is also questionable that the interpretative activity of the Court of Cassation truly remedied to the vagueness and to the lack of determination characterizing letter b of Article 1. As seen, in accordance with the interpretation of the Court of Cassation, the implementation of letter b is limited to those who “over a significant time period, have committed crimes generating profits that in a certain period represented the unique source, or at least a significant part, of their income”. The problem is that the Italian legal system is full of *these types of crimes*.<sup>85</sup> The mere exclusion of criminal fines or *no profit* crimes seems devoid of an effective selective capacity. This is enough to question the compliance of letter b with the need (expressed by the abovementioned judgment no. 177/1980 of the Constitutional Court) to anchor the norms describing ordinary or qualified dangerous individuals to “offences or categories of offences”: the concept of crimes generating profits is too wide and vague even for being considered a category of offences. On closer inspection, the two elements characterizing letter b have not to do with the kind of offences; they are actually represented by the “habitualness” in

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<sup>82</sup> Maiello V., *La prevenzione ante delictum*, quoted, 338.

<sup>83</sup> Joined Chambers of Penal Cassation 31<sup>st</sup> March 2004, no. 23016.

<sup>84</sup> Supreme Criminal Court, section II, no. 27263/2019.

<sup>85</sup> See Pisani N., *Misure di prevenzione e pericolosità “generica”, tra tassatività sostanziale e tassatività processuale*, *Giur. Cost.*, 2019, dossier 1, 331.

committing profitable crimes and by the “relationship between proceeds from crimes and whole incomes” of the person concerned. Both the aspects are again characterized by a significance vagueness. First of all, the criteria according to which a period of time can be considered “relevant” for the purposes of habitualness are undefined. The same holds for the criteria by which the incidence of illicit proceeds on incomes have to be calculated and evaluated<sup>86</sup>. What has been said undermines the respect of the predictability even in the “conventional perspective”.

#### **4. Further aspects of vagueness concerning Articles 1 and 4 of the Antimafia Code**

The aspects of indeterminacy of preventive measures do not end with what has been said so far. As far as Article 1 is concerned, to the previous considerations concerning its letter b we must add the perplexities concerning letter c of the same article 1. This letter qualifies as dangerous those individuals who, again on the basis of factual evidence, may be regarded as individuals having committed offences endangering the physical or mental integrity of minors or posing a threat to health, security or public peace. This norm has recently been object of the attention of the legislator, who has well specified it inserting the “repeated violation of the mandatory expulsion order envisaged by Article 2 and of the prohibition of going to specific places contained in the current legislation”<sup>87</sup> among the ‘factual elements’ that can prove the dedication to commit the offences envisaged by letter c itself.

Nevertheless, the reserves expressed by literature remain current. On the one hand, letter c refers to criminal offences identified by protected interests: physical or mental integrity of minors, health, security and public peace. On the other hand, some of these interests are vague; let us think of minors’ moral integrity<sup>88</sup>, public security<sup>89</sup> and peace<sup>90</sup>. This vagueness makes the categories under examination potentially omnivorous.

Moving to Article 4 (i.e. the qualified dangerousness), we shall quickly review just a few examples of vague rules without claims of exhaustiveness.

Firstly, there is the category of those “who have taken part in dissolved political associations according to Law no. 645 of 20<sup>th</sup> June 1952 and whose

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<sup>86</sup> See Maiello V., *La prevenzione ante delictum*, quoted, 338.

<sup>87</sup> See Decree Law no. 14/2017, converted with amendments by Law no. 48/2017.

<sup>88</sup> See F. Mazzacuva, *Le persone*, quoted, 98; MAIELLO V., in AA.VA., *La legislazione*, quoted, 326; FIANDACA G., *Misure*, quoted, 115.

<sup>89</sup> See, for instance, Supreme Criminal Court, section I, no. 21350/2017, quoted

<sup>90</sup> There is the example of the exercise of prostitution in the streets (see FORTE C., *Codice*, quoted, 36). On this point, the Court of Cassation expressed in the opposite direction. See Supreme Criminal Court, section I, no. 38701/2014 and Supreme Criminal Court, section I, no. 8811/2018.



subsequent behavior denotes that they continue to perform an *activity analogoutos to the previous one*” (art. 4, letter e). The explicit reference to the analogy catches the eye and represents a *pass-partout* for a creative jurisprudence free to interpret the concept of ‘*activity analogous to the previous one*’ either as participation to fascist associations, movements or groups (crime envisaged and punished by Article 2, Paragraph 2 of Law no. 645/1952<sup>91</sup>) or as something different.

In addition, we should also mention the norm concerning those who - convicted in the past for a series of listed serious crimes – have to be considered as having criminal tendencies concerning the same kind of crimes on the basis of which they were convicted (letter g<sup>92</sup>). In this case the reference to “criminal tendencies” brings to mind the 1980 judgment of the Constitutional Court that – has we have seen - has “censured” the other rule that referred to those “whose outward conduct gives reason to believe that they have criminal tendencies”<sup>93</sup>. Despite the differences with the norm declared unlawful in 1980, the conclusion characterizing the just considered judgment can be extended to letter g under examination: a “space of uncontrollable discretion”<sup>94</sup> is in fact attributed to the judges in deciding which conducts represent symptoms of the tendency to commit crimes of the same nature.

Lastly, we should consider letters d and f concerning the *preparatory acts, objectively relevant, or/and (‘ovvero’) executive* directed to the commission of a series of specifically listed serious offences having the indicated purposes (letters d and f art. 4).<sup>95</sup> The reference to preparatory acts and, more recently, to executive acts is archaic. From the time the Italian Criminal Code (“Codice Rocco”) entered into force, it has expunged any mention to the just referred categories of acts because of the difficulties to identify them and to draw the line between them<sup>96</sup>.

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<sup>91</sup> Petrini D., *La prevenzione inutile. Illegittimità delle misure praeterdelictum*, Napoli, 1996, 210.

<sup>92</sup> Article 4, letter g): “outside the cases described by letters d), e) and f), those who have been convicted for one of the crime provided for in Law no. 895 of 2<sup>nd</sup> October 1967 and in article 8 et seq. of Law no. 497 of 14th October 1974 and subsequent amendments, when it must be considered, for their subsequent conduct, that they have the tendency to commit a crime of the same type with the purpose described in letter d)”.

<sup>93</sup> Constitutional Court no. 177/1980, quoted on article 1, no. 3, Law 27th December 1956, no. 1423. Cfr., F. MAZZACUVA, *Le persone*, quoted, 116; LEOTTA C.D., *Il volto*, quoted.

<sup>94</sup> Constitutional Court, no. 177/1980, quoted.

<sup>95</sup> Article 4, letter d): “... and to those who, in groups or individually, put in place preparatory acts which are objectively relevant, and/or executive aimed at overturning the law of the state, with the commission of one of the offence provided for in Chapter 1, Title VI, Book II of the Criminal Code or provided for in articles 284,285,286,306,438,439,605 and 630 of the same Code; as well as the crimes committed in connection with terrorism, even international, that is to say to take part in a conflict in foreign territory in support of an organization which pursue terroristic purposes as provided for in article 270 *sexies* of Criminal Code.

<sup>96</sup> Fiandaca-Musco, *Diritto penale, parte generale*, quoted, 482

Moreover, if it is true that the legislative clarifications (according to which preparatory acts must be “objectively relevant” and have a “certain direction”) can stem the risk that the norm refers to the mere criminal intention, the problem is that the preparatory acts may not be able to contain the anticipation of the intervention threshold of preventive measures and, in any case, to guide the interpreter.<sup>97</sup> It cannot be argued that the just described vagueness has been definitely dispelled by the Law 161/2017 thanks to the inclusion of the words “ovvero esecutivi” (or/and executive). In fact, in Italian language the word “ovvero” can be an enhanced form of the disjunctive “or” (oppure). At the same time, however, it can also be a synonym of “namely” or “that is” (ossia).<sup>98</sup> As a consequence, the preparatory acts objectively relevant have not necessarily to be considered as executive acts.<sup>99</sup>

To these critical considerations we might add the questionable relationship between the suspects belonging to Mafia-type associations (Article 4, letter a) and the participation and external contribution to criminal association envisaged by the Criminal Code (Artt. 416 and 110). These issues, however, go beyond the spaces of this work.

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<sup>97</sup> Consider for instance the preparatory acts aimed at reconstituting the fascist party: the vagueness of the concept creates problem to understand whether and how the circumstance of dangerousness under assessment differs from the offence provided for in article 2 of the Law no. 645/1952, which punishes the organization of associations, movements or groups which have antidemocratic purposes proper to fascist party with methods indicated by the provision itself. It is claimed that the preparatory acts are those which are not constituted yet by all the conditions required by Law no. 645/1952: see Gallo E., *Misure*, quoted, 16; Mazzacuva F., *Le persone*, quoted, 113

<sup>98</sup> <http://www.treccani.it/vocabolario>.

<sup>99</sup> FINOCCHIARO S., *La riforma del codice antimafia (e non solo): uno sguardo d'insieme alle modifiche appena introdotte*, in *Dir. Pen. Cont.*, 2017, no. 10, 251.

## CONCLUSIONS

Considering the vagueness characterizing a significant part of Art. 1 and 4 of the Antimafia Code, the courageous judgment of the Constitutional Court that removed from the Italian legal system the reference to individuals “who, on the basis of factual evidence, may be regarded as habitual offenders” (Art 1, letter a) seems even more appreciable. At the same time, however, a note of regret remains. The Constitutional Court’s refusal to deal with the reference to “factual elements” envisaged by Article 1, on the basis of an argumentative ploy,<sup>100</sup> seems to represent a wasted opportunity.

As highlighted by the literature,<sup>101</sup> the precision of the criminal norm is eroded from outside when the judge’s assessment of the fact described by the norm itself does not require full evidence. From this point of view, the already mentioned 1980 judgment of the Constitutional Court (concerning individual with criminal tendencies) together with the known 1981 judgment of the Constitutional Court regarding the illegitimacy of the crime of plagiarism (plagio)<sup>102</sup> teach that the lack of verifiable and falsifiable empirical assessment of facts described by the criminal norm empties of content the principle of legality<sup>103</sup>.

Going back to judgment no. 24/2019, therefore, it would have been appreciable that the Court had specified the meaning of the “factual elements” on the basis of which a person can be classified as ordinary dangerous ex art. 1. Specifically, it would have been desirable that the Court had specified how these factual elements must be proven in the prevention procedure and how these factual elements relate to the evidence of the same facts ascertained in the criminal trial<sup>104</sup>. In a nutshell, our regret is that the Court did not take the opportunity to hinder the infiltration of the “logic of suspect” in the preventive measures system.

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<sup>100</sup> The Court claims not to want extend its judgment to the to national jurisprudence that selects the types of evidence which may be used as sources of evidence of substantial requirements envisage by art. no. 1 Antimafia Code. The reason is that, according to the Costitutional Court, this is a problem of ‘procedural legality’ which falls outside the ongoing proceeding.

<sup>101</sup> Maiello V., *La prevenzione ante delictum*, quoted, 340.

<sup>102</sup> As it is known, with the judgment no. 96 of 8<sup>th</sup> June 1981, the Constitutional Court declared the constitutional illegitimacy of plagiarism crime (once provided for in the Italian penal code), by stating that the legislator has the duty “to make assumptions which express circumstances corresponding with reality” because of “the reference to phenomenon whose possibility to occur has been ascertained on the bases of criteria that in the light of current knowledge seem verifiable”. See Pulitanò D., *Biodiritto e diritto penale*, in Rodotà S., Talacchini M. (edit by), *Ambito e fonti del biodiritto*, Giuffrè, Milan, 2010, 642.

<sup>103</sup> Pulitanò D., *Sui rapporti fra diritto penale sostanziale e processo*, *Rivista italiana di diritto e procedura penale*, 2005, 953.

<sup>104</sup> Maiello V., *La prevenzione ante delictum*, quoted, 341.

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# A SUGGESTION TO PROTECT HUMAN RIGHTS IN CIRCLES OF BARAKAH

*Bereket Dairelerinde İnsan Haklarının Korunması İçin Bir Öneri*

**By Judge Akif TÖGEL\***

## **Abstract**

This study aims to identify the problem of justice and to offer solutions to current unjust situations by benefiting from Barakah Circles Theory. This paper also discusses the theoretical base for the concept of justice and connects the theory of justice to the geopolitical importance of Beytulmakdis. Additionally, it is argued in this study that justice and human rights problems in the cases of Iraq and Syria can be solved with the peace model of 'land of hope,' which implemented the same model to the same region starting from Caliph Umar's period. The article concludes with determining the importance of ensuring peace, providing, and protecting fundamental human rights in second and third circles, including Syria, Iraq, and Egypt, which is seen as the most crucial step to be taken within this scope.

**Key words:** Protecting Human Rights, Global Justice, Barakah Circles, Land of Hope, Peace Model.

## **Özet**

Bu çalışmanın amacı, Bereket Daireleri Teorisinden yararlanarak adalet ve insan hakları ile ilgili sorunları tespit etmek ve incelenen bölgelerdeki adil olmayan durumlara çözümler sunmaktır. Ayrıca bu makale adalet kavramının teorik temelini tartışmakta ve adalet teorisi ile Beytulmakdis'in jeopolitik önemi arasında bağlantı kurmaktadır. Çalışmada Irak-Suriye bölgesindeki adalet ve insan hakları ile ilgili problemlerin, Halife Ömer döneminden başlayarak aynı bölgeye aynı modeli uygulayan "umut ülkesi" barış modeliyle çözülebileceği ileri sürülmektedir. Son tahlilde, Suriye, Irak ve Mısır da dahil olmak üzere ikinci ve üçüncü dairelerde barışın sağlanması, asgari insan haklarının temin edilerek korunması bu kapsamda atılacak en önemli adım olarak görülmektedir.

**Anahtar Kelimeler:** İnsan Haklarının Korunması, Küresel Adalet, Bereket Daireleri, Umut Ülkesi, Barış Modeli.

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## INTRODUCTION

Among the essential characteristics of the human being is to distinguish between justice and oppression. The principle of justice could be described as the moral obligation to act based on fair adjudication between competing claims. Besides, the description of justice is “a fair and proper administration of laws.”<sup>1</sup> When we study about the definition of justice and identify many human rights breaches, it is tough to accept that there is global justice in the world.

The term “problem of justice,” as discussed in this study, is used to pay attention to the different aspects of justice. As a premise, various implementations of justice in different parts of the world can be a ‘problem.’ As a part of human beings, all humans deserve the same and equal type of justice all around the world. However, in the last twenty/thirty years, depending on the data of human rights violations, the problem of justice is increasing rapidly.<sup>2</sup> When we look at different parts of the world, we see lots of social and economic issues related to the term justice. In this regard, one can argue that starting from the September 11 attacks, the US military interventions in Afghanistan, Iraq, and Syria have brought injustice to the region.<sup>3</sup> It is impossible to recognize fundamental human rights like; right to life, liberty, and personal security, also freedom from torture. Specifically, while we focus on the unfair situation and human rights invasions in Palestine, the significance of constructing justice in this region inspiring from Barakah Circles will become clear.

This study aims to discuss the global percept of justice. It also suggests solving the justice problem and protecting human rights in terms of the Barakah Circles Theory as a model. In this concept, at first, the theoretical framework of peace for justice will be analyzed. In this framework, we will review Circle Theory in Geopolitics and the relation between Barakah Circles Theory. The limits of these circles also will be defined. Secondly, barakah circles model will be implemented to the cases of Iraq and Syria, to point out if this region in peace, it will influence in growing circles to all other countries in this region. Therefore, we can claim that the core attempt of this study is to use the barakah circles model as a tool to interpret the problem of justice in given cases.

### **Theoretical Framework: Peace for Justice**

Justice is the first virtue of social institutions and systems of thought. A

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<sup>1</sup> Bryan A. Garner (Ed), “Justice”, *Black’s Law Dictionary*, St. Paul, 1999, p.869.

<sup>2</sup> “The Current Outlook for Human Rights and Democracy”, *Report for IIHR*, San José, 2003, p.3.

<sup>3</sup> Anthony H. Cordesman, “Losing by “Winning”: America’s Wars in Afghanistan, Iraq, and Syria”, *Commentary for Center for Strategic and International Studies*, Washington, D.C., August 2018.

theory, however elegant and economical, must be rejected or revised if it is untrue; likewise, laws and institutions, no matter how efficient and well-arranged, must be reformed or abolished if they are unjust.<sup>4</sup> However, the theory of justice is not easy to prove that it is untrue because of the terms of justice mostly vary from person to person.

What is justice? It seems, in the first sense, is a question of philosophy. However, as a human being, we might start by noting that when we ask what justice is, the term 'justice' is not senseless. We argue about justice because we feel, debate, and assume a level of mutual understanding. According to Hayek, only human conduct can be called just or unjust. However, in a particular state of affairs, the term refers, in fact, to the actions when we consider that it can apply only to such consequences of a person's actions as it has been in his power to determine.<sup>5</sup>

Furthermore, we share a language, and we are aware that we are not arguing about a tangible and clear concept. When we say about justice, there may be much we do not know, but we know that justice has something to do with treating the same cases as the same.<sup>6</sup> To argue about justice is to say about what people are due. Merely grasping the meanings of words tell us that punishment, even mild punishment, is not what innocent people desire.<sup>7</sup> While treating similar cases, similarly, does not rule out honestly, punishing the innocent, giving people their due does.<sup>8</sup>

According to Rawls, there are two principles of justice. "The first one is, each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all. The second principle is, to arrange social and economic inequalities so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity."<sup>9</sup>

When we talk about establishing justice from a global perspective, we should look at what is global justice? What is the use of global justice? What purpose is this normative inquiry supposed to serve? We might think that the central obstacle to achieving a better world seems to be more a problem of political will than of understanding.<sup>10</sup> This question can be interpreted substantively, to

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<sup>4</sup> John Rawls, *A Theory of Justice*, Cambridge, 1999, p.3.

<sup>5</sup> Friedrich August von Hayek, *Law, Legislation and Liberty*, V.2, London, 1976, p.31-32.

<sup>6</sup> David Schmidtz, *Elements of Justice*, New York, 2006, p.7.

<sup>7</sup> Schmidtz, p.8.

<sup>8</sup> Schmidtz, p.9.

<sup>9</sup> Rawls, p.266; Brishen Rogers, "Justice at Work: Minimum Wage Laws and Social Equality." *Texas Law Review*, vol. 92, no. 6, May 2014, p.1543.

<sup>10</sup> Kok-Chor Tan, *What is This Thing Called Global Justice*, New York, 2017, p.4.



be asking what global justice would require of us and what a just global order, or a less unjust one, would look.

Nevertheless, before beginning to explore this substantial question, what global justice as a philosophical inquiry is should be clarified. While the definition of justice, and hence the distinction between justice and other related concepts like ethics, is itself a point of debate among philosophers. That global justice as an inquiry aims to identify our duties to one another in the world. At large beyond the limits of our own country, and to clarify the basis and form of these duties.<sup>11</sup>

After arguing on the meaning and concept of justice and global justice, we can ask that what is the explanation of justice in terms of Palestine issue or the context of the problems encountered in the Middle East. It is possible to find a model-policy that has been applied earlier in this region as a solution. This model is called “peace for justice.”

According to El-Awaisi, the best practical and transparent model to represent this policy of dealing with non-Muslims or multicultural societies is Umar’s Assurance of Safety to the people of Aelia<sup>12</sup>. Actually, “Umar’s Assurance is the major religious pillar and the frame of reference to establish the nature of this relationship between the communities of Islamicjerusalem’s <sup>13</sup> society, which rejects the notion of the supremacy of one person or race over others.”<sup>14</sup>

Furthermore, one can argue that Islamicjerusalem, which has as one of its main characteristics competing for political and religious claims, should be “presented as a model for conflict resolution through constructive argumentation methodology.” As a means for a “constructive dialogue” and favorable negotiation with its conflicting parties. The history of this region proves adopting constructive discussions in the past has opened the way for conflict resolution in this area.<sup>15</sup>

When one takes the model of ‘peace for justice’ to solve the problem of justice and to protect the human rights, the main argument is that how can this model be applied in a more extended area? Yet, disputes and conflicts can become more complicated in different parts of the world. However, it is possible to give the Barakah Circles theory as a suggestion to this problem.

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<sup>11</sup> Tan, p.5.

<sup>12</sup> Aelia Capitolina was a Roman colony, built under the emperor Hadrian on the site of Jerusalem.

<sup>13</sup> The word Islamicjerusalem as a compound word is used by scholars to draw attention to the real meaning of the word. According to these scholars, instead of Islamic Jerusalem, the usage of Islamicjerusalem is more attached to the historical roots of this region.

<sup>14</sup> Abd al-Fattah M. El-Awaisi, *Introducing Islamicjerusalem*, Al-Maktoum Institute Academic Press, Dundee, 2007, p.102.

<sup>15</sup> El-Awaisi, p.104.

The essential components of this approach should be examined to understand the logic of the theory.

The circle theory of IslamicJerusalem is derived from the circle theory of geopolitics and focuses on the geopolitical importance of this region. Historical facts within this region clearly show that if this land is stable, the neighboring countries are calm and in peace. Still, if IslamicJerusalem region is in trouble, other contiguous states have critical problems too.

The link between this geopolitical importance of IslamicJerusalem and Barakah of this land is defined as Barakah in Circles. If we take the center of the circles of Barakah as Masjid al-Aqsa, the highest intensity of Barakah is in this center, both materially and spiritually. Namely fertile soil, climate, and historical heritage are material aspects of Barakah, also mentally, the same region is a habitat for prophets like Abraham, Moses, and Jesus. According to the circle theory of IslamicJerusalem, the two-sided Barakah expands in circles and exists throughout the region.<sup>16</sup>

Due to the close relation between Barakah and the strategic importance of IslamicJerusalem, we claim that if the vital security of this region guaranteed, and universal human rights fulfilled, the Barakah that splashes from this region can be useful. There are lots of commitments from Our' an and Hadith related to the Barakah that generated within this region. Many historical examples prove the link between the Barakah and the strategic influence of this land. One example is from the period which is started after the first Muslim Fath of Aelia and ended with the siege of the first crusade. Before this period, the region was full of chaos, and the conflicts between Christians and Jews were also affecting other countries. However, Muslim governance in this region established a peaceful environment, and Barakah spread to other neighbor countries.

El-Awaisi, in his theory, borrows the terminology of the Circle Theory, adapts it to his understanding of a very significant verse in the Qur'an, which underlines the concept of the Barakah including all kinds of Barakah.<sup>17</sup> The verse is as follows; "Glory to He Who did take His worshipper, Muhammad, for a journey by night from Al-Haram Mosque [at Makkah] to al-Aqsa Mosque [at IslamicJerusalem], which we have surrounded with Barakah" (Qur'an, 17:1). El-Awaisi focuses on this verse mentioning Barakah and interprets it as the center of the Barakah is in the al-Aqsa Mosque, which means that the al-Aqsa Mosque is the place where the origin of Barakah is central.

Besides, the Barakah moves in circles around this center, which might be challenging to measure. Following the argument, it is easy to say that Barakah

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<sup>16</sup> Mohd Roslan Mohd Nor, "The Center of Barakah", *The Significance of IslamicJerusalem in Islam*, Kuala Lumpur, 2017, p.44.

<sup>17</sup> El-Awaisi, p.27.

reached all parts of the world, though not on the same scale. The level of Barakah means that, if someone is living near to the center, he/she is very close to the epicenter of the Barakah. This interaction can be animated as the water drops on a lake or a pond. The center of the water drops is always more in-depth than the circles surrounding it. If one lives further away from the center, he/she will have some Barakah but not to the same level as someone living in the center. In other words, the Barakah, which travels in circles around al-Aqsa Mosque, is gradually diminished; the further one moves away from the center.<sup>18</sup>

After long research on circles, El-Awaisi develops the idea and proposes that, as the Barakah is flowing in circles around the whole area of IslamicJerusalem, Al-Ard al-Mubaraka should not be only al-Sham or Egypt but both of them together. Additionally, findings of this Circle Theory shows that the first global Muslim mission started with the revelation received by Muhammad in Makkah in 610 CE and ended with the collapse of the Muslim political system in 1924 in Istanbul. This time was seven years after the British occupation of IslamicJerusalem. The distance between the Kaaba in Makkah and al-Aqsa Mosque in IslamicJerusalem is 1292.5 kilometers, and the distance between Istanbul and IslamicJerusalem is 1269 kilometers.<sup>19</sup> This geographical dimensions, clearly reveals the connection between the countries and cities which are on these circles.

According to theory, circles around Al-Aqsa Mosque are not limited to one or two, but inspired from the verse below; there should be a third circle surrounding all. “The two important words, in verse 1 of chapter Al-Isra of the Qur’an, from (min), and to (ilâ), summarise the twinning relationship between Makkah and IslamicJerusalem.” Prophet Muhammad traveled by night from Al-Haram Mosque at Makkah to al-Aqsa Mosque at IslamicJerusalem. El-Awaisi’s argument may be summarised thus: from is the point of departure or the starting point, which is also the point of reference to the last point. “According to Muslim belief, Makkah was the first chapter in the life of humanity when Adam built the first house of worship on earth.”<sup>20</sup> As an extension to this belief, the final chapter or the relationship with earth will finish in IslamicJerusalem. According to the Qur’anic verses<sup>21</sup> and the Prophetic traditions, “IslamicJerusalem will be the land where the dead will be raised, gathered and assembled. From the Muslim point of view, IslamicJerusalem was the nearest gate to heaven as this is the route the Prophet Muhammad took to heaven.” According to El-Awaisi, “it assured Prophet Muhammad that reaching IslamicJerusalem would mean

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<sup>18</sup> El-Awaisi, p.28.

<sup>19</sup> El-Awaisi, p.30-33.

<sup>20</sup> El-Awaisi, p.31.

<sup>21</sup> Qur’an, 50: 41.

that the influence, impact, and model of IslamicJerusalem would radiate, grow and expand to reach a global geographical location and people. It showed the international elements and effects of IslamicJerusalem and demonstrated that this could be not only an internal issue but a global one. Indeed, it established the uniqueness of this region and its effects on the rest of the world.”<sup>22</sup>

The theoretical framework, which relates justice with peace, also sees the starting point of this theory as the “land of hope.” The term land of hope is relevant to Night Journey of Prophet Muhammad. El-Awaisi argues that the Night Journey and Ascension was a turning point for both Muslims and IslamicJerusalem and a significant starting point of transition in their history. It occurred at a harsh and critical time when the Prophet Muhammad and the oppressed Muslims were enduring all kinds of injury, challenges, and persecution by their people and in their home town Makkah.<sup>23</sup> Roslan states that Night journey happened with the body and the soul together depending on the Tafsir of the Qur’anic verse 17:60.<sup>24</sup> However Urin,<sup>25</sup> while citing Nöldeke, he defines Muhammed’s journey as visionary and compares it with Ezekiel’s journey.<sup>26</sup>

After this very distressing event, Prophet Muhammad met with a unique prophetic experience in IslamicJerusalem. One can argue that the response to his earnest, moving, and emotional complaint came by his transportation on Al-Buraq -a supernatural animal- far away in terms of time and place to the land of hope. He was taken by night on a miracle journey from Makkah to IslamicJerusalem.<sup>27</sup> According to a verse from Quran,<sup>28</sup> the land of hope is not restricted to one particular group based on their religion, race, or gender, but is open to everyone in the universe without any discrimination. It is impossible to argue that IslamicJerusalem is the land of hope for Muslims only. On the

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<sup>22</sup> El-Awaisi, p.32-34.

<sup>23</sup> El-Awaisi, p.39.

<sup>24</sup> Mohd Roslan Nor, “The Land of the Night Journey and Ascension”, *The Significance of IslamicJerusalem in Islam*, Kuala Lumpur, 2017, pp. 95-118.

<sup>25</sup> Uri Rubin, “Muhammad’s Night Journey (Isrâ) to Al-Masjid Al-Aqsa, Aspects of the Earliest Origins of the Islamic Sanctity of Jerusalem” *Al-Qantara*, vol.29, 2008, pp.147-164.

<sup>26</sup> The Book of Ezekiel is the third of the Major Prophets in the Tanakh and one of the major prophetic books in the Old Testament, following Isaiah and Jeremiah. According to the book itself, it records seven visions of the prophet Ezekiel, exiled in Babylon, during the 22 years from 593 to 571 BCE.

<sup>27</sup> El-Awaisi, p.39.

<sup>28</sup> “We said, O fire! Be thou cool and safe for Abraham! Then they planned against him, but We made them the greater losers. We rescued him and (his nephew) Lot (and directed them) to the land which We have given *Barakah* for everyone in the universe” (*Lil’alamin*”, *Al-Ard al-lati Bâraknâfihâ*) (Qur’an, 21:69-71)

contrary, it should be an open land to anyone seeking refuge and serenity.<sup>29</sup> Furthermore, the concept of justice for all humanity (justice for all) can be defended.

### **Seeking Peace and Justice: Cases of Iraq and Syria**

Fifteen years after Operation Iraq Freedom, Iraqis still ask the burning question about the future of their country: can a united Iraq survive? Last year a report on the future of Iraq was published by the Iraq Task Force, a group founded a year earlier by the Washington-based Atlantic Council. The group consisted of many politicians, academics, and experts. In conclusion, the authors of the report offer a series of recommendations to the US administration. According to report; “It is in the interest of our national security that we do our best to help bring about an Iraq that is independent, stable and prosperous: one at peace with its neighbors; one reflecting legitimate and effective governance and one strongly inclined to cooperate closely with the United States in the Middle East and beyond.”<sup>30</sup> If one interprets this report, as everything is stable in the Iraq issue and also may think that justice established and human rights protected in this country. However, many Iraqis are not so optimistic and not convinced that such a goal, like democracy, peace, or justice, can be achieved without changing the government. Also, a close look at Iraq can see that change is not coming at least for the next few years.

When the US and Britain led the invasion in 2003, for what turned out to be no good reason, so many people were wondering whether the removal of Saddam Hussain was all it was cracked up to be. Did the lives of most ordinary Iraqis get better? Moreover, now they are about to get a whole lot worse. Before the operation Iraq, “Baghdad was still noisy and unclean and full of building sites, but it was bustling and thriving. There was not a huge amount in the shops, but people had all they needed to get by. It was a secular state, and Sunnis and Shias seemed to bump along together; there were plenty of Christians, and even a few Jews left. The country has begun to slip into anarchy, but it was not always like this. It used to be a much happier and safer place to live.”<sup>31</sup>

According to news from the region, after May 2018 elections in Iraq, uncertainty over the composition of the new government has raised tensions at a time when public impatience is growing over poor essential services, high unemployment, and the slow pace of rebuilding after the war with Islamic State.<sup>32</sup>

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<sup>29</sup> El-Awaisi, p.40.

<sup>30</sup> Kamran Karadaghi, “Iraq is still far from establishing peace, stability, democracy and prosperity”, *The National*, 8.4.2018.

<sup>31</sup> Chris Maume, “It was better to live in Iraq under Saddam”, *Independent*, 12.6.2014.

<sup>32</sup> “Iraq election: Months after vote, Moqtada al-Sadr finally negotiates alliance with 16 political groups”, *Abc News*, 3.9.2018.

While the problem of justice caused by the civil war in Iraq still in progress, another action is taken to another country, which is in Circles of Barakah. Beginning in 2011, Western and Middle Eastern powers rallied around the slogan “Assad must go!” This singular focus on the fate of Syria’s president hardened positions on all sides and made it much more challenging to explore other options. The calls for regime change have diminished since then, but there are still some voices in Western policy circles that demand a full transition of power from the Assad government. A better approach at this point would be to test the Syrian government’s ability to embark on a new course that has the potential to bring the war to a close.<sup>33</sup> This test may be done by giving a chance to the regime to establish democratic management via elections and also a democratic constitution.

Despite the enthusiasm that justice will be secured when the conflict is resolved, and Syrian society reconstructs itself, history tells a different tale. According to KA, dictatorial regimes elsewhere are unwilling and unable to come to terms with the past because domestic justice is misled by the practice of amnesties or the state’s legal institutions are paralyzed and cannot be reliable.<sup>34</sup> However, we should hope that peace will bring justice to Syria too.

Jenkins argues that the only option now open to the west in Syria is whether or not to make it worse. No amount of grandstanding, feel-good rhetoric, or intermittent bombing is going to impede the Assad regime’s path to victory in its civil war. It must now be evident that every ounce of aid given by the west to the Syrian opposition since 2011 has just prolonged that country’s agony. Seven years ago, western intelligence and the western media declared that Bashar al-Assad was about to fall. Since then, the half-hearted intervention has been worse than no intervention at all. Outside meddling in the Middle East’s civil wars has never been productive, except death and destruction.<sup>35</sup>

At the end of 2019, cases of Iraq and Syria show us that Barakah Circles Theory is very significant. As a proof of peace and justice balance, unless peace is ensured in this region, it cannot be expected that a just order will prevail. In this context, it is not necessary to connect a fair administration directly with democracy. As discussed above, monarchical administrations can sometimes offer a more comfortable environment and fundamental human rights for the happiness of the people, compared to the war and constant conflict environment.

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<sup>33</sup> Jimmy Carter, “In Syria, an Ugly Peace Is Better Than More War”, *The New York Times*, 24.8.2018.

<sup>34</sup> Kassaye KA, “The Long Road towards Justice in Syria: Challenges and Perspectives on War Crimes”, *Journal of Civil & Legal Sciences*, 2018, 7:1, p.2.

<sup>35</sup> Simon Jenkins, “Only Assad’s victory will end Syria’s civil war. The west can do nothing”, *The Guardian*, 9.4.2018.

## CONCLUSION

The ongoing hunger, war, and human rights violations show that there is a justice problem in the world that needs attention. The Barakah Circles Theory shows the way and gives a chance to solve the problem of justice. Also, ongoing Beytulmakdis studies in this region point out that the liberation of the land of hope can be a significant example of the establishment of peace and justice worldwide.

In the theory of barakah circles, as stated above, El-Awaisi takes Al-Aqsa Mosque to the center of Beytulmakdis and forms circles around this area. According to the theory, all the countries which are in these three circles connect geopolitically. This connection is based on some verses from the Quran and also the Hadith of Prophet Mohammad. As a result of this connection, the countries located within the circles should be stable, to establish peace and justice both in the region and worldwide.

Cases of Iraq and Syria, which have been struggling with the civil war in the last 7-15 years, can be seen as a threat to seek justice because of their problematic situation. Also, these two cases prove that the peaceful environment brings justice, whatever their form of government monarchy or democracy. The peace that will reestablish in Iraq and Syria, according to the theory, will be significant in the way of Free Palestine. Thus, the atmosphere of peace and justice that rebuilt in the region will be a hope for all humanity.

The other recent case can be given from the Israeli occupation starting in 1948. Human rights violations and oppression to the Muslim people of Palestine continues. This chaos within the region is affecting lots of countries like Syria, Iraq, Egypt, Turkey, Iran, and Russia, as given in circle theory. Many people lost their lives after the United States occupation through Iraq and Syria. Also, the last coup to the democratically elected leader Morsi in Egypt and the 2016 coup attempt in Turkey showed the geopolitical importance of Islamicjerusalem. Historical experiences show that if Islamic jerusalem were in peace today, this peaceful environment would affect all the surrounding countries and their people positively.

Despite the instability in the region, the barakah effect of the land is still active. Israel is taking the material barakah advantage of Islamicjerusalem. The genetic and technological developments in Israel are examples of this connection. Additionally, retain of Islamicjerusalem by Israeli occupation forces, offering the chance to control powerful and rich countries like the United States and the United Arab Emirates.

To sum up, the link between the land of Barakah and the circles around Islamicjerusalem is crystal clear. This strong relationship is not a new concept. The guidance of verses of Qur'an and the practice of Prophet Muhammad,

first Muslim Fatih, and the Ottoman rule in the region are examples of the importance of this land to Muslims. The Crusader's journeys to this land also show the importance of this region to Christians. Capture attempts of Jews starting from the last fifty years of the Ottoman Empire and Israeli occupation beginning in 1948 also shows the very importance of so-called promised land to the Jews.

On the contrary, all historical periods show that only Muslim control of this land has given peace for both this land and the countries around this region. This peace is a result of the directive of the verse from the Qur'an that means; Islamicjerusalem is 'the land which We have given Barakah for everyone in the universe. (Qur'an 21:71) As a result of this vision, this region can be named as 'land of hope' if Muslims control it for the benefit of all human beings. These historical examples light the way to solve the justice problem and suggests a peaceful coexistence model for both Palestine and other countries in the region.



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# AUSKUNFTSANSPRUCH DES DURCH EINE SAMENSPENDE GEZEUGTEN KINDES GEGEN DEN ARZT IM LICHTE DER SCHWEIGEPFLICHT

*Heterolog Döllenme İle Doğan Çocuğun Hekimin Sır Saklama Yükümlülüğü  
Karşısında Bilgi Edinme Hakkı*

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## **Zusammenfassung**

Die vorliegende Arbeit beschäftigt sich mit dem Thema, Auskunftsanspruch des durch eine Samenspende gezeugten Kindes gegen den Arzt im Lichte der Schweigepflicht.“ Die ärztliche Schweigepflicht ist das Kernstück der ärztlichen Berufsethik und sie wird seit dem Eid des Hippokrates Maßstäbe für die Tätigkeit der Ärzteschaft gesetzt. Hingegen hat das Kind, das mittels einer künstlichen Insemination gezeugt wurde, nach dem Urteil des BGH vom 28.01.2015- XII ZR 201/ 13 grundsätzlich einen Anspruch darauf hat, die Identität seines anonymen Samenspenders verlangen kann. Auf diesem Punkt liegt eine Diskussion bzgl. der Lage der ärztlichen Schweigepflicht angesichts des Auskunftsanspruchs des Kindes vor. Dafür soll zunächst auf die Schweigepflicht selbst eingegangen und die Reichweite der ärztlichen Schweigepflicht unter die Lupe genommen werden. Anschließend werden die Rechte der Beteiligten (Kind, Samenspender und Wunscheltern) anhand des Urteils des BGH (BGH, Urteil vom 28.01.2015- XII ZR 201/13) dargestellt. Schließlich wird die Verhältnismäßigkeit der ärztlichen Schweigepflicht diskutiert.

**Schlüsselwörter:** Arzt, die ärztliche Schweigepflicht, der hippokratische Eid, Straftat, Samenspende, Anspruch auf Auskunft, künstliche Befruchtung, Urteil des BGH

## **Özet**

Bu çalışma “Heterolog Döllenme İle Doğan Çocuğun Hekimin Sır Saklama Yükümlülüğü Karşısında Bilgi Edinme Hakkı” konusunu ele almaktadır. Hekimin sır saklama yükümlülüğü Hipokrat yemininden dek tıp etik kurallarının özünü oluşturur. Diğer yandan ise Alman Federal Mahkemesi’nin 28.01.2015 tarihli XII ZR 201/13 numaralı kararında, heterolog döllenme sonucu dünyaya gelen çocuğun prensip olarak hekimden babasının kim olduğunu öğrenme hakkına sahip olduğu, hekimden biyolojik babasının kimliğini açıklamasını isteyebileceği kabul edilmiştir. Bu noktada hekimin sır saklama yükümlülüğünün çocuğun bilgi edinme hakkı karşısındaki durumu tartışma konusu yaratmaktadır. Bu çalışmada öncelikle hekimin sır saklama yükümlülüğü ve hukuki kapsamı mercek altına alınacaktır. İlgililerin- çocuk, sperm bağışçısı, istemci ebeveynler- bilgi edinme hakkına ilişkin hukuki hakları, Alman Federal Mahkemesi kararı altında incelenecek, son olarak hekimin sır saklama yükümlülüğü ile çocuğun bilgi edinme hakkı arasındaki menfaat çatışması tartışılacaktır.

**Anahtar Kelimeler:** Hekim, hekimin sır saklama yükümlülüğü, Hipokrat yemini, suç, sperm bağışçısı, bilgi edinme hakkı, suni döllenme, Alman Federal Mahkemesi Kararı

## Einführung

Die Klägerinnen, die durch eine künstliche heterologe Insemination gezeugt wurden, waren vor Gericht gezogen und verklagten den behandelnden Arzt auf Weitergabe von Informationen zum Samenspender bzw. zur Identität ihres biologischen Vaters. Jedoch hatte ihre Mutter und ihr rechtlichen Vater durch den Behandlungsvertrag in einer notariellen Erklärung gegenüber der Reproduktionsklinik auf Auskunft über die Identität des anonymen Samenspenders verzichtet. Diesbezüglich hat der BGH (Bundesgerichtshof) am 28.01.2015 ein Urteil, AZ.: XII ZR 201/13, zum „Anspruch des Kindes auf Auskunft über die Identität des anonymen Samenspenders“ verkündet. Der BGH hat übrigens entschieden, dass die ärztliche Schweigepflicht dem Auskunftsanspruch des Spenderkreises nicht entgegen steht.

Die vorliegende Arbeit beschäftigt sich mit dem Thema „Auskunftsanspruch des durch eine Samenspende gezeugten Kindes gegen den Arzt (BGH, Urteil vom 28.01.2015- XII ZR 201/13) im Lichte der ärztlichen Schweigepflicht.“ Nur wenige Diskussionen wurden über das Thema „Auskunftsanspruch des durch eine Samenspende gezeugten Kindes gegen den Arzt“ geführt, wie und ob ein künstlich gezeugtes Kind einen Anspruch auf die Auskunft der Identität seines Samenspenders hat. Anhand eines Urteils vom 28.01.2015 wird untersucht, wie und ob ein Kind, das mittels einer künstlichen (Heterologen) Insemination gezeugt wurde, grundsätzlich einen Anspruch darauf hat, die Identität seines anonymen Samenspenders verlangen kann. Die rechtswissenschaftlichen Grundlagen bzw. Aspekte aus dem grundlegenden Urteil werden nachstehend, um einem gerechten Ergebnis zu kommen, erläutert. Mit genau diesen wird die vorliegende Arbeit befassen. Dafür soll zunächst auf die Schweigepflicht selbst eingegangen und die Reichweite der ärztlichen Schweigepflicht unter die Lupe genommen werden. Anschließend folgt eine Darstellung der Rechte der Beteiligten (Kind, Samenspende und Wunscheltern). Schließlich wird die Verhältnismäßigkeit der ärztlichen Schweigepflicht diskutiert.

## Ärztliche Schweigepflicht

### 1. Was versteht man unter der ärztlichen Schweigepflicht?

Die ärztliche Schweigepflicht ist das Kernstück der ärztlichen Berufsethik.<sup>1</sup> Sie wird seit dem Eid des Hippokrates Maßstäbe für die Tätigkeit der Ärzteschaft gesetzt.<sup>2</sup>

*„...Was ich bei der Behandlung sehe oder höre oder auch außerhalb der Behandlung im Leben der Menschen, werde ich, soweit man es nicht*

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<sup>1</sup> Bayer, Die ärztliche Schweigepflicht, in: Ulsenheimer (Hrsg.), Rechtliche Probleme in Geburtshilfe und Gynäkologie, 1990, s.118.

<sup>2</sup> Pöttgen, Medizinische Forschung und Datenschutz, 2008, s. 216 ff.

*ausplaudern darf, verschweigen und solches als ein Geheimnis betrachten.*"<sup>3</sup>

Die ärztliche Schweigepflicht verlangt von dem Arzt nicht zu äußern, was der von ihm betreute Person nicht wünscht und was die Person in ihrem rechtlichen Verfahren nicht offenbart wissen möchte.<sup>4</sup> Der Arzt grundsätzlich die Pflicht eine Vertrauensverhältnisses zwischen Arzt und Patient aufzuführen.<sup>5</sup> Denn die Basis der Arzt- Patient- Beziehung wird stets im gegenseitig Vertrauen liegen.<sup>6</sup> Die ärztliche Schweigepflicht setzt keinen Behandlungsvertrag voraus, sondern sie kommt vom Natur des Berufs her.<sup>7</sup> Trotzdem kann sie nach heutigem recht auf eigenen Rechtsgrundlagen herleitet werden. Diese sind §9 MBO- Ä (Musterberufsordnung der Ärzte), § 14 Abs.2 TPG (Transplantationsgesetz), §19 Abs.3 TPG, § 203 StGB (Strafgesetzbuch). In diesem Zusammenhang im folgenden Abschnitt wird die Reichweite der ärztlichen Schweigepflicht erläutert.

### **1.1. Reichweite der ärztlichen Schweigepflicht**

Die ärztliche Schweigepflicht wurzelt in der Menschenwürde nach Art. 1 Abs.1 GG und dem allgemeinen Persönlichkeitsrecht nach Art.2 Abs.1 GG.<sup>8</sup> Demnach steht der „ Wille des Einzelnen, so höchstpersönliche Dinge wie die Beurteilung seines Gesundheitszustands durch einen Arzt vor fremden Einblick zu bewahren“, auch unter dem Schutz der Verfassung.<sup>9</sup>

*„ Wer sich in ärztliche Behandlung begibt, muss und darf erwarten, dass alles, was der Arzt im Rahmen seiner Berufsausübung über seine gesundheitliche Verfassung erfährt, geheim bleibt und nicht zur Kenntnis Unberufener gelangt. Nur so kann zwischen Patient und Arzt jenes Vertrauen entstehen, das zu den Grundvoraussetzungen ärztlichen Wirkens zählt, weil es die Chancen der Heilung vergrößert und damit- im Ganzen gesehen- der Aufrechterhaltung einer leistungsfähigen Gesundheitsfürsorge dient.“*<sup>10</sup> (BVerfG NJW 1972, 1123,1124)

Des Weiteren ist die Pflicht zur Verschwiegenheit für die in Deutschland tätigen

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<sup>3</sup> Pschyrembel/ Zink, Pschyrembel Klinisches Wörterbuch mit den klinischen SYDROMEN UND Nomia Anatomica, 255. Auflage, s. 695, f.s.v. *Hippokratischer Eid*.

<sup>4</sup> Fritze/ Mehrhoff (Hrsg.), Die Ärztliche Begutachtung, Rechtsfragen, Funktionsprüfungen, Beurteilungen, 8.Aufl. 2012, s.3.

<sup>5</sup> Knauer/ Brose in Spickhoff (Hrsg.), Medizinrecht, 8. Aufl. 2014, § 205 Rn.1.

<sup>6</sup> Stacher, Ganzheitliche Krebstherapie- 5. Wiener Dialog über Ganzheitsmedizin, 2009, s.122.

<sup>7</sup> Knauer/ Brose in Spickhoff (Hrsg.), Medizinrecht, 8. Aufl. 2014, § 203 Rn.1 ff.

<sup>8</sup> Geppert, Die ärztliche Schweigepflicht im Strafvollzug, Aufl. 1 1983, s.12.

<sup>9</sup> Ulsenheimer, Arztstrafrecht in der Praxis, 5. Aufl. 2015, s.529.

<sup>10</sup> Madea, Praxis Rechtsmedizin: Befunderhebung, Rekonstruktion, Begutachtung, 2. Aufl. 2007, s. 575.

Ärztinnen und Ärzte in § 9 MBO- Ä geregelt. § 9 MBO- Ä lautet wie folgt:<sup>11</sup>

„(1) Ärztinnen und Ärzte haben über das, was ihnen in ihrer Eigenschaft als Ärztin oder Arzt anvertraut oder bekannt geworden ist – auch über den Tod der Patientin oder des Patienten hinaus – zu schweigen. Dazu gehören auch schriftliche Mitteilungen der Patientin oder des Patienten, Aufzeichnungen über Patientinnen und Patienten, Röntgenaufnahmen und sonstige Untersuchungsbefunde.

(2) Ärztinnen und Ärzte sind zur Offenbarung befugt, soweit sie von der Schweigepflicht entbunden worden sind oder soweit die Offenbarung zum Schutze eines höherwertigen Rechts-gutes erforderlich ist. Gesetzliche Aussage- und Anzeigepflichten bleiben unberührt. Soweit gesetzliche Vorschriften die Schweigepflicht der Ärztin oder des Arztes einschränken, soll die Ärztin oder der Arzt die Patientin oder den Patienten darüber unterrichten.

(3) Ärztinnen und Ärztedürfenihren Mitarbeiterinnen und Mitarbeitern sowie Personen, die zur Vorbereitung auf den Beruf an der ärztlichenTätigkeitteilnehmen, Informationenüber Patienten zugänglich zu machen. Über die gesetzliche Pflicht zur Verschwiegenheit haben sie diese zu belehren und dies schriftlich festzuhalten.

(4) Gegenüber den Mitarbeiterinnen und Mitarbeitern von Dienstleistungsunternehmen sowie sonstigen Personen, die an der beruflichen Tätigkeit mitwirken, sind Ärztinnen und Ärzte zur Offenbarung befugt,soweit dies für die Inanspruchnahme der Tätigkeit der mitwirkenden Personen erforderlich ist. Ärztinnen und Ärzte haben dafür zu sorgen, dass die mitwirkenden Personen schriftlich zur Geheimhaltung verpflichtet werden. Diese Verpflichtung zur Geheimhaltung haben Ärztinnen und Ärzte vorzunehmen oder auf das von ihnen beauftragte Dienstleistungsunternehmen zu übertragen.

(5) Wenn mehrere Ärztinnen und Ärzte gleichzeitig oder nacheinander dieselbe Patientin oder denselben Patienten untersuchen oder behandeln, so sind sie untereinander von der Schweigepflicht insoweit befreit, als das Einverständnis der Patientin oder des Patienten vorliegt oder anzunehmen ist.“

Nach dieser Regelung werden keine strafrechtliche Sanktionen angesichts der Verletzung der ärztlichen Schweigepflicht vorgesehen. Zudem obliegt die ärztliche Schweigepflicht unter strafrechtliche Sanktionierung. In der aktuellen Fassung des Strafgesetzbuches ist die Pflicht zur Verschwiegenheit in § 203 verankert. Taten nach § 203 Abs.1 StGB werden mit Freiheitsstrafe bis zu einem Jahr oder mit Geldstrafe bestraft.

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<sup>11</sup> Lilie, Medizinrecht Gesetzestexte, 7. Aufl. 2015, s. 103

Überdies spricht der § 19 Abs. 3 Nr. 3 TPG (i.V.m. 14 Abs. 2 TPG) von einer Strafbarkeit, d.h. ein Arzt kann dich durch die Weitergabe von Daten gegenüber Kommission strafbar machen. Also jeder vorsätzliche Verstoß gegen das Verschwiegenheitsgebot führt dazu, dass der Arzt mit Freiheitsstrafe bis zu einem Jahr oder mit Geldstrafe bestraft werden kann. Das allgemeine Persönlichkeitsrecht eines Patienten wird auf die Schweigepflicht des Arztes auch zivilrechtlich geschützt. Aufgrund einer Verletzung der Schweigepflicht kann die behandelte Person gegen den Arzt Schadenersatzansprüche i.S.d. § 823 I BGB bzw. § 823 II BGB i.V. m. § 203 StGB bzw. § 19 TPG geltend machen.<sup>12</sup>

## **1.2. Allgemeine Grundzüge der ärztlichen Schweigepflicht i.S.d. § 203 StGB**

### **a. Das geschützte Rechtsgut**

Nach überwiegender Auffassung in der Rechtsprechung und in der Lehre wird als Rechtsgut, welches im Sinne des § 203 StGB zu behandeln ist, die Geheimsphäre und Individualsphäre der Person angenommen. Sie haben in dem verfassungsrechtlich geschützten allgemeinen Persönlichkeitsrecht gem. nach Art. 2 Abs. 1 i.V.m. Art. 1 Abs. 1 GG (das ergibt sich aus Art. 2 I GG der freien Entfaltung und Art. 1 I GG der Menschenwürde) ihre Wurzeln und findet ihren Ausdruck im Grundrecht, das Recht auf informationelle Selbstbestimmung. Im Mittelpunkt dieses Artikels steht das private Geheimnis vor.<sup>13</sup>

### **b. Objektiver Tatbestand**

Geschützt werden durch § 203 StGB persönliche Geheimnisse.<sup>14</sup> Darunter versteht man eine Tatsache, die nur in einem bestimmten abgrenzten Personenkreis bekannt ist und an deren Geheimhaltung der Patient ein „verständliches“, also sachlich begründetes und damit schutzwürdiges Interesse hat.<sup>15</sup> Diese Geheimnisse können alle Erkenntnisse der ärztlichen Behandlung bspw. Anamnese, Diagnose, Art der Krankheit, Röntgenaufnahme usw. dargelegt werden.

### **c. Tathandlung: Offenbaren eines Geheimnisses**

Der Bruch der ärztlichen Schweigepflicht – die Tathandlung – ist die Offenbarung eines fremden Geheimnisses. Dies heißt: Weitergabe des

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<sup>12</sup> Schlund in Laufs (*Hrsg.*) / Uhlenbruck / Krauskopf et al., Handbuch des Arztrechts, 3. Aufl. 2002, S. 545.

<sup>13</sup> edb., S. 546-547.

<sup>14</sup> Cierniak / Pohlitz in Müko - StGB §§ 185-262, 2012, § 203 Rn.11.

<sup>15</sup> Ulsenheimer in Laufs / Kern (*Hrsg.*), Handbuch des Arztrecht, 4. Aufl. 2010, § 66 Der objektive Tatbestand §§ 203, 204 StGB, Rn.1.

Geheimnisses an einen dritten Person, der zum Kreis des schweigepflichtigen Kreises nicht gehört.<sup>16</sup> Die anonymisierte Bekanntgabe von medizinischen Daten ist kein „Offenbaren“ nach § 203 StGB dargestellt.<sup>17</sup>

#### **d. Subjektiver Tatbestand**

Der subjektiver Tatbestand des § 203 StGB setzt vorsätzliches Handeln voraus.<sup>18</sup> Strafbar ist nämlich die vorsätzliche, rechtswidrige, schuldhaftes Verletzung gegen die Schweigepflicht, wobei bedingter Vorsatz genügt.<sup>19</sup> Hierbei glaubt der Arzt irrtümlich, dass ein Geheimnis nicht mehr vorliege, wird die Verletzung der Pflicht zur Verschwiegenheit nicht strafrechtlich geahndet.<sup>20</sup>

#### **e. Zur Verschwiegenheit verpflichtetes Personenkreis**

§ 203 StGB ist ein Sonderdelikt mit einem ausschließenden Katalog an Tatsubjekten. § 203 Abs.1 Nr.1 StGB lautet wie folgt:

*„(1) Wer unbefugt ein fremdes Geheimnis, namentlich ein zum persönlichen Lebensbereich gehörendes Geheimnis oder ein Betriebs- oder Geschäftsgeheimnis, offenbart, das ihm als*

- 1. Arzt, Zahnarzt, Tierarzt, Apotheker oder Angehörigen eines anderen Heilberufs, der für die Berufsausübung oder die Führung der Berufsbezeichnung eine staatlich geregelte Ausbildung erfordert,*
- 2. Berufspsychologen mit staatlich anerkannter wissenschaftlicher Abschlußprüfung,*
- 3. Rechtsanwalt, Kammerrechtsbeistand, Patentanwalt, Notar, Verteidiger in einem gesetzlich geordneten Verfahren, Wirtschaftsprüfer, vereidigtem Buchprüfer; Steuerberater, Steuerbevollmächtigten oder Organ oder Mitglied eines Organs einer Rechtsanwalts-, Patentanwalts-, Wirtschaftsprüfungs-, Buchprüfungs- oder Steuerberatungsgesellschaft,*
- 4. Ehe-, Familien-, Erziehungs- oder Jugendberater sowie Berater für Suchtfragen in einer Beratungsstelle, die von einer Behörde oder Körperschaft, Anstalt oder Stiftung des öffentlichen Rechts anerkannt ist,*
- 5. Mitglied oder Beauftragten einer anerkannten Beratungsstelle nach den §§ 3 und 8 des Schwangerschaftskonfliktgesetzes,*
- 6. staatlich anerkanntem Sozialarbeiter oder staatlich anerkanntem*

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<sup>16</sup> edb., Rn.8-9.

<sup>17</sup> Braun, „Schweigepflicht in Arztpraxis und Krankenhaus“ in Roxin/ Schroth (Hrsg.), Handbuch des Medizinstrafrechts, 4. Aufl. 2010, s.239.

<sup>18</sup> Knauer/ Brose in Spickhoff(Hrsg.), Medizinrecht, 2. Aufl. 2014, StGB §§ 203-205 , Rn. 53.

<sup>19</sup> Ulsenheimer in Laufs/ Kern (Hrsg.), Handbuch des Arztrecht, 4. Aufl. 2010, § 66 Der objektive Tatbestand §§ 203,204 StGB, Rn. 2-3.

<sup>20</sup> Braun in Roxin/Schroth (Hrsg.), s.241.

*Sozialpädagogen oder*

7. *Angehöriger eines Unternehmens der privaten Kranken-, Unfall- oder Lebensversicherung oder einer privatärztlichen, steuerberaterlichen oder anwaltlichen Verrechnungsstelle*

*anvertraut worden oder sonst bekanntgeworden ist, ...”*

Zusammenfassend gehören zum schweigepflichtigen Personenkreis Ärzte, Tierärzte, Apothekern und sonstiger Heilberufe (z.B. Hebamme, Krankenschwester). Jedoch gehören die Personen, die in einem Krankenhaus tätig sind, nicht zu diesem Personenkreis.

#### **f. Wann ist die Verletzung der ärztlichen Schweigepflicht rechtswidrig?**

Offenbaren der Patientengeheimnisse ist nur strafbar i.S.d. § 203 StGB, wenn unbefugte Weitergabe liegt vor. In eigenen Fällen können Ärzte/ Ärztinnen berechtigt bzw. verpflichtet sein, Patientengeheimnisse weiterzugeben.<sup>21</sup> Diese Rechtfertigung kommen insbesondere in Betracht:

- I. Patienteneinwilligung (sog. Entbindung von der Schweigepflicht)
- II. Mutmaßliche Einwilligung
- III. Rechtfertigender Notstand, §34 StGB
- IV. Gesetzliche Offenbarungspflichten- und rechten

Die ärztliche Schweigepflicht schützt das Vertrauen der behandelten Personen. Sie versichert nicht ein Eigeninteresse der Arztes an der Geheimhaltung seiner Behandlung.<sup>22</sup> Wenn eine stillschweigende oder ausdrückliche **Einwilligung des Patienten** vorliegt, fällt die Schweigepflicht des Arztes weg. Die Gestaltung der Einwilligung wird in verschiedenen Formen aufgenommen. Die Einwilligung kann lediglich vor der Tat erläutert werden. Ferner muss sie noch außen erkennbar geworden sein.<sup>23</sup>

Eine Offenbarungsbefugnis kann sich auch **der mutmaßlichen Einwilligung** ergeben. Wenn der Patient seine Einwilligung nicht erklären kann bzw. sein Einverständnis nicht geben kann, etwa weil er bewusstlos ist, folgt mutmaßliche Einwilligung, die vermutete Zustimmung des Patienten ist.<sup>24</sup> Beispielweise kann der Arzt die Angehörigen eines bewusstlosen Unfallverletzten oder im Falle des Todes bzw. tödlicher Erkrankungen informieren.<sup>25</sup>

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<sup>21</sup> Knauer/Brose in Spickhoff (Hrsg.), Medizinrecht 2011 §203 Rn.32; Fischer, Strafgesetzbuch und Nebengesetze, 60.Aufl. 2013, § 203 Rn. 31; Ulsenheimer, Arztstrafrecht in der Praxis, s.540.

<sup>22</sup> Kiesecker/ Rieger in Heidelberger Kommentar 30. Aktualisierung Arztrecht, Krankenhausrecht, Medizinrecht, 2010, Nr.4750, Rn.5.

<sup>23</sup> Braun in Roxin/Schroth (Hrsg.), s.244.

<sup>24</sup> Ulsenheimer, Arztstrafrecht in der Praxis, s. 545.

<sup>25</sup> Schönke/Schröder/Lenker in Schönke(Hrsg.) et al., Strafgesetzbuch: StGB Kommentar, 15.



Eine weitere Offenbarungsbefugnis ist für den Arzt gegeben, wenn **gesetzliche Melde- und Offenbarungspflichten/-rechte** vorliegen. Diese finden sich in verschiedenen (Spezial-)Gesetzen verstreut. Sie ergibt sich bspw. aus den gesetzlichen Meldepflichten nach dem Infektionsschutzgesetz. (§§6 bis 15 IfSG) Des Weiteren werden in dem Katalog des § 138 StGB die Straftaten aufgeführt, die zur Anzeige gebracht werden müssen.<sup>26</sup>

Schließlich ergibt sich eine Offenbarungsbefugnis noch aus dem sogenannten Güter- und Interessenabwägungsprinzip. Das Vorliegen des rechtfertigenden Notstands gemäß §34 StGB kann den Bruch der Schweigepflicht rechtfertigen. Ein Recht zur Offenbarung entsteht dann, wenn sie zum Schutz eines höherrangigen Rechtsgutes erforderlich ist. Das Oberlandesgericht Frankfurt hat in seinem Urteil vom 05.10.1999, AZ.: 8U 67/99 die Mitteilung eines Arztes über die HIV- Infektion eines Ehemannes an dessen Frau bezüglich des § 34 StGB als gerechtfertigt angesehen.<sup>27</sup>

Das Oberlandesgericht Frankfurt stellte in seinem Urteil dazu folgendes fest:<sup>28</sup>

*„ Selbst wenn man ergänzend zum Schutz der Intimsphäre des Patienten den Gesichtspunkt des präventiven Gesundheitsschutzes hinzukommt, kann nicht zweifelhaft sein, daß dem Schutz des Lebens und der Gesundheit einer konkret von einer Ansteckung bedrohten Patienten Vorrang gebührt und zu einer Entscheidung zu seinen Gunsten führen muß. Auch der Senat hat keinen Zweifel daran, daß Aids- Patienten in ihrem Vertrauen auf die Zuverlässigkeit der ärztlichen Verschwiegenheit geschützt werden müssen. [...]*

*Dieser Grundsatz erfährt jedoch eine Einschränkung durch § 34 StGB, wonach das ärztliche Schweigegebot zum Schutz einer höherwertigen Rechtsgutes durchbrochen werden darf und sogar muß. [...] Der Senat ist unverändert davon überzeugt, daß der von ... ausgehenden Gefahr für die Klägerin anders als durch ihre Information über den Aids- Ausbruch nicht begegnet werden konnte. [...] Er hatte zu bedenken, daß auch die Klägerin seine Patientin war und von ihm Aufklärung über die ihr bedrohenden schwerwiegenden Risiken beanspruchen konnte. [...]*

Ansichts der Verantwortlichkeit des Beklagten auch für die Sicherheit

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Abschnitt, § 203, s. 1798 ff.

<sup>26</sup> Zuck/ Quass, Medizinrecht: Öffentliches Medizinrecht, Haftpflichtrecht, Arztstrafrecht, 2. Aufl., Rn.66,s.240.

<sup>27</sup> Chasklowicz/ Weber in Chasklowicz/Schroeder et al., Ärztliche Schweigepflicht und Schutz der Patientendaten: Wissenswertes vom Datenschutz über die Praxisdurchsuch bis zum Zeugnisverweigerungsrecht des Arztes, 1. Aufl., s.59.

<sup>28</sup> OLG Frankfurt, AZ.: 8U 67/99, Urteil vom 05.10.1999, URL:[http://www.lareda.hessenrecht.hessen.de/lexsoft/default/hessenrecht\\_lareda.html#docid:3779845](http://www.lareda.hessenrecht.hessen.de/lexsoft/default/hessenrecht_lareda.html#docid:3779845). [21.03.2019].

der Klägerin konnte und durfte er jedoch allein auf Grund des Versprechens des Erkrankten, er werde Kondome benutzen. Keinesfalls davon überzeugt sein, daß dies auch geschehen würde. [...] Ihm gereicht zum Vorwurf, daß er eine falsch, gewichtete Güterabwägung im Sinne des § 34 StGB vorgenommen hat. Dies zu beurteilen ist Aufgabe der Gericht.“

## **2. Schweigepflicht und künstliche Befruchtung**

Ein besonderes Problem der Pflicht zur Verschwiegenheit des Arztes betrifft Reproduktionsmediziner.<sup>29</sup> Der Bundesgerichtshof hat am 28.01.2015 durch Urteil ( XII ZR 201/13) entschieden, dass Kinder, die mittels künstlicher heterologer Insemination gezeugt wurden, grundsätzlich einen Auskunftsanspruch gegen den Reproduktionsmediziner über die Identität des anonymen Samenspenders verlangen kann. In diesem Zusammenhang verliert die Berufsausübungsfreiheit des Reproduktionsmediziners seine maßgebliche Bedeutung. In diesem Fall kollidieren gegenläufige Rechtsgüter miteinander, die im folgenden Abschnitt auf der Basis von dem Urteil des BGH erläutert werden. Hiermit sind die konkrete Rechte der heterologen Insemination aufgeklärt.

### **Konkrete Rechte der heterologen Insemination**

Um das Verhältnis zwischen dem Gebot der ärztlichen Schweigepflicht einerseits und der Offenbarungspflicht des Arztes andererseits zu bewerten, müssen somit vor allem die individuellen Rechte der beteiligten Personen bei heterologen Inseminationen ermittelt und dann gegeneinander abgewogen werden.

#### **a. Rechte auf Verschwiegenheit**

##### **aa. Samenspender**

Das konkrete Recht des Samenspenders herleitet aus dem allgemeinen Persönlichkeitsrecht. (Art.2 Abs. 1 i.V.m Art. 1 Abs. 1 GG) Das ist unterfallendes Recht auf informationelle Selbstbestimmung als die Befugnis des Einzelnen, grds. selbst zu entscheiden, wann und innerhalb welcher Grenzen persönliche Lebenssachverhalte entdeckt werden.<sup>30</sup>

Bei der Insemination ist der Samenspender durch den behandelnden Arzt informiert werden, dass das Kind Auskunft verlangen kann. Aus dieser Richtung ist keine Anonymität zugesichert worden. Weil das Recht des

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<sup>29</sup> Chasklowicz/ Weber in Chasklowicz/Schröder et al., Ärztliche Schweigepflicht und Schutz der Patientendaten: Wissenwertes vom Datenschutz über die Praxisdurchsuch bis zum Zeugnisverweigerungsrecht des Arztes, 1. Aufl., s.150.

<sup>30</sup> BGH, Urteil vom 28.01.2015, XII ZR 201/13, Rn.52.

Samenspenders auf informationelle Selbstbestimmung bis dahin allerdings das Recht des Kindes auf Kenntnis der eigenen Abstammung gegenüber, dem regelmäßig ein höheres Gewicht zu kommen wird.<sup>31</sup>

Ein weiteres konkretes Recht ist das wirtschaftliche Interesse des Samenspenders. Das gezeugte Kind kann unterhalts- und erbrechtliche Ansprüche anmelden. Auf diesem Punkt ist das Interesse des Samenspenders gegen die Rechtsposition des Kindes abzuwägen.

### **ab. Wunscheltern**

Das geschützte Interesse der Wunscheltern besteht insbesondere aus dem denkbaren Schamgefühl. Dieses Gefühl empfinden sie, weil sie unfähig sind, ein Kind in natürlicher Weise zu zeugen. Genau in dieser Situation spielt die Schweigepflicht des Arztes eine wichtige Rolle. Der Arzt ist verpflichtet, einem Patienten seine Angst vor Offenbarung gegenüber Dritten in höchstpersönlichen und intimen Angelegenheiten zu nehmen.<sup>32</sup>

Die Kindesmutter soll vor Gefährdungslagen für Leben, Gesundheit, persönliche Freiheit oder andere schutzwürdige Belange geschützt werden gemäß § 31 SchKG, die sich ergeben können, wenn ihr soziales Umfeld von der Mutterschaft erfährt.<sup>33</sup>

Hierbei spielt die ärztliche Schweigepflicht eine unheimlich große Rolle. Gleichfalls begründet für eine Pflicht zur Geheimhaltung die Sorge der Wunscheltern, dass eine Offenbarung den Familienfrieden stet stören könnte.

### **b. Rechte des Kindes**

Das Recht des Kindes auf Kenntnis der eigenen Abstammung ist in den Art. 2 Abs. 1 i.V.m. Art. 1 Abs. 1 GG garantiert, umfasst das allgemeine Persönlichkeitsrecht und genießt daher verfassungsrechtlichen Schutz.<sup>34</sup> Jedoch verleiht das allgemeine Persönlichkeitsrecht keinen Anspruch auf Verschaffung solcher Kenntnis und kann nur vor der Vorenthaltung erlangbarer Informationen durch staatliche Organe schützen.<sup>35</sup>

Der Auskunftsanspruch des Kindes Ausfluss seines verfassungsrechtlichen geschützten allgemeinen Persönlichkeitsrechts dient eine Information zu haben, die für die Entfaltung der Persönlichkeit von elementarer Bedeutung sein kann. Weil das Recht auf freie Entfaltung der Persönlichkeit und die Verpflichtung zur Achtung und zum Schutz der Menschenwürde gemäß Art. 2 Abs. 1 i.V.m. Art. 1 Abs. 1 GG jedem Einzelnen einen autonomen Bereich

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<sup>31</sup> edb., Rn. 53-54.

<sup>32</sup> edb. Rn. 55.

<sup>33</sup> edb. Rn. 33.

<sup>34</sup> edb., Rn. 7.

<sup>35</sup> edb., Rn. 8.

privater Lebensgestaltung schützen. Somit kann man seine Individualität entwickeln und wahren. Die Kenntnis der eigenen Abstammung besitzt zu den Elementen, die für die Entfaltung der Persönlichkeit von entscheidender Bedeutung sein können. Bezüglich der Ahnen kann im Bewusstsein des Einzelnen eine Schlüsselstellung für sein Selbstverständnis und seine Stellung in der Gemeinschaft einnehmen. Die Bekanntschaft der Herkunft kann wichtige Anknüpfungspunkte für das Verständnis des familiären Zusammenhangs und für die Entwicklung der eigenen Persönlichkeit geben. Wenn die eigene Abstammung zu klären unmöglich ist, kann diese Unmöglichkeit der Person riesig verunsichern und belasten.<sup>36</sup>

### **Verhältnismäßigkeit der ärztlichen Schweigepflicht**

Auf diesem Punkt kommt in Betracht die Berufsausübungsfreiheit (Art. 12 Abs. 1, Satz 2 GG) des Reproduktionsmediziners und der Schutz dieses Gesetzes richtet sich gegen die Normen oder Akte, die sich entweder direkt auf die Berufstätigkeit beziehen oder mindestens eine objektiv berufsregelnde Angelegenheit haben. Es kann aber dahinstehen, ob die Verpflichtung zur Einwilligung von Auskünften in der Beziehung mit vorgenommenen ärztlichen Behandlungsmaßnahmen insoweit eine Intervention darstellt. Weil bei der vorzunehmenden Abwägung diese Rechtsposition keine maßgebliche Bedeutung bekommt.<sup>37</sup> Dazu kommen die einschlägigen Richtlinien der Bundesärztekammer für die Reproduktionsmedizin. Für Reproduktionsmedizin geltenden Richtlinien der Bundesärztekammer ist seit 1985 festgehalten, dass der Arzt dem Samenspender keine Anonymität zusichern kann, sondern ihn aufklären muss, dass er dem Kind gegenüber zur Nennung des Namens verpflichtet ist beziehungsweise dokumentieren hat, dass sich der Samenspender damit einverstanden erklärt.<sup>38</sup>

Man kann hierbei sagen, dass das Persönlichkeitsrecht des Kindes ein erhebliches Gewicht hat und aus Art. 12 Abs.1 Satz 2 GG folgendes Geheimhaltungsinteresse des behandelnden Arztes existiert nicht. Und auch nach dem Urteil des BGH vom 28.1.2015 überwiegt das Auskunftsinteresse des Kindes wegen seines Persönlichkeitsrechtes angesichts der ärztlichen Schweigepflicht.

Der Behandlungsvertrag befindet sich zwischen dem Wunscheltern und dem Arzt. Das gezeugte Kind ist in diesem Zusammenhang dritte Person. Aber dieser Vertrag vereinbart zugunsten des Kindes. Somit gehört das Kind auch unter diesem Vertrag. Die Schweigepflicht des behandelnden Arztes gegenüber

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<sup>36</sup> edb., Rn. 41.

<sup>37</sup> edb., Rn. 44.

<sup>38</sup> edb., Rn. 15.

Dritten kann allerdings im allgemeinen Persönlichkeitsrecht wurzelnden Anspruch des Kindes jedenfalls eine Offenbarungspflicht des behandelnden Arztes folgt. Damit verhält sich der Arzt nicht unbefugt im Sinne des §203 StGB und gerechtfertigt.

### **Anspruch auf die Auskünfte des durch eine Samenspende gezeugten Kindes**

Nach dem Urteil des BGH vom 28.1.2015, XII ZR 201/13 kann ein Kind, wenn das mittels einer Samenspende gezeugt wurde, einen Anspruch auf die Auskünfte, die Identität ihrer anonymen Samenspender zu erfahren. Dies ergibt sich unter dem Gesichtspunkt von Treu und Glauben i.S.d. § 242 BGB. Vorausgesetzt ist, dass der Anspruchsteller, der zur Durchsetzung eines eigenen Rechts auf Auskunft angewiesen ist, in entschuldbarer Weise über das Bestehen und den Umfang seines Rechtes im Ungewissen ist und das Gegenüber unschwer in der Lage ist, die zur Beseitigung dieser Ungewissheit erforderlichen Auskünfte zu erteilen und ihm dies zumutbar ist.<sup>39</sup>

BGH hat einige Voraussetzungen festgestellt, die erfüllt sein müssen.

Es muss zwischen den Parteien eine Rechtsbeziehung bestehen, die „Sonderverbindung“ genannt wird. Eine Sonderverbindung kann sich aus einem vertraglichen, gesetzlichen Schuldverhältnis, oder familienrechtlichen oder erbrechtlichen Verhältnis ergeben<sup>40</sup> und sie kann bei einem Vertrag mit Schutzwirkung zugunsten Dritter entstehen, die zu einem Auskunftsanspruch gemäß § 242 BGB führt.

BGH definiert den Behandlungsvertrag zwischen Wunscheltern und dem behandelnden Arzt ist als Vertrag mit Schutzwirkung des zeugenden Kindes. Somit entsteht eine Rechtsbeziehung zwischen dem Spenderkind und Reproduktionsmediziner. Auf diese Weise kann das Spenderkind direkt aus dem Behandlungsvertrag Auskunftsansprüche gegen den Reproduktionsmediziner stellen. Eine weitere Voraussetzung ist, dass das Kind ein konkretes Informationsbedürfnis über die Identität des Samenspenders hat. Dieses Bedürfnis kommt auf das Recht auf Kenntnis der eigenen Abstammung an. Dieses Recht ist das verfassungsrechtlich geschützte allgemeine Persönlichkeitsrecht.

Das auffälligste ist, dass BGH kein bestimmtes Mindestalter für Auskunftsanspruch des Kindes voraussetzt. Er lehnt die angenommene Mindestaltersgrenze von 16 Jahren ab und gestattet, dass der Anspruch durch Eltern als gesetzliche Vertreter des Kindes geltend gemacht werden kann.<sup>41</sup>

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<sup>39</sup> edb., Rn. 10.

<sup>40</sup> edb., Rn. 11.

<sup>41</sup> edb., Rn. 34.

### **Schlussfolgerung**

Die ärztliche Schweigepflicht verlangt von dem Arzt, nicht zu äußern, was der von ihm betreute Person nicht wünscht und was die Person in ihrem rechtlichen Verfahren nicht offenbart wissen möchte.

Die ärztliche Schweigepflicht obliegt unter strafrechtliche Sanktionierung. Das Patientengeheimnis wurde in §203 StGB unter strafrechtlichen Schutz gestellt. Auch der § 19 Abs. 3 Nr. 3 TPG (i.V.m. 14 Abs. 2 TPG) spricht von einer Strafbarkeit, d.h. ein Arzt kann dich durch die Weitergabe von Daten gegenüber Kommission strafbar machen.

Der BGH hat durch Urteil (XII ZR 201/13) entschieden, dass ein Kind, das durch eine künstliche (Heterologe) Insemination gezeugt wurde, grundsätzlich von der Reproduktionsklinik Auskunft über die Identität des anonymen Samenspenders verlangen kann. Ein bestimmtes Mindestalter des Kindes ist dafür nicht erforderlich.

Das Persönlichkeitsrecht des Kindes hat ein erhebliches Gewicht und aus Art. 12 Abs.1 Satz 2 GG folgendes Geheimhaltungsinteresse des behandelnden Arztes existiert nicht. Und auch nach dem Urteil des BGH vom 28.1.2015 überwiegt das Auskunftsinteresse des Kindes wegen seines Persönlichkeitsrechts angesichts der ärztlichen Schweigepflicht.

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# POLITICAL AND CONSTITUTIONAL DEVELOPMENTS IN TUNISIA AND EGYPT IN THE AFTERMATH OF THE ARAB SPRING

*Arap Baharı Sonrası Tunus ve Mısır'daki Siyasal ve Anayasal Gelişmeler*

**Dr. Abdurrahman TEKİN , Res. Asst. Ömer TEMEL\***

## **Abstract**

People of the Arab World, who had to lead their lives under authoritarian governments for remarkably long years until the Arab Spring, failed to obtain any concrete response to their democratic demands and quests. The civil commotions commencing in the year 2010 spread over the whole Arab territories and led to overthrowing of the leaders in Tunisia, Egypt and Libya, which hallmarked the signals of a new approaching era. The given democratisation movements have proved to be unsuccessful owing to the facts that the people of the Arab World lacked experience in the regime of democracy, and that the countries with particular goals on the said territory were irritated by the Islamic awakening, and that the new authorities taking over the governments might make use of the natural resources and strategic regions against the interests of the western states and that Israel's security in the region might be jeopardised.

As a result of protracted endeavours in Tunisia, such a constitution that bears nothing less than those of western liberal democracies has been drafted and adopted through public reconciliation, and afterwards, political and constitutional reforms have been carried out decisively. As for Egypt, the constitution drafted in 2012 was a significant stride towards democratisation and acquisition of rights and freedom, which nevertheless was suspended by the coup in 2013. Even though many improvements brought about by the Constitution of 2012 have been preserved in the Constitution of 2014 which embodies the martial democracy, the way of its adoption was not inclusive of whole public and the Parliament is deprived of effective opposition, because of which the constitutional developments remain solely on the paper.

**Key Words:** Arap Spring, Jasmin Revolution, Constitutional Developments in Tunisia and Egypt, Democracy and Human Rights in Tunisia and Egypt

## **Özet**

Arap coğrafyasındaki halklar, Arap Baharına kadar uzun yıllar, otoriter yönetimler altında demokratik taleplerine cevap bulamamışlardır. 2010 yılında başlayan halk hareketlerinin tüm coğrafyaya yayılması ve başta Tunus, Mısır ve Libya'da liderlerin düşürülmesiyle yeni bir çağın açılacağına sinyalleri alınmıştır. Ancak bölge halkının demokrasi rejimi konusundaki tecrübesizliği; İslami uyanışın, bu coğrafya üzerinde hedefleri olan ülkeleri düşündürmesi; doğal kaynakların ve stratejik öneme sahip bölgelerin, yeni kurulan otoritelerce batılı devletlerin istemediği şekilde kullanılması olasılığı ve İsrail'in bölgedeki güvenliği gibi sebepler ile demokratikleşme hareketleri akamete uğratılmıştır.

Tunus'ta uzun uğraşlar sonucu, toplumsal bir uzlaşma ile batılı liberal demokrasileri aratmayacak bir anayasa yapılarak, siyasal ve anayasal reformlar kararlı bir şekilde yürütülmeye çalışılmıştır. Mısır'da ise 2012 yılında yapılan anayasa ile demokratikleşme ve hak ve hürriyetler yolunda ciddi bir ilerleme kaydedilmiş, ancak 2013 darbesi ile bu süreç kesintiye uğramıştır. Postallı demokrasiye geçilen 2014 Anayasası'nda, 2012 Anayasası'nın getirdiği birçok iyileşme korunsun da seçimlerde toplumun belli bir kesiminin dışlanması ve mecliste etkin bir muhalefetin olmaması anayasal gelişmelerin kâğıt üzerinde kalmasına sebep olmaktadır.

**Anahtar Kelimeler:** Arap Baharı, Yasemin Devrimi, Tunus ve Mısır'daki Anayasal Gelişmeler, Tunus ve Mısır'da Demokrasi ve İnsan Hakları.

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## INTRODUCTION

The recent popular uprisings in the Arab World have been labelled as the Arab Spring by the West and this term has been in prevalent use since then. Nevertheless, a literature scan presents that such terms as Arab Awakening, Arab Uprisings and Arab Revolution have also been used. Even though the most appropriate term to use for the occurrences in the said region would be the Arab Winter<sup>1</sup>, this study prefers to use the concept of Arab Spring whose usage prevails in the literature.

It is presumed to be not wrong to trace back to the period of separation of this region from the Ottoman Empire so as to identify what evokes the Arab Spring. In fact, the main underlying reason behind the current revolts in this region is totalitarian mode of governance. This mode of governance stems from continuation of the mentality of rule that the Western states imposed or supported upon partitioning of the Ottoman Empire. Despite having abandoned and abolished government of mandates, i.e. tutelage for various reasons, the sovereign powers ruling the region after Ottoman Empire divided via the artificial borders the Arab people who indeed share the same language, religion and race, and thereafter shaped the future of this region, which is very precious in terms of geopolitics and economy, according to their own will. Particularly in Iraq, Syria and Lebanon, ethnical and sectarian minorities have been deemed more entitled to rule compared to legitimate majority powers while in other countries, the right to rule has been apparently bestowed upon several leaders of tribes or dynasties in an effort to create leaders who abide by the west. It might be deduced that these obedient leaders who do not represent the public are prone to be totalitarian and repressive so as to reinforce their own positions<sup>2</sup>.

It seems that the countries in this region granted and made available to the West their prolific natural and economic resources in return for gaining the support of Western states at the forefront of the economic, technologic, political and military power. Under these circumstances, it might be considered that the western countries ignored all sorts of sporadic democratic demands of the region's people aiming to change the current order, without any regards to

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<sup>1</sup> Ali Acar, Habib Aydın, "Arap Baharı Üzerine Oryantalist ve Marksist Değerlendirmeler", **Süleyman Demirel Üniversitesi İktisadi ve İdari Bilimler Fakültesi Dergisi**, V:22/2, 2017, p. 512; Alper Dede, "The Arab Uprisings: Debating the Turkish Model", **Insight Turkey**, V: 13/2, 2011, p. 23.

<sup>2</sup> Abdullah Kiran, "Arap Baharı, Suriye Ve Demokratik Dönüşüm Beklentileri", **Muş Alparslan Üniversitesi Sosyal Bilimler Dergisi**, V: 2/1, 2014, p. 98; Yusuf Sayın, "Arap Baharı Süreci ve Sömürgelerin Çözülmesi", **KMÜ Sosyal ve Ekonomik Araştırmalar Dergisi**, V: 18/30, 2016, p. 68; Murat Açıl, "Tunus'un Demokratik Dönüşümü ve Anayasa Yapım Süreci", **Selçuk Üniversitesi Hukuk Fakültesi Dergisi**, V: 25/1, 2017, p. 166.

the fact that the legitimacy of governments relies on the monarchy, coups or power rather than democracy. Moreover, it is alleged that the revenue obtained from the rich natural resources are allocated to the public as hush money so as to hinder and impede any potential steps to be taken for democratisation<sup>3</sup>. Demands for democratisation have been rendered ineffective and remained unsupported because this region does not bear much significance<sup>4</sup> for the west as long as the western countries, particularly the United States of America (USA), have secure access to the sources of oil at reasonable prices, and ensure the security of their own strategic military bases as well as that of Israel, and the current totalitarian government leaders do not pose any risk to realisation of their desires<sup>5</sup>. In fact, USA and western countries have preferred stability to the democracy and have remained silent against all anti-democratic practices and violations of human rights so long as their interests are not prejudiced<sup>6</sup>.

On the other hand, nerve compressions and social explosions occurred in the countries like Egypt and Tunisia which lack the advantage of having natural resources, and which have lagged behind in industrial breakthrough, and which were severely affected by the impacts of global economic crisis of 2008-2009, and where free market does not function and foreign investors keep away. Having difficulty in access to the basic needs, unemployment and high inflation also aggravated the unrest, thus leading to a popular uprising<sup>7</sup>.

In Tunisia, the civil commotions, which erupted as an economic-oriented rebellion and then evolved into questioning of the legitimacy of political elites, shortly spread across the whole Arab World excluding few countries, which consequently ousted the dictators in Tunisia, Egypt, Libya and Yemen, and changed the governments in Oman, Morocco and Jordan. In general, the Arab countries strived to quell the public demands by resorting to constitutional reforms.

Today Tunisia is regarded as the first and sole fruit of the Arab Spring. The popular uprising achieved a response at short notice and thus, a democratic and bloodless revolution took place. As for Egypt, even though a bloodless revolution took place, the Muslim Brotherhood movement who attained both legislative and executive powers through democratic means was unseated through a coup allegedly supported by the Freedom and Justice Party, western countries, Israel and Saudi Arabia, thereby returning the country to its past

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<sup>3</sup> Oğuzlu Tarık, “Arap Baharı ve Yansımaları”, **ORSAM**, V: 3/36, 2011, p. 9.

<sup>4</sup> Hasan Kösebalan, Muzaffer Şenel, Ufuk Ulutaş, “Ortadoğu Konuşmaları, Bölgesel ve Küresel Perspektiften Arap Baharı”, Ed. by. Zahide Tuba Kor, **Arap Baharı'nın İlk Demokratik Deneyimi: Tunus Seçimleri**, Küre Yayınları, İstanbul, 2014, p. 195-233.

<sup>5</sup> Oğuzlu, 2011, p. 10-11.

<sup>6</sup> Oğuzlu, 2011, p. 11; Göçer, 2015, p. 53.

<sup>7</sup> Harun Öztürkler, “Tunus Ekonomisinin Genel Özellikleri”, **ORSAM**, V: 4/37, 2012, p. 54.

years of dictatorship<sup>8</sup>.

The well-known political scientist Huntington classified the waves of democratisation and stated that the disintegration of Soviet Union led to the 3<sup>rd</sup> and last wave of democratisation. It springs to the mind whether the civil commotions starting in 2010 in the Arab World, which hosts no democratic state apart from few exceptions, will trigger the 4<sup>th</sup> wave of the democratisation movements which have not resumed as from 1990s.<sup>9</sup> Nevertheless, the sequence of events taking place so far has demonstrated that it is improbable for democracy to arrive at this region until distant future either by legal means or by revolutions. The main underlying reasons among many others might be cited as that Arab countries lack experience in politics and democracy, and that the desire for democratisation is overshadowed by the economy being the pressing issue for the public, and that Arab societies making their own decisions of their own free will conflict with political and economic interests of western countries. Furthermore, it should be expressed from scratch that transition to and transformation into a democratic system where the public actively participates in the government is also related to the long-standing culture of democracy.<sup>10</sup> For instance, it might be claimed that democracy has been properly and entirely established in Turkey upon the first free elections run in 1950 terminating the period during which the public was kept off the government. However, in order to gain an insight as to what paves way for the free elections in 1950, one must trace back to the proclamation of the Republic in 1923, and, on the other hand, with a view to interpreting the latter, one must trace back to the Ottoman Empire, especially the period when the constitutional developments were performed. As is seen, Turkey owes its position in 1950s to its almost half century-long culture of democracy and politics. However, it seems unlikely to present such a timeline for the countries in the Arab World. That's why the Arab people either cannot achieve democracy as in the case of Syria or democracy slips through their fingers as in the case of Egypt. As is observed, this region still houses the kingdoms equipped with reinforced powers or pro-coup heads of state whose legitimacy does not rely on democratic elections. Therefore, nations who have not experienced various hurdles in realisation of democracy in their past would not find it easy to

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<sup>8</sup> Azzurra Meringolo, "From Morsi to Al-Sisi: Foreign Policy at the Service of Domestic Policy", *Insight Egypt*, 2015, p. 4.

<sup>9</sup> Huntington, Samuel. P., **Democracy's Third Wave**, *Journal of Democracy*, V: 2/2, 1991, p. 12-34; Huntington, Samuel. P., "Will More Countries Become Democratic", *Political Science Quarterly*, V: 99/2, 1984, p. 196-197, Çakı, Fahri, "Arap Baharı: İslam Üzerine Söylemsel Dönüşümün Habercisi Mi?", *Akademik İncelemeler Dergisi*, V: 6/2, 2011, p. 126.

<sup>10</sup> Kıran, Abdullah, "The Arab Spring and the Chance of Democratic Transformation in Syria", *Muş Alparslan Üniversitesi Sosyal Bilimler Dergisi*, V: 1/1, 2013, p. 17.

establish democracy through coups or revolutions.

This study intends to analyse the political atmosphere in Tunisia and Egypt before the Arab Spring. Indeed, the constitutional and political developments occurred after the revolutions will be clarified better by analysing the main reasons and origin of the events which brought those nations to the edge of riot. Additionally, through making a comparison between the constitutions in effect prior to or following the revolutions in Egypt and Tunisia, changes of any kind would be examined in such topics as legitimacy of constitutions, legislation, execution, judiciary system, separation of powers, the system of check and balance, the composition of legislative and judicial bodies, human rights, political parties, election systems and viewpoints of constitutions at Sharia.

## **1. Political and Constitutional Developments in Tunisia after the Arab Spring**

Political and constitutional developments in Tunisia are so deeply intertwined that it would be challenging to examine these developments separately and independently. Nonetheless, in an effort to have the subject better understood, political and constitutional developments will be evaluated under separate headings.

### **1.1. Transition from Authoritarian System to Liberal Constitutional System and Important Political Developments**

Even though Tunisia declared its independence from France in 1956 under the leadership of Habib Bourguiba, the existence of France's military in the country did not terminate until 1963. Bourguiba was announced as the President for a lifetime by the Parliament, which revealed the first signals of the fact that the regime of Bourguiba would not come to an end easily through democratic means. Government leaders of Tunisia had to always cope with the organised opposition which maintained its existence by virtue of the unionisation structure inherited from France. As a result, Bourguiba often had to grapple with the extensive protests launched by the labour unions. For instance, quelling of a protest with strict measures in 1978 led to arrestment of almost all the leaders of unions. Even if it is suggested that Bourguiba came to realise that his reign could not continue with use of force and therefore introduced the multi-party elections for the first time in 1981, Bourguiba's party held all the seats in the Parliament as a result of this sham election.<sup>11</sup>

Zine al-Abidine Ben Ali who formerly served as the Minister of Interior and Prime Minister in Bourguiba's government, took over the power upon an

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<sup>11</sup> Ufuk Ulutaş, Furkan Torlak, "Devrimden Demokrasiye Tunus'un Seçimi", **SETAANALİZ**, Sayı: 46, 2011, p. 6.

occasion called silent/ bloodless revolution in 1987.<sup>12</sup> Having sensed the urgent need for change in the acutely uneasy society, Bin Ali had 7 doctors issue medical reports declaring 80-year old Bourguiba as mentally unfit to rule the state, thereby inaugurating a new authoritarian era through bloodless coup.<sup>13</sup> At the beginning of his term of office, Bin Ali signalled his tendency to return to pluralist mode of governance and multi-party elections, and released the political prisoners from the jails in an attempt to reduce the high tension in the society.<sup>14</sup> Nevertheless, when Bin Ali won both presidency and parliamentary elections in 1989, he adopted a majoritarian and controlled mode of governance like his predecessor.<sup>15</sup> Along with stepping in of first opposing party in the presidential elections apart from Bin Ali's party, Bin Ali confronted his first rival in 1999. However, the way the elections were held absolutely complies with the concept of 'plebiscite' used to express that the democracy is "in words" not in deeds, which weakened the public's not only trust in the political power but also faith in democratisation. With a glance at the election outcomes, it seems reasonable to deduce that Bin Ali's rival was nominated as presidential candidate just to ensure legitimacy of elections.<sup>16</sup>

The middle-class of the society was demolished by Bin Ali's policy of making available the economic resources solely to the particular social spheres. Since the number of losers of economy surpassed the number of winners, the society was drifted into social explosion due to economic course of events.<sup>17</sup> The civil society naturally rebelled against then-current status quo on the following grounds that Tunisia is deprived of rich natural resources, and was severely devastated by the impacts of 2008's global economic crisis, and had an unemployment rate rising up to 18 percent and youth unemployment climbing up to 42 percent<sup>18</sup>, and, what's more, their non-elected leaders laid the groundwork for wretched conditions in the society.

It is of course not true to claim that the Arab Spring only stemmed from

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<sup>12</sup> The Carter Center, "The Constitution-Making Process in Tunisia", 2014, p. 21.

<sup>13</sup> Açıl, 2017, p. 179-180.

<sup>14</sup> Fred Halliday, "Tunisia's Uncertain Future", **Middle East Report**, V: 163, 1990, p. 25-27; Angrist, Michele Penner, "Parties, Parliament and Political Dissent in Tunisia", **Journal The Journal of North African Studies**, V: 4/4, 1999, p. 91-92.

<sup>15</sup> Christopher Alexander, "Authoritarianism and Civil Society in Tunisia Back from the Democratic Brink", **Middle East Research and Information Project Report 205**, 1997, p. 34-38.

<sup>16</sup> Daniel Tavana, Alex Russell, "Tunisia's Parliamentary & Presidential Elections", Project on Middle East Democracy, 2014, p. 19, (Online) <https://pomed.org/wp-content/uploads/2014/10/Tunisia-Election-Guide-2014.pdf>, 25 March 2019.

<sup>17</sup> Konur Alp Koçak, "Yasemin Devrimi'nden Arap Baharı'na Tunus", **Yasama Dergisi**, V: 22, 2012, p. 30.

<sup>18</sup> Index Mundi, 2018, (Online) [https://www.indexmundi.com/tunisia/unemployment\\_rate.html](https://www.indexmundi.com/tunisia/unemployment_rate.html), Accessed: 17 May 2018.

economic grounds. Tunisia was identified as one of the most suppressive regimes of the world by international observers<sup>19</sup> on account of illegal detentions and persecutions, state's tight grip on media and internet, pressure on and threats towards dissenting voices and human rights activists along with no right to live offered to the cited spheres during Bin Ali's reign. All such social imbalances felt deeply in all aspects of life evoked social explosion thus waging a new era for Tunisia. Consequently, the desire to fulfil economic and political demands of the public and to eradicate the economic and political corruptions and to ensure access to the basic rights and freedom laid the foundations to spark off the civil commotion.<sup>20</sup>

The society itself initiated a new movement with a view to improving the social and political conditions, putting an end to corruptions and assuring general freedoms. Tunisian people who were oppressed and wrestled with economic and political troubles under the half-century long dictatorial regime, poured out into the streets by organising themselves on the social media after a university graduate street vendor killed himself by setting himself on fire.<sup>21</sup>

The continuous demonstrations defying against the threats of persecutions and detentions spread across the whole country by virtue of organised social structure of Tunisia, use of mass media means and gaining both national and international support.<sup>22</sup> Upon extending of demonstrations all over the country, Bin Ali abandoned the country and thereafter the National Unity Government was formed, which was greeted with excitement in the Arab region. Although 'an Islamic awakening' did not exist among the dynamics of the Arab Spring, the movement indirectly arouse expectations with respect to realisation of such an awakening through which the regimes based on monarchy, dictation and strict laicism would be toppled and instead anti-USA, anti-Europe and anti-Israel regimes would be formed.<sup>23</sup>

As soon as Bin Ali left the country, Mohamed Ghannouchi formed a

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<sup>19</sup> Christopher Walker, Vanessa Tucker, "Tunisia, The Arab Spring's Pivotal Democratic Example", 2011, p. 1, (Online) <https://freedomhouse.org/article/tunisia-arab-springs-pivotal-democratic-example>, 8 March 2019.

<sup>20</sup> Ulutaş, Torlak, 2011, p. 6.

<sup>21</sup> Merve Birdane, "Arap Baharı Sürecinde Tunus'un Demokrasiye Geçişinde Sivil Toplumun Rolü", *International Journal of Humanities and Social Science Invention*, V: 6/10, 2017, p. 87; Achy, Lahcen. "Tunisia's Economic Challenges" The Carnegie Papers, Carnegie Middle East Center, 2011, p. 5, (Online) [https://carnegieendowment.org/files/tunisia\\_economy.pdf](https://carnegieendowment.org/files/tunisia_economy.pdf), Accessed: 05 December 2018

<sup>22</sup> Zeynep Şahin Mencütek, Ferihan Polat, Ayşegül Durmuş, "Devrimsel Süreç Olarak Arap Baharı'nı Immanuel Wallerstein Üzerinden Anlamak", *Pamukkale Üniversitesi Sosyal Bilimler Enstitüsü Dergisi* V: 22, 2015, p. 9.

<sup>23</sup> Oktay Bingöl, "Arap Baharı ve Ortadoğu: Çok Eksenli Güç Mücadelesinde Denge Arayışları", *Türk Dünyası İncelemeleri Dergisi*, V: XIII/2, 2013, p. 34-35.



transitional government and Fouad Mebazaa, the former president of the Chamber of Deputies was appointed as interim President. So as not to startle Bin Ali's loyal soldiers and government leaders, Ghannouchi assigned 12 Ministers from the former government to the newly set up cabinet, which triggered widespread public demonstrations and eventually the cabinet was reshuffled on January 27th, 2011.<sup>24</sup>

Upon formation of the government, the issue of which legal norm would create a basis for this transition period emerged. Shall the Constitution 1959 be deemed still valid and in force or shall this Constitution be repealed thereby causing a legal gap and then the new route of the President Mebazaa be followed up?<sup>25</sup> Owing to difficulty of drawing a new road map inclusive of all social spheres, Mebazaa is claimed to prefer the former to the latter option. However, according to the provisions of the Constitution 1959, 'powers of interim President are too few to count that he is obliged to hold an election in the country within 45-60 days.<sup>26</sup> Mebazaa's hands were tied due to the facts that it seemed impossible in such a short notice like 60 days to re-establish the forbidden parties under Bin Ali's reign and prepare them for the approaching election, and to ensure a democratic electoral system after setting up an election supervisory mechanism. What's more, the Constitution 1959 was not able to provide flexibility for smooth democratic transition. Nevertheless, the Constitution was circumvented and the transition period was sustained thanks to empowering of Mebazaa by the both Assemblies to issue a decree-law and also by virtue of the provisions of the newly issued Decree-Law No. 14.<sup>27</sup>

This Decree-Law entrusted the President with extensive and strong powers and thus helped him manage the process easily. This Decree-Law prescribed and ensured that both Prime Minister and Ministers of interim period cannot compete in the elections of the Chamber of Deputies, and that the interim President cannot run in the election of the Chamber of Deputies and in any other election held after adoption of New Constitution.<sup>28</sup> These provisions set down as a rule that these cited must not acquire a new position or title in the future, thereby ensuring that these persons served impartially and unselfishly during their interim terms of office.

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<sup>24</sup> Birdane, 2017, p. 90.

<sup>25</sup> Açıl, 2017, p. 185.

<sup>26</sup> Tunisia's Constitution, 1959, art. 57, (Online) <http://www.wipo.int/edocs/lexdocs/laws/en/tn/tn028en.pdf>, Accessed: 10 May 2018.

<sup>27</sup> Açıl, 2017, p. 185.

<sup>28</sup> Decree-Law No. 2011-14 dated 23 March 2011, "Relating to the Provisional Organization of the Public Authorities", 2011, art. 11, 15, (Online) <https://www.wipo.int/wipolex/en/details.jsp?id=11175>, Accessed: 05 April 2018.

All the preparations required for establishment of a democratic system were completed by the Decree-Laws of the Transitional Government. The Constituent Parliament of Tunisia was founded via the election held. Although none of the parties running in the election won the majority of votes, the parties adopting Islamic thoughts formed a strong alliance. The winner of the election, Ghannouchi, waived his chance to be elected as Presidency to Marzouki who was another party leader in the alliance, and waived his chance to be elected as Prime Minister to Cibali, the secretary general of his party El-Nahda and left presidency of the Parliament to Jafar, the younger member of alliance.<sup>29</sup> As is seen, Rashed Ghannouchi who won the elections by 41 percent with a landslide victory assured that his friends of common cause were not appointed to influential positions in order to prevent the fragile politics of the country from deteriorating under the intensive pressure from the secular and western social spheres.

The intensive pressure of the public masses in the country, who used all kinds of issues they faced an excuse to hold demonstrations, wore out the current government and caused the Prime Minister to resign after assassination of an opponent leader, which eventually paved the way for formation of a new cabinet consisting of more technocratic and independent persons.<sup>30</sup> Upon escalation of demonstrations, Ghannouchi called an election in attempt to prevent social tensions. This move thwarted any coup attempt leading to return to the former dictatorial regime like in Egypt. Being surrounded by such hardships, Ghannouchi could not prevent his party from turning out to be opposition in the election of 2014.

## 1.2. Constitutional Developments in the aftermath of Revolution

Tunisia is regarded as the only country who managed to create a democratic constitution during the Arab Spring. Under this heading, we will scrutinise and identify what sorts of changes took place when the old and new Constitutions are compared with respect to such subjects as legislation, execution,

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<sup>29</sup> Koçak, 2012, p. 45.

<sup>30</sup> Ahmed El-Sayed, "Post-Revolution Constitutionalism: The Impact of Drafting Processes on the Constitutional Documents in Tunisia and Egypt", *Electronic Journal of Islamic and Middle Eastern Law*, V: 2, 2014, p. 45-46; The fact that Nahda 'held majority of seats in the Parliament' together with its allied parties does not denote any sign of legitimacy for observers of Western political, academic and human rights institutions. Nevertheless, in the European countries, any party which won the election by gaining 25 percent or 30 percent of votes is deemed legitimate power with no adverse comment or implication on it, whereas, in Tunisia, coming into power of a party with Islamic concerns by 40 percent of votes is regarded as troublesome and the discourse suddenly changes. It begins to be expressed that this government in force cannot do whatever it wills, and the figures are so twisted and misrepresented that 60 percent of the public is shown to be opposing the Nahda.

jurisdiction, rights, freedoms and Sharia. First of all, we will analyse whether the constitution was established through social inclusion or not, i.e. ‘legitimacy of constitution’, which is one of the most crucial indicators of ‘extent of democracy’ of a constitution.

### 1.2.1. Legitimacy of Constitution-Making Process

As per Özbudun’s classification, three different ways are available for transition to democracy, which are designated as “reform”, “breakaway” and “agreement”. In Tunisia, breakaway refers to a process in which the government in power suddenly collapsed due to revolution or popular uprising and none of the political leaders of the past took part in formation of new government. Özbudun puts forward two options either of which is to be preferred in making of constitution after transition to democracy through breakaway. The options are either ‘making of constitution by democratic and representative constituent Parliament’ or “making of constitution under the influence of transitional government”.<sup>31</sup>

In Tunisia, it seems that the first democratic option which puts an emphasis on representation of vast majority of public has been used in drafting and adopting the Constitution. In this method, the public embrace their constitution as a result of a process during which all freedoms of the constitution, particularly freedoms of press and speech are assured by the representatives who are elected by a fair, free and transparent election and do not turn a deaf ear to public demands. Therefore, drafting of constitutions through this method lasts longer than those designed by a certain group of elites behind closed doors.<sup>32</sup>

Although Tunisia was ruled under a repressive government, its history and social, economic and cultural background contributed to globalisation of Tunisian people and creation of a strong civil society, which promoted active participation of all social and political segments of society in the first democratic constitution-making process of the country.<sup>33</sup>

The legitimacy of constitution-making process was also strengthened through setting up a supreme electoral commission by a decree-law in order to conduct electoral processes and ensure election security. During Bin Ali’s term of office, electoral processes used to be conducted by the Ministry of Interior. The dictatorial regime used to take advantage of non-availability of

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<sup>31</sup> Ergun Özbudun, **Demokrasiye Geçiş Sürecinde Anayasa Yapımı**, Ankara, Bilgi Yayınevi, 1993, p. 29-31.

<sup>32</sup> Gluck, Jason, “Constitutional Reform in Transitional States: Challenges and Opportunities Facing Egypt and Tunisia”, *USIP*, 92, 2011, p. 4, (Online) <https://www.usip.org/sites/default/files/PB92.pdf>, Accessed: 15 May 2018.

<sup>33</sup> Mona Ahmed Saleh, “Constitution-Making in Transition: A Comparative Study of the 2012 Egyptian and 2014 Tunisian Constitutions”, **Unpublished Master Thesis**, The American University in Cairo, 2014, p. 28.

an effective supervisory mechanism to resolve the election disputes. On the other hand, in the new era, entrusting the conduct of election processes to an independent supreme electoral commission and assigning the judicial review of election disputes to the Council of State remarkably increased the legitimacy of the authorities entitled to draft the Constitution.<sup>34</sup>

It would not be incorrect to argue that the above-cited Supreme Commission had a quite pluralist structure. This Commission who was comprised of 16 members included four lawyers, three judges, two university professors, two non-governmental organisation leaders, one notary, one journalist, one foreign resident, one accountant and one IT specialist.<sup>35</sup>

Another component required to establish the legitimacy of the Constitution is that the electoral system to be used in formation of the parliament, which will be in charge of drafting the Constitution, must uphold a pluralistic approach. This component was not disregarded in Tunisia and therefore proportional electoral system was adopted. According to this electoral system, each party is represented in the Parliament in proportion to the number of votes they gain in the constituencies. In the election of Parliament of Tunisia, even very minor parties managed to hold seats in the Parliament by virtue of implementation of proportional representation system and thanks to the lack of any electoral threshold, which democratised both the election system and constitution-making process. The election outcomes brought about a fragmented parliament in which 19 parties and 8 independent candidates acquired representation in the Parliament. In addition to envisaging such an election system to ensure representation of all social spheres in the Parliament, gender-related regulations were made to ensure active participation of women in the processes. It was stipulated that half of the candidates the parties nominate in the constituencies had to be women, and it was further prescribed that the lists of candidates had to be prepared by placing names of men and women one after another to prevent women from being placed at the end of the list.<sup>36</sup>

14,083 observers of the Supreme Electoral Commission of Tunisia were assigned to supervise proper and safe running of elections. Moreover, 661 international observers in total, 52 of whom were from Arab countries and 10 of whom were from Turkey, followed up the election processes.<sup>37</sup> With respect to how legitimate and democratic the running elections were, complimentary

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<sup>34</sup> Açıl, 2017, p. 191.

<sup>35</sup> IFES, "Elections in Tunisia: The 2011 Constituent Parliament, Middle East and North Africa International Foundation for Electoral Systems", 2011, p. 1, (Online) <https://cpb-us-e1.wpmucdn.com/blogs.cornell.edu/dist/b/596/files/2011/08/8D5F8d01.pdf>, Accessed: 18 May 2018.

<sup>36</sup> Açıl, 2017, p. 190.

<sup>37</sup> Ulutaş, Torlak, 2011, p. 7-8.

remarks and responses were received from international observers, the ministries of exterior of many countries and international organisations like Arab League.<sup>38</sup>

In Tunisia, the elected Parliament which was deemed to promote democratic transformation assumed two important functions. First function was to conduct usual legislative processes as in the assemblies of other countries while the second was to draft a democratic constitution. Although some countries elect a second Parliament called ‘constituent Parliament’, which will be exclusively in charge of making a constitution, in order not to raise the workload of the Parliament, whereas Tunisia did not follow this practice and instead entrusted one single Parliament with both tasks. In this sense, it might be argued that, driven by the fact that the Parliament is expected both to draft a constitution and conduct legislative processes, French-type constituent Parliament model was preferred as a manner of democratic constitution-making.

In order for the Constitution to be adopted in the constituent Parliament, two different quorums were laid down. In case the Constitution is adopted by the 2/3 of total number of Parliament members, the Constitution will directly come into force. On the other hand, in case the Constitution is adopted by any percentage between 1/2 and 2/3 of total number of Parliament members, draft Constitution is proposed to the approval of public opinion via referendum. During and after the constitution-making process, western academicians and Tunisian opposition strived to underestimate the legitimacy of Nahda with their intensive perception operation. Even though the Islamic parties constitute more than 60 percent of the Parliament in numbers, it was constantly expressed that these parties could not make the Constitution as they pleased, by putting an emphasis on the fact that these parties actually gained support of 49.7 percent of the voters in the election.<sup>39</sup> Although the parties, which allied with Nahda, had the sufficient power to make the Constitution at their will based on the number of seats they held in the Parliament, the Nahda coalition demonstrated reconciliatory approach towards the opposition parties. Therefore, the process did not result as similarly as in the Egypt and the Constitution was eventually adopted by high number of approval votes.<sup>40</sup> Despite many hardships faced, the constituent Parliament adopted the Constitution on January 26, 2014 with

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<sup>38</sup> Ulutaş, Torlak, 2011, p. 12-13.

<sup>39</sup> Hatem M’Rad, “The Process of Institutional Transformation in Tunisia after the Revolution”, Ed. by. Grote, Rainer; Röder, Tilmann J., **Constitutionalism, Human Rights, and Islam after the Arab Spring**, Oxford, Oxford University Press, 2016, p. 71- 86.

<sup>40</sup> Andrea G. Brody-Barre, “The Impact of Political Parties and Coalition Building on Tunisia’s Democratic Future”, **The Journal of North African Studies**, V: 18/2, 2012, p. 211-230.

200 approvals, 4 abstentions and 12 rejections.<sup>41</sup>

As is seen, in spite of having restricted itself with drafting the Constitution within a year, the newly founded Parliament managed to complete the constituting-making process only in 2014 because of the non-reconciliatory attitudes of the “strict secular” minority in the Parliament remaining from the old regime and also due to the widespread protests and marches. Since Nahda frequently took steps to lessen the tension, withdrew from the government although it came first in the election, and retreated from the issues likely to arouse tensions, the task of Constitution-making handed over to the government officials by the people was accomplished in peace and with ease.

### 1.2.2. Legislative Developments

Under this heading, we will try to analyse the democratisation steps in Tunisia with a brief assessment of the roles tailored for the Parliament in the old and new constitutions. Prior to the revolution, the Parliament of Tunisia was equipped with quite weak powers. The Parliament which used to function under absolute hegemony of the executive power can naturally be described as a part of executive body.<sup>42</sup> For long years, one single party ruled and dominated the Parliament. Although other parties were allowed to run in the elections, which were held shortly before the revolution, these parties might be considered as “satellite party”,<sup>43</sup> inasmuch as it is prevalently observed in almost all dictatorial regimes that the satellite parties blindly attached to dictators are granted the right to run in the elections just in order to dismiss the increasing demands for democracy and right to speak.

Tunisia had adopted a bicameral system when the Constitution of 1959 was in effect. Pursuant to this system, the Chamber of Deputies used to be directly elected by the popular votes while the Chamber of Advisors used to be selected partly by the public and the Head of State.<sup>44</sup> The practice of appointing of chamber members by the Head of State, which was usually observed in the old British colonies like India, Australia and Canada, was favoured in Tunisia too only to end up in a quite undemocratic scene. It is of course not expectable to accomplish representative democracy with this practice which causes the public to be governed by the persons they did not elect. The bicameral legislature was abolished and instead unicameral legislature was preferred.

Another most significant legislative change took place in the structure of parliamentary commissions. The issues to be brought up and discussed

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<sup>41</sup> Açıl, 2017, p. 198.

<sup>42</sup> Basak Akar Yüksel, Yılmaz Bingöl, “The Arab Spring in Tunisia: A Liberal Democratic Transition?”, *Elektronik Sosyal Bilimler Dergisi*, V: 12/47, 2013, p. 318.

<sup>43</sup> The Carter Center, 2014, p. 21.

<sup>44</sup> Tunisia’s Constitution, 1959, art. 19/para. 1-7.

in the Parliament are first prepared by the parliamentary commissions and finalised by the deputies, which constitutes a very important phase because composition of commission members plays a vital and fundamental role in the countries' politics. In the old Constitution and in its revised versions, no regulation was found as to how the opposition would be represented in the commissions because there was not any direct or indirect reference to opposition parties. In any country governed for a half-century by a single party, representation of more than one party in the country's commissions would not be naturally possible too. On the other hand, in the Constitution drafted during the period of transition to multi-party elections, existence of opposition was not forgotten and it was explicitly stated that all parties would be represented in the parliamentary commission according to proportional representation.<sup>45</sup> Additionally, it was stipulated that the Chairmen of Budget and Foreign Affairs Commissions would be designated by the opposition parties. What's more, opposition parties were entitled to set up an investigation commission once a year to supervise the operations and actions of executive body.<sup>46</sup>

As is seen in the new era, existence of legislature, particularly opposition, has been admitted and, to this end, many requisite regulations have been issued to integrate them into the system and equip them with more powers. The new regulations have involved, inter alia, determination of members of independent, impartial and autonomous administrative authorities, which are established to conduct operations in specific fields or advise either legislative body or executive body on specific topics. In Tunisia, it has also been prescribed and assured that the Parliament shall host the election of members of independent administrative authorities like the Electoral Commission, Audio-Visual Communication Commission, Human Rights Commission, Sustainable Development Commission and Good Governance and Anti-Corruption Commission, and that their members shall be elected by qualified majority voting.<sup>47</sup> Determination of members of such empowered institutions and organisations by the legislative body rather than executive body points out the importance attached to the Parliament. Moreover, requirement of qualified majority for this election promotes alliance between parties and thus helps foster a pluralistic structure.

Another distinguishable change in the Constitution of 2014 is on the authorisation to introduce a bill of law. In almost all democratic countries, every deputy (Member of Parliament) is authorised to introduce a bill by himself whereas the right to introduce a bill can only be employed by a group

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<sup>45</sup> Tunisia's Constitution, 2014, art. 59/para. 2, (Online) <http://www.constitutionnet.org/vl/item/tunisia-constitution-2014>, Accessed: 11 May 2018.

<sup>46</sup> Tunisia's Constitution, 2014, art. 125, 126, 127, 128, 129,130.

<sup>47</sup> Tunisia's Constitution, 2014, art. 62.

of 10 deputies in Tunisia.<sup>48</sup> If this right is granted to each and every deputy in Parliament, then it might be mentioned about a more democratic practice.

The old Constitution did not include any provision making the way for removal of the Head of State from office. Even if this procedure had been inserted in the old constitution, it would not be likely to implement the procedure due to the then-current regime, but, it could have been an indicator of democratisation and would enable change of current regime through legitimate ways. This deficiency has been remedied in the newly drafted Constitution and ‘responsibility’ of the Head of State has been integrated into the constitutional system.<sup>49</sup>

Although constitutions of many countries allow for use of the powers to declare war and make peace by either simple majority or absolute majority, the new Constitution requires 3/5 of the total number of members of Parliament to decide on these issues. Determination of such a hard-to-reach percentage means to strengthen the Parliament and to ensure participation of especially opposition parties in the decision-making process.<sup>50</sup>

Another issue to touch upon is organic laws/institutional acts (*lois organiques*). Constitution-maker has assigned different legal statues to the laws enacted by the Parliament on several topics named organic law, which are of high importance for the society and governance of the country, such as election, political parties or basic rights and freedoms. By virtue of importance of these laws, harder-to-reach majority is required to be fulfilled for these laws compared to simple majority required for other laws. The underlying reason behind adopting an organic law by a very hard-to-reach percentage in the Parliament might be argued to aim at urging the parties to make alliance and to ensure broader participation in carrying out such important procedures. It seems that the Constitution of 2014 regulates the organic law like the old Constitution of Tunisia and similarly requires the same quorum, i.e. absolute majority of all members of parliament. Nevertheless, contrary to the old Constitution, the Constitution of 2014 provided a much longer list with respect to which topics to be regulated by organic laws. Some of these topics can be exemplified as follows: budget law, citizenship law, local governments, voting of international treaties, election law, human rights and freedoms, syndicates etc.<sup>51</sup> It can be deduced from this situation that this has been a good progress in terms of hindering a lesser majority group in the legislative body to easily take decisions on such important political matters of the country.

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<sup>48</sup> Tunisia’s Constitution, 2014, art. 88.

<sup>49</sup> Tunisia’s Constitution, 2014, art. 77/para. 2-subpara. 4.

<sup>50</sup> Tunisia’s Constitution, 2014, art. 65/para. 2.

<sup>51</sup> M’Rad, 2016, p. 84.



Last but not least, another issue to mention is judicial review of laws. When the old Constitution was in effect, the power to subject the laws to judicial review was exclusively vested in the Head of State. However, the new Constitution granted this power to 30 deputies, i.e. approximately 1/7 of the Parliament, along with the Head of State. Exercise of this power by deputies enables that any legislative act introduced by the sufficient majority of Parliament against the Constitution can be nullified after being referred to the Constitutional Court by 30 deputies whom even minor parties can bring together.<sup>52</sup>

### 1.2.3. Executive Developments

Although Tunisia had a dual executive system prior to the revolution which consists of the head of state and ministers, it could not be possible for the council of ministers to make decisions and create policies independently of the Head of State. It might be claimed that design of a dual executive system does not actually aim at sharing of powers, but instead intends to conceal the dictatorial regime in the background.<sup>53</sup> In spite of the dual executive system in place, the old Constitution specified that the executive power could be exercised at the disposal of the Head of State and the government was only expected to assist this management.<sup>54</sup> In the old constitutional order, the Head of State was exempt from the liabilities of his own actions and works with impunity and political immunity, and could not be judged even if his term of office terminated, which is the indicator of such an immense reinforced power held by the Head of State.<sup>55</sup>

The new constitutional system established after 2014 has been built upon the semi-presidential system where the dual execution has been equipped with broad authority as in the old system. However, dual execution has remained only in words in the latter system. In this context, prime minister has been designated as the head of government and has also been entitled to execute general politics of the state along with the Head of State. Because of being also in charge of smooth running and proper functioning of various administrative organisations, public authorities and Ministries, the Prime Minister has become much more powerful compared to the former system.<sup>56</sup>

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<sup>52</sup> M'Rad, 2016, p. 84.

<sup>53</sup> Açı, 2017, p. 174-175.

<sup>54</sup> Tunisia's Constitution, 1959, art. 37.

<sup>55</sup> Tunisia's Constitution, 1959, art. 41/para. 2; No matter what kind of regulations are issued with respect to constitution or no matter how hard it is tried to conceal and obscure the truth, it might be argued that these states are governed by a super-presidential system under such regimes. See Açı, 2017, p. 175.

<sup>56</sup> Jörg Fedtke, "Comparative Analysis Between the Constitutional Processes in Egypt And Tunisia- Lessons Learnt- Overview of the Constitutional Situation in Libya", 2014, p. 10-11, (Online) [www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO-](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO-)

Being empowered in the new constitutional system after having been removed from a symbolic position, the Council of Ministers has been enabled through the new regulations to easily obtain a vote of confidence to take office/continue to serve. Constructive vote of no confidence, one of the tools of the 'rationalised parliamentarism' model implemented in Germany, has also been involved in the Constitution. According to this model, removal of the Prime minister from office would require votes of absolute majority of total number of all parliament members while the new Prime minister to take the office is required to receive the votes of absolute majority of all parliament members.<sup>57</sup> It might be claimed that what is aimed at through this practice is to empower and stabilise governments in the countries which have fragmented parliaments.<sup>58</sup>

The old constitutional system did not impose any restriction or limitation on election of heads of state whereas new constitutional system has set down that presidency can be occupied twice at most.<sup>59</sup> This will ensure that this office changes hands without being permanently occupied by one single person as in the old system. It was cited above that Bin Ali ran for the pre-revolutionary presidential elections mostly as the single candidate. The underlying reason for this was based on a provision in the Constitution. In order to be presidential candidate, it is required to collect signatures of a certain number of deputies or mayors. Existence of a single-party regime in the country caused Bin Ali to be unrivalled. The pressure that this situation put on Bin Ali triggered a constitutional amendment within the scope of democratisation steps. Accordingly, in case either the Parliament or the mayors cannot nominate any presidential candidate, any political party leader can automatically run as candidate in the elections of 2009.<sup>60</sup> However, it has been regulated in the new system that even a small number of people from the public can nominate presidential candidates, thus creating competitive election circumstances.

The other powers strengthening the position of Head of State in the old Constitution were to declare state of emergency and, with this end in view, take necessary measures. The State of Head was required to consult the Prime Minister and Presidents of both Chambers in order to eliminate the emergency circumstances.<sup>61</sup> Even though the Head of the State was required to take advice of the given persons prior to taking measures, this consultation was not binding on him. Taking into consideration the fact that the Prime Minister and Presidents of Chambers belonged to the party of the Head of State in Tunisia governed by

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AFET\_NT(2014)433840, Accessed: 14 May 2018.

<sup>57</sup> Tunisia's Constitution, 2014, art. 97/para. 2.

<sup>58</sup> Kemal Gözler, **Anayasa Hukukunun Genel Teorisi**, Volume 1, Bursa, Ekin, 2010, p. 621.

<sup>59</sup> Tunisia's Constitution, 1959, art. 39/para. 3; Tunisia's Constitution, 2014, para. 75/para. 5.

<sup>60</sup> Tunisia's Constitution, 1959, art. 40/para. 3; Tunisia's Constitution, 2014, para. 74/para. 4.

<sup>61</sup> Tunisia's Constitution, 1959, art. 46/1.

a single-party, this act of consultation would not be expected to put the brakes on execution. This provision was likewise preserved in the Constitution of 2014, albeit inclusive of the President of the Constitutional Court as the person to be consulted along with others. More importantly, contrary to the old one, this Constitution has not ignored the Parliament and has vested the President of Parliament and 30 deputies with the right to apply to the Constitutional Court for cancellation of the measures when deemed unlawful.<sup>62</sup>

One of the most important tools empowering the Head of State is the power to veto. The old Constitution stipulated that any act of legislation rejected and returned to the Parliament by the Head of State for reconsideration had to be re-passed by 2/3 votes of the total number of Parliament members to resubmit the bills for approval by the Head of State. However, the new Constitution reduced this quorum and instead, found sufficient the absolute majority of all Parliament members.<sup>63</sup> Thus, ‘the veto weapon’ employed by the Head of State to put an immense pressure on the Parliament has been preserved in the new system too, albeit with alleviated influence.

#### **1.2.4. Judicial Developments**

It is asserted that the pre-revolutionary judicial system of Tunisia did not function independently of the legislation and execution, instead acted as the sub-organ of the executive body.<sup>64</sup> To prove whether such a contentious statement is based on truth at least theoretically, the constitutions have to be examined. First of all, it would be useful to compare the legal guarantees provided to judges in order to ascertain the level of development of the judicial system. The Constitution of 1959 set down that judges and prosecutors were independent and not obliged to abide by anything other than the laws and could not be arrested unless they were caught red-handed in the act of committing a serious crime. The new Constitution has not found these guarantees adequate enough and additionally offered another guarantee that judges and prosecutors cannot be dismissed from their places of duty involuntarily.<sup>65</sup> It can be deduced that judges who have achieved a very significant guarantee through inclusion of such a provision in the Constitution will be able to conduct their duties without fear of being exiled or expelled any longer.

In the new constitutional system, remarkable efforts have been exerted to maintain independent functioning of the supreme board which has been in charge of promotion, appointment, dismissal from profession, assignment,

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<sup>62</sup> Tunisia’s Constitution, 2014, art. 80/para. 3.

<sup>63</sup> Tunisia’s Constitution, 1959, art. 52/para. 2; Tunisia’s Constitution, 2014, art. 81/para. 3.

<sup>64</sup> The Carter Center, 2014, p. 90.

<sup>65</sup> The Carter Center, 2014, p. 90-91; Tunisia’s Constitution, 1959, art. 65; Tunisia’s Constitution, 2014, art. 106, 107.

disciplinary procedures of judges and prosecutors. In the old Constitution, selection of members of the Supreme Board which was in charge of promotion procedures of judges and prosecutors was entirely subject to the law. Therefore, it might be asserted that this Board was under the influence of Bin Ali who dominated the Parliament. In the old system, in order for judges and prosecutors to be appointed to their places of duty, the decision of the Head of State was required upon advice of ‘Supreme Judicial Court’ whose independence was in doubt, whereas, the new system has prescribed that final decisions of the Board on promotions are required to be signed by the Head of State just as a mere formality.<sup>66</sup> Despite the fact that involvement of the executive body in the selection of judicial members does not seem to be quite democratic, both more independent functioning of the Board and rendering the approval of the Head of State as a mere procedural requirement distinguish the new Constitution from the old one.

The scope of jurisdiction of the Constitutional Court has been extended and the legislative body has had more influence in its member composition. Furthermore, all organic laws have been counted in among the norms to be referred to the Constitution Law for revocation. The old Constitution included a less variety of organic laws, whereas they have increased in number and type in the new Constitution. Although only specific organic laws were subject to judicial review in the old Constitution, the new Constitutional system enabled review of all organic laws. Moreover, the new constitution paved the way for concrete control of norms, which means that in any pending case, the norm applied to the case can be claimed to be unconstitutional, and an appeal can be lodged to the Constitutional Court to review it with this ‘Contention of Unconstitutionality’. What’s more, 30 deputies are allowed to appeal to the Constitutional Court for contention of unconstitutionality of a norm adopted by the Parliament and to request judicial review of the relevant norms, thereby enabling some acts of legislature to be balanced indirectly by the judicial system via its instruments of abstract and concrete controls of norms.<sup>67</sup> Upon the appeal of the Parliament to put the Head of State on trial and to remove him from office, the Constitutional Court was designated as the authorised body to hear this trial, which has empowered the Court and reinforced its position in the state’s system of government.<sup>68</sup> Additionally, the Constitutional Court has been authorised to settle and resolve, within a week, any disputes emerging between the government bodies. For instance, in case of any dispute of powers between the Head of State and the Prime Minister, the Court has been entitled to deliver a judgment thereon. Even if it can be asserted that such

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<sup>66</sup> Tunisia’s Constitution, 1959, art. 66; Tunisia’s Constitution, 2014, art. 112.

<sup>67</sup> Tunisia’s Constitution, 1959, art. 72; Tunisia’s Constitution, 2014, art. 120/para. 1.

<sup>68</sup> Fedtke, 2014, p. 11.

an intermediary role might also bear the risk of politicisation of the Court<sup>69</sup>, it will not be inaccurate to state that the most appropriate and impartial body to be authorised in resolution of any disputes between government agencies is the judicial body. This authorisation will thus promote legalisation of politics. By virtue of all the above-cited powers, the Court can also exercise its power on the executive body to more easily ensure balance among powers.

As for member composition of the Court, in the old constitutional order, the Constitutional Court was comprised of 9 members, 4 of whom used to be appointed by the Head of State and 2 of whom by the President of Parliament and 3 of whom by the Supreme Judicial Bodies. On the other hand, according to the new Constitution, the Head of State, the Parliament and the Supreme Judicial Council appoint 4 members each.<sup>70</sup> It is easily understood from this brief outline that the Parliament has attained a more critical position. Since the quorum sought after in determination of the members to be elected to the Constitutional Court by the Parliament is qualified majority, member composition of the Court will be rendered more pluralistic. Equal division of the power of appointment into 3 branches of government indicates that none of the branches are deemed superior to another and that balance of powers are strengthened.<sup>71</sup>

### **1.2.5. Other Constitutional Developments**

Under this heading, we will try to put an emphasis on whatever changes have taken place in the new Constitution with respect to such issues as position of religion, general situation of human rights, women's rights and political rights.

Although Tunisia is a country where a great majority of its population are Muslim, the political system somehow used to distance itself from religion because both leaders of the State prior to the revolution had adopted and carried out a secularist politics. Nevertheless, the Constitution of 1959 began with a Basmala and highlighted among the characteristics of the country that the religion of the State was Islam.<sup>72</sup> In the constitution-making processes, the Nour Party and the Freedom and Justice Party, which had a numerical superiority in the Parliament, desired to govern the State with Sharia, but they had to give up and renounce their desires owing to pressing voice of local and international society. Islamic Parties demonstrated a reconciliatory approach and upheld the attitude of the Constitution of 1959 towards religion and thus, the provision that the religion of the State is Islam was included

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<sup>69</sup> The Carter Center, 2014, p. 89.

<sup>70</sup> Tunisia's Constitution, 1959, art. 75; Tunisia's Constitution, 2014, art. 118/para. 1-2.

<sup>71</sup> The Carter Center, 2014, p. 92.

<sup>72</sup> Tunisia's Constitution, 1959, art. 1.

in the Constitution without any direct reference to Sharia.<sup>73</sup> Furthermore, the Constitution has specified that the State is liable to protect ‘sacred religious values’. It seems that this article has been designed to protect not only Islam but also all religious beliefs.<sup>74</sup> Even though the Islamic Law, Sharia, protects non-Muslim’s freedoms of religion and worship, inclusion of this issue also in the Constitution can be regarded as a signal to the West.

It was mentioned above that in the old constitutional order, single-party regime dominated the political life for quite a long period of time and later on, ‘satellite parties’ were set up to have the legitimacy of the dictatorial regime recognised through the reforms. As the public could not find any other political alternatives in the elections, they naturally lost their interest in the elections, thereby causing the political freedoms to remain solely on the paper. Implementation of the ‘majority rule system’, which is one of the election systems that do not generate fair outcomes, aggravated the situation.<sup>75</sup>

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In the post-revolutionary constitutional system, there have been provisions with respect to holding of elections in a fair and transparent manner and setting up of an independent electoral commission, which was a significant

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<sup>73</sup> The Carter Center, 2014, p. 80; Monica Marks, “Convince, Coerce, or Compromise? Ennahda’s Approach to Tunisia’s Constitution”, **Brookings Doha Center Analysis**, Paper No. 10, 2014, p. 20-22.

<sup>74</sup> Tunisia’s Constitution, 2014, art. 6.

<sup>75</sup> Akar Yüksel, Bingöl, 2013, p. 319.

<sup>76</sup> Açıl, 2017, p. 180-181.

step towards democratic running of the elections.<sup>77</sup> Thanks to preference of a proportional representation system without any election threshold as well as assurance of the right to organise, more than a hundred political parties have been set up, which describe and characterise themselves as ‘centre-right, centre-left, centre, socialist, right-wing, environmentalist, left-wing, Islamist, independence party, Marxist, Marxist Leninist, new left-wing, pro-Arab League, workers’, progressive, reformist, social democrat, social libertarian, communist, scientific socialist<sup>78</sup>, and thus achieving a great breakthrough in establishment of a pluralist order.

Some regulations stand out in the new constitutional system with respect to women’s rights in addition to their political rights and freedoms. At the very beginning of the constitution-making process, women were defined as complementary to men. Such a definition or characterisation was harshly criticised by the local and international media and non-governmental organisations. The Nahda representatives emphasized that women were fundamentally equal to men, but they differed from each other in terms of biological roles and responsibilities and therefore, men and women complemented each other in a family.<sup>79</sup> Due to intensifying pressure on them, this statement was removed from the constitution and instead it has been highlighted that men and women are the individuals with equal rights and duties. In this sense, it has been ensured in the constitution that the state will play an active role to increase women’s achievements and provide equal opportunities along with protecting the women’s rights, thus imposing a positive obligation on the State.<sup>80</sup>

Along with the assured rights and freedoms, some independent administrative authorities such as the Electoral Commission, Audio-Visual Communication Commission have also been guaranteed in the Constitution. Securing these authorities in the Constitution of Tunisia as is seen in almost all liberal constitutional systems are of high significance in terms of ensuring duly implementation of the provisions of the Constitution. Additionally, it can also be asserted that effective operation of these organisations can help many rights and freedoms take on a higher importance.<sup>81</sup>

Despite the fact that many constitutional developments have taken place with regards to effective exercise of fundamental rights and freedoms, ‘grounds for general limitations’ on the guaranteed rights and freedoms have also been specified in the constitution, which is perceived to be somehow undemocratic. Accordingly, it will be possible to place limitations on fundamental rights and

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<sup>77</sup> The Carter Center, 2014, p. 87.

<sup>78</sup> Ulutaş, Torlak, 2011, p. 8.

<sup>79</sup> Marks, 2014, p. 23.

<sup>80</sup> Tunisia’s Constitution, 2014, art. 21, 46.

<sup>81</sup> M’Rad, 2016, p. 84.

freedoms by law on several general grounds of protecting rights of other people, public order, national security, public health, public decency or necessities of a democratic state.<sup>82</sup> Criticisms have been directed since this might lead up to restricting or exploitation of the essential rights and freedoms by the executive body which might derive the legal basis of its practices from these open-ended ambiguous concepts.<sup>83</sup>

## **2. Political and Constitutional Developments in Egypt in the aftermath of the Arab Spring**

### **2.1. From Dictatorship to Revolution and from Revolution to So-called Democracy**

The political structure of Egypt is more military-oriented compared to that of Tunisia. Principal reasons behind this military orientation are constant coups and changing hands of presidency among military persons. Upon the coup staged in 1952 by the military organisation called as ‘Free Officers’, Gamal Abdel Nasser ended up being in search of an identity and followed a balance policy between Arab nationalist and state-centric socialism under the influence of the Soviets. Successor Anwar Sadat who rose to the power upon death of Nasser made efforts to build a more liberal system after abandoning socialist policies and put an emphasis on private enterprises. During the terms of office of both these leaders, three large-scale wars were waged against Israel and the position of military in the eyes of the public was reinforced as the Egyptian military played an effective role in these wars. However, due to being defeated in these wars, the economy collapsed and reconciliation with the West was sought after. Under the Camp David Accords, Egypt received military and economic aid and assistance from the USA in return for recognition of Israel, which caused Egypt to find itself within the West Block against the Soviets. Upon the assassination of Sadat, the country had been governed by Hosni Mubarak with his repressive and despotic methods for 30 years until the Arab spring. Ongoing Liberal economic policies could not suggest any remedy to deteriorating economy of the country. Consequently, the economy of Egypt was heavily burdened with debt from many countries and entities particularly IMF, the USA and European countries.<sup>84</sup>

In order to gain an insight into the current situation of Egypt, we should examine the three important factors which act as a driving force of social,

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<sup>82</sup> Tunisia’s Constitution, 2014, art. 49.

<sup>83</sup> Abdurrahman Tekin, “The Development Process of Human Rights from the Adoption of Charter of Alliance to the Constitutional Complaint in Turkish Constitutional System”, **Human Rights Review**, V: 11, 2016, p. 110.

<sup>84</sup> Göçer, İsmet, “Arap Baharı’nın Nedenleri, Uluslararası İlişkiler Boyutu ve Türkiye’nin Dış Ticaret Ve Turizm Gelirlerine Etkileri”, **KAÜ İİBF Dergisi**, V: 6/10, 2015, p. 61.



economic, religious, political and constitutional developments. First one refers to structure of the military which played a leading role in the wars against Israel despite even being defeated and which brought many military persons to power and owned probably one quarter of the whole Egypt economy. The second one refers to the non-governmental organisations which were suppressed with anti-freedom policies by the dictatorial governments in order to reinforce their own power and hinder emergence of any alternatives the public might prefer to them. The third factor is that Egypt hosts strong religious organisations and movements<sup>85</sup> because it bears the necessary qualities to be identified as the cultural and religious capital for over hundreds of years. These three dynamics must be taken into account and assessed in understanding of any kind of development in Egypt.

In order for entirely distant secular, Islamic and socialist spheres of non-homogenous society to be ruled in peace and tranquillity under the dictatorial regime, reforms were occasionally introduced during the reign of Mubarak. The reforms, which allowed for running of more than one party in the elections with the intention of increasing the legitimacy of the then-current regime, were effectively used by the organised opposition shortly afterwards. However, this led to termination of reforms.<sup>86</sup> The latest example of this took place in 2005 and the Muslim Brotherhood, which was mostly excluded and ostracised from the politics, gained 88 seats in the Parliament with such a power, no opposing party had ever attained.<sup>87</sup> One of the principal factors facilitating this situation can be considered to be the reforms allowing for presence of non-governmental organisations not only during voting but also during counting of votes as well as camera-recording of the counting of votes.<sup>88</sup>

The opposition, which had great expectations for the elections to be held in 2010, realised that the then-current anti-democratic system could not be easily eliminated through democratic means due to some restrictions imposed by the regime. The opposition had to withdraw from and boycott the approaching election race on the grounds that the judicial review of electoral disputes was removed, and that the opposition parties could not carry out their electioneering activities effectively under pressure of the regime, and that the regime put a heavy pressure on use of printed and visual media means. The Muslim Brotherhood, the largest opposition movement, which had succeeded

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<sup>85</sup> Saleh, 2014, p. 42; Edip Asaf Bekaroğlu, Veysel Kurt, “Mısır’da Otoriter Rejimin Sürekliliği ve Ordu: ‘Arap Baharı’ ve Sonrası Sürecin Analizi”, **Türkiye Ortadoğu Çalışmaları Dergisi**, V: 2/2, 2015, p. 11.

<sup>86</sup> Bekaroğlu, Kurt, 2015, p. 12.

<sup>87</sup> Saleh, 2014, p. 41-42.

<sup>88</sup> Mona El-Ghobashy, “Egypt’s Paradoxical Elections”, **Middle East Report**, V: 238, 2006, p. 22.

in entering the parliament with 88 deputies in 2005, managed to gain only one seat this time owing to various pressures and frauds. The public felt convinced that it was high time for change of the regime when nearly 500 of 514 members of the Parliament belonged to either Mubarak's party or the parties or independents standing by his party.<sup>89</sup> Moreover, Mubarak's preparations for handing over the power to his son Gamal also caused strong reaction in the public<sup>90</sup> and arouse their desire to give an end to this situation. Taking advantage of the popular uprising beginning in Tunisia, millions of people poured out to streets against Mubarak. Having realised that the country took an irreversible, the army changed sides, which paved the way for a new era.

The armed forces announced that they temporarily seized the control of the government after Mubarak and proclaimed that a Constitutional Declaration consisting of 63 articles was brought into force to provide for a democratic transformation. An election calendar was promulgated for both Chambers of Parliament. According to the election results, the party of Mohammed Morsi, a follower of the Muslim Brotherhood movement and other Islamic parties won a landslide victory. As Morsi won the presidential election held in 2012 and the Constitution of 2012 was drafted and took effect<sup>91</sup>, democratic transformation period gained speed.

The wind of democracy in Egypt lasted for a short time and the army seized the government which was ruled under the leadership of Morsi, the first democratically elected Head of State and a new period of time resumed as the substitute of its past. It might be expressed that a lot of factors had an impact on this period the Country underwent. The following grounds might be considered to set the stage for the coup. Although Morsi and the parties he allied with had the parliamentary majority, all their actions and decisions of any kind drew a strong reaction at both local and international levels as in Tunisia. The protest marches continued incessantly. The economic recession resulting from the stockpiling methods of anti-Morsi wealthy people could not be surmounted. Other countries in the region felt disturbed by strengthening of the Muslim Brotherhood movement through the developments in Egypt. Morsi built closer ties with Palestine and Turkey by following anti-Israel policies. The fact that Morsi was not enabled to govern the country despite remaining in power because of strikes by the civil officers of the past government who had penetrated deep into the armed forces, police departments, judicial bodies and bureaucracy, can be enumerated among the most critical reasons behind

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<sup>89</sup> Bekaroğlu, Kurt, 2015, p. 20.

<sup>90</sup> Barnes, Ashley, "Creating democrats? Testing the Arab Spring", *Middle East Policy*, V: 20/2, 2013, p. 66.

<sup>91</sup> Feuille, James, "Reforming Egypt's Constitution: Hope for Egyptian Democracy?", *Texas International Law Journal*, V: 47/1, 2011, p. 258.

Morsi's failure in overcoming the crises and behind this military coup can be enumerated.<sup>92</sup>

The democratic transformation initiated by the public in Egypt was shortly converted into a dictatorial regime upon firm refusal of this transformation by the public under the silent watch of the entire West. Local and international community, academicians, media and political spheres vigorously criticising the majoritarian approaches of Morsi remained silent to murdering of thousands of unarmed demonstrators in a morning prayer by Sisi who was brought to power by coup, to detentions of Muslim Brotherhood leaders, acquittals of the representatives of the old dictatorial regime particularly Mubarak, trials of Morsi and many other politicians with death penalty, which left a deep scar in the history of democracy.<sup>93</sup> Although Morsi and his allied parties had gained over 70 percent majority of the Parliament, all sorts of reforms and moves of these parties were deemed unreasonable and inadequate to such an extent that even the western academicians designated this period as a "black period"<sup>94</sup>. In the period of time between revolution and coup, such concepts as 'west and pro-Israel and anti-Israel' mainly used in distinguishing between social layers of Egyptian people lost their meanings. Having gathered together by exclusively being driven by such concepts as economic situation and social justice<sup>95</sup>, the society turned a blind eye to ousting of the democratically elected Morsi government and preferred the coup and the coup-backed government to the democracy they had formerly introduced.

Despite the West's continual pressing for democracy in the past quarter-century, the following grounds prove that the Western world does not find objectionable the cooperation with the authoritarian governments when deemed compatible with their own interests<sup>96</sup>. John Kerry, the Secretary of the State of the USA, summarised as 'restoration of democracy' the seizure of people's will by means of bloody methods on air in 21st century. Egypt and the

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<sup>92</sup> Ali Zeynel Gökpınar, "Müslüman Kardeşler, Mısır'ı Neden ve Nasıl kaybetti?", 2014, (Online) [www.aljazeera.com.tr/gorus/musluman-kardesler-misiri-neden-ve-nasil-kaybetti](http://www.aljazeera.com.tr/gorus/musluman-kardesler-misiri-neden-ve-nasil-kaybetti), Accessed: 07 June 2018.

<sup>93</sup> Kingsley, Patrick, "Egypt's Rabaa Massacre: One Year on" 2014, (Online) <https://www.theguardian.com/world/2014/aug/16/rabaa-massacre-egypt-human-rights-watch>, 10 March 2019; Human Rights Monitor, "Documented Cases of Extrajudicial Killings and Enforced Disappearances in August", 2015, (Online) [humanrights-monitor.org/Posts/ViewLocale/17274#.XIZLOCgzaM9](http://humanrights-monitor.org/Posts/ViewLocale/17274#.XIZLOCgzaM9), 10 March 2019; The Law Library of Congress, "Egypt: Pending Charges Against Mohammed Morsi", 2014, (Online) <https://www.loc.gov/law/help/morsi-trial/pending-charges-against-mohammed-morsi.pdf>, 11 March 2019.

<sup>94</sup> El-Sayed, 2014, p. 47-57.

<sup>95</sup> Bingöl, 2013, p. 35.

<sup>96</sup> Kurt, Veysel, "3 Temmuz Darbesi: Mısır'da Müesses Nizamın Yeniden Tesisi", **ORSAM**, V: 8/76, 2016, p. 39.

West expanded their military and economic relations without any slowdown and remained silent to violations of human rights.

## **2.2. Constitutional Developments in the aftermath of Revolution and Coup**

### **2.2.1. Constitution-making Process and Issue of Legitimacy of New Constitution**

The army, which realized the approaching end of Mubarak's government, seized the power in order not to be excluded from the period of transformation and ensured the democratic transformation took place under their own control. The Military Council proclaimed how to and when to hold parliamentary elections pursuant to a 63-article Constitutional Declaration they issued. The closed parties found a chance to be reorganised and eventually the given election was held in which voting and counting of votes lasted almost one-month to the astonishment of all the countries ruled according to a liberal constitutional system.<sup>97</sup>

Unlike Tunisia, the newly established Parliament of Egypt was only in charge of enactment while it was stipulated to set up a separate Constituent Assembly for constitution-making processes. The intention behind founding the Constituent Assembly by following the USA-type procedures was to accelerate the democratic transformation while assuring that both assemblies became engaged in their own respective works. As per the Constitutional Declaration, the Constituent Assembly shall be comprised of 100 members whose 50 members were required to be selected from the Parliament and the remaining 50 to be designated outside the Parliament. Taking into account that 70 percent of all seats of the Parliament were held by the Islamic parties, it would be inevitable for at least 70 percent of all members of the Constituent Assembly to belong to the same Islamic parties. However, 66 members of the Assembly turned out to come from Islamic front. During the constitution-making process, the pro-western secular members of the opposition forgot deserving only 30 percent of the public and struggled to acquire a larger slice of the cake. When they failed to accomplish, they decided to boycott the Constitution Assembly. Afterwards, the Constituent Assembly was set up for a second time and it was composed of 85 members, 64 of whom were selected from the Islamic front. Inadequate representation of religious minorities and women in the secondly established Assembly laid the groundwork of the objections raised at the legitimacy of the Constitution.<sup>98</sup> Ensuring pluralist composition of the Constituent Assembly would create a tight-knit community

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<sup>97</sup> Al Jazeera, "Mısır'da Seçimler Nasıl Düzenleniyor?", 2011, (Online) [www.aljazeera.com.tr/haber-analiz/misirda-secimler-nasil-duzenleniyor](http://www.aljazeera.com.tr/haber-analiz/misirda-secimler-nasil-duzenleniyor), Accessed: 08 June 2018.

<sup>98</sup> Saleh, 2014, p. 54-59.

and increase the legitimacy of the drafted Constitution. Nevertheless, it must also be pointed out that the persons and entities making accusations against the legitimacy of the Constitution of 2012 kept silent against the allegations about illegitimacy of the Constitution of 2014 to be touched upon soon below, which is quite noteworthy.

Shortly after drafting of the Constitution, Morsi's government was overthrown by the military coup and Adly Mansour, formerly the Chief Judge of Constitutional Court, became the interim Head of State.<sup>99</sup> Following the coup, a Constitutional Declaration consisting of 33 articles was proclaimed as to how to revise the Constitution of 2012. The Advisory Council of Experts comprised of 6 legal experts and 4 university professors was assigned to determine how to amend the Constitution. A Constituent Assembly consisting of 50 members was set up to draft the new Constitution. Although all segments of the society were invited to take a seat in the Assembly, exclusive of the followers of the Muslim Brotherhood movement, which won the 5 consecutive elections in the wake of the revolution. The Assembly involved a great variety of people from parties, intellectuals, workers, peasants, merchants, universities, churches, police and military departments.<sup>100</sup> Excluding the Muslim Brotherhood from the constituting-making processes indicated not only the fact that the democratic means did not lay the groundwork for the coup but also that the post-coup military government would not be democratically ruled.

### **2.2.2. Legislative Developments**

Having established a unicameral legislature upon adoption of the Constitution of 1971, Egypt set up a second chamber called the Shura Council i.e. Consultative Council as per the Constitutional amendment of 1980. The relationship between the Chambers was asymmetrically built, according to which the People's Assembly was entrusted with such stronger and wider authorities that the People's Assembly was entitled to have the final word in case of any dispute between two chambers.

The Head of State was authorised to appoint a specific number of deputies, albeit considered not democratic to some extent, in the elections of both chambers' deputies, which naturally enabled the Head of State to possess a directive power over legislature. The practice of appointment of deputies for both chambers, which is usually carried out in monarchical states, was in place for both Chambers of Egypt. It was prescribed that 10 members of People's

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<sup>99</sup> Meyer-Resende, Michael, "Egypt: In-Depth Analysis of the Main Elements of the New Constitution", 2014, p. 6, (Online) [http://www.europarl.europa.eu/RegData/etudes/note/join/2014/433846/EXPO-AFET\\_NTpercent282014percent29433846\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2014/433846/EXPO-AFET_NTpercent282014percent29433846_EN.pdf), Accessed: 18 May 2018.

<sup>100</sup> Meyer-Resende, 2014, p. 6-7.

Assembly and 1/3 of members of the Shura Council shall be selected by the Head of State. It was also explicitly laid down in the Constitution that half of the deputies would be made up of workers and farmers.<sup>101</sup>

The Constitution of 1971 vested the Head of State with the powers of dissolving the Parliament, calling the Parliament to an extraordinary meeting, bringing forward a bill, which enabled the executive body to be relatively more powerful than the legislative body.<sup>102</sup> On the other hand, the legislative body was vested with several additional powers in an attempt to remedy and strengthen its position against the executive body. For instance, the right of deputies to raise written and oral questions to members of executive body was guaranteed under the constitution. Furthermore, the Assembly was also entitled to instigate a parliamentary inquiry, introduce a motion of no-confidence i.e. censure motion against a minister with 1/10 of its members and to launch a general debate with 20 deputies. As observed, the Constitution of 1971 specified and made available almost all kinds of legislative checks on the executive power, as practised in the liberal constitutional systems.<sup>103</sup> What matters at this very stage is whether any opposition exists to exercise these vital powers for democracy. Apart from the elections of 2014 in which the Muslim Brotherhood ran as independents and then gained 88 deputies, the main opposition parties had managed to hold 7 seats at most against the Mubarak's party in the 5 elections preceding the revolution.<sup>104</sup> It would not be wrong to assume that vesting the assembly of Egypt with the same powers as those granted to assemblies of the most democratic countries of the world would be of no avail as long as such parliamentary election results persist. Bearing in mind the following argument is theoretically articulated, it stands out that the Constitution of 1971 does not differ much from the Constitutions of 2012 and 2014. While both the Constitution of 1971 and the Constitution of 2014 were respectively in force, there was no effective opposition in the parliament in spite of many tools to be used by the opposition parties.

On the other hand, when the Constitution of 2012 was in effect, there were a freely elected government in power and strong opposition parties. Therefore, for the first time in Egypt, convenient and favourable circumstances emerged to be able to implement the provisions laid down in the constitution with respect to the legislative body. Although the Constitution of 2012 designed a bicameral system as in the former Constitution, the Constitution of 2014

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<sup>101</sup> Egyptian Constitution, 1971, art. 87, 194, 196, (Online) <http://www.wipo.int/wipolex/en/details.jsp?id=7140>, Accessed: 01 June 2018.

<sup>102</sup> Egyptian Constitution, 1971, art. 102, 109, 136.

<sup>103</sup> Egyptian Constitution, 1971, art. 124, 126, 129, 131, 135.

<sup>104</sup> Inter Parliamentary Union, "Egypt Majlis Al-Nuwab (House of Representatives)" 2018, (Online) [archive.ipu.org/parline-e/reports/2097\\_arc.htm](http://archive.ipu.org/parline-e/reports/2097_arc.htm), Accessed: 09 June 2018.

removed this system and instead reduced the number of Chambers to one as in the period before 1980. The Constitution of 2012 prescribed that the Head of State shall appoint 10 members of People's Assembly and 10 percent at most of the members of Shura Council. On the other hand, the Constitution of 2014 introduced a unicameral legislature and, in this sense, lay down that the Head of State shall appoint 5 percent of members of this single assembly.<sup>105</sup> Nevertheless, a bicameral legislature was desired to be brought back through a bill of law submitted to and approved by Parliament in 2019 with a pending referendum thereon. It was provided in the bill that 1/3 of all members of second Chamber shall be appointed by the Head of State.<sup>106</sup>

Another issue to mention is that the Head of State was authorised to declare a state of emergency and take extraordinary measures. Pursuant to the Constitution of 1971, such kind of decisions of the Head of State were subject to approval by 2/3 members of the Assembly whereas the Constitutions of 2012 and 2014 required the same decisions to be approved by of ½ of the Assembly members. It can be asserted that necessitating such a relatively hard-to-reach ratio which was specified as 2/3 in the Constitution of 1971 and ½ in the Constitution of 2014 surely strengthened the place and position of the Parliament. This very assumption that such an approval would increase the importance and power of the Parliament would be realised in case the period of Constitution of 2012 continued. Because the only period of time when all segments of the society could freely get organized and run in the elections in a democratic environment was the period of the Constitution of 2012. Nevertheless, it is noticeable in other periods that the Parliament was dependent on and used to function under the direction of the Head of State who forcibly seized people's right to govern and sustained his power through the anti-democratic elections described as plebiscite. It cannot be naturally expected from such a dependent parliament to object to these decisions, which results in the fact that necessity of approval by the Parliament remains only on paper-based procedure.<sup>107</sup>

Even though the Constitution of 1971 vested the Head of State with the power to easily dissolve the Parliament, the use of this power was rather more difficult under the Constitutions of 2012 and 2014 which prescribed as follows:

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<sup>105</sup> Egyptian Constitution, 1971, art. 108/para. 1; Egyptian Constitution, 2012, art. 128, (Online) <http://www.wipo.int/edocs/lexdocs/laws/en/eg/eg047en.pdf>, Accessed: 01 June 2018; Egyptian Constitution, 2014, art. 102/para. 4, (Online) [https://www.constituteproject.org/constitution/Egypt\\_2014.pdf](https://www.constituteproject.org/constitution/Egypt_2014.pdf), Accessed: 01 June 2018.

<sup>106</sup> Egypt Today, "Breaking: Egypt's Parliament Approves Constitutional Amendments in Principle", 2019, p. 1, (Online) [www.egypttoday.com/Article/2/64705/BREAKING-Egypt-s-Parliament-approves-constitutional-amendments-in-principle](http://www.egypttoday.com/Article/2/64705/BREAKING-Egypt-s-Parliament-approves-constitutional-amendments-in-principle), 4 March 2019.

<sup>107</sup> Egyptian Constitution, 1971, art. 108/para. 1; Egyptian Constitution, 2012, art. 148/para. 3.

the head of State would be allowed to dissolve the Parliament on the condition that the Parliamentary activities were first suspended with a decree-law for 20 days and afterwards a referendum was held on dissolution of the Parliament. Furthermore, it was also provided that, according to referendum results, if the public voted for the Parliament members to remain in office, the Head of State would immediately resign, or if the public voted for the Parliament members to be discharged from office, an early general election would be called and then held within 30 days.<sup>108</sup> Such a mechanism of dissolution was thus envisaged that it built a mutual balance between legislative and executive bodies and even might result in removal of the Head of State from the office.

Unlike the Constitution of 1971, other two Constitutions required approval by the Parliament for the executive's activities like borrowing and finding sources of finance. Since the executive body was entirely in need of the parliamentary approval for these activities, it was constitutionally guaranteed that the executive body could not be only decision-maker when the country's economy was concerned, which can be considered a positive step towards reinforcement of the Parliament.<sup>109</sup>

### 2.2.3. Executive Developments

It is seen that the executive body of Egypt had a remarkably vital role in the politics of the country prior to the revolution. It is observed that the Head of State was always at the core of the political regime of the country and possessed all the powers and authorities.<sup>110</sup> The Head of State was brought up to an untouchable position in the system because of the broad range of powers and privileges from dissolution of the Parliament to his unaccountability, from selection of deputies to declaration of state of emergency.<sup>111</sup> As Lord Acton stated, "Power tends to corrupt, and *absolute power* corrupts absolutely".<sup>112</sup> As witnessed many times in the history, vesting one person with absolute power causes him to degenerate even if he does not will or desire it. This is exactly what happened in Egypt in the true sense of the word.

What stands out in the Constitution of 1971 as an anti-democratising factor of the system is that the given Constitution only mentioned what would happen in case of resignation, death and incapability of the Head of State and did not involve any provision as to how to regulate political or criminal liabilities of the

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<sup>108</sup> Egyptian Constitution, 2012, art. 127; Egyptian Constitution, 2014, art. 137.

<sup>109</sup> Egyptian Constitution, 2012, art. 120; Egyptian Constitution, 2014, art. 127.

<sup>110</sup> Global Partners and Associates, "Parliament and the New Egyptian Constitution", 2013, p. 5, (Online) <https://www.gpgovernance.net/publication/parliament-in-the-2013-draft-constitution/>, Accessed: 05 May 2018.

<sup>111</sup> Global Partners and Associates, 2013 p. 5.

<sup>112</sup> Acton Research Lord Acton Quote Archive, "Power and Authority", (Online), <https://acton.org/research/lord-acton-quote-archive>, 16 August 2017.



Head of State.<sup>113</sup> Because it is unthinkable that that any authorised person bears no responsibilities. No matter whether they will be destined to remain only on paper or not even in case of existence of provisions related to liabilities, the absence of such provisions reveals an insight into democratic structure of the period of 1971.

Mubarak removed the limit on the number of terms the Head of State can serve, who was allowed to be elected twice at most during the reign of Sadat, thereby opening a new era which would last for 30 years. Having been constantly exercised by Sadat, the power to declare a state of emergency specified under the Constitution was at the disposal of Mubarak along with the power to hold a referendum, which reinforced his power day by day. Moreover, after having included in the Constitution ‘an article on terrorism’, Mubarak attained such a power that he could take all kinds of measures with a view of ensuring and maintaining public order and security in case of ‘threat of terrorism’.<sup>114</sup> It should be taken into account that for these measures to be taken, it will be found sufficient to simply face a threat of terrorism rather not experience a terrorist attack, which points out how this power can be easily exercised. Additionally, holders of important political positions and mayors would not be selected through elections, instead would be exclusively designated by the Head of State. On top of that, the law enacted in 1994 ruled that the mukhtars, i.e. representatives of neighbourhoods, would even be designated by the central authority.<sup>115</sup>

When the provisions of the Constitutions of 2012 and 2014 are examined, it is noticed that both constitutions bear striking similarities in many aspects. As stated above under the title of legislation, the Constitution of 2014 led to formation of a remarkably powerful execution because of absence of an opposition in the Parliament which would be able to balance the execution. For instance, both Constitutions required 2/3 majority votes of the Parliament to re-submit a formerly refused bill for approval by the Head of State. Since almost all the deputies were supporters of Sisi the putschist Head of the State in the parliamentary composition after 2014, it can be argued that it would be very unlikely to resubmit the bills for approval by the Head of State.<sup>116</sup>

The political system established in Egypt after 2014 can be identified with the semi-presidential system of government. However, when this system designed with an inspiration from France was scrutinised in depth, 2 significant differences are noticed. One of the differences was the reinforced veto cited

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<sup>113</sup> Egyptian Constitution, 1971, art. 82-85.

<sup>114</sup> Egyptian Constitution, 1971, art. 148, 152, 179; Feuille, 2011, p. 234-248.

<sup>115</sup> Bekaroğlu, Kurt, 2015, p. 18-19.

<sup>116</sup> Egyptian Constitution, 2012, art. 104/f. 3; Egyptian Constitution, 2014, art. 123/para. 3.

above. This power borrowed from the USA corrupts the checks and balances between executive and legislative bodies in favour of the execution. Unlike France, the Head of State in Egypt was authorised to perform all kinds of actions without the requirement of a countersignature. The power of the Head of State to call a referendum on any subject without being subject to any limitations enables him to quell and resistance of the Parliament from scratch.<sup>117</sup> Giving the Army a supra-constitutional position under the new Constitution as well as lacking of the factors essential for existence of an opposition differ this Constitution from that of Tunisia.<sup>118</sup>

After having made a proposal in 2019 for a constitutional amendment with respect to extending his two terms of office finishing in 2022 to additional two six-year terms of office, Sisi the putschist Head of State had this amendment adopted in the Parliament with up to 85 per cent of all votes. With this amendment entering into force through a referendum, Sisi paved the way for serving as the Head of State until 2034, which lifts the lid on the test of democracy of Egypt.<sup>119</sup>

#### **2.2.4. Judicial Developments**

An examination of the Constitution of 1971 indicates that the judiciary, whose scope and framework were narrowly defined therein, was not provided with a constitutional guarantee. It was not specified in the constitution at all how many members the authorised body in charge of appointment of judges and prosecutors, the Constitutional Court and other supreme courts of appeals would be comprised of and how these members would be appointed. All these issues were to be regulated by the laws, in other words, were put at the disposal of the majority of the Parliament. Taking into account that Mubarak's party always held the majority of seats in the Parliament, it can be asserted that there was not any separation and balance of powers in Egypt before the year 2012. On the other hand, the Constitution of 2012 explicitly provided who shall select the members of the supreme courts, albeit, not much positively. Because this allows the holder of parliamentary majority to easily revise the member composition of the judicial body. In this context, the sole favourable development was that it was prescribed in the Constitution that the Court was made up of one chairman and ten members. However, as in the past, the Constitution of 2014 did not include any provision with regards to number of court members and as to who

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<sup>117</sup> In fact, the system in Egypt can be called as plebiscitary presidency. See. European Parliament, "Egypt: In-Depth Analysis of the Main Elements of the New Constitution", 2014, p. 9, (Online) [www.europarl.europa.eu/RegData/etudes/note/join/2014/433846/EXPO-AFET\\_NT\(2014\)433846\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2014/433846/EXPO-AFET_NT(2014)433846_EN.pdf), Accessed: 15 May 2018; Egyptian Constitution, 2014, art. 157.

<sup>118</sup> Fedtke, 2014, p. 9.

<sup>119</sup> Egypt Today, 2019, p. 1.

would select them.<sup>120</sup> The constitutional amendment, which was adopted by the Parliament in 2019 with a pending referendum thereon, enabled the Head of State to appoint the very high judiciary members and chief prosecutors and to preside over the supreme judicial council.<sup>121</sup>

The Constitution of 2012 involved a provision prescribing that the judicial body had its own budget and had to be definitely consulted when an amendment of law concerned the judicial body. It can thus be inferred that the judicial body began to be considered somehow important a little bit. Preserving of the same provision in the Constitution of 2014 can be construed as a favourable progress. .<sup>122</sup>

One of the most important problems in the Egyptian judicial system is the existence of military justice due to a history brimmed with military coups and because of the military's close interest in politics of the country. In this sense, what raises an issue at this point is that civilians are being tried in the military courts although soldiers are supposed to be tried for their crimes arising out performance of their duties as long as it falls under the scope of military jurisdiction. While the Constitution of 1971 was in force, the duties of the military courts were not defined in the Constitution and it was absolutely put at the disposal of the Parliament to define it as they will. Showing a sharp contrast to the former one in this respect, the Constitution of 2012 introduced a regulation which significantly restricted the broad range of powers of the military courts over the civilians. Accordingly, the military courts will be deemed a competent authority to put the civilians on trial provided that they cause any harm or damage to the military personnel. The Constitution of 2012 showed signs of retrogression on this matter and enumerated in detail the circumstances under which the civilians would be tried at the military courts.<sup>123</sup>

As per the judicial review of laws, although the Constitution of 1971 regulated this matter, interestingly it did not explicitly specify by whom and how this right would be exercised. Likewise, the Constitutions of 2012 and 2014 did not mention who would use this right. On the contrary, the Constitution of 2012 laid down that the control of norms shall be conducted as “preventive control”.<sup>124</sup> Thus, the judicial body will have the chance to review an act of legislation passed in the Parliament before it enters into force and will attain

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<sup>120</sup> Egyptian Constitution, 2012, art. 176; Egyptian Constitution, 2014, art. 193.

<sup>121</sup> The Tahrir Institute for Middle East Policy, “Draft Constitutional Amendments”, 2019, p. 1, (Online) <https://timep.org/wp-content/uploads/2019/02/DraftConstitutionalLawBrief2-7-19.pdf>, 4 March 2019.

<sup>122</sup> Egyptian Constitution, 2012, art. 169; Egyptian Constitution, 2014, art. 185.

<sup>123</sup> Fedtke, 2014, p. 9; Egyptian Constitution, 1971, art. 183; Egyptian Constitution, 2012, art. 198; Egyptian Constitution, 2014, art. 204/para. 2.

<sup>124</sup> Egyptian Constitution, 2012, art. 177; Egyptian Constitution, 2014, art. 192.

an important power against the legislation.

Under the Constitution of 2012, Al-Azhar University was entitled to review the laws in terms of conformity with Islamic rules and principles and to make decisions, albeit not binding. However, the Constitution of 2014 completely revoked this power of Al-Azhar University and instead emphasized principal duties of Al-Azhar University to contribute to proper teaching and spread of Islam in Egypt and in the world.<sup>125</sup> It might be deduced from the above-cited provisions that the Constitution of 2012 was drafted in light of more Islamic concerns and with a desire to rule the state according to Sharia principles, whereas the Constitution of 2014 embodied the desire of pro-coup government to be more pleasantly perceived by the West.

Now that theoretical dimensions of the judicial developments in Egypt have been briefly explained, it will be worthwhile to touch upon the practical aspects of Egyptian judiciary. In the countries with a background of dictatorial rule like Egypt, the judiciary fulfils the functions of acquitting the dictatorship of the consequences of their actions and legitimatising their practices rather than performing what the law requires. In other words, it can be stated the judges protect the dictatorial regime, from which they derive their power, rather than the law itself and that they exercise their judiciary power as a means of fulfilling the demands of the possessors of power, by whom they are nourished, rather than implementing the law.<sup>126</sup>

The post-coup events support these arguments. For instance, after Morsi and his allied parties had won a victory in the first democratic election, the Constitutional Court took a decision to cancel and nullify parliamentary elections; however, Morsi convened the Parliament and continued his works in defiance of this decision. By introducing reforms, he also endeavoured to clear the judiciary from the members who remained from Mubarak's period and adopted his 'mindset'.<sup>127</sup> In fact, even though the judiciary members in all democratic countries have to abide by the laws enacted by the legislative body and punish violators of the laws, the judicial body in the countries like Egypt objects to all the legal regulations which are not in favour them and thus get engaged in judicial activism. It can be asserted that these arguments are supported and verified by the following facts<sup>128</sup>. After the judiciary

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<sup>125</sup> Egyptian Constitution, 2012, art. 4; Egyptian Constitution, 2014, art. 7.

<sup>126</sup> David Risley, "Egypt's Judiciary: Obstructing or Assisting Reform?", **Middle East Institute**, 2016, p. 6-9.

<sup>127</sup> Fahmy, George, "The Parliament and the Judiciary: Between the principles of Accountability and Independence", 2013, p. 25-26, (Online) <http://www.gpgovernance.net/wp-content/uploads/2013/08/Publication-1-Full-EN.pdf>, Accessed: 05 June 2018.

<sup>128</sup> Al Jazeera, "Hosni Mubarak Acquitted Over 2011 Protester Killings", 2017, (Online) [https://www.aljazeera.com/news/2017/03/hosni-mubarak-acquitted-2011-protester-](https://www.aljazeera.com/news/2017/03/hosni-mubarak-acquitted-2011-protester-killings)

system returned to its former order during Sisi's term, Morsi and leaders of the Muslim Brotherhood Movement were brought to trial with a sentence of capital punishment, the ousted leader Mubarak charged with pre-revolutionary unlawful processes was acquitted, and no investigation was launched at all about killing of thousands of unarmed people demonstrating against the coup.

### 2.2.5. Other Constitutional Developments

Egypt, where over one hundred million people live and 90 percent of the population are Muslim, has always been of high significance for the World of Islam from past to present. As the Cairo served as one of the foremost capitals of the World of Islam in the fields of culture, literature and Islamic law particularly during the Umayyad, Abbasid and Ottoman periods, respect to Islam and sensitivity to Islamic institutions have been displayed at the highest-level no matter which mode of governance comes to power. Therefore, it would not be inaccurate to assert that none of political actors can achieve success without support of the prominent figures with featured Islamic identities. This judgment can be supported by the fact that Sisi's government, which occupied the first elected President Morsi's position through a coup, took a primary step, *inter alia*, to gain the support of Al-Azhar University just after the coup. Although the Constitution of 1971 was drafted under the governance of those without Islamic concerns, it was provided therein that the religion of the state shall be Islam by virtue of Egypt's significant place in the Islamic Civilisation.

It was mentioned that Sharia shall be one of the principal resources of the laws.<sup>129</sup> By means of an amendment made thereto in 1980, it was provided that Sharia shall be the main source of laws, thereby paving the way for control of norms within a broader scope. Thus, efforts were made to raise Sharia up to a superior position. On the other hand, since it was not explicit enough what the concept of 'Islamic Principles', which corresponds to the word Sharia, refers to, all segments of society interpret it in a different way. In an attempt to overcome this ambiguity, different interpretations had been produced until adoption of the Constitution of 2012.<sup>130</sup>

Likewise, the Constitution of 2012 specified that Islam shall be the religion of the State and that Sharia shall be the fundamental source of laws. Unlike the Constitution of 1971, this Constitutions answered the question as to

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killings-170302152023669.html, 5 March 2019; Adham Youssef, Ruth Michaelson, "Egypt Sentences 75 Muslim Brotherhood Supporters to Death", 2018, (Online) <https://www.theguardian.com/world/2018/sep/08/egypt-sentences-75-to-death-in-rabaa-massacre-mass-trial>, 5 March 2019.

<sup>129</sup> Egyptian Constitution, 1971, art. 2.

<sup>130</sup> Dupret Baudoin, "The Relationship between Constitutions, Politics, and Islam", Ed. by Rainer Grote and Tilmann J. Röder, **Constitutionalism, Human Rights, and Islam after the Arab Spring**, New York, Oxford University Press, 2016, p. 239.

which Islamic principles would constitute the basis thereof. Accordingly, the concept of ‘Islamic Principles’ referred to the whole of following components: Quran (*the holy book of Islam*), Sunnah (*traditions and practices of Islamic prophet*), Usul al-Fiqh (*methodology of Islamic Jurisprudence*) and *Madhhabs of Islam (legal schools of thought)*.<sup>131</sup> The Constitution of 2014 underwent a retrogression and did not clarify the vagueness as to which Islamic Principles would be resorted to.

In contrast to the Constitution of 1971, the Constitutions of 2012 and 2014 did not disregard the Christians and Jews and prescribed that they would be subject to the jurisprudence of their own religions on the matters concerning their personality and religions. It was additionally stated that they would be free to select their own religious leaders.<sup>132</sup> It can be inferred that the underlying reason for adoption of this article was not to scare the non-Muslim community with this provision declaring Islam as the principal source of laws, and assure that their rights would also be protected.

Al-Azhar University, which has a voice in Islamic matters, is a highly significant institution in Egypt. This fact was not ignored in drafting of the Constitution 2012 which stipulated that Al-Azhar was an independent institution free from external pressures, and that the Council of Senior Schools in Al-Azhar is an authority to be consulted about the matters related to Sharia, and that members of this Council could not be dismissed or discharged from their posts<sup>133</sup> In fact, during the Constitution-making deliberations, such matters as whether an enacted law will come into force before being reviewed by Al-Azhar or whether it is required to appeal to Al-Azhar for repealing of a law in force became the subjects of discussions. Nevertheless, since putting the above-cited reforms in practice will turn Egypt into a country ruled by Sharia in real terms not just on paper, such proposals were withdrawn owing to a barrage of harsh criticisms, and instead the Constitutional Court was invested with the power to review the laws in terms of their compliance with Sharia.<sup>134</sup> On the other hand, the Constitutional Court would be able to consult Al-Azhar about some issues, if need be, under the above-cited provision. However, the Constitution of 2014 removed the advisory role of Al-Azhar and left no room for either the Parliament or the courts to resort to Al-Azhar.<sup>135</sup> Thus, the influence of an institution with a solid Islamic background, which would indirectly supervise whether the laws derived their sources from Islamic principles or would at least express their opinion on a relevant issue, was

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<sup>131</sup> Egyptian Constitution, 2012, art. 2, 219.

<sup>132</sup> Egyptian Constitution, 2012, art. 3; Egyptian Constitution, 2014, art. 3.

<sup>133</sup> Egyptian Constitution, 2012, art. 4.

<sup>134</sup> Fedtke, 2014, p. 13.

<sup>135</sup> Egyptian Constitution, 2014, m. 7; Fedtke, 2014, p. 13.

removed. It can therefore be asserted that the country succeeded in letting the Sharia principles to degenerate. Another constitutional reform was related to the election of Head of State. Only in one of the ten presidential elections held until the Revolution, it became possible for three candidates to run for and contest in the election together owing to the absence of opposition in the Parliament or due to the fact that the opposition was represented by the satellite parties during some periods of time.

Although the Constitutions of 2012 and 2014 simplified the conditions of candidacy, here it will be actually mentioned how an electoral body in charge of management of elections would be set up. One of the most critical factors for running fair, free and transparent elections is that the institution to be assigned to manage and supervise elections must be independent and autonomous.<sup>136</sup> Under the Constitution of 1971, the Electoral Commission was comprised of 10 members with 5 members to be selected from senior judges and with other 5 members from the public.<sup>137</sup> The fact that almost all the members of the Parliament stand by the government in power sheds light on the matter regarding which political movement these 5 members might belong to. Ineffectiveness of the opposition parties in the Parliament and governance of the country by the dictatorial regime caused no candidate to be nominated or, even if any candidate was nominated, caused the elections not to go beyond being plebiscite. The Constitution of 2012 tried to come up with a solution to this issue. To this end, it prescribed that all the members of the Commission would be selected from the senior judges and that no political organisation including the Parliament would interfere in this election.<sup>138</sup>

The Constitution of 2014 displayed signs of retrogression on this issue. Accordingly, all the ten members of the Commission would be selected from judiciary members also by judiciary members. Nevertheless, appointment of these persons would be subject to decision of approval by the Head of State.<sup>139</sup>

Additionally, retrogression occurred also in the field of human rights and freedoms. As a matter of fact, half of the articles of the Constitutions of 2012 and 2014 involved human rights. Articles 8-81 of the Constitution of 2012 and Articles 8-93 of the Constitution of 2014 were dedicated to human rights and freedoms. In order for establish an effective legal system which protects human rights and freedoms, it must not be deemed adequate to expound these rights at length in the constitution, these rights must not lose their meanings due to

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<sup>136</sup> The Electoral Commission, "Electoral Legislation, Principles and Practice: A Comparative Analysis", 2012, p. 45-52, (Online) [http://www.electoralcommission.org.uk/\\_data/assets/pdf\\_file/0009/150498/Electoral-legislation-comparative-analysis.pdf](http://www.electoralcommission.org.uk/_data/assets/pdf_file/0009/150498/Electoral-legislation-comparative-analysis.pdf), 10 April 2017.

<sup>137</sup> Egyptian Constitution, 1971, art. 76/5.

<sup>138</sup> Egyptian Constitution, 2012, art. 209/1.

<sup>139</sup> Egyptian Constitution, 2014, art. 209/1.

exceptions and not be rendered non-functional because of play on words.<sup>140</sup> These judgments can be verified with the following examples. The Constitution of 2014 involved the freedom of faith rather than freedom of religion. Furthermore, although the rights of assembly and association and freedoms of thought and expressions were specified therein, miscellaneous exceptions and practices caused these rights and freedoms lose their meanings.<sup>141</sup> Likewise, closure of political parties was so broadly interpreted and explicated that it can be claimed that this right was prejudiced to the core.

The dissolution of the ‘Freedom and Justice Party’ identified with the Muslim Brotherhood was decided based on the allegation of its being a party established based on religious grounds<sup>142</sup>, which exemplifies how the *principle of narrow interpretation of exceptions to the freedoms was ignored*. Even though it is not inaccurate to describe this party as a political wing of the Muslim Brotherhood, this fact must not be deemed sufficient enough to indicate that this party was established based on “a religious ground.”

Another point to touch upon is the freedom from persecution. In this sense, the Constitution of 2014 stated that persecutions of any kind would be forbidden without any exceptions. However, it seems quite noteworthy that ‘other acts of maltreatment’ were not counted in and forbidden along with persecutions. Likewise, it has been very controversial for the said Constitution not to replace the concept of ‘harm’ in its statement of ‘... physical and mental harm cannot be inflicted...’ with the concept of ‘suffering’ used in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, i.e. the “Torture Convention”. This situation demonstrates that the constituent power interspersed throughout the constitution only the elements it would need to reinforce its power after the coup, and did not include in the constitution any matter that might run the risk of being accused of charged with.

When the Constitution of 2014 is examined in terms of the regulations as to under which circumstances a state of emergency could be declared, it is observed that the conditions of a State of Emergency were designed in conformity with the constitutional systems. On the other hand, it was criticised for not drawing a framework of limitations that could be imposed on rights and freedoms during a state of emergency. It was likewise exposed to criticism for not introducing any limitation with respect to infringement of the inviolable rights and freedoms like the freedom from persecution as prescribed in many international treaties.<sup>143</sup>

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<sup>140</sup> Gluck, 2011, p. 5, Fedtke, 2014, p. 12.

<sup>141</sup> Egyptian Constitution, 2014, art. 64, 65, 75.

<sup>142</sup> Egyptian Constitution, 2014, art. 74.

<sup>143</sup> European Parliament, 2014, p. 13.



Although the condition that the laws regulating the rights and freedoms shall be adopted by 2/3 votes of the total number of members of the parliament would not cause any inconvenience during the periods of government when the executive body enjoys absolute power over the legislative body and the state is ruled by a majoritarian system, it might constitute a problem during the periods when the parliament becomes fragmented and democracy is applied. Had such a hard-to-reach quorum been required for placing a limitation on the rights and freedoms, a reasonable and effective protection would have been assured; however, the rule of adopting the laws expanding the scope of a right by 2/3 of the total number of parliament members takes criticism.<sup>144</sup>

### CONCLUSION

The Arab Spring was supposed to offer the people of this region an opportunity to elect their government leaders with a free will. This process turning out to be successful at the very beginning without any external support in Tunisia and Egypt overthrew the oppressive leaders from their offices. As the changes of powers in these countries which are of high significance in terms of geopolitics and natural resources took place in favour of those with an Islamic identity, the powers with particular goals on Arab region suffered from the fear of any Islamic awakening in this region. Efforts were made in Tunisia and Egypt, which achieved success the beginning of the process, by both internal and external dynamics to adjust the democracy with ‘a west-type alignment and balancing’. When the West came to realise that both the potential impacts of the Nahda and Muslim Brotherhood movements on other countries and the path followed by these countries would be out of their control, public demonstrations were triggered to arouse instabilities and political crises, thereby causing the screams of happiness to result in people’s murmuring by means of economic operations.

The Nahda movement which managed the period of transition to democracy in Tunisia after the revolution was deliberately worn out and was reduced to being opposition from that time. On the other hand, in Egypt, Mohammed Mursi, the first democratically elected president was overthrown by a military coup. Even though the democratic institutions and democracy function fairly well compared to their counterparts, the country continues to be deeply afflicted by the economic and political crises. The course of events was sharply reversed in Egypt in the wake of the revolution and a constitutional order completely distinct from that of Mubarak’s period was tried to be designed and established. The silence and unresponsiveness of the western countries and academic spheres to the occurrences in Egypt have been the indicators of the fact that the West attaches more importance to the identity, belonging and

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<sup>144</sup> Fedtke, 2014, p. 13; Egyptian Constitution, 2014, art. 121/4.

allegiance of a leader rather than the form of government of a state.<sup>145</sup>

As frequently witnessed in the history, one of the first actions to take in the immediate aftermath of the processes like coups and revolutions is to suspend the current constitution and instead, make a new constitution, which has repeated in this region too. In fact, the idea of amending or replacing the constitutions usually stems from outburst of the anger at the previous constitutional system. In this sense, such a new understanding permeated down to the society that the design of the state must be arranged in a manner to prevent the post-revolutionary governments of Tunisia and Egypt, formerly ruled by the repressive leaders, from being more authoritarian. At this very stage, the need to make a new constitution arose. Indeed, the idea of limiting the government in power with a higher norm unlikely to be changed lies behind the logic of existence of the constitutions. In this context, constitution-making processes were launched in both Tunisia and Egypt by the constituent assemblies (despite all the pressures of the transitional military council) whose democratic structure was built in front of the whole world. In these countries which have heterogeneous social structure and suffer from wide divergence of opinions, the new constitutions were adopted in the assemblies by the qualified majorities and entered into force following the referendums. Although the allied parties, who won the general elections in both countries, possessed the power to draft the constitutions on their own, they preferred to take steps backward on many matters with the aim of reaching a compromise, thereby assuring the inclusiveness and legitimacy of the constitution. Constitutions of the both countries with a high population of muslims were actually drafted under the sway of political actors to be regarded Islamists.

As the Sharia and religion-state relations were addressed in many parts of the constitution, it is possible to infer that influence of Islamic constitutionalism prevailed. The enacted laws are considered to be in conformity with the liberal system. In this context, it is observed in Tunisia and Egypt that the constitutions were designed to involve the typical features of liberal constitutionalism along with those of the Islamic constitutionalism, and that necessary instruments were interspersed throughout the constitution to assure a limited power, thereby making the necessary arrangements for smooth running of powers within a system of checks and balances. However, Egypt did not have the same destiny with Tunisia. The ruling party was dissolved by the coup and ‘so-

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<sup>145</sup> In case one leader, even if he is a dictator, demonstrates obedience to Western countries, antidemocratic governance of his country is excused or tolerated, which is very noteworthy in terms of seeing the meaning the West attaches to democracy. Because these arguments are also justified when the Western countries mostly focus the democratisation demands and criticisms on such leaders as Putin, Maduro and even Erdogan rather than a leader who comes to power by coup.

called democracy' stepped in under the leadership of coup-plotters. First of all, the Egyptian Constitution of 2012 was targeted, inter alia, by the coup-plotters and instead, a new constitution-making process was instigated. Although the Constitution of 2014 did not undergo theoretical retrogression at a large scale compared to the Constitution of 2012, it seems that a pluralist system of democracy was not formed. Because dissolution of parties, suspension of many freedoms and rendering of the legislative power as a satellite of the executive power led to forming of such an order in which the powers were virtually united.

After all the above-cited courses of events, what needs to be done by the oppositions of both Egypt and Tunisia is to raise their democratic demands through democratic means within the framework of democracy, and to struggle further to win power at the polls by being in continuous search for democratic means without being marginalised or ostracised from the system. As for the governments in power, they are required to implement policies that will enable pluralism by bearing in mind that one day they might also be reduced to an opposition.

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# PSYCHOLOGICAL HARASSMENT IN THE WORKPLACE: HOW TO PROVE BEFORE THE TURKISH COURTS?

*İşyerinde Psikolojik Taciz: Türk Mahkemelerinde Nasıl Kanıtlanır?*

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*“It is possible to destroy someone just with words, looks, and innuendoes: this is called perverse violence or moral harassment.”*

*Marie-France Hirigoyen \**

## Abstract

This article discusses the burden of proof in the cases based on psychological harassment. Psychological harassment is widespread in working environments. However, victims generally keep quiet about harassers actions. Because of that, it is hard to prove psychological harassment. In the lawsuits of non-pecuniary damages regarding psychological harassment, courts generally tend to order a miserable amount of compensation. Also, the burden of proof is the most challenging part in court procedures because victims can barely gather evidence and find witnesses.

**Keywords:** Psychological harassment, mobbing, sexual harassment, workplace harassment, the burden of proof

## Özet

Bu makalede psikolojik taciz temelli vakıalarda ispat yükü sorunu ele alınmaktadır. Aslında çalışma hayatında psikolojik taciz vakıaları oldukça yaygındır. Ancak bununla birlikte, mağdur genellikle taciz eylemini gerçekleştiren kişilerin hareketlerine karşı sessiz kalmaktadır. Zira psikolojik tacizi kanıtlamak oldukça zordur. Ek olarak uygulamada psikolojik taciz temelli davalarda genellikle mahkemeler, tam ispat sağlanamadığı için oldukça düşük miktarlarda manevi tazminata hükmetmek eğilimindedir. Mağdur bakımından, mahkeme yargılaması ispat yükü sorunu, kanıt ve tanık bulma zorluğu nedeni ile oldukça güç hale gelmektedir.

**Anahtar Kelimeler:** Psikolojik taciz, mobbing, cinsel taciz, işyerinde taciz, ispat yükü.

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## INTRODUCTION

Psychological harassment in the workplace has existed well before; we realize this concept and regulate in our laws. Since the idea of psychological harassment was unfamiliar to employees, many of them were not aware of the fact that they were victims of workplace harassment.

Psychological harassment occurs between two parties: harasser and victim. The harasser is generally someone who has a higher position in the workplace. However, psychological harassment can also be seen between an employee and employer, between an employee and fellow employees or between an employee and non-employees.

Psychological harassment may happen to anyone at any moment in a working environment. In other words, psychological harassment is widespread in working environments. However, victims generally keep quiet about the harassers actions. Because in the lawsuits of non-pecuniary damages regarding psychological harassment, courts typically tend to order a miserable amount of compensation. Also, burden of proof is the most challenging part in the court procedures because victims can barely gather evidence and find witnesses. As a consequence, it of that it is difficult to prove psychological harassment.

The concept of the workplace harassment sometimes can include discrimination, despite the fact that the concept of the discrimination differs from the concept of the workplace harassment. At that point it is essential to state that employees can also have a right to claim a discrimination case when the psychological harassment actions amounts to direct or indirect discrimination on the grounds of race, sex, religion or disability.

In this study firstly, we define of psychological harassment; afterward, issues about evidencing in the cases based on psychological harassment are discussed.

### I. WHAT IS PSYCHOLOGICAL HARASSMENT?

The definition of psychological harassment is the systematic harassment of a single person by a larger group. The definition can vary depending on the situation.<sup>1</sup> Psychological harassment, workplace harassment, workplace bullying, or mobbing are expressing the same form of behavior. Psychological harassment is characterized by being continuous, repeated, and systematic.<sup>2</sup>

Psychological harassment in the workplace is not new; however, until recently it has been unreported and kept quiet. This is because many of the employees are not aware of the fact that they are victims of workplace

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<sup>1</sup> Leymann, 119; Mocanu-Suciu, 213. Yamada, 480; Yuvali, 725-726.

<sup>2</sup> Kovačević/Boranijašević, 778; Pascu, 147; Ezer, 300.

harassment, and most victims change their workplaces or terminate their contracts to escape from harassers' actions.

Psychological harassment occurs between two parties; harasser and victim. Harasser is generally someone who has a higher position in the workplace. However, psychological harassment can also be seen between employee and employer, between employee and fellow employees or between employee and non-employees.<sup>3</sup> Those who harass employers are often troubled people who suffer from psychological disorders.<sup>4</sup>

For the first time the concept of psychological harassment in workplace disputes was used by Heinz Leymann's.<sup>5</sup> In other words, the concept of psychological harassment in the workplace began with Leymann's List. Heinz Leymann's work is the milestone for workplace harassments.

Psychological harassment covers an extensive range of conducts. Forty-five actions identified as mobbing were classified into five categories as *Leymann's List*.<sup>6</sup> These categories are<sup>7</sup>:

1. *Effects on self-expression and communication*

- Preventing the victim from the opportunity to self-express by using the superior's hierarchy
- Interrupting the victim constantly while speaking
- Preventing the victim from the opportunity to self-express by colleagues
- Colleagues yell and offend the victim
- Criticizing the victim's work constantly
- Criticizing the victim's private life constantly

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<sup>3</sup> "There are different kind of mobbing. These depend on the way it occurs and on the intention.

1. *Vertical mobbing is exerted by superiors on an employee or, more rarely, by the employees on their superior. These two kinds of mobbing are generally referred to as bottom-up mobbing (when one or more employees do not recognize the boss's authority) and top-down mobbing (when the harasser is in a higher position than the victim) which includes attitudes and actions related to the abuse of power.*

2. *Peer or horizontal mobbing is where colleagues are aggressive towards other colleagues. The harasser and the victim are at the same level as two colleagues with equal job status. Normally, envy, gossip, conflicts, rivalries, and personal antipathies among colleagues are more aggressive and emotionally involving than those between superiors and employees."* European Commission's Daphne Project Report: Recognizing and Dealing with Bullying and Harassment in the Workplace. See; <http://www.surrey.ac.uk/Education/cse/daphne.htm>

<sup>4</sup> **Kovačević /Boranijašević**, 778.

<sup>5</sup> **Pascu**, 147; **Ballard/Easteal**, 18; **Tinaz**, 14.

<sup>6</sup> **Leymann**, 120; **Mocanu-Suciu**, 213.

<sup>7</sup> **Leymann**, 120; See; <http://www.antimobbing.eu/lipt.html>; <http://www.leymann.se/English/frame.html>;

- Terrorizing the victim by telephone
  - Threatening the victim verbally
  - Threatening the victim in written
  - Refusing the eye contact with the victim
  - Ignoring the presence of the victim
2. *Effects on social relationships and connections*
- Not speaking with the victim anymore
  - Not allowed the victim to access to another person
  - Giving the victim another position at work which isolates and pushes it away from colleagues
  - Forbidding colleagues to talk to the victim
  - Denying the presence of the victim
3. *Effects on personal reputation and dignity*
- Slandering about the victim
  - Spreading rumors about the victim
  - Making fun of the victim
  - Claiming that the victim is mentally disorder
  - Forcing the victim to undergo a psychiatric evaluation
  - Mocking the disability of the victim
  - Imitating the voice and actions of the victim to make fun of
  - Attacking political or religious beliefs of the victim
  - Mocking the private life of the victim
  - Making fun of the victim's nationality or origin
  - Obligate the victim to accept humiliating activities
  - Inequitable assessment of the victim's work
  - Questioning or contesting to victim's decisions
  - Harassing victim by obscene or insulting words
  - Harassing victim sexually by gestures or proposals
4. *Effects on a professional carrier and life quality*
- Preventing the victim from taking any tasks
  - Preventing the victim from finding any tasks for him/herself
  - Assigning victim with useless, unnecessary or nonsense tasks
  - Assigning victim with the tasks below the abilities of the victim
  - Assigning victim continually with new tasks
  - Forcing to complete humiliating assignments
  - Assigning victim with tasks that are way beyond his/her qualifications to discredit him/her
5. *Effects on physical health*
- Forcing the victim to do a physically strenuous job
  - Threatening victim with physical violence

- Threatening victim with physical aggression
- Abusing victim physically
- Causing general damages that create financial costs to the victim
- Damaging the victim's workplace or home
- Continuous sexual harassment

In the workplace harassment, the role of the employee or professional abilities of the employee can intentionally be underestimated.<sup>8</sup> Psychological harassment's final goal is making the victim quit the job on her/his own initiative.<sup>9</sup> In other words, the primary purpose of harassment is to isolate the victim in the workplace.<sup>10</sup> Workplace harassment affects the victim negatively, such as depression, post-traumatic stress disorders, physical illness, or low work performance.<sup>11</sup> Workplace harassment can have more terrible consequences. Often times, the employee cannot quit his/her position since his or her income depends on it, which can make the situation even worse.

ACAS<sup>12</sup> underline some adverse effects of psychological harassment such as poor morale, poor employee relations, and loss of respect for superiors, poor job performance, reduced productivity and damage to company reputation.<sup>13</sup>

The International Labour Organization defines workplace harassment as “*offensive behavior that is repeated over time and manifested as vindictive, cruel, or malicious attempts to humiliate or undermine an individual or group of employees.*”<sup>14</sup>

According to European Commission’s survey mobbing is “*a negative form of behavior, either between colleagues or between hierarchical superiors and subordinates, where the person who is the object of mobbing is repeatedly humiliated and attacked directly or indirectly by one or more persons for the purpose and with the effect of alienating him or her*”.<sup>15</sup>

French law has very detailed regulations about psychological harassment. In France, the Social Modernization Law dated 2002 has entered into force to

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<sup>8</sup> **Pascu**, 146.

<sup>9</sup> **Kovačević /Boranijašević**, 778; **Yuvali**, 727

<sup>10</sup> **Pascu**, 146.

<sup>11</sup> **Smit**, 792.

<sup>12</sup> Acas (Advisory, Conciliation and Arbitration Service) provides free and impartial information and advice to employers and employees on all aspects of workplace relations and employment law.

<sup>13</sup> Advice leaflet - Bullying and harassment at work: a guide for managers and employers, 2. <http://www.acas.org.uk/index.aspx?articleid=1864>

<sup>14</sup> Framework guidelines for addressing workplace violence in the health sector, the training manual ICN, PSI, WHO, ILO, Geneva (Switzerland) (2005) See; [http://www.ilo.org/safework/info/instr/WC\\_MS\\_108542/lang-en/index.htm](http://www.ilo.org/safework/info/instr/WC_MS_108542/lang-en/index.htm)

<sup>15</sup> European Commission’s Daphne Project Report: Recognizing and Dealing with Bullying and Harassment in the Workplace. See; <http://www.surrey.ac.uk/Education/cse/daphne.htm>

combat and prevent workplace harassment. This law is a key instrument with its specific provisions about workplace harassment. The law added articles about workplace harassment to the French Labour Code. According to the article 1152/2 of the French Labour Code “*employees shall not be subjected to repeated actions constituting moral harassment, which intentionally or unintentionally deteriorate their working conditions and are likely to violate their rights and dignity, impair their physical or mental health or jeopardize their professional future.*”<sup>16</sup> Despite the fact that there is no clear definition, the law sets a framework to psychological harassment.

Turning to Turkey, Grand National Assembly of Turkey’s Commission of Equal Opportunities for Women and Men prepared a report about psychological harassment. According to this report psychological harassment is “*systematic and continuous psychological or physical actions which aim to bully or harass an employee*”. According to the report in working environment, fellow employees or employer declare an employee as a persona non grata and they isolate, discourage or terrorize him/her by verbal or physical harassments.<sup>17</sup>

6701 numbered Turkish Human Rights and Gender Equality Institution Law<sup>18</sup> also defines harassment in the article 2/1-j. According to this article, “*Harassment: Any intimidating, degrading, humiliating or embarrassing behavior including psychological and sexual forms which intent to infringe on human dignity based on one of the foundations of this Law*”.

Turkish law doctrine used the concept of psychological harassment for the first time in a high court decision. In this significant specific case, plaintiff is a geological engineer and he claims that he is harassed by his superior. He also claimed that his superior threatening him verbally and in written. For example, his superior takes his written statement five times in one year and gives him regularly unjust disciplinary punishments. In consequence of these actions, he become mentally depressed and has to take professional help and use some medicine. The High court states that these forms of behaviors should be considered as a psychological harassment. In labour relations, employer has some liabilities such as duty of care, duty of respect and duty of protection. In this framework, according to high court's decision, the abovementioned behaviors are against liabilities of employer, and beside this, they constitute harassment.<sup>19</sup>

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<sup>16</sup> Lerouge, 110-112.

<sup>17</sup> Commission of Equal Opportunities for Women and Men Report’s, 6. See; [https://www.tbmm.go.v.tr/komisyon/kefe/docs/komisyon\\_rapor\\_no\\_6.pdf](https://www.tbmm.go.v.tr/komisyon/kefe/docs/komisyon_rapor_no_6.pdf)

<sup>18</sup> See; <https://humanrightscenter.bilgi.edu.tr/media/uploads/2016/05/12/TIHEK.pdf>

<sup>19</sup> Y. 9HD, 30.05.2008, E.2007/9154, K.2008/13307. See; <https://www.yargitay.gov.tr/>

## II. THE FORMS OF PSYCHOLOGICAL HARASSMENT

Even the legal definition is not entirely clear; it is difficult to determine if the behavior can be considered as bullying, psychological harassment, sexual harassment, or something else. All of these legal concepts are very close to one another. In other words, there is a fine line between these legal concepts.

It is not easy to categorize the harasser's behavior. Because of its extensive usage, there is no universally accepted definition. The behavior can be a form of bullying, sexual harassment, religious harassment, or psychological harassment. Therefore psychological harassment, mobbing, or bullying can be used interchangeably.<sup>20</sup>

### Psychological Violence

According to The World Health Organization's definition violence is *"the intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment, or deprivation."*<sup>21</sup>

Psychological violence or harassment aims to harm victim's mental health. It affects the victim negatively, causing depression, post-traumatic stress disorders, and physical illness, etc.<sup>22</sup>

Psychological violence or harassment describe behaviors which violate victim's rights and dignity, impair his/her mental health or jeopardize the professional future rather than physical actions. For example changing the employee's position in the workplace for thirty times in nine months is considered psychological violence.<sup>23</sup>

### Bullying

According to European Agency for Safety and Health at Work, sheet numbered 23 *"Workplace bullying is repeated, unreasonable behavior directed towards an employee, or group of employees, that creates a risk to health and safety."*

Within this definition *'unreasonable behavior'* means behavior that a reasonable person, having considered the circumstances, would see unreasonable including behavior that is victimizing, humiliating, undermining

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<sup>20</sup> Ballard/Easteal, 18-19; Morrall/Urquhart, 165.

<sup>21</sup> World Health Organization's World Report On Violence And Health: Summary, Geneva (2002), See; [http://www.who.int/violence\\_injury\\_prevention/violence/worldreport/en/summary\\_en.pdf](http://www.who.int/violence_injury_prevention/violence/worldreport/en/summary_en.pdf)

<sup>22</sup> Çelik/Caniklioğlu/Canbolat, 326-329.

<sup>23</sup> YHGK, 25.9.2013, E.2012/9-1925, K.2013/1407. See; <https://www.yargitay.gov.tr/>



or threatening; 'behavior' includes actions of individuals or a group.

"Risk to health and safety" includes risk to the mental or physical health of the employee. Bullying often involves a misuse or abuse of power, where the targets can experience difficulties in defending themselves.<sup>24</sup>

Bullying generally represents an assault of the victim's dignity.<sup>25</sup> And bullying must be repeated in order to accept this behavior as psychological harassment.<sup>26</sup>

Bullying can be seen in different forms such as yelling at someone, threatening someone, cursing someone, spreading false rumors, taking credit for someone else's work or avoiding to make an eye contact, ignoring the presence of someone. For example, continuously yelling at an employee and humiliating him/her for making victim quit the job on her/his own initiative by psychological pressure is considered as bullying.<sup>27</sup>

### **Sexual Harassment**

Sexual harassment is unwanted sexual relations between unequal parties. In this relationship, harassers usually hold the position of power over victims' jobs or manipulate them.<sup>28</sup> Sexual harassment can be seen in two different forms. The first form of it is creating hostile or offensive work environment through sexual harassment. The second form involves harassment in which a superior demands sexual relation in exchange for job benefits.<sup>29</sup>

Sexual harassment can be seen as unwelcome comments, offensive sexual jokes, insults and innuendoes or unwanted physical contacts.<sup>30</sup> For example keeping track of woman employee's menstrual periods on the desk calendar and making remarks about her moods is another form of sexual harassment.<sup>31</sup>

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<sup>24</sup> European Agency for Safety and Health at Work, Sheet Numbered 23. See; <https://osha.europa.eu/en/publications/factsheets/23>

<sup>25</sup> **Smit**, 791.

<sup>26</sup> **Ballard/Easteal**, 22.

<sup>27</sup> Y.9.HD, 30.5.2008, E.2007/9154, K.2008/13307. See; <https://www.yargitay.gov.tr/>

<sup>28</sup> **Frost**, 19.

<sup>29</sup> **Martucci/Terry**, 126; **Süzek**, 419.

<sup>30</sup> **Frost**, 19-20; **Stonebraker**, 168; **Taneja**, 295.

<sup>31</sup> "Plaintiff is a twenty-seven-year-old female of Mexican-American heritage. Plaintiff began working for defendant on November 6, 1976. Plaintiff's responsibilities as a switch bill clerk required her to have her work reviewed at least once a day by Mr. Webb. Therefore, plaintiff had occasion to be in Mr. Webb's office frequently. Mr. Webb consistently made sexually explicit and demeaning remarks to Mrs. Coley which was neither encouraged, invited, or condoned by her. These included references to the size of her "boobs," keeping track of her menstrual periods on his office calendar and making remarks about her moods in relation thereto, and repeated inquiries as to when she was going to "do something nice for him." These inquiries became more insistent over time until in early March before plaintiff was to take a vacation Mr. Webb began to count down the days which plaintiff had left to do

Sexual harassment in the workplace is not new, however it has been unreported until recently. Most victims change their workplaces or terminate their contracts in order to escape from harassers' actions. As a consequence of that harassers feel more powerful and victimize other women in the workplace.<sup>32</sup> Victims also hesitate to make a complaint about sexual behaviors as it's hard to maintain confidentiality in the court procedures.<sup>33</sup>

Sexual harassment sometimes can be seen between fellow employees. In these circumstances an employer is responsible for acts of sexual harassment in the workplace where the employer knows or should have known of the conduct, unless they can show that it took immediate and appropriate corrective action.<sup>34</sup>

The employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer knows or should have known of the conduct and fails to take immediate and appropriate corrective action.<sup>35</sup>

The gender-specific bullying is the most common form of workplace bullying. When it comes to gender discrimination in workplace, people generally describe or imagine a labour relation between men and women. In reality, women who earned a status in predominantly male working environment are unhelpful and rude to other women by whom they feel threatened by, in order to protect their own status.<sup>36</sup>

The difference between sexual harassment and psychological harassment depends on characteristics of the behavior. Sexual harassment has a sexual meaning and is based on sexual acts, whereas psychological harassment is related to humiliating, undermining or intimidating the victim's dignity.<sup>37</sup>

### Religious Harassment

The U.S. Equal Employment Opportunity Commission defines religious harassment as "*treating an employee unfavorably because of his or her*

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*something beautiful or he "would stop being nice and start to get mean." According to plaintiff's testimony, she was so frightened by the implications of these remarks that she did not report for work on the last scheduled workday preceding her vacation." Coley v. Consolidated Rail Corp, 561 F. Supp. 645 (1982), See; <https://law.justia.com/cases/federal/district-courts/FSupp/561/645/1894697/>*

<sup>32</sup> Frost, 19.

<sup>33</sup> In house mechanisms and alternative dispute resolutions can be used for preventing from this hesitation. See; Slowik, 11-12.

<sup>34</sup> Martucci/Terry, 129-130; Frost, 20; Taneja, 301-302; Stonebraker, 173.

<sup>35</sup> Frost, 20.

<sup>36</sup> Smit, 780.

<sup>37</sup> Mollamahutoğlu/Astarlı/Baysal, 229-231; Süzek, 419-420; Narmanhoğlu, 321; Aktay/Arıcı/Senyen Kaplan, 151; Tunçomağ/Centel, 137; Çelik/Caniklioğlu/Canbolat, 324.

*religious beliefs.*” Religious harassment includes not only people who belong to traditional, organized religions, such as Buddhism, Christianity, Hinduism, Islam, and Judaism, but also others who have sincerely held religious, ethical or moral beliefs.<sup>38</sup>

Religious harassment can be seen as forbidding employee from taking annual leaves for religious holiday or making fun of employee’s religious belief. Religious harassment can also be considered as discrimination. In these circumstances employee can also have a right to claim a discrimination case.

### **Discrimination**

The concept of the discrimination differs from the concept of the workplace harassment.<sup>39</sup> However sometimes workplace harassment can include discrimination.

It is essential to state that employees can also have a right to claim a discrimination case when the amount of harassing actions leads to direct or indirect discrimination on the grounds of race, sex, religion or disability.

A specific and the most common form of discrimination is sexual harassment.<sup>40</sup> However theoretically when a superior sexually harasses employees of both sexes and indirected sexual behaviors creates a hostile and offensive working environment for men and women, discrimination-based rather than sexual harassment case must be discussed.<sup>41</sup>

### **Work-related disputes**

Psychological harassment must be applied carefully because of the fact that there is a risk of confusing it with regular work related disputes.<sup>42</sup> In order words, workplace harassment must not be confused with difficult working conditions or inadequate income etc.<sup>43</sup>

The High Court of Turkey states that if all the other employees in the workplace are also subjected to unfair, rude and offensive behaviors, psychological harassment cannot be discussed. In these circumstances, workplace-related disputes come into question.<sup>44</sup> According to another high court’s decision only superior’s dominating and strict behaviors cannot be considered as psychological harassment. Psychological harassment’s final goal

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<sup>38</sup> See; <https://www.eeoc.gov/laws/types/religion.cfm>

<sup>39</sup> Çelik/Caniklioğlu/Canbolat, 327.

<sup>40</sup> Pascu, 146.

<sup>41</sup> Martucci/Terry, 128.

<sup>42</sup> Lerouge, 109; Taşkın, 400.

<sup>43</sup> Ezer, 301; Yuvalı, 728.

<sup>44</sup> Y. 22.HD, 22.5.2014, E.2013/11788, K.2014/14008. See; <https://www.yargitay.gov.tr/>

is making victim quit the job or isolate the victim in the workplace.<sup>45</sup> In another high court decision, it is stated that long term observation cannot be considered as psychological harassment in the workplace, because there is no intention to torture or harass the employee.<sup>46</sup>

### III. HOW TO PROVE?

One of the most important issues in psychological harassment based case is the burden of proof. The victim who is subjected to psychological harassment should prove this claim. However, many harassment based cases involve an accuser's word against that of her/his alleged harasser, the so-called "*he said, she said*" incidents.<sup>47</sup> In term of evidence, it is very hard to prove harassment in the workplace. Especially it is quite difficult to prove the harassment claim after the termination of the employment contract.<sup>48</sup> In addition according to U.S court practices, the order of proof in each form of harassment is somewhat different.<sup>49</sup>

Actually burden of proof is an obligation of a party to produce the evidence that will prove the claims they have made against the other party. In other words, burden of proof is closely related to bearing an obligation to prove the claim.<sup>50</sup>

According to Turkish doctrine, the burden of proof can be examined under two headlines: objective burden of proof and subjective burden of proof. Objective burden of proof defines, when the party who has to presents the evidence of the incidents to the court and bears the burden of proof, cannot prove them, this inability affects the judgment against this party.<sup>51</sup> In short course, if the party cannot present his/her evidences, that may cause losing the case. Subjective burden of proof means that the parties are obligated to present their evidences to the court.<sup>52</sup>

According to burden of proof, when the party cannot present the evidences and therefore cause the uncertainty of the real situation, this party has to suffer

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<sup>45</sup> Y. 9.HD, 12.2.2013, E.2010/38293, K.2013/5390. See; <https://www.yargitay.gov.tr/>

<sup>46</sup> Y. 7.HD, 20.1.2015, E.2014/14808, K.2015/131. See; <https://www.yargitay.gov.tr/>

<sup>47</sup> **Bowers/McDermott**, 451; **Stonebraker**, 172.

<sup>48</sup> **Çelik/Caniklioğlu/Canbolat**, 332.

<sup>49</sup> **Martucci/Terry**, 126.

<sup>50</sup> **Görgün/Börü/Toraman/Kodakoğlu**, 476; **Budak/Karaaslan**, 217; **Arslan/Yılmaz/Ayvaz**, 373; **Atalay/Pekcanitez**, 1694; **Tanrıver**, 777; **Bozkurt**, 383.

<sup>51</sup> **Yıldırım**, 74; **Albayrak**, 292; Afterwards, we are going to use the concept of burden of proof as an objective burden of proof.

<sup>52</sup> **Yıldırım**, 74; **Albayrak**, 287.

his uncertainty.<sup>53</sup> Thus burden of proof is not an obligation, but is an onus.<sup>54</sup>

According to Turkish doctrine, both parties needs to present evidences to the court regardless of the burden of proof. In this circumstances when the court can solve the case by the virtue of this evidences, the court doesn't pay attention of the fact that which party bears the burden of proof.<sup>55</sup> According to the High Court of Turkey, *"the party, who claims a fact which is against to natural order of life, is obligated to prove this fact becomes reality."*<sup>56</sup> If the court incorrectly determines the party who bears burden of proof, the lack of proof may be occurred and this may cause the danger of the rejection of the case.<sup>57</sup>

Mostly the main reason of dismissal of the most cases based on psychological harassment is the absence or lack of proof. Courts tend to look for conclusive and convincing evidence in psychological harassment based case as well as in other types of cases.<sup>58</sup>

As a general rule the plaintiff bears burden of proof. However there are specific cases where the general rule is softened and exceptions are accepted.<sup>59</sup> For example according to article 5 of the Turkish Labour Law *"If the employee shows a strong likelihood of such a violation, the burden of proof that the alleged violation has not been materialized shall rest on the employer."* The High Court of Turkey has tried to find a solution regarding burden of proof in order to protect employee in labour relations. According to the high court's solution, courts may also consider the signs of harassment and life experiences. In other words, prima facie evidences may be also taken into account.<sup>60</sup> However it is essential to clarify that generally more evidence is required than subjective evidence in order to prove psychological harassment.

To make a decision on the cases based on the psychological harassment based cases, firstly courts need to identify the form of behavior. Behaviors which constitute psychological harassment can differ from one working environment to another. For example, in one workplace late night calls can be routine and necessary, while in another workplace this behavior can be

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<sup>53</sup> **Görgün/Börü/Toraman/Kodakoğlu**, 476; **Budak/Karaaslan**, 217; **Arslan/Yılmaz/Ayvaz**, 373; **Atalay/ Pekcanitez** (Usul), 1694; **Tanriver**, 777.

<sup>54</sup> **Pekcanitez/Atalay/Özekes**, 331; For further information of the concept of "onus" in Turkish law see; **Eren**, 45.

<sup>55</sup> **Atalı/Ermenek/Erdoğan**, 477; **Arslan/Yılmaz/Ayvaz**, 374; **Yavaş**, 751.

<sup>56</sup> YHGK, 22.05.2012, E.2012/6-1575, K.2013/732.

<sup>57</sup> **Yavaş**, 742.

<sup>58</sup> **Taşkın** (Mobbing), 391.

<sup>59</sup> **Bilgili**, 74.

<sup>60</sup> **Savaş Kutsal**, 639.

considered as harassment. In the frame of these explanations we need to clarify that the most essential thing in the court procedure is to convince the court that the behavior oversteps the line of work-related disputes.

The cases based on the psychological harassment, the most common evidence is witness statements. Generally, witnesses are employers in the same workplace. Most witnesses have hesitate to give statement against employer. Since, they fear to lose their jobs or positions.

In French labour law, there is an exemplary and guide regulation on witness's hesitation. Several provisions in the French Labour Law were modified in order to accommodate to new regulations on workplace harassment. The burden of proof of moral harassment in the workplace was also modified. According to article 1154/1 of the French Labour Law "*the employee establishes the facts which support the presumption that harassment has occurred*". Which means the burden of proof is changed from this point thereafter it is a defendant's obligation to prove that there is not any action which constitutes harassment.<sup>61</sup>

The French law gives privilege to witnesses in workplace harassment cases. In other words, employees who denounce moral harassment have immunity.<sup>62</sup> According to article 1152/2 of the French Labour Law "*employees may not be penalized, dismissed or subjected to discriminatory measures for bearing witness to or reporting such actions.*"

It is very important to state that in psychological harassment cases, immunity of employers who denounce moral harassment is justified to ensure that harassment will be reported.

## **Legal Regulations**

### **a. International Legal Regulations**

Before Turkish legal regulations will be reviewed, it is important to mention the international regulations briefly which are taken into consideration in our law during legislative process.

According to the Charter of Fundamental Rights of the European Union, article number 31 "*Every worker has the right to working conditions which respect his or her health, safety and dignity.*"<sup>63</sup>

In 1989, the European Council Directive N.89/391 was adopted. The aim of this Directive is to introduce measures to encourage improvements in the safety and health of workers at work. According to the Directive an employer

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<sup>61</sup> Lerouge, 114.

<sup>62</sup> Lerouge, 119.

<sup>63</sup> See; <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>

shall ensure the safety and health of workers in every aspect related to work.<sup>64</sup> This includes in relation to the risk of harassment.

Based on these recommendations, most European countries have introduced new specific regulations regarding workplace harassment.<sup>65</sup> On the other hand, some European countries have introduced rules for preventing and combating workplace harassment in their existing labour law.<sup>66</sup>

### **b. Turkish Legal Regulations**

According to Constitution of the Republic Of Turkey article 17, “*everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence.*”<sup>67</sup> The provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, and administrative authorities and other institutions and individuals. Laws shall not be contrary to the Constitution. For this reason, we are going to make our explanations in the frame of article 17. In other words, article 17 will be our compass to find the most proper solutions regarding psychological harassment cases.

In the Turkish Regulations there is no specific or direct regulation regarding burden of proof for psychological harassment cases, general principles of the 4721 numbered Turkish Civil Code and the 6100 numbered Turkish Civil Procedure Code should applied.

According to 4721 numbered Turkish Civil Code article 6 “*Unless the Law ordered the contrary, any one of the parties has to prove his/her/its claim.*”

According to 6100 numbered Turkish Civil Procedure Code article 190 “*Unless the Law ordered the contrary, the party who gain a right from the claim in favor of himself/herself, shall bear the burden of proof.*”

In the 4857 numbered Turkish Labor Code, there are two main principles: protection of labor and interpretation favor of labor. However, these two main principles are not accepted by the 6100 numbered Turkish Civil Procedure

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<sup>64</sup> See; <https://osha.europa.eu/en/legislation/directives/the-osh-framework-directive/1>

<sup>65</sup> **Pascu**, 148- 149; for example Belgium has introduced law named “*The Protection against Violence, Moral Harassment and Sexual Harassment in the Workplace*”.

<sup>66</sup> **Pascu**, 149; for example French Labor Code were modified in order to accommodate to new regulations about workplace harassment.

<sup>67</sup> Article 17: “*Everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence.*

*The corporeal integrity of the individual shall not be violated except under medical necessity and in cases prescribed by law; and shall not be subjected to scientific or medical experiments without his/her consent.*

*No one shall be subjected to torture or mal-treatment; no one shall be subjected to penalties or treatment incompatible with human dignity.”* See; [https://global.tbmm.gov.tr/docs/constitution\\_en.pdf](https://global.tbmm.gov.tr/docs/constitution_en.pdf)

Code.<sup>68</sup> Thus the most important issue of the legal procedure of harassment cases is burden of proof and the most challenging part of the procedure for the employee is presenting evidences to the court to prove his case. For this reason mostly the main reason of dismissal of psychological harassment based cases is the absence or lack of proof.

The Turkish Labour Law numbered 4857 recently entered into force, unfortunately there is no direct regulation regarding workplace harassment. Because of the fact that there is no special regulation in Turkish Labour Law, psychological harassment is considered within the scope of the employer's obligations which is arisen from such as duty of care, duty of respect and duty of protection.<sup>69</sup>

Employer's duty to protect the health, safety and welfare of their employees is regulated separately in three different laws: 4857 numbered Turkish Labour Law<sup>70</sup>, 6098 numbered Turkish Law of Obligation<sup>71</sup> and 6331 numbered Occupational Health and Safety Law<sup>72</sup>.

As we mentioned above, there is no specific regulation regarding psychological harassment in Turkish Labour Law. However, according to article 5 of Turkish Labour Law<sup>73</sup> in case of psychological harassment there

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<sup>68</sup> Okur, 589; Bozkurt, 384-389.

<sup>69</sup> Süzek, 419-421; Çelik/Caniklioğlu/Canbolat, 320; Limoncuoğlu, 57.

<sup>70</sup> See; <https://www.mevzuat.gov.tr/MevzuatMetin/1.5.4857.pdf>.

<sup>71</sup> See; <http://www.mevzuat.gov.tr/MevzuatMetin/1.5.6098.pdf>.

<sup>72</sup> See; <https://www.mevzuat.gov.tr/MevzuatMetin/1.5.6331.pdf>.

<sup>73</sup> Article 5: "No discrimination based on language, race, sex, political opinion, philosophical belief, religion and sex or similar reasons is permissible in the employment relationship. Unless there are essential reasons for differential treatment, the employer must not make any discrimination between a full-time and a part-time employee or an employee working under a fixed-term employment contract (contract made for a definite period) and one working under an open-ended employment contract (contract made for an indefinite period).

Except for biological reasons or reasons related to the nature of the job, the employer must not make any discrimination, either directly or indirectly, against an employee in the conclusion, conditions, execution and termination of his (her) employment contract due to the employee's sex or maternity.

Differential remuneration for similar jobs or for work of equal value is not permissible.

Application of special protective provisions due to the employee's sex shall not justify paying him (her) a lower wage.

If the employer violates the above provisions in the execution or termination of the employment relationship, the employee may demand compensation up his (her) four months' wages plus other claims of which he (she) has been deprived. Article 31 of the Trade Unions Act is reserved.

While the provisions of Article 20 are reserved, the burden of proof in regard to the violation of the above – stated provisions by the employer rests on the employee.

However, if the employee shows a substantial likelihood of such a violation, the burden of proof that the alleged violation has not materialized shall rest on the employer."



is also a violation of the duty of equal treatment. For this reason the employee can take a legal action regarding the right of equal treatment.<sup>74</sup>

Duty of equal treatment doesn't mean absolute equality, because this obligation is relative.<sup>75</sup> It is stated that the duty of equal treatment should be applied in the same way to the workers which are in the same condition. In short course, law accepted horizontal equity. Horizontal equity implies that we give the same treatment to people in an identical situation. In other words, horizontal equity is the equal treatment of equals<sup>76</sup>. According to the High Court, *"The duty of equal treatment burdens the employer an obligation not to behave differently among workers working in the same workplace without a just and objective reason."*<sup>77</sup>

The most common way for the violating of duty of equal treatment occurs by psychological harassment. However, when psychological harassment occurs between an employee and fellow employees or between an employee and non-employees, this situation cannot be considered as breach of duty of equal treatment. On the other hand, if the employer tolerates the fellow employees' or non-employees' behaviors which can be considered as psychological harassment for the purpose of discrimination, then the employer's this behaviors should be accepted as a breach of duty of equal treatment<sup>78</sup>.

Although there is no specific regulation regarding psychological harassment in Turkish Labour Law, we can find a very specific regulation in Turkish Law of Obligation. It is important to clarify that this Law can also be applied to labour disputes, when there is a lack of regulation in labour law.

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<sup>74</sup> **Limoncuoğlu**, 66.

<sup>75</sup> **Mollamahmutuoğlu/Astarlı/Baysal**, 236; **Narmanlıoğlu**, 323; **Tunçomağ/Centel**, 142; **Aktay/Arıcı/Senyen Kaplan**, 158; **Çelik/Caniklioğlu/Canbolat**, 383.

<sup>76</sup> **Çukur**, 475.

<sup>77</sup> YHGK, 7.6.1969, E.1969/606, K.1969/607; YHGK, 23.12.2009, E.2009/9-485, K.2009/598. In another decision of the High Court, the employer terminated two employees work contract, because he caught these employees at playing okey game during work hours. However at the same time the employer also caught eight different employees in the same place and he didn't terminate their work contracts as well because of this breach of the work contract. The employees, whom work contracts were terminated, filed a case against the employer for breaching the duty of equal treatment. The employer claimed that the employees whom work contracts were terminated, are the most experienced ones, so they should have known that will be a breach of work contract. However, the High Court stated that the employer cannot treat the plaintiff employees differently just because of their work experiences. The duty of equal treatment burdens the employer an obligation not to behave differently among workers working in the same workplace without a just and objective reason. For this reason according to court, there is an unjust termination of the work contract. Y. 9HD, 14.2.2009, E.2009/4160, K.2011/2530

<sup>78</sup> **Limoncuoğlu**, 66.

According to article 417 of Turkish Law of Obligation,<sup>79</sup> the employer is obliged to respect and preserve its employees' personality; keep a reliable and fair order within the workplace; preserve the employees from psychological and sexual harassments; and take any necessary precautions to preserve employees, who have been subject to harassment, from further damages. As can be seen, this regulation constitutes the legal basis of the employer's duty of care.<sup>80</sup> In addition, according to this regulation it is necessary to state that the employer is also obliged to protect employees' psychological health as much as physical health in the frame of duty of care<sup>81</sup>.

Finally, duty to protect the health, safety and welfare of their employees is regulated in the 6331 numbered Occupational Health and Safety Law. The aim of this Law is to regulate the duties, powers, responsibilities, rights and obligations of employers and employees in order to ensure occupational health and safety in workplaces and to improve existing health and safety conditions.

According to article 1 of the Occupational Health and Safety Law "*Object of this law is to regulate duties, authority, responsibility, rights and obligations of employers and workers in order to ensure occupational health and safety at workplaces and to improve existing health and safety conditions.*"

According to article 4/1 "*The employer shall have a duty to ensure the safety and health of workers in every aspect related to work*".<sup>82</sup> What is meant

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<sup>79</sup> Article 417: "*An employer is obliged to respect and preserve its employees' personality; keep a reliable and fair order within the workplace; preserve the employees from psychological and sexual harassments; and take any necessary precautions to preserve employees, who have been subject to harassment, from further damages.*

*The employer shall take all necessary measures to ensure the occupational health and safety in the workplace and keep necessary the tools and equipment faultlessly. Workers are also obliged to obey all kinds of measures which are taken to ensure occupational health and safety.*

*If an employee dies; his/her personality rights are violated; or his/her physical or mental integrity is harmed, due to the employer's failure in fulfillment of these obligations, the employer will be obliged to compensate the employee's or his/her family's pecuniary and non-pecuniary damages.*"

<sup>80</sup> Kantarcı, 110; Çukur, 73.

<sup>81</sup> Temizel, 213.

<sup>82</sup> Article 4: "(1) *The employer shall have a duty to ensure the safety and health of workers in every aspect related to the work. In this respect, the employer shall; a) take the measures necessary for the safety and health protection of workers, including prevention of occupational risks and provision of information and training, as well as provision of the necessary organization and means and shall ensure that these measures are adjusted taking account of changing circumstances and aim to improve existing situations. b) monitor and check whether occupational health and safety measures that have been taken in the workplace are followed and ensure that nonconforming situations are eliminated. c) carry out a risk assessment or get one carried out; d) take into consideration the worker's*

by the duty to ensure health protection is not only related to the physical harm. The duty to health protection includes the employees' psychological health. In other words, psychological health is protected by this Law as well as physical health.<sup>83</sup>

6331 numbered Occupational Health and Safety Law has been published in the Official Gazette No. 28339 dated 30 June 2012 and introduced several new concepts and additional obligations to employers in relation to occupational health and safety related issues. Although this Law is a newly introduced legislation, it is an important deficiency that the law does not contain any provisions for psychological harassment directly.<sup>84</sup>

If 6331 numbered Occupational Health and Safety Law would have regulated psychological harassment clearly and directly, these regulations would be accepted specific provisions regarding psychological harassment in Turkish Labour Law. Because 6331 numbered Occupational Health and Safety Law replaced the relevant provisions of Labor Code and become the general legislation governing occupational health and safety in Turkey. Thus the problem of complexity of applying which regulation to the dispute would be solved.

Besides above mentioned three main Law, 6701 numbered Turkish Human Rights and Gender Equality Institution Law<sup>85</sup> may also be discussed. However, before making an application in the frame of 6701 numbered Law, the applicant must follow the legal procedures according to 4857 numbered Labor Code. If the applicant could not get any legal sanctions regarding his/her discrimination claim, is allowed to make an application in the frame of 6701 numbered Law.

According to the Law, the Institution has the right to examine the allegations of violation of the right to equal treatment, discrimination or torture and ill-treatment on the basis of the application. It is prohibited under the Law numbered 6701 to discriminate against persons based on the grounds of sex, race, color, language, religion, belief, sect, philosophical or political opinion,

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*capabilities as regards health and safety where he entrusts tasks to a worker; e) take appropriate measures to ensure that workers other than those who have received adequate information and instructions are denied access to areas where there is life-threatening and special hazard.*

*(2) In case an employer enlists competent external services or persons, this shall not discharge him from his responsibilities in this area.*

*(3) The workers' obligations in the field of safety and health at work shall not affect the principle of the responsibility of the employer.*

*(4) Measures related to health and safety at work may in no circumstances involve the workers in financial cost."*

<sup>83</sup> Süzek, 419.

<sup>84</sup> Limoncuoğlu, 60.

<sup>85</sup> See; <https://humanrightscenter.bilgi.edu.tr/media/uploads/2016/05/12/TIHEK.pdf>

ethnic origin, wealth, birth, marital status, health status, disability and age. According to article 6, the employer shall not cause any discrimination during the work-related processes in the work place such as recruitment process, vocational training, in-service training or promotion system.

In the Law, there is a specific regulation about burden of proof in the discrimination cases. According to the article 21, in the applications for violation of the prohibition of discrimination, if the applicant can present strong evidences regarding her/his claim, the other party must prove that this behavior does not constitute the violation of the prohibition of discrimination and the principle of equal treatment.

It is important to state that the concept of the discrimination differs from the concept of the psychological harassment. However sometimes workplace harassment can include discrimination. In this situation employees can also have a right to claim a discrimination case when the amount of harassing actions leads to direct or indirect discrimination on the grounds of race, sex, religion or disability.

As a conclusion, employer's duty to protect the health, safety and welfare of their employees is regulated in three different laws as we mentioned above. For this reason, employee can find the most suitable regulation for his/her case and base his/her claim on these articles.

### **Turkish Court's Perspective**

The High Court of Turkey, states that psychological harassment is usually occurs between the harasser and the victim. On the contrary the victim, who claims that he/she has been subjected to psychological harassment, is obliged to prove this claim. For this reason, in the cases based on psychological harassment reasonable proof is accepted. When the victim presents strong prima facie evidences of violations of the employer's rights, the employer is obliged to prove that such a violation does not exist.<sup>86</sup>

The High Court states that only superior's dominant and strict behaviors cannot be considered as psychological harassment. To prove psychological harassment, it is necessary to consider whether personal rights have been violated or not. In addition the employee shall prove that he/she is subjected to psychological harassment. To accept the psychological harassment based case, there should be a secure sign regarding harassment. Only victim's statements are not enough when there is no other evidence. In this circumstances when the superior proves his behaviors are only dominant and authoritative by the

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<sup>86</sup> YHGK, 24.1.2018, E.2017/7-3017, K.2018/99; Y. 9.HD, 9.7.2019, E.2016/32575, K.2019/15142; Y. 22.HD, 28.12.2017, E.2016/6932, K.2017/31060; Y. 22.HD, 23.2.2016, E.2014/30716, K.2016/4938. See; <https://www.yargitay.gov.tr/>

email exchange between himself and employee, the case should be rejected.<sup>87</sup>

According to the high court's decision the victim is allowed to prove the harassment claim with only witness statements. Nevertheless, it was stated that the harassment claim could not be proved if the witness statements are not based directly on their own experience. In other words, the witness must see the harassment with his own eyes or hear the harassment with his own ears.<sup>88</sup>

The High court also accepts expert reports as proof of psychological harassment. According to the high court's decision the victim's medical report about victim's mental health and complementary witness statements are enough to prove psychological harassment.<sup>89</sup>

According to the high court's decision regarding who should bear the burden of proof, when the plaintiff presents the facts which raise suspicion that psychological harassment was happened in the workplace, the burden of proof changes to the defendant.<sup>90</sup> From this point, the defendant employer must prove that harassment didn't occur.

Finally, we would like to give an example of the high court decision regarding workplace harassment which includes sexual harassment. Occasionally, psychological harassment may occur along with sexual harassment.

In the High Court's decision, the plaintiff employee was offered sexual intercourse by his superior. As a result her refusal, her position in the workplace was reduced and she was harassed in front of the fellow employees. Afterwards the plaintiff terminated her employment contract, because sexual demands of the superior were heard by other employees and therefore she became depressed. According to the high court, sexual harassment often occurs between the harasser and the victim. Therefore, generally it is not possible to find eyewitnesses. As a result of this, prima facie evidences and other witness statements should be considered by the court in order to protect the employee who is generally the weak part of the labour relation. In other words, the court should demand satisfactory evidences rather than material evidences.<sup>91</sup>

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<sup>87</sup> Y. 9.HD, 12.2.2013, E.2010/38293, K.2013/5390; Y. 22.HD, 1.11.2017, E.2015/18297, K.2017/23809; Y. 22.HD, 22.1.2014, E.2013/37918, K.2014/729; Y. 7.HD, 10.3.2016, E.2015/37812, K.2016/6073; Y. 9.HD, 12.12.2018, E.2015/26965, K.2018/23062. See; <https://www.yargitay.gov.tr/>

<sup>88</sup> Y. 9.HD, 11.12.2018, E.2016/16456, K.2018/22875; Y. 9.HD, 24.9.2018, E.2015/24193, K.2018/16436; Y. 7.HD, 8.5.2014, E.2014/1345, K.2014/10208; Y. 9.HD, 12.12.2018, E.2015/26965, K.2018/23062. See; <https://www.yargitay.gov.tr/>

<sup>89</sup> Y. 22.HD, 21.2.2014, E.2014/2157, K.2014/3434; Y. 9.HD, 1.4.2011, E.2009/8046, K.2011/9717; Y. 22.HD, 28.12.2017, E.2016/6932, K.2017/31060; Y. 22.HD, 21.2.2014, E.2014/2157, K.2014/3434; Y. 22.HD, 24.4.2017, E.2017/32194, K.2017/9305. See; <https://www.yargitay.gov.tr/>

<sup>90</sup> Y. 22.HD, 27.12.2013, E.2013/693, K.2013/30811. See; <https://www.yargitay.gov.tr/>

<sup>91</sup> Y. 9.HD, 4.11.2010, E.2008/37500, K.2010/31544; Y. 7.HD, 8.5.2014, E.2014/1345,

## CONCLUSION

Psychological harassment in the workplace has existing well before; we realize this concept and regulate in our laws. Psychological harassment is widespread in working environments. However, victims generally keep quiet about harassers' actions. Because of the fact that the burden of proof is the most challenging part of the court procedure. Victims can barely gather evidence and find witnesses. However, the victim who is subjected to psychological harassment should prove his/her claim.

The burden of proof is an obligation of a party to produce the evidence that will prove the claims they have made against the other party. In other words, burden of proof is closely related to bear an obligation to prove the claim. In principle the plaintiff bears burden of proof. However there are specific cases where the general rule is softened and exceptions are accepted such as harassment based cases.

The cases based on the psychological harassment, the most common evidence is witness statements. Generally witnesses are employers in the same workplace. Most witnesses have hesitation about giving statement against employer, since, they fear to lose their jobs or positions. However in psychological harassment cases, by providing immunity to employers who denounce moral harassment can solve this problem.

The victim is allowed to prove the harassment claim with only witness statements. Nevertheless it was stated that the harassment claim could not be proved if the witness statements are not on based directly own knowledge. In other words, witness must see the harassment with his own eyes or hear the harassment with his own ears.

Expert reports are also accepted as a proof to psychological harassment. Victim's medical report about mental health and complementary witness statements are enough to prove psychological harassment.

Finally when the plaintiff presents the facts which raise suspicion that psychological harassment was happened in the workplace, the burden of proof changes to the defendant. From this point, the defendant employer must prove that harassment doesn't occur.

As we mentioned above, in the 4857 numbered Turkish Labor Code, there are two main principles: protection of labor and interpretation favor of labor, which are not accepted by the 6100 numbered Turkish Civil Procedure Code. Thus the most important issue of the legal procedure of harassment

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K.2014/10208; Y. 22.HD, 16.1.2019, E.2016/3654, K.2019/1020; Y. 7.HD, 13.5.2015, E.2015/4718, K.2015/8718; Y. 9.HD, 11.12.2018, E.2016/16456, K.2018/22875. See; <https://www.yargitay.gov.tr/>

cases is burden of proof and the most challenging part of the procedure for the employee is presenting evidences to the court to prove his case. Because there is no specific regulation regarding burden of proof in the psychological harassment cases in the Labor Code.

Consequently we need to state that the general rules regarding the burden of proof should be softened and some exceptions should be accepted. In other words, the procedural rules regarding the burden of proof in the psychological harassment cases should be considered in the frame of two main principle of labor law. Especially, when the victim presents the videos, pictures, audio records, phone records or any other evidences which are collected without harasser's permission to the court, these evidences shouldn't be accepted as illegal.

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